

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

FILED

DEC 7 - 1995

ROBERT LEE BALLARD,)
)
 Plaintiff,)
)
 vs.)
)
 CORRECTIONAL MEDICAL SERVICES,)
 et al.,)
)
 Defendants.)

Nos. 95-C-663-E
(Base File)

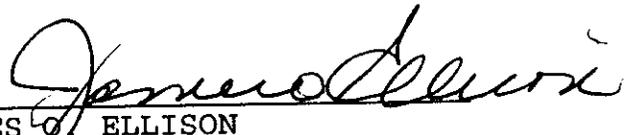
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE DEC 8 1995

ORDER

On October 17, 1995, the Court granted Plaintiff eleven days within which to submit a motion for leave to amend and a combined amended complaint. Plaintiff has failed to comply with the order. Accordingly, this consolidated action is hereby DISMISSED for lack of prosecution.

SO ORDERED THIS 7th day of December, 1995.


JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 7 1995

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

MS. LORRAINE TETO, SUCCESSOR)
TRUSTEE TO THE RICHARD J. BROHAN)
TRUST NO. 1)

Plaintiff,)

AMERICAN AIRLINES EMPLOYEES)
FEDERAL CREDIT UNION; FEDERAL)
RESERVE BANK; LIBERTY BANK AND)
TRUST COMPANY; AMERICAN AIRLINES,)
INC.; BANK OF OKLAHOMA, INC.;)
BANK IV, INC; PATRICIA DUNN;)
DOUGLAS BROHAN; JAMES BROHAN;)
MARILYN KRAFT; EUGENE BROHAN AND)
DOROTHY BROHAN; SUSAN BROHAN;)
AND DIANE FABIAN)

Defendants.)

Case No. 95 C 1080E
(Tulsa County District
Court Case No. PT-95-36)

ENTERED ON DOCKET
DATE DEC 08 1995

ORDER OF REMAND

This cause having come on to be heard on motion of the Plaintiff, Ms. Lorraine Teto, for an order remanding the above cause of action to the District Court of the State of Oklahoma, in and for the County of Tulsa, and the court being fully advised, it is

ORDERED that the motion of the Plaintiff, Ms. Lorraine Teto, be hereby granted and that the cause of action asserted by the Plaintiff be remanded to the District Court of Oklahoma, in and for the County of Tulsa; and that a certified copy of this Order be mailed by the Clerk of this court to the Clerk of the District Court of Oklahoma.

DATED: 12/6/95

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

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

FILED

DEC 7 - 1995

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

STEPHEN DEWITT DORMAN,)
)
 Plaintiff,)
)
 v.)
)
 JIM CANNASTER,)
)
 Defendants.)

Case No. 95-C-1049-E ✓

ENTERED ON DOCKET
DATE DEC 08 1995

ORDER

Plaintiff, an inmate presently incarcerated in Bartlesville pending a parole revocation hearing, has filed a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and a pro-se civil rights complaint pursuant to 42 U.S.C. § 1983. He alleges that Jim Cannaster, his appointed public defender, has failed to contact him at the jail to discuss his case. Plaintiff seeks \$500,000 in damages, an apology from Mr. Cannaster, and an order directing the disbarment of Mr. Cannaster.

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

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

meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327).

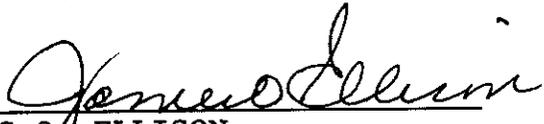
After construing Plaintiff's pro se pleading liberally, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action lacks an arguable basis in law and should be dismissed sua sponte as frivolous. While Plaintiff may be able to state a malpractice claim under Oklahoma law against Cannastar, that claim does not constitute a federal case.¹ See Lemmons v. Law Firm of Morris and Morris, 39 F.3d 264, 266 (10th Cir. 1994); see also Bilal v. Kaplan, 904 F.2d 14, 15 (8th Cir. 1990) (per curiam); Brown v. Schiff, 614 F.2d 237, 239 (10th Cir.) (per curiam), cert. denied, 446 U.S. 941 (1980). "The conduct of counsel, either retained or appointed, in representing clients, does not constitute action under color of state law for purposes of a section 1983 violation." Bilal, 904 F.2d at 15; see also Lemmons, 39 F.3d at 266. Cf., Tower v. Glover, 467 U.S. 914, 920 (1984) (citing Polk County v. Dodson, 454 U.S. 312, 325 (1981)) (public defender does not act under color of state law when representing an indigent defendant in a state criminal proceeding). Moreover, Plaintiff has not alleged any grounds for the exercise of diversity jurisdiction in this case. See Lemmons, 39 F.3d at 266.

Accordingly, as this case lacks an arguable basis in law, it is hereby DISMISSED as frivolous under section 1915(d). Plaintiff's motion to proceed in forma pauperis is GRANTED. The

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

Clerk shall MAIL a copy of the complaint to Plaintiff.

SO ORDERED THIS 7th day of December, 1995.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

DEC 7 1995

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

Civil Case No. 95-C 396H

ENTERED ON DOCKET

DATE 12-8-95

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Judgment of Foreclosure filed on November 15, 1995 be vacated and this action shall be dismissed without prejudice.

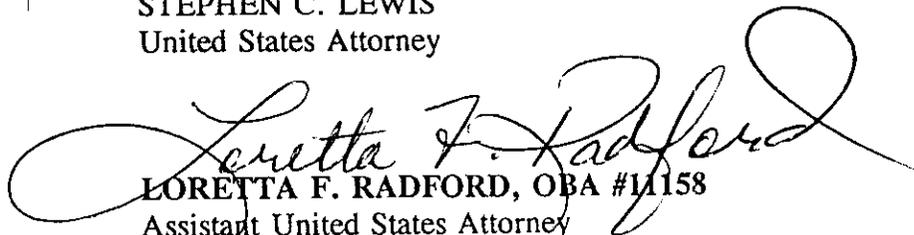
Dated this 07th day of December, 1995.

S/ GVEN ERIK HOLMES

UNITED STATES DISTRICT JUDGE

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 loop at the end.

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

DEC 7 1995

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

SINCLAIR OIL CORPORATION,)
)
 Plaintiff,)
)
 v.)
)
 WILLIAM R. THOMAS d/b/a)
 Sinclair Gas Marketing)
 Company and d/b/a Sinclair)
 Oil & Gas Company,)
)
 Defendant.)

Case No. 94-CV-795-H ✓

ENTERED ON DOCKET

DATE 12-8-95

ADMINISTRATIVE CLOSING ORDER

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

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

IT IS SO ORDERED.

This 5TH day of December, 1995.

Sven Erik Holmes
United States District Judge

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

FILED

DEC 7 1995

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

NEW YORK LIFE INSURANCE)
COMPANY,)
)
Plaintiff,)
)
v.)
)
RAMCO HOLDING CORPORATION,)
et al.)
)
Defendants.)

Case No. 93-C-1049-*H*

ENTERED ON DOCKET
12-8-95

ORDER OF DISMISSAL

Now on this 5TH day of December, 1995, the above matter comes on for hearing upon Defendants' Motion to Dismiss, the Court being advised that Plaintiff has no objection to said motion and good cause shown finds that such order should be granted. It is therefore

ORDERED, that Count V (Civil Conspiracy) contained in Defendants' counterclaims against Plaintiff is hereby dismissed without prejudice.

[Signature]
United States District Judge

134

FILED

DEC 6 1995

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

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

OSCAR DURANT,

Plaintiff,

vs.

SHIRLEY S. CHATER,
Commissioner, Social
Security Administration,

Defendant.

CASE NO. 92-C-942-J ✓

FILED ON BOOKET

12-8-95

ORDER

Having considered the parties' Stipulation for Award of EAJA Fees and Costs,
IT IS HEREBY ORDERED that the Defendant shall pay to the Plaintiff's attorney the
total amount of Three Thousand Five Hundred Sixteen and 14/100 Dollars (\$3,516.14)
for attorney's fees and costs.


SAM A. JOYNER
UNITED STATES MAGISTRATE JUDGE

SUBMITTED ON BEHALF OF BOTH PARTIES BY:

STEPHEN C. LEWIS
United States Attorney

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

Attorney for Plaintiff:
TIMOTHY M. WHITE
2526 E. 71st Street, Suite A
Tulsa, Oklahoma 74136-5576
(918) 492-9335

28
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FRANKLIN HOWARD and
JANET HOWARD, Husband
and Wife,

Plaintiffs,

vs.

AMERICAN AIRLINES, INC.,
a Foreign Corporation,

Defendant.

DEC - 7 1995

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

No. 95-C-94 B

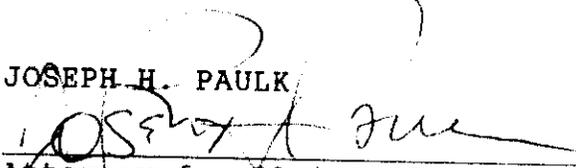
ENTERED ON DOCKET

DATE DEC 08 1995

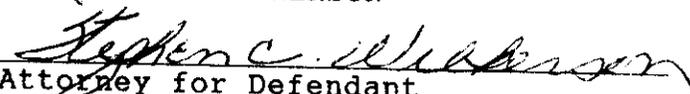
STIPULATION OF DISMISSAL

COME NOW the Plaintiffs, Franklin Howard and Janet Howard, and the Defendant, American Airlines, by and through their respective attorneys, and in accordance with Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedures, hereby stipulate to the dismissal with prejudice of all claims and causes of action involved herein with prejudice for the reason that all matters, causes of action and issues in the case have been settled, compromised and released herein, including post and pre-judgment interest.

JOSEPH H. PAULK


Attorney for Plaintiffs

STEPHEN C. WILKERSON


Attorney for Defendant

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

FILED

DEC 6 1995

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

ROBERT E. COTNER,
Plaintiff,

vs.

No. 92-C-1182-H ✓

LARRY FUGATE, and DOUG
NICHOLS,
Defendants.

ENTERED ON DOCKET

DATE 12-7-95

ORDER

This matter comes before the Court on Plaintiff's motion for rehearing. The Court liberally construes Plaintiff's motion as one to alter or amend judgment under Fed. R. Civ. P. 59(e). See Van Skiver v. U.S., 952 F.2d 1241 (10th Cir. 1991) (a motion challenging judgment which is served within ten days of rendition of judgment is ordinarily considered as a motion to alter or amend judgment under Rule 59(e), whereas a motion filed after that time is considered as a motion seeking relief from judgment under Rule 60(b)), cert. denied, 113 S.Ct. 89 (1992).

Having reviewed Plaintiff's motion and attached exhibits, the Court concludes that the motion should be denied. Accordingly, Plaintiff's motion for rehearing (docket #72) is hereby DENIED.

IT IS SO ORDERED.

This 5TH day of DECEMBER, 1995.


Sven Erik Holmes
United States District Judge

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

FILED

DEC 6 1995 *la*

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

CHARLES L. FREDERICK,)
)
Plaintiff,)
)
v.)
)
EDWARD L. EVANS, et al.,)
)
Defendants.)

Case No. 94-C-0090-H ✓

ENTERED ON DOCKET
DATE 12-7-95

J U D G M E N T

This matter came before the Court on a Petition for a Writ of Habeas Corpus. The Court duly considered the issues and rendered a decision in accordance with the order filed on December 6, 1995.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for the Defendants and against the Plaintiff.

IT IS SO ORDERED.

This 5TH day of ~~December~~ 1995.


Sven Erik Holmes
United States District Judge

FILED

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

DEC 6 1995



CHARLES L. FREDERICK,)
)
 Plaintiff,)
)
 v.)
)
 EDWARD L. EVANS, et al.,)
)
 Defendants.)

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

Case No. 94-C-0050-H ✓
90

ENTERED ON DOCKET

DATE 12-7-95

ORDER

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge (Docket # 22) (regarding Plaintiff's Petition for Writ of Habeas Corpus (Docket # 1) and Plaintiff's Objection to the Report and Recommendation of the U.S. Magistrate Judge (Docket # 23).

When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

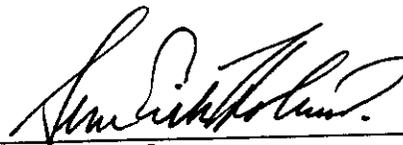
Based on a review of the Report and Recommendation of the Magistrate Judge and the Objection thereto, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge

24

granting dismissing Plaintiff's petition for a writ of habeas corpus.

IT IS SO ORDERED.

This 5TH day of DECEMBER 1995.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

AMANDA BAXTER,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER, Commissioner of)
 Social Security,)
)
 Defendant.)

FILED

DEC - 8 1995

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

No. 95-C-986-B

ENTERED ON DOCKET
DATE DEC 07 1995

ORDER

On October 13, 1995, this Court denied Plaintiff's Application for Leave to Proceed *In Forma Pauperis*. [Doc. No. 2]. On November 6, 1995, the Court received a letter dated October 31, 1995 from Plaintiff's counsel of record, Leslie R. Reynolds. This letter informed the Court that "[d]ue to financial reasons [Plaintiff] is unable to pay the filing fees, and therefore, is not able to pursue this claim in District Court." On November 17, 1995, the Court ordered Plaintiff to show cause by November 24, 1995 why this action should not be dismissed without prejudice. [Doc. No. 3]. To date, Plaintiff has not responded in any way. Due to Plaintiff's failure to prosecute this case, the Court hereby dismisses this action without prejudice. See Fed. R. Civ. P. 41(b).

IT IS SO ORDERED.

Dated this 5th day of December 1995.

Thomas R. Brett
United States District Judge

4

FILED

DEC - 6 1995

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

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

HELEN SUE BROWN and JAMIE)
BROUSSARD TIERNEY,)
)
 PLAINTIFFS,)
)
 v.)
)
 CITGO PETROLEUM CORPORATION,)
)
 DEFENDANT.)

Case No. 94-C-717-B

ENTERED ON DOCKET
DATE DEC 07 1995

JUDGMENT

This case came on for jury trial on November 20, 1995. At the close of all the evidence, the Court granted Defendant Citgo Petroleum Corporation's Fed.R.Civ.P. 50 motion as to Plaintiff Jamie Broussard Tierney's retaliatory discharge and public policy claims, and as to Plaintiff Helen Sue Brown's claim of wrongful demotion under the Americans With Disabilities Act. Judgment is hereby entered in favor of Defendant Citgo Petroleum Corporation and against Plaintiff Jamie Broussard Tierney on her retaliatory discharge and public policy claims, and against Plaintiff Helen Sue Brown on her alleged wrongful demotion claim.

In accordance with the jury verdict rendered on November 27, 1995, Judgment is hereby entered in favor of Defendant Citgo Petroleum Corporation and against Plaintiff Helen Sue Brown, on Plaintiff's claim of failure to accommodate under the Americans With Disabilities Act. Each party is to pay its or her own attorneys' fees.

90

Costs are assessed against the Plaintiffs, Helen Sue Brown and Jamie Broussard and in favor of the Defendant Citgo Petroleum Corporation, if timely applied for under Local Rule 54.1.

DATED this 6th day of December, 1995.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

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

RON GUIDRY and RON GUIDRY &
ASSOCIATES,

Plaintiffs,

vs.

PENNWELL PUBLISHING COMPANY
and FIRE ENGINEERING, INC.,
and SANDY NORRIS,

Defendants.

Case No. 95-C-874-B

ENTERED ON DOCKET

DATE DEC 07 1995

J U D G M E N T

In accord with the Order filed November 14, 1995, sustaining the Defendants' Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, Pennwell Publishing Company, Fire Engineering, Inc., and Sandy Norris, and against the Plaintiffs, Ron Guidry and Ron Guidry & Associates. Plaintiffs shall take nothing of their claim. Costs are assessed against the Plaintiffs, if timely applied for under Local Rule 54.1, and each party is to pay its respective attorney's fees.

Dated, this 5 day of December, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC - 5 1995

CEMCO MANUFACTURING, INC.,)
)
Plaintiff,)
)
v.) Case No. 95-C-921B
)
SOUTHWEST Gh COMPANY, L.L.C.,)
)
Defendant.)

ENTERED ON DOCKET

DATE DEC 07 1995

JOURNAL ENTRY OF DEFAULT JUDGMENT

NOW, on this 5 day of Dec., 1995, the above-entitled cause comes on before me, the undersigned Judge of the above-entitled Court. Plaintiff, CEMCO Manufacturing, Inc., represented and having entered its appearance by its counsel, Kelly F. Monaghan of Monaghan & Associates, and the Defendant, Southwest Gh Company, L.L.C., having been lawfully served with Summons in this case and failing to enter its appearance or file an Answer within the statutorily prescribed period. Whereupon, the Court, having examined the court files herein and after due deliberations thereon, finds as follows:

The Court finds that on September 14, 1995, Plaintiff filed its Complaint in the above-entitled and numbered cause with the Court Clerk, requesting judgment against Defendant for specific sums set forth therein, plus pre-judgment and post judgment interest, attorney's fees and court costs.

The Court further finds that on October 2, 1995, Defendant was served with Summons and the Complaint by serving George Bingham, an officer of Defendant, as evidenced by the Return of Summons filed

in this cause of action with the Court Clerk indicating that proper service had been made on the Defendant.

The Court further finds that the Clerk of this Court has entered default in this matter.

The Court further finds that the allegations contained in Plaintiff's Complaint are taken as true and correct, and that it is hereby granted judgment against Defendant as hereinafter set forth.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, Southwest Gh Company, L.L.C., was lawfully served with Summons in this cause and has not made an appearance and, therefore, is in default.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff be granted judgment against Defendant, Southwest Gh Company, L.L.C., in the principal amount of \$63,642.12, pre-judgment interest through October 27, 1995, in the amount of \$4,150.72, costs in the amount of \$120.00, an attorney fee of \$1,000.00, for a total judgment of \$68,912.84, with interest thereon at the rate of ten percent (10%) per annum from the date this judgment is entered.

ALL FOR WHICH LET EXECUTION ISSUE.

S/ THOMAS R. BRETT

JUDGE OF THE DISTRICT COURT

Kelly F. Monaghan OBA #11681
MONAGHAN & ASSOCIATES
5800 East Skelly Drive, Suite 1210
Tulsa, Oklahoma 74135
(918) 627-6202

ATTORNEY FOR PLAINTIFF

ENTERED ON DOCKET
DATE DEC 07 1995

FILED

DEC 6 1995

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

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

GRAVELY, a division of ARIENS)
COMPANY, a Wisconsin corporation,)
)
Plaintiff,)
)
v.)
)
ALL-SAW SERVICES, INC., an)
Oklahoma corporation, ROBERT W.)
CHRISTIE, Individually, L.W.)
CHRISTIE, Individually, and)
GRAVELY TURF EQUIPMENT, INC., an)
Oklahoma corporation,)
)
Defendants.)

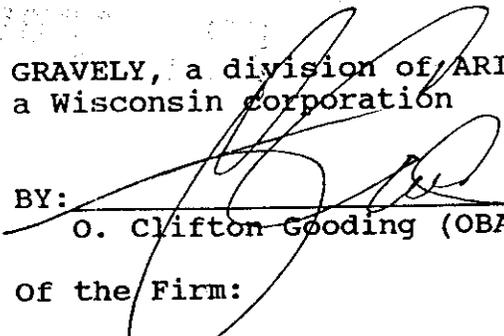
Case No. 93-C-1087-K

JOINT STIPULATION OF DISMISSAL

In accordance with Fed.R.Civ.P. 41(a)(1)(ii), PLAINTIFF,
GRAVELY, A Division of ARIENS COMPANY, and ALL-SAW SERVICE, INC.,
ROBERT W. CHRISTIE, L.W. CHRISTIE and GRAVELY TURF EQUIPMENT, INC.
"DEFENDANTS" herein, hereby dismiss their Complaint and
Counterclaims respectively asserted in the referenced matter, with
prejudice to the refiling thereof, each party to bear their own
attorneys fees and costs.

DATED this 5 day of December, 1995.

GRAVELY, a division of ARIENS COMPANY,
a Wisconsin corporation

BY: 

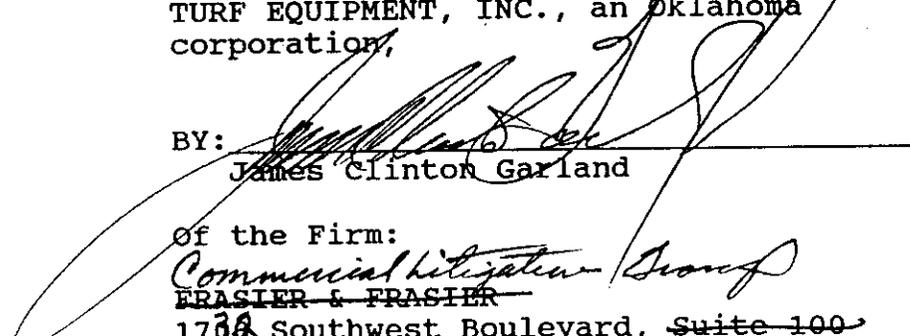
O. Clifton Gooding (OBA #10315)

Of the Firm:

GOODING MULINIX & HARDIN
A Professional Corporation
1500 City Place
Park Avenue at Robinson
Oklahoma City, Oklahoma 73102
(405) 232-0200

Attorneys for GRAVELY, a division of
ARIENS COMPANY, a Wisconsin corporation

ALL-SAW SERVICES, INC., an Oklahoma
corporation corporation, ROBERT W.
CHRISTIE, L.W. CHRISTIE, and GRAVELY
TURF EQUIPMENT, INC., an Oklahoma
corporation,

BY: 

James Clinton Garland

Of the Firm:

Commercial Litigation Group
~~FRASIER & FRASIER~~
1738 Southwest Boulevard, Suite 100
Tulsa, Oklahoma 74107

Attorney for ALL-SAW SERVICES, INC., an
Oklahoma corporation, ROBERT W. CHRISTIE
L.W. CHRISTIE, and GRAVELY TURF EQUIPMENT
INC., an Oklahoma corporation

gravely\jointdimis

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

JOYCE MARTIN,)
)
 Plaintiff,)
)
 vs.)
)
 AMERICAN AIRLINES, a Delaware)
 corporation,)
)
 Defendant.)

No. 94-C-202-K

ENTERED ON DOCKET
DATE DEC 06 1995

FILED

DEC 4 1995

JUDGMENT

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

This matter came before the Court for consideration of the motion to dismiss and for sanctions by Defendant American Airlines against Plaintiff Joyce Martin. 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 1 DAY OF December, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

23

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

JOYCE MARTIN,
Plaintiff,
vs.
AMERICAN AIRLINES, a Delaware
corporation,
Defendant.

No. 94-C-202-K

ENTERED ON RECORD
DATE DEC 03 1995

FILED

DEC 4 1995

ORDER

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

Before this Court is Defendant American Airlines' Motion to Dismiss and for Sanctions. Defendant asserts as the grounds for dismissal and sanctions the "utter failure and refusal by the Plaintiff to comply with this Court's orders or cooperate in discovery." (Def. Mot. Dis. Sanct.) Plaintiff did not respond to Defendant's motion within fifteen (15) days, as required by the Local Rule. Local Civil Rule 7.1(C), U.S. District Court for the Northern District of Oklahoma. The Rule provides that a failure to respond in a timely manner "will authorize the court, in its discretion, to deem the matter confessed, and enter relief requested." Id.

Several weeks after the deadline for Plaintiff's response had passed, this Court instructed the Clerk of the Court to contact Plaintiff's counsel, Mr. Thomas L. Bright, to inquire whether he planned to file a response to Defendant's motion to dismiss. On November 2, 1995, over a month and a half after Defendant had filed

22

its motion, Plaintiff's counsel filed a response. The response stated that "Plaintiff has not responded to any of the documents sent to plaintiff by Bright," (Resp. at ¶ 1), and that "Bright cannot effectively represent the plaintiff without assistance from the plaintiff especially in response to a motion for Rule 37 sanctions up to and including dismissal." (Id. at ¶ 4.)

This Court has the authority to dismiss Plaintiff's action because of her failure to prosecute. Link v. Wabash Railroad Co., 82 S.Ct. 1386, 1388 (1962). The Supreme Court has explained that involuntary dismissal under Rule 41(b), Fed. R. Civ. P., does not require a motion by the defendant; a federal trial court has the authority to dismiss *sua sponte* for lack of prosecution. Id. at 1388-89.

Plaintiff has failed to comply with discovery requests and has failed even to cooperate with her own counsel in responding to Defendant's motions. Pursuant to Rule 41(b), Fed. R. Civ. P., Plaintiff's action is therefore DISMISSED for failure to prosecute.

ORDERED this 1 day of December, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

DEC - 5 1995

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

MICHAEL J. SWAN, Successor to
BUCHBINDER & ELEGANT, P.A.,
Receiver of Aikendale Associates,
a California Limited Partnership,
ROBERT MARLIN and JACK D. BURSTEIN,

Plaintiffs,

vs.

RESOLUTION TRUST CORPORATION, as
receiver for SOONER FEDERAL SAVINGS
AND LOAN ASSOCIATION, W. R. HAGSTROM,
EDWARD L. JACOBY, DELOITTE,
HASKINS & SELLS, PAINWEBBER
INCORPORATED and STEPHEN ALLEN,

Defendants.

No. 89 C-843-E

ENTERED ON BOOKET

DATE DEC 06 1995

ORDER AND JUDGMENT

On the Application of PaineWebber Incorporated ("PaineWebber") to confirm an arbitration award and for entry of judgment, the Court by previous order having found that judgment should be granted to PaineWebber, the Court hereby finds as follows:

A. That the Plaintiffs filed and prosecuted an arbitration proceeding before the New York Stock Exchange ("NYSE") of all the claims asserted against PaineWebber in this litigation;

B. That the Plaintiffs agreed in their Uniform Submission Agreement to the NYSE that they would be bound by the arbitration award and that judgment could be entered by this Court on that award;

1/2

C. That the NYSE has rendered its decision in the arbitration in which it awarded nothing to the Plaintiffs, dismissed their claims against PaineWebber, and awarded to PaineWebber on its counterclaim against Michael J. Swan as Receiver for Aikendale Associates, the amount of \$88,396.81, plus interest as provided by New York law from March 31, 1989;

D. That New York law allows interest at the rate of 9% per annum, thereby making the accumulated interest through June 30, 1995, in the amount of \$49,723.21;

E. That the arbitration award rendered by the NYSE as to Plaintiffs and PaineWebber was properly obtained and should be confirmed pursuant to 9 U.S.C. § 9;

F. That PaineWebber having prevailed in the arbitration, and no claims against PaineWebber remaining for adjudication, there is no just reason for delay of entry of judgment in favor of PaineWebber on the arbitration award rendered by a panel under the auspices of the NYSE;

G. That entry of judgment on the arbitration award will permit PaineWebber to begin proceedings to collect the judgment without waiting for the claims against the remaining defendants to be adjudicated;

H. That no just reason exists for delaying entry of judgment on the confirmed arbitration award;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT:

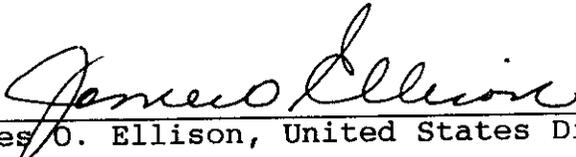
1. The arbitration award rendered by the NYSE is hereby confirmed to the extent provided herein pursuant to 9 U.S.C. § 9.

2. Judgment is hereby entered in favor of PaineWebber and against Plaintiffs on all claims asserted by Plaintiffs against PaineWebber, pursuant to the arbitration award.

3. Judgment is hereby entered in favor of PaineWebber and against Plaintiff, Michael J. Swan as Receiver for Aikendale Associates in the amount of \$138,120.02 on PaineWebber's counter-claim against Plaintiffs, pursuant to the arbitration award.

4. Interest shall accrue on the amount stated in the preceding paragraph from July 1, 1995 through the date that this Judgment is satisfied at the rate of 9% per annum, simple, pursuant to the arbitration award.

5. This judgment is final as to all claims between Plaintiffs and PaineWebber pursuant to Federal Rule of Civil Procedure 54(b).


James O. Ellison, United States District Judge

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

FILED

DEC 5 1995

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

DEANNE SMITH,

Plaintiff,

vs.

ROY DALE MELTON, and
the CITY OF DEWEY,

Defendants.

CASE NO. 94-C-1030-B

ENTERED ON DOCKET

DATE DEC 06 1995

J U D G M E N T

In accord with an Order entered simultaneously herewith, granting Summary Judgment in favor of Defendant, the City of Dewey and against Plaintiff, Deanne Smith, judgment is entered in favor of Defendant, the City of Dewey and against Plaintiff, Deanne Smith on all claims.

Costs are assessed against Plaintiff if timely applied for pursuant to Local Rule 54.1. Each party is to bear her or its own attorneys fees.

DATED this 7th day of December, 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

15

Plaintiff alleges Defendant Melton then forced Plaintiff to perform a sexual act completely against her will. Plaintiff seeks actual and punitive damages.

City's Statement of Uncontroverted Facts

1. Plaintiff's amended complaint does not contain any allegations which would establish a Section 1983 cause of action against Dewey.

2. Officer Roy Melton pleaded guilty to and was convicted of sexual battery against Deanne Smith as a result of the incident described in the amended complaint.

In her response Plaintiff agrees with City's Statement of Uncontroverted Facts.

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

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

To survive a motion for summary judgment, nonmovant "must establish

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

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

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

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

City's motion is predicated upon two theories, one of which Plaintiff admits. They are:

(1) There is no basis for a Section 1983 action against Dewey because Plaintiff has failed to allege or establish sufficient facts to impose such a liability on Dewey; and

(2) There is no state tort liability against Dewey because the uncontroverted facts establish that Officer Roy Melton was acting outside the scope of his employment at the time of the incident complained of.

Plaintiff concedes City's first issue.

Under the Governmental Tort Claims Act a municipality is

liable only for the actions of its officers committed within the scope of employment. 51 O.S.A. § 153 provides:

"(A) The state or a political subdivision shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment. * * * The state or a political subdivision shall not be liable under the provisions of this act for any act or omission of an employee acting outside the scope of his employment."

City argues that the guilty plea by Melton means that as a matter of law he was not acting within the scope of his employment at the time he committed the acts in question. Plaintiff concedes that Parker v. City of Midwest City, 850 P.2d 1065 (Okla.1993), and Houston v. Reich, 932 F.2d 883 (10th Cir.1991) support City's position. The Court agrees. Thus, unless the City has waived its immunity under the act, no liability exists.

Plaintiff argues that at the time of the incident City had in effect a policy of liability insurance purchased through the Oklahoma Municipal Assurance Group, by the purchase of which City allegedly waived its immunity under the Governmental Tort Claims Act. Plaintiff alleges that under the terms of the policy purchased by City an event such as the present matter is covered by the policy.

Plaintiff cites paragraph 26 of the policy which defines personal injury:

"Personal injury" means injury caused by the acts of plan members or employees while acting in the scope of duties of such resulting in:

- a. false arrest, detention or imprisonment or malicious prosecution;
- d. assault and battery; or
- e. any violation of an individual's rights guaranteed by state or U.S. Constitution or laws."

Plaintiff also cites the Governmental Tort Claims Act, at § 158, which provides:

"(B) If a policy or contract of liability insurance covering the state or political subdivision or its employees is applicable, the terms of the policy govern the rights and obligations of the state or political subdivision and the insurer with respect to the investigation, settlement, payment and defense of claims or suits against the political subdivision or its employees covered by the policy."

In support of its waiver argument, Plaintiff quotes 51 O.S. §152.1(B) which provides in pertinent part that: "The state, only to the extent and in the manner provided in this act, waives its immunity and that of its political subdivisions." Plaintiff cites Herwig v. Board of Education, 673 P.2d 154 (Okla.1993) as setting forth the rationale for holding a political subdivision liable on an insured risk to the extent of coverage under liability insurance:

"The defense of sovereign immunity is based in part on the risk of successful plaintiffs depleting the resources of the state at the expense of tax revenues. Liability insurance changes this situation. If the political subdivision has obtained insurance coverage, there is a fund independent of the agencies' assets upon which an injured plaintiff may draw. 'Otherwise, the insurer would reap the benefits of the premiums paid without being obligated to pay any damages for which the department was insured. Schrom v. Oklahoma Industrial Development, Okl., 536 P.2d 904, 907 (1975).'" Id. at 156.

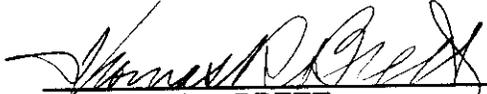
The Court agrees with the rationale of Herwig. However, the liability insurance must still be applicable to the incident, a factor which is missing herein. The policy which City purchased covered "personal injury" caused by its employees "while acting in the scope of duties of such resulting in" . . . "assault and battery". There appears to be no conceivable scenario under this record wherein sexual battery, which admittedly happened, is within

the scope of Officer Melton's duties.

In short, the liability insurance, which did not waive City's sovereign immunity, does not apply to the sexual battery which admittedly occurred herein outside of the scope of the officer's duties.

The Court concludes City's Motion should be and the same is herewith GRANTED. A Judgment in conformance with the Court's Order will be simultaneously entered herewith.

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



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

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

DEC 5 1995

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

RUSSELL McINTOSH and
MARION PARKER,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
HENRY G. CISNEROS, Secretary,
Department of Housing and
Urban Development,

Defendants.

CASE NO. 95-C-652-B

ENTERED ON DOCKET
DATE DEC 06 1995

O R D E R

This matter comes on for consideration of Defendants' Motion To Dismiss, filed September 22, 1995.

This is an action wherein Plaintiffs allege that Defendants discriminated against them on the basis of their race (Black) with regard to employment as residential real estate appraisers.¹

Defendants argue that Plaintiffs' attempted invocation of the Federal Torts Claims Act (FTCA) cannot be maintained because Defendants have: (1) Failed to meet Federal Rule of Civil Procedure 8 (a) pleading standards; (2) Failed to allege an actionable duty which has been breached by the Defendants, notably the Department of Housing and Urban Development (HUD); (3) Failed to bring such action within the two-year time period required by the statute of limitations as set forth in 28 U.S.C. §2401(b); (4) The Court lacks

¹ Each Defendant has pursued independent lawsuits against various banks, mortgage companies and lending institutions based upon essentially the same allegations of discrimination.

jurisdiction over the Secretary of HUD as a Defendant.

(1) Failed to meet Federal Rule of Civil Procedure 8 (a) pleading standards;

Defendants argue that Plaintiffs' Complaint is vague and indefinite in that it does not specify any negligence on the part of Defendant nor cite to any specific statutory or regulatory provision which has been violated. Plaintiffs respond that under Rule (8) a pleader is only required to give fair notice of the claim, the grounds sued upon and a demand for relief, all of which Plaintiffs claim has been done.

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

While the Court agrees with Defendants that Plaintiffs' Complaint is somewhat vague and inadequately alleges how Defendants may have violated the Fair Housing Act (and whether such violation, if proven, is properly brought under the FTCA), the Court declines to dismiss Plaintiffs' action based upon failure to comply with Rule 8 standards.

(2) Failed to allege an actionable duty which has been breached by the Defendants, notably the Department of Housing and Urban Development (HUD);

Here Plaintiffs fall into serious error. Title 28 U.S.C. §§ 1346(b) and 2674 waive sovereign immunity "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" and provide for liability "in the same manner and to the same extent as a private individual under like circumstances." Ayala v. United States, 49 F.3d 607 (10th Cir.1995). The applicable law regarding any issues of duty is "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Franklin v. United States, 992 F.2d 1492 (10th Cir.1993).

Even if specific behavior is statutorily required of a federal employee, the government is not liable under the FTCA unless state law recognized a comparable liability for private persons. Ayala, at 610. Further, the requirement of an analogous liability under state law is not satisfied by mere allegations of breach of federal statutes or regulations. Chen v. United States, 854 F.2d 622 (2nd.Cir.1988)

The Court concludes Plaintiffs have failed to state an actionable cause under the FTCA and this action should therefore be dismissed.

(3) Failed to bring such action within the two-year time period required by the statute of limitations as set forth in 28 U.S.C. §2401(b);

Even assuming Plaintiffs had stated a cause of action under the FTCA, it is the Court's view that Plaintiffs have failed to

timely file an administrative claim with the Government regarding these claims. Plaintiffs, in their Complaint, allege they have been aware of these conditions (different treatment of Black appraisers by the Tulsa HUD office) since 1985. As attachments to the Complaint Plaintiffs provide letters from HUD denying their \$1 million dollar claims for alleged discrimination because of race in the hiring of real estate appraisers. These letters are dated January 18, 1995. It is inconceivable to the Court that these potential claims have been pending since circa 1985.²

Plaintiffs have failed to file the instant action within the two years allowed by 28 U.S.C. § 2401 (b). Plaintiffs' allegation of a continuing tort has, in the Court's view, no merit.

The Court concludes that Plaintiffs failed to timely bring the instant action and the same should be dismissed for lack of subject matter jurisdiction.

(4) The Court lacks jurisdiction over the Secretary of HUD as a Defendant.

Again, even assuming Plaintiffs had stated a proper cause under the FTCA, the only proper party would be the United States. The Plaintiffs named as a Defendant the Secretary of HUD. Tort claims under the FTCA must be brought against the United States and not its agencies or agency heads. 28 U.S.C. § 1346(b); § 2679(a). These statutory provisions have been uniformly held to bar suit under the FTCA against a federal agency *eo nomino*. Gilles v. United States, 906 F.2d 1386 (10th Cir.1990). The Secretary of HUD should

² Neither Plaintiffs nor Defendants indicated in their pleadings the exact dates Plaintiffs filed their respective administrative claims.

be dismissed herein.

The Court concludes, for the reasons stated above, the Plaintiffs' action herein should be and the same is hereby DISMISSED.

IT IS SO ORDERED this 4 day of ^{dec.}~~November~~ 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE DEC 06 1995

ZEBCO CORPORATION

Civil Action No. 93-C 837K

Plaintiff,

v.

SHAKESPEARE COMPANY,

Defendant.

FILED

DEC 5 1995

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

ORDER OF DISMISSAL

This cause comes before the Court on the Stipulation for Dismissal with Prejudice signed and executed by the attorneys for all parties in this cause, and upon consideration of the record and such Stipulation , and the Court being otherwise advised;

IT IS HEREBY ORDERED that this action is hereby dismissed with prejudice, each party to bear its own costs and attorneys' fees.

Dated: 12-4-95

ENTER:

s/ TERRY C. KERN

United States District Judge

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

REUBEN THOMAS,)
)
Plaintiff,)
)
vs.)
)
RON WARD, et al.,)
)
Defendants.)

No. 94-C-789-K

ENTERED ON DOCKET
DATE DEC 06 1995

FILED

DEC 5 1995

ORDER

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

On January 20, 1995, the Court granted Plaintiff twenty days to submit the requisite documents to proceed with service of process-i.e. summons and marshal forms. As of the date of this order, Plaintiff has yet to comply with the above order.

Accordingly, this action is hereby DISMISSED for lack of prosecution.

SO ORDERED THIS 4 day of December, 1995.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

CONNIE ALLEN DEWEES,)
)
Plaintiff,)
)
vs.)
)
OKLAHOMA DEPARTMENT OF)
CORRECTIONS,)
)
Defendants.)

ENTERED ON DOCKET
No. 95-C-455-K, DATE DEC 06 1995

FILED
DEC 5 1995

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

ORDER

On May 22, 1995, the Clerk of the Court notified Plaintiff that he needed to submit a motion for leave to proceed in forma pauperis and mailed him the requisite form. As of the date of this order, Plaintiff has yet to comply with the above order.

Accordingly, this action is hereby DISMISSED WITHOUT PREJUDICE for failure to pay the filing fee.

SO ORDERED THIS 4 day of December, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

2

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 4 1995



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

WILLIAM J. FROMM,

Plaintiff,

v.

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

Defendant.

No. 95-C-276-J ✓

ENTERED ON DOCKET

DATE 12-5-95

ORDER²⁾

Plaintiff, William J. Fromm, 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 ALJ's decision is not supported by substantial evidence, and (2) the ALJ did not include all of Plaintiff's impairments in the hypothetical

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 October 20, 1992. The application was denied initially and upon reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held October 19, 1993. *R. at 45*. By order dated July 6, 1994, the ALJ determined that Plaintiff was not disabled. *R. at 24-37*. The Plaintiff appealed the ALJ's decision to the Appeals Council. On February 2, 1995 the Appeals Council denied Plaintiff's request for review. *R. at 4*.



question posed to the vocational expert. For the reasons discussed below, the Court affirms the Secretary's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born November 5, 1948, and at the time of his hearing before the ALJ was 44. *R. at 50.* Plaintiff is a high school graduate. *R. at 51.*

At his hearing on October 19, 1993, Plaintiff testified that he was in the Navy from February 1, 1968 until December 1, 1971. *R. at 51.* From June 1982 until June 1991 he was a motel manager and maintenance worker. *R. at 53.* Plaintiff also worked as a cement finisher for a construction company *R. at 54.* Plaintiff testified that his last day of work was December 3, 1991, and at that time he worked at Western Publishing putting price stickers on books. Plaintiff worked forty hours per week for about three months. *R. at 52.*

Plaintiff testified that he takes pain and nerve pills every night which sometimes make him drowsy. *R. at 62.* Plaintiff stated that he has trouble sleeping, but sleeps between six and fifteen hours after he falls asleep. *R. at 62.* Plaintiff testified that he wakes up between eight and eleven in the morning, dresses himself, and sits in his recliner. *R. at 63.* Plaintiff stated that he alternates between his recliner and bed *R. at 63-64.*

According to Plaintiff, his doctors told him that he needs exercise. *R. at 64.* Plaintiff tried to cook for exercise. However, he sometimes forgot to turn the stove off when he was cooking, so he stopped. *R. at 75.* Plaintiff stated he can walk about one-half of a block before he starts hurting, and that he tries to walk about five

minutes at a time, lean on something, and then walk again. Plaintiff testified that after about 15 minutes of standing he starts hurting, and he usually has to lay down to relieve his pain. *R. at 65.* Plaintiff stated he can sit about 15 minutes before he starts hurting. Plaintiff usually sits in his recliner. *R. at 65.* Plaintiff stated he can lift five pounds, but that he cannot twist much or it hurts his back. *R. at 66.* Plaintiff believes that he can lift a gallon of milk. *R. at 66.* Plaintiff believes that he could probably walk one quarter of a mile if he pushed himself, but he stated his back would start hurting. *R. at 75-76.* Plaintiff also stated that he drives once or twice a week, about eight miles, into town. *R. at 51.*

Plaintiff believes that his pain interferes with his concentration. *R. at 67.* Plaintiff testified that he does not participate in very many social activities, that he does not like people, and that he is depressed. *R. at 67-68.*

Plaintiff takes Limbritol for his nerves, which he states helps him. *R. at 70.* Some of the medications he takes make him drowsy, but he has not asked his doctor about this. *R. at 71-72.*

On May 15, 1991, Plaintiff was treated by Mike McGee, M.D., for sensorineural loss due to noise exposure. The doctor noted that moderately loud sounds could cause pain but would not ultimately harm Plaintiff. *R. at 155.*

On August 1, 1991, Plaintiff had surgery for a recurrent right inguinal hernia. The surgery was performed by L.E. Speed, M.D. *R. at 165.*

On January 23, 1992, Plaintiff was admitted to Jan Phillips Episcopal Memorial Medical Center for evaluation of back problems. An MRI scan of the lumbar spine

revealed a herniated lumbar disc at the L5-S1 level. *R. at 171.* Plaintiff's surgeon was John Smithson, Jr., M.D., and Plaintiff's surgery occurred on January 24, 1992. *R. at 171, 173.* The doctor's notes indicate that following surgery, Plaintiff showed improvement. *R. at 171.* Plaintiff was discharged on January 29, 1992. *R. at 171.*

Dr. Smithson examined Plaintiff and noted that Plaintiff demonstrated moderate discomfort, that he bore weight equally on both extremities, that he exhibited no evidence of pelvic tilt, and that he was able to bend forward to 60 degrees. Dr. Smithson also noted that Plaintiff exhibited low back discomfort, demonstrated normal muscular strength testing, and was able to ambulate on his heels and toes without evidence of heel or foot drop. *R. at 175.* Dr. Smithson reported that, following the surgery, Plaintiff had no apparent operative complications and appeared to tolerate the procedure well. *R. at 176-78.*

On February 24, 1992, Plaintiff saw Dr. Smithson for a routine check-up following his surgery. Dr. Smithson reported that Plaintiff demonstrated excellent results from the surgery and had significantly improved. Dr. Smithson noted that Plaintiff stated that his pre-operative back pain had resolved within one week of his surgery. Plaintiff was permitted to return to work with the restriction of lifting no more than fifty pounds. On April 10, 1992, Plaintiff reported routine stiffness and soreness with increased activity, which his doctor noted as normal following surgery. *R. at 186.* Plaintiff returned six weeks later and complained of a great deal of recurrent low back pain, stiffness and soreness. The doctor noted that Plaintiff's

symptoms were consistent with osteoarthritic discomfort, and Plaintiff was given a prescription for Relafen. *R. at 187.*

Plaintiff was examined by "Casey" K. Chan, M.D., on July 23, 1992. Dr. Chan noted that Plaintiff's bone scan on July 24, 1992 was normal, and he did not know why Plaintiff was continuing to have back pain. *R. at 191.*

A July 17, 1992 CT of Plaintiff's lumbar spine was interpreted as normal. *R. at 204.* A July 16, 1992 X-ray of Plaintiff's lumbar spine indicated normal alignment of Plaintiff's vertebrae and normal disc space. *R. at 205.*

Plaintiff was examined by Kenyon K. Kugler, M.D., on January 4, 1993 for back and leg pain. Dr. Kugler noted that Plaintiff walks with a normal gait, but had pain on straight leg raising at 60 degrees. Dr. Kugler concluded that Plaintiff continued to have back pain in spite of a decompressive L5 laminectomy in January 1992. *R. at 213.*

Griffith C. Miller, M.D., evaluated Plaintiff for a workers' compensation claim on April 10, 1992 and on August 21, 1992. After the April 1992 exam, Dr. Miller concluded that Plaintiff was temporarily totally disabled and needed more treatment from Dr. Smithson.⁴¹ *R. at 224.* Following the August 1992 exam, Dr. Miller stated that he had no opinion with respect to whether Plaintiff was temporarily disabled. Dr. Miller additionally concluded that Plaintiff had an impairment of 20% to his left hand due to injury. *R. at 230.*

⁴¹ Plaintiff's last and final visit to Dr. Smithson was April 10, 1992. *R. at 187.*

Plaintiff claims he is disabled due to back pain, tendinitis, difficulty with his left wrist, a hernia, hearing difficulties, pain in the groin area, depression, and difficulty sleeping. *R. at 54*. On September 6, 1994, Plaintiff noted that he had experienced a slight improvement in his back and was now able to stand for over one hour at a time and walk about one-half mile. Plaintiff also stated he was less moody and depressed and that his sex life was beginning to improve. He additionally stated that he still had difficulty sleeping, and was awakened by severe leg aches in the middle of the night.

II. STANDARD OF REVIEW

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

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

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

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

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

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

"The finding of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401.

Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff could perform his past relevant work as a desk clerk or his past temporary job of placing price tags on books. The ALJ determined that although Plaintiff did have back pain, Plaintiff retained the residual functional capacity to perform work except for work involving lifting greater than twenty pounds and was not disabled.

IV. REVIEW

Substantial Evidence

Plaintiff initially asserts that the record lacks substantial evidence to support the ALJ's decision. Plaintiff asserts that a variety of impairments, including back pain, left wrist pain, groin pain, recurrent hernia, depression, and an inability to sleep, have prevented him from working.

Back Pain

Plaintiff's records reveal a history of complaints of back pain. On January 23, 1992, Plaintiff was admitted for evaluation of his back complaints. An MRI scan of his lumbar spine revealed a herniated lumbar disc at the L5-S1 level. *R. at 171*. Dr. Smithson operated on Plaintiff on January 24, 1992, and following the surgery, Plaintiff improved. *R. at 171*. Plaintiff was discharged on January 29, 1992. *R. at 171*. During a routine check-up on February 24, 1992, Dr. Smithson reported that Plaintiff demonstrated excellent results from the surgery and had significantly

improved. Dr. Smithson released Plaintiff to return to work with the restriction of lifting no more than fifty pounds.

On April 10, 1992, Plaintiff reported stiffness and soreness with increased activity. His doctor noted that such soreness was normal following surgery. *R. at 186.* Plaintiff returned six weeks later and noted a great deal of recurrent low back pain, stiffness and soreness. The doctor noted that Plaintiff's symptoms were consistent with osteoarthritic discomfort, and Plaintiff was given a prescription for Relafen. *R. at 187.*

Subsequent examinations of Plaintiff revealed no explanation for any further back discomfort. On July 23, 1992, Dr. Chan noted that Plaintiff's July 24, 1992 bone scan was normal, and he did not know why Plaintiff was continuing to have back pain. *R. at 191.* A July 17, 1992 CT of Plaintiff's lumbar spine was interpreted as normal. *R. at 204.* A July 16, 1992 X-ray of Plaintiff's lumbar spine indicated normal alignment of Plaintiff's vertebrae and normal disc space. *R. at 205.*

An RFC Assessment on November 9, 1992 indicated that Plaintiff could occasionally lift fifty pounds, frequently lift 25 pounds, stand about six hours in an eight hour day, sit about six hours in an eight hour day, and push/pull an unlimited amount. *R. at 106.* In addition the doctor noted that Plaintiff took his pants off with ease, that Plaintiff's forward flexion indicated no evidence of pain, and that Plaintiff exhibited a full range of motion with both hips and knees. *R. at 106-107.*

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.

Initially, the ALJ summarized Luna and its requirements, Plaintiff's medical record, and Plaintiff's testimony. *R. at 29-33*. The ALJ noted that Plaintiff was taking medication, but had relatively no side effects although Plaintiff did testify that the medication which he took at night made him drowsy. *R. at 33*. The ALJ also observed that Plaintiff had not followed the recommended exercise therapy.⁶¹ *R. at 33*. In addition, the only functional limitation placed upon Plaintiff by his surgeon was that he not lift over fifty pounds.⁷¹ The ALJ noted that Plaintiff's testimony regarding his lack of daily activities "would certainly lend itself to deconditioning, however, there is no record of any muscle atrophy." *R. at 34*.

⁶¹ Plaintiff testified that exercise caused him pain.

⁷¹ Plaintiff's surgeon included this statement on Plaintiff's initial visit. Plaintiff's record indicates that his condition deteriorated, to a limited degree, following his initial visit. *R. at 186-87*.

The ALJ additionally concluded that Plaintiff's testimony was not fully credible. The ALJ observed that Plaintiff's statements regarding his daily activities were inconsistent with the record, and that although Plaintiff testified that he eats well and reclines all day, the record does not indicate that Plaintiff has gained a significant amount of weight.⁸¹ *R. at 34.*

Plaintiff asserts that the ALJ erred by not finding that Plaintiff was disabled due to pain, and by discounting Plaintiff's complaints of pain. However, the mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988).

Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment.

Id. 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's determination that Plaintiff's back pain did not preclude him from engaging in light work is supported by substantial evidence.

Ear Pain

On May 15, 1991, Plaintiff was examined by Mike McGee, M.D., for noise exposure and tinnitus.⁹¹ Dr. McGee concluded that "the pain he experiences will not

⁸¹ The record does indicate that Plaintiff's weight fluctuated between approximately 190 pounds and 215 pounds.

⁹¹ Tinnitus is "a subjective ringing or tinkling sound in the ear." *Taber's Cyclopedic Medical Dictionary* 2000 (17th ed. 1993).

really ultimately harm him." *R. at 155.* Masking and sound barrier protection was recommended, and Plaintiff was requested to check back in two years, "or sooner should he have any other problems." *R. at 155.* The ALJ notes that no other records document Plaintiff's ear pain or hearing loss, nothing indicates that Plaintiff ever returned to Dr. McGee, and no doctors reported that Plaintiff had any difficulty hearing or understanding. *R. at 27.* The ALJ's conclusion that Plaintiff's ear impairment is not severe enough to preclude Plaintiff from engaging in substantial gainful activity is supported by substantial evidence.

Left Wrist

Plaintiff asserts that he has pain and decreased gripping ability in his left thumb and wrist. Plaintiff was examined for a worker's compensation claim by Griffith C. Miller, M.D., on April 10, 1992 and on August 21, 1992. In his April report, Dr. Miller makes no mention of any impairment to Plaintiff's left wrist or thumb, but concludes that due to back pain Plaintiff is temporarily totally disabled. *R. at 223-24.* In his August report Dr. Miller noted that he had no opinion regarding Plaintiff's temporary disability. Dr. Miller also noted that Plaintiff has pain in his left thumb with decreased gripping ability and determined Plaintiff had a 20% impairment to his left hand. *R. at 230.*

The ALJ correctly observed that Plaintiff's medical records contain no other evidence of an impairment to his left wrist. *R. at 27.* Plaintiff's May 17, 1993 application does not list his left wrist impairment as a reason for his inability to work. *R. at 120.* An RFC Assessment conducted on November 9, 1992, by N. Berner,

M.D., indicates that Plaintiff has no restrictions on reaching, grabbing, or handling (including fine and gross manipulation). *R. at 108.* This RFC Assessment was affirmed after a second review by J. Perkins, M.D., on April 18, 1993. The ALJ's conclusion that Plaintiff's ability to work was not diminished by a wrist impairment is supported by substantial evidence.

Hernia

Plaintiff had surgery for recurrent right inguinal hernia on August 1, 1991. However, as correctly noted by the ALJ, Plaintiff's records do not indicate that he was ever treated for additional problems related to the surgery, or that the hernia has caused additional problems for Plaintiff. The ALJ's conclusion that Plaintiff's prior treatment for a hernia did not preclude his present ability to work is supported by substantial evidence.

Mental Impairment

Plaintiff alleges that he is depressed, unable to sleep properly, unable to handle stress, and dislikes being around people. Plaintiff initially claimed anxiety and nervousness in 1989. *R. at 234.* Plaintiff testified that he was once referred to a psychiatrist by the VA hospital, but because the VA psychiatrist merely took several coffee breaks and handed him a list of civilian doctors he decided that an appointment with a psychiatrist would not be worth it. *R. at 79-80.* Plaintiff's medications lists indicate that Plaintiff takes medication for depression.^{10\} *R. at 70.*

^{10\} Plaintiff testified he was taking Limbitrol for depression, and the ALJ notes that Plaintiff took Elavil. *R. at 16, 29, 152, 213.* Elavil is the trade name for amitriptyline hydrochloride, an antidepressant. See *Taber's Cyclopedic Medical Dictionary* 62, 611 (17th ed. 1993).

The ALJ correctly notes that the record contains very little evidence to substantiate Plaintiff's asserted mental impairment. *R. at 28-29*. The ALJ determined that Plaintiff does not have a medically determinable mental impairment and concluded "that the medication relieved the claimant of his situational depression in that there is no evidence that he has ever sought further evaluation or treatment" *R. at 29*.

At Step four, the claimant has the burden of proof to establish a medically determinable impairment. The ALJ determined that the Plaintiff had not established the existence of a mental impairment, and that conclusion is supported by substantial evidence.

Hypothetical Question to Vocational Expert

Plaintiff additionally alleges that the ALJ erred by presenting flawed hypothetical questions to the vocational expert. However, a decision at Step four of the evaluation process, that a claimant can return to his past relevant work, does not require the consultation of a vocational expert. See Glenn v. Shalala, 21 F.3d 983, 988 (10th Cir. 1994).

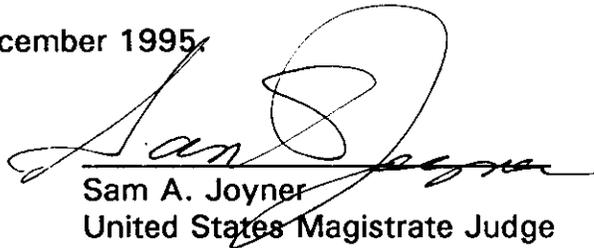
Plaintiff asserts that the ALJ failed to include in the hypothetical question posed to the vocational expert the additional limitations that Plaintiff's medication makes him sleepy, that Plaintiff has mental problems, and that Plaintiff's fingers were numb. However, an ALJ is not required to accept all of a plaintiff's testimony with respect to restrictions as true. The ALJ only need pose the restrictions to the vocational expert which the ALJ accepts as true. 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).

The hypothetical posed by the ALJ was proper. The ALJ noted that although Plaintiff takes medication, the proper use of such medication "would not preclude him from functioning." *R. at 85*. In addition, the ALJ determined that Plaintiff's wrist/hand impairment, and Plaintiff's mental impairment were not supported by the record. Considering Plaintiff's medical record and the ALJ's determinations, the hypothetical posed by the ALJ adequately included Plaintiff's restrictions.

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

Dated this 4 day of December 1995.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 4 1995

sa

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

WILLIAM J. FROMM,

Plaintiff,

v.

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

Defendant.

No. 95-C-276-J ✓

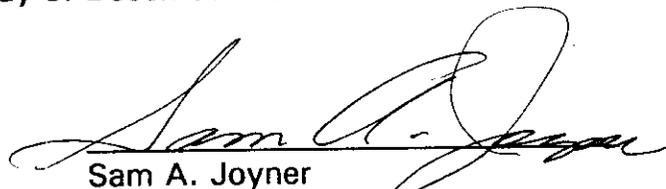
ENTERED ON DOCKET

DATE 12-5-95

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 4 day of December 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.

9

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

AMERICAN STATES INSURANCE COMPANY,
an Indiana corporation,

Plaintiff,

v.

MICHAEL SHUE DeCORTE and CHERYL
DeCORTE,

Defendants.

ENTERED ON DOCKET
DATE 12-5-95

Case No. 94-C-108-H ✓

FILED

DEC 4 1995

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

J U D G M E N T

This Court entered an order on November 13, 1995 granting summary judgment in favor of Plaintiff American States Insurance Company.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Plaintiff and against the Defendants.

IT IS SO ORDERED.

This 4TH day of December, 1995.


Sven Erik Holmes
United States District Judge

FILED

DEC - 4 1995

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

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

DR. RODRIGO RAMIREZ, and)
MS. BARBARA SNOW,)

Plaintiffs,)

vs.)

OKLAHOMA DEPARTMENT OF)
MENTAL HEALTH, and)
DANIEL CLUTE, and)
GERALD D. GOODNER, and)
WOODROW PENDERGRASS, and)
NANCEY PRIGMORE, and)
BOB LeFLORE,)

Defendants.)

Case No. 91-C-681-B

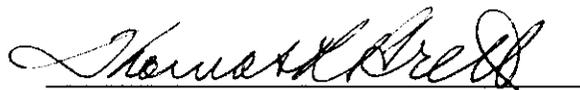
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DATE DEC 05 1995

ORDER

NOW on this 4 day of Dec., 1995, this matter comes on for hearing pursuant to the Joint Stipulation of Dismissal and Application for Dismissal With Prejudice of the parties hereto. The Court, being fully advised in these premises, finds that the Application should be granted.

IT IS THEREFORE ORDERED that this cause is dismissed with prejudice.


UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE 12-5-95

NORMA CALHOUN

Plaintiff,

v.

LIVING CENTERS OF AMERICA,
INC., a foreign corporation;
LIVING CENTERS OF TEXAS, INC.,
a foreign corporation, d/b/a
REGENCY PARK NURSING HOME;
FLORENCE ALEXANDER

Defendants.

Case No. 94-C-628-H ✓

FILED
IN OPEN COURT

DEC 4 1995

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

J U D G M E N T

This action came on for consideration before the Court, the Honorable Sven Erik Holmes, United States District Judge, presiding, and the issues having been duly heard, and a decision having been duly rendered in favor of Plaintiff.

IT IS THEREFORE ORDERED that Defendants make payment to Plaintiff in the amount of \$15,000.

IT IS SO ORDERED.

This 4th day of December, 1995.


Sven Erik Holmes
United States District Judge

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

BARTIN PIPE AND PILING SUPPLY,)
LTD.,)
)
Plaintiff,)
)
v.)
)
CHRIS WATSON and RICHARD)
ERICKSON,)
)
Defendants.)

FILED ON DOCKET
12-5-95

Case No. 94-CV-107-H ✓

DEC 1995 *sa*

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

J U D G M E N T

This action came on for consideration before the Court, the Honorable Sven Erik Holmes, United States District Judge, presiding, and the issues having been duly heard, and a decision having been duly rendered in favor of Plaintiff Bartin Pipe and Piling Supply, Ltd. ("Plaintiff"), and Cross-Claimant Richard Erickson.

IT IS THEREFORE ORDERED that Defendant Chris Watson make payment to Plaintiff in the amount of \$50,000, that Defendant Richard Erickson make payment to Plaintiff in the amount of \$100,000, and that Defendant Chris Watson make payment to Cross-Claimant Richard Erickson in the amount of \$2,483.50.

IT IS SO ORDERED.
This 4TH day of December, 1995.


Sven Erik Holmes
United States District Judge

67

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

FILED

DEC 4 1995

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

JULIE L. ANDERSON, SHANTELL
JOHNSON, NEISHA BYERS, and
EBONY NASH TAYLOR,

Plaintiffs,

v.

WORLD PUBLISHING COMPANY,
an Oklahoma corporation,
and NEWSPAPER PRINTING
CORPORATION, an Oklahoma
corporation,

Defendants.

Case No. 93-C-755-H ✓
Case No. 94-C-84-H
(CONSOLIDATED)

ENTERED ON DOCKET
DATE 12-5-95

J U D G M E N T

This action came on for consideration before the Court, the Honorable Sven Erik Holmes, United States District Judge, presiding, and the issues having been duly heard, and a decision having been duly rendered in favor of Plaintiffs.

IT IS THEREFORE ORDERED that Defendants make payment to Plaintiff Julie L. Anderson in the amount of \$69,000, that Defendants make payment to Plaintiff Shantell Johnson in the amount of \$66,000, that Defendants make payment to Plaintiff Niesha Byers in the amount of \$35,000, and that Defendants make payment to Plaintiff Ebony Nash Taylor in the amount of \$35,000.

IT IS SO ORDERED.

This 4TH day of December, 1995.


Sven Erik Holmes
United States District Judge

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

FILED

DEC 1 - 1995

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

SHERRELL JULIAN,
Plaintiff,
vs.
HEA MANAGEMENT GROUP, INC.,
d/b/a CARE NURSING CENTER;
and PATTI HENSON,
Defendants.

Case No. 95-C-833-BU

ENTERED ON
DATE DEC 04 1995

O R D E R

This matter comes before the Court upon the Motion to Dismiss filed by Plaintiff, Sherrell Julian, wherein Plaintiff requests the Court to dismiss this matter with prejudice due to the settlement of this matter by the parties. Upon due consideration, the Court finds that the motion should be granted.

Accordingly, the Motion to Dismiss (Docket Entry #3) is hereby GRANTED. This action is hereby DISMISSED WITH PREJUDICE.

Entered this 1st day of December, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

H

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

FILED
DEC 1 - 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RANDY W. DUMIGAN,)
)
 Plaintiff,)
)
 vs.)
)
 ED WALKER, et al.,)
)
 Defendants.)

No. 95-C-1132-BU ✓

ORDER

ENTERED ON DOCKET
DEC 04 1995
DATE _____

On November 15, 1995, the Clerk of the Court notified Plaintiff that he needed to submit a motion for leave to proceed in forma pauperis and mailed him the requisite form. On November 29, 1995, the above correspondence was returned to the Court with the following notation: "Return to Sender."

Accordingly, this action is hereby DISMISSED WITHOUT PREJUDICE for failure to pay the filing fee.

SO ORDERED THIS 1st day of Dec, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

CLIFFTON TARVER for)
PRENTICE S. TARVER, a minor,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER, Commissioner of)
Social Security,^{1/})
)
Defendant.)

NOV 30 1995 *ja*

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

No. 94-C-826-J ✓

FILED ON DOCKET

12-4-95

ORDER^{2/}

Now before the Court is Plaintiff, Prentice S. Tarver's, appeal of the Secretary's decision denying him Children's Supplemental Security Income ("SSI") benefits.^{3/} Plaintiff alleges that he is entitled to SSI benefits because he is disabled as a result of a seizure disorder. Plaintiff argues that the ALJ's decision to deny him benefits is not supported by substantial evidence, as a whole, because the ALJ erred by relying on

^{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 May 26, 1995.

^{3/} Plaintiff filed his application for benefits on June 24, 1992. [*R. at 174-77*]. The application was denied by the Secretary on September 22, 1992. [*R. at 185-87*]. Plaintiff's request for reconsideration was denied on January 26, 1993. [*R. at 193-95*]. A hearing before an Administrative Law Judge ("ALJ") was held on November 10, 1993. [*R. at 151-172*]. Plaintiff was represented by counsel at this hearing. By an order dated September January 7, 1994, the ALJ denied Plaintiff's benefit application. [*R. at 130-139*]. Plaintiff submitted additional medical evidence to the Social Security Administration Appeals Council and requested review of the ALJ's decision. [*R. at 6-129*]. The Appeals Council denied Plaintiff's request for review on July 8, 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) & 1383(c)(3).

12

medical evidence older than 12 months from the date of the ALJ's decision. Plaintiff also argues that the following specific determinations made by the ALJ are not supported by substantial evidence: (1) that Plaintiff's seizure disorder is controlled by medication, and (2) that the adverse side effects of Plaintiff's medication do not significantly limit Plaintiff's ability to function independently, appropriately, and effectively in an age-appropriate manner. 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 six year old boy in the first grade. *R. at 154*. Plaintiff has been diagnosed with a seizure disorder. Plaintiff's seizures seem to occur primarily at night. *R. at 244-47, 253*. It is undisputed that Plaintiff's most severe seizures manifest themselves as follows: (1) Plaintiff has pain and or numbness in his right leg, (2) Plaintiff's right side begins to shake, (3) Plaintiff may become unstable and fall, (4) Plaintiff bites the inside of his mouth, and (5) Plaintiff occasionally loses consciousness. *R. at 160-62, 209*.

From approximately the age of 18 months to age four, Plaintiff has been admitted to the hospital on four separate occasions for febrile seizures. "Febrile" seizures are seizures that relate to or are caused by high fever.^{4/} Plaintiff's medical

^{4/} Tabor's Cyclopedic Medical Dictionary (17th ed. 1993) defines "febrile" to mean "feverish." *Id.* at 715. Tabor's describes "febrile convulsions" as follows:

About three to five percent of children will experience a convulsion associated with fever. Most will have this in the period between 6 months and two to three years of age. Febrile convulsions are rare after age of six to eight. Boys are more susceptible than girls to this type of convulsion.

Id.

records indicate that during this period, he suffered from chronic infection of his middle ear (*otitis media*)^{6/} and upper respiratory infections. These infections apparently caused high fevers, resulting in febrile seizures.^{6/}

Plaintiff was last hospitalized at St. John's on February 16, 1992 as a result of a seizure. *R. at 220-230*. This time, however, Plaintiff was not running a fever. As a result of his February 1992 hospitalization for non-febrile seizure activity, Plaintiff was seen by Harley B. Morgan, M.D. Dr. Morgan is a neurologist with a pediatric specialty. Dr. Morgan notes that Plaintiff had suffered from febrile seizures in the past and concludes that Plaintiff may have developed a partial^{7/} epilepsy unassociated with fever. *R. at 244-45*. John Kramer, M.D., on his report discharging Plaintiff from St. John's on February 18, 1992 also gave the following assessment: "seizure disorder, cause undetermined, often called epilepsy." *R. at 229-30*.

Dr. Morgan's and Dr. Kramer's diagnoses are supported by diagnostic testing. On March 26, 1992, Dr. Morgan hooked Plaintiff up to an EEG. The EEG report was

^{5/} See Tabor's Cyclopedic Medical Dictionary 1388 (17th ed. 1993).

^{6/} Plaintiff was hospitalized on December 12, 1988 at Stuttgart Memorial Hospital in Stuttgart, Arkansas. *R. at 263*. Plaintiff was hospitalized on June 29, 1989 and July 17, 1989 at St. John Medical Center (St. John's) in Tulsa Oklahoma. *R. at 304-309*. Plaintiff was also hospitalized on March 26, 1990 at St. Francis hospital in Tulsa Oklahoma. *R. at 14-18*. The records from these hospitalizations indicate that Plaintiff was hospitalized each time for febrile seizures that were the result of a high fever caused by infection.

^{7/} "Partial seizures begin focally with a specific sensory, motor, or psychic aberration that reflects the affected part of the cerebral hemisphere where the seizure originates." The Merck Manual 1437 (16th ed. 1992).

abnormal. It was suggestive of "benign rolandic epilepsy."^{8/} *R. at 246-47.* Dr. Morgan conducted a second EEG almost one year later on March 3, 1993. This EEG was "mildly" abnormal and still suggestive of seizures. *R. at 253.*

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 ALJ applied the correct legal standards. 42 U.S.C. §§ 405(g) & 1383(c)(3); 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

^{8/} "Benign rolandic epilepsy" is defined as "a self-limited, autosomal dominant disorder of childhood consisting of partial seizures manifested by facial movements and grimaces, often followed by [convulsive twitching of the muscles]." Dorland's Medical Dictionary 566 & 1719 (28th ed. 1994).

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)^{9/} 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.

^{9/} Pursuant to 42 U.S.C. § 1383(c)(3), the requirements of § 423(d) are specifically made applicable to SSI cases.

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) & 416.912(d) (emphasis added).

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) & 1383(d)(1). 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). See also Sullivan v. Zebley, 493 U.S. 521, 528 (1990). Under the circumstances presented by this case, the Court finds no evidence that § 404.1512(d) or § 416.912(d) are 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).

Plaintiff's application for benefits was filed on June 24, 1992. The medical records in Plaintiff's file span from December 1988 to January 1993. Thus, the record for the twelve month period preceding the date Plaintiff filed his application was adequately developed. Furthermore, there is nothing in the record which suggests that any additional records even exist.

IV. THE STANDARDS APPLICABLE TO EVALUATION OF DISABILITY IN CHILDREN

A person may obtain SSI benefits (1) if his financial resources are below a certain level, and (2) if he is aged, blind or disabled. 42 U.S.C. § 1382. Under the SSI subchapter of the Social Security Act, an individual will be considered disabled

if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of an individual under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

42 U.S.C. § 1382c(a)(3)(A) (emphasis added).

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

Id. at § 1382c(a)(3)(B). "In plain words, [the above-quoted sections establish that] a child is entitled to benefits if his impairment is as severe as one that would prevent

an adult from working." Zebley, 493 U.S. at 529.

The Secretary has developed a four-step sequential evaluation process to evaluate a minor's alleged disability. First, the Secretary determines whether the minor is engaged in substantial gainful activity. If he is, the minor will not be considered disabled. If the minor is not engaged in substantial gainful activity, the Secretary will then determine whether the minor's impairment is severe. If it is not, the minor will not be considered disabled. If the minor's impairment is severe, the Secretary will then determine whether the minor has an impairment that meets or equals the severity of one of the impairments listed at 20 C.F.R. Pt. 404, Subpt. P., App. 1 ("the Listings"). If the minor's impairment is of Listing severity, he will be considered presumptively disabled. If the minor's impairment is not of Listing severity, the Secretary must determine whether the impairment is of "comparable severity" to an impairment that would disable an adult. 20 C.F.R. § 416.924(b)-(f).

The Secretary's regulations define "comparable severity" as follows:

By the term *comparable severity*, we mean that your physical or mental impairment(s) so limits your ability to function independently, appropriately, and effectively in an age-appropriate manner that your impairment(s) and the limitations resulting from it are comparable to those which would disable an adult. Specifically, your impairment(s) must substantially reduce your ability to --

- (1) Grow, develop, or mature physically, mentally, or emotionally and, thus, to attain developmental milestones . . . at an age-appropriate rate; or
- (2) Grow, develop, or mature physically, mentally, or emotionally and, thus, to engage in age-appropriate activities of daily living . . . in self-care, play and recreation, school and academics, community activities, vocational settings, peer relationships, or family life; or

- (3) Acquire the skills needed to assume roles reasonably expected of adults. . . .

20 C.F.R. § 416.924(a)(1)-(3).

To determine whether a child has an impairment that is of comparable severity to that which would disable an adult, the Secretary conducts an Individualized Functional Assessment ("IFA"). 20 C.F.R. § 416.924(f). An IFA is similar to the Residual Functional Capacity ("RFC") assessment performed by the Secretary when an adult's claim of disability is evaluated. While conducting an IFA, the Secretary "will consider the functions, behaviors, and activities that are appropriate to [the claimant's] age. . . ." 20 C.F.R. 416.924a(a)(4).

For preschool children like Plaintiff^{10/}, the following "domains of development or functioning" are evaluated by the Secretary during an IFA:

- (1) Cognitive development, e.g., your ability to understand, to reason and to solve problems, and to use acquired knowledge and concepts;
- (2) Communicative development (includes speech and language), e.g., your ability to communicate by telling, requesting, predicting, and relating information, by following and giving directions, by describing actions and functions, and by expressing your needs, feelings, and preferences in a spontaneous, interactive, and increasingly intelligible manner, using simple sentences in grammatical form;
- (3) Motor development (includes gross and fine motor skills), e.g., your ability to move and use your arms and legs in increasingly more intricate and coordinated activity, and your ability to use your hands with increasing coordination to manipulate small objects during play.

^{10/} The Secretary's regulations define the following five categories of children: (1) older infants and toddlers, age 1 to attainment of age 3; (2) preschool children, age 3 to attainment of age 6; (3) school-age children, age 6 to attainment of age 12; (4) young adolescents, age 12 to attainment of age 16; and (5) older adolescents, age 16 to attainment of age 18. 20 C.F.R. § 416.924d(f)-(j). Plaintiff was five years old when he filed his application for SSI benefits. Therefore, he was a "preschool" child at the time of application for benefits.

- (4) Social development, e.g., your ability to initiate age-appropriate social exchanges and to respond to your social environment through appropriate and increasingly complex interpersonal behaviors, such as showing affection, sharing, cooperating, helping, and relating to other children as individuals or as a group;
- (5) Personal/behavioral development, e.g., your ability to help yourself and to cooperate with others in taking care of your personal needs, in adapting to your environment, in responding to limits, and in learning new skills;
- (6) Concentration, persistence, and pace, e.g., your ability to engage in an activity, such as dressing or playing, and to sustain the activity for a period of time and at a pace appropriate to your age.

20 C.F.R. § 416.924d(h).

A preschool child will be considered disabled at the IFA level if he has (1) a "marked" impairment in one of the six domains described above and a "moderate" impairment in a second domain, or (2) a "moderate" impairment in any three of the six domains. 20 C.F.R. § 416.924e(c)(2)(i)-(ii). A moderate impairment is one that is not as severe as a marked impairment. A "marked" impairment is one that is "more than moderate but less than extreme" and exists where "the degree of limitation is such as to interfere seriously with the ability to function (based upon age-appropriate expectations) independently, appropriately, effectively, and on a sustained basis." 20 C.F.R. § 416.924e(b); 20 C.F.R. Pt. 404, Subpt. P., App. 1, § 112.00C.

The ALJ in this case determined that (1) Plaintiff was not engaging in substantial gainful activity, (2) Plaintiff's seizure disorder is severe, and (3) Plaintiff's seizure disorder did not meet or equal a Listing. Having made these determinations, the ALJ was required to proceed to step-four of the sequential evaluation process for minors and conduct an IFA. At the IFA stage, the ALJ determined that (1) Plaintiff

is taking medication (i.e., Tegretol) that adequately controls his seizures, and (2) the side effects of the medication do not significantly affect Plaintiff's ability to function independently, appropriately, and effectively in an age-appropriate manner. *R. at 134-38.* Therefore, the ALJ found Plaintiff to be not disabled.

V. THE ALJ'S DETERMINATION THAT PLAINTIFF IS NOT DISABLED IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Plaintiff's Seizures Are Adequately Controlled By Medication.

Plaintiff's non-febrile seizures apparently began sometime around February 1992, when he was admitted to St. John's. *R. at 229-30, 279.* Sometime during February or March 1992, Plaintiff's doctors put him on Tegretol to control his seizures. *R. at 246-47, 262.* The ALJ determined that Plaintiff's seizures were being controlled by Tegretol. Plaintiff argues on appeal that this determination is not supported by substantial evidence. The Court does not agree.

Plaintiff's mother specifically testified that Plaintiff's seizures have been controlled by Tegretol since February 1992. *R. at 162.* The last seizure Plaintiff's mother remembers seeing occurred in June or July of 1992. In fact, Plaintiff's mother specifically testified that Plaintiff was disabled not because of his seizures, but because of the effects of the Tegretol on Plaintiff (i.e., drowsiness, pain and mood swings). *R. at 163.*

Plaintiff was seen by his treating pediatric neurologist, Dr. Morgan, in March and April of 1992. Dr. Morgan noted after both visits that Tegretol was controlling the seizures and since being put on Tegretol, Plaintiff had not had any seizures. *R. at 244.* Plaintiff saw Dr. Morgan again in March 1993 and Dr. Morgan noted

"improving seizure control." *R. at 256.* Plaintiff saw Dr. Morgan again in August of 1993. At that time, Dr. Morgan noted (1) that Plaintiff's "jerking" at night had resolved itself, and (2) that Plaintiff had not had a seizure for eight months. Dr. Morgan's overall impression was that adequate seizure control had been achieved. *R. at 259.* Dr. Luther Monroe, M.D., conducted a consultive IFA of Plaintiff on May 3, 1992. Dr. Luther also notes that Plaintiff's seizures appear to be under control. *R. at 182.*

Dr. Morgan's and Dr. Monroe's conclusion that Plaintiff's seizures are being controlled by Tegretol is also supported by diagnostic evidence. Dr. Morgan diagnosed Plaintiff with benign rolandic epilepsy as a result of an "abnormal" EEG in March of 1992. *R. at 246-47.* Dr. Morgan performed another EEG a year later in March of 1993. This later EEG was "mildly abnormal." Also, "[t]he prominent[,] frequent epileptiform discharges noted on earlier [EEG's were] no longer present." *R. at 253.* "Epileptiform" discharges are discharges which "resembl[e] epilepsy or its manifestations." Dorland's Medical Dictionary 567 (28th ed. 1994). Thus, the later EEG indicates that the prominent and frequent epilepsy-related discharges shown on earlier EEG's were no longer present in March 1993, after a year of Tegretol use.

The only evidence in the record that detracts from the ALJ's conclusion that Plaintiff's seizures are under control is the fact that Plaintiff was admitted to Children's Hospital in Arkansas in November 1993. *R. at 20-26.* The records from Children's Hospital are not clear, but it appears that Plaintiff may have had a seizure in November 1993. The medical records indicate that this seizure occurred

approximately three months after Dr. Morgan reduced Plaintiff's Tegretol intake. *R. at 259.*

The doctors at Children's Hospital increased Plaintiff's Tegretol intake and control of Plaintiff's seizures appears to have been regained. *R. at 22.* John Bornhofen, M.D., also performed an EEG while Plaintiff was at Children's Hospital. Dr. Bornhofen noted that this EEG was "mildly abnormal" and indicated that this abnormality could have been caused by the fact that Plaintiff was drowsy at the time of the EEG. Dr. Bornhofen also noted that there was no persistent epileptiform (i.e. epilepsy related) activity. *R. at 23.* Thus, the November 1993 seizure appears to be an isolated incident, possibly brought about by a reduction of Plaintiff's Tegretol intake.

It is also significant to note that none of the records from Plaintiff's teachers indicate that he has ever had a seizure while at school. The Court finds, therefore, that there is substantial evidence in the record to support the ALJ's conclusion that Plaintiff's seizures are adequately controlled by medication. See Pacheco v. Sullivan, 931 F.2d 596, 598 (10th Cir. 1991); Teeter v. Heckler, 775 F.2d 1104, 1107 (10th Cir. 1985) (holding that an impairment that can reasonably be controlled with medication is not considered disabling under the Social Security Act).

B. The Side Effects of Plaintiff's Medication Do Not Significantly Affect Plaintiff's Ability to Function Independently, Appropriately, and Effectively In An Age-Appropriate Manner.

Plaintiff argues that even if it can be said that his seizures are under control, he is still disabled as a result of the adverse side effects of the Tegretol which he takes to control his seizures. In particular, Plaintiff complains that his Tegretol intake makes him drowsy, causes him pain (i.e., leg pain, headaches and stomach aches), and causes mood swings. Plaintiff argues that the limitations caused by these non-exertional impairments are of comparable severity to render an adult disabled. The Court does not agree.

To determine whether Plaintiff's non-exertional impairments were of comparable severity (i.e., disabling), the ALJ conducted an Individualized Functional Assessment of Plaintiff, as required by the Secretary's regulations. *R. at 137-38*. The ALJ determined that Plaintiff's non-exertional impairments caused

1. no significant limitation to Plaintiff's (a) cognitive function, (b) communicative function, or (c) social development;
2. a less than moderate limitation to Plaintiff's (a) personal/behavioral function, and (b) concentration, persistence and pace; and
3. a moderate limitation to Plaintiff's motor development.

Id. Dr. Luther Woodcock, M.D., also conducted an IFA on May 3, 1992, which supports the ALJ's findings. *R. at 179-182*. Based on the degrees of limitation found by the ALJ, Plaintiff is not disabled as a result of the side effects of Tegretol. 20 C.F.R. § 416.924e(c)(2)(i)-(ii). The Court finds that there is substantial evidence to

support this conclusion.

Although there are no report cards in the record, the record as a whole indicates that Plaintiff is achieving and doing well in school, despite his non-exertional impairments. *R. at 245, 250-51.* Other than his participation in a headstart program before beginning kindergarten, Plaintiff has not required special education, tutoring or other services due to his impairments. *R. at 199-201.* Plaintiff's teachers all seem to agree that Plaintiff is making the same academic progress as other children his age. *R. at 214-15, 223-24, 250-51.* No specific learning problems have been identified. *R. at 211, 250-51.* There appear to be no limitations on Plaintiff's ability to write, read, follow directions or listen. *R. at 223-24, 250-51.* Thus, there is substantial evidence to support the ALJ's conclusion that there is no significant limitation of Plaintiff's cognitive functioning.

The record also indicates that Plaintiff participates in all school activities. *R. at 210-15, 250-51.* Plaintiff also engages in normal, age-appropriate activities. He does chores, watches TV, plays Nintendo, plays outside with other children, rides his bike, etc. *R. at 210-212.* Plaintiff's teachers have indicated that, on the whole, Plaintiff's behavior is normal for a boy his age. He is not a behavior problem and he is generally obedient. Plaintiff is also generally polite and friendly, and he plays well with other children. *R. at 212, 223-24, 250-51.* Thus, there is substantial evidence to support the ALJ's conclusion that there is no significant limitation of Plaintiff's social or communicative functioning.

Plaintiff's mother indicates that Plaintiff does not play sports as much as he would like. The record is contradictory, however, regarding the reason for the decrease in the amount of sports participation. On one hand, Plaintiff's mother attributes it to tiredness caused by Tegretol. On the other hand, Plaintiff's mother attributes it not to Plaintiff's inability to engage in sports activities, but to a fear that Plaintiff might have a seizure while engaging in some sport. *R. at 159-60*. The testimony about Plaintiff's inability to play sports is also somewhat inconsistent with the reports from Plaintiff's teachers that he engages in all school activities and plays with other children while at school. It is the ALJ's job, not this Court's to resolve conflicts in the evidence such as these. See, e.g., Tillery v. Schweiker, 713 F.2d 601, 603 (10th Cir. 1983).

Plaintiff's headstart teacher does indicate that when Plaintiff first began taking Tegretol, he was more aggressive than he had been with other children and that he did not get along with the other children. *R. at 214-15*. However, the records from kindergarten and first grade indicate that Plaintiff plays well with other children and is not a behavior problem. It appears, therefore, as if this initial aggressiveness resolved itself. Two years later, while in first grade, Plaintiff apparently tripped a child. However, Plaintiff's teacher at that time stated that she did not see the incident and was not sure what precipitated the tripping. *R. at 331-32*. It appears that this was an isolated incident, and not indicative of a major behavioral problem. Thus, there is substantial evidence to support the ALJ's conclusion that there is only a less than moderate limitation of Plaintiff's personal behavioral functioning.

There is one note in the record that when Plaintiff began taking Tegretol, he missed two or three days of school to adjust to his medication. *R. at 211*. Other than this isolated instance, nothing in the record indicates that Plaintiff is having significant attendance problems at school. Plaintiff's first grade teacher is the only teacher who has indicated that Plaintiff is slow to respond in the mornings. She indicates that she has had some problems getting Plaintiff on task in the mornings, but no real problems in the afternoons. *R. at 331-32*. No other teacher has ever indicated such a problem with Plaintiff. Considering Plaintiff's apparent normal academic progress, it appears that his "slowness" in the mornings is not significantly affecting him. Thus, there is substantial evidence to support the ALJ's conclusion that there is only a less than moderate limitation in Plaintiff's concentration, persistence and pace.

There is nothing in the record indicating that Plaintiff has motor control problems when he is not having a seizure. And, as discussed above, Plaintiff's seizures are currently being controlled by medication. When he is not having a seizure, Dr. Morgan has found that Plaintiff's motor skills are normal, that his "[m]ovements [are] smooth and well-coordinated," and that his "[w]alking and running gait [is] well-coordinated." *R. at 245*. Thus, there is substantial evidence to support the ALJ's conclusion that there is moderate limitation in Plaintiff's motor functions.

Having found only one of the six domains evaluated during an IFA to be moderately limited (i.e., motor function) and two to be less than moderately limited (i.e., behavioral and concentration), the ALJ was justified in finding that Plaintiff's

impairments are not of comparable severity to those which would render and adult disabled. 20 C.F.R. § 416.924e(c)(2)(i)-(ii). Accordingly, the Secretary's determination that Plaintiff is not entitled to SSI benefits is AFFIRMED.

IT IS SO ORDERED.

Dated this 30th day of November 1995.

A handwritten signature in cursive script, appearing to read "Sam A. Joyner", written over a horizontal line.

Sam A. Joyner
United States Magistrate Judge

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

CLIFFTON TARVER for)
PRENTICE S. TARVER, a minor,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER, Commissioner of)
Social Security,^{1/})
)
Defendant.)

NOV 30 1995

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

No. 94-C-826-J ✓

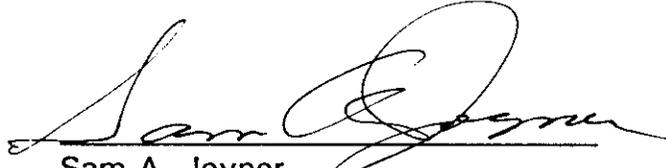
ENTERED ON DOCKET

DATE 12-4-95

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 30th 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 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.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 30 1995 *sa*

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

JAMES E. JACKSON,)
)
)
 Plaintiff,)
)
)
 v.)
)
)
 SHIRLEY S. CHATER, Commissioner of)
 Social Security,^{1/})
)
 Defendant.)

No. 94-C-68-J ✓
5

ENTERED ON DOCKET
DATE *12-4-95*

JUDGMENT

This action has come before the Court for consideration and an Order affirming the decision of the Administrative Law Judge 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 30 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.

11

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 30 1995

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

JAMES E. JACKSON,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,¹¹

Defendant.

No. 94-C-68-J ✓

ENTERED ON DOCKET

DATE 12-4-95

ORDER²¹

Plaintiff, James E. Jackson, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Secretary denying Social Security benefits.³¹ Plaintiff asserts error because (1) the ALJ improperly analyzed Plaintiff's complaints of pain, (2) the ALJ did not properly consider the opinion of an examining physician, (3) the ALJ erred by not finding that Plaintiff's mental impairment was severe, and (4) the

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 insurance benefits on March 31, 1993. *R. at 13*. The application was denied initially and upon reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held May 10, 1994. *R. at 179*. By order dated August 10, 1994, the ALJ determined that Plaintiff was not disabled. *R. at 13-20*. The Plaintiff appealed the ALJ's decision to the Appeals Council. On November 30, 1994, the Appeals Council denied Plaintiff's request for review. *R. at 5*.

hypothetical question presented to the vocational expert was flawed. For the reasons discussed below, the Court affirms the Secretary's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born October 23, 1944. *R. at 30.* At the hearing, Plaintiff testified that was in the navy for nine years and nine months, and that he also worked as a truck driver (until 1987). *R. at 185, 189.* Plaintiff stated that his most recent work was as a clerk in a bookstore and lasted for three months. *R. at 185, 189.*

According to Plaintiff he can no longer work as a truck driver because he cannot sit and drive or shift. *R. at 186.* Plaintiff testified that he has had problems since he was released from the hospital in 1972. *R. at 186.*

Plaintiff testified that his basic problem is his arthritis, and that not much can be done for his condition. Plaintiff's current activities include fixing meals, sitting, and mowing the yard once a week with a riding lawn mower. *R. at 187, 192.*

Plaintiff stated that he does not go any place, but that sometimes people come to visit him. *R. at 187.* Plaintiff has some friends who visit him about every other day.

Plaintiff does not see a doctor on a regular basis because he cannot afford it. *R. at 189.* Plaintiff testified that he is in constant pain and physical activity makes his pain worse. *R. at 189.* Plaintiff stated that his pain causes him to awaken from his sleep every hour each night. *R. at 191.* Plaintiff testified that he takes only over-the-counter medication for his pain because he is unable to afford prescriptions.

According to Plaintiff, he takes about 15-20 Motrin, Advil, or Tylenol each day. Plaintiff stated that the medication does not stop the pain but does decrease it a bit.

Plaintiff testified that he lies down approximately three to four hours each day.

R. at 191. Plaintiff has help cooking, cleaning, and doing laundry.

Plaintiff believes that he can only sit for 10-15 minutes before he has to move.

R. at 193. Plaintiff can stand, if he is permitted to shuffle from foot to foot, for about 15-20 minutes. *R. at 194.* Plaintiff can walk about 25-30 yards before he has to sit down. Plaintiff stated he can carry about three to five pounds, but cannot carry the weight very far. *R. at 195.* In addition, Plaintiff drops things on a regular basis. *R. at 196-97.*

Plaintiff's vocational report, dated April 7, 1993, indicates that Plaintiff worked in trucking from 1971 until 1989. *R. at 97.* Plaintiff describes his job as requiring approximately eight hours of sitting, one hour of walking, one hour of standing, and frequent bending. *R. at 98.*

A Residual Functional Capacity ("RFC") Assessment, conducted on July 1, 1993 indicated that Plaintiff could occasionally lift 50 pounds, frequently lift twenty-five pounds, stand/walk six hours in an eight hour day, sit six hours in an eight hour day, and push/pull an unlimited amount. *R. at 43-50.* The Assessment indicates a primary diagnosis of arthritis. *R. at 43.* The doctor also noted that Plaintiff alleged multiple joint pains although an exam by Dr. David B. Dean on June 16, 1993 indicated no joint deformities or swelling. In addition, Plaintiff's right leg was noted

as being four centimeters shorter than his left leg, some crepitance⁴¹ of the knees was indicated, but Plaintiff had a full range of motion and no neurological defects. *R. at 44.* However, Plaintiff's pain was noted as affecting his RFC. *R. at 44.* No other limitations were indicated. *R. at 43-50.* This Assessment was "affirmed as written" on September 2, 1993 by Thurma Fiegel, M.D. *R. at 50.*

Plaintiff was examined on June 16, 1993 by David B. Dean, M.D.. Dr. Dean noted that Plaintiff was alert, oriented, neat in appearance, acceptably groomed, and drove himself to the appointment. *R. at 121.* Dr. Dean recorded that Plaintiff injured his spine in a 1969 helicopter crash while on active duty in Vietnam and that Plaintiff later fractured his right femur. Dr. Dean noted that Plaintiff had no decrease in grip strength or fine motor movement in either hand, no loss of muscle mass or motor strength. Plaintiff was described as well-developed, well-nourished, and exhibiting no acute distress. The exam of both knees revealed crepitus throughout the range of motion. However, both knee joints were entirely stable. Plaintiff additionally exhibited full range of motion of his lumbosacral spine, but he had pain with forward flexion. In addition, Plaintiff had some sensory deficit in the right thigh and right lower leg. The doctor also noted that Plaintiff's right femur was shorter than his left, causing a pelvic tilt to the right, but that Plaintiff's gait was safe and stable without assistance. *R. at 124.*

⁴¹ "Crepitation" is "a grating sound heard on movement of ends of a broken bone; a clicking or crackling sound often heard in movements of joints . . . due to roughness and irregularities in the articulating surfaces." *Taber's Cyclopedic Medical Dictionary* 466 (17th ed. 1993).

On July 21, 1993, Dr. Dean also conducted a mental exam, concluding that Plaintiff had a "generalized anxiety disorder, chronic, moderate in extent." *R. at 133.*

On June 30, 1993, Janice C. Boon, Ph.D., completed a Psychiatric Review Technique ("PRT") form for Plaintiff. Dr. Boon indicated that Plaintiff's mental impairment was "not severe." *R. at 51.* Dr. Boon did note that Plaintiff had generalized anxiety. *R. at 55.* Dr. Boon's PRT was "affirmed as written" on September 1, 1993 by Carolyn Goodrich, Ph.D. *R. at 52.*

An RFC Assessment was completed by Rick L. Robbins on April 25, 1994. *R. at 141-43.* The Assessment indicates that Plaintiff can sit, stand, or walk for only ten minutes at a time. *R. at 141.* In addition, Plaintiff can sit for only two hours during an eight hour day, stand for only two hours in an eight hour day, and walk for only two hours in an eight hour day. *R. at 141.* Plaintiff's ability to lift from 0-5 pounds was marked "never." *R. at 141.* Plaintiff's ability to use his feet and hands for repetitive movements was marked as impaired, and the form indicates that Plaintiff is unable to bend, squat, crawl, climb, or reach. *R. at 142.*

A September 8, 1994 psychological report by Douglas A. Brown, Ph.D., concluded that Plaintiff suffered from: (1) post traumatic stress disorder due to his service in Vietnam, (2) major depression, and (3) a personality disorder which included anti-social characteristics. *R. at 159.* Dr. Brown noted that he believed Plaintiff to be honest in his feelings, and indicated that Plaintiff's mental impairment met

Listings⁵¹ 12.04, 12.06, and 12.08. *R. at 159-160.* Dr. Brown additionally stated that Plaintiff has palpitations, awakens in the middle of the night with cold sweats, has no energy, and has unpredictable panic attacks. *R. at 158.* Plaintiff's restriction of activities, difficulty in maintaining social functioning, deficiencies of concentration and episodes of deterioration were all "marked" or "frequent."⁶¹ *R. at 168.*

Plaintiff's only other medical records are pre-1985. On March 8, 1969, Plaintiff was admitted to a hospital after a car wreck. Surgery was performed on Plaintiff's right femur, and a pin was placed in Plaintiff's right tibia. Because X-rays did not indicate that the fracture was stabilizing, a bone graft was performed on September 5, 1969. The doctor notes that Plaintiff did well. *R. at 153.* Plaintiff was permitted to return to limited duty, avoiding standing, physical exercise, running, and similar exertions for six months. *R. at 154.*

On February 29, 1972, Plaintiff underwent surgery to remove the pin from his right femur. Plaintiff was discharged from the hospital and permitted to return to full duty *R. at 151.* On June 16, 1972, Plaintiff was admitted for recurrent knee pain,

⁵¹ An individual who meets or equals a Listing (20 C.F.R. Pt. 404, Subpt. P, App. 1) is presumed disabled.

⁶¹ The following four functional areas are considered under the Listings: (1) activities of daily living; (2) social functioning; (3) concentration, persistence or pace; and (4) deterioration or decompensation in work or work-like settings. For a claimant's mental impairment to be severe enough to meet or equal a mental impairment listing, the claimant must have sufficient limitation in at least two of the four functional areas mentioned above. The PRT form rates the degree of functional loss for the first two areas (*i.e.*, daily activities and social functioning) as "none," "slight," "moderate," "marked" and "extreme." Only a "marked" or "extreme" rating in these first two areas is significant enough to meet or equal a mental impairment listing. The PRT form rates the degree of functional loss for the third area (*i.e.*, concentration, etc.) as "never," "seldom," "often," "frequent" and "constant." Only a "frequent" or "constant" rating in this third area is significant enough to meet or equal a mental impairment listing. The PRT form rates the degree of functional loss for the fourth area (*i.e.*, decompensation or deterioration) as "never," "once/twice," "repeated" and "continual." Only a "repeated" or "continual" rating in this fourth area is significant enough to meet or equal a mental impairment listing.

and scheduled for surgery. The doctor's notes indicate that Plaintiff's right leg was one inch shorter than his left leg, and that his right thigh showed one-half inch of atrophy. Plaintiff's surgery was canceled because Plaintiff was on unauthorized leave. *R. at 152.*

On February 24, 1982, Plaintiff was admitted for arthroscopy of both of his knees. Plaintiff was discharged on January 19, 1982 with crutches for ambulation. The doctor noted that Plaintiff would be unable to work for two weeks, but was capable of handling any funds to which he was entitled. *R. at 155.*

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

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).

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

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

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

"The finding of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401.

Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff could perform his past relevant work as a truck driver which was at the medium exertional level. The ALJ found the Plaintiff's testimony not credible. *R. at 18*. The ALJ determined that the medical records and Plaintiff's testimony did not indicate that Plaintiff was unable to perform work at the medium level. *R. at 15-17*. The ALJ additionally concluded that Plaintiff's asserted mental impairment was not severe. *R. at 16-17, 21-23*.

IV. REVIEW

Pain Evaluation

Plaintiff initially asserts that the ALJ erred by not fully evaluating Plaintiff's pain and by improperly discrediting Plaintiff's testimony. Plaintiff additionally asserts that the ALJ ignored the "nexus" doctrine.

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. 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); Talley v. Sullivan, 908 F.2d 585, 587 (10th Cir. 1990) (credibility determinations by an ALJ are generally binding on review).

Initially, the ALJ summarized Luna and its requirements, Plaintiff's medical record, and Plaintiff's testimony. *R. at 40-45.* The ALJ noted that the medical records did not support Plaintiff's testimony. In addition, records of Plaintiff's examinations indicated no muscle atrophy or weakness, but revealed that Plaintiff was well-developed and well-nourished. The ALJ also observed that Plaintiff socializes with at least two friends every other day. Plaintiff does not regularly use a cane or crutches (although Plaintiff testified that he sometimes uses a cane), and Plaintiff takes only over-the-counter pain medication (although Plaintiff testified that was all he could afford.)

Plaintiff's medical records are sparse. However, at least one RFC Assessment indicates Plaintiff's ability to work is at the medium exertional level. An RFC Assessment, conducted on July 1, 1993 indicated that Plaintiff could occasionally lift 50 pounds, frequently lift twenty-five pounds, stand/walk six hours in an eight hour day, sit six hours in an eight hour day, and push/pull an unlimited amount. *R. at 43-*

50. This Assessment was "affirmed as written" on September 2, 1993 by Thurma Fiegel. *R. at 50.*

Plaintiff asserts that the ALJ erred by not finding that Plaintiff was disabled due to pain, and by discounting Plaintiff's complaints of pain. However, the mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) "Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment." Id.

As noted, credibility determinations by the trier of fact are not usually disturbed upon review. In addition, the ALJ's findings are supported by the medical records. The ALJ's conclusion that Plaintiff was able to perform medium work despite his complaints of pain is supported by substantial evidence.

Assessing Physician Evidence

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

The ALJ is responsible for determining credibility and resolving conflicts in medical testimony. See, e.g., Tillery v. Schweiker, 713 F.2d 601, 603 (10th Cir. 1983). Generally, 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). An examining physician's opinion is accorded greater weight than the opinion of a non-examining physician. Andrews v. Shalala, 53 F.3d 1035, 1041 (10th Cir. 1995).

In this case, Plaintiff presented no evidence from a treating physician. The record does contain three assessments from examining doctors. A July 1, 1993 RFC Assessment indicates that Plaintiff's abilities fit the "medium exertional level." This Assessment was "affirmed as written" on September 2, 1993 by Dr. Fiegel. *R. at 50*. On June 16, 1993, Plaintiff was examined by Dr. Dean. Dr. Dean noted that both of Plaintiff's knee joints were stable, that Plaintiff exhibited full range of motion of his lumbosacral spine, and that Plaintiff's gait was safe and stable without assistance. *R. at 124*. An RFC Assessment by Dr. Robbins, on April 25, 1994, indicates that Plaintiff's abilities were extremely limited. *R. at 141-43*.

Plaintiff asserts that the ALJ disregarded the April 1994 opinion of Dr. Robbins. Contrary to Plaintiff's assertion, the ALJ's opinion does not indicate that the medical evidence from Plaintiff's treating physicians was ignored. The ALJ summarized the findings of Dr. Robbins but concluded that his findings were inconsistent with the notes from his examination. Dr. Robbins' notes did not reveal any muscle weakness, muscle atrophy, or neurological deficits. The ALJ's findings are supported by

substantial evidence, and, on review, the Court will not reweigh the ALJ's determinations.

Mental Impairment

The procedure for evaluation of a mental impairment is outlined at 20 C.F.R. § 1520a. If a claimant has a mental impairment, the degree of functional loss resulting from the impairment must be rated in four areas.⁸¹ 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). An ALJ must attach to his decision a PRT form detailing his assessment of the claimant's level of mental impairment. 20 C.F.R. § 1520a(d).

In this case, with respect to Plaintiff's mental functional 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 -- never;
- (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.

⁸¹ 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).

R. at 22. The ALJ concluded that although Plaintiff has anxiety, Plaintiff does not have a mental impairment of Listing severity. The ALJ's conclusion is supported by substantial evidence. In a July 21, 1993 mental examination conducted by Dr. Dean the doctor concludes that Plaintiff has a "generalized anxiety disorder, chronic, moderate in extent." *R. at 132.* On June 30, 1993, Janice C. Boon, Ph.D., completed a PRT form for Plaintiff. Dr. Boon did note that Plaintiff had generalized anxiety, but indicated that Plaintiff's mental impairment was "not severe." *R. at 51, 55.* Dr. Boon's PRT was "affirmed as written" on September 1, 1993 by Carolyn Goodrich, Ph.D. *R. at 52.* The ALJ also noted that Plaintiff testified that at least two friends visit him every other day. In addition, the ALJ observed that Plaintiff maintains a social relationship with the woman who owns the trailer that he lives in and that she assists him in the performance of household chores. *R. at 17.*

Plaintiff asserts that the ALJ erred by not finding that his mental impairment was disabling or met a Listing. Plaintiff relies on a September 8, 1994 psychological report by Dr. Brown who concluded that Plaintiff suffered from post traumatic stress disorder, major depression, and a personality disorder which includes anti-social characteristics. *R. at 159.* Dr. Brown's report was considered by the Appeals Council. The Appeals Council noted that although the evaluation by Dr. Brown indicated Plaintiff had a problem with concentration and extreme social withdrawal, Plaintiff did not exhibit any concentration problems in his prior exam and testified that he maintained some social contacts. In addition, although Plaintiff related to Dr. Brown that he had panic attacks, he denied such attacks in his prior evaluation by Dr.

Dean. *R. at 130, 161*. The Appeals Council determined that Dr. Brown's assessment was based primarily on Plaintiff's statement of symptoms which was inconsistent with the record. *R. at 5-6*. This finding is supported by substantial evidence.

Plaintiff additionally alleges that the ALJ failed to properly consider his mental impairment in concluding that Plaintiff could perform his past relevant work. However, the ALJ determined that Plaintiff's mental impairment would have no more than a minimal effect on Plaintiff's ability to work. *R. at 17*. The ALJ observed that Plaintiff maintains some social contacts and that the record demonstrates that Plaintiff's mental problems have resulted in only slight restrictions on his activities. *R. at 17*. The ALJ's finding is supported by substantial evidence.

Hypothetical to Vocational Expert

Plaintiff asserts that the ALJ failed to include all of Plaintiff's impairments in the hypothetical presented to the vocational expert. However, a decision at Step four of the evaluation process, that a claimant can return to his past relevant work, does not require the consultation of a vocational expert. See Glenn v. Shalala, 21 F.3d 983, 988 (10th Cir. 1994). Regardless, an ALJ is not required to accept all of a plaintiff's testimony with respect to restrictions as true, but may pose such restrictions to the vocational expert which are accepted as true by the ALJ. 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). Considering Plaintiff's medical record, the

ALJ's determinations, and the hypothetical posed by the ALJ, the ALJ's finding that Plaintiff can perform his past relevant work is supported by substantial evidence.

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

Dated this 30 day of November 1995.

A handwritten signature in cursive script, appearing to read "Sam A. Joyner". The signature is written in black ink and is positioned above a horizontal line.

Sam A. Joyner
United States Magistrate Joyner

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

RED WING PRODUCTS, INC. and)
KEY TEMPORARY PERSONNEL,)
INC.,)

Plaintiffs,)

vs.)

LEANN BURRIS,)

Defendant.)

No. 95-C-295-K

FILED

DEC - 1 1995

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

ENTERED ON DOCKET
DATE DEC 04 1995

JUDGMENT

This matter came before the Court for consideration of the motion for summary judgment by Plaintiffs Red Wing Products, Inc. ("Red Wing") and Key Temporary Personnel, Inc. ("Key") as well as the Court's *sua sponte* motion for summary judgment in favor of Defendant Leann Burris ("Burris"). 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 Plaintiffs.

ORDERED THIS DAY OF 30 NOVEMBER, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

18

ENTERED ON DOCKET

DATE ~~DEC 07 1995~~

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

FILED

NOV 30 1995

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

RED WING PRODUCTS, INC. and)
KEY TEMPORARY PERSONNEL,)
INC.,)
)
Plaintiffs,)
)
vs.)
)
LEANN BURRIS,)
)
Defendant.)

No. 95-C-295-K

O R D E R

Before the Court is the motion for summary judgment by Plaintiffs Red Wing Products, Inc. ("Red Wing") and Key Temporary Personnel, Inc. ("Key") as well as the Court's sua sponte motion for summary judgment in favor of Defendant Leann Burris ("Burris").

I. Background

On February 2, 1995, Burris instituted an action against Defendants in the District Court of Creek County, Oklahoma. Burris' petition alleges that Red Wing and Key wrongfully discharged her in violation of the laws of Oklahoma in retaliation for her requesting Material Safety Data Sheets for chemicals used and stored at Red Wing and for reporting safety violations to the Occupational Safety and Health Administration ("OSHA") and the Environmental Protection Agency ("EPA"). (Petition at ¶ 4-5.) Plaintiffs argue in the instant case that Burris' state law claims are preempted by federal labor law and policy since her activities

17

arguably fell within the scope of the National Labor Relations Act ("NLRA") which protects rights of employees to engage in concerted activities for their mutual protection. If so, argue Plaintiffs, state and federal court jurisdiction is extinguished, and this matter must be left to the National Labor Relations Board ("NLRB"). In support of this argument, Plaintiffs contend that Burris contacted at least ten Red Wing employees, approximately fifteen percent of Red Wing's work force, to discuss health and safety concerns in the workplace.

Plaintiffs ask this Court to issue a declaratory judgment stating that:

- (a) Burris' activities arguably fall within the scope of the NLRA;
- (b) Burris' state law claims are preempted by federal labor law and policy;
- (c) application of Oklahoma law to Burris' claims violates the Supremacy Clause of the United States Constitution;
- (d) the District Court of Creek County, Oklahoma is without subject matter jurisdiction to entertain Burris' state law claims due to federal preemption and;
- (e) Burris' claims are within the exclusive jurisdiction of the National Labor Relations Board.

Additionally, Plaintiffs ask this Court to enjoin the District Court of Creek County from proceeding in Burris' state law action and to enjoin the application and enforcement of Oklahoma law to Burris' claims.

Plaintiffs Red Wing and Key moved for summary judgment on their claim for Declaratory Judgment. Following this Court's Order

of August 16, 1995, denying Plaintiffs' motion for summary judgment, this Court agreed to reconsider Plaintiffs' motion. On November 8, 1995, this Court entered a Notice of *Sua Sponte* Motion to Grant Summary Judgment in favor of Defendant in order to provide Plaintiffs an opportunity "to come forward with all of [their] evidence." Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986). Plaintiffs were given fifteen days to file a supplemental brief opposing the Court's motion, which they did.

II. The Garmon Preemption Doctrine

This Court must determine whether Burris' state court action is preempted by the NLRA. The NLRA is a comprehensive federal code regulating all labor relations in interstate commerce. Therefore, the Act supersedes and preempts any state or local action that conflicts directly with its national scheme. Under San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), the NLRB maintains primary jurisdiction for regulating activities that are at least "arguably" protected by § 7 of the NLRA or "arguably" prohibited by § 8 of that statute. Section 7 of the NLRA regulates the rights of employees to organize and engage in collective bargaining; § 8 prohibits employers and unions from committing unfair labor practices.

As the basis of their preemption claim, Plaintiffs contend that Burris engaged in "concerted activity" protected by § 7 of the NLRA. The Act provides, "Employees shall have the right to . . . engage in other concerted activities for the purpose of . . .

mutual aid or protection." 29 U.S.C.A. § 157. Thus under Garmon, if this Court finds that Burris' claim alleges that she was discharged for engaging in conduct arguably constituting "concerted activities," the interest in a uniform federal labor policy requires this Court to declare that the state court before which Burris brought her claim must defer to the exclusive jurisdiction of the NLRB.

Nevertheless, Garmon does not create a *de minimis* standard for preemption. The Supreme Court explained:

The precondition for pre-emption, that the conduct be "arguably" protected or prohibited, is not without substance. It is not satisfied by a conclusory assertion of pre-emption If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the Board. The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.

International Longshoremen's Association, AFL-CIO v. Davis, 476 U.S. 380, 394-95 (1986).

III. Federal Court Jurisdiction

Before examining the merits, this Court must first determine whether it has jurisdiction to entertain the dispute brought before it. This action originated in state court, and Plaintiffs now ask for injunctive relief to enjoin those proceedings so that the suit may proceed before the NLRB pursuant to the NLRA. A suit may be brought in federal court seeking injunctive relief against state

action on the basis of Garmon. See Bud Antle, Inc. v. Barbarosa, 45 F.3d 1261, 1269 (9th Cir. 1994). See also Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting); Wisconsin Dept. of Industry v. Gould, 475 U.S. 282, 285 (1986).

IV. Discussion of Preemption Claim

A. *Burris' Safety Complaints.* Before this Court is the following question: whether the conduct for which Burris claims she was wrongly discharged is protected under § 7 of the NLRA. If this conduct arguably constituted "concerted activities" under § 7, her state law claim would be preempted by the NLRA, and the NLRB would have exclusive jurisdiction over her claim. If the conduct did not arguably constitute concerted activities, her claim is properly decided by the state court in which she brought her action.

In her state court petition, Burris asserts "that her termination was wrongful and in retaliation for requesting Material Safety Data Sheets and reporting said violations to OSHA and to EPA." (Petition at ¶ 5.) Authority from the NLRB and federal courts of appeal clearly indicates that such conduct is not "concerted activities" under § 7. In the mid-1980s, the NLRB modified its standard for "concerted activities" with respect to safety complaints made by a sole employee. Under the new standard, which has been upheld by several circuits as a permissible interpretation of the NLRA, "an employee's action may be concerted for the purposes of the NLRA only if the action is engaged in with

or on the authority of other employees, and not solely by and on behalf of the employee himself." Prill v. NLRB, 835 F.2d 1481, 1482-83 (D.C. Cir. 1987), cert. denied sub nom. Meyers Indust. v. NLRB, 487 U.S. 1205 (1988) (emphasis added) (affirming Meyers Industries, Inc., 281 NLRB No. 118 at 15-16 (1986)). See also Ewing v. NLRB, 861 F.2d 353 (2nd Cir. 1988); NLRB v. Mini-Togs, Inc., 980 F.2d 1027 (5th Cir. 1993). In facts similar to the instant case, the D.C. Circuit upheld the NLRB's reading of § 7 and held that a single employee who made safety complaints under state and federal law was not engaged in "concerted activity" because he was not acting with the authority of other employees.

At the heart of this dispute is whether the safety complaints of a single employee acting on his own can constitute concerted activity under the Act. Previously, under [old NLRB authority] the efforts of a single worker to invoke state and federal laws regulating occupational safety were held protected activity under section 7. The Board had determined that such complaints were "concerted" on the theory that the action of one individual bringing statutory safety concerns to light is presumed to assert the rights of all employees interested in safety. Put simply, the Board now rejects th[is] theory A worker no longer takes "concerted" action by himself unless he acts on the authority of his fellow workers.

Id. at 1483 (citations omitted) (emphasis added).

There is no evidence in the record that Burris was acting with or on the authority of her coworkers when she made her safety complaints. Rather, it appears that no other employees authorized Burris, either implicitly or explicitly, to act for them in this regard.¹ Hence, Burris' reports to OSHA and the EPA do not

¹ In their Brief in Response to the Court's Sua Sponte Motion to Grant Summary Judgment, Plaintiffs point to affidavits of Jeff Creason and Kathy Rogers that assert that Burris urged them to call

constitute "concerted activities" under § 7, and her state court action should not be preempted. See Davis, 476 U.S. at 394-95 ("[A] party asserting pre-emption must advance an interpretation of the Act that . . . has not been 'authoritatively rejected' by the courts or the Board.").

B. *Burris' Contacts with Coworkers.* Plaintiffs argue that Burris' contacts with her coworkers concerning alleged safety problems at Red Wing constituted "concerted activities" under § 7; therefore, they argue, her state court action is preempted by the NLRA. However, Burris does not claim that these alleged contacts with coworkers were the cause of her discharge; indeed, these contacts are nowhere mentioned in Burris' state court petition. Rather, they were raised by Plaintiffs in an attempt to deprive the state court of jurisdiction over Burris' claim. Plaintiffs urge this Court to base its preemption analysis on facts alleged by Plaintiffs, rather than those contained in Burris' petition. This Court declines Plaintiffs' invitation to find a Supremacy Clause problem where there is none. This Court need look no further than the claims Burris has raised in her state court petition to make a determination of whether her action is preempted. As her petition

OSHA and others about alleged safety problems at Red Wing. (Br. Resp. Ct. Mot. Summ. J. at 12; Creason Aff. ¶ 3; Rogers Aff. ¶ 4.) This evidence does not contradict the Court's finding that Burris was not acting with or on the authority of her coworkers when she made her safety complaints to OSHA and the EPA. (See Burris Aff. ¶ 6 (asserting that she "acted solely upon [her] own.").)

alleges no conduct protected by § 7,² her action does not trigger the Garmon preemption doctrine.

V. Conclusion

This Court finds that Burris' claim is not preempted by the NLRA and should properly remain in state court. Although Burris has not moved for summary judgment, this Court has the power to enter summary judgment *sua sponte*. Durtsche v. American Colloid Co., 958 F.2d 1007, 1009 n.1 (10th Cir. 1992) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986)). If, as here, one party moves for summary judgment, and it is clear from the record that there is no genuine dispute respecting a material fact essential to the proof of movant's case and that the case cannot be proved if a trial should be held, the court may *sua sponte* grant summary judgment to the non-moving party. Yu v. Peterson, 13 F.3d 1413, 1415 n.3 (10th Cir. 1993) (citing Cool Fuel, Inc. v. Connett, 685 F.2d 309, 311 (9th Cir. 1982)).

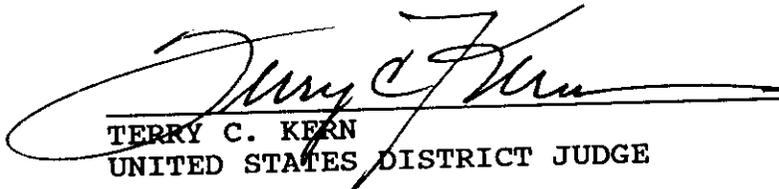
The Supreme Court has observed that a district court may grant summary judgment *sua sponte*, "so long as the losing party was on notice that she had to come forward with all of her evidence." Celotex, 477 U.S. at 326. This Court provided Plaintiffs fifteen days notice to respond to its *sua sponte* motion for summary

² While Burris' contacts with coworkers alleged by Plaintiffs might arguably constitute "concerted activities," see El Gran Combo de Puerto Rico v. NLRB, 853 F.2d 996, 1003 (1st Cir. 1988); Meyers Industries, Inc., 281 NLRB No. 118 at 15-16 (1986), aff'd sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied sub nom. Meyers Indust. v. NLRB, 487 U.S. 1205 (1988), resolution of this question is not necessary for disposition of the instant case.

judgment. See Notice of Sua Sponte Motion to Grant Summary Judgment. Cf. Fed. R. Civ. P. 56(c) (requiring 10 days notice). Plaintiffs took this opportunity to file a supplemental brief. (Br. Resp. Ct. Mot. Summ. J.)

Therefore, having provided adequate notice to Plaintiffs, and having found that there is no genuine dispute respecting a material fact essential to the proof of Plaintiffs' case and that the case cannot be proved if a trial should be held, this Court grants summary judgment for Defendant Burris and against Plaintiffs Red Wing and Key.

ORDERED this 30 day of November, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

conviction relief, alleging the Information for First Degree Burglary was defective in that it did not allege the essential elements of First Degree Burglary. The Tulsa County District Court denied relief and the Oklahoma Court of Criminal Appeals affirmed on the basis of a state procedural bar.

In the instant petition for a writ of habeas corpus, Petitioner again alleges that the information charging him with First Degree Burglary was defective. Respondent contends that Petitioner's claim is procedurally barred.

II. ANALYSIS

Respondent concedes, and this Court finds, that Petitioner meets the exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

The alleged procedural default in this case results from Petitioner's failure to raise his claim in a timely direct appeal and his failure to provide the court sufficient reason for failing to do so. The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or

demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

Applying these principles to the instant case, the Court concludes Petitioner's claim is barred by the procedural default doctrine. The state court's procedural bar as applied to Petitioner's claim was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not raised on direct appeal. Moore v. State, 809 P.2d 63, 64 (Okla. Crim. App.), cert. denied, 502 U.S. 913 (1991) (the doctrine of res judicata bars consideration in post-conviction proceedings of issues which have been or which could have been raised on direct appeal).

Because of his procedural default, this Court may not consider Petitioner's claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of

justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause by alleging ineffective assistance of counsel. He contends he "was denied a direct appeal due to his trial attorney's failure to discuss the pros and cons of . . . a direct appeal." (Petition, docket #1, at 7.) An attorney, however, has no absolute duty in every case to advise a defendant of his appeal rights or to file an appeal following a guilty plea conviction. Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir. 1989) (citing Marrow v. United States, 772 F.2d 525, 527 (9th Cir. 1985); Carey v. Laverette, 605 F.2d 745, 746 (4th Cir.) (per curiam) (there is "no constitutional requirement that defendants must always be informed of their right to appeal following a guilty plea"), cert. denied, 444 U.S. 983 (1979)); see also Hardiman, 971 F.2d at 506; Castellanos v. United States, 26 F.3d 717 (7th Cir.

1994); Davis v. Wainwright, 462 F.2d 1354 (5th Cir. 1972). Only "[i]f a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right" does counsel have a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock, 880 F.2d at 1188; see also Shaw v. Cody, No. 94-6172, 1995 WL 20425, *2 (10th Cir. Jan. 20, 1995) (unpublished opinion); Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (counsel's failure to file a requested appellate brief, when he had not yet been relieved of his duties through a successful withdrawal, amounted to constitutionally ineffective assistance). "This duty arises when 'counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim.'" Hardiman, 971 F.2d at 506 (quoting Marrow v. United States, 772 F.2d 525, 529 (9th Cir. 1985)).

Petitioner does not allege he asked counsel to file a motion to withdraw his guilty plea or appeal his conviction within ten days of sentencing. Nor has Petitioner alleged a constitutional claim of error which could result in setting aside his guilty plea. See Hardiman, 971 F.2d at 506. The sufficiency of an indictment or information is not a matter for federal habeas relief unless the information is so deficient that the convicting court lacked jurisdiction. Heath v. Jones, 863 F.2d 815 (11th Cir. 1989); Uresti v. Lynaugh, 821 F.2d 1099 (5th Cir. 1987). Under the Sixth and Fourteenth Amendment, Petitioner is entitled to fair notice of the criminal charges against him, and claims of due process

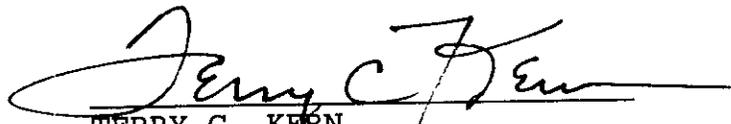
violations in not providing such fair notice are cognizable in a habeas corpus action. See Hunter v. State of N.M., 916 F.2d 595, 598 (10th Cir. 1990), cert. denied, 500 U.S. 909 (1991); Franklin v. White, 803 F.2d 416 (8th Cir. 1986), cert. denied, 481 U.S. 1020 (1987). In the instant case, the Court finds no such constitutional error in the charge in question.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). Petitioner, however, does not claim that he is actually innocent of the crime at issue in this habeas action. Therefore, Petitioner's claim is procedurally barred.

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that Petitioner cannot establish cause and prejudice, or a fundamental miscarriage of justice to excuse his procedural default. Accordingly, the petition for a writ of habeas corpus is hereby DENIED.

SO ORDERED THIS 30 day of November, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE DEC 01 1995

ZEBCO CORPORATION)
)
)
Plaintiff,)
)
v.)
)
SHAKESPEARE COMPANY,)
)
Defendant.)

Civil Action No. 93-C 837K

FILED

NOV 30 1995

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

STIPULATION FOR DISMISSAL WITH PREJUDICE

The parties to this action having executed a Settlement Agreement, it is hereby stipulated and agreed that this action, including all claims, demands and counterclaims asserted therein, shall be dismissed with prejudice, each party to bear its own costs and attorneys' fees.

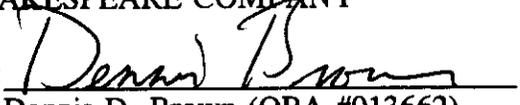
Respectfully submitted,

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