

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

FILED

JAN 18 1996

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

No. 95-C-1162H

JONI FRANK,

Plaintiff,

v.

MICHAEL D. FRANK,

Defendant.

ENTERED ON DOCKET
DATE 1-19-96

JUDGMENT

Pursuant to Defendant's Rule 68 Offer of Judgment, and Plaintiff's acceptance of said offer, judgment is hereby entered in favor of Plaintiff and against Defendant for a principal sum of Ten Thousand One Dollars (\$10,001.00) in addition to accrued costs and attorneys' fees.

S/ SVEN ERIK HOLMES

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

APPROVED AS TO FORM:

By: *Ron W. Little*
Sam P. Daniel, OBA No. 2153
Ronald W. Little, OBA No. 15291
DOERNER, SAUNDERS, DANIEL & ANDERSON
320 S. Boston Ave., 5th floor
Tulsa, Oklahoma 74103
(918) 582-1211
ATTORNEYS FOR PLAINTIFF

By: *James E. Poe*
James E. Poe, OBA No. 7198
COVINGTON & POE
111 W. 5th Street, Suite 740
Tulsa, Oklahoma 74103
ATTORNEYS FOR DEFENDANT

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

FILED

JAN 18 1996

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

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

Plaintiff,

v.

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

Defendants.

Case No. 94-C-1036-H ✓

ENTERED ON DOCKET
DATE 1-19-96

O R D E R

This matter comes before the Court on a Motion for Summary Judgment by Plaintiff Thrifty Rent-A-Car System, Inc. ("Thrifty"). Thrifty moves for summary judgment both on its claim and on Defendants' counterclaims.

I.

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

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

477 U.S. at 322.

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

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

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

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

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury

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

On November 9, 1995, the Court entered an order prohibiting Defendants The John W. Walden Company ("Walden Co."), John W. Walden, and Barbara K. Walden (collectively, "Defendants") from offering any evidence in this case. Therefore, the following material facts are deemed admitted. See N.D. LR 56.1B.

II.

I. Facts relating to Thrifty's action for non-payment of amounts owed under the Master Lease Agreement.

1. On October 23, 1995, Thrifty and Walden Co. entered into a "Master Lease Agreement" for the purpose of leasing vehicles to Walden Co.

2. In connection with the execution of the Master Lease Agreement, John W. Walden and Barbara K. Walden executed a guaranty.

3. The amount currently owed to Thrifty by Walden Co., John W. Walden and Barbara K. Walden is \$269,342.08, plus pre-judgment interest in the amount of \$119.98 per day from September 30, 1994.

II. Facts relating to Defendants' counterclaim for breach of the Master Lease Agreement.

4. There are several documents that regulate Thrifty leasing programs. One of these documents is the Master Lease Agreement

which contained the terms applicable throughout the multi-year term of the agreement. In addition, from time to time, Thrifty published various Lease Programs which contained more specified terms, such as the specific models of cars Thrifty was offering at that time and the lease prices for such cars. Thrifty offered a separate Lease Program at least every automotive model year. To order cars, lessees, such as Walden Co., would submit an Order Form.

5. Under the terms of the Master Lease Agreement, Thrifty was not required to accept any of Walden Co.'s Order Forms.

6. The Master Lease Agreement provides in pertinent part:

¶1.A ...[Thrifty] shall not be obligated to accept any Order Form from LESSEE. ...

¶1.B ...[N]othing herein shall compel [Thrifty] to provide LESSEE with any motor vehicles or to accept any Order Form...

¶13 ...On or before May 1 of each year, LESSEE agrees to furnish [Thrifty] an annual financial statement ... In addition, LESSEE shall deliver to [Thrifty] on or before May 1, August 1 and November 1 of each year, quarterly financial statement... .

7. Thrifty informed Walden Co. that it would not lease vehicles to Walden Co. because of its negative net worth. According to Mr. Walden, Walden Co. was informed of Thrifty's decision in September of 1992.

8. Walden Co. financial statements of July 31, 1992 showed a negative net worth of \$300,000.

9. Walden Co. lost money in both 1990 and 1991. In 1991 Walden Co. lost almost \$300,000.

10. Walden Co. has no information that Thrifty refused to lease its cars for any reason other than the negative net worth on its balance sheet.

11. After Thrifty informed Walden Co. that it would not lease any vehicles to Walden Co., Walden Co. did not seek vehicles from other sources because Mr. Walden was distracted from the car rental business.

III. Facts relating to Defendants' claim for breach of the sub-license agreement.

12. The sub-license agreement is an agreement between Ken Elder and John Walden; Thrifty is not a party to the Agreement.

13. Prior to buying the sub-license, Mr. Walden dealt with Ken Elder; he did not talk with anyone at Thrifty.

14. The sub-license agreement does not prohibit Ken Elder, much less Thrifty, from selling cars to Thrifty's Baltimore licensee, who then used the cars in a Dollar Rent A Car or Budget Car Rental business in the areas surrounding Walden Co.'s location. Paragraph 1 of the sub-license agreement provides in pertinent part:

...Sub-Licensors hereby grants to Sub-Licensee...an Exclusive Sub-License to use the System and the service mark "Thrifty" in respect to the business of Vehicle Rental and Leasing, subject to all the terms and conditions of the Agreement. [The geographical area subject to this grant is then described].

Further, paragraph 2 provides in part:

Sub-Licensee also recognizes and acknowledges [Thrifty's] and Sub-Licensors' exclusive right to use and to grant the right to others to use, or sub-license to use, the name "Thrifty" in conjunction with the business of

Vehicle Rental and Leasing in the territory described in Section 1 above ...

III.

The undisputed facts demonstrate that, pursuant to the Master Lease Agreement, Walden Co. owes Thrifty \$269,342.08 plus pre-judgment interest in the amount of \$119.98 per day from September 30, 1994. Further, because John W. Walden and Barbara K. Walden executed a guaranty in connection with the Master Lease Agreement, they are responsible for the amount due as well. Thus, as a matter of law, Thrifty is entitled to summary judgment on its claim.

Summary judgment on Defendants' counterclaim for breach of contract is also appropriate. The gravamen of Defendants' counterclaim is that Plaintiff wrongfully refused to provide vehicles and subsidized other businesses within the exclusive territory of Walden Co. However, the Master Lease Agreement provided that Plaintiff was not required to accept any orders from Walden Co. Further, there are no facts suggesting that Plaintiff wrongfully assisted competitors of Walden Co. Thus, as a matter of law, Thrifty is entitled to judgment on Defendants' counterclaim as well.

IT IS SO ORDERED.

This 18TH day of JANUARY, 1995.



Sven Erik Holmes
United States District Judge

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

FILED

JAN 18 1996

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

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

Plaintiff,

v.

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

Defendants.

Case No. 94-C-1036-H ✓

ENTERED ON DOCKET

DATE 1-19-96

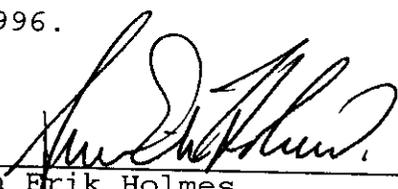
J U D G M E N T

This matter came before the Court on a Motion for Summary Judgment by Plaintiff. The Court duly considered the issues and rendered a decision in accordance with the order filed on January 18, 1996.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for the Plaintiff in the amount of \$269,342.08 plus pre-judgment interest in the amount of \$119.98 per day from September 30, 1994 and against the Defendants.

IT IS SO ORDERED.

This 18TH day of JANUARY 1996.


Sven Erik Holmes
United States District Judge

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

DEBORAH D. KIMBALL,
Plaintiff,

vs.

WESTEL, INC., a Corporation
Defendant.

JAN 18 1996

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

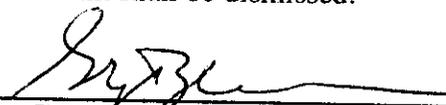
No. 95-C-490-H

ENTERED ON DOCKET

DATE JAN 19 1996

JOINT STIPULATION OF DISMISSAL

Pursuant to Fed.R.Civ.P. 41(a), the Plaintiff, Deborah D. Kimball, by and through her attorneys, and the Defendant, WESTEL, INC., by and through its attorney, jointly stipulate that the Plaintiff's action against the Defendant shall be dismissed.



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and

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Attorneys for Defendant

(6)

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

FILED

JAN 18 1996

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



LEONARD STERLING GOOD,)
)
Petitioner,)
)
vs.)
)
STATE OF OKLAHOMA,)
)
Respondent.)

No. 95-C-1219-H

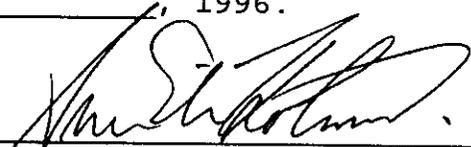
ENTERED ON DOCKET
JAN 19 1996
DATE _____

ORDER

On December 20, 1995, the Clerk of the Court notified Petitioner that he had not submitted a motion for leave to proceed in forma pauperis in lieu of required filing fee and directed him to do so within twenty days. As of the date of this order, Petitioner has failed to submit a motion for leave to proceed in forma pauperis or the required \$5.00 filing fee. Accordingly, this action is hereby **dismissed without prejudice** for failure to pay the filing fee. See Local Rule 5.1(F).

IT IS SO ORDERED.

This 17th day of JANUARY, 1996.



Sven Erik Holmes
United States District Judge

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

FILED
JAN 18 1996

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

JACQUI STARR,

Plaintiff,

vs.

PEARLE VISION, INC., d/b/a
PEARLE VISION EXPRESS, a
corporation,

Defendant.

Case No. 92-C-463-B ✓

ENTERED ON DOCKET

DATE JAN 19 1996

J U D G M E N T

In accordance with the jury verdict filed this date, judgment is hereby entered in favor of Defendant Pearle Vision, Inc., d/b/a Pearle Vision Express, and against the Plaintiff, Jacqui Starr. Costs are assessed against the Plaintiff, if timely applied for under Local Rule 54.1, and each party is to pay its respective attorney's fees.

Dated, this 18th day of January, 1996.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JAN 18 1996

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

WILLIAM P. JOHNSON AND LORI
JOHNSON, his wife, Parents, Guardians,
and Next Friend of Jane Doe, a minor,

Plaintiffs,

vs.

MANAGEMENT AND TRAINING
CORPORATION,

Defendant.

No. 95 C 500 H

ENTERED ON DOCKET

DATE JAN 19 1996

ORDER OF DISMISSAL WITH PREJUDICE

The Court, having before it the written Joint Stipulation for Dismissal With Prejudice signed by all parties to this litigation, finds that based upon the agreement of the parties the litigation captioned herein should be dismissed with prejudice to refiling in the future.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the litigation captioned herein, including all complaints, counterclaims, cross-complaints, and causes of action of any type by any party, should be and the same are hereby dismissed with prejudice.

IT IS SO ORDERED this 17th day of January, 1996.

S/ SVEN ERIK HOLMES

SVEN ERIK HOLMES
United States District Court Judge

JAD/bjo

G:\LIT\1222\2\DISMISS.ORD

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

FILED

JAN 18 1996

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

ROBERT L. WIRTZ, JR.,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ, et al.,)
)
 Defendants.)

No. 95-C-631-C ✓

ENTERED ON DOCKET

DATE JAN 19 1996 ✓

ORDER

This matter comes before the Court on the motion to dismiss of the City of Tulsa and on Plaintiff's motions for declaratory order and to appoint the U.S. Justice Department. (Docket #5, #6, and #11.)

Plaintiff, a state prisoner appearing pro se, brings this action pursuant to 42 U.S.C. § 1983, challenging the conditions of confinement at the Tulsa City-County Jail and alleging excessive use of force, deliberate indifference to a serious medical condition, and denial of access to the courts. The City of Tulsa has moved to dismiss for failure to state a claim on the ground that Plaintiff's complaint does not allege any actionable conduct on the part of the City of Tulsa. This Court agrees. The Tulsa County Sheriff is solely responsible for the operational control of the consolidated Tulsa City-County Jail. Therefore, it appears beyond doubt that Plaintiff could prove no set of facts in support of his claim against the City of Tulsa. See Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988) (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)).

Accordingly, the motion to dismiss of the City of Tulsa

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

F I L E D

TERENCE WOOD,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

JAN 18 1996

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

Case No. 93-C-877-W

ENTERED ON DOCKET
~~COPY~~ 1996

ORDER

This case is remanded to the agency for further medical assessment of the claimant.

Dated this 18th day of January, 1996.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S: Wood.2

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

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

JULIE SHANNON,
(formerly Julie Mitchell),
Plaintiff,

vs.

CONTINENTAL AIRLINES, INC.,
a Delaware corporation; and
PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a New Jersey
corporation,
Defendants.

ENTERED ON DOCKET
DATE JAN 19 1996

No. 95-C-163-K

FILED

JAN 18 1996

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

ORDER

Now before this Court are the motion for partial summary judgment by Plaintiff Julie Shannon, and the motion for summary judgment by Defendants Continental Airlines, Inc. ("Continental") and Prudential Insurance Company of America ("Prudential").

I. **BACKGROUND**

Continental established and maintained a group insurance plan for its employees and their dependents ("the Continental Plan"). Prudential was the insurance carrier for the Continental Plan beginning in the 1992 plan year. Among the features of the plan were life insurance benefits. All eligible employees were provided Employee Basic Term Life Coverage ("Basic Coverage") on a non-voluntary, non-contributory basis. Employees could also elect Employee Optional Term Life Coverage ("Optional Coverage") on a voluntary, contributory basis.

Michael Wayne Mitchell ("Mitchell") became an employee of

Continental on October 30, 1989 and was first eligible for coverage on December 1, 1989. Mr. Mitchell received Basic Coverage, but declined the Optional Coverage at the time he initially enrolled. However, on October 14, 1991, Mr. Mitchell executed an enrollment form for Optional Coverage. Since Mitchell enrolled more than 31 days after he was first eligible for coverage, under the terms of the insurance plan Mitchell was required to provide evidence of insurability in order to obtain Optional Coverage. Mitchell completed a statement of good health on December 28, 1991, which Prudential received on January 2, 1992. Mitchell died in a one-car automobile accident on January 7, 1992.

Plaintiff Julie Mitchell, now Julie Shannon ("Plaintiff" or "Shannon"), as decedent's spouse and beneficiary, submitted a claim for the proceeds of the Basic Coverage. That claim was approved and paid in full by Prudential on March 19, 1992, in the amount of \$21,172.20. Plaintiff's claim for Optional Coverage has been denied by Continental on the ground that the policy was not in effect at the time of Mitchell's death.

Plaintiff's complaint alleges two causes of action under the Texas Insurance Code, art. 21.21: (1) wrongful and unfair denial of insurance claim and (2) mental anguish, pain and suffering resulting therefrom. Defendants moves for summary judgment, arguing that ERISA preempts Plaintiff's state law claims and that Plaintiff has not stated a claim under ERISA. Plaintiff moves for partial summary judgment, contending that her state law claims are not preempted by ERISA because the Optional Coverage was not a plan

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

JULIE SHANNON,
(formerly Julie Mitchell),

Plaintiff,

vs.

CONTINENTAL AIRLINES, INC.,
a Delaware corporation; and
PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a New Jersey
corporation,

Defendants.

ENTERED ON DOCKET
DATE JAN 19 1996
No. 95-C-163-K

FILED

JAN 18 1996

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

JUDGMENT

This matter came before the Court for consideration of the motion for partial summary judgment by Plaintiff Julie Shannon, and the motion for summary judgment by Defendants Continental Airlines, Inc. and Prudential Insurance Company of America.

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 Defendants and against the Plaintiff.

ORDERED THIS DAY OF 17 JANUARY, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

JAN 18 1996

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

SAMUEL J. WILDER, Pro Se,)
)
 Plaintiff,)
)
 vs.)
)
 BOARD OF COUNTY COMMISSIONERS)
 OF THE COUNTY OF TULSA, et)
 al.,)
)
 Defendants.)

Case No. 96-C-23-BU

ENTERED ON DOCKET

DATE JAN 18 1996

ORDER

Plaintiff, Samuel J. Wilder, has filed an Affidavit of Financial Status, which the Court construes as a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and has filed a complaint styled as a "Notice of Appeal." In reliance upon the representations and information set forth in Plaintiff's Affidavit, Plaintiff is hereby permitted leave to file and maintain this action without prepayment of fees, costs or security.

As stated, Plaintiff has filed a complaint styled as a "Notice of Appeal." In the complaint, Plaintiff seeks to appeal a decision by Tulsa County Special District Judge Howard Mafford dismissing Plaintiff's petition on March 31, 1995. Plaintiff states in his Opening Brief, filed contemporaneously with the Notice of Appeal, that he appealed the decision to the Oklahoma Supreme Court on April 11, 1995. From the Opening Brief, it appears that no decision has yet been rendered by the Oklahoma Supreme Court.

Having reviewed the complaint, the Court finds that it lacks subject matter jurisdiction over the complaint and that dismissal

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under Rule 12(h)(3) of the Federal Rules of Civil Procedure¹ is appropriate. The United States Supreme Court has made it clear that United States District Courts do not have jurisdiction to review or reverse a final determination of the state court in judicial proceedings. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 475 (1983). Moreover, any appeal from a state's highest court must be addressed to the United States Supreme Court. Facio v. Jones, 929 F.2d 541, 543 (10th Cir. 1991).

Accordingly, Plaintiff's motion for leave to proceed in forma pauperis is **GRANTED**. However, Plaintiff's complaint is **DISMISSED** for lack of subject matter jurisdiction.

ENTERED this 18 day of January, 1996.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

¹Rule 12(h)(3) provides:

Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 LAEL DENNIS OWENS aka LAEL D.)
 OWENS; CANDICE K. OWENS; STATE)
 OF OKLAHOMA ex rel OKLAHOMA)
 TAX COMMISSION; K. DEAN WERTZ;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET
DATE JAN 19 1996

FILED

JAN 18 1996

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

Civil Case No. 95-C 934K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18 day of January, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear not having claimed no interest in the subject property; the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, appears by Assistant General Counsel Kim D. Ashley; and the Defendants, LAEL DENNIS OWENS aka LAEL D. OWENS, CANDICE K. OWENS, and K. DEAN WERTZ, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, LAEL DENNIS OWENS aka LAEL D. OWENS, will hereinafter be referred to

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

as ("LAEL DENNIS OWENS"). LAEL DENNIS OWENS and CANDICE K. OWENS are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendants, LAEL DENNIS OWENS and CANDICE K. OWENS, each waived service of Summons on October 16, 1995; and that the Defendant, K. DEAN WERTZ, acknowledged receipt of Summons and Complaint via certified mail on November 6, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on September 28, 1995; that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, filed its Answer on October 23, 1995; and that the Defendants, LAEL DENNIS OWENS, CANDICE K. OWENS, and K. DEAN WERTZ, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Seven (7), Block Six (6), MAPLEWOOD THIRD
ADDITION to the City of Tulsa, Tulsa County, State of
Oklahoma, according to the recorded Plat thereof.

The Court further finds that on June 25, 1980, Donald Eugene Cuenca and Deborah Lynn Cuenca, executed and delivered to Turner Corporation of Oklahoma, Inc. their mortgage note in the amount of \$37,800.00, payable in monthly installments, with interest thereon at the rate of eleven and one-half percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Donald Eugene Cuenca and Deborah Lynn Cuenca, executed and delivered to Turner Corporation of Oklahoma, Inc. a mortgage dated June 25, 1980, covering the above-described property. Said mortgage was recorded on June 30, 1980, in Book 4482, Page 371, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 13, 1988, Turner Corporation of Oklahoma, Inc. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development, its successors and assigns. This Assignment of Mortgage was recorded on December 14, 1988, in Book 5145, Page 1615, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, LAEL DENNIS OWENS, currently holds the record title to the property via mesne conveyances and is the current assumptor of the subject indebtedness.

The Court further finds that on November 14, 1988, the Defendants, LAEL DENNIS OWENS and CANDICE K. OWENS, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on November 17, 1989 and November 26, 1991.

The Court further finds that the Defendant, LAEL DENNIS OWENS, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, LAEL DENNIS OWENS, is indebted to the Plaintiff in the principal sum of

\$63,438.58, plus interest at the rate of 11.5 percent per annum from March 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of a tax warrant in the amount of \$198.88 which became alien on the property as of September 16, 1988; and a lien in the amount of \$924.97 which became a lien as of September 16, 1988. Said liens are inferior to the claim of the Plaintiff, United States of America.

The Court further finds that the Defendants, LAEL DENNIS OWENS, CANDICE K. OWENS, and K. DEAN WERTZ, are in default, and have no right, title or interest in the subject real property.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, LAEL DENNIS OWENS, in the principal sum of \$63,438.58, plus interest at the rate of 11.5 percent per annum from March 1, 1995 until judgment, plus interest thereafter at the current

legal rate of 5.35 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, have and recover judgment in rem in the amount of \$1,123.85 for state taxes, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, LAEL DENNIS OWENS, CANDICE K. OWENS, K. DEAN WERTZ, COUNTY TREASURER, Tulsa County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

Third:

In payment of Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, in the amount of \$1,123.85, plus accrued and accruing interest, for state taxes currently due and owing.

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

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

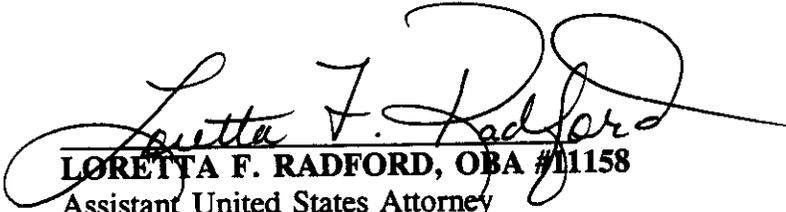
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

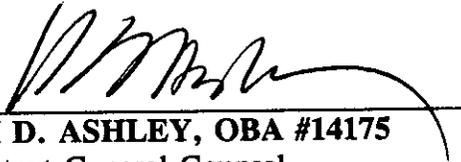
APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



KIM D. ASHLEY, OBA #14175

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

Judgment of Foreclosure
Civil Action No. 95-C 934K

LFR/lg

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

SHERRY PRESSLER,

Plaintiff,

vs.

INDEPENDENT SCHOOL DISTRICT
NO.1 OF TULSA COUNTY, et al.,

Defendants.

ENTERED ON DOCKET
DATE JAN 19 1996

No. 95-C-16-K

FILED

JAN 18 1996

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

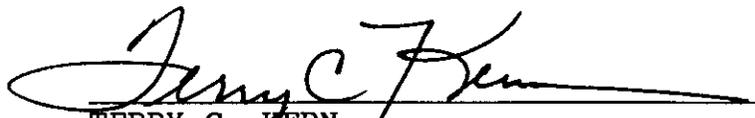
ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE 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, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation

is necessary.

ORDERED this 18 day of January, 1996.


TERRY C. FERN
UNITED STATES DISTRICT JUDGE

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

HELEN MARIE VARNER, JERRY
VARNER and MID-AMERICA
STOCKYARDS, INC.,

Plaintiffs,

vs.

SUN COMPANY, INC., (R & M),
TEXACO INC., a Delaware
corporation, and RHODES
HIERONYMUS, JONES, TUCKER
& GABLE, INCORPORATED,

Defendants.

ENTERED ON DOCKET
DATE JAN 19 1996

No. 95-C-713-K

FILED

JAN 18 1996

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

ADMINISTRATIVE CLOSING ORDER

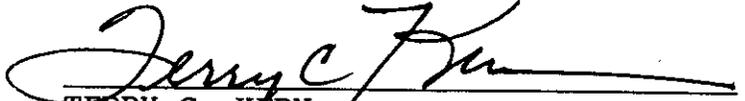
The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE 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, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation

12

is necessary.

ORDERED this 18 day of January, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

31550082/sar

FILED

LINDA L. PINION and
GILBERT PINION,

Plaintiffs,

vs.

J.C. PENNEY CO., INC.,

Defendant.

JAN 18 1996

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

No. 95-C-204-K

ENTERED ON DOCKET
JAN 19 1996

DATE _____

ORDER OF DISMISSAL WITH PREJUDICE

NOW, on this 18 day of January, 1996, this matter comes on for consideration before the undersigned Judge of the District Court upon the parties' Joint Application for an Order of Dismissal With Prejudice.

The Court being informed by the parties that all issues, causes of action and demands and claims of any nature involved in this litigation have been fully compromised and settled.

The Court therefore finds that this litigation should be and same is hereby dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that this litigation should be and same is hereby dismissed with prejudice.

IT IS FURTHER ORDERED, that all parties are to bear their own respective attorney fees, costs and expenses incurred in this litigation.

s/ TERRY C. KERN

JUDGE OF THE U.S. DISTRICT COURT

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

FILED

JAN 17 1996

Hard M. Lawrence, Court Clerk
DISTRICT COURT

BRANDY LYNN ESTELL,)
)
Plaintiff,)
)
vs.)
)
A-1 FREEMAN NORTH AMERICAN, INC.)
an Oklahoma Corporation;)
A-1 MOVERS, INC.,)
an Oklahoma Corporation;)
A-1 METRO MOVERS OF KANSAS, INC.,)
a Kansas Corporation; and)
RICK DYER, an Individual,)
)
Defendants.)

Case No. 95-C-1244H

JURY TRIAL DEMANDED

ENTERED ON DOCKET
DATE 1-18-96

VOLUNTARY DISMISSAL

Plaintiff Brandy Estell hereby dismisses the above-styled and numbered cause as to
Defendants A-1 Freeman North American, Inc. and A-1 Movers, Inc.



Brian E. Duke, OBA #14710
WHITE, HACK & DUKE, P.A.
111 West 5th Street, Suite 510
Tulsa, Oklahoma 74103
(918) 582-7888
ATTORNEY FOR THE PLAINTIFFS

CERTIFICATE OF MAILING

I hereby certify that on the 17th day of January, 1996, a true and correct copy of the above and foregoing was deposited in the U.S. Mails with proper postage thereon fully prepaid to the following:

A-1 Movers, Inc.
c/o Jimmy Fletcher
2505 Southwest 6th
Lawton, OK 73501

and

A-1 Freeman North American, Inc.
c/o MOCK, SCHWABE, WALDO, ELDER,
REEVES & BRYANT
211 North Robinson, 15th Floor
Oklahoma City, OK 73102



Brian E. Duke

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

DON AUSTIN, an individual,)
BARBARA WILLIS, an individual,)
DOROTHY COOKS, an individual, and)
KAREN SNAP, an individual, and)
other JOHN DOE or JANE DOE)
Plaintiffs as they become known,)
Plaintiffs,)

vs.)

SUN REFINING AND MARKETING)
COMPANY,)
Defendant.)

FILED
IN OPEN COURT
JAN 17 1996
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

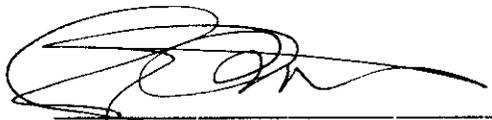
Case No. 92-C-258-H ✓

ENTERED ON DOCKET
DATE 1-18-96

VOLUNTARY DISMISSAL OF CERTAIN PLAINTIFFS' CLAIMS

The parties hereto do hereby stipulate pursuant to F.R.C.P. Rule 41 (a)(1) the claims of John Doe or Jane Doe plaintiffs as they become known, be and they are hereby dismissed without prejudice.

Respectfully Submitted,



JOHN M. MERRITT, OBA #6146
Merritt & Rooney, Inc.
917 North Robinson
Oklahoma City, Oklahoma 73102
ATTORNEY FOR PLAINTIFFS

1-17-96
Date

Robert P. Redemann

ROBERT P. REDEMANN, OBA
Rhodes, Heironymus, Jones,
Tucker & Gable
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
ATTORNEY FOR DEFENDANT

1-17-96

Date

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

FILED

JAN 16 1996

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

VERL D. HAVICE,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

Case No. 94-C-953-W ✓

ENTERED ON DOCKET

DATE JAN 18 1996

ORDER

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

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

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

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

the meaning of the Social Security Act.²

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to do light work limited as follows: a limited use of the right knee because of the limited range of motion, flexion being 20 degrees and extension being full with mild crepitation and mild pain but walking being accomplished well, mild osteoarthritis in the neck and back areas, insulin dependent diabetes, controlled hypertension, mild peripheral neuropathy in both feet, and inability to squat or climb, for the period prior to October 5, 1992. He found that, commencing October 5, 1992, claimant had the residual functional capacity to perform less than the full range of sedentary work.⁴ He concluded that claimant was unable to perform his past relevant work as a painter and truck mechanic, was 54 years old, which is defined as closely approaching advanced age, had an 8th-grade education, and

² Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

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

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

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

⁴ On October 5, 1992, Claimant was diagnosed as having "a very markedly distended urinary bladder and bilateral hydronephrosis." (TR 465). Thereafter, this condition required claimant to practice urinary self-catheterization 2 to 4 times per day. (TR 461). According to the vocational expert, this would preclude employment otherwise performable by claimant despite his other exertional impairments. (TR 625).

had acquired work skills, such as operating machinery, following verbal as well as written orders, doing work according to specifications, identifying how parts are coupled together, and recognizing flaws which he demonstrated in past work, which could be applied to meet the requirements of skilled or semiskilled work activities of other work. Based on an exertional capacity for light work and the claimant's age, education, and work experience, he found that claimant was "not disabled," prior to October 5, 1992, but, beginning on October 5, 1992, his range of sedentary work was significantly compromised and he was disabled. The ALJ found that there were a significant number of jobs in the national economy which claimant could perform prior to October 5, 1992, such as light tool maintenance worker, semiskilled position, light template maker, semiskilled, and production checker/tester, semiskilled. Having determined that claimant's impairments did not prevent him from performing his past relevant work, the ALJ concluded that he was not disabled under the Social Security Act prior to October 5, 1992.⁵

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

- (1) The decision of the ALJ that, prior to October 5, 1992, claimant was able to do light work is not supported by substantial evidence, because he could not meet the standing requirements of light work or the sitting requirements of sedentary work.
- (2) The ALJ mischaracterized and/or misconstrued the medical evidence which shows he could not meet the standing requirement of light work or the sitting requirement of sedentary work.
- (3) The ALJ's hypothetical question to the vocational expert did

⁵ Claimant met the special insured status requirement for Title II benefits only through September 30, 1992, and the ALJ's finding of disability only as of October 5, 1992 serves to deny claimant Title II benefits. The ALJ properly found that claimant was only entitled to Supplemental Security Income benefits under Title XVI, commencing on the October 5, 1992 date.

not include correct medical information.

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

Claimant has a very extensive medical record since January 18, 1988, when he saw Dr. William McCreight, Jr., following a fall on the ice with complaints of pain in his right knee and elbow. (TR 39, 257, 287). X-rays of the right elbow and right knee showed previous internal fixation for a previous fracture of the right patella, which was healed, and moderate osteoarthritic changes in the right knee, but no acute fractures. (TR 287). He was diagnosed with a strain to the right knee and elbow, treated with heat, rest, and pain medications, and returned to regular work. (TR 287).

Claimant was seen again on March 22, 1988, for continued pain in his right knee and occasional give-way type weakness. (TR 287). The doctor found moderate crepitus with flexion and extension of the knee, but no ligamentous instability or effusion, prescribed Motrin, and limited stair climbing. (TR 287). On April 5, 1988, he was re-evaluated and referred to Dr. Jerry Sisler to determine if he had a torn meniscus. (TR 288).

Claimant filed his application for social security benefits alleging he became disabled on April 19, 1988. He had knee surgery on May 4, 1988. (TR 270-279). On July 22, 1988, Dr. Sisler reported there was ongoing knee discomfort, feelings of giving way, and joint grinding. (TR 279). The doctor concluded that claimant had received maximum benefit from medical treatment and was "capable of work of moderate nature which would

include being on his feet 50 percent of the time but minimal climbing and no squatting or kneeling." (TR 279). Dr. Sisler found he was impaired 5% from the scar on the knee and 15% for persistent pain for workers compensation purposes as a result of the injury to the knee, which aggravated pre-existing arthritis. (TR 279).

On April 27, 1989, Dr. Michael Sullivan saw claimant for knee pain, swelling, and falls while going down stairs. (TR 319). The doctor found no edema or erythema in any joints, but the right knee showed some deformity on the lateral portion with osteophyte formation and limitation of flexion of about 20°, but full extension causing mild crepitation. (TR 320). The doctor concluded that claimant had traumatic arthritis to his right knee and suffered pain when he used the knee to any extent, but he could walk "quite well." (TR 320). The doctor noted that claimant also had non-disabling mild osteoarthritis in his spine and other joints, insulin-controlled diabetes, controlled hypertension, and very mild peripheral neuropathy. (TR 321). The doctor concluded that the knee would prevent claimant:

from pursuing work that involves a great deal of physical labor or being on his feet. He cannot now and I would not expect him to in the future, be able to squat or climb stairs or ladders. He is none-the-less, able to walk perfectly adequately.

He is thus fully capable of performing sedentary labor where he is sitting, most of the time. With his educational background however, this may be quite difficult for him to find such a job, although it is noted that he was in sales at one time, and I would anticipate that he would be able to perform that function. He should be considered disabled for any work involving hard, physical labor, or work that requires standing for many hours at a time. (TR 321).

On August 22, 1989, Dr. Sisler examined claimant for knee pain and swelling and neck and low back pain. (TR 336). The doctor reported that claimant rose from a chair

with some difficulty, due to pain in the right knee and had a considerable limp when bearing weight on the right leg. (TR 336). When asked to squat, claimant did so with considerable difficulty and he had difficulty ascending a step, as evidenced "by vaulting the step rather than actually powering up." (TR 336). Motions in the right knee showed extension to 5 degrees and flexion to 105 degrees. (TR 336). There was audible and palpable crepitation in the right knee as it passed from flexion to extension against gravity, but no ligamentous instability. (TR 336). X-rays of the right knee showed moderate osteophytes involving the medial and lateral joint compartments of the right knee and large osteophytes on the superior and inferior poles of the patella, showing panarthrosis of the right knee joint. (TR 336). The doctor concluded:

This man has advanced traumatic arthritis of the right knee. In the past, even though there were complaints and troubles with the right knee, he has functioned as a driver. With time and continued use, the traumatic arthritis has progressed to the point he is no longer able to function. Sitting for long periods of time while driving is very painful. Standing, walking and stair climbing are also very painful. Furthermore, there are medical problems of hypertension and diabetes which add additional restraints to his well being, stamina and functional capacity. (TR 337).

On November 14, 1989, Dr. McKenzie examined claimant for knee pain and swelling, pain in his right hip, neck, and elbow, headaches, and occasional dizziness. (TR 363-364). The doctor found claimant had been totally disabled from April 21, 1988 until July 22, 1988 and from August 22, 1989 until November 14, 1989, and could still not return to work. (TR 364). He found swelling in the knee, stiff-legged walking, limitation of range of motion, and loss of strength and senses in the knee. (TR 365). He concluded that there was 53.5% permanent partial impairment to the right lower extremity for workers compensation purposes. (TR 365). He stated "[t]he patient's condition at this

time may be considered permanent and stationary. The patient's disability precludes heavy work and heavy lifting." (TR 366).

On August 28, 1990, Dr. Sisler saw claimant for increasing knee discomfort, inability to walk, and neck discomfort. (TR 413). The doctor found that cervical spine motions were about 50 percent of normal and the right knee was swollen. (TR 413). There was moderate joint effusion, and claimant ambulated with a distinct limp on the right and could not squat more than 50 percent of the way on the right knee. (TR 413). Motions in the right knee showed extension to 5 degrees, flexion to 100 degrees, and there were palpable osteophytes and tenderness along the medial joint margin and audible and palpable crepitation in the right knee during motions, but no ligamentous instability. (TR 413). X-rays of the spine were normal, but x-rays of the knee showed large osteophytes on the adjacent sides of the tibia and femur, with the most advanced degenerative changes in the patella at the superior and inferior poles. (TR 412). The doctor concluded: "[h]e has multiple problems including traumatic arthritis of the right knee and chronic strain symptoms in the cervical spine. The medical problems include diabetes mellitus and symptoms of syncope when he turns his face sharply toward the left." (TR 412).

X-rays done on August 24, 1992, showed that the wire suture in claimant's knee was fractured, and there was degenerative change in the femur and tibia, especially the medial tibial plateau. (TR 472). These degenerative changes were seen as fairly stable since 1986. (TR 472). Noting that claimant only met the special insured status requirement for Title II benefits through September 30, 1992, the ALJ concluded he had become disabled on October 5, 1992, which was when doctors at the VA Hospital had concluded he had a

markedly distended urinary bladder and bilateral hydronephrosis. (TR 384).

At a hearing on October 12, 1993, claimant testified that he usually did not do household chores, but went shopping sometimes with his wife. (TR 602, 604). He watches television six to eight hours a day. (TR 602). He claims his activities are limited by constant pain, depression, and stress. (TR 602-603). He claimed he could stand 15 minutes and walk 3 to 4 minutes, with 5 to 10 minutes being the most he could walk and then only for 30 feet after which time his legs and back would hurt. (TR 609). He said he can sit for 30 minutes with his feet elevated and can lift 10 pounds, but lifting 20 pounds will hurt his back and legs. (TR 608, 610). He is unable to climb any stairs and cannot stoop. (TR 609). If he uses his hands repetitively, they swell and cramp. (TR 613).

There is merit to claimant's contentions that the decision of the ALJ that claimant was able to do light work from April 19, 1988 to October 5, 1992, is not supported by substantial evidence and that he mischaracterized the evidence to reach this decision. Light work involves "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds [A] job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls." 20 C.F.R. §404.1567(b).

When Dr. Sisler reported that claimant could return to work on July 22, 1988 after his knee surgery, he found that claimant was only capable of work "of moderate nature which would include being on his feet 50 percent of the time." (TR 279). On April 27, 1989 Dr. Sullivan concluded claimant was precluded from work that required him to be

on his feet, but could do sedentary work. (TR 318-321). Within four months, on August 22, 1989, Dr. Sisler found that claimant was "no longer able to function," "[s]itting for long periods of time while driving is very painful," and "hypertension and diabetes . . . add additional restraints to his . . . functional capacity." (TR 337). Three months later Dr. McKenzie concluded he had a permanent leg impairment of 53.5% for workers compensation purposes. (TR 365).

The ALJ compared Dr. Sisler's July 22, 1988 evaluation and Dr. Sullivan's April 27, 1989 evaluation and found the two were "roughly comparable," and therefore

a prescription for sedentary work is not supportable based upon the treating physician's opinions or Dr. Sullivan's own evaluation. Dr. Sisler's August 28, 1990 opinion indicates that the claimant has traumatic arthritis. There is no indication in the medical report of Dr. Sisler that there is any problem with standing or walking which are also restricted although there are several complaints noted. (TR 389).

The ALJ also discussed Dr. McKenzie's report of November 14, 1989, finding it showed only two periods of disability, one in 1988 and one in 1989, both for 3 months for a total of approximately 6 months, "which is significantly short of the required 12 months." (TR 389). He noted that the doctor's report consisted of an evaluation "for Worker's Compensation principles which do not equate to a residual functional capacity but instead use a percentage disability." (TR 389). The ALJ concluded that the standard used for disability varies from the one used under the Social Security Act, so the assessment of a percentage figure for disability was of limited value in establishing the claimant's disability. (TR 389).

The ALJ also discussed numerous VA clinic notes in the record, noting that the one note on June 9, 1992, clearly indicated "that the claimant does not need any ambulatory

assistance" and that his cellulitis condition was improving, and that x-rays of the knee on August 21, 1992, showed that "the degenerative changes were stable, that is there was no worsening since February 20, 1986." (TR 390).

The ALJ concluded that the medical evidence demonstrated that:

claimant has clearly established problems with his right knee, although not to the extent he alleges in his testimony. One of his primary treating sources, the VA, has clearly indicated that the claimant has degenerative changes. However, there have been no significant changes since February 20, 1986, based upon objective evidence. Dr. Sisler's reports, which have been compiled over a much shorter period of time, indicate a greater degree of change based also upon X-ray studies.

The ALJ observed that the VA reports were for periods approximately two years prior to Dr. Sisler's initial report and approximately two years after his most recent report, "thereby providing a better control and allowing for maximum healing to occur." (TR 390-391). The ALJ also concluded that actual physical findings showed some tenderness and limitation of range of motion in the cervical spine, suggesting early arthritis, and that claimant's peripheral neuropathy became worse over time, culminating in the October 5, 1992 diagnosis of neurogenic bladder. (TR 391). He noted that claimant sat at the hearing for 120 minutes "without any significant or observable pain or pain influenced behavior being evidenced." (TR 393). The ALJ assumed that the claimant had taken pain relieving medications "which further indicates that the claimant's pain medications are functioning well in their control of the claimant's pain." (TR 393).

Although the court does not find substantial evidence to support the ALJ's conclusion that claimant could do light work prior to October 5, 1992, his hypothetical questions to the vocational expert were posed in the alternative, and covered both light and

sedentary work. The court finds that there is substantial evidence that claimant could do sedentary work after he was released to work on July 22, 1988 following his knee surgery. The records of Dr. Sisler, Dr. Sullivan, and Dr. McKenzie can all be read to support the conclusion that claimant could do sedentary work during the period stretching from 1988 to 1992. According to 20 C.F.R. §404.1567(a), sedentary work involves:

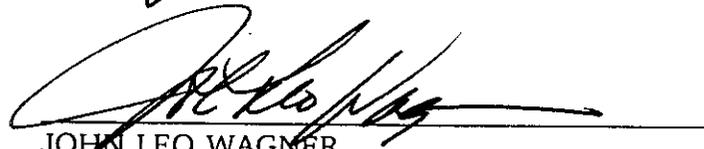
lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary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

The vocational expert found that claimant had acquired job skills that were transferable to sedentary work, such as production line assembler and stock and inventory work (TR 616-18). Consequently, there is substantial evidence in the record to support the ALJ's conclusion that claimant could perform sedentary work, and was not disabled prior to October 5, 1992.

In summary, the court finds that claimant was not disabled prior to the time he was last insured for benefits under §§ 216(i) and 223 of the Social Security Act, but did become disabled as of October 5, 1992.

AFFIRMED.

Dated this 12th day of January, 1995.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:havice.or

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

FILED

JAN 17 1996

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

VERL D. HAVICE,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 Commissioner of Social Security,¹)
)
 Defendant.)

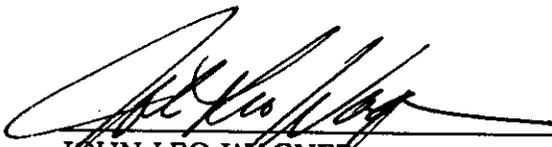
Case No: 94-C-953-W ✓

ENTERED ON DOCKET
DATE JAN 18 1996

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed January 16, 1996.

Dated this 16th day of January, 1996.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

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

F I L E D

JAN 17 1996

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

WALTER CHARLES SMITH,)
)
Petitioner,)
)
v.)
)
RON CHAMPION and THE)
ATTORNEY GENERAL OF THE)
STATE OF OKLAHOMA,)
)
Respondents.)

Case No. 95-C-199-BU ✓

ENTERED ON DOCKET

DATE JAN 18 1996

AMENDED REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE

Petitioner's application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 is now before the Magistrate Judge for consideration. Petitioner was convicted on July 28, 1993 in Tulsa County District Court, Case No. CRF-92-2970, and sentenced to 18, 10, 10, and 20 years imprisonment, the sentences to run consecutively.

Petitioner seeks federal habeas relief on the alleged grounds that he has suffered a delay and prejudice in perfecting his appeal, because the preliminary hearing transcript cannot be produced and his counsel did not require transcription, thus resulting in an incomplete appeals record.

The court has been notified that the Oklahoma Court of Criminal Appeals issued an order in petitioner's appeal on October 9, 1995, reversing the decision and remanding the case for a new trial. ("See Exhibit A"). Petitioner's petition for a writ of habeas corpus should be dismissed.

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to these findings and

①

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

FILED

JAN 17 1996

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

KELTON J. GUDENOGE,)
)
Plaintiff,)
)
vs.)
)
LARRY STOGSDILL, et al.,)
)
Defendants.)

No. 95-C-599-B ✓

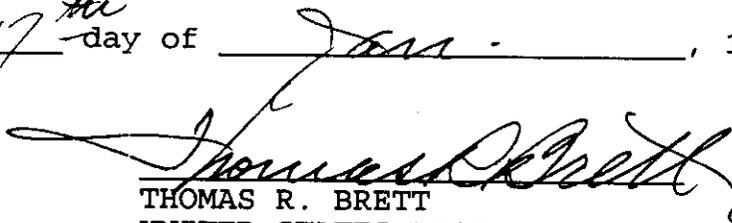
ENTERED ON DOCKET
JAN 18 1996
DATE _____

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on December 22, 1995. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹ Accordingly, Defendants' motion to dismiss or for summary judgment (doc. #7) is **granted** and the above captioned case is **dismissed**.

SO ORDERED THIS 17th day of Jan., 1996.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹Local Rule 7.1.C reads as follows:

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

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

FILED

JAN 17 1996

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

DURENDA ESTRADA,)
)
Plaintiff(s),)
)
vs.)
)
U.S. POSTAL SERVICE,)
)
Defendant(s).)

Case No. ⁹⁵ 94-C-107-B ✓

ENTERED ON DOCKET

DATE JAN 18 1996

JUDGMENT DISMISSING ACTION
BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 17th day of January, 1996.


THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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

FILED

TOMMY ROGERS,)
)
 Plaintiff,)
)
 vs.)
)
 "JOHN DOE" OFFICER DUPREE,)
 and STANLEY GLANZ,)
)
 Defendants.)

Case No. 94-C-476-B
Chief Judge Thomas R. Brett

JAN 17 1996
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE JAN 18 1996

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, Tommy Rogers and Stanley Glanz, Sheriff of Tulsa County hereby stipulate that the action against Stanley Glanz may be dismissed with prejudice.


LINDA K. GREAVES
Assistant District Attorney
Attorney for Stanley Glanz

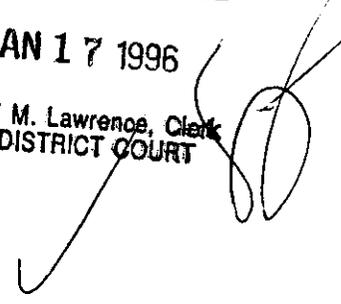

TOMMY ROGERS
Pro Se

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

FILED

JAN 17 1996

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



FLORINE GALLOWAY,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
)
 COMMISSIONER OF SOCIAL)
 SECURITY,¹)
)
 Defendant.)

Case No. 94-C-916-W

ENTERED ON DOCKET
DATE JAN 18 1996

ORDER

This order pertains to Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act and Motion for Award of Court Costs (Docket #12) and Defendant's Response in Opposition to Plaintiff's Application for Attorney Fees Under the Equal Access to Justice Act ("EAJA") (Docket #16), 28 U.S.C. § 2412(d). On October 12, 1995, the court entered judgment in favor of plaintiff, finding her entitled to disability insurance benefits. Plaintiff is therefore the prevailing party in this case.

Under the EAJA, a court may award attorney fees to a "prevailing party . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The Supreme Court has held that "substantially justified" does not mean justified to a high degree, but

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

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rather "has been said to be satisfied if there is a 'genuine dispute' . . . or 'if reasonable people could differ as to [the appropriateness of the contested action].'" Pierce v. Underwood, 487 U.S. 552, 565 (1988) (citations omitted). The Court held that a position can be "substantially justified" if it was justified for the most part. Id.

In its order of January 2, 1996, the court found that the Commissioner was not substantially justified in taking the position she did and granted Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act and Motion for Award of Court Costs (Docket #12). Counsel is entitled to fees in the amount of \$123.00 per hour, based on computations regarding the increased cost of living since the enactment of the EAJA in 1981. According to the CPI-Detailed Report, U.S. Department of Labor, Bureau of Labor Statistics (June 1994), the Consumer Price Index for All Urban Consumers ("CPI-U") was 93.4 in 1981 and 153.7 in October, 1995. To compute the percentage of change, the old CPI-U is subtracted from the new one, which leaves 60.30, and that number is divided by the old CPI-U, which is .64, and multiplied by 100, which results in a 64% change. The base rate for attorney's fees is \$75.00 and 64% of that rate is \$48.00. The adjusted hourly rate is the base rate plus the increase in fee resulting from a higher CPI-U, or \$123.00 per hour. For sixteen hours of work, counsel is entitled to a total fee of \$1968.00.

Dated this 17th day of January, 1996.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:galloway.3

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

HAZEL F. BUTLER, et al,)
)
 Plaintiffs,)
)
 vs.)
)
 FIBREBOARD CORPORATION, et al,)
)
 Defendants.)

ENTERED ON DOCKET
DATE JAN 18 1996

No. 90-C-275-K **FILED**

JAN 17 1996

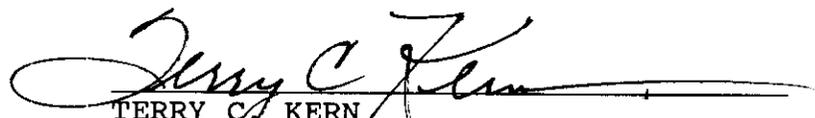
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE 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, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 30 days that settlement has not been completed and further litigation is necessary.

ORDERED this 16 day of January, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

21

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 12 1996

fa

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

CAROLYN CALDRON,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,¹¹

Defendant.

No. 95-C-217-J ✓

ENTERED ON DOCKET

DATE 1-17-96

ORDER²¹

Plaintiff, Carolyn Caldron, 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 evaluated Plaintiff's mental impairment, (2) the ALJ failed to include all of Plaintiff's impairments in the hypothetical presented to the vocational expert, (3) the ALJ failed to properly consider Plaintiff's complaints

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 November 30, 1992. *R. at 107-111*. The application was denied initially and upon reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held January 20, 1994. *R. at 59*. By order dated September 12, 1994, the ALJ determined that Plaintiff was not disabled. *R. at 40-51*. The Plaintiff appealed the ALJ's decision to the Appeals Council. On February 24, 1995 the Appeals Council denied Plaintiff's request for review. *R. at 4*.

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of pain, (4) the ALJ erred in evaluating Plaintiff's Residual Functional Capacity, and (5) the ALJ failed to consider the combined effect of all of Plaintiff's complaints. For the reasons discussed below, the court affirms the decision of the Secretary.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born September 16, 1948, and has a twelfth grade education. *R. at 67, 106.* Plaintiff previously worked as a mail clerk, and as an aide on a special education bus. *R. at 68, 70.*

Plaintiff last worked on July 29, 1992. *R. at 68.* Plaintiff claims she was injured, on the job, while working on an address labeling machine and while moving various heavy packages. *R. at 149.* Plaintiff initially claimed disability due to a herniated disk, arthritis, heel spur, chronic bronchitis, and a pinched nerve. *R. at 159.* At her hearing she additionally stated that she thought she was addicted to pain medication and was currently undergoing treatment. *R. at 80-82.*

II. STANDARD OF REVIEW

Disability under the Social Security Act is defined as the

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

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

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

42 U.S.C. § 423(d)(2)(A). The Secretary has established a five-step process for the evaluation of social security claims.⁴¹ See 20 C.F.R. § 404.1520.

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,

⁴¹ 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).

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 retained the Residual Functional Capacity ("RFC") to perform work in the sedentary range. *R. at 47*. The ALJ found that Plaintiff should be restricted to lifting, pushing, or pulling no more than ten pounds. *R. at 43*. The ALJ evaluated Plaintiff's complaints of pain but concluded that Plaintiff's testimony was not fully credible and that Plaintiff was not disabled due to pain. *R. at 44*. The ALJ noted that although Plaintiff stated she had a substance addiction problem, the record did not indicate that it would interfere with her ability to work. In addition, Plaintiff was currently undergoing treatment. *R. at 45*. The ALJ additionally concluded that Plaintiff's "anxiety disorder" did not interfere with her ability to work. *R. at 46*.

IV. REVIEW

Mental Impairment

Plaintiff asserts that the ALJ failed to follow the appropriate regulations because the ALJ completed the "Psychiatric Review Technique Form" ("PRT") rather than requesting that a mental health care professional complete the form. The Tenth Circuit addressed this issue in Bernal v. Bowen, 851 F.2d 297, 301 (10th Cir. 1988). The statutes do provide that "[a]n initial determination . . . that an individual is not

under a disability, in any case where there is evidence which indicates the existence of a mental impairment, shall be made only if the Secretary had made every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment." 42 U.S.C. § 421(h). The regulations provide that at the ALJ hearing level, the ALJ may complete the form without assistance, may call a medical advisor for assistance in preparing the document, or may decide to remand the case for completion of the document and a new determination. 20 C.F.R. § 404.1520a(d). "Thus, under the regulation, the ALJ had three options for completing the PRT, including the choice of completing the documentation himself." Bernal, 851 F.2d at 301. Consequently, the ALJ did not err by completing the form without the assistance of a medical advisor. See also Andrade v. Secretary of Health & Human Services, 985 F.2d 1045, 1050 (10th Cir. 1993), *citing Bernal*, 851 F.2d 297.

Plaintiff additionally asserts that Plaintiff had a "severe mental impairment." Plaintiff's initial application did not include any allegations of a mental impairment. *R. at 111, 159*. Plaintiff later alleged "stress and anxiety" from her lack of income. *R. at 171*. Plaintiff did not testify with respect to her "stress and anxiety" and did not allege that stress or anxiety interfered in any way with her ability to work. Plaintiff's only "mental evaluation" was an MMPI (Minnesota Multiphasic Personality Inventory) in June of 1992. The evaluator concluded that Plaintiff's scores "indicate some moderate elevations on the anxiety scale, suggesting a fair amount of tension." *R. at 284*. Nothing in the record indicates that Plaintiff's anxiety would, in any way

affect Plaintiff's ability to work. The ALJ concluded, based on the record, Plaintiff's testimony, and the MMPI evaluation that Plaintiff did not have a mental disorder. The ALJ's conclusion is supported by substantial evidence. See also Bernal, 851 F.2d at 301 ("the record is completely devoid of any evidence seriously challenging the ALJ's final determination regarding the severity of Bernal's impairments or the appropriateness of the RFC assessment given by the ALJ. Since the ALJ's decision is amply supported by the medical reports and the record, Mr. Bernal was not prejudiced by the ALJ's action [completing the PRT on his own].").

Plaintiff additionally alleges that the ALJ failed to properly consider her "significant mental impairment" because the ALJ did not adequately consider Plaintiff's "narcotic drug abuse being maintained on Methadone." Plaintiff's application for Methadone treatment indicated that Plaintiff had a "23 year opiate addiction," had abstained for eight years, and "due to [her] back injury was introduced to opiates for pain." *R. at 270*. Plaintiff testified that she was concerned about becoming addicted to prescription medications and decided to go to a Methadone treatment center. *R. at 81-82, 87*. Plaintiff testified that because of the Methadone she sometimes did not need to take her prescribed pain medication. *R. at 88*. Plaintiff testified to no other effects of the Methadone treatment or her asserted drug addiction.

The ALJ determined, and that determination is supported by the record, that Plaintiff was receiving treatment for her asserted drug addiction. In addition, the record contains no evidence to suggest that Plaintiff's ability to work is in any way

interfered with by a drug addiction, or by her current treatment. To the contrary, the "Methadone Treatment Rules and Regulations" contemplate employment by the individual receiving treatment. *R. at 15 ("you must be gainfully employed within 120 days of admission)*. If a method of treatment restores an individual's ability to work, the individual is not disabled. See Pacheco v. Sullivan, 931 F.2d 695 (10th Cir. 1991); Duran v. Secretary of Health & Human Services, No. 90-553, 1992 WL 102518, at *2 (10th Cir. May 13, 1995).

Hypothetical to Vocational Expert

Plaintiff asserts that the ALJ erred by not including Plaintiff's "severe mental impairments" in the hypothetical question posed to the vocational expert, and by failing to inquire as to the effect of stress on an individual with Plaintiff's "fragile background."

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 and the ALJ's determination of Plaintiff's "mental impairment," the hypothetical posed by the ALJ adequately included Plaintiff's restrictions.

Pain Analysis

Plaintiff alleges that the ALJ failed to evaluate Plaintiff's complaints of pain in accordance with Luna and failed to consider Plaintiff's Methadone treatment.

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. In assessing a claimant's complaints of pain, the following factors may be considered.

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

Id. at 165.

Initially, the ALJ summarized Luna and its requirements, Plaintiff's medical record, and Plaintiff's testimony. *R. at 41-44*. The ALJ noted that Plaintiff did not seek treatment of her back from September 1992 through June 1993, that Plaintiff did not require the use of an assistive device, and that Plaintiff had not had a recommendation for a pain clinic, physical therapy treatment, or a weight loss program. *R. at 44*. The ALJ concluded that although Plaintiff did have some pain, Plaintiff did not suffer from disabling pain.

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

The ALJ's determination that Plaintiff did not suffer from disabling pain is supported by the record. Furthermore, in the hypothetical presented to the vocational expert, the ALJ included qualifications that the individual experienced low to chronic pain. *R. at 96-97*.

Plaintiff asserts that the "mere fact that the claimant is on Methadone shows that she had a . . . pain problem." However, Plaintiff was not prescribed Methadone for her pain, but was taking Methadone for treatment of a drug addiction. Furthermore, Plaintiff testified that while on Methadone she has sometimes not

needed to take her other pain medication (Lortab). *R. at 88*. The record also does not reflect that the ALJ failed to consider Plaintiff's Methadone treatment. *R. at 44-46*.

Residual Functional Capacity⁵¹

Plaintiff asserts that the ALJ's conclusion that Plaintiff could perform light or sedentary work was error. Plaintiff notes that one of Plaintiff's doctors stated that Plaintiff could not be on her feet all day and could not lift over ten pounds. In addition, Plaintiff is critical of Dr. Dandridge's assessment of Plaintiff, asserting that Dr. Dandridge did not review any of Plaintiff's records and that his assessment was the lone indication in the record that Plaintiff was able to sit for an amount of time necessary to perform sedentary work.

The regulations define sedentary work as

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

20 C.F.R. § 404.1567(b). The ALJ found that Plaintiff had the ability to engage in sedentary work activity, but was restricted to lifting, pushing, or pulling no more than ten pounds. *R. at 43, 44*. The ALJ's determination is supported by substantial evidence.

⁵¹ Residual Functional Capacity is "the maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirement of jobs." 20 C.F.R. Pt. 404, Subpt. P, App. 2 § 200.00(c).

A RFC Assessment conducted on January 14, 1993 by Thurma Fiegel, M.D., indicates that Plaintiff can occasionally lift ten pounds, frequently lift five to ten pounds, stand at least six hours (eight hour day), sit at least six hours (eight hour day), and push/pull an unlimited amount. *R. at 128.* Dr. Fiegel additionally noted that Plaintiff has a degenerative disc. *R. at 128.*

On her list of daily activities Plaintiff indicated that she cooked once a day, cleaned three times a week and did minimal grocery shopping about twice each week. *R. at 162.* Plaintiff additionally noted that she drove to the grocery store and to her mother's house at least twice each week. *R. at 162.*

Plaintiff's treating physician has made several statements with respect to Plaintiff's disability status. On July 24, 1992, Jeff Black, M.D., indicated, by letter, that Plaintiff should not lift, pull, or push anything over ten pounds due to a pinched nerve in her back. *R. at 182.* On July 29, 1992, Plaintiff's doctor noted that "[t]he patient is here mainly just to discuss her work situation and with her back. She said she really just can't tolerate working and that every time she works she gets in a lot of pain. She wants me to release her. I agreed I felt she was, at least temporarily, *disabled from the type of work she does.*" *R. at 180 (emphasis added).* By letter dated March 12, 1993, Dr. Black stated that Plaintiff sustained a back injury "and has been disabled since July 30, 1992." *R. at R. at 178.* Dr. Black notes that Plaintiff will probably continue to be disabled until she has surgery for "correction of a L4-5 disc herniation." *R. at 178.* However, on May 4, 1993, Dr. Black wrote that Plaintiff "suffers from a L4-5 disck [sic] herniation of the lumbar spine which causes her

chronic pain and limits her ability to work. I have recommended that she not lift, pull or push anything weighing over ten pounds. These restrictions should apply until the L4-5 disc herniation has been repaired or the pain resolves." *R. at 232.* On December 29, 1993, Dr. Black filled out a "verification of disability" form and indicated that Plaintiff was "disabled." *R. at 257-58.*

Plaintiff was examined by Randall Hendricks, M.D. on September 30, 1992. Dr. Hendricks noted that he believed Plaintiff's "complaints are certainly quite severe, but her physical examination doesn't suggest that I find objective injury that is that severe at least based on a complaint status." *R. at 237.* Dr. Hendricks suggested an MRI of the lumbar spine and a diskogram. *R. at 238.* On July 29, 1993, Plaintiff underwent an awake lumbar diskogram. *R. at 244.* Dr. Hendricks concluded that "both the L3-4 and L5-S1 disks are somewhat degenerative, but neither really produce true radicular symptoms into the left leg. The L4-5 disk was slightly degenerative and produced no pain." *R. at 244.*

William S. Dandridge, M.D., examined Plaintiff on November 29, 1993. *R. at 246.* Dr. Dandridge observed that Plaintiff walked without abnormality, stood erect, and had no restriction of movement of her toes, ankles, knees, hips, fingers, wrists, elbows, or shoulders. *R. at 246.* Dr. Dandridge indicated that Plaintiff could sit for six hours (eight hour day), stand for six hours (eight hour day), and walk for six hours (eight hour day), but sit, stand, or walk for only one hour continuously. *R. at 251.* Dr. Dandridge concluded that "[t]he orthopaedic examination fails to disclose any objective findings to substantiate this patient's subjective complaints." *R. at 247.*

Dr. Dandridge indicated that his opinion was based on "physical exam and medical reports." *R. at 252.*

On October 11, 1993, Plaintiff completed a "Physical Examination for Life Improvement Center" form. *R. at 274-75.* Plaintiff answered "no" to the following questions.

Have you ever been refused employment because of your health?

Have you ever been unable to hold a job because of inability to perform certain physical tasks or for any other medical reason?

During the past two years have you been absent from work or school because of illness or injury for more than a combined total of 10 days?

Any health restrictions on the type of work you can perform?

R. at 275.

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). 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).

The ALJ's opinion indicates that the ALJ considered Plaintiff's treating physician's opinion, and concluded that it was not inconsistent with a finding that Plaintiff could perform sedentary work. *R. at 4.* Although Dr. Black checked "disabled" on Plaintiff's form on December 29, 1993, Dr. Black's medical records and

his prior letters with respect to Plaintiff's "disability status" indicate that Plaintiff should not lift over ten pounds, that Plaintiff should not return to her previous work, and that Plaintiff should limit her activities. *R. at 178, 180, 182, 232, 257-58.* The conclusion of the ALJ that Dr. Black's findings were not inconsistent with performing limited sedentary work activity is supported by the evidence.

Although Plaintiff urges that Dr. Dandridge's opinion be discounted because Dr. Dandridge did not consider Plaintiff's medical history. Dr. Dandridge's report indicates that his findings were based on "physical exam and medical reports." *R. at 252.* Exactly what "medical reports" is unclear from the record. *R. at 252.* Regardless, Dr. Dandridge's opinion is not the only support in the record that Plaintiff is able to sit for the requisite time necessary to the performance of sedentary work. A RFC Assessment from January 1993 indicated Plaintiff could sit for six hours in an eight hour day. *R. at 127.*

As noted above, "substantial evidence" is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. The record contains substantial evidence to support the ALJ's conclusion as to Plaintiff's RFC.

Plaintiff additionally cites Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993) as supporting Plaintiff's contention that the ALJ improperly relied on a "lack of evidence" in the record. The Court in Thompson did conclude that an "absence of evidence is not evidence." *Id.* at 1490. However, the Thompson court noted that "the ALJ, finding no evidence upon which to make a finding as to RFC, should have

exercised his discretionary power to order a consultative examination of Ms. Thompson to determine her capabilities." Id. In this case, at least two consultative examinations support the ALJ's conclusion as to Plaintiff's RFC. *R. at 127, 246.*

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

Combined Effect of Impairments

Heel Spurs

Plaintiff asserts that the ALJ inappropriately dismissed Plaintiff's complaint of heel spurs. Although Plaintiff is correct that the ALJ confused portions of Plaintiff's record,⁶¹ the ALJ additionally noted that the evidence did not indicate that heel spurs interfered with Plaintiff's ability to work, that the record contains little evidence of Plaintiff seeking treatment for heel spurs, and that the recommended treatment was pads for her shoes. *R. at 42.*

⁶¹ The ALJ noted, with respect to Plaintiff's "heel spurs," that Plaintiff failed to purchase "Norplant." As Plaintiff points out, Norplant was suggested to Plaintiff in relation to birth control, and not with respect to her heel spur. The ALJ's confusion resulted, perhaps, because Plaintiff's records (April 15, 1992) in which she saw the doctor for plantar fasciitis is on the same page that Plaintiff saw her doctor (May 26, 1992) to discuss contraception.

On November 8, 1991, Dr. Black noted that Plaintiff has a left heel spur. He recommended different shoes for better support, and additionally noted that she should consider changing jobs because she currently has to remain on her feet all day. *R. at 194.* On April 15, 1992 Plaintiff was diagnosed with plantar fasciitis.⁷¹ Dr. Black recommended that she try to stay off her feet, have warm soaks, and return if the condition worsened. *R. at 184.* The ALJ's conclusions are supported by substantial evidence.

Arthritis

Plaintiff additionally asserts that the ALJ inadequately addressed Plaintiff's complaints of arthritis.

The ALJ concluded that Plaintiff did not suffer from a severe arthritic condition due to the lack of medical evidence to support Plaintiff's claims, the lack of sedimentation rate, and the lack of any severe inflammation. The ALJ's conclusions are supported by substantial evidence.

Plaintiff's sedimentation rate was "6," and Plaintiff's treating physician noted only that Plaintiff "probably does have some rheumatic type process." *R. at 195, 210.* Nothing indicates that Plaintiff suffered from severe arthritis, and Plaintiff testified that her current medication "definitely helps with the arthritis pain." *R. at 76-77.* In addition, the hypothetical presented by the ALJ to the vocational expert

⁷¹ "Plantar" is defined as "concerning the sole of the foot." *Taber's Cyclopedic Medical Dictionary* 1522 (17th ed. 1993). "Fasciitis" is an "inflamed condition . . . of a fibrous membrane covering, supporting, and separating muscles." *Taber's Cyclopedic Medical Dictionary* 710, 712 (17th ed. 1993).

included an individual experiencing "mild to moderate to occasional chronic pain." *R. at 97.*

Chronic Bronchitis/Asthma

Plaintiff alleges that the ALJ failed to give adequate consideration to Plaintiff's asthma and bronchitis. The ALJ concluded that Plaintiff did not have severe asthma (based on no trips to the emergency room for treatment, no record of attacks, and no hospitalizations for asthma or bronchitis). *R. at 42-43.* However, because Plaintiff had been described medications for the treatment of asthma, the ALJ concluded Plaintiff did have some respiratory problems. *R. at 43.* The ALJ found that Plaintiff should not work in an environment which would expose Plaintiff to excessive air pollutants. *R. at 43.* The ALJ also included these restrictions in the hypothetical presented to the vocational expert. *R. at 96-98.* The ALJ's conclusions are supported by substantial evidence.

Combination of Impairments

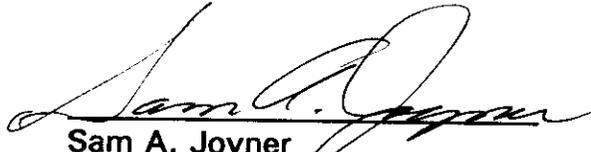
Plaintiff additionally asserts that the ALJ failed to consider the combined effect of all of Plaintiff's impairments. Plaintiff relies upon Hargis v. Sullivan, 945 F.2d 1482 1492 (10th Cir. 1991). In Hargis, the Tenth Circuit reversed a finding of non-disability, finding that the ALJ failed to adequately consider the combined effect of the Plaintiff's mental impairments with Plaintiff's physical impairments. In Hargis, the court emphasized that "[t]he Secretary . . . cannot . . . dismiss a claimant's mental impairment once there is a finding that the claimant does not meet the listings." *Id.*

An ALJ must consider the combined effect of all of a plaintiff's impairments.

However, an ALJ is not required to consider the "effect" of an impairment which the ALJ has determined that a plaintiff does not have. In this case, the ALJ adequately addressed each of Plaintiff's impairments, and presented all of the impairments which the ALJ found that Plaintiff had to the vocational expert for a determination of whether jobs existed in the national economy which Plaintiff could perform. The ALJ's findings are supported by substantial evidence. See Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

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

Dated this 12 day of January 1996.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 12 1996

ja

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

CAROLYN CALDRON,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,¹¹

Defendant.

No. 95-C-217-J ✓

ENTERED ON DOCKET

1-17-96

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 12 day of January 1996.



Sam A. Joyner
United States Magistrate Judge

¹¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 12 1995

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

BILLY R. MARBLE,

Plaintiff,

v.

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

Defendant.

No. 94-C-971-J ✓

ENTERED ON DOCKET

1-17-95

ORDER²⁾

Plaintiff, Billy R. Marble, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Secretary denying Social Security benefits.³⁾ Plaintiff asserts error because (1) the Secretary relied on evidence which was eleven to thirteen months "old" at the time of Plaintiff's hearing, (2) Plaintiff almost met Listing § 1.05(c), and (3) the Secretary improperly evaluated the medical evidence and

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

²⁾ This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

³⁾ Plaintiff filed an application for disability insurance benefits on February 19, 1993. *R. at 46-49*. The application was denied initially and upon reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held February 4, 1994. *R. at 21*. By order dated March 15, 1994, the ALJ determined that Plaintiff was not disabled. *R. at 11-16*. The Plaintiff appealed the ALJ's decision to the Appeals Council. On August 11, 1995, the Appeals Council denied Plaintiff's request for review. *R. at 3*.

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Plaintiff's testimony. For the reasons discussed below, the Court affirms the Secretary's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born May 31, 1945, and has a high school education. *R. at 25, 46.* Plaintiff had an L5-S1 diskectomy on February 2, 1991, and a right L5-S1 partial hemilaminectomy on April 11, 1991. *R. at 113, 120.* Plaintiff complains of pain in his back and legs, and an inability to walk, sit, or drive for any length of time. *R. at 33-34, 84.* Plaintiff previously worked repairing houses, and making oil tanks and heat exchangers. *R. at 78.*

II. STANDARD OF REVIEW

The Secretary has established a five-step process for the evaluation of social security claims.⁴¹ 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

⁴¹ 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 was not disabled at step five. The ALJ concluded that Plaintiff did have a severe impairment due to degenerative disc disease. *R. at 15*. However, the ALJ determined that although Plaintiff could not return to his past work, based on Plaintiff's limitations and the testimony of a vocational expert, Plaintiff retained the residual functional capacity to perform a number of jobs in the national economy. *R. at 14-16*.

IV. REVIEW

Sufficiency of the Medical Record

Plaintiff initially asserts that the Secretary erred because the "ALJ failed to fully develop the evidentiary record by failing to obtain Claimant's recent medical treatment records, and instead relying upon medical evidence from 11-13 months prior to the hearing date."

The federal statutes require that a decision to deny Social Security benefits be based on "a complete medical history of at least the preceding twelve months. . . ." Id. 42 U.S.C. § 423(d)(5)(B). However, 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.

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

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

20 C.F.R. § 404.1512(d) (emphasis added).

Congress has delegated to the Secretary broad power to adopt regulations "which are necessary or appropriate" to carry out the 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. A 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); 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 assertion that the ALJ erred by relying on medical evidence from "11-13 months prior to the hearing date" is improper. Regardless, Plaintiff's application for benefits was filed on February 19, 1993. The medical records relied on by the ALJ span from April 1991 to March 1993. In addition, Plaintiff's record includes an RFC Assessment from March 1993. *R. at 58, 101, 140.* The record for the twelve month period preceding the date Plaintiff filed his application was adequately developed.

Plaintiff additionally asserts that the ALJ failed in his duty to adequately develop the record because the ALJ did not request medical records from Dr. Wittenberg.

Although a claimant has the general duty to prove disability, a social security disability hearing is a non-adversarial proceeding and an ALJ has a duty to develop the factual record. See *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). The statutes require that "[i]n making any determination the Commissioner of Social Security shall make every reasonable effort to obtain from the individual's treating physician (or other treating health care provider) all medical evidence, including diagnostic tests, necessary in order to properly make such determination, prior to evaluating medical evidence obtained from any other source on a consultative basis." 42 U.S.C. § 423(d)(5)(B) (emphasis added).

In *Musgrave*, the Tenth Circuit Court of Appeals, in examining the duty of the ALJ to develop the record concluded that the "important inquiry is whether the ALJ asked sufficient questions to ascertain (1) the nature of a claimant's alleged

impairments, (2) what on-going treatment and medication the claimant is receiving, and (3) the impact of the alleged impairment on a claimant's daily routine and activities." Musgrave, 966 F.2d at 1374.

Plaintiff complains that the ALJ erred in failing to request records from Dr. Wittenberg. A review of the record reveals that the ALJ adequately met his duty to develop it. Plaintiff alleges disability due to his back and leg pain.

Q: And then what happened to stop your work there?

A: I just got to where I couldn't do my work.

Q: Why?

A: I'd go to work and I hurt so much all day. Then whenever like I said, if I drove a truck to make deliveries, why I couldn't walk whenever I would come back and get out of the truck. If I was driving a standard or something, like my foot and leg would cramp up so bad that I couldn't even feel the gas pedal. I would just have to watch the speedometer.

Q: What was causing that?

A: My back. Sitting in the car or pick up, my back -- it depended on how I sat. A lot of times I'd sit a certain way and it would be my left leg. But it was usually my right leg.

R. at 29-30. Plaintiff noted several doctors that Plaintiff saw for treatment of his back and/or leg pain, including Dr. Marauk, Dr. Snabbels, and Kavrnick. *R. at 30-31.* The record includes records from each of the doctors⁵¹ mentioned by Plaintiff. *R. at 101, 123, 135.*

The ALJ additionally asked Plaintiff what doctor he was currently seeing, and Plaintiff answered that he was not currently going to a doctor. Plaintiff added that "I get my medication from Dr. Wittenberg. He's my family doctor." *R. at 34.*

⁵¹ Kavrnick was Plaintiff's physical therapist.

Plaintiff's February 4, 1994 medications list notes "Zantac" prescribed by "Whittenburg" for Plaintiff's ulcer. The only other medication listed is Nuprin, which Plaintiff notes he takes for pain and at night to sleep. *R. at 147*. Based on the record and circumstances of this case, the Court concludes that the ALJ did not err by failing to request the medical records of a doctor who was prescribing ulcer medication for Plaintiff.

Listing § 1.05(C)

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

Plaintiff argues that his condition almost meets Listing § 1.05(C). Listing 1.05 provides:

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

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

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.05(C).

Plaintiff has not met his burden of proving that the Listing is met. The ALJ noted that although Plaintiff had a restricted range of motion of the lumbar spine,

Plaintiff's records did not establish evidence of "significant sensory loss, reflex change, weakness or atrophy of the lower extremities." *R. at 13*. The ALJ's decision that Plaintiff did not meet or equal a Listing is supported by the record, and the ALJ did not err in concluding that Plaintiff's medical impairments do not meet or equal a Listing.

Substantial Evidence

Plaintiff additionally asserts that the ALJ improperly assessed Plaintiff's complaints of pain and Plaintiff's credibility.

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. In assessing a claimant's complaints of pain, the following factors may be considered.

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

Id. at 165.

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

Following surgery in April 1991, Plaintiff's surgeon noted that Plaintiff had "dramatic relief of his right foot pain . . . [and] ambulated without a limp and was started on an exercise program on the second postoperative day." *R. at 101*. Dr. Brock E. Schnebel, on January 8, 1993, reported that according to the "AMA Guides to Permanent Impairment" his opinion was that Plaintiff had a 20% whole person impairment. Dr. Schnebel concluded that "I think he is employable, but perhaps a vocational rehab consultation as well as a functional capacities evaluation may be beneficial for him." *R. at 135*. Dr. Schnebel, in an examination on November 10, 1992 also noted that Plaintiff "moved[d] about the room with ease and can walk on his heels and metatarsal heads. He has a slightly antalgic gait and demonstrates some

grimacing with walking." *R. at 137*. Plaintiff was also treated by Dr. R. Hicks. On February 1, 1993, Dr. Hicks noted that Plaintiff "does not exhibit evidence of serious nerve damage. I think it would be safe for him to tolerate these symptoms, undergo a program of aptitude testing, job retraining and job rehabilitation and leave his medical file open or we can proceed with operative intervention." *R. at 140*.

Plaintiff testified that he can drive, but he experiences pain. Plaintiff stated that after driving "whenever I get out I have to stand there for just a minute before I can stand and start moving." *R. at 25-27*. Plaintiff also testified that "I try to walk quite - all I can. That's what the doctors recommended. And I get up mornings and take a bath and clean up and I'll mope around the yard. And I'll come in and try to do a little housework. I'll lay on the patio for a while. And then I'll try to walk again. And so it depends on how my back feels as to the amount of walking I do. But they recommended I try to keep leg exercises and walk or they say if that muscle gets soft back there it's going to get worse." *R. at 37*. Plaintiff testified that he cannot lift much, and that ironing hurts his back. *R. at 37*.

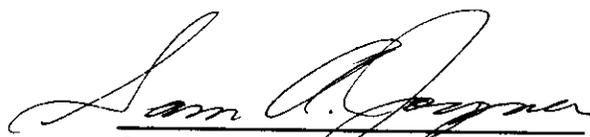
An RFC Assessment from March 29, 1993 by Charles D. Harris, M.D., indicates Plaintiff could occasionally lift twenty pounds, frequently lift ten pounds, stand/walk about six hours (eight hour day), sit about six hours (eight hour day), and push/pull an unlimited amount. *R. at 58-65*. This Assessment is "approved as written" by Vallis D. Anthony, M.D., on April 27, 1993. *R. at 65*.

The ALJ noted that Plaintiff is no longer under the care of a physician, that two examining physicians have suggested Plaintiff obtain vocational rehabilitation and job

retraining, that Plaintiff takes over-the-counter pain remedies, and that Plaintiff does not require assistance for ambulation. *R. at 13.* The ALJ's determination that Plaintiff did not suffer from disabling pain is supported by the record. Furthermore, in the hypothetical presented to the vocational expert, the ALJ included qualifications that the individual experienced chronic pain. *R. at 38.*

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

Dated this 12 day of January 1996.

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

JAN 12 1996

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

BILLY R. MARBLE,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,¹¹

Defendant.

No. 94-C-971-J ✓

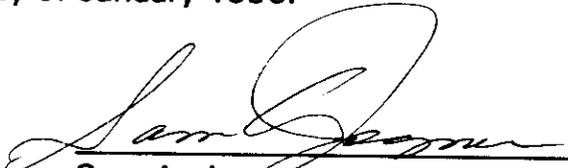
ENTERED ON DOCKET

1-17-96

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 12 day of January 1996.



Sam A. Joyner
United States Magistrate Judge

¹¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

FILED
JAN 16 1996

BURNIE D. BOYCE,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION,)
)
 Respondent.)

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

No. 96-C-0020-C ✓

ENTERED ON DOCKET ✓

DATE JAN 17 1996 ✓

ORDER OF TRANSFER

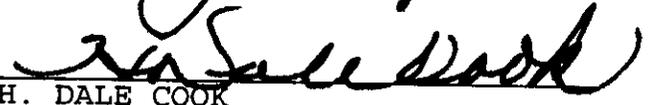
Before the court are Petitioner's motion for leave to proceed in forma pauperis and an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Upon review of the petition, it has come to the court's attention that Petitioner was convicted in Bryan County, Oklahoma, which is located within the territorial jurisdiction of the Eastern District of Oklahoma. Therefore, in the furtherance of justice, this matter may be more appropriately addressed in that district.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Petitioner's motion for leave to proceed in forma pauperis is **granted**;
- (2) Petitioner's application for a writ of habeas corpus is **transferred** to the Eastern District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d).
- (3) The Clerk shall **mail** a copy of the petition to Petitioner and the Oklahoma Attorney General's Office.

IT IS SO ORDERED this 16th day of January, 1996.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

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

JAN 16 1996

U.S. LASER, LIMITED,
an Oklahoma corporation

PLAINTIFF

vs.

Q-ZAR FRANCHISING, INC.,
a Delaware corporation,

DEFENDANT

CIVIL ACTION NO. 95-C-409-B

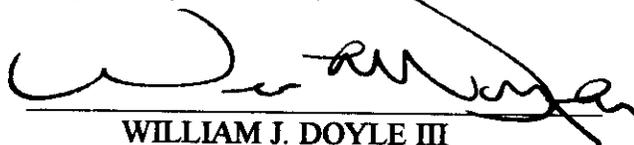
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DATE JAN 17 1996

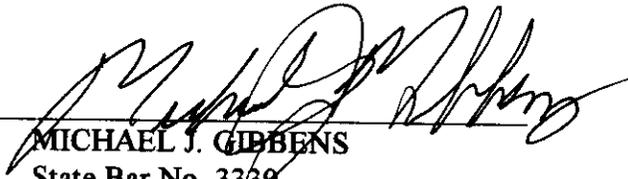
STIPULATION OF DISMISSAL

Comes now the Plaintiff, U.S. Laser, Limited, and the Defendant, Q-Zar Franchising, Inc., being all of the parties who have appeared in this action, and pursuant to Rule 41 (a) (1)(ii) of the Federal Rules of Civil Procedure, hereby file this Stipulation of Dismissal to dismiss with prejudice all claims and causes of action in existence and relating to this matter for the reason that all matters in controversy have been settled and compromised pursuant to that certain Compromise Settlement Agreement entered into between the parties. Each party is to bear its own costs and attorneys' fees.

Respectfully submitted,



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/davis/stip-2/010596

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

FILED

JAN 16 1996

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

GENERAL DYNAMICS CORPORATION,)
a Delaware corporation,)
)
Plaintiff,)
)
vs.)
)
INTERSOURCE, INC.,)
an Oklahoma corporation,)
)
Defendant.)

No. 95-C-286-B ✓

ENTERED ON DOCKET

DATE JAN 17 1996

AMENDED JUDGMENT

The Judgment of the Court filed herein January 8, 1996, is hereby amended, to reflect the appropriate interest rate, as follows: In keeping with the Findings of Fact and Conclusions of Law filed January 8, 1996, Judgment is hereby entered in favor of General Dynamics Corporation and against InterSource, Inc., in the principal sum of Eight Hundred Twenty Thousand Five Hundred Thirteen and 37/100 Dollars (\$820,513.37). Said judgment shall bear interest at the rate of 5.16% per annum from and after the date hereon. Costs are hereby assessed against the Defendant if timely applied for pursuant to Local Rule 54.1. Any claim for attorneys fees must be timely filed pursuant to Local Rule 54.2.

DATED this 16th day of January, 1996.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JAN 16 1996

Ward M. Lawrence, Court Clerk

GINA THOMISON,)
)
Plaintiff,)
)
v.)
)
CITY OF BARTLESVILLE, ex rel.)
BARTLESVILLE POLICE DEPARTMENT;)
BARTLESVILLE POLICE DEPARTMENT,)
a political subdivision of the)
City of Bartlesville; ROBERT)
METZINGER, individually and)
in his official capacity as)
City Manager; STEVE BROWN,)
individually and in his official)
capacity as Police Chief; JOE)
SLACK, individually and in his)
official capacity as an Officer,)
)
Defendants.)

Case No. 95 C 836 B

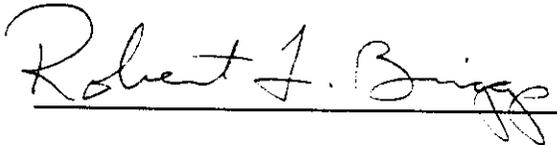
ENTERED ON DOCKET
DATE JAN 17 1996

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Federal Rules of Civil Procedure Rule 41, the parties hereby stipulate to a dismissal with prejudice of this action against Defendant Bartlesville Police Department. The parties agree that the Bartlesville Police Department is not a party capable of being sued under the Governmental Tort Claims Act.

BRIGGS & GATCHELL

DOERNER, SAUNDERS, DANIEL & ANDERSON



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Attorneys for Plaintiff

Attorneys for Defendants

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

WENDELL TENISON and BETTY)
TENISON, individually and)
as husband and wife,)
)
Plaintiff,)
vs.)
)
CITY OF BIXBY, an Oklahoma)
Corporation; MICKY WEBB,)
as an individual and in his)
capacity as CITY MANAGER OF)
BIXBY, OKLAHOMA; BIXBY CITY)
COUNCIL MEMBERS in their)
capacity as city council)
members; Trustees of the)
BIXBY PUBLIC WORKS AUTHORITY)
in their capacity as trustees;)
JOE WILLIAMS, individually;)
and ED STONE, individually,)
)
Defendants.)

ENTERED ON DOCKET
DATE JAN 16 1996

Case No. 95-C-509-BU ✓

FILED
JAN 12 1996
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter comes before the Court upon the Motion to Dismiss of Defendant Micky Webb and the Motion to Dismiss of Defendant Bixby Public Works Authority. Plaintiffs, Wendell Tenison and Betty Tenison, have not responded to the motions within the time prescribed by Local Rule 7.1(C) and have not made any request for an extension of time to respond to the motions. Pursuant to Local Rule 7.1(C), the Court deems the motions confessed.

Having reviewed the motions, the Court finds that Plaintiff, Wendell Tenison's federal claims and state contract claims against Defendants, Micky Webb, as an individual and in his capacity as city manager of Bixby, Oklahoma, and Bixby Public Works Authority, should be dismissed without prejudice for failure to obtain service of process within the time prescribed by Rule 4(m), Fed.R.Civ.P.

The Court finds that Plaintiff, Wendell Tenison's state tort claims against Defendant, Micky Webb, as an individual and in his capacity as city manager of Bixby, Oklahoma, should be dismissed with prejudice based upon individual immunity under section 163(C) of the Governmental Tort Claims Act ("Act"), Okla. Stat. tit. 51, § 151, et seq. and based upon exemptions under section 155 of the Act. The Court finds that Plaintiff, Wendell Tenison's state tort claims against Defendant, Bixby Public Works Authority, should be dismissed with prejudice based upon exemptions under section 155 of the Act. The Court finds that Plaintiff, Betty Tenison's claims against Defendants, Micky Webb, as an individual and in his capacity as city manager of Bixby, Oklahoma, and Defendant, Bixby Public Works Authority, should be dismissed with prejudice for failure to state a claim for relief, Rule 12(b)(6), Fed.R.Civ.P.

From the record, the Court notes that Defendants, Bixby City Council Members, Trustees of the Bixby Public Works Authority, Ed Stone, individually, and Joe Williams, individually, have not been served within the time prescribed by Rule 4(m), Fed.R.Civ.P. Pursuant to Rule 4(m), Plaintiffs, Wendell Tenison and Betty Tenison, are given notice that these Defendants shall be dismissed without prejudice, unless Plaintiffs demonstrate in writing on or before January 23, 1996, good cause for the failure to obtain service upon these Defendants.

Based upon the foregoing, the Motion to Dismiss of Defendant, Micky Webb (Docket Entry #13) and the Motion to Dismiss of Defendant, Bixby Public Works Authority (Docket Entry #15) are

GRANTED. In addition, Plaintiffs, Wendell Tenison and Betty Tenison, are given notice that Defendants, Bixby City Council Members, Trustees of the Bixby Public Works Authority, Ed Stone, individually, and Joe Williams, individually, will be dismissed without prejudice unless Plaintiffs demonstrates in writing on or before January 23, 1996, good cause for the failure to obtain service upon these Defendants.

ENTERED this 12th day of January, 1996.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

F I L E D

ANDREW BRANDYS,)
)
Plaintiff,)
)
vs.)
)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

JAN 12 1996

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

Case No. 93-C-1021-W

ENTERED ON DOCKET
DATE JAN 16 1996

ORDER

This order pertains to Plaintiff's Motion for Attorney Fees Pursuant to the Social Security Act (Docket #14), Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (Docket #15), Defendant's Response to Plaintiff's Motion for Attorney's Fees (Docket #16), Defendant's Response to Plaintiff's Application for Attorney Fees and Expenses Under EAJA (Docket #17), and Plaintiff's Response to Court's Order of December 9, 1995 (Docket #19). On August 21, 1995, the court granted judgment to plaintiff (Docket #13).

Pursuant to 42 U.S.C. § 406(b)(1), "[w]henver a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for

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

such representation, not in excess of 25 per cent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment" Counsel states that he expended 13.65 hours on this case and seeks fees in the amount of \$132.00 per hour. Plaintiff's monthly benefit rate has not yet been determined by the Commissioner and the amount of past due benefits is also not yet known.

Pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), a prevailing party is entitled to attorney's fees in an action against the United States, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. The Commissioner has not argued that it was substantially justified in its position in this case.

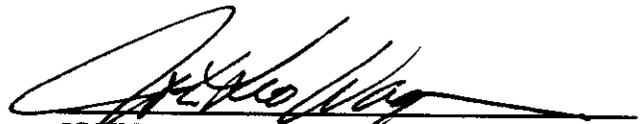
Defendant partially objects to plaintiff's counsel's motion for fees pursuant to § 406(b), pointing out that one of the hours claimed was for preparation of counsel's fee petition and time spent petitioning for fees is not properly chargeable to one's client and is not compensable under § 406(b). Whitt v. Califano, 601 F.2d 160, 161 n.2 (4th Cir. 1979). Thus, Defendant argues that, under this statute, counsel is only entitled to compensation for 12.65 hours related to the judicial portion of this case.

Under § 2412(d)(2)(A) of the EAJA, attorney's fees are not to be awarded in excess of \$75.00 per hour, "unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved justifies a higher fee." Complete discretion is afforded district courts in awarding such fees. Pierce v. Underwood, 487 U.S. 552, 571 (1988); Headlee v. Bowen, 869 F.2d 548, 551 (10th Cir.), cert. denied, 493 U.S. 979 (1989). Fees are to be computed using

the most recent publication of the CPI-Detailed Report, U.S. Department of Labor, Bureau of Labor Statistics, including the Consumer Price Index for All Urban Consumers ("CPI-U"). According to the Report, the CPI-U was 93.4 in October of 1981 and 152.9 in August of 1995. To compute the percentage of change, the old CPI-U is subtracted from the new one, which leaves 59.5, and that number is divided by the old CPI-U, which is .64, and multiplied by 100, which results in a 64% change. The base hourly rate for attorney's fees is \$75.00 and 64% of that rate is \$48.00. The adjusted hourly rate is the base rate plus the increase in fee resulting from a higher CPI-U, or \$123.00 per hour.

Counsel is only entitled to fees in this case under one statute. Plaintiff's Motion for Attorney's Fees Pursuant to the Social Security Act (Docket #14) is denied and Plaintiff's Motion for Attorney's Fees Pursuant to the Equal Access to Justice Act (Docket #15) is granted. Counsel is awarded EAJA fees for 13.65² hours at a rate of \$123.00 an hour, for a total of \$1,678.95. Once plaintiff's past due benefits are determined by the Commissioner, the court will determine if he deserves to be awarded fees under §406(b)(1) and, if so, he will refund the smaller fee to his client, as required by Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986).

Dated this 12th day of January, 1996.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:brandys.3

²Counsel may receive fees for the hour of time spent preparing his petition for counsel fees under the EAJA. Commissioner, Immigration and Naturalization Service v. Jean, 496 U.S. 154 (1990).

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

GAIL L. OFFERMANN, M.D.,)
)
 Plaintiff,)
)
 vs.)
)
 CLAREMORE REGIONAL HOSPITAL;)
 WILLIAM O. SMITH, M.D.,)
 DENNIS E. MOURNING, M.D.,)
 LARRY I. YOUNG, M.D.,)
 TIMOTHY R. BOWER, M.D., WES)
 W. MCFARLAND, D.O. and KEN)
 SEIDEL,)
)
 Defendants.)

Case No. 95-C-1178-BU ✓

ENTERED ON DOCKET
DATE JAN 16 1996

FILED
JAN 12 1996
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

On November 30, 1995, the defendants removed the above-entitled action to this Court from the District Court of Rogers County, Oklahoma. In their notice of removal, the defendants asserted that the plaintiff had presumably alleged a claim under section 1 of the Sherman Act, 15 U.S.C. § 1, and that removal was proper under 28 U.S.C. § 1441. The plaintiff has timely filed an application seeking to remand this action to the District Court of Rogers County, Oklahoma. In her application, the plaintiff asserts that she has not alleged a claim against the defendants under the Sherman Act; rather, she has alleged a claim against the defendants under Oklahoma's antitrust statute, Okla. Stat. tit. 79, § 1. The defendants have objected to the plaintiff's application and the plaintiff has replied thereto.

The jurisdictional rules for removal are well established. Under 28 U.S.C. § 1441(a), the defendant or defendants may remove

"any civil action brought in a State court of which the district courts of the United States have original jurisdiction." The Supreme Court, in Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 207 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987), discussed removal under § 1441:

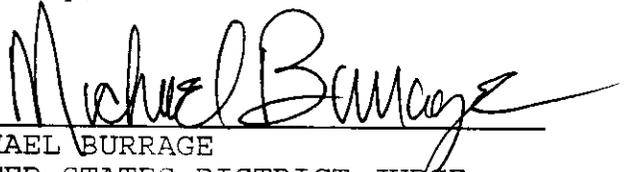
Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal question jurisdiction is required. The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law. (citations omitted).

Upon review of the parties' submissions and the plaintiff's amended petition, the Court concludes that the plaintiff has not alleged a federal claim under the Sherman Act against the defendants. The plaintiff has not made any allegations of a conspiracy, contract or combination between the defendants to unreasonably restrain trade. Randy's Studebaker Sales, Inc., 533 F.2d 510, 516 (10th Cir. 1976) (two elements of a section 1 claim under the Sherman Act are unreasonable restraint of trade and a conspiracy, contract or combination to attain it); 15 U.S.C. § 1. It appears that the plaintiff is pursuing relief from the defendants under section 1 of Title 79 of the Oklahoma Statutes based upon the language that "every act . . . in the form of trust, or otherwise, . . . in restraint of trade or commerce within this State is hereby declared to be against public policy and illegal." Okla. Stat. tit. 79, § 1. As a federal question does not appear on

the face of the plaintiff's amended petition and the plaintiff and the defendants are citizens of the same state, the Court finds that it lacks subject matter jurisdiction over this action and that this action must be remanded to the District Court of Rogers County, Oklahoma. 28 U.S.C. § 1447(c).¹

Accordingly, the plaintiff's Application to Remand to the District Court of Rogers County (Docket Entry #7) is GRANTED. The Clerk of the Court is directed to effect the remand of this matter to the District Court of Rogers County, Oklahoma.

ENTERED this 11th day of January, 1996.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

¹In remanding this action to the state court, the Court makes no determination as to the merits of the plaintiff's claim. That determination should be made by the state court.

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

FILED

JAN 12 1996

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

TERRY L. HILL,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 Commissioner of Social Security,¹)
)
 Defendant.)

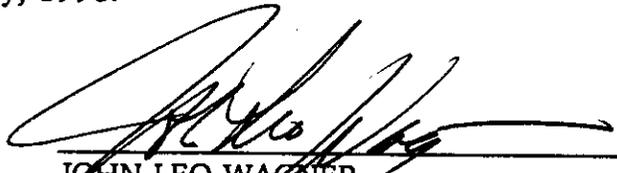
Case No: 94-C-720-BU /

ENTERED ON DOCKET
DATE JAN 16 1996

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed January 12, 1996.

Dated this 12th day of January, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

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

F I L E D

JAN 12 1996

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

TERRY L. HILL,

Plaintiff,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

Case No. 94-C-720-~~B~~W ✓

ENTERED ON DOCKET

DATE JAN 10 1996

ORDER

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

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

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

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

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

22

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertion and nonexertional requirements of sedentary work, except for occasional lifting of more than 10 pounds, frequent lifting of more than 5 pounds, prolonged standing or walking, and excessive bending or twisting. He concluded that claimant's pain and other symptoms did not affect his concentration or prevent the performance of sedentary work with these limitations. He found that claimant was unable to perform his past relevant work as a roustabout, maintenance foreman, and pumper/roustabout. He noted that claimant was 47 years old, which is defined as a younger individual, had a high school education, and in view of his age and residual functional capacity, transferability of work skills was not material. He concluded that there were a significant number of jobs in the national economy which claimant could perform, such as assembler and inspector. Having determined that claimant's impairments did not prevent him from performing a significant number of jobs, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

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

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

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

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

- (1) The ALJ erred in failing to consider claimant's hearing loss.
- (2) The ALJ's determination of claimant's residual functional capacity did not take into consideration medical evidence that he suffers a severe back condition.
- (3) The ALJ erred in failing to find that claimant suffered disabling depression and anxiety caused by pain and medications which would affect his residual functional capacity.
- (4) The ALJ's hypothetical question to the vocational expert was defective.

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

Claimant suffered a back injury on March 24, 1990 when he slipped on some ice and twisted his back (TR 225). He had a CAT scan which showed a left paracentral L5-S1 disk herniation and he elected to have Dr. Brian Howard perform a hemilaminectomy and discectomy of his L5-S1 disc on April 24, 1990 (TR 168-174, 225). Post-operatively he did well, except for occasional mild soreness in his midline lower back, for which he took anti-inflammatory medications (TR 225). He developed a gastrointestinal hemorrhage secondary to that, and underwent an esophagogastroduodenoscopy, which showed a gastric ulcer (TR 225). He required a transfusion on August 27, 1990 (TR 182-183, 225). He was given Zantac and no further stomach problems have occurred.

From July 30, 1990 through October 12 1990, claimant was enrolled in a CHART rehabilitation program and made good progress, but continued to have some discomfort in his lower back, which was aggravated by activity (TR 225, 286-87). A repeat MRI on January 8, 1991 showed degenerative disk disease at the L3-4, L4-5, and the previous L5-

S1 level, without evidence of recurrent disk herniation (TR 195, 225). He was given a permanent partial impairment rating for worker's compensation purposes on January 18, 1991. (TR 225, 261).

Claimant returned to Dr. Howard's office on May 13, 1992, complaining of pain in his lower back with radiation into the backs of both legs and into the plantar aspect of both feet, mainly on the right (TR 225). He had had no precipitating injury. (TR 225). An MRI showed a small left paracentral disk herniation versus post-operative scar at the L5-S1 level (TR 225). He received two epidural steroid injections without significant improvement (TR 225).

Claimant was seen by Dr. Karl Detwiler on June 8, 1992, who felt that continued conservative care was indicated (TR 225). Claimant re-entered the CHART program, but was unable to continue because of persistent severe pain (TR 225). He was ultimately referred for a computerized axial tomographic scan, which was performed on August 27, 1992 (TR 225). The scan showed persistent degenerative disk disease and narrowing at the L5-S1 level with facet hypertrophy and some foraminal stenosis (TR 226). He was re-evaluated by Dr. Detwiler, in light of his ongoing pain and the degenerative changes of his facet joints. (TR 226). Both Dr. Detwiler and Dr. Howard concurred in recommending a decompressive laminectomy and fusion (TR 226).

Claimant underwent a bilateral decompressive laminectomy at L-5, a bilateral L5-S1 medial facetectomy and superior L-5 medial facetectomy, left discectomy L4-L5 and L5-S1, autologous mass fusion L4 to S1, and rogozinski rodding L4 to S1 on September 22, 1992 (TR 230-236). By May of 1993, Dr. Detwiler reported that claimant was suffering back

pain, but he ambulated well, had no evidence of weakness, and his sensation and reflexes were normal (TR 272) In June of 1993, he enrolled in a WET aquatic exercise program (TR 290-291).

By August 30, 1993, Dr. Detwiler reported that claimant continued to suffer back and left leg pain, especially with activity, and did not feel he had improved since the surgery, but he had no weakness and had normal sensation and reflexes (TR 271). The doctor noted that there was decreased range of motion (TR 271). On October 13, 1993, the doctor noted similar complaints and findings, but stated that a lumbar myelogram and post myelogram CT were performed on October 5, 1993 (TR 283). The doctor concluded:

On these there is noted to be evidence of rapid narrowing of the thecal sac and nerve rootlets from L5-S1 distally. There is no evidence of disk herniation on my evaluation and likewise there is no evidence of compression of the nerve rootlets at any point. These studies are more consistent with epidural fibrosis.

It is my impression that the patient does indeed have epidural fibrosis related to his lumbar disk surgery x two. I do not believe that he would be benefitted with further surgical intervention. At this point I feel that Mr. Hill would only benefit from a chronic pain program as he is unable to tolerate non-steroidal anti-inflammatories secondary to gastritis and GI bleeding.

(TR 283).

On October 13, 1993, Dr. Howard stated that, due to the claimant's back problems, he could not lift over 10 pounds, could not repetitively lift over 5 pounds, and could not stand or walk for prolonged periods or do excessive bending or twisting (TR 294).

On December 9, 1992, claimant underwent a psychiatric consultative examination (TR 243). The doctor noted that he was "sad, but cooperative" and "well-grounded in current external reality." (TR 244). The doctor found that he "feels himself to be

somewhat less than a worthwhile person and experiences chronic, recurrent insomnia as a result of his low back pain." (TR 244). The doctor noted that, while claimant was anxious and depressed, he was able to care for himself (TR 243). He was found to exhibit normal affect, orientation, memory, fund of information, judgment, and ability to do calculations (TR 244). The doctor's diagnosis was "Axis I. (1) Major depression, chronic, moderate in severity. (2) Generalized anxiety disorder, chronic, moderate in severity. Axis II. No diagnosis." (TR 244).

Dr. R. Smallwood did a psychiatric review of claimant on March 24, 1993 and concluded that claimant's affective disorder was not severe and only slightly affected his daily activities, social functioning, and concentration. (TR 107-113).

The ALJ concluded that claimant did well after his first surgery until May of 1992, when his symptoms recurred, and then, after his second surgery, he had pain, but no muscle weakness or atrophy, sensory loss, or reflex change in his lower extremities (TR 14). The ALJ pointed out that, following the first surgery, claimant entered a reconditioning program and was discharged at a medium physical demand level (fifty pounds), and on November 4, 1990, his doctor stated that he "could return to work at his regular duties" (TR 15, 261). However, a month later the doctor ordered an MRI because claimant's pain was getting progressively worse and two months later he concluded claimant had degenerative disc disease at L3-4, L4-5, and L5-S1, had reached maximal medical benefit, and was permanently partially impaired. (TR 260-261).

The ALJ relied on Dr. Howard's report of October 13, 1993 to find that claimant's back impairment limited him to sedentary work, which involves lifting no more than 10

pounds at a time, and occasionally lifting or carrying articles like docket files, ledgers, and small tools, is performed primarily in a seated position, and entails no significant stooping (TR 15). The ALJ concluded that the medical opinion of Dr. Howard was supported by the laboratory and physical findings contained in the record, which showed no impairment in the use of the arms and hands (TR 15). He observed that Dr. Howard reported claimant was temporarily totally disabled on July 17, 1992, but he subsequently underwent a lumbar fusion in September 1992, so the opinion of Dr. Howard was not inconsistent with the determination that there was no impairment which prevented him from performing sedentary work for a period of 12 consecutive months.

The ALJ found no evidence of any other physical problems that would preclude claimant from doing sedentary work (TR 16). He stated:

The record shows the claimant has complained of a hearing loss, however, these complaints are not documented in the record. Furthermore, medical reports demonstrate the claimant has no problem hearing a normal conversational voice without the use of any assistive device (Exhibit 17). Notably, the claimant had no difficulties hearing the Administrative Law Judge at the hearing.

(TR 16). Exhibit 17 at page 157 of the record does not mention anything about claimant's hearing.

The ALJ discussed the December 9, 1992 psychiatric examination and claimant's testimony that his depression "messes up" his mind (TR 18, 48). The ALJ stated:

The claimant's list of current medications shows only Elavil which was prescribed in June 1993 (4 months prior to the hearing), and is taken by the claimant at bedtime to help him sleep . . . at least 6 hours. The claimant also testified that his "pain" medication makes him confused; however, the claimant takes Elavil only at night which would not interfere with his daily activities. Furthermore, the claimant testified at the hearing that despite his complaints of confusion, he is able to follow the plot of a television show

while watching television, which he indicated he does most of the day. Thus, the substantial evidence shows the claimant's mental problems have resulted in no more than slight restrictions of activities of daily living, no more than slight difficulties in maintaining social functioning, and no more than seldom deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner. There is no evidence the claimant's mental problems have resulted in any episodes of deterioration or decompensation in work or worklike settings.

(TR 18).

The ALJ also noted that claimant described his daily pain as moderate to severe, said he cannot stand or walk more than thirty minutes, sit more than sixty minutes, lift more than a gallon of milk, and bend or stoop (TR 18-19, 54-55). He also noted that claimant could not take anti-inflammatory medications, so he only used Tylenol for pain (TR 19). Based on these facts, examinations showing no muscle weakness or sensory loss, laboratory tests showing a solid fusion and no further disk herniation, the absence of an assistive device for ambulation, and claimant's ability to care for himself, do simple household chores, walk six blocks a day, and drive 100 miles with only one stop, the ALJ concluded he did not suffer severe, disabling pain (TR 19).

The ALJ satisfied the burden to fully and fairly develop the record in this case. See, Baker v. Bowen, 886 F.2d 289 (10th Cir. 1989). The ALJ's conclusion that "claimant has no problem hearing a normal conversational voice without the use of any assistive device" (TR 16) is supported by substantial evidence. The Report of Lay Information prepared by a social security disability examiner on November 3, 1992 states:

In reference to his hearing, he says that working around oil fields all his life has damaged his hearing. He has not been to a doctor for hearing loss, and has no test records, although he did get tested by a mobile facility once. He does not wear a hearing aid and there is no amplifying device on his phone. Claimant had no trouble hearing normal conversational voice on the

telephone (TR 157).⁴

This record is further substantiated by the observations of the ALJ during the hearing, where he found that claimant had no vocationally significant hearing loss.⁵

Claimant has presented the court with medical review article by Dr. David W. Guyer concerning arachnoiditis, a "nonspecific inflammatory process causing fibrosis and hyalinization of the arachnoid membrane, which becomes thickened and adherent to both the pia and dura mater," leading to changes ranging from clumping of nerve roots and blunting of nerve root pouches to multisegmental transverse obliteration of the subarachnoid space. The article states that the vast majority of cases are caused by medical intervention, primarily spine surgery and myelography.

Claimant has had two spinal surgeries and Dr. Detwiler concluded on October 13, 1993 that claimant has epidural fibrosis⁶ related to the surgeries. Claimant's counsel suggests that the court has a burden to develop the record as to the possibility that claimant suffers from arachnoiditis. Dr. Guyer's article states that, of 51 patients diagnosed with arachnoiditis, 37% worked full-time until retirement, 13% were able to work part-

⁴ The ALJ incorrectly characterizes this as a "medical report", when it really originated from a telephone interview with claimant conducted by a disability examiner (TR 16). In this context, where the ability to hear and communicate is readily observable by a lay person, the inadvertent mischaracterization of the origin of the report is harmless.

⁵ The claimant's brief draws the court to several instances where the claimant either misunderstood a question asked, or did not hear it clearly, and requested that it be repeated (TR 39, 41-46, 49, 51, 57, 60). The court has carefully reviewed the transcript, and finds that in each instance, once the question was repeated, the claimant had no problem hearing, understanding, and giving an appropriate answer. Having reviewed thousands of pages of transcript during the course of a judicial and legal career, the court has noticed nothing out of the ordinary in this hearing transcript. Such misstarts during the course of a question and answer interrogation are exceedingly common even where there is no question but that the person being examined has normal hearing. Although it makes sense that claimant may have experienced some hearing loss as a result of his years in the oilpatch, he has failed to show the existence of a hearing loss that is vocationally significant. The ALJ's reliance on his first hand experience with claimant at the hearing, and on the documented experience of the disability examiner, constitutes substantial evidence supportive of his decision.

⁶ "Fibrosis" is an abnormal formation of fibrous tissue and "epidural" relates to the outer membrane covering the spinal cord.

time, and 50% were unable to work at all. It is clear that a diagnosis of arachnoiditis would not mandate a finding of disability. Even if this argument has not been waived by the failure to raise it below, as is urged by the Secretary, there is sufficient evidence in the record to establish claimant's exertional capacity, as well as any diminution of that capacity because of pain. Claimant's exertional capacity has been established by substantial evidence, and is unlikely to change even if a remand allowed a supplemental diagnosis of arachnoiditis to be obtained. Such a diagnosis may more fully explain the etiology of existing pain, but such explanation would not affect claimant's residual functional capacity, as the ALJ has already fully considered the amount of pain present in making that determination (TR 18-19).

There is no merit to claimant's contention regarding a disabling mental condition. Both Dr. Dean and Dr. Smallwood found that claimant's depression was not severe and did not affect his daily activities (TR 107-113, 243-44).

AFFIRMED.

Dated this 11th day of January, 1995.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:hill.002

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

FILED

JAN 12 1996

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

WILLIAM L. PATCH,)
)
Plaintiff,)
)
vs.)
)
UNITED SERVICES AUTOMOBILE)
ASSOCIATION,)
)
Defendant.)

Case No. 95-C-54-BUR

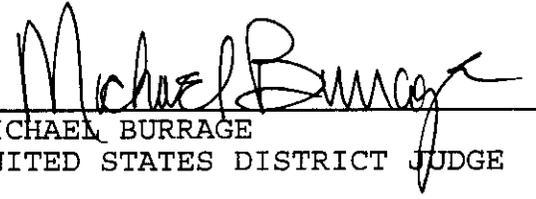
ENTERED ON DOCKET

ORDER

DATE JAN 16 1996

This matter comes before the Court upon Plaintiff, William L. Patch's Motion for Dismissal filed on January 8, 1996. For good cause shown, the Court **GRANTS** Plaintiff's Motion and **DISMISSES WITH PREJUDICE** the above-entitled action.

ENTERED this 11th day of January, 1996.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILE
JAN 12 1996
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CHARLES M. COATS,
Plaintiff,
vs.
FLINT INDUSTRIES, INC.,
a Delaware corporation,
Defendant.

Case No. 95-C-524-BU ✓

ENTERED ON DOCKET
DATE JAN 16 1996

ORDER

This matter comes before the Court upon Plaintiff, Charles M. Coats' Application to Dismiss With Prejudice Damages Claim against Flint Industries, Inc (Docket Entry #20). Upon due consideration of the unopposed motion, the Court hereby **GRANTS** the application and **DISMISSES WITH PREJUDICE** the above-entitled action.

ENTERED this 11th day of January, 1996.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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at an hourly rate of \$118.20. Under the EAJA, the statutory maximum for attorney fees is \$75.00 per hour. Counsel claims an entitlement to the higher rate based on the increased cost of living since the enactment of the EAJA in 1981 as evidenced by the Consumer Price Index published by the United States Department of Labor.

Section 2412(d)(2)(A) of the EAJA provides that: ". . . attorney's fees shall not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved justifies a higher fee." Complete discretion is afforded district courts in awarding attorney fees under the EAJA. Pierce v. Underwood, 487 U.S. 552, 571 (1988); Headlee v. Bowen, 869 F.2d 548, 551 (10th Cir.), cert. denied, 493 U.S. 979 (1989).

According to the CPI-Detailed Report, U.S. Department of Labor, Bureau of Labor Statistics (June 1994), the Consumer Price Index for All Urban Consumers ("CPI-U") was 93.4 in 1981 and 153.2 in September, 1995. To compute the percentage of change, the old CPI-U is subtracted from the new one, which leaves 59.80, and that number is divided by the old CPI-U, which is .64, and multiplied by 100, which results in a 64% change. The base rate for attorney's fees is \$75.00 and 64% of that rate is \$48.00. The total fee is the base rate plus the increase in fee resulting from a higher CPI-U, or a total fee of \$123.00 per hour.

Plaintiff is awarded an Equal Access to Justice Attorney Fee at the rate of \$123.00 per hour multiplied by 19.00 hours for a total fee of \$2,337.00 plus filing fees and court costs in the amount of \$127.10. Plaintiff is awarded a total award of Attorney Fees and

Costs pursuant to the Equal Access to Justice Act in the total amount of \$2,464.10.

Dated this 11th day of January, 1996.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:Akers.3

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PEGGY YERTON,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
 et al.,)
)
 Defendants,)

Case No. 95-C-496-B

FILED

ENTERED ON DOCKET

JAN 11 1996

DATE JAN 12 1996

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

STIPULATION OF DISMISSAL

COMES NOW the Plaintiff, Peggy Yerton, by and through her attorney, David M. Anderson, Defendant, USA, by and through Stephen C. Lewis, U.S. Attorney for the Northern District of Oklahoma and Phil Pinnell, Assistant U.S. Attorney and Defendant, First American Title and Abstract Company, by and through its attorney, Mark W. Dixon and submit this Stipulation of Dismissal of the above styled cause.

PEGGY YERTON, PLAINTIFF
by David M. Anderson
David M. Anderson, OBA#270
Attorney for Plaintiff

USA, DEFENDANT
by Phil Pinnell
Phil Pinnell, OBA#7169
Attorney for Defendant

FIRST AMERICAN TITLE & ABSTRACT CO,
DEFENDANT
by Mark W. Dixon
Mark W. Dixon, OBA#2978,
Attorney for Defendant

*approved as dismissal
of all claims.. -
1-11-96
Shawna K. [Signature]*

FILED

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

JAN 11 1996

STATE FARM FIRE AND CASUALTY)
COMPANY, an Illinois Corporation)

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

Plaintiffs,)

vs.)

Case No. 95-C-187B

BUILDING SYSTEMS OF TULSA, INC.,)
a Oklahoma Corporation,)

Defendant/Third-Party)
Plaintiff)

vs.)

ENTERED ON DOCKET

U-HAUL COMPANY OF OKLAHOMA, INC.,)
an Oklahoma Corporation,)

DATE JAN 12 1996

Third-Party Defendant.)

ORDER OF DISMISSAL

COMES NOW the Court on this 11 day of January, 1996, and having considered the Joint Application For Dismissal filed by all parties herein, does find that said motion should be, and is hereby, sustained and that the claims of all parties should be dismissed without prejudice to their rights to refile the same.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the claims of Plaintiff, State Farm Fire and Casualty Company, Defendant, Building Systems of Tulsa, Inc. and Third-Party Defendant, U-Haul Company of Oklahoma, Inc., are hereby dismissed without prejudice to their rights to refile the same.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OKLAHOMA

ENTERED ON DOCKET
DATE JAN 12 1996

MARSHA K. SMITH,)

Plaintiff,)

vs.)

LEON DODSON, an Individual,)

Defendant.)

Case No. 95-C 213K

FILED

JAN 11 1996

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

ORDER

NOW on this 11 day of Jan, 1996 comes on before me the undersigned Judge of the above entitled action the Plaintiff's Motion to Dismiss. The Court having reviewed the pleadings filed herein and fully advised in the premises finds said motion should be sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint filed in the above captioned matter be dismissed without prejudice.

s/ **TERRY C. KERN**

JUDGE OF THE DISTRICT COURT