

DEFENDANTS

By Sheila M. Powers

R. Casey Cooper, OBA #1897
Sheila M. Powers, OBA #013757
Of BOESCHE, McDERMOTT & ESKRIDGE
100 West Fifth, Suite 800
Tulsa, OK 74103-4216
(918) 583-1777

ATTORNEYS FOR DEFENDANTS
ALLIED CORPORATION, ALLIED-SIGNAL
INC., ALLIED-SIGNAL GROUP BENEFITS
PROGRAM AND CONNECTICUT GENERAL LIFE
INSURANCE COMPANY, IMPROPERLY NAMED
AS CIGNA GROUP INSURANCE

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

DEC 09 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
ONE 1989 FORD F150 SUPERCAB)
PICKUP TRUCK,)
VIN NO. 1FTEX15Y5KKA32522,)
)
Defendant.)

CIVIL ACTION NO. 96-C-³⁴²~~341~~-E

ENTERED ON DOCKET
DATE DEC 10 1996

**JUDGMENT OF FORFEITURE
BY DEFAULT AND BY STIPULATION**

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture by Default and by Stipulation against the defendant vehicle and all entities and/or persons interested in the defendant vehicle, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 26th day of April, 1996, alleging that the defendant vehicle was subject to forfeiture pursuant to 21 U.S.C. § 881(a)(4), because it was used, or intended to be used, to commit, or to facilitate the commission of, a violation of the drug prevention and control laws of the United States.

Warrant of Arrest and Notice In Rem was issued on the 26th day of April, 1996, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant vehicle and for publication in the Northern District of Oklahoma.

On the 14th day of June, 1996, the United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and the Order on the defendant vehicle.

The following individuals were determined to be potential claimants in this action with possible standing to file a claim herein, and the United States Marshal for the Northern District of Oklahoma personally served the following persons and entities having a potential interest in this action, to-wit:

- | | | |
|----|---------------|---------------|
| 1. | Lanell Rios | June 26, 1996 |
| 2. | Tate Edmonson | July 6, 1996 |
| 3. | Santiago Rios | July 31, 1996 |

United States Marshals 285s reflecting the services set forth above are on file herein.

All persons or entities interested in the defendant vehicle were required to file their claims herein within ten (10) days after service upon them of the Warrants of Arrest and Notices In Rem, publication of the Notices of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s). On July 2, 1996, Lanell Rios filed her Claim and Answer herein; subsequently Lanell Rios executed a Stipulation for Forfeiture of the defendant vehicle. This Stipulation for Forfeiture was filed on October 8, 1996. On July 26, 1996, Tate Edmondson executed a Disclaimer of Interest, which was filed herein on August 5, 1996.

No other persons or entities upon whom service was effected more than thirty (30) days ago have filed a Claim, Answer, or other response or defense herein.

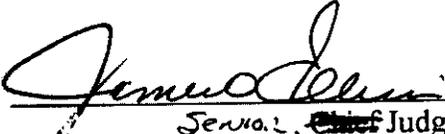
The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant vehicle was located, on July 11, 18 and 25, 1996. Proof of Publication was filed August 20, 1996.

No other claims in respect to the defendant vehicle have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant vehicle, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant vehicle, and all persons and/or entities interested therein, except Lanell Rios, who executed Stipulation for Forfeiture, filed herein on October 8, 1996, and except Tate Edmondson who executed a Disclaimer of Interest, filed herein on August 5, 1996.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Judgment be entered against the following-described defendant vehicle:

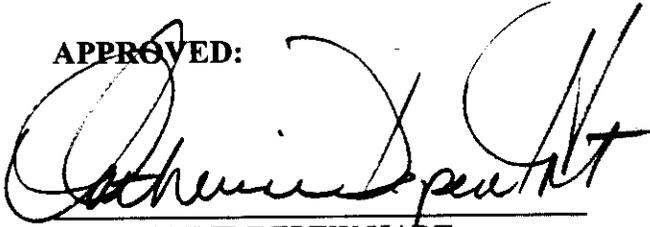
One 1989 Ford F150 Supercab Pickup Truck
VIN No. 1FTEX15Y5KKA32522

and that such defendant vehicle be, and it is, forfeited to the United States of America for disposition according to law.



Senior, ~~Chief~~ Judge of the
United States District Court

APPROVED:

A handwritten signature in black ink, appearing to read "Catherine Depew Hart". The signature is written in a cursive style with large, sweeping letters. It is positioned above a horizontal line.

CATHERINE DEPEW HART
Assistant United States Attorney

NAUDDLPEADENFCRIOSJUDGMENT

MW

ENTERED ON

DATE 12-10-96

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

F I L E D

DEC 6 1996

PP

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Patricia Thomas,)
)
Plaintiff,)
)
vs.)
)
P.M.B. Enterprises West, Inc.,)
a New Mexico corporation,)
)
Defendant.)

Case No. 96-C-672-K ✓

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiff, Patricia Thomas, and the Defendant, P.M.B. Enterprises, Inc., jointly stipulate and agree that this action should be and is dismissed with prejudice. Each party has agreed to bear its or her own costs, attorney's fees and expenses.

Dated this 26th day of November, 1996.

Sheila Gladstone, 12/2/96
Sheila Gladstone, Esq.
Haynes & Boone, L.L.P.
1600 One American Center
600 Congress Ave.
Austin, Texas 78701
(512) 867-8400
ATTORNEY FOR DEFENDANT

Ralph Simon
Ralph Simon, OBA #8254
403 S. Cheyenne, Ste. 1200
Tulsa, Oklahoma 74103-3807
(918) 582-9339
ATTORNEY FOR PLAINTIFF

9

RT

ENTERED

DATE 12-10-96

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

TEDDY J. INMAN,

Plaintiff,

vs.

SHIRLEY S. CHATER,
COMMISSIONER OF THE SOCIAL
SECURITY ADMINISTRATION,

Defendant.

No. 95-C-445-W ✓

FILED

DEC 06 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the Defendant's Objections to the Report and Recommendation of the Magistrate Judge.¹ This is a civil action of the plaintiff pursuant to 42 U.S.C. §405(g), seeking review of the Secretary's denial of disability benefits.

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)
2. A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).
3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).
4. A person who is able to perform work he has done in the past is not disabled. 20

¹ Although framed as a "Judgment", the Magistrate Wagner's Order and Judgment in this matter will be treated as a report and recommendation as no consent to proceed before a magistrate judge was entered.

C.F.R. §416.920(e).

5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Serv., 898 F.2d 774, 776 (10th Cir. 1990).

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

The Plaintiff was born on August 13, 1945, completed a high school education, and worked

as a pipefitter his entire life. He alleges suffering from a disability since November, 1991 as a result of pituitary adenoma with surgery and radiation treatments, back problems, fatigue, a memory loss, high blood pressure, and shoulder and ankle problems.

In support of her denial of Plaintiff's claim, the Secretary found that the Claimant was not disabled within the meaning of the Social Security Act. Specifically, the ALJ found that the claimant was severely impaired as a result of pituitary adenoma, degenerative disk disease of the lumbar spine, status post dislocation of the right shoulder, and degenerative joint disease of the ankle. Additionally, subjective evidence of the claimant's pain was presented; however, the ALJ concluded that the pain was not of such intensity as to preclude claimant from engaging in all substantial gainful activity. The ALJ determined that the claimant was unable to return to his former line of work as a pipefitter, but that he could perform work of a sedentary nature. Since the ALJ found that the claimant was capable of performing sedentary work, he concluded that the claimant was not disabled, and denied benefits accordingly. The Plaintiff sought relief from the ALJ's decision claiming six points of error:

- (1) The ALJ ignored the opinions of claimant's treating doctors.
- (2) The ALJ ignored claimant's exertional and nonexertional impairments, including nausea, weakness, dizziness, lack of a sense of taste, smell, and thirst, ankle, back, and shoulder pain, and poor memory.
- (3) The ALJ placed incorrect weight on a VA disability rating.
- (4) The ALJ improperly relied on the social security grids.
- (5) The ALJ did not properly question the vocational expert.
- (6) The decision of the ALJ that claimant can do sedentary work is not supported by substantial evidence.

The Magistrate Judge determined that Plaintiff's first three claims of error were without merit, but found that the ALJ did not meet his burden in identifying and establishing the claimant's ability

to perform some specific occupations which encompass a significant number of available jobs. 20 C.F.R. § 404.1566(b). The Magistrate overruled the ALJ in part and recommended that the case be remanded for further testimony by a vocational expert concerning claimant's residual functional capacity and whether jobs exist in the national economy which he can perform. Defendant objected to these findings claiming that the Magistrate Judge reweighed the evidence and disregarded the deference owed to the ALJ as fact-finder.

The Court has conducted a thorough review of the record and concludes there is insufficient evidence to support a finding that the plaintiff retains the residual functional capacity to engage in a *full range* of sedentary exertional activity or that he could perform *most* jobs in the sedentary RFC level. *See, Thompson v. Sullivan*, 987 F.2d 1482, 1491 (10th Cir. 1993). Although Dr. Karathanos did complete a RFC evaluation indicating that the claimant was capable of sitting for two hours, standing or walking for 30 minutes, and sitting a total of six hours in an eight hour day, (R. at 231), this single report, in light of other evidence of the claimants exertional and nonexertional impairments is insufficient to constitute substantial evidence. Additionally, Dr. Karathanos' report suggests that the claimant's ability to lift, carry, bend, squat, crawl or climb was limited - only to be done on an infrequent basis, (R. at 321) whereas sedentary work requires *occasional* lifting and carrying of articles weighing no more than ten pounds. The record is inadequate to meet the Secretary's burden of proving that the claimant can work at a sedentary level. Likewise, it is insufficient to establish whether or not the claimant can perform *most* jobs in the full range of sedentary-level work. The ALJ's rejection of the Plaintiff's subjective complaints regarding pain were not sufficient to come to a conclusion of non-disability.

An ALJ's finding regarding the claimant's noncredibility does not compel a finding of not disabled. Rather, the credibility determination is just a step on the way to the

ultimate decision. The ALJ must also determine whether the claimant has an RFC level and can perform the full range of work at his RFC level on a daily basis.”

Thompson, 987 F.2d at 1491. The *Thompson* case is analogous to the present in terms of its evaluation of an ALJ's rejection of a claimant's subjective complaints of pain. Although the ALJ's investigation in the *Thompson* case was much less thorough than that of the ALJ in the present claim, the facts are analogous. Claimant Thompson sought disability payments for back problems and pain. She was given a prescription for the pain, but could not afford to continue, so she took Ibuprofen instead. The claimant testified that she was unable to drive, do housework or shopping, or sit, stand or walk for any length of time. The ALJ found the claimant's testimony to be not credible and determined that although she suffered enough pain to render her unable to return to her past relevant work, she retained the RFC to do sedentary work. The ALJ, without further evidence, determined that the claimant could do the full range of sedentary work, and applied the “grids” to conclude that the claimant was not disabled.

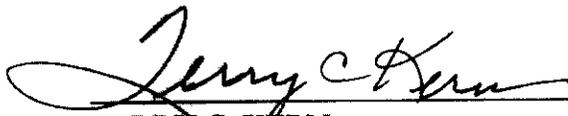
Like the *Thompson* case, the ALJ here determined that the claimant's testimony regarding the extent of his pain was not credible in light of other evidence on the record. Indeed, substantial evidence existed for the ALJ to reach this conclusion. However, the ALJ did exactly what the ALJ in *Thompson* did at that point. He, relying solely on the report of Dr. Karathanos and evidence of the Plaintiff's daily activities, determined that Mr. Inman was capable of performing the full range of sedentary work and applied the “grids” to conclude that he was not disabled. The ALJ cited as evidence of the claimant's capabilities the fact that Mr. Inman spent his day watching television, doing yard work, tending the garden and enjoying morning trips to the coffee shop. (R at 96). While these facts may preclude an initial finding of non-disability, they do not suffice to prove the claimant's ability to perform the full range of sedentary work on a daily basis. “[E]vidence that a claimant

engages in limited activities . . . does not establish that the claimant can engage in light or sedentary work activity.” *Thompson*, 987 F.2d at 1491 *citing Gossett v. Bowen*, 862 F.2d 802, 807 (10th Cir. 1988). Additionally, there is evidence in the record that Plaintiff’s mental abilities are impaired and that the type of job he might be able to perform may be limited due to his low tolerance for stress and high concentration requirements. (R. at 313, 316). Likewise, there is objective medical evidence to support the Plaintiff’s subjective reports of pain. *See, e.g.*, R. at 239. (“This is very mild degenerative change and there is some mild scoliosis. No *acute* abnormality is identified.”) (*emphasis added*); R. at 240. (“Cannot rule out loose bodies within the [ankle] joint.”); R. at 246. (“It is not known nor shown why this range of motion [in the shoulder] is so limited and so severe in limitation.”).

Due to the lack of substantial evidence on the record regarding the Plaintiff’s ability to perform the full range of sedentary work, the ALJ, per the remand order, should have “obtain[ed] evidence from a vocational expert to clarify the effect of the assessed limitations on the claimant’s occupational base. . . . In so doing, the ALJ must ensure that the hypothetical questions reflect the specific capacity/limitations established by the record as a whole.” (R at 286).

Defendant’s objections (docket #10) are overruled. The case is hereby REVERSED and REMANDED for further testimony by a vocational expert concerning claimant’s residual functional capacity and whether jobs exist in the national economy which he can perform.

SO ORDERED THIS 5th DAY OF NOVEMBER, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON FILE
12-10-96

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

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
v.)
)
ESTATE OF RONALD L. McMUNN,)
Deceased, George S. Stoia,)
Administrator; SHIRLEY ANN McMUNN,)
individually and as personal)
representative of the Estate of)
Ronald L. McMunn; STEPHEN LEE)
McMUNN; LINDA KAY MEAKES;)
MARC McMUNN; BRAD MURRAY;)
LORI O'DELL; BOARD OF COUNTY)
COMMISSIONERS OF WASHINGTON)
COUNTY,)
)
Defendants.)
)

Civil No. 96-CV-601-K ✓

F I L E D

DEC 06 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION AND ORDER TO DISMISS
BRAD MURRAY

Plaintiff, the United States of America, and Defendant, Brad Murray, hereby stipulate to the dismissal of Brad Murray, for the reason that he claims no interest in the subject real property at issue in this matter. The parties rely on the following facts in support of their joint stipulation:

1. On July 1, 1996, the United States filed suit: i) to reduce to judgment the federal income tax assessments made against taxpayers Ronald L. McMunn and Shirley A. McMunn in the total amount of \$12,771.74 for the taxable year 1985; and ii) to foreclose the federal tax liens against the subject real property held in the name of Ronald L. McMunn, who is now deceased.
2. Brad Murray was named as a Defendant to this action pursuant to 26 U.S.C. Section 7403(b), only insofar as he might claim an interest in the subject real property.

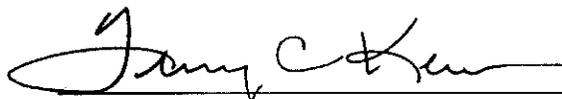
3. The subject real property is located in Washington, County, Oklahoma, and is described as:

Lot Four (4), Block One (1), Lannom Addition,
including a 10 foot strip on west side of Lot
4, Block 1, Bartlesville, Washington, County,
Oklahoma.

4. Brad Murray agrees that he has no interest in the above described property.

WHEREFORE, the United States of America, and Brad Murray, stipulate to the dismissal of Brad Murray from the above-referenced action since he claims no interest in the subject real property.

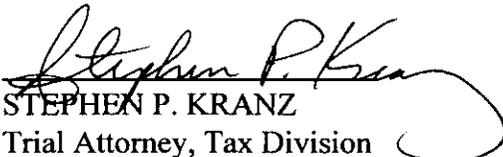
IT IS SO ORDERED THIS 5th day of December, 1996.



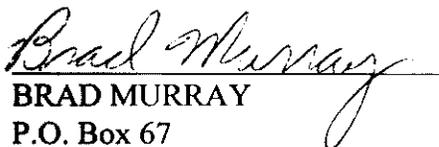
HONORABLE TERRY C. KERN, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Approved as to form:

STEPHEN C. LEWIS
United States Attorney
Northern District of Oklahoma


STEPHEN P. KRANZ
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-0079

Dated: November 4, 1996.


BRAD MURRAY
P.O. Box 67
Dewey, Oklahoma 74029

Dated: November 15, 1996.

0701
KIDANZ
8911

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

ENTERED ON DOCKET
DATE 12-10-96

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
v.)
)
ESTATE OF RONALD L. McMUNN,)
Deceased, George S. Stoia,)
Administrator; SHIRLEY ANN McMUNN,)
individually and as personal)
representative of the Estate of)
Ronald L. McMunn; STEPHEN LEE)
McMUNN; LINDA KAY MEAKES;)
MARC McMUNN; BRAD MURRAY;)
LORI O'DELL; BOARD OF COUNTY)
COMMISSIONERS OF WASHINGTON)
COUNTY,)
)
Defendants.)
_____)

Civil No. 96-CV-601-K ✓

FILED

DEC 06 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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TAX DIVISION
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**JOINT STIPULATION AND ORDER TO DISMISS
LINDA KAY MEAKES**

Plaintiff, the United States of America, and Defendant, Linda Kay Meakes, hereby stipulate to the dismissal of Linda K. Meakes, for the reason that she claims no interest in the subject real property at issue in this matter. The parties rely on the following facts in support of their joint stipulation:

1. On July 1, 1996, the United States filed suit: i) to reduce to judgment the federal income tax assessments made against taxpayers Ronald L. McMunn and Shirley A. McMunn in the total amount of \$12,771.74 for the taxable year 1985; and ii) to foreclose the federal tax liens against the subject real property held in the name of Ronald L. McMunn, who is now deceased.

5169536 JMN

2. Linda Kay Meakes was named as a Defendant to this action pursuant to 26 U.S.C. Section 7403(b), only insofar as she might claim an interest in the subject real property.

3. The subject real property is located in Washington, County, Oklahoma, and is described as:

Lot Four (4), Block One (1), Lannom Addition,
including a 10 foot strip on west side of Lot
4, Block 1, Bartlesville, Washington, County,
Oklahoma.

4. Linda Kay Meakes agrees that she has no interest in the above described property.

WHEREFORE, the United States of America, and Linda Kay Meakes, stipulate to the dismissal of Linda Kay Meakes from the above-referenced action since she claims no interest in the subject real property.

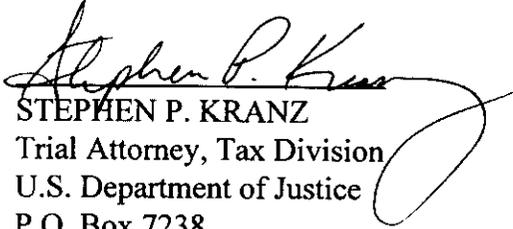
IT IS SO ORDERED THIS 5th day of December, 1996.



HONORABLE TERRY C. KERN, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Approved as to form:

STEPHEN C. LEWIS
United States Attorney
Northern District of Oklahoma



STEPHEN P. KRANZ
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-0079

Dated: November 4, 1996.



LINDA KAY MEAKES
2911 Forest Glade Road
Windsor, Ontario, Canada N8R1L4

Dated: November 8, 1996.

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

UNITED STATES OF AMERICA)
)
 Plaintiff,)
)
 v.)
)
 ESTATE OF RONALD L. McMUNN,)
 Deceased, George S. Stoia,)
 Administrator; SHIRLEY ANN McMUNN,)
 individually and as personal)
 representative of the Estate of)
 Ronald L. McMunn; STEPHEN LEE)
 McMUNN; LINDA KAY MEAKES;)
 MARC McMUNN; BRAD MURRAY;)
 LORI O'DELL; BOARD OF COUNTY)
 COMMISSIONERS OF WASHINGTON)
 COUNTY,)
)
 Defendants.)
 _____)

Civil No. 96-CV-601-K ✓

FILED

DEC 06 1996 *DL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION AND ORDER TO DISMISS
STEPHEN LEE McMUNN

Plaintiff, the United States of America, and Defendant, Stephen Lee McMunn, hereby stipulate to the dismissal of Stephen Lee McMunn, for the reason that he claims no interest in the subject real property at issue in this matter. The parties rely on the following facts in support of their joint stipulation:

1. On July 1, 1996, the United States filed suit: i) to reduce to judgment the federal income tax assessments made against taxpayers Ronald L. McMunn and Shirley A. McMunn in the total amount of \$12,771.74 for the taxable year 1985; and ii) to foreclose the federal tax liens against the subject real property held in the name of Ronald L. McMunn, who is now deceased.

2. Stephen Lee McMunn was named as a Defendant to this action pursuant to 26 U.S.C. Section 7403(b), only insofar as he might claim an interest in the subject real property.

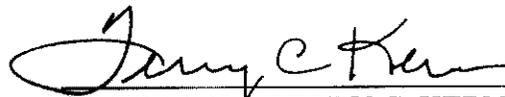
3. The subject real property is located in Washington, County, Oklahoma, and is described as:

Lot Four (4), Block One (1), Lannom Addition,
including a 10 foot strip on west side of Lot
4, Block 1, Bartlesville, Washington, County,
Oklahoma.

4. On August 13, 1996, Stephen Lee McMunn filed a statement with the Court whereby he released any interest in the above described property.

WHEREFORE, the United States of America, and Stephen Lee McMunn, stipulate to the dismissal of Stephen Lee McMunn from the above-referenced action since he claims no interest in the subject real property.

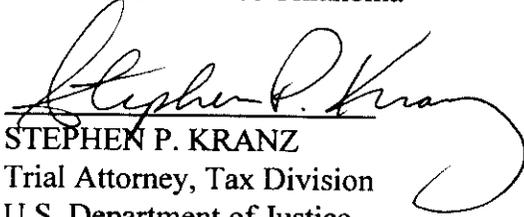
IT IS SO ORDERED THIS 5th day of December, 1996.



HONORABLE TERRY C. KERN, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Approved as to form:

STEPHEN C. LEWIS
United States Attorney
Northern District of Oklahoma



STEPHEN P. KRANZ
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-0079

Dated: November 4, 1996.



STEPHEN LEE McMUNN
2807 South Hickory
Sapulpa, Oklahoma 74066

Dated: November 5, 1996.

ENTERED ON DOCKET
12-10-96

FILED

DEC 06 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
v.)
)
ESTATE OF RONALD L. McMUNN,)
Deceased, George S. Stoia,)
Administrator; SHIRLEY ANN McMUNN,)
individually and as personal)
representative of the Estate of)
Ronald L. McMunn; STEPHEN LEE)
McMUNN; LINDA KAY MEAKES;)
MARC McMUNN; BRAD MURRAY;)
LORI O'DELL; BOARD OF COUNTY)
COMMISSIONERS OF WASHINGTON)
COUNTY,)
)
Defendants.)
_____)

Civil No. 96-CV-601-K

JOINT STIPULATION AND ORDER TO DISMISS
MARC McMUNN

Plaintiff, the United States of America, and Defendant, Marc McMunn, hereby stipulate to the dismissal of Marc McMunn, for the reason that he claims no interest in the subject real property at issue in this matter. The parties rely on the following facts in support of their joint stipulation:

1. On July 1, 1996, the United States filed suit: i) to reduce to judgment the federal income tax assessments made against taxpayers Ronald L. McMunn and Shirley A. McMunn in the total amount of \$12,771.74 for the taxable year 1985; and ii) to foreclose the federal tax liens against the subject real property held in the name of Ronald L. McMunn, who is now deceased.

He

2. Marc McMunn was named as a Defendant to this action pursuant to 26 U.S.C. Section 7403(b), only insofar as he might claim an interest in the subject real property.

3. The subject real property is located in Washington, County, Oklahoma, and is described as:

Lot Four (4), Block One (1), Lannom Addition,
including a 10 foot strip on west side of Lot
4, Block 1, Bartlesville, Washington, County,
Oklahoma.

4. Marc McMunn agrees that he has no interest in the above described property.

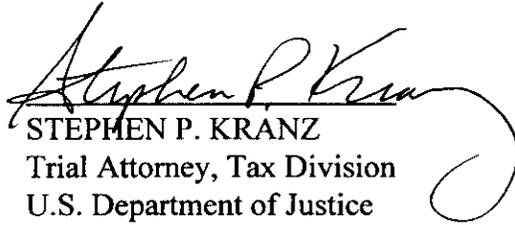
WHEREFORE, the United States of America, and Marc McMunn, stipulate to the dismissal of Marc McMunn from the above-referenced action since he claims no interest in the subject real property.

IT IS SO ORDERED THIS 5th day of December, 1996.


HONORABLE TERRY C. KERN, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

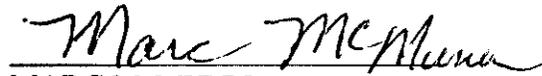
Approved as to form:

STEPHEN C. LEWIS
United States Attorney
Northern District of Oklahoma



STEPHEN P. KRANZ
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-0079

Dated: November 4, 1996.



MARC McMUNN
401 West Fairlane Court
Sapulpa, Oklahoma 74066-6805

Dated: November 6, 1996.

ENTERED ON DOCKET

DATE 12/10/96

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

F I L E D

SHIRLEY TREVATHAN NOWLIN,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER, Commissioner,)
 Social Security Administration,)
)
 Defendant.)

DEC 9 1996 *SAC*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

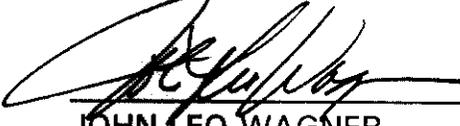
Case No. 93-C-369-W ✓

ORDER

This order pertains to Plaintiff's Application and Motion for Award of Attorney's Fees and for Approval of Award to Plaintiff (Docket #27), and Defendant's Response (Docket #29). The defendant states that she has no objection to the court approving attorney's fees and costs totaling \$4,531.75, as requested by plaintiff.

By this court's order filed May 8, 1996, plaintiff was awarded attorney's fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, in the amount of \$3,786.13. Plaintiff's Motion for Award of Attorney's Fees and for Approval of Award to Plaintiff (Docket #27) is granted, and plaintiff's counsel is ordered to refund the smaller EAJA award to the plaintiff, pursuant to 42 U.S.C. § 406(b)(1) and the decision in Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986).

Dated this 6th day of December, 1996.



 JOHN LEO WAGNER
 UNITED STATES MAGISTRATE JUDGE

S:nowlin.atty

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

LANCASTER COLONY CORPORATION,)
a Delaware corporation,)
)
Plaintiff,)
v.)
)
LONNIE JOHNSON; ERMA REED;)
AMANDA LOU JOHNSON, the heir of Robert)
L. Johnson; and AVERY ROGERS and)
LACY ROGERS, the heirs of Peggy L. Johnson,)
)
Defendants.)

FILED
DEC 9 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 96 CV-685 H /

ORDER

DATE DEC 9 1996 ✓

Upon application of the Plaintiff, Lancaster Colony Corporation, and for good cause shown, the Judge finds that said application should be granted in the amount of \$ 798.50.

IT IS SO ORDERED.



U. S. District Judge

FILED ON DECEMBER 6 1996
12-9-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff,

v.

MICHAEL SHUE DECORTE;
GLORIA L. DECORTE fka Gloria Lois Stone;
STATE OF OKLAHOMA ex rel.
Oklahoma Tax Commission;
PHIL RUSSELL STONE;
STATE OF OKLAHOMA ex rel.
Department of Human Services;
HOUSEHOLD FINANCE CORPORATION III;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

FILED

DEC 06 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 96-CV-550-K ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 5th day of December

1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma,** appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission,** appears by Kim D. Ashley, Assistant General Counsel; that the Defendant, **State of Oklahoma ex rel. Department of Human Services,** appears by its attorney Vicki A. Cox; and the Defendants, **Michael Shue DeCorte, Gloria L. DeCorte fka**

Gloria Lois Stone, Phil Russell Stone, and Household Finance Corporation III, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Michael Shue DeCorte**, executed a Waiver of Service of Summons on June 27, 1996; that the Defendant, **Gloria L. DeCorte fka Gloria Lois Stone**, executed a Waiver of Service of Summons on June 27, 1996; that the Defendant, **Phil Russell Stone**, executed a Waiver of Service of Summons on July 11, 1996; that the Defendant, **Household Finance Corporation III**, was served on June 20, 1996 by certified mail, return receipt requested, delivery restricted to the addressee.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answers on June 28, 1996; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, filed its Answer on or about July 18, 1996; that the Defendant, **State of Oklahoma ex rel. Department of Human Services**, filed its Answer on July 3, 1996; that the Defendants, **Michael Shue DeCorte, Gloria L. DeCorte fka Gloria Lois Stone, Phil Russell Stone, and Household Finance Corporation III**, 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 upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty-five (25), Block Seven (7), FOX RUN, an Addition to the City of Jenks, County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on March 5, 1991, Michael Shue DeCorte and Gloria L. DeCorte executed and delivered to Fourth Mortgage & Investment Company, Inc., their mortgage note in the amount of \$77,425.00, payable in monthly installments, with interest thereon at the rate of 9 percent per annum.

The Court further finds that as security for the payment of the above-described note, Michael Shue DeCorte and Gloria L. DeCorte, husband and wife, executed and delivered to Fourth Mortgage & Investment Company, Inc., a real estate mortgage dated March 5, 1991, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on March 7, 1991, in Book 5307, Page 2262, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 5, 1991, Fourth Mortgage & Investment Company, Inc., assigned the above-described mortgage note and mortgage to Lumbermen's Investment Corporation Of Texas. This Assignment of Mortgage was recorded on August 6, 1991, in Book 5340, Page 1334, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 21, 1994, Temple-Inland Mortgage Corporation Successor By Merger To Lumbermen's Investment Corporation Of Texas assigned the above-described mortgage note and mortgage to the Secretary of Veterans Affairs. This Assignment of Real Estate Mortgage was recorded on December 8, 1994, in Book 5677, Page 0497, in the records of Tulsa County, Oklahoma, and re-recorded on March 27, 1996, in Book 5795, Page 1387, in the records of Tulsa County, Oklahoma. This loan was reamortized pursuant to which the entire debt due was made principal and the interest rate was changed to 5.5 percent.

The Court further finds that the Defendants, **Michael Shue DeCorte and Gloria L. DeCorte fka Gloria Lois Stone**, made default under the terms of the aforesaid note and mortgage by reason of their **failure to make the monthly installments due thereon**, which default has continued, and that by **reason** thereof Plaintiff alleges that there is now due and owing under the note and mortgage, **after full credit for all payments made**, the principal sum of \$81,826.65, plus **administrative charges** in the amount of \$453.00, plus **penalty charges** in the amount of \$51.20, plus **accrued interest** in the amount of \$3,190.41 as of February 15, 1996, plus interest accruing **thereafter** at the rate of 5.5 percent per annum until judgment, plus interest thereafter at **the legal rate** until fully paid, and the costs of this action in the amount of \$308.00 (**\$300.00 fee for abstracting; \$8.00 fee for recording Notice of Lis Pendens**).

The Court further finds that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, has **liens on the property** which is the subject matter of this action in the total amount of \$1,328.28 **together** with interest and penalty according to law, by virtue of Tax Warrant No. ITI9200957800, dated June 4, 1992, and recorded on June 18, 1992, in Book 5413, Page 2472 in the **records of Tulsa County, Oklahoma**; and by virtue of Tax Warrant No. ITI9200968500, dated June 9, 1992, and recorded on June 18, 1992, in Book 5414, Page 0097 in the **records of Tulsa County, Oklahoma**. Said liens are inferior to the interest of the Plaintiff, **United States of America**.

The Court further finds that the Defendant, **State of Oklahoma ex rel. Department of Human Services**, has a **lien on the property** which is the subject matter of this action in the amount due and owing **on a Statement of Judgment, Case No. FD 90-4367**,

dated December 5, 1994, and recorded on December 8, 1994, in Book 5677, Page 0439 in the records of Tulsa County, Oklahoma. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$65.00 plus any accruing costs and interest which became a lien on the property as of June 26, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, Phil Russell Stone and Household Finance Corporation III, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment against Defendants, Michael Shue DeCorte and Gloria L. DeCorte fka Gloria Lois Stone, in the principal sum of \$81,826.65, plus administrative charges in the amount of \$453.00, plus penalty charges in the amount of \$51.20, plus accrued interest in the amount of \$3,190.41 as of February 15, 1996, plus interest accruing thereafter at the rate of 5.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.45 percent per annum until fully paid, plus the costs of this action in the amount of \$308.00 (\$300.00 fee for abstracting; \$8.00 fee for recording Notice of

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, have and recover in rem judgment in the total amount of \$1,328.28 together with interest and penalty according to law, by virtue of the above-described tax warrants.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Department of Human Services, have and recover judgment in the amount due and owing on the above-described statement of judgment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$65.00 for personal property taxes for the year 1991, which became a lien on the property as of June 26, 1992, plus interest and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Phil Russell Stone, Household Finance Corporation III, 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 an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

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

Fourth:

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

Fifth:

In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Department of Human Services.

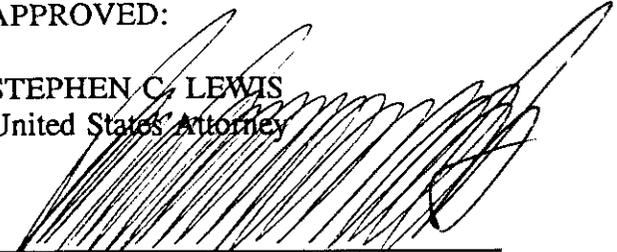
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

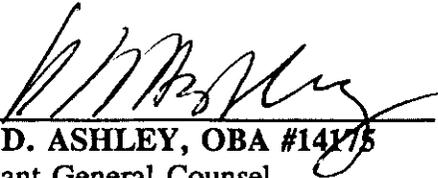
Judgment of Foreclosure
Case No. 96-CV-550-K (DeCorte)



DICK A. BLAKELEY, OBA #852

Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918)
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Case No. 96-CV-550-K (DeCorte)



KIM D. ASHLEY, OBA #14175

Assistant General Counsel

P.O. Box 53248

Oklahoma City, Oklahoma 73152-3248

(405) 521-3141

Attorney for Defendant,

State of Oklahoma ex rel. Oklahoma Tax Commission

Judgment of Foreclosure

Case No. 96-CV-550-K (DeCorte)

Vicki A. Cox

VICKI A. COX, OBA #44 FIRM#

Department of Human Services

Tulsa District Child Support Office

P.O. Box 3643

Tulsa, Oklahoma 74101-3643

(918) 581-2203

Attorney for Defendant,

State of Oklahoma ex rel. Department of Human Services

Judgment of Foreclosure

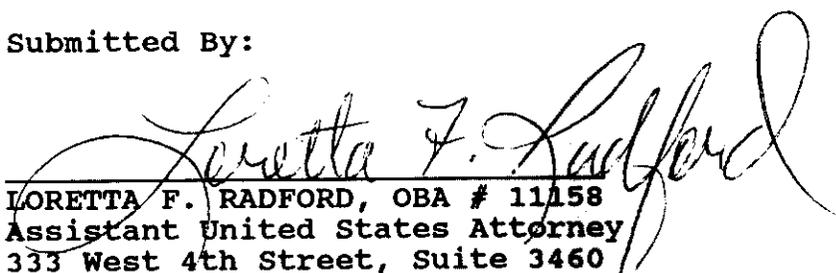
Case No. 96-CV-550-K (DeCorte)

PB:cas

annum until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$120.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.45 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 06 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

SUSAN A. HEIDRICK,
SS# 488-56-9945

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security Administration,

Defendant.

No. 95-C-1172-K ✓

ENTERED ON FILE

12-9-96

REPORT & RECOMMENDATION

Plaintiff, Susan A. Heidrick, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{1/} Plaintiff asserts error because (1) the ALJ improperly rejected Plaintiff's treating physician's opinion, (2) the ALJ improperly concluded that Plaintiff has the residual functional capacity to engage in substantial gainful activity, and (3) the ALJ did not adequately address whether Plaintiff met a Listing. For the reasons discussed below, the United States Magistrate Judge recommends that the Court reverse and remand the Commissioner's decision.

^{1/} Plaintiff filed an application for disability and supplemental security insurance benefits in February of 1993. [R. at 87]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge James D. Jordan (hereafter, "ALJ") was held February 4, 1994. [R. at 38]. By order dated August 15, 1994, the ALJ determined that Plaintiff was not disabled. [R. at 12]. Plaintiff appealed the ALJ's decision to the Appeals Council. On October 23, 1995, the Appeals Council denied Plaintiff's request for review. [R. at 5].

12

I. PLAINTIFF'S BACKGROUND

Plaintiff's Testimony

Plaintiff was born on October 1, 1958. [R. at 41]. Plaintiff testified that, at the time of the hearing, she weighed approximately 175 pounds, but that her usual weight was approximately 110 pounds. Plaintiff stated that her medication had caused her to gain weight. [R. at 41-42].

Plaintiff testified that she had worked at a variety of positions. Plaintiff was an assistant manager at a Pizza Hut when she was eighteen for less than one year, and owned and operated an antique store with her mother for approximately three years. Plaintiff additionally worked as a nanny in Dallas for approximately six years, delivered pizza for approximately six months, and worked in the "deli" at Price Mart for over one year. [R. at 44-48]. Plaintiff stated that she last worked in 1993, and that her mother has been and currently was paying all of her bills. [R. at 48].

Plaintiff testified that she attends church approximately three times each week, goes to movies, visits garage sales, and sometimes plays with her sister's children. [R. at 52-54].

Plaintiff testified that she is a manic-depressive paranoid schizophrenic, and has been hospitalized 18 times for various problems. [R. at 56]. Plaintiff stated that at times she believes she is from a different planet. [R. at 56]. Plaintiff did note that she has not been hospitalized since she stopped working in 1993. [R. at 58].

Plaintiff testified that the medication she takes does help to control her mental disorder, but that she had been properly taking her medication and was still

hospitalized, on one occasion, in Vinita. [R. at 61]. Plaintiff testified that some of the side effects of her medications include blurred vision, constipation, drowsiness, loss of her "train of thought," and difficulty concentrating. [R. at 62, 64]. Plaintiff stated that her doctors have told her that there is nothing that they can do about the side effects. [R. at 64].

Plaintiff testified that she does not go anyplace alone, but is always accompanied by somebody. Plaintiff stated that she sometimes "blanks out" for a minute or two. [R. at 66]. When she is hospitalized, Plaintiff testified that she can sometimes become violent or dangerous. [R. at 66]. Plaintiff stated that her behavior at times is unusual. She noted that one time she was found by some people standing in a field by a pond, and on one occasion she peeled the wallpaper off of the bathroom in a bank. [R. at 66]. Plaintiff additionally testified that she sometimes hears voices. According to Plaintiff, although she does not usually experience visual hallucinations, she has seen blood on a wall, and has seen spirits. [R. at 68].

Plaintiff's Brother

Plaintiff's brother testified that Plaintiff was released to his care from Vinita. He testified that he stays with Plaintiff approximately two or three days each week. [R. at 69]. According to Plaintiff's brother, if he does not stay with Plaintiff, either Plaintiff's sister, mother, or father stays with her. [R. at 71].

He testified that Plaintiff has difficulty remembering if she has taken her medications and has to be reminded to take them. [R. at 71]. He additionally testified that Plaintiff became ill in 1992 even though she had been on her medications.

According to Plaintiff's brother, the stress of working contributes to Plaintiff's condition. [R. at 72]. Plaintiff's brother additionally noted that Plaintiff experiences side effects from the medications, including blurred vision and difficulty concentrating. [R. at 72].

Plaintiff's brother testified that keeping a job has been Plaintiff's biggest problem. According to her brother, any kind of work increases her stress and leads to difficulty over a period of time. [R. at 73].

Non-examining/Non-Treating Medical Reports

A Mental Residual Functional Capacity Assessment was completed on April 5, 1993, by Carolyn Goodrich, Ph.D. [R. at 100]. Dr. Goodrich indicated that Plaintiff's capabilities were "not significantly limited" in any of the listed categories. [R. at 100-102]. Dr. Goodrich noted that "claimant can understand and perform simple tasks and some complex ones. She can interact appropriately with others. She can adapt to a work situation." [R. at 102]. Dr. Goodrich's assessment was "affirmed as written" by Stephen J. Miller, Ph.D., on June 21, 1993.

Dr. Goodrich additionally completed a Psychiatric Review Technique form. Dr. Goodrich noted that although Plaintiff does not meet a Listing, she does have a severe impairment. [R. at 104]. Plaintiff's restrictions of activities of daily living were noted as "slight." Plaintiff's difficulty in maintaining social functioning was noted as "slight." Plaintiff's deficiencies of concentration, persistence or pace was noted as "often," and Plaintiff's episodes of deterioration or decompensation in work or work-like setting was

indicated as "once/twice." [R. at 111]. This assessment was "affirmed as written" on June 21, 1993, by Dr. Miller. [R. at 105].

Hospitalizations

On November 15, 1977, Plaintiff was admitted for an "acute psychotic episode" to St. John's Hospital in Springfield, Missouri. [R. at 147]. Her records note that she was experiencing an acute schizophrenic reaction with agitation, characterized by delusional thinking, depression, obsessive compulsive features, and depersonalization. Her history of admission indicated that she ran away from home at age 14 and was married at age 16. Plaintiff had an abortion at age 19, and the interviewer noted that Plaintiff had various problems with her marriage and family. Part of the reason for Plaintiff's admission was her increasing violence. Plaintiff was described as breaking chairs, refusing to sleep, and standing in the rain. [R. at 152]. Plaintiff was discharged against medical advice on November 24, 1977. [R. at 147].

Plaintiff was again admitted on December 11, 1977, and discharged on December 31, 1977. [R. at 167]. The record indicates that "on admission patient was catatonic, was blocked, delusional, was having auditory and visual hallucinations, refusing to eat, and had some difficulty with initiating any conversation or movement." [R. at 167]. Plaintiff was given medications, including Haldol, and her condition gradually improved. Plaintiff was diagnosed as having "schizophrenia," and on discharge her condition was indicated as "markedly improved." [R. at 167].

Plaintiff was again admitted on December 15, 1978, and discharged on February 16, 1979. Plaintiff was described as belligerent, hostile, and angry on admission.

Plaintiff was given approximately ten electroshock treatments during her stay, and Plaintiff's mother obtained a court order to have Plaintiff committed. [R. at 170]. Plaintiff's condition was noted as improved at the time of her discharge. Plaintiff's diagnosis was "schizophrenia, paranoid type, under remission." [R. at 170].

Plaintiff was admitted on May 15, 1981, and discharged on May 21, 1981, after being placed on a 96 hour hold by police. [R. at 178]. Plaintiff was described as having "bizarre, irrational behavior, complicated by angry outbursts and combative agitated behavior." [R. at 178]. Plaintiff was noted as not posing a "management" problem until approached about signing herself in for extended care. The record notes that Plaintiff indicated she did not need hospital care. Plaintiff was describe as "poor of insight," and was discharged at the end of the 96 hour hold. The final discharge diagnosis was "schizophrenia in partial exacerbation." [R. at 178].

Plaintiff was again admitted on a 96 hour hold on September 20, 1982. [R. at 191]. Her treating doctor indicated that Plaintiff had "chronic paranoid schizophrenia and should be followed vigorously if outpatient therapy fails on this occasion. Her next hospitalization should be for 21 days minimum. . . ." [R. at 191]. Plaintiff was discharged on September 27, 1992, after refusing to sign herself in for additional treatment.

Plaintiff was admitted on December 3, 1986, and discharged on January 13, 1987. Plaintiff was brought in by her mother because she was talking about hurting herself. Plaintiff was found in a treatment room scrubbing the walls. Plaintiff was described as having obsessive behavior and thinking, and as paranoid. Plaintiff spoke

of devils and demons. Plaintiff's memory was described as intact but with poor judgment and concentration. Plaintiff was diagnosed as "bipolar mixed with psychotic features." [R. at 291-295].

Plaintiff was admitted April 5, 1988, to the Harris County Psychiatric Center "under a mental health warrant," and discharged May 4, 1988. [R. at 324]. Plaintiff was described as "stable" at the time of her discharge.

Plaintiff was admitted on May 17, 1988, to the Colorado State Hospital, and discharged on June 16, 1988. Plaintiff's admission history noted that she had a long history of chaotic episodes, that she had been destructive to property and that she had been verbally hostile. [R. at 198]. Plaintiff was brought to the hospital by the police. Plaintiff is described as having had a traumatic childhood and having been unwanted by her mother. Plaintiff's treatment plan reveals that at the age of 23 Plaintiff was raped, that during her second hospitalization she was treated with electroshock therapy, and that she has had an affective disorder since she was 19. [R. at 204]. The interviewer notes that "[t]he patient currently is filled with grandiosity, and unrealistic discharge plans. When she is more stable, I will discuss possible vocational rehabilitation, social security benefits and aftercare plan in the community of her choice." [R. at 207]. Plaintiff was diagnosed with a "bipolar disorder, manic." [R. at 214].

Plaintiff was admitted on September 7, 1990, and discharged on September 12, 1990, at St. John's in Springfield, Missouri. [R. at 221]. (At this time, Plaintiff was living in Texas, but was in Missouri visiting friends.) At admission Plaintiff was

described as "out of control, combative, throwing things arounds [sic], religiously and sexually preoccupied, grandiose, auditory and visual hallucinations." Plaintiff was discharged when "it was felt that she had sufficiently recovered to where she could go back to Texas." Plaintiff was diagnosed with "bi-polar disorder, manic with mood congruent psychotic features." [R. at 221].

Plaintiff was admitted on April 10, 1991, and discharged on April 25, 1991. [R. at 309]. Plaintiff had been excessively cleaning a refrigerator and believed she was communicating with Satan. Plaintiff was described as having delusional thinking, expressing anger towards the staff, and exhibiting manic behavior. Plaintiff's diagnosis on discharge was "bipolar disorder manic phase." [R. at 313].

Plaintiff was admitted to the Dallas County Hospital on July 25, 1991, when she was brought in by the Dallas police. [R. at 230]. Plaintiff had been observed placing items from her refrigerator and make-up into her bathtub, and filling the bathtub with water. Plaintiff denied being ill. Plaintiff described herself as being a princess and was noted as having somewhat delusional thinking and hearing voices. [R. at 234]. The doctors noted that Plaintiff had a history of poor compliance in taking her medications. [R. at 240]. Plaintiff checked out on July 30, 1991, against medical advice, because she stated she had to get back to work or she would lose her job. [R. at 230].

Plaintiff was admitted on January 17, 1992, and discharged January 27, 1992. [R. at 300]. Plaintiff apparently drove from Dallas, arriving at the Tulsa Crisis Center and was reported as preoccupied with cleaning. Plaintiff talked to people who were

not present. Plaintiff's hair was wet "as was a sweater, which she dunked in the toilet to allegedly get the hair spray out of her hair." [R. at 301].

The medical records do not indicate an admission sheet, but do indicate that Plaintiff was discharged on February 8, 1992 after treatment. [R. at 253].

Plaintiff was admitted on December 22, 1992, on an emergency detention order, and discharged on January 7, 1993. [R. at 353]. Plaintiff claimed that she was the devil. Plaintiff apparently believed that her brother was going to kill her. [R. at 456]. The Staff Psychiatrist noted that "one would have to believe that we have an affective disorder, of a psychotic nature that is cyclical." [R. at 356].

Plaintiff's "Treating Physician"

Plaintiff was first examined by J.D. Karn, M.D., on April 28, 1992. He noted that she had a history of over 14 hospitalizations over the past 15 years, and had been diagnosed as a manic depressive. [R. at 275]. According to Dr. Karn, Plaintiff had been in denial over her condition for several years, but was "beginning to realize the serious nature of her illness." [R. at 275].

On January 14, 1993, Dr. Karn noted that Plaintiff was delusional when not on her medications, was histrionic, and suffered from bi-polar disorder. According to Dr. Karn, Plaintiff "has difficulty with stressful situations; cannot focus for long periods or on one subject; is easily distracted. . . ." In addition, Dr. Karn noted that Plaintiff "has difficulty with carrying out simple tasks [and] has to be told several times; works well with supervisor, not well on her own; [has] difficulty with work pressure; has trouble getting along with co-workers." [R. at 254].

Plaintiff's records additionally note numerous visits (approximately two per month in 1992 and 1993) to Associated Centers for Therapy, Inc. [R. at 257-273]. Plaintiff's biggest "stressors" are noted as her job. [R. at 270]. On April 30, 1992, the interviewer noted that although social security was discussed with Plaintiff, but that Plaintiff did not want to apply for disability, but wanted to enter vocational rehabilitation. [R. at 225]. On December 22, 1992, the interviewer reports that Plaintiff was very agitated and upset, accused the interviewer of being into witchcraft, and rambled about evil and the end of the world. [R. at 266]. On January 29, 1993, Plaintiff stated that her vision was blurred and that she was having difficulty paying attention. [R. at 264].

The record indicates that (at least prior to February 1994), Plaintiff's last appointment with Dr. Karn was on January 4, 1994. [R. at 276]. Dr. Karn completed a Mental Residual Functional Capacity Assessment for the Social Security Administration on February 16, 1994. Dr. Karn indicated that Plaintiff's ability to carry out simple instructions, remember work procedures, and remember detailed instructions was "marked;" that Plaintiff's ability to respond to supervision and ability to perform any ordinary routine tasks were "marked;" that Plaintiff's ability to respond to co-workers, ability to deal with the public, and ability to function independently were "moderate;" that her ability to complete a normal workday, ability to exercise appropriate judgment, ability to concentrate over an eight-hour period, and ability to perform routine tasks were "marked;" that Plaintiff's ability to maintain continuous performance was "moderate," that Plaintiff's ability to perform routine tasks on a

sustained basis, ability to complete sequential tasks, and ability to work a normal eight-hour day were all "marked;" that Plaintiff's ability to work according to a schedule, and ability to abide by occupational rules was "moderate;" that Plaintiff's ability to make decisions was "marked;" that Plaintiff's ability to maintain social functioning, her ability to be aware of hazards, and her ability to tolerate customary work pressures was "moderate." "Moderate" was defined as "an impairment which affects but does not preclude ability to function." "Marked" was defined as "an impairment which seriously affects the claimant's ability to function independently, appropriately, and effectively." [R. at 362]. Dr. Karn also noted that Plaintiff had been unable to function outside of a highly supportive living situation in the past two years, and that Plaintiff's condition was likely to deteriorate if she was placed under the stress of a job. [R. at 367].

Hospitalizations after the ALJ Hearing

After the hearing before the ALJ,^{2/} Plaintiff was admitted on October 15, 1994 and discharged December 16, 1994. Plaintiff was scared that she would hurt her mother, was admitted on an emergency detention, and was later committed for 28 days. Plaintiff exhibited manic behavior, was hearing voices, and was observed picking lint and dust off of a desk and eating it.

^{2/} These records were submitted by Plaintiff's attorney to the Appeals Council prior to their review of the ALJ's decision.

Plaintiff was admitted on April 17, 1995 and discharged April 24, 1995. [R. at 462]. Plaintiff was diagnosed with a "schizoaffective disorder, bipolar type." [R. at 463].

Plaintiff was admitted on March 20, 1995, and released on April 6, 1995. [R. at 398]. Plaintiff was noted as having experienced auditory hallucinations.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{3/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

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

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work

^{3/} 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 Commissioner has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Commissioner'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 Commissioner is supported by substantial evidence, **does not** 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 not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously **examine** the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary^{4/} 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

^{4/} 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. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

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.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff was not disabled at Step Five of the sequential evaluation process. The ALJ discounted Dr. Karn's findings with respect to Plaintiff because Dr. Karn had not treated Plaintiff for almost ten months and because Dr. Karn's observations were not supported by his treatment notes. The ALJ questioned Plaintiff's credibility because the ALJ noted that Plaintiff had filed for social security benefits although the ALJ had concluded that Plaintiff was not disabled. [R. at 24]. The ALJ found that Plaintiff could not return to her past relevant work. However, based on the testimony of a vocational expert, the ALJ concluded that Plaintiff could engage in work which existed in the national economy and was therefore not disabled. [R. at 26].

IV. REVIEW

Treating Physician

Plaintiff initially asserts that the ALJ improperly discounted the opinion of Dr. Karn, Plaintiff's treating physician. The Court agrees.

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). If an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). In Goatcher v. United States Dep't of Health & Human Services, 52 F.3d 288 (10th Cir. 1995), the Tenth Circuit outlined factors which the ALJ must consider in determining the appropriate weight to give a medical opinion.

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

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

The ALJ gives several reasons for disregarding the opinion of Dr. Karn. First, the ALJ notes that Dr. Karn's mental assessment evaluation was completed in February 1994, but that Dr. Karn's last previous appointment with claimant was in April 1993 (ten months prior to the assessment). The ALJ's observation ignores the record entry by Dr. Karn on January 14, 1993, which records one of Plaintiff's appointments with Dr. Karn. Dr. Karn noted that Plaintiff's last visit was over two months ago, and that she should be scheduled to return in two to three weeks. [R. at 265]. In addition, the record includes a letter submitted by Tom Dutton. Mr. Dutton was Plaintiff's "case manager," and he saw Plaintiff on a weekly basis during the time that she was treated by Dr. Karn. Mr. Dutton notes that Plaintiff's last visit with Dr. Karn (as of February 4, 1994) was on January 4, 1994, or the month before Dr. Karn completed the mental evaluation for the Social Security Administration. [R. at 376]. Consequently, either the record from which the ALJ was working was incomplete, or these entries were overlooked by the ALJ.

The second reason that the ALJ gives for discounting Dr. Karn's opinion is that although Plaintiff was hospitalized in early January 1993, her condition remained relatively stable since that time. Initially, the Court notes that although the ALJ did not have the benefit of the records which were submitted to the Appeals Council, those records clearly establish that Plaintiff was hospitalized on at least three

occasions after the ALJ's hearing.^{5/} In addition, Plaintiff testified and the record indicates that she stopped working in 1993. Dr. Karn's records indicate (as do several other medical records) that work places a great deal of stress on Plaintiff. [R. at 262]. The ALJ never evaluates to what degree Plaintiff's "decision" to stop working has "stabilized" her condition. If Plaintiff's condition is stable only if she continues not to work, she is certainly not "capable of performing substantial gainful activity" within the meaning of the Social Security Act.

The ALJ additionally questioned Dr. Karn's statement that Plaintiff had been unable to function outside a supportive living situation for the past two years because he did not find corroboration in Dr. Karn's treatment notes. However, Plaintiff's brother testified that either he, his mother, father, or sister stayed with Plaintiff at all times. In addition, during this time Plaintiff was visited on a regular basis by counselor[s] working with Dr. Karn.

Finally, the ALJ questions Dr. Karn's conclusions because they "do not address the issue of the claimant's compliance with use of recommended medication." The ALJ concluded, based on "the record," that "this failure of compliance was [not] due to lapses of memory, but rather that they were willful acts by the claimant." Initially, the Court notes that the ALJ's discussion with respect to this issue is woefully

^{5/} Plaintiff was hospitalized in October 1994, March 1995, and April 1995. [R. at 398, 418, 452, 462].

inadequate.^{6/} In Teter v. Heckler, 775 F.2d 1104 (10th Cir. 1985), the Tenth Circuit Court of Appeals noted that

[c]ourts reviewing whether a claimant's failure to undertake treatment will preclude the recovery of disability benefits have considered four elements, each of which must be supported by substantial evidence: (1) the treatment at issue should be expected to restore the claimant's ability to work; (2) the treatment must have been prescribed; (3) the treatment must have been refused; (4) the refusal must have been without justifiable excuse.

Id. at 1107. The ALJ does not specifically deal with any of the issues identified in Teter. Furthermore, the record does not support a conclusion that Plaintiff's failure to follow her prescribed treatment was willful. Plaintiff's brother testified that Plaintiff had to be continually monitored or Plaintiff would forget to take her medications. In addition, Plaintiff's doctors noted that Plaintiff believed that her medical condition was under control and that she was in "denial" with respect to her medical condition. The ALJ does not evaluate to what degree Plaintiff's mental condition caused her "willful" failure to take her medications. In addition, Plaintiff and her brother both testified that even when she followed her prescribed medications she had experienced difficulties which required hospitalization.

On remand, the ALJ should re-evaluate Plaintiff's treating physician's opinions, giving due consideration to the concerns outlined above.

^{6/} The Court notes that the ALJ's conclusion that Plaintiff willfully failed to follow her prescribed treatment is within the context of discounting Plaintiff's treating physician's conclusions. However, if the ALJ attempts to rely on the Plaintiff's asserted failure to follow a prescribed treatment as justification for discounting the Plaintiff's treating physician's conclusion, the ALJ should provide his analysis of the issues involved in his determination of whether Plaintiff failed to follow her prescribed treatment.

Residual Functional Capacity

Plaintiff asserts that the ALJ's conclusion that she had the residual functional capacity ("RFC") to perform a substantial number of jobs was not supported by the record. Specifically, Plaintiff states that the ALJ improperly evaluated her RFC and did not provide appropriate hypothetical questions to the vocational expert.

The ALJ concluded that although Plaintiff could not return to her past work, she retained the RFC to perform a substantial number of jobs in the national economy and was therefore not disabled.

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). On appeal, the court's role is to verify whether substantial evidence in the record supports the ALJ's decision, and not to substitute the court's judgment for that of the ALJ. See Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995) ("Credibility determinations are peculiarly within the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence."); Musgrave v. Sullivan, 966 F.2d 1371, 1374 (10th Cir. 1992).

In this case, the ALJ found that Plaintiff was not disabled, and noted that "[i]n that the claimant, implicit in her act of filing for benefits, alleges such a degree of disability, the Administrative Law Judge questions the credibility of the claimant." [R. at 24]. The ALJ then concludes that "after careful evaluation" the Plaintiff's subjective complaints (including blurred vision, inability to concentrate, and sleepiness)

would not interfere with her ability to work. The ALJ's conclusions are not supported by substantial evidence.

Initially, the ALJ's "logic" appears circuitous. The ALJ first finds that Plaintiff is not disabled. The ALJ concludes that although Plaintiff is not disabled, she filed for disability, and therefore she must not be fully credible. Such a conclusion certainly cannot provide substantial evidence for a credibility finding. On remand the ALJ should analyze Plaintiff's credibility giving due consideration to the factors outlined by the Tenth Circuit. See, e.g., Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995); Cruse v. United States Department of Health & Human Services, 49 F.3d 614 (10th Cir. 1995); Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991); Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987).

Furthermore, the vocational expert testified that if Plaintiff was experiencing blurred vision, that limitation alone would preclude virtually all of the jobs which he had identified. [R. at 80]. Plaintiff testified that her medications caused blurred vision; Plaintiff's brother testified that her medications caused her vision to blur; and Plaintiff's physician's notes indicated that Plaintiff complained about blurred vision. Reliance on the testimony of a vocational expert can provide substantial evidence to support a finding that a significant number of jobs exist which an individual can perform. However, an ALJ must present all of a claimant's limitations to the vocational expert. On remand, the ALJ should carefully consider each of Plaintiff's limitations and make certain that each limitation is included in any hypothetical question posed to the vocational expert.

The Listings^{7/}

Plaintiff additionally asserts that the ALJ erred because he did not find that Plaintiff was disabled in accordance with the Listings. The ALJ completed and attached the required Psychiatric Review Technique Form. The ALJ found that Plaintiff's restrictions of daily living were slight, her difficulties in maintaining social functioning were slight, her deficiencies in concentration were often, and her episodes of deterioration were once/twice. [R. at 31]. The ALJ noted that his conclusions were based on "the reasons cited above." [R. at 25]. This includes ten pages of the ALJ's decision.

In Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996), the Tenth Circuit Court of Appeals discussed an ALJ's analysis of whether or not a claimant met the Listings. The court noted that "[i]n this case, the ALJ did not discuss the evidence or his reasons for determining that appellant was not disabled at step three, or even identify the relevant Listing or Listings; he merely state[d] a summary conclusion that appellant's impairments did not meet or equal any Listed Impairment. . . . Under this statute, the ALJ was required to discuss the evidence and explain why he found that appellant was not disabled at step three."

In this case, the ALJ certainly did a better job than what is described by the court in Clifton. However, on remand, if the ALJ concludes that Plaintiff does not

^{7/} At step three, a claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1, commonly referred to as the "Listings." An individual who meets or equals a Listing is presumed disabled.

meet a Listing, the ALJ should pay particular attention to the dictates of Clifton and explain his reasons for finding that Plaintiff was not disabled under the Listings.

RECOMMENDATION

Based on the legal and factual issues in this case, the United States Magistrate Judge recommends that the District Court **REVERSE** the decision of the Commissioner and **REMAND** the case for further proceedings consistent with this decision.

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See, e.g., Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 6th day of December 1996.



Sam A. Joyner
United States Magistrate Judge

ENTERED ON DOCKET
12-9-96

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

FILED

DEC 08 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN RE:

SAMUEL L. BEWLEY and ELIZABETH
JANE BEWLEY,

Debtors,

UNITED STATES OF AMERICA,

Appellant,

vs.

Case No. 96-C-279-K

SAMUEL L. BEWLEY and ELIZABETH
JANE BEWLEY,

Appellees.

REPORT AND RECOMMENDATION

The instant appeal from the United States Bankruptcy Court for the Northern District of Oklahoma is before the undersigned United States Magistrate Judge for report and recommendation. *Greigo v. Padilla*, 64 F.3d 580 (10th Cir. 1995). The appeal has been fully briefed and an advisory hearing was held on July 10, 1996.

The United States appeals from the order of the Bankruptcy Court, Stephen J. Covey, J., disallowing the Internal Revenue Service's proof of claim. Because the Court agrees with the Bankruptcy Court that Plaintiff did not "willfully" fail to pay over employee withholding taxes, the undersigned United States Magistrate Judge RECOMMENDS that the decision of the Bankruptcy Court, *In re Bewley*, 191 B.R. 459 (Bankr. N.D. Okla. 1996), be AFFIRMED.

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I. JURISDICTION AND STANDARD OF REVIEW

The District Court has jurisdiction over this appeal under 28 U.S.C. § 158. The Bankruptcy Court's legal conclusions are subject to *de novo* review. *Phillips v. White (In re White)*, 25 F.3rd 931, 933 (10th Cir. 1994). The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540 (10th Cir. 1988).

II. PROCEDURAL HISTORY AND FACTS

On August 5, 1993, the debtor, Samuel L. Bewley ("Bewley" or "Debtor") filed a voluntary petition under Chapter 13 of the Bankruptcy Code. The Internal Revenue Service ("IRS") filed a proof of claim for a penalty assessment pursuant to 26 U.S.C. § 6672. The penalty assessment was based on non-payment over to the United States of income and social security taxes withheld from the wages of employees of Phoenix Transportation, Inc. for the second and third quarters of 1990, all four quarters of 1991, and the first quarter of 1992. Bewley filed an objection to the IRS proof of claim, maintaining that he was not a responsible person as defined under § 6672.

The relevant facts are not in dispute; the following information is taken directly from the Memorandum Opinion of the Bankruptcy Court. *Bewley*, 191 B.R. at 460-61.

Phoenix Transportation, Inc. ("Phoenix"), an Oklahoma corporation, operated a flatbed trucking business within the continental United States. Samuel Lawrence Bewley ("Debtor") incorporated Phoenix in June 1987. Debtor had been in the

trucking business since 1934; at the time of the trial he was 81 years old. When Phoenix was incorporated, Debtor served as president; Debtor's wife, Elizabeth Jane Bewley, served as secretary and treasurer; and Debtor's son, Mike L. Bewley ("Mike Bewley"), served as vice-president.

Initially, Debtor and his wife owned all of the stock of Phoenix. However, on January 2, 1990, Debtor and his wife transferred all of the stock of Phoenix to their son, Mike Bewley. Debtor was in ill health at the time of the stock transfer. Debtor was to receive \$250,000.00 at the rate of \$2,500.00 per month from the sale of the stock.

The record is clear that Debtor was not a responsible person for Phoenix between January 2, 1990 and June 1, 1992.¹ Mike Bewley was in control of the operations of Phoenix and was the responsible person for Phoenix from early in 1990 until his death on May 28, 1992. Debtor's duties at Phoenix during this time were in sales only.

During the period when Mike Bewley was the responsible person for and had control of the operations of Phoenix, the company accrued outstanding federal withholding taxes in the amount of \$110,742.57. These withholding taxes, called "trust fund taxes," include federal social security and income taxes withheld from employees wages. The outstanding trust fund taxes accrued during the second and

¹ Debtor and the IRS stipulated that Debtor was not a responsible person for Phoenix during the period when the outstanding federal withholding tax liability accrued.

third quarters of 1990, during all four quarters in 1991, and during the first quarter of 1992.

After Mike Bewley's death on May 28, 1992, Debtor began operating Phoenix again. On June 1, 1992, at the time Debtor assumed operating the company, Phoenix had approximately \$8,662.00 in the bank. The company was generating income and accounts receivable of \$90,000.00 to \$100,000.00 per month. Phoenix's operating expenses were between \$80,000 and \$90,000 per month. During June of 1992, Phoenix received \$84,991.15 in accounts receivable.

On or about June 17, 1992, Phoenix and the IRS entered into an agreement which allowed Phoenix to continue to operate and to make payments on the outstanding trust fund taxes owed to the IRS.² Phoenix agreed to pay a percentage of its gross monthly revenues to the IRS each month and to use the balance of gross revenues to meet operating expenses. During the months that followed, Phoenix remained in operation and made the agreed payments to the IRS on the outstanding taxes in the amount of \$26,789.03 and paid the trust fund taxes which accrued during that time. After approximately four months, Phoenix could not meet its financial obligations and the business was closed. During all times when Debtor operated Phoenix and was the responsible person for Phoenix, both before and after the time when Mike Bewley operated Phoenix, all current trust fund taxes were paid.

² Phoenix and the IRS executed IRS Form 433(d) on or about June 17, 1992. Form 433(d) is not a part of the record. However, the testimony at trial indicated that the agreement required Phoenix to pay a percentage of its gross monthly revenues to the IRS in payment of the outstanding trust fund taxes.

On August 5, 1993, the Debtor and his wife filed a voluntary petition under Chapter 13 of the United States Bankruptcy Code. The IRS filed a proof of claim for a responsible person penalty assessment against the Debtor in the amount of \$113,076.00 for unpaid trust fund taxes of Phoenix. Debtor filed a Motion to Disallow Claim of the Internal Revenue Service pursuant to 11 U.S.C. § 502(a).

The Bankruptcy Court conducted a trial on July 13, and July 28, 1995, and entered its order disallowing the IRS proof of claim on February 6, 1996, the IRS perfected a timely appeal to the United States District Court.

III. BANKRUPTCY COURT HOLDING

Following the two-day trial, the Bankruptcy Court found that although Debtor was not a responsible person when the outstanding taxes accrued, he became a responsible person subject to the penalty when he regained control of Phoenix. *Bewley* 191 B.R. at 462. However, applying the Supreme Court's analysis in *Slodov v. United States*, 436 U.S. 238, 98 S.Ct. 1778, 56 L.Ed.2d 251 (1978), the Bankruptcy Court ruled that Debtor's liability was limited to the \$8,662 Phoenix had in the bank when he regained control of the company. *Bewley* 191 B.R. at 462.

Further, the Bankruptcy Court found that:

[t]he IRS's agreement which allowed Phoenix to continue in operation precludes a finding of Debtor's willful failure to pay. Debtor failed to pay pursuant to an agreement. Therefore, such failure to pay cannot be construed as willful.

Id. at 463. The Bankruptcy Court concluded that, under *Slodov*, the \$8,662.00 liquid assets (cash) on hand at the time Debtor assumed control should have been paid to

the IRS on the trust fund taxes previously accrued. However, since the evidence demonstrated that after Debtor assumed control \$26,789.03 had been paid against the accrued trust fund taxes, the Bankruptcy Court concluded that Debtor had no liability as a responsible person for Phoenix and denied the IRS claim in full.

There is no dispute that Debtor was a responsible person once he assumed control of the company as of June 1, 1992. *Bewley*, 191 B.R. at 462. The United States appeals the Bankruptcy Court's exclusion of Phoenix's accounts receivable collected within 30 days after Debtor assumed control of Phoenix (\$84,991.15) from its calculation of the company's assets for the purpose of determining the Debtor's § 6672 liability under *Slodov*. The United States also challenges the Bankruptcy Court's ruling that Debtor lacked the requisite willfulness for responsible person liability to attach under § 6672; the ruling that the agreement between Phoenix and the IRS shielded Debtor from liability under § 6672; and the Bankruptcy Court's reduction of Debtor's liability by the amount of the payments Phoenix made to the IRS.

IV. DISCUSSION

The Internal Revenue Code requires employers to withhold federal social security and income taxes from their employees' wages as those wages are paid. 26 U.S.C. §§ 3102(a) & 3402(a); *Bowlen v. United States*, 956 F.2d 723, 726 (7th Cir.1992). Because the employer is only required to pay over the taxes quarterly, the accumulated withholdings are deemed to constitute a "special fund in trust for the United States." 26 U.S.C. § 7501(a); *Slodov v. United States*, 436 U.S. 238, 243,

98 S.Ct. 1778, 1783, 56 L.Ed.2d 251 (1978). Once the employer withholds taxes from an employee's wages, the withholdings are credited to the employee regardless of whether they are paid over to the government; therefore, "the IRS has recourse only against the employer for their payment." *Id.* One of the IRS's most effective tools for ensuring it receives withheld trust-fund taxes is 26 U.S.C. § 6672, which creates personal liability for persons within an employer's business who are responsible for collecting and paying over the withheld taxes but willfully fail to do so. Section 6672 in part provides:

(a) General Rule.--Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to [sic] a penalty equal to the total amount of tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672(a).

Thus, § 6672 imposes liability on a person if: (1) the individual is a person responsible for collecting and paying over trust-fund taxes, and (2) the individual willfully failed to carry out these responsibilities. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993); *Hochstein v. United States*, 900 F.2d 543, 546 (2d Cir. 1990). Once the IRS assesses a putatively responsible person with a penalty under § 6672, that person bears the burden of showing by a preponderance of the evidence either he was not a responsible person or he did not act willfully. *Finley v. United States*, 82 F.3d 966, 970 (10th Cir. 1996); *Hochstein*, 900 F.2d at 546.

A. Treatment of Accounts Receivable

In *Slodov*, the Supreme Court discussed the extent of personal liability for trust fund taxes § 6672 incurred by one who becomes a "responsible person" for a company owing back trust fund taxes under § 6672. In that case, the petitioner Slodov, an orthodontist, purchased the stock and assumed the management of three corporations engaged in the food vending business. At the time of the purchase the companies were indebted for approximately \$250,000 in trust-fund taxes. However, at the time petitioner assumed control, the corporations had no liquid assets. The IRS advised petitioner it had no objection to his continuing operations so long as current tax obligations were met and the arrearage was paid as soon as possible. After the petitioner assumed control of the companies, the corporations acquired sufficient funds to pay the taxes, but the funds were used to pay employees' wages, rent, suppliers and other creditors and to meet day-to-day expenses in operating the business. After a short period of time the corporations terminated operations and filed for bankruptcy. During that time current taxes were paid, but no payments were made on the back trust-fund taxes. The IRS sought to collect the entire \$250,000 from petitioner. *Slodov*, 98 S.Ct. at 1782-83.

The Supreme Court determined that under § 6672 one who assumes control of a business does not become a guarantor for payment of delinquent taxes simply by undertaking to continue operation of the business. *Id.* at 1788. Nor does § 6672 operate to impress a trust on after-acquired cash. *Id.* at 1789. The Court stated "there must be a nexus between the funds collected and the trust created. That

construction [of §7501] is consistent with the accepted principle of trust law requiring tracing of misappropriated trust funds into the trustee's estate in order for an impressed trust to arise." *Id.* at 1789-90. The Court concluded:

We hold that a "responsible person" under § 6672 may violate the "pay over" requirement of that statute by willfully failing to pay over trust funds collected prior to his accession to control when at the time he assumed control the corporation has funds impressed with a trust under §7501, but that §7501 does not impress a trust on after-acquired funds, and that the responsible person consequently does not violate § 6672 by willfully using employer funds for purposes other than satisfaction of the trust-fund tax claims of the United States when at the time he assumed control there were no funds with which to satisfy the tax obligation and the funds thereafter generated are not directly traceable to collected taxes referred to by that statute. That portion of the judgment of the Court of Appeals on the Government's cross-appeal holding petitioner liable under § 6672 for wage withholding and FICA taxes required to be collected from employees' wages prior to January 31, 1969, is Reversed. [footnote omitted].

Id. at 1791.

In holding that Debtor's liability was limited to the \$8662 in cash Phoenix had on hand at the time he assumed control of the company, the Bankruptcy Court relied upon the fact that "in *Slodov* the Court clearly declined to hold that all after-acquired cash of the corporation was impressed with a trust in favor of the United States." *Bewley*, 191 B.R. at 462. The Bankruptcy Court declined to follow the Seventh Circuit's decision in *Purdy Co. of Illinois v. United States*, 814 F.2d 1183 (7th Cir. 1987) which holds that *Slodov* permits "liquid assets" other than cash and bank accounts to be included in the calculation of funds impressed with a trust at the time

a new "responsible person" takes over control of a corporation. In a footnote the Bankruptcy Court expressed its belief that *Purdy* could not be reconciled with the Supreme Court holding in *Slodov*. *Bewley*, 191 B.R. at 462 n.3. Based on its interpretation of *Purdy*, the Bankruptcy Court rejected the IRS's contention that the \$84,991.15 of accounts receivable paid to Phoenix in the month following Debtor's assumption of control of the company should be included as liquid assets impressed with a trust under § 7501.

This Court takes a contrary view. It is this Court's opinion that the \$84,991.15 in accounts receivable deposited by Phoenix within 30 days of the time Debtor re-gained control of the company are liquid assets impressed with a trust under § 7501. The *Slodov* holding does not limit application of "responsible person" penalties only to cash on hand. The Supreme Court extended its holding to situations where "there were no funds with which to satisfy the tax obligation and the funds thereafter generated are not directly traceable to collected [trust-fund taxes]." *Slodov*, 98 S.Ct. at 1791. [emphasis supplied]. Said differently, under *Slodov* § 6672 responsible person liability might³ attach to a new person in control in two situations: (1) when funds are on hand at the time of accession to control, and (2) when after-acquired funds are directly traceable to withheld taxes. See e.g. *Purdy*, 814 F.2d at 1190. These limitations require careful analysis.

³ Subject to a finding of willfulness, discussed *infra*. at pp. 13-17.

First, the Court must determine whether, at the time Debtor took over, there were funds available with which to satisfy the existing tax obligation. Since the corporations in *Slodov* had no unencumbered assets, the Supreme Court did not specifically define what it meant by the term "funds," nor has the Tenth Circuit addressed the issue. However, the Supreme Court characterized the corporations in *Slodov* as having "no liquid assets." 98 S.Ct. at 1782, 1785, 1787. The use of the term "liquid assets" indicates that the word "funds" in *Slodov* has a broader meaning than just cash and bank accounts. In *Purdy*, the Seventh Circuit reached this conclusion.

The *Purdy* Court affirmed the district court ruling that "holdback funds"⁴ retained by an automobile manufacturer from an auto dealer were "liquid assets" or "funds" for purposes of the *Slodov* rule that new persons in control of a failing enterprise may be responsible for past withholding tax delinquencies to the extent the employer corporations had funds or liquid assets at the time of transfer of control. The Court stated that the "holdback" funds could be construed either as funds generated by business transacted before the change in control and thus as funds unrelated to the new responsible person's activities or as "funds" or "liquid assets" owned by the company at the time of the change in control. *Purdy*, 814 F.2d at 1189. Because the holdback funds were an obligation of a creditworthy obligor to

⁴ The "holdback" funds were monies returned to the employer car dealership by General Motors and represented the accumulation of 2% rebates to be paid by GM on each purchase of a car by the dealership. In essence the funds were the dealership's own funds held on deposit by an obligor of immense credit-worthiness. *Purdy*, 814 F.2d at 1190.

pay back funds within 60 days of the time of accession to control, the Court held that the funds must be considered "liquid assets" and therefore as "funds" for purposes of *Slodov* analysis. Further, since the Debtor was on notice that the holdback funds were an item promptly reducible to cash as of the time of accession to control, the holdback funds were impressed with a trust-fund obligation. *Id.* at 1191.

In the present case Debtor testified that at the time he took over Phoenix, there were accounts receivable on the books [Tr. 41] and the business ordinarily took in \$90,000 to \$100,000 per month. [Tr. 43]. Phoenix deposited \$84,991.15 during June 1992, the month following Debtor's accession to control of the company. There is no contention that these funds were generated by work done during that month. Debtor's testimony was unequivocal that the freight bills to Phoenix's customers were either paid promptly by those customers or were sent to one of several factoring companies in order to immediately generate cash. [Tr. 32-38; 41]. Like in *Purdy*, the Debtor was on notice that the accounts receivable were promptly reducible to cash as of the time he took control of the company.

The same result should obtain in this case as in *Purdy*. The Phoenix accounts receivable were paid promptly after Debtor's accession to control, and were attributable directly to work done before the change in control. Those promptly paid accounts receivable, measured by the funds deposited during the month of June 1992, must be considered "liquid assets" for the purpose of the *Slodov* analysis. Therefore, under *Slodov*, the proper measure of Debtor's liability is the \$8,662 cash

on hand and the \$84,991.15 accounts receivable paid within 30 days; a total of \$93,653.15.

B. Willfulness

Upon the death of his son and resuming operation of the corporation, Debtor became a responsible person and was obligated to "pay over" to the government the liquid assets of the corporation in satisfaction of the past due taxes. If the Debtor willfully failed to "pay over" the liquid assets, he would become personally liable, up to the amount of the liquid assets, for the past due taxes under § 6672 and *Slodov*. Personal liability is imposed on the responsible person under § 6672 only if the person willfully fails to carry out the responsibilities of collecting, accounting for, or paying over withholding taxes. The dispositive question in this case is the same one presented to the Court in *Finley v. United States*, 82 F.3d 966, 971 (10th Cir. 1996):

The question is whether his action or inaction on this obligation was accompanied by the scienter necessary to create liability. *Slodov*, 436 U.S. at 254, 98 S.Ct. at 1788-89 (§ 6672 does not impose "an absolute duty to 'pay over'" delinquent withholdings and "was not intended to impose liability without personal fault").

Once the IRS assesses a responsible person with a penalty under § 6672, that person bears the burden of showing by a preponderance of the evidence that either he is not a responsible person or he did not act willfully. *Finley*, at 970.

Here, the Bankruptcy Court found that the Debtor met his burden of proof and concluded that he did not act willfully, as follows:

The IRS's agreement which allowed Phoenix to continue in operation precludes a finding of Debtor's willful failure to

pay. Debtor failed to pay pursuant to an agreement. Therefore, such failure to pay cannot be construed as willful.

Bewley, 191 B.R. at 463. This finding of fact by the Bankruptcy Court may only be disturbed if found to be clearly erroneous. See *Bradshaw v. U.S.*, 83 F.3d 1175 (10th Cir. 1995) (recognizing that in the Tenth Circuit willfulness is a question of fact subject to the clearly erroneous standard of review).

Before Debtor took over control of the company, he had no personal liability for the back taxes, as he was not a responsible person at the time the tax obligation was incurred. As an alternative to paying over the liquid assets of the company to the government, the Debtor negotiated an agreement with the government whereby the company would continue to operate, utilize its liquid assets to pay other creditors and make installment payments on the back taxes. Because no evidence was adduced on this point, we do not know what provision, if any, the agreement made for the contingency that the company might fail to stay in business and likewise, might fail to pay all of its back taxes.

Certainly the government was not required to enter into this agreement. The government could have insisted that the Debtor immediately pay over the liquid assets or incur personal liability under § 6672. Additionally, the government could have negotiated for the Debtor's contingent personal liability as part of the agreement should the company fail to make all of the necessary installment payments. However, there is no evidence in the record that the government availed itself of any of these alternatives. The only evidence regarding the agreement in the record was the

undisputed fact that the government allowed the Debtor to use the liquid assets to pay other creditors and accepted installment payments against the back taxes.

The government contends that **despite** this agreement, the Debtor nonetheless "willfully" failed to "pay over" the liquid assets of the company to the government. The Court rejects the government's contention as unsupported by law, logic or the fundamental fairness that must exist **between** the government and its citizens.

Once the government made **this** agreement with the Debtor, the rights of the parties were governed by the agreement, not by § 6672. Thus, on the record presented to the Bankruptcy Court, Debtor's liability, if any, should have been based on the agreement, not a willful failure to "pay over" under § 6672. Reduced to its essence, the conclusion of the Bankruptcy Court, and this Court, is that the government may not agree with Debtor that he can utilize the liquid assets of the company to pay other creditors and then come before the Court and assert that the Debtor "willfully" failed to "pay over" the liquid assets of the company to the government. *See generally McCarty v. U.S.*, 437 F.2d 961, 969-70, Ct. Cl. 1971 (finding of willfulness precluded based, in part, on existence of installment agreement for payment of delinquent taxes).

Muck v. United States, 3 F.3d 1378 (10th Cir. 1993), cited by the government is not determinative of this case. In *Muck*, the corporate president sought a refund of a § 6672 penalty assessed against him. He maintained that a payment agreement between the IRS and the company's general manager refuted a finding of willfulness. The *Muck* Court concluded that **because** the president was a responsible person and

had incurred § 6672 personal liability for his willful failure to pay over the back taxes, the agreement between the general manager of the company and the IRS did not serve to release the president of his pre-existing personal liability unless it specifically provided that he was personally held harmless. *Id.* at 1382.

Muck is not controlling because this case presents an entirely different factual and procedural situation. In *Muck* the Tenth Circuit reviewed and affirmed the district court's grant of summary judgment in favor of the United States regarding the Plaintiff's tax liability. The record was examined, *de novo*, to determine if any genuine issue of material fact was in dispute. *Muck*, 3 F.3d at 1380. This case, however, is an appeal from the Bankruptcy Court in which that Court resolved the factual dispute concerning the existence of willfulness. That factual finding is entitled to a degree of deference to which the Plaintiff's position in *Muck* was not entitled.

Furthermore, in *Muck* the president sought to refute a finding of willfulness and sought relief from liability which already existed. Unlike the president in *Muck*, here Debtor was not already liable for the taxes. He was not a responsible person at the time the taxes were incurred and upon becoming a responsible person he obtained an agreement with the government permitting use of the company's liquid assets for the payment of other creditors. The question in *Muck* was whether the agreement relieved the president of liability. The question here is whether Debtor ever became liable in the first place. It makes sense to require an agreement with the IRS to specifically include a hold harmless provision to absolve the president in *Muck* from

the liability that already exists. It makes no sense to require absolution where no liability exists.

V. CONCLUSION

The Bankruptcy Court's finding of fact that Debtor did not "willfully" fail to pay over the liquid assets of the corporation is supported by the evidence and not clearly erroneous. Accordingly, this Court recommends that the Bankruptcy Court finding that Debtor did not "willfully" fail to "pay over" be AFFIRMED and that Debtor be found to have no liability to the government pursuant to § 6672.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of after being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 6th day of December, 1996.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

DEC 06 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORYX ENERGY COMPANY,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF THE
INTERIOR,

Defendant.

Case No. 92-C-1052-E ✓

ENTERED ON DOCKET

DATE DEC 09 1996

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ORYX ENERGY COMPANY,

Defendant.

Case No. 93-C-265-E
(Consolidated)

JUDGMENT

In accord with the Order filed November 21, 1996 sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, United States Department of the Interior and against the Plaintiff, Oryx Energy Company.

IT IS SO ORDERED THIS 5TH DAY OF DECEMBER, 1996.

James O. Ellison
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

178

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

DEC 06 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID K. HOEL,

Plaintiff,

vs.

DONALD B. ATKINS, T. BRETT SWAB,
TODD W. SINGER, DAN MURDOCK,
LAWRENCE A.G. JOHNSON, BROWN J.
AKIN, III, LAURIE E. AKIN, J. PETER
MESSLER, AND BRADFORD GRIFFITH,

Defendants.

No. 96-C-268-E ✓

ENTERED ON DOCKET
DATE DEC 09 1996

ORDER

Now before the Court is the Motion to Dismiss for Failure to State a Claim (Docket #6) of the defendants J. Peter Messler and Bradford Griffith, the Motion to Dismiss for Failure to State a Claim (Docket #9) of the defendant Donald B. Atkins, the Motion to Dismiss for Lack of Jurisdiction (Docket #11) of the defendant Lawrence A. G. Johnson, the Motion to Dismiss With Prejudice (Docket #15) of the defendants T. Brett Swab and Todd W. Singer, the Motion to Dismiss for Failure to State a Claim (Docket #17) of the defendants Brown J. Akin, III and Laurie E. Akin, and the Motion to Dismiss for Lack of Jurisdiction of the defendant Dan Murdock (Docket #20).

Plaintiff brings this claim pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 et seq., alleging several "schemes" to cause financial harm to Jean Marie Akin, and to cause financial and political harm to

himself. Hoel (as trustee of several trusts set up by Brown Akin) became involved in a dispute between Brown, III and Laurie Akin (Brown Akin's children) and their step-mother Jean Marie Akin over the assets of these trusts after Brown died. The children then filed a civil suit against Jean Marie Akin and Hoel (seeking Hoel's removal as trustee), using defendant Johnson as their attorney. Defendant Atkins was appointed special master in that case, and returned a report critical of Hoel's actions as trustee. The Akins amended the suit to seek money damages as well. The other defendants (Murdock, Swab, Singer, Messler, and Griffith) are all named for their role in bringing criminal charges against Hoel. Hoel asserts that the criminal charges were brought for the purpose of effecting the outcome of the civil case, for the purpose of hampering his efforts to become elected to the 14th Judicial District, Office 12, and for the purpose of effectively shutting down his law practice.

The defendants each filed motions to dismiss with two primary arguments. The defendants assert that Hoel has failed to allege an enterprise engaged in interstate commerce, and that he has failed to allege a pattern of racketeering activity, thus failing to state a claim under RICO. Defendants Murdock, Swab, Singer, Messler and Griffith also argue that they are immune from suit under theories of prosecutorial or judicial immunity.

Although the defendants originally filed motions to dismiss, the Court, at the status conference, allowed the defendants to convert the motions to summary judgment, and allowed plaintiff time in which to respond to the supplemental motions. In considering the motions, the court has reviewed all material submitted,

including the affidavits of Lawrence A.G. Johnson, Brown J. Akin III, and Laurie E. Akin. Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

18 U.S.C. §1962 provides, in pertinent part:

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering

activity or the collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

As is clear from the plain language of the statute, RICO "prohibits only racketeering activity involving an enterprise "engaged in, or the activities of which affect, interstate or foreign commerce." Burcher v. McCauley, 871 F.Supp. 864, 870 (E.D. Va. 1994). To be engaged in interstate commerce, an enterprise must be "directly engaged in the production, distribution, or acquisition of goods and services in interstate commerce." United States v. Robertson, 115 S.Ct. 1732, 1733 (1995). On the other hand, "the 'affecting commerce' test was developed to define the extent of Congress's power over purely intrastate commercial activities that nonetheless have substantial interstate effects." Id.

The defendants contend that the alleged enterprise was neither engaged in interstate commerce, nor did it have substantial interstate effects. Plaintiff does not contend that the alleged enterprise was engaged in interstate commerce, but rather argues that the enterprise had substantial interstate effects in that Plaintiff has an interstate law practice. Defendants make two arguments in this regard. First, they note that plaintiff's Complaint does not support plaintiff's assertion regarding substantial interstate effects:

13. Throughout 1990 and continuing through 1996, Defendants conceived on and participated in fraudulent schemes as more fully set forth below, which constitutes a pattern of racketeering activity as defined by 18 U.S.C. §1961(5). The impact of these schemes and activities occurred in Oklahoma. The participants in this enterprise are residents of Oklahoma.

Defendants also rely on Burcher v. McCauley, 871 F.Supp. 864, 869 (E.D. Va. 1994) for the proposition that the practice of law in general does not constitute interstate commerce so as to implicate RICO. The Court finds that plaintiff's general statement that "the enterprise was responsible for disrupting the Plaintiff's law practice affecting non-residents of Oklahoma," in light of the statement that the "impact of these schemes and activities occurred in Oklahoma," is insufficient to confer jurisdiction on this Court under RICO. The requisite showing of interstate commerce, simply has not been made in this case and does not appear possible on these facts.

Defendants' Motions to Dismiss (Docket #'s 9,11,15, 17 and 20) are granted. In light of the disposition of these motions, and the Court's satisfaction that, under the law of RICO as it exists today, the facts of this case are not sufficient to state a claim upon which relief may be granted, the Court does not address the issue of Plaintiffs' ability to proceed pro se.

DATED this 5th day of December, 1996.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

DEC 6 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HEATER SPECIALISTS, INC.,)
an Oklahoma corporation,)
)
Plaintiff,)

v.)

Case No. 96-C-752C

JOHN BROWN ENGINEERS)
and CONSTRUCTORS LIMITED,)
a British corporation,)
)
Defendant.)

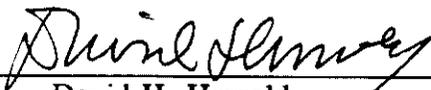
ENTERED ON DOCKET

DATE DEC 09 1996

NOTICE OF DISMISSAL OF CASE WITHOUT PREJUDICE

Plaintiff Heater Specialists, Inc., an Oklahoma corporation, pursuant to Fed.R.Civ.P.
41(a)(1), hereby dismisses this case without prejudice as to refiling.

RICHARD D. FUNK (OBA # 13070)
TONY W. HAYNIE (OBA # 11097)
DAVID H. HERROLD (OBA #17053)

By: 
David H. Herrold

CONNER & WINTERS,
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Attorneys for the Plaintiff
HEATER SPECIALISTS, INC.

FILED

DEC 08 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

CHERRY COMMUNICATIONS, INC.,)
an Illinois corporation,)

Plaintiff,)

vs.)

WORLDCOM, INC.,)
a Georgia corporation,)

Defendant.)

No. 96-C-1102-B

ENTERED ON DOCKET
DATE DEC 09 1996

ORDER

This case is hereby transferred to the docket of Chief Judge Terry C. Kern as it is related to the matter which came before him in an injunction proceeding held on October 15, 1996 in Cherry Communications, Inc. v. Worldcom, Inc. Case No. 96-C-933-K. All future pleadings should be designated as Case No. 96-C-1102-K.

ORDERED this 11th day of December, 1996.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 12/4/96

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

F I L E D

DEC 6 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONALD R. SWINNEY,)
SSN: 440-40-1097,)

Plaintiff,)

v.)

CASE NO. 94-C-869-M ✓

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

Defendant.)

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 6th
day of Dec., 1996.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 12/1/96

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

F I L E D

DONALD R. SWINNEY

Plaintiff,

vs.

Case No. 94-C-869-M ✓

SHIRLEY S. CHATER, ¹ Commissioner
Social Security Administration,

Defendant,

DEC 06 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Plaintiff, Donald R. Swinney, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.² In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the

¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-297. However, this order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

² Plaintiff's June 8, 1992 (protectively filed 5/4/92) application for disability benefits was denied August 18, 1992 and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held December 2, 1993. By decision dated January 18, 1994 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on July 7, 1994. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Secretary has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its discretion for that of the Secretary. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991).

The record of the proceedings has been meticulously reviewed by the Court. The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has properly outlined the required sequential analysis. The Court incorporates that information into this order as the duplication of effort would serve no purpose.

Plaintiff, Donald R. Swinney, age 53 at the time of the denial decision, alleges he became unable to work on October 5, 1990 due to back pain and the loss of the use of his left hand. Plaintiff met the insured status requirement for Title II benefits through December 31, 1991. His previous applications for benefits were denied June 24, 1991. The ALJ reviewed the prior applications and the evidence supporting them and determined that there was no basis upon which to reopen the previous applications. The ALJ expressly stated that he did not consider the merits of the previous determinations. Accordingly, the period prior to June 25, 1991 was not before the ALJ. In addition, because of the December 31, 1991 expiration of

Plaintiff's insured status, the period of time subsequent to that date was not before the ALJ as 42 U.S.C. § 423(d)(1)(A) provides that consideration of a claimant's case may be undertaken only during the period when the claimant is insured for benefits. The time frame under consideration extended only from June 25, 1991 to December 31, 1991.

The ALJ found that Plaintiff could not return to this past relevant work as a truck driver, carpenter, policeman, or pneumatic tool repairman at the heavy exertional level. [R. 51]. Relying on testimony of a vocational expert, the ALJ found that despite his limitations, Plaintiff could perform other work available in the economy between the dates June 25, 1991 and December 31, 1991 and therefore denied disability benefits.

Plaintiff alleges that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff states that the ALJ: (1) erroneously failed to reopen the earlier application for benefits; (2) failed to consider all of the objective medical evidence; (3) posed a defective hypothetical question to the vocational expert; and (4) improperly evaluated credibility and pain. The case is being remanded because the denial decision contained only a conclusory analysis of Plaintiff's credibility and pain. Since the case is being remanded, the Court has fully addressed Plaintiff's other contentions, and finds them to be without merit.

I. FAILURE TO REOPEN CASE

The ALJ expressly stated that Plaintiff's previous applications for benefits were not being re-opened. It is well-established that federal courts have no jurisdiction to

review the refusal to reopen Plaintiff's previous claims for disability benefits. See *Califano v. Sanders*, 430 U.S. 99, 107-08, 97 S.Ct. 980, 985-86, 51 L.Ed.2d 192 (1977). The decision not to reopen a previously adjudicated claim for benefits is not a final decision reviewable under 42 U.S.C. § 405(g). *Brown v. Sullivan*, 912 F.2d 1194, 1196 (10th Cir. 1990). However, a de facto reopening of a previous application is subject to judicial review. *Taylor for Peck v. Heckler*, 738 F.2d 1112, 1115 (10th Cir. 1984).

A de facto reopening occurs when an ALJ considers the merits of a previous application and reappraises the evidence without deciding the administrative res judicata issue. *Taylor*, 738 F.2d at 1114. A previous application is not considered to be reopened where, as here, the ALJ merely reviews previously submitted evidence as background information and does not reappraise the evidence. *Frustaglia v. Secretary of Health and Human Services*, 829 F.2d 192, 193 (1st Cir. 1987); *Burks-Marshall v. Shalala*, 7 F.3d 1346, 1348 (8th Cir. 1993). As the Eighth Circuit explained in *Burks-Marshall*, "[t]reating any admission of evidence from prior claims as a waiver of the [Commissioner's] power not to reopen, as the claimant apparently suggests, would not be in the best interest of claimants. Such a rule might cause Administrative Law Judges to resist the admission of evidence potentially advantageous to claimants." *Id.* at 1348.

II. MEDICAL EVIDENCE

Medical evidence in the record dates from October 1990 [R. 207] to October 1993. [R. 252]. Plaintiff alleges that the ALJ failed to properly consider much of this

medical evidence. However, because most of the medical evidence in the record was generated either before, or after the relevant six month time frame under consideration, it was not strictly relevant. The only medical evidence generated between June 25, 1991 and December 31, 1991 is a July 9, 1991 medical report prepared by neurosurgeon Samuel H. Shaddock, M.D. [R. 223-225].

Dr. Shaddock examined the MRI of Plaintiff's lumbar spine, noting disc protrusions directed more to the left at L4-5 and L5-S1. [R. 224]. Although the CT scan of the lumbar spine was of sub-optimal resolution, it showed left posterior osteophytes at L5-S1 and confirmed hypertrophy of the facet joints at L4-5 and L5-S1. On examination, Dr. Shaddock found slight tenderness over the sacroiliac areas bilaterally, more on the left, than right. Plaintiff was able to flex more than 90 degrees, but reported discomfort on resuming an upright position. Straight leg raising was negative for radicular pain and rotation of the hip joints with knees and hip flexed was not uncomfortable. [R. 225]. Dr. Shaddock found no motor, sensory, or reflex deficits in either leg. His impression was: (1) history of lumbar and probably left sacroiliac strain, (2) chronic sacroiliac strain; and (3) lumbar intervertebral disease, L4-5 and L5-S1. Dr. Shaddock did not recommend surgery because "there is no objective evidence of radiculopathy." *Id.* A work hardening program was recommended.

Dr. Shaddock's report is consistent with subsequent examinations. On July 15, 1992 a consultative exam was performed by internist, David B. Dean, M.D. wherein Dr. Dean found:

There is a full range of motion of the lumbosacral spine at the hip with pain with forward flexion, extension and right lateral bending. Heel and toe walking are normally performed, and straight leg raising signs are negative in sitting and lying positions. Deep tendon reflexes are equal, full and physiological in both lower extremities, and leg lengths are equal. and limb circumferences are equal in both lower extremities. There is sensory deficit in the L4-L5 and L5-S1 dermatome of the left thigh, left lower leg and left foot.

[R. 228].

Another consultative exam was performed September 24, 1992 by rehabilitation medicine specialist, James D. Harris, D.O. Dr. Harris found a diminished left Achilles deep tendon reflex, negative straight leg raising signs bilaterally, limited mobility of lumbar spine with forward flexion 30% of normal and sidebending and rotation limited due to pain. Notably, although Dr. Harris found more significant limitations than the other physicians, he did not find that Plaintiff's condition ruled out all work. He stated:

I do not feel that this gentleman can do heavy labor type of involvement in view of his chronic degenerative change. I feel that he would be better in a more sedentary type of vocation. Our big drawback is that he does not have a lot of academic skills to drawn [sic] on, although he does have his GED according to the patient. I would recommend, as previously mentioned, a sedentary type of vocation where he can get and move about and not have excessive heavy lifting.

[R. 235].

Plaintiff argues that the ALJ ignored allegations of shoulder and neck pain. He points to the December 18, 1990 report of Dr. Duncan [R. 196] and the July 15, 1992 report of Dr. Dean [R. 227] which report bursitis involving the shoulders and

right shoulder girdle pain. In his December 1990 report Dr. Duncan did mention "bursitis' involving both shoulders." However, that was not a diagnosis. The report merely related that "He [Plaintiff] states he has 'bursitis' involving both shoulders." [R. 196]. According to Dr. Duncan, Plaintiff's complaints of bursitis, tennis elbow and arthritis of the knee and neck "are minor, of a long standing nature and have not been responsible for any dysfunction." *Id.*

Dr. Dean's July 1992 report states that Plaintiff injured his shoulder in a fall from a ladder at home and since that time has experienced limitation of range of motion of the right shoulder girdle but has not sought medical evaluation for this problem. [R. 227]. Dr. Dean's examination of Plaintiff's right shoulder revealed limitation of range of motion of the right shoulder girdle on abduction and flexion, but no swelling erythremia, tenderness or crepetious was noted. [R. 228]. Subsequent examinations by Dr. Durick , October 1992 and 1993 [R. 242, 252], do not document shoulder complaints.

Concerning Plaintiff's neck, Dr. Dean found Plaintiff's neck to be "supple" [R. 228]; Dr. Harris found degenerative joint disease of the cervical spine (but none-the-less believed that Plaintiff was capable of more sedentary work)[R. 234-35]; Dr. Durick found Plaintiff's neck to be supple with "good range of motion without real difficulty." [R. 243, 253].

The Court finds the ALJ's statement that "the weight of the evidence compiled after December 31, 1991 is consistent with Dr. Shaddock's opinion" to be supported by substantial evidence. To the extent that the more recent records document

impairment, the rule applies that records describing a claimant's current condition cannot be used to support a retrospective diagnosis of disability absent evidence of an actual disability during the time of insured status. *Cf. Coleman v. Chater*, 58 F.3d 577, 579 (10th Cir. 1995).

III. HYPOTHETICAL QUESTION

Plaintiff contends that the ALJ improperly relied upon the vocational expert's response to a hypothetical question that did not include decrease or loss of grip strength and fine motor manipulation of the nondominant hand. Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, in posing a hypothetical question, the ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990).

The record is clear that in 1985 Plaintiff had an accident in which three fingers of the left hand were severed and reattached, with a resulting diminishment of function for that hand. [R. 80, 170; 227-29]. However, in the years since the accident with his hand, Plaintiff worked as a handyman/carpenter, as a truck driver, and as a pneumatic tool repairman. [R. 169]. There is nothing in the medical record to suggest that the condition of Plaintiff's hand has deteriorated since he last worked.

The ALJ's hypothetical included restrictions related to Plaintiff's hand, as

follows: "he has lost the use of the **second** and third fingers of his [left]³ hand and partial use of his first finger of his **right hand**." [R. 102]. After determining that the injury was to Plaintiff's non-dominant hand, the vocational expert testified as to the availability of occupations utilizing Plaintiff's transferable skills. Contrary to Plaintiff's assertion, the vocational expert did **not** testify that all of the jobs utilizing transferable skills required bilateral manual dexterity. The vocational expert's testimony was clear that of the three occupations utilizing transferable skills, only pneumatic tool repair at the light exertional level would **require** bilateral manual dexterity. However, he believed that with a nondominant hand being the one that has the limitations, that work could still be performed. [R. 103]. He did not state that the other jobs, security guard (light exertional level) and **policeman** work (sedentary) would require bilateral manual dexterity. *Id.*

The Court finds Plaintiff's complaints about the hypothetical questioning to be without merit.

IV. PAIN AND CREDIBILITY ANALYSIS

The framework for the proper analysis of the evidence of allegedly disabling pain was set out in *Luna v. Bowen*, 834 F.2d 161 (10th Cir.1987). The Court "must consider (1) whether Claimant established a pain-producing impairment by objective medical evidence; (2) if so, whether there is a "loose nexus" between the proven

³ The hearing transcript reveals that the ALJ's question related that Plaintiff's injury was to his right hand. However, Plaintiff corrected the ALJ and it is apparent from the remainder of the exchange that the vocational expert understood the injury to be to the left hand, and that Plaintiff is right-handed. [R. 102-103].

impairment and the Claimant's subjective allegations of pain; and (3) if so, whether considering all the evidence, both **objective** and subjective, Claimant's pain is in fact disabling." *Glass v. Shalala*, 43 F.3d 1392, 1395 (10th Cir.1994) (quoting *Musgrave v. Sullivan*, 966 F.2d 1371, 1375-76 (10th Cir.1992) (citing *Luna*, 834 F.2d at 163-64)); *see also Thompson v. Sullivan*, 987 F.2d 1482, 1488 (10th Cir.1993).

The ALJ did address claimant's complaints of disabling pain; however, he did so in conclusory fashion. After noting the general regulations and law governing assessments of pain, the ALJ stated:

After careful evaluation of claimant's signs and symptoms; the nature, duration, frequency, and intensity of the pain; the factors precipitating and aggravating the pain; the dosage, effectiveness, and side effects of the medication taken for relief of pain; the claimant's functional restrictions and the combined impact on the claimant's daily activities, the Administrative Law Judge finds that the claimant is not suffering from a totally disabling pain syndrome according to the criteria established in 20 CFR 404.1529 as interpreted by Social Security Ruling #88-13.

[R. 50]. "[I]t is well settled that administrative agencies must give reasons for their decisions." *Reyes v. Bowen*, 845 F.2d 242, 244 (10th Cir.1988). Here, the ALJ gave his conclusion but not the reasons for his conclusion. The ALJ stated that he was applying the framework set forth in *Luna*, but the Court is left to speculate what specific evidence led the ALJ to find claimant's pain was not disabling.

Though the ALJ did not state whether the objective evidence established a pain-producing impairment or whether there was a loose nexus between that impairment and Plaintiff's subjective complaints of pain, there appears to be evidence

that Plaintiff's back problems caused him some degree of pain. Assuming that "objective medical evidence showed that [claimant] had a back problem producing pain, the ALJ was required to consider [his] assertions of severe pain and to 'decide whether he believe[d them].'" *Thompson*, 987 F.2d at 1489 (quoting *Luna*, 834 F.2d at 163). To do this, he should have considered factors such as "the levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence." *Id.*, quoting *Hargis*, 945 F.2d at 1489) (further quotation omitted). Although the ALJ listed some of these factors, he did not explain why the specific evidence relevant to each factor led him to conclude Plaintiff's subjective complaints were not credible. Moreover, there is evidence that could be viewed as supporting Plaintiff's contention: he has sought medical treatment, including surgery for back pain; he has taken medication to relieve pain; his daily activities have been greatly restricted; and the ALJ himself found the claimant's testimony to be "credible to the extent that it is consistent with a residual functional capacity of light, limited as follows" [R. 52].

Credibility determinations are peculiarly the province of the finder of fact, and the Court will not upset such determinations when supported by substantial evidence. *Diaz v. Secretary of Health & Human Servs.*, 898 F.2d 774, 777 (10th Cir.1990).

However, "[f]indings as to credibility should be closely and affirmatively linked to substantial evidence and not just a conclusion in the guise of findings." *Huston v. Bowen*, 838 F.2d 1125, 1133 (1988)(footnote omitted); *see also Marbury v. Sullivan*, 957 F.2d 837, 839 (11th Cir.1992) (ALJ "must articulate specific reasons for questioning the claimant's credibility" where subjective pain testimony is critical); *Williams on Behalf of Williams v. Bowen*, 859 F.2d 255, 261 (2d Cir.1988) ("failure to make credibility findings regarding ... critical testimony fatally undermines the Secretary's argument that there is substantial evidence adequate to support his conclusion that claimant is not under a disability"). Here, the link between the evidence and credibility determination is missing; the ALJ's conclusion is all that has been provided.

This case is similar to *Kepler v. Chater*, 68 F.3d 387 (10th Cir. 1995) where the Court, finding that the ALJ's opinion contained only conclusory findings concerning pain and credibility, remanded the case for the limited purpose of requiring the express findings in accordance with *Luna*. As in *Kepler*, because the Court finds no merit to Plaintiff's other contentions of error, a limited remand of this case for the Commissioner to make express findings in accordance with *Luna*, with reference to relevant evidence as appropriate, concerning claimant's claim of disabling pain is in order. *See Rainey v. Department of Health & Human Servs.*, 48 F.3d 292, 293 (8th Cir.1995) (remanding for "express determinations regarding [claimant's] credibility"); *Hollis v. Bowen*, 837 F.2d 1378, 1385 (5th Cir.1988) ("Failure to indicate the credibility choices made and the basis for those choices in resolving the crucial

subsidiary fact of the truthfulness of subjective symptoms and complaints requires reversal and remand.") (quotation omitted). Also, as in *Kepler*, the Court does not dictate any result. The remand "simply assures that the correct legal standards are invoked in reaching a decision based on the facts of the case." *Huston*, 838 F.2d at 1132.

CONCLUSION

The Court REVERSES the decision of the Secretary and REMANDS the case for the purpose of making express findings in accordance with *Luna* and 20 C.F.R. § 404.1529 concerning Plaintiff's claim of disabling pain and for any further proceedings the ALJ finds necessary in light of those new findings.

SO ORDERED this 6th day of December, 1996.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

SAC

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

FILED

DEC 5 1996

AMBER FLINT,)
)
 Plaintiff,)
)
 v.)
)
 DOCTORS' HOSPITAL, an)
 affiliate of Columbia)
 Healthcare Corporation)
)
 Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Court No. 96-CV-175-B

Judge: Thomas R. Brett

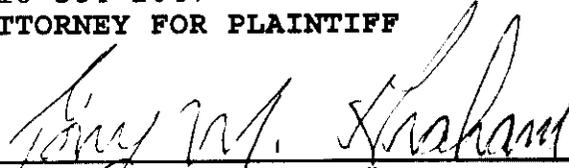
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DISMISSAL WITH PREJUDICE

All parties hereby stipulate, pursuant to Federal Rules of Civil Procedure, Rule 41(a)(1)(ii), to the dismissal of this action against Defendant, Doctors' Hospital, an affiliate of Columbia Healthcare Corporation, with prejudice.



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FLINT\DWP\mb

22

CLT

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

F I L E D

DEC 05 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ROBERT E. PARKER, INC.,)

PLAINTIFF,)

v.)

CASE NO. 93-C-111-E)

STATE OF OKLAHOMA, ex rel.)
OKLAHOMA TAX COMMISSION,)
and UNITED STATES OF AMERICA,)
ex rel. INTERNAL REVENUE)
SERVICE.)

DEFENDANTS.)

RECEIVED

DEC 5 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

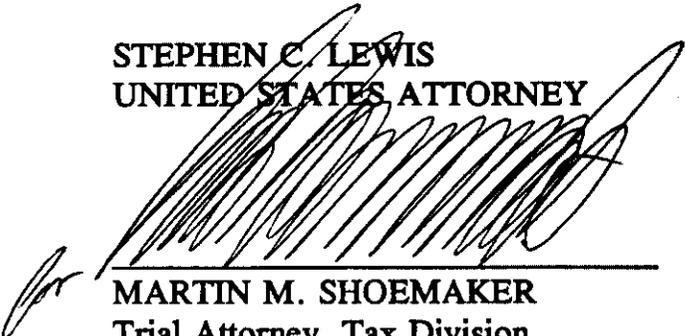
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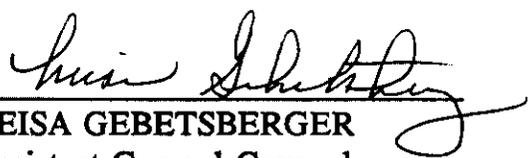
DATE: DEC 06 1996

STIPULATION OF DISMISSAL

The Defendants State of Oklahoma, ex rel., Oklahoma Tax Commission, and United States of America, ex rel., Internal Revenue Service, hereby stipulate to dismissal of this case. In support, the Defendants would show the Court that an Order to Distribute Interplead Funds was entered in this case on April 17, 1996, and that such funds have been disbursed.

STEPHEN C. LEWIS
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ENCL. 3-1-1

DATE 12/5/96

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

DEC 3 1996 *SLC*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MELVIN M. OTT, JR.,)
)
)
 Plaintiff,)
)
)
 v.)
)
)
 SHIRLEY S. CHATER,)
 Commissioner of Social)
 Security,)
)
)
 Defendant.)

Case No: 95-C-566-W ✓

JUDGMENT

Judgment is entered in favor of the Plaintiff, Melvin M. Ott, Jr., in accordance with this court's Order filed December 3, 1996.

Dated this 3rd day of December, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:judgment

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

RICHARD C. ROBINSON,)
)
Plaintiff,)
)
vs.)
)
BLUE CIRCLE, INC., an)
Alabama Corporation,)
)
Defendant.)

DEC 3 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96 CV 585B
Hon. Thomas R. Brett

DOCKET
DEC 05 1996

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The Plaintiff, RICHARD C. ROBINSON, through undersigned counsel, and pursuant to Rule 41(a)(1), FRCP, hereby dismisses this lawsuit against the Defendant, BLUE CIRCLE, INC., with prejudice to the refile of same. All counsel of record consent to said dismissal as reflected by their signatures hereon. Each side shall bear their own attorneys fees and costs.

Respectfully submitted,

THE ASH LAW FIRM

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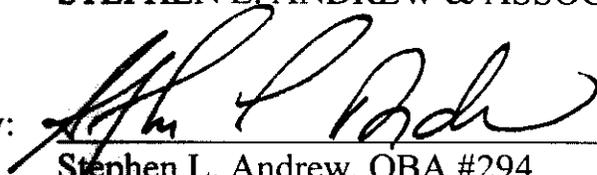
ATTORNEYS FOR DEFENDANT

and

Respectfully submitted,

STEPHEN L. ANDREW & ASSOCIATES

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918/583-1111

ATTORNEYS FOR DEFENDANT

DATE 12/5/96

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

F I L E D

MELVIN M. OTT, JR.,

Plaintiff,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

DEC 3 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-566-W ✓

ORDER

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

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

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

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The 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

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 not engaged in substantial gainful activity since May 30, 1993. He concluded that claimant had the residual functional capacity to perform a full range of sedentary work of an unskilled nature, subject to no lifting over 25 pounds on a regular basis, standing or walking limited to 15 minutes, and no fine work requiring normal vision prior to February 5, 1994. He

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

³The 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).

found that claimant could not perform his past relevant work, but that occupations existed in the national economy in significant numbers that he could perform prior to February 5, 1994, when he turned fifty, but not after that date. Having determined that claimant's impairment did not prevent him from doing relevant work available in the national economy, prior to February 5, 1994, the ALJ concluded that he was not disabled at any time prior to that date, but was disabled after that date under the Social Security Act.

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

- (1) The ALJ improperly determined claimant could perform sedentary work subject to certain limitations prior to February 5, 1994, but not thereafter.
- (2) The ALJ erred in mechanically applying the Medical-Vocational guidelines (grids).
- (3) The ALJ failed to make the proper pain findings in this case as to claimant's credibility.

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

Claimant has a history of **diabetes** mellitus, type II, non-insulin-dependent diabetes mellitus (NIDDM), a condition that can be controlled by insulin, diet, exercise, and hygienic measures.⁴ (TR 37, 129). On his July 1, 1993 application for benefits, he claimed he had not been working since January 1, 1993 "not completely

⁴Taber's Cyclopedic Medical Dictionary

due to my condition, but because of economic layoff." (TR 85). He contended that his job search was difficult because he had difficulty reading and was unable to stand or walk for long periods. (TR 85).

Claimant suffers proliferative diabetic retinopathy caused by the diabetes and has undergone laser photocoagulation to control the damage to his eyes. (TR 103, 113-118). He attended diabetes management classes from June of 1992 to August of 1993 at the Indian Health Care Center (TR 125-133) and takes insulin and capoten for hypertension. (TR 179).

Claimant visited Dr. Raymond E. Townsend on May 6, 1987 (TR 108-110). The doctor noted no visual complaints, 20/25 vision in both eyes, and background diabetic retinopathy. (TR 108-110). Claimant was seen by Dr. Townsend again on June 14, 1993, and the doctor noted that the claimant had, with correction, 20/40 vision in the right eye and 20/25 vision in the left eye and proliferative retinopathy (TR 104-107). On August 4, 1993, in a letter reporting these two visits, Dr. Townsend wrote that claimant was "able to perform most work-related activities with the exception of those tasks that require very fine eyesight." (TR 103).

On February 28, 1990, claimant was seen in the ophthalmology clinic at W.W. Hastings Indian Hospital, where his vision was measured at 20/25 in the right eye and 20/20 in the left eye, uncorrected; with correction it was noted claimant's vision would be 20/20 in both eyes. (TR 118). On August 17, 1992, Dr. Abel Lau at the Tulsa Indian Health Care Center noted that claimant's hypertension and diabetes were poorly controlled, and he needed a new medication regimen, an exercise program,

and a consultation with a dietician. (TR 129). Six months later on February 22, 1993, he was treated for bronchitis at the Health Care Center and again his poor control over diabetes was noted. (TR 124).

Dr. Van Williams at the ophthalmology clinic at W.W. Hastings Indian Hospital saw claimant several times from early April 1993 to late May 1993. (TR 113-118). On April 9, 1993, Dr. Williams measured claimant's vision at 20/60 in the right eye and 20/50 in the left eye, noting that claimant's vision had decreased and he was seeing "dirty spots" in the periphery of his vision. (TR 118). Dr. Williams recorded at an undated April 1993 visit that claimant's vision was "getting more blurry," and measured it at 20/80 in the right eye and 20/70 in the left. (TR 117). On April 26, 1993, Dr. Williams reported that claimant's vision was measured at 20/80 in the right eye and 20/70 in the left eye "with little chance of future improvement." (TR 116). The doctor stated that claimant "may have increasing problems doing his work especially if his vision continues to decline." (TR 116).

On May 11, 1993, Dr. Williams measured claimant's vision at 20/70 in the right eye and 20/50 in the left eye, with correction. (TR 115). On May 25, 1993, claimant's vision was measured at 20/40 in the right eye and 20/30 in the left eye, with correction. (TR 113). The record indicates that, on the same day, claimant was referred to and seen by Dr. Schoeffler for a recommendation and evaluation. (TR 113). Dr. Schoeffler measured claimant's vision at 20/30 in the right eye and 20/25 in the left eye, with correction. (TR 114).

Claimant was also examined by Dr. Richard E. Mills on October 11, 1993, who

reported claimant's visual acuity at 20/30 in both eyes with correction. (TR 158). Diabetic retinopathy was noted, but claimant did not exhibit any signs of cataracts or glaucoma. (TR 158-159). The doctor emphasized to claimant that it was "very crucial for him to stay well disciplined with his diabetic management." (TR 159).

Dr. Luther Woodcock conducted a physical examination of the claimant on December 13, 1993, and concluded that the claimant had the residual functional capacity to stand, walk or sit with normal breaks for six hours out of a regular eight-hour workday. (TR 68). Dr. Woodcock determined that claimant could occasionally lift or carry 20 pounds and could frequently lift or carry 10 pounds. (TR 68). Significantly, he found that claimant had no visual limitations. (TR 70). Additionally, Dr. Woodcock stated that "[p]ain does not affect" the claimant. (TR 68).

At the hearing on June 22, 1994, claimant testified that his daily activities included listening to the radio for four hours, fixing two meals, napping an average of five hours per day, and doing housework, including vacuuming and laundry. (TR 39, 45). He vacuums and "watch[es] the premises" of the church he attends in exchange for a room. (TR 39, 44). He has a driver's license and a car which he uses occasionally. (TR 36). Claimant further testified that he could lift up to fifty pounds and sit for up to one hour before experiencing any problems, but experienced swelling if he stood or walked for longer than fifteen minutes. (TR 40).

It is significant that, at the June 22, 1994 hearing, a vocational expert testified as to claimant's ability to perform work activities other than those connected with his former work, stating at first that he could not perform any sedentary jobs because he

had no transferable skills and could do no fine work.⁵ She revised that conclusion under the ALJ's further questioning, stating that there were perhaps 7500 sedentary cashier jobs not requiring paperwork and security systems monitor jobs that claimant

⁵The testimony of the vocational expert went as follows:

Q. (by ALJ). Okay. Let me pose a hypothetical to you. Assume a man who is aged 50; who has the same education and past relevant work as the claimant in this case, and I found that such person could perform work which involved no lifting over 25 pounds on a regular basis, and that his standing or walking was restricted to under 15 minutes at a time. Would such person be able to do any substantial gainful activity in the economy?

A. That person, even though they could lift 25 pounds, would only be able to perform sedentary work because of the inability to walk more than 15 minutes at a time. He'd have to be able to walk an hour, up to two hours at a time, to perform light work.

Q. Okay. And would such a person then be able to do any substantial gainful activity -- I mean, if we limit it to sedentary, are there any jobs that such person could do?

A. As previously mentioned, there are no transferable skills to sedentary jobs, so there would be some sedentary unskilled jobs, which is unskilled assembly work, and there are 144,000 of those jobs in the national economy, and 18,000 in this region of Texas, Arkansas, Oklahoma, and --

Q. Okay. Let me back up here just a minute here. Let me add to my hypothetical -- I'm sorry -- and I meant to do this before -- that this person could do no fine work which requires normal corrected vision. You mentioned assembly work and I question as to whether or not such person could do assembly work.

A. That's right. If that's another restriction, that person would not be able to perform sedentary assembly work. That normally does require good vision, as far as ability to do fine work.

Q. Uh-huh.

A. So that would probably eliminate any sedentary work that person could do. (TR 47-48).

might be able to perform without good vision. Claimant's attorney challenged this contention, asking what the Dictionary of Occupational Titles ("DOT") code for the position of cashier was, and the vocational expert stated she did not know. (TR 49-50). The attorney also pointed out that the position of security system monitor was a semiskilled position under the DOT, and the vocational expert agreed, concluding that claimant had no transferable skills and therefore could not be considered as qualified to hold such a job (TR 50-51).

There is merit to claimant's first contention. "Residual functional capacity" is defined by the regulations as what the claimant can still do despite his or her limitations. Davidson v. Secretary of Health & Human Servs., 912 F.2d 1246, 1253 (10th Cir. 1990). The Secretary has established categories of sedentary, light, medium, heavy, and very heavy work, based on the physical demands of the various kinds of work in the national economy. 20 C.F.R. § 404.1567. "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.

20 C.F.R. § 404.1567(a).

Substantial evidence does not support the ALJ's finding that claimant could do sedentary work with certain limitations from May 30, 1993 to February 5, 1994, but not after that date. The ALJ determined claimant had the residual functional capacity

to perform sedentary work, limited as follows: lifting over twenty-five pounds, standing or walking more than fifteen minutes, and doing fine work requiring normal vision. (TR 22). However, he also noted that claimant had no transferable skills. Although the ALJ suggests in his opinion that the vocational expert testified that claimant could perform cashier and security systems monitor jobs, the record reveals that the vocational expert ultimately reached the opposite conclusion (TR 49-51).

If a claimant suffers from nonexertional impairments that limit the ability to perform a full range of work in a specific guideline category, as the ALJ found claimant does, the ALJ is required to utilize the testimony of a vocational expert. Reed v. Sullivan, 988 F.2d 812, 816 (8th Cir. 1993). A vision impairment is nonexertional and not encompassed in the definition of sedentary work. Cummins v. Schweiker, 670 F.2d 81, 84 (7th Cir. 1982).

The ALJ erred when he suggested that the vocational expert had concluded that claimant could do security systems monitor jobs -- in fact, she concluded that he did not have the transferable skills to do such jobs (TR 50-51). While she stated there might be cashier jobs he could perform, she admitted that she did not know the DOT code for cashier so did not possess the information necessary to reach this conclusion (TR 49-50). In fact, under the DOT, "cashier" is defined as a job requiring light physical demands.⁶ Thus, claimant could not perform cashier jobs, since the

⁶The position of "Cashier II (clerical)," job number 211.462-010, is defined in the DOT as follows:

Receives cash from customers or employees in payment for goods or services

ALJ determined he could only do sedentary work. The ALJ's conclusion that there existed jobs in the national economy that claimant could perform was fatally undermined by the vocational expert's answers to his hypothetical questions and the questions of counsel. See Podedworny v. Harris, 745 F.2d 210, 219 (3rd Cir. 1984).⁷

and records amounts received: **Recomputes or computes bill, itemized lists, and tickets showing amount due, using adding machine or cash register. Makes change, cashes checks, and issues receipts or tickets to customers. Records amounts received and prepares reports of transactions. Reads and records totals shown on cash register tape and verifies against cash on hand. May be required to know value and features of items for which money is received. May give cash refunds or issue credit memorandums to customers for returned merchandise. May operate ticket-dispensing machine. May operate cash register with peripheral electronic data processing equipment by passing individual price coded items across electronic scanner to record price, compile printed list, and display cost of customer purchase, tax, and rebates on monitor screen. May sell candy, cigarettes, gum, and gift certificates, and issue trading stamps. May be designated according to nature of establishment as Cafeteria Cashier (hotel & rest.); Cashier, Parking Lot (automotive ser.); Dining-Room Cashier (hotel & rest.); Service-Bar Cashier (hotel & rest.); Store Cashier (clerical); or according to type of account as Cashier, Credit (clerical); Cashier, Payments Received (clerical). May press numeric keys of computer corresponding to gasoline pump to reset meter on pump and to record amount of sale and be designated Cashier, Self-Service Gasoline (automotive ser.). May receive money, make change, and cash checks for sales personnel on same floor and be designated Floor Cashier (clerical). May make change for patrons at places of amusement other than gambling establishments and be designated Change-Booth Cashier (amuse. & rec.).**

⁷The court also notes that 20 C.F.R. § 404.1563, which pertains to "age as a vocational factor," states as follows:

[W]e do not determine disability on your age alone. We must also consider your residual functional capacity, education, and work experience. If you are unemployed because of your age and you can still do a significant number of jobs which exist in the national economy, we will find that you are not disabled. We explain in detail how we consider your age as a vocational factor in Appendix 2. However, we will not apply these age categories mechanically in a borderline situation.

The decision of the ALJ is not supported by substantial evidence, and is reversed. Claimant is entitled to disability benefits calculated from May 30, 1993 under § 216(i) and 223 of Title II of the Act, 42 U.S.C. § 416(i) and 423, respectively and the Commissioner shall compute and pay benefits accordingly.

Dated this 29th day of November, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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(emphasis added).

The ALJ concluded that, **considering claimant's impairments, residual functional capacity, age, education, and work experience**, he was disabled when he turned fifty, which is considered advanced aged, **on February 5, 1994**, under Rule 201.14 of the Medical Vocational Guidelines ("grids") found in Appendix 2, Subpart P, Regulations No. 4 of the Social Security statutes, 20 C.F.R. § 404. The ALJ's finding that he was not disabled for the previous eight months from May 30, 1993 to February 1994, would apparently not be considered by the Tenth Circuit to be an improper mechanical application in a borderline situation. See, Lambert v. Chater, 96 F.3d 469 (10th Cir. 1996), where the court concluded that a claimant, who was seven months short of the next category, "did not fall within a borderline situation preventing application of the grids."

Although this court had originally viewed the present case as one involving such an improper "mechanical application," the timely guidance provided by the Lambert decision has forced a reconsideration of that view. However, disposition of this appeal does not turn upon that issue. Rather, the case must turn upon the fact that the Secretary did not carry her burden to establish claimant's residual functional capacity to perform sedentary work from May 30, 1993 to February 5, 1994. In concluding otherwise, the ALJ relied on demonstrably mistaken expert testimony.

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

FILED

DEC 4 - 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MARIE T. GIAN, an individual,)
)
 Plaintiff,)
)
 v.)
)
 METROPOLITAN LIFE INSURANCE)
 COMPANY, a Foreign Corporation,)
 and DELL R. HUGHES, an Individual,)
)
 Defendants.)

Case No. 96-CV-1021-BU

ENTERED ON DOCKET
DATE DEC - 5 1996

AGREED ORDER TO REMAND

Plaintiff Marie T. Gian, having filed a motion for remand pursuant to 28 U.S.C. § 1447 denying any federal question, and Defendants Metropolitan Life Insurance Company and Dell R. Hughes having consented to the form and entry of an order of remand by and through their respective undersigned attorneys, and good cause appearing, IT IS ORDERED that this action be and it hereby is remanded to the District Court in and for Tulsa County, State of Oklahoma, without costs and fees to any party.

Dated, this 4th day of ~~December~~, 1996.

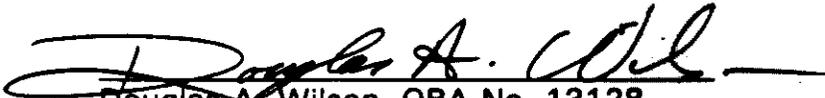

UNITED STATES DISTRICT COURT JUDGE

Approved as to form and content:



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Patricia Ledvina Himes, OBA No. 5331
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METROPOLITAN LIFE INSURANCE COMPANY



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ATTORNEYS FOR DEFENDANT,
DELL R. HUGHES



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ATTORNEYS FOR PLAINTIFF,
MARIE T. GIAN

PLD/128879.1

DATE 12/5/96

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

F I L E D

MICHAEL E. LOWTHER,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 COMMISSIONER OF SOCIAL)
 SECURITY,¹)
)
 Defendant.)

DEC 4 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-919-W ✓

ORDER

This order pertains to Defendant's Motion to Alter or Amend Order (Docket #11). Defendant asks the court to amend its Order and Judgment entered on September 30, 1996.

There is merit to defendant's contention that the court erred in finding that SSR 83-12 precluded a finding that claimant has the residual functional capacity to perform sedentary work as a matter of law, since the ALJ found that he was required to alternate sitting and standing. The court failed to recognize that the Tenth Circuit noted in Soliz v. Chater, 82 F.3d 373, 375 (10th Cir. 1996), that SSR 83-12 merely requires a vocational expert to be consulted to clarify implications for the

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.

occupational base if a claimant must alternate sitting and standing while working. This was done during claimant's hearing before the ALJ, so there was no legal error. The ALJ asked the vocational expert if claimant could do any sedentary jobs if he had to alternate sitting and standing, and the expert stated that 25 percent of the 144,000 unskilled bench assembly and 80,000 machine operating sedentary jobs that existed in the national economy, or 56,000 jobs, permitted a sit/stand option at will. (TR 220-221, 223).

There is therefore substantial evidence to support the ALJ's finding that claimant retained the residual functional capacity to perform a significant number of sedentary jobs with a sit/stand option that exist in the national economy. Claimant's contentions that substantial evidence does not support the finding and that the ALJ's hypothetical question was improper,² because it asked the vocational expert to assume he could do sedentary work, did not consider his pain, and ignored Ruling 83-

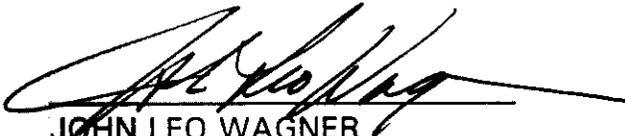
² The ALJ's first hypothetical question was as follows:

I'd like you to assume that we have an individual who is of the same age, education and work experience as the claimant, and by education, I mean, although he has a tenth grade education, I want you to assume he can only read at the second grade level, and has otherwise an average ability to -- average to poor ability to read, and cannot write at all, or work with numbers. I want you to further assume that the hypothetical claimant has the physical capacity to perform sedentary work, but with the following limitations -- and the question is going to be whether there's other work the hypothetical individual could perform, and if so, whether they're -- that work exists in the national economy. If it does exist, I'd like you to identify the jobs, and the numbers of jobs that do exist. The further limitations would be that this individual could only occasionally stoop or crouch, could not bend or do any crawling, and in order to be able to perform work at the sedentary level would need to be able to sit and stand at will. With those limitations, are there any jobs that you can identify that exist in the national economy?

12, have no merit.

Defendant's Motion to Alter or Amend Order (Docket #11) is granted. The court amends its Order and Judgment of September 30, 1996 to find that the decision of the ALJ is affirmed.

Dated this 4th day of December, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:lowther.alter

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

FILED

DEC - 4 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DWITT E. FLATT, et al,)
)
 Plaintiff(s),)
)
 vs.)
)
 ARCO OIL & GAS CO., et al,)
)
 Defendant(s).)

Case No. 96-C-654-B ✓

ENTERED ON DOCKET
DATE DEC 05 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 4th day of December, 1996.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

AW
11-29

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC - 3 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KAREN ANITA RAMIREZ fka KAREN
A. AQUINO; JUAN MANUEL
RAMIREZ; COUNTY TREASURER,
Tulsa County, Oklahoma; BOARD OF
COUNTY COMMISSIONERS, Tulsa
County, Oklahoma,

Defendants.

Civil Case No. 95-C 863B

ENTERED ON CLERK

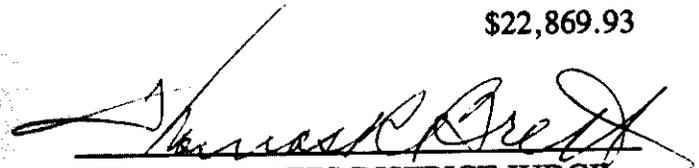
DATE DEC 04 1996

ORDER OF DISBURSAL

NOW on the 3rd day of Dec, 1996, there came on for

consideration the matter of disbursement of \$23,319.00 received by the United States Marshal for the sale of certain property described in the Notice of Sale in this case. The Court finds that the said \$23,319.00 should be disbursed as follows:

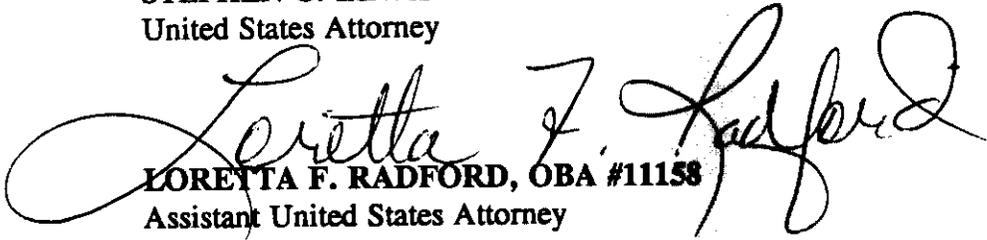
United States Marshal's Costs	\$422.07
Executing Order of Sale	3.00
Advertising Sale Fee	3.00
Conducting Sale	3.00
Appointing Appraisers	6.00
Appraisers' Fees	225.00
Publisher's Fee	182.07
United States Department of Justice Credit for Judgment of \$62,376.78	\$22,869.93


UNITED STATES DISTRICT JUDGE

23

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



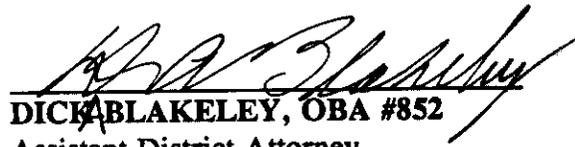
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Assistant United States Attorney

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(918) 581-7463



DICK BLAKELEY, OBA #852

Assistant District Attorney

406 Tulsa County Courthouse

Tulsa, Oklahoma 74103

(918) 596-4841

Attorney for Defendants,

County Treasurer and

Board of County Commissioners,

Tulsa County, Oklahoma

LFR:flv

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

F I L E D

DEC 03 1996



Phil Lombardi, Clerk
U.S. DISTRICT COURT

KENNETH EDWARD DOTY, JR.,
Plaintiff,

vs.

LEROY YOUNG, E. MILLIGAN, AND
KURT DYER,

Defendants.

Case No. 95-C-944-E

ENTERED ON DOCKET
DEC 04 1996

DATE _____

JUDGMENT

Judgment is hereby entered for Defendants and against Plaintiff. Dated this 3rd day of

December, 1996.



JAMES O. ELLISON
U.S. DISTRICT COURT SENIOR JUDGE

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

F I L E D

DEC 03 1996

RLC

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KENNETH EDWARD DOTY, JR.,

Plaintiff,

vs.

LEROY YOUNG, E. MILLIGAN, AND
KURT DYER,

Defendants.

Case No. 95-C-944-E ✓

ENTERED ON DOCKET

DATE DEC 04 1996

ORDER

There being no objection, the Court adopts the Magistrate Judge's Report and Recommendation filed October 25, 1996 [Dkt. 8]. **THE COURT ORDERS THAT THIS CASE BE DISMISSED** as outlined in the Magistrate Judge's Report and Recommendation.

Dated this 1st day of Dec., 1996.

James O. Ellison

JAMES O. ELLISON

U.S. DISTRICT COURT SENIOR JUDGE

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

FILED

DEC 03 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY, and STATE FARM)
FIRE AND CASUALTY COMPANY,)

Plaintiffs,)

vs.)

BILL McCALISTER, and DEBBIE)
McCALISTER,)

Defendants.)

No. 96-C-892-C

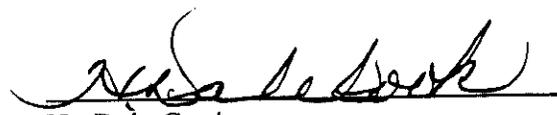
ENTERED IN COURT
DEC 04 1996

JUDGMENT

This matter came before the Court for consideration of defendants' motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for defendants, Bill and Debbie McCalister, and against plaintiffs, State Farm, with respect to plaintiffs' Complaint, filed on September 27, 1996, seeking a declaration from this Court that plaintiffs and defendants had entered into a full and final settlement regarding defendants' UM claim arising out of defendants' December 1993 vehicle collision.

IT IS SO ORDERED this 2nd day of December, 1996.



H. Dale Cook
U.S. District Judge

12

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

STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY, and STATE FARM)
FIRE AND CASUALTY COMPANY,)

Plaintiffs,)

vs.)

BILL McCALISTER, and DEBBIE)
McCALISTER,)

Defendants.)

F I L E D

DEC 03 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-892-C

ENTERED IN COURT

DEC 04 1996

ORDER

Currently pending before the Court is the motion filed by defendants seeking to dismiss for failure to state a claim, or in the alternative, summary judgment.

On September 27, 1996, plaintiffs filed the present action against defendants, invoking diversity jurisdiction pursuant to 28 U.S.C. § 1332. Plaintiffs seek a declaratory judgment that plaintiffs and defendants entered into a full and final settlement of defendants' claims for uninsured/underinsured motorist ("UM") coverage. On October 17, 1996, defendants filed their motion to dismiss, or in the alternative, motion for summary judgment. For purposes of this Order, the Court will focus solely upon defendants' alternative motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

On December 26, 1993, defendant, Bill McCalister, was injured in an auto collision while driving a rented vehicle in Florida. As a result, Bill McCalister suffered serious chest injuries, which required surgery. Prior to the accident, plaintiff, State Farm Mutual Automobile Insurance Co.,

issued five vehicle insurance policies to **defendants**, with each policy providing a maximum of \$100,000 in UM coverage. Additionally, **plaintiff**, State Farm Fire and Casualty Co., issued a Personal Liability Umbrella Policy to **defendants**, providing a maximum of \$1,000,000 in UM coverage. Each insurance policy was in effect at the time of the accident. Following the accident, **defendants** filed a claim with **plaintiffs** to recover UM coverage under **defendants'** policies. After some delay while investigating **defendants'** claim, State Farm Mutual paid **defendants** \$50,000 in UM benefits on March 2, 1995 under policy number 2788-890-36B. On May 1, 1995, State Farm Mutual paid **defendants** \$100,000 in UM benefits under policy number 2588-400-36A, and \$100,000 in UM benefits under policy number 2601-824-36A. Upon payment of the proceeds under said policies, **defendants** executed three separate Release and Trust Agreements. Each release agreement identified the specific policy number from which the payments were made. **Defendants** never signed any document purporting to fully settle all claims which **defendants** may have against **plaintiffs**. Further, **plaintiffs** did not pay any benefits under the two remaining vehicle policies nor under the umbrella policy, and **defendants** did not sign any release with respect to these remaining policies. Subsequent to **plaintiffs'** payment of benefits under the above numbered policies, **defendants** asked **plaintiffs** to pay additional benefits under the UM claim. **Plaintiffs** took the request under advisement. In August of 1995, **plaintiffs** notified **defendants** that **defendants'** request for additional payments was denied. **Defendants** subsequently demanded that the balance of UM benefits be paid to **defendants** in exchange for a full release of all claims. **Plaintiffs** in turn filed the present action, seeking a ruling that the prior payments of UM benefits to **defendants** constituted a full and final settlement of all **defendants'** claims for UM coverage arising out of the December 1993 accident.

Plaintiffs claim that the payments made to **defendants** totaling \$250,000 constitute a full and

final settlement of defendants' UM claim arising out of the December 26 accident. Plaintiffs claim that defendants accepted the checks totaling \$250,000 in consideration for the settlement of defendants' UM claim, and in exchange for said payment, defendants executed three releases. Plaintiffs further allege that after the settlement was concluded, defendants demanded that plaintiffs void the settlement and pay additional proceeds. Plaintiffs maintain that the payments made to defendants were in exchange for a full and final settlement of defendants' claims, and plaintiffs seek a declaration from the Court stating such.

Plaintiffs argue that the releases signed by defendants evince the parties' intention that the payments made to defendants were in exchange for a full and final settlement of defendants' present and future claims for UM coverage. Plaintiffs further assert that the fact that the three releases refer to specific policy numbers from which the settlement was funded does not establish that the settlement was partial. Plaintiffs argue that defendants signed their releases which provided that defendants fully and finally settled their UM claim against plaintiffs.

Conversely, defendants maintain that the releases which they signed only impact the policy number specifically mentioned in each release. Thus, defendants argue that defendants are not foreclosed from seeking coverage under the three remaining policies which were not mentioned in the executed releases. Defendants represent that they never asked plaintiffs to void any release. Rather, defendants requested payment of benefits as provided by the terms of the remaining policies which were unaffected by the releases.

As an initial matter, the Court notes that the parties agree that Oklahoma law governs the present dispute. The standard for granting summary judgment is rather strict. Rule 56(c) of the F.R.C.P. provides that summary judgment "shall be rendered forthwith if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Furthermore, the "trial court has no real discretion in determining whether to grant summary judgment. . . . A moving party must establish his right to a summary judgment as a matter of law, and beyond a reasonable doubt." U.S. v. Gammache, 713 F.2d 588, 594 (10th Cir.1983). "Pleadings and documentary evidence are to be construed liberally in favor of a party opposing a Rule 56 motion." First Western Government Securities, Inc. v. U.S., 796 F.2d 356, 357 (10th Cir.1986). "However, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative;' . . . the nonmovant must come forward with specific facts showing a genuine issue for trial." Frank v. U.S. West, Inc., 3 F.3d 1357, 1361 (10th Cir.1993).

Upon examining the briefs and exhibits submitted by the parties, the Court concludes that defendants' motion has merit and that summary judgment should be granted in defendants' favor. All inferences that may properly be drawn from the documents presented indicate that defendants did not execute a full and final release of all present and future UM claims which may be brought against plaintiffs as a result of the December 1993 accident. Rather, it is apparent from the record that defendants merely executed a release with respect to certain enumerated policy numbers. The Court acknowledges that such releases appear valid and therefore prevent defendants from pursuing a claim under these specific policy numbers. However, it is also apparent that the releases executed by defendants in no way impact or affect the policy numbers which were not mentioned or specified in such releases. Hence, defendants have not waived or released any claim against plaintiffs for UM coverage under the three remaining policies which were not specified in the three releases.

Plaintiffs' argument that defendants effectively released all present and future UM claims

which defendants may have under all the policies is inconsistent with the documents provided by defendants. Upon examining the releases in question, it is clear that defendants only effectively released claims under the specific policy number mentioned in the release. Each release provides, in part, that defendants received a certain amount "IN FULL SETTLEMENT AND FINAL DISCHARGE OF ALL CLAIMS UNDER THE UNDERINSURED MOTORIST COVERAGE OF THE ABOVE NUMBERED POLICY BECAUSE OF BODILY INJURIES KNOWN AND UNKNOWN AND WHICH HAVE RESULTED OR MAY IN THE FUTURE DEVELOP" (emphasis added). It is beyond contention that only one interpretation may properly be drawn from the above language, i.e., that defendants solely released those claims arising under the *numbered policy* appearing in the release. Consequently, defendants did not surrender any claims under a policy which was not specified in any of the releases. The only claims which defendants surrendered are those arising under the policy numbers appearing in the release. Any claims under any other policy numbers therefore remain viable.

If plaintiffs desired that the payments to defendants be in full satisfaction of all present and future claims under all defendants' policies with plaintiffs, plaintiffs should have provided for such in the documents which defendants executed. This, however, was not done. Rather, defendants executed documents which released their claims only under specific policy numbers. In plaintiffs' response to defendants' present motion, plaintiffs claim that in exchange for the payment of \$250,000, defendants executed three releases. This is certainly correct, but it does not mean that defendants thereby released all claims under all policies. Rather, plaintiffs effectively admit that \$250,000 was paid in consideration of defendants executing three releases. However, the releases which defendants executed only pertain to the \$250,000 which was paid under certain policy numbers, and the releases

further foreclose the right of defendants to pursue a claim under the policy numbers contained in the releases. The releases on their face, however, do not operate to prevent defendants from pursuing a claim under those policies which were not mentioned in the releases. That is, in exchange for \$250,000, defendants only surrendered the right to pursue a claim under three specific policy numbers; by accepting the \$250,000, however, defendants in no way bargained away their right to pursue a claim under the three policies not contained in the releases. It would have been incredibly simple for plaintiffs to have given legal effect to the parties' alleged intention to enter into a full and final settlement with respect to all claims under all policies; plaintiffs could have simply required defendants to execute a document surrendering all claims under all available policies in exchange for plaintiffs' payment of \$250,000. Plaintiffs did not do so, and the Court will not rewrite the releases in order to give effect to an intention when such an intention clearly runs counter to the unambiguous language of the releases.

Plaintiffs seek to excuse their error and have this Court adopt an inconsistent meaning of the releases by arguing that the identification of the policies on the releases was merely an administrative procedure followed by plaintiffs when multiple policies are involved in the settlement of a UM claim. This assertion is without merit and runs counter to the express language of the releases, which clearly provide that defendants released all claims under the *above numbered policy*. If such is an administrative practice of plaintiffs', perhaps it is time for plaintiffs to consider modifying their policies and instruments, so that the documents which their insureds execute actually give effect to plaintiffs' alleged intentions.

In Corbett v. Combined Communications Corp. of Oklahoma, Inc., 654 P.2d 616, 617 (Okla. 1982), the Oklahoma Supreme Court held that a release is a contract. Hence, it is clear that the

releases executed by defendants are **contracts and** must be interpreted in accordance with contract law. Oklahoma law provides that the “**language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.**” 15 O.S. § 154. As the Court has previously noted, the releases executed by **defendants** are certainly unambiguous. The releases specifically provide that defendants agree to **surrender** claims under specific policy numbers in exchange for the payment by plaintiffs of a **certain sum**. The Court has difficulty envisioning how these contracts of release could be any more **clear** as to their meaning. “The language in a contract is given its plain and ordinary meaning **unless** some technical term is used in a manner meant to convey a specific technical concept. . . . **If the language is unambiguous, the court is to interpret it as a matter of law.**” Oklahoma Oil & Gas Exploration, Drilling Program 1985-A v. W.M.A. Corp., 877 P.2d 613, 615 (Okla.App. 1994). “**When the bargained-for contract is in writing, a court may neither make a new contract to benefit a party nor rewrite the existing one. . . . The law will not make a better contract than the parties themselves have seen fit to enter into.**” *Id.* This, however, is precisely what plaintiffs ask the Court to **do**, i.e., to ignore the plain language of the contracts and effectively rewrite them pursuant to some **claimed** intention which plaintiffs allegedly possessed when entering into the releases. The Court **refuses** to grant such a request. It is contrary to the fundamentals of contract law for plaintiffs to **suggest** that the releases do not mean what they clearly impart. If plaintiffs desired a different **meaning** to be extracted from the releases, plaintiffs should have incorporated different language **which** would have given legal effect to such intentions. “[N]either forced nor strained construction will be indulged, nor will any provision be taken out of context and narrowly focused upon to **create** and then construe an ambiguity so as to import a favorable consideration to either party **than that** expressed in the contract.” Dodson v. St. Paul

Insurance Co., 812 P.2d 372, 376 (Okla. 1991). Moreover, even when ambiguity is found to exist in an insurance contract, the doubt is to be resolved against the insurer. Combined Mut. Cas. Co. v. Metheny, 223 P.2d 533 (Okla. 1950).

Accordingly, defendants' motion for summary judgment is hereby GRANTED. Defendants' policies of insurance, numbers 2784-005-36A, 2756-610-36A, and 3636-1162-9, issued by plaintiffs, remain unaffected by the three contracts of release currently at issue. With respect to these unaffected policy numbers, the Court concludes that defendants did not enter into a contract purporting to effectuate a full and final settlement of all defendants' claims for UM coverage arising out of the December 1993 accident. All other pending motions are hereby rendered MOOT by entry of this Order.

IT IS SO ORDERED this 2nd day of December, 1996.


H. Dale Cook
U.S. District Judge

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U.S. ATTORNEY
N.D. OKLAHOMA

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

DEC 03 1996

Le

MARION WADE QUINTON, JR.,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiff,)

v.)

Case No. 96-C-686-E

PHILLIS CURTIS,)

DENNIS KELLEY,)

JERRY G. McRAE)

DONALD R. NICHOLS, and)

J. TRACY,)

Defendants.)

ENTERED ON DOCKET
DATE DEC 04 1996

ORDER OF DISMISSAL

This case came on for a case management conference on November 19, 1996, and pursuant to that proceeding IT IS HEREBY ORDERED, ADJUDGED and DECREED:

The plaintiff's causes of action pursuant to the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 filed against the individually named federal defendants, Phyllis Curtis, Dennis Kelley, Jerry G. McRae, Donald R. Nichols, and J. Tracy are hereby dismissed without prejudice.

To the extent that the plaintiff's present action includes a claim against the Department of Veterans Affairs for its denial of his request to waive an overpayment indebtedness allegedly incurred in 1985, the Court finds that an appeal has been initiated by the plaintiff which is now pending before the Board of Veterans Appeals. Accordingly, at this time this Court is without jurisdiction to hear the overpayment issues.

(6)

Accordingly, IT IS HEREBY ORDERED that this case be dismissed without prejudice.



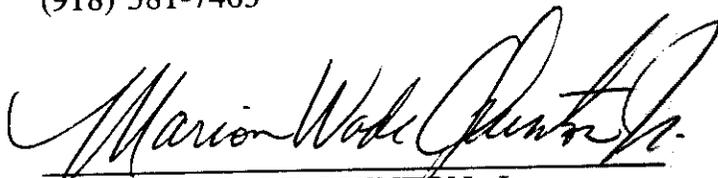
JAMES O. ELLISON
United States District Judge

APPROVED AS TO FORM:

STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463



MARION WADE QUINTON, Jr.
2802 Nassau Avenue
Sand Springs, Oklahoma 74063

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 03 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 DUANE MELUGIN,)
)
 Defendant.)

Civil Action No. 96-C-820-E ✓

ENTERED ON DOCKET

DATE DEC 04 1996

DEFAULT JUDGMENT

This matter comes on for consideration this 2^d day of December, 1996, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Duane Melugin, appearing not.

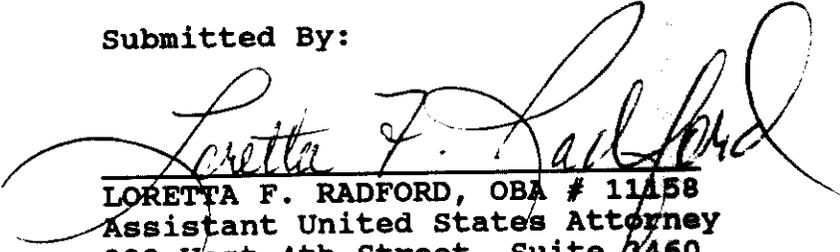
The Court being fully advised and having examined the court file finds that Defendant, Duane Melugin, was served with Summons and Complaint on October 25, 1996. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Duane Melugin, for the principal amount of \$3,200.00, plus accrued interest of \$131.68, plus administrative charges in the amount of \$234.00, plus interest thereafter at the rate of 5 percent per

annum until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$120.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.49 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


LORETTA F. RADFORD, OBA # 11458
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

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

F I L E D

DEC 02 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

KENNETH SIZEMORE,
(SSN: 442-60-7384)

Plaintiff,

vs.

SHIRLEY S. CHATER,
Commissioner of Social Security,

Defendant.

No. 95-C-1165-B

ENTERED ON DOCKET
DATE DEC 03 1996

**OPINION AFFIRMING REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE**

The Court has for review the appeal by Plaintiff, Kenneth Sizemore, of the Report and Recommendation of the United States Magistrate Judge filed October 21, 1996, which affirmed the Commissioner's (Action of the Appeals Council on Request for Review-September 22, 1995 - R-4) and the Administrative Law Judge's (ALJ) February 24, 1995 (R-39) prior decision denying Plaintiff's disability insurance benefits.

The Plaintiff asserts as grounds of error that the Magistrate Judge's Report and Recommendation filed October 21, 1996, is not supported by any evidence and is, therefore, contrary to law. Plaintiff further urges the Magistrate Judge gave improper weight to the opinion of a treating physician and improperly assesses Plaintiff's complaints of pain.

Pursuant to Fed.R.Civ.P. 72(b) and 28 U.S.C. § 636(b)(1) the undersigned has made a *de novo* review of the entire record.

This case involves the well-recognized tension between Plaintiff's complaints of chronic pain emanating from previous low back surgeries and from back strain of June 3, 1993, and a dearth of objective findings in support.

The Court concludes the ALJ properly analyzed Plaintiff's complaints of pain and the record evidence in accordance with the teaching of Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). The Court also concludes the ALJ applied the correct legal standards herein and his decision is supported by substantial evidence. Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987), and Williams v. Bowen, 844 F.2d 748, 750-753 (10th Cir. 1988). The Court further concludes that neither the ALJ nor the Magistrate Judge gave improper weight to the opinion of treating physician, R. Michael Eiman, D.O.

Following a thorough review of the record, the Court accepts the Report and Recommendation of the Magistrate Judge and hereby affirms the Commissioner's denial of disability insurance benefits to the Plaintiff, Kenneth Sizemore.¹ Thus, the Report and Recommendation of the Magistrate Judge is hereby affirmed.

IT IS HEREBY SO ORDERED this 2nd day of December, 1996.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹Wherein the Magistrate Judge's Report and Recommendation refers to Dr. M. (Mark) A. Haynes, M.D., it should be Dr. M. (Mark) A. Hayes.

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

F I L E D

DEC - 2 1996



Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRENDA RICHARDS,

Plaintiff,

vs.

No. 96-C-67-B ✓

DR. JAMES SMALL, and SAINT JOHN
MEDICAL CENTER, ex rel., WORKMED
OCCUPATIONAL HEALTH NETWORK,

Defendants.

ENTERED ON DOCKET

DEC 03 1996

DATE

ORDER

Before the Court is Plaintiff's Motion for Mental Examination Pursuant to Rule 35 of the Federal Rules of Civil Procedure (Docket No. 11). In her motion, Plaintiff Brenda Richards requests the Court to order a mental examination of defendant Dr. James Small. The Court finds that Plaintiff's motion fails to show good cause for the requested mental examination or that Dr. Small's mental condition is in controversy, as required by Fed.R.Civ. P. 35(a). Therefore, the Court denies plaintiff's motion.

ORDERED this 2nd day of December, 1996.



THOMAS R. BRETT
UNITED STATES DISTRICT COURT

44

ENTERED ON FILE
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

NOV 29 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

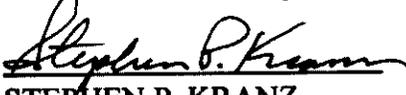
UNITED STATES OF AMERICA)
)
 Plaintiff,)
)
 v.)
)
 ESTATE OF RONALD L. McMUNN,)
 Deceased, George S. Stoia,)
 Administrator; SHIRLEY ANN McMUNN,)
 individually and as personal)
 representative of the Estate of)
 Ronald L. McMunn; STEPHEN LEE)
 McMUNN; LINDA KAY MEAKES;)
 MARC McMUNN; BRAD MURRAY;)
 LORI O'DELL; BOARD OF COUNTY)
 COMMISSIONERS OF WASHINGTON)
 COUNTY,)
)
 Defendants.)

Civil No. 96-CV-601-K

UNITED STATES' VOLUNTARY DISMISSAL OF COMPLAINT AS TO LORI O'DELL

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the United States hereby dismisses its claim against defendant, Lori O'Dell. The dismissal is without prejudice as Lori O'Dell has not answered the complaint against her, nor has she otherwise appeared in this action.

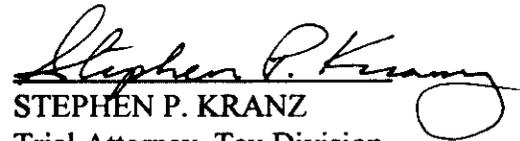
STEPHEN C. LEWIS
United States Attorney


 STEPHEN P. KRANZ
 Trial Attorney, Tax Division
 U.S. Department of Justice
 Post Office Box 7238
 Ben Franklin Station
 Washington, D.C. 20044
 Telephone: (202) 514-0079

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 27th day of November, 1996, a true and accurate copy of the above United States' Voluntary Dismissal of Complaint as to Lori O'Dell was served by mail, postage prepaid, to:

Shirley A. McMunn
809 North Ross
Dewey, Oklahoma 74029



STEPHEN P. KRANZ
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-0079

ENTERED ON DOCKET

DATE 12/2/96

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

F I L E D

NOV 21 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNIVERSAL SHOWCASE, INC.,)
a corporation,)

Plaintiff,)

vs.)

Case No. 95-C-534-~~W~~

OKLAHOMA FIXTURE COMPANY,)
a corporation,)

Defendant.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on before the court for trial on its merits on June 20-21, 1996, and trial having been completed, the court makes Findings of Fact and draws Conclusions of Law as follows.

FINDINGS OF FACT

Any Conclusion of Law that might be properly characterized as a Finding of Fact is incorporated herein.

1. The court has jurisdiction of the parties and subject matter herein, under 28 U.S.C. §1332.
2. Plaintiff timely commenced this action.
3. Plaintiff is a Canadian corporation which is engaged in the business of manufacturing fixtures such as custom showcase frames and metal hardware systems. It supplies retailers and other companies engaged in producing fixtures for retailers.

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4. Defendant is an Oklahoma corporation engaged in the manufacture of fixtures for retail stores, with its principal place of business in Tulsa, Oklahoma.

5. Defendant's largest customer, accounting for approximately 90% of its annual revenue, is Dillard's Department Stores ("Dillard's").

6. In April of 1994, Defendant was awarded a Dillard's job to provide store fixtures as part of the remodel of the Dillard's Department Store in the Northpark Shopping Mall in Dallas, Texas. The part of this job pertinent to this case involved manufacturing and installing new showcases and back islands for Clinique and Estee Lauder cosmetic display areas. These showcases were to be 90% glass, supported by fully welded frames with invisible joints, and attached to wood bunkers. The Clinique frames were to be made of stainless steel, while those for the Estee Lauder showcases were to be made of brass, as specified by the cosmetic companies.

7. The showcase frames were to be installed prior to Thanksgiving 1994. Time was of the essence in completing the showcases, because the weeks between Thanksgiving and Christmas are the peak period for retail store sales and no remodeling work can go on during this time.

8. Although time was of the essence, Defendant did not contact Plaintiff for approximately three months. In late July 1994, Defendant, through its materials purchaser, Rod Cummins ("Cummins"), contacted Plaintiff about the North Dallas project regarding the possible manufacture of the frames for the Estee Lauder and Clinique showcases by early October so they could be installed by November 1, 1994. Plaintiff advised Defendant that it could not deliver the frames within the time

frame desired by Defendant.

9. Peter Turk ("Turk"), one of Plaintiff's owners, informed Defendant that Plaintiff could deliver the Estee Lauder frames by November 15, 1994 in an August 19, 1994 fax to Cummins. Duane Walker ("Walker"), Defendant's Executive Vice President, contacted Dillard's and obtained an extension to Thanksgiving for installation of the Estee Lauder fixtures. No extension was possible with regard to the Clinique fixtures, because a major promotion was set to begin November 1, 1994.

10. On August 22, 1994, Defendant sent Plaintiff a purchase order for the Estee Lauder fixtures, which specified November 15, 1994 as the date of delivery. This purchase order gave the purchase price for the material to be supplied as \$17,673.00, but this amount was later revised to \$47,491.25. Although no change was made in writing as to the delivery date, the parties orally communicated frequently about the status of the manufacturing process, and Defendant was made aware that the November 15, 1994 date was unrealistic and that delivery would take place subsequent to that date.

11. Cummins had contacted another manufacturer, Style Mark, about the availability of frames for the Clinique projects to be delivered in time for the November 1, 1994 promotion and alternate frames for the Estee Lauder project, because he did not expect Plaintiff to meet the November 15, 1994 delivery date.

12. Although the Style Mark frames did not meet the contract specifications, Defendant ordered Style Mark frames in September to meet the Thanksgiving 1994 installation deadline. Defendant planned to replace the Style Mark frames with the

Plaintiff's frames in January or February 1995, after Dillard's completed its inventory, and consequently did not cancel its order with Plaintiff for the Estee Lauder frames.

13. Using the Style Mark frames, Defendant was able to assemble and install the showcases for the Clinique and Estee Lauder projects in a timely fashion prior to Thanksgiving 1994 and invoiced Dillard's for them. Dillard's was not satisfied with the Style Mark frames, and required their replacement. Defendant placed an order with Plaintiff for the Northpark Dallas Clinique showcase frames on November 18, 1994.

14. Defendant received the Estee Lauder frames manufactured by Plaintiff in late December 1994. The frames arrived in a protective wrap and were logged and stored with the wrap in place until final assembly required that they be mounted on the wooden showcase bunkers.

15. The court finds that defects such as incorrect dimensions, cracked welds, and scratches in the finish were first revealed to Defendant at the time the frames were unwrapped for final assembly. The court finds that such defects should have been discovered by means of inspection at the time the frames were received, logged and stored by Defendant.

16. Plaintiff's witnesses claim that the frames were fully inspected and not defective before being shipped to Defendant. However, Plaintiff had them inspected by Steve Summers at Defendant's premises, and he found them to be defective.

17. After receiving Summers' report, Plaintiff admitted that negligence was involved in the manufacturing of the Estee Lauder frames, and offered to replace

them.

18. The court finds that the frames were defective prior to the initiation of Defendant's assembly process. Ron Turk testified that the Plaintiff's cost of replacing the frames would be \$25,000.00, and the court so finds.

19. The court finds that the replacement of the defective Estee Lauder frames at the point at or shortly after the defects were discovered was a commercially reasonable way to proceed, and was an appropriate way for Plaintiff to meet its contractual obligations to Defendant. Any delay in the discovery of the defects was the result of Defendant's failure to properly inspect the frames when received.

20. Defendant received the Clinique frames in two shipments in mid-January 1995. The Plaintiff admits that these frames had a problem with the tracks for the sliding doors on the curved portion of the frames. Plaintiff agreed to replace the defective tracks and requested a template from Defendant from which to manufacture new tracks. Defendant provided the templates on December 5, 1994, but Plaintiff has not delivered the replacement tracks.

20. Defendant utilized the Estee Lauder and Clinique frames supplied by Plaintiff in the showcase frames which were reinstalled in the spring of 1995 at the Dillard's Northpark store. The frames were accepted by Dillard's and had remained there through the date of trial.

21. On May 18, 1995, Defendant unilaterally assessed a "back charge" of \$96,928.80 against outstanding invoices due to Plaintiff. This represented the Defendant's entire cost of replacing the temporary Style Mark frames with Plaintiff's

frames. In order to recover the **entire** replacement cost, the “back charge” was artificially calculated upon a labor rate of **\$133.00** per hour, which the Plaintiff found to be unreasonable. The Plaintiff **never** agreed to the back charge.

21. In light of the **\$25,000.00** replacement cost for the Estee Lauder frames, the court finds that the back charge of **\$96,928.00** was unreasonable. This back charge was initially imposed based on the misapprehension that the non-conforming Style Mark frames (both Estee Lauder and Clinique) were “defective” frames supplied by Plaintiff. However, when this turned out not to be the case, Defendant still refused to make adjustments to the back charge. Plaintiff then canceled all pending purchase orders from Defendant and filed this lawsuit, alleging non-payment of invoices in the total amount of **\$167,832.87**.

22. Defendant admits that it **owes** Plaintiff **\$167,832.87**. The amount of this debt was liquidated prior to the initiation of this lawsuit.

CONCLUSIONS OF LAW

Any Finding of Fact which is **more** appropriately characterized as a Conclusion of Law is incorporated herein.

The court draws Conclusions of Law as follows:

1. This court has jurisdiction **over** the parties and the subject matter herein under 28 U.S.C. §1332.

2. Defendant breached its **contractual** arrangement with Plaintiff by failing to pay what it admittedly owed for materials provided.

3. Plaintiff is entitled to judgment against the Defendant in the principal sum of \$141,332.87 (the liquidated sum of \$167,832.87 admittedly owed, less a \$26,500 offset representing the cost of adjustments voluntarily offered, and found to be appropriate by the court) plus pre-judgment interest from June 14, 1995, post-judgment interest, costs, and, as Plaintiff is the prevailing party, a reasonable attorneys fee, to be taxed as costs pursuant to 12 Okla. Stat. § 936.

4. Defendant is entitled to an offset judgment against the Plaintiff for the amount of \$1,500.00, the cost of the offered replacement of the defective tracks on the four Clinique radius showcase frames, plus \$25,000.00, the cost of the offered replacement of the Estee Lauder frames. Both these adjustments were offered to the Defendant prior to the initiation of this lawsuit, or the filing of Defendant's counterclaim. The court finds that these are necessary, appropriate, and commercially reasonable adjustments, and by timely offering them, Plaintiff avoided a breach of its contractual obligations.

5. Defendant's own procrastination and mismanagement were the causes of its incurring "lost opportunity costs" in the amount of its normal gross profit margin of 33%, because it had to rebuild the Estee Lauder showcases at its own expense when it could have been working on another job. Plaintiff delivered the frames in a timely fashion, according to the agreements and understandings of the parties. Plaintiff never promised delivery in time for pre-Thanksgiving installation, and was in no way responsible for the installation of the non-conforming Style Mark showcases, which caused Dillard's to be dissatisfied. Consequently, Defendant is not entitled to

"lost opportunity costs" attributable to Defendant's loss of the Estee Lauder and Clinique work in three subsequent Dillard's department store projects.

Dated this 27th day of November, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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ENTERED ON DOCKET

DATE 12/2/96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

ROBERT E. HILL,)
SSN 445-60-9857,)

PLAINTIFF,)

vs.)

SHIRLEY S. CHATER,^{1/})
Commissioner, SOCIAL SECURITY)
ADMINISTRATION,)

DEFENDANT.)

NOV 27 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CASE NO. 96-C-646-M

ORDER

Plaintiff, Robert E. Hill, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits^{2/}. In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Secretary has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health*

^{1/} Effective March 31, 1995 the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-297. However, this order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

^{2/} Plaintiff's first application for Disability Insurance Benefits filed August 14, 1986 was denied December 9, 1986. No further action was taken on that claim. Plaintiff's second application for Disability Insurance Benefits dated November 12, 1992 was denied January 27, 1993. The denial was affirmed on reconsideration. A hearing before an ALJ was held on May 26, 1994 after which a denial decision was issued on November 7, 1994. The Appeals Council affirmed the findings of the ALJ on May 9, 1995. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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& Human Servs., 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its discretion for that of the Secretary. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991).

The record of the proceedings has been meticulously reviewed by the Court. The undersigned United States Magistrate Judge finds that the Administrative Law Judge (ALJ) has properly outlined the required sequential analysis. The Court therefore incorporates that information into this order as duplication would serve no useful purpose.

Plaintiff applied for benefits claiming disability caused by an on-the-job injury on August 24, 1984. He was awarded SSI benefits as of October 1, 1992 but appealed the denial of benefits for the time period between August 24, 1984 and December 31, 1990.^{3/} Plaintiff later amended the onset date of disability to October 29, 1988. [R. 36]. The time period for benefits at issue in this appeal is October 29, 1988 to December 31, 1990.

Plaintiff alleges he is disabled due to difficulties using his hands, multiple joint pain, headaches and mental problems, including anxiety and depression. The ALJ found Plaintiff could perform his past relevant work (PRW) as a machinist, welder, back hoe operator and filling station attendant. [R. 16-27]. The determination of the ALJ, therefore, was that Plaintiff is not disabled within the meaning of the Social Security Act.

^{3/} Date Plaintiff was last insured.

Plaintiff contends that the ALJ failed to properly evaluate the demands of Plaintiff's past relevant work in accordance with *Henrie v. U.S. Dept. of Health & Human Services*, 13 F.3d 351 (10th Cir. 1993) and Social Security Regulation (SSR) 82-62 by failing to determine the physical and mental demands of his PRW and whether Plaintiff's RFC permitted Plaintiff to perform this work.

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

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

. . . .

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

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982). The ALJ must make specific factual findings detailing how the requirements of claimant's past relevant work fit the claimant's current limitations. The ALJ's findings must contain:

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

Id.; *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Washington v. Shalala*, 37 F.3d 1437, 1442 (10th Cir. 1994); *Henrie v. U.S. Department of Health & Human Services*, 13 F.3d 351 (10th Cir. 1993).

This Court notes that *Henrie* was primarily concerned with the ALJ's failure to develop sufficient facts in the record regarding the claimant's PRW. The *Henrie* Court noted that the record was simply devoid of any evidence on these issues and based upon that lack of evidence, found reversal and remand necessary.

With regard to the development of the factual record concerning the claimant's prior relevant work, SSR 82-62 states as follows:

The claimant is the primary source for vocational documentation, and statements by the claimant regarding past work are generally sufficient for determining the skill level, exertional demands and nonexertional demands of such work. Determination of the claimant's ability to do PRW requires a careful appraisal of (1) the individual's statements as to which past work requirements can no longer be met and the reason(s) for his or her inability to meet those requirements; (2) medical evidence establishing how the impairment limits ability to meet the physical and mental requirements of the work; and (3) in some cases, supplementary or corroborative information from other sources such as employers, the *Dictionary of Occupational Titles*, etc., on the requirements of the work as generally performed in the economy.

In the instant case, Plaintiff did not appear at the hearing before the ALJ on May 26, 1994 because he was incarcerated at the time in the Nowata County Jail for assault with a deadly weapon. [R. 33]. His mother appeared at the hearing and testified on his behalf. [R. 48-61]. Plaintiff's mother testified regarding Plaintiff's daily activities, medical treatment, medications and his behavioral problems, but she could not testify as to the specific jobs Plaintiff held or the duties connected with those jobs. [R. 49-50].

The record includes the disability reports completed by Plaintiff on August 14, 1986, [R. 142], and on November 12, 1992. [R. 152]. However, the reports contain only a brief general description of Plaintiff's former job duties:

Machinest, Shop Forman (sic)
Rebuilt engines; ran machines, open spindle lathes, hollow spindle lathes,
Bridgeport Mill, hones (sic), boring mills, turret lathes, drill press, OD grinders,
learned all about machine shop duties.

[R. 152]. There is nothing more in the record containing descriptions of, or information regarding, Plaintiff's PRW. The VE did provide the skill and exertional levels of Plaintiff's PRW. [R. 62]. However, this testimony contains no mention of the mental demands of Plaintiff's PRW. The record, therefore, lacks substantial evidence as to the physical and mental demands of Plaintiff's past relevant work.

At the second phase of the Step Four analysis, the ALJ must make findings regarding the physical and mental demands of the claimant's past relevant work. *Henrie*, 13 F.3d at 361. To make the necessary findings, the ALJ must obtain adequate "factual information about those work demands which have a bearing on the medically established limitations", *Winfrey*, 92 F.3d at 1024. Here, the ALJ did not obtain any information about the demands of Plaintiff's PRW that would have a bearing on Plaintiff's exertional and nonexertional abilities, his restricted use of his right hand, his chronic pain or his mental impairment, beyond what was in the limited disability report. Instead, the ALJ asked a vocational expert (VE) whether someone with certain characteristics, including the limitations mentioned, could perform any of his past relevant work. [R. 64]. The VE responded that such a person could perform some of the machinist work that Plaintiff had done in the past, reduced by half due to required repetitive use of the hands in some

of those jobs. [R. 64]. The VE testified that such a person could also do the filling station job, reduced by 75% due to the necessity of dealing with the public. [R. 64-65]. The VE also testified that a person with the limitations described by the ALJ would be able to return to his former occupations of backhoe operator and welder. [R. 65]. The VE did not provide any information about how the demands of those jobs, either as Plaintiff actually performed them or as they are generally performed in the national economy, related to the physical and mental limitations described by the ALJ. There was no inquiry regarding the nature of, and physical and mental demands associated with, the machinist, filling station attendant, backhoe operator or welder jobs. Nor was there any inquiry as to Plaintiff's ability to perform these jobs prior to the time his insured status expired. Thus, the ALJ failed in his basic obligation to ensure that an adequate record is developed during the disability hearing consistent with the issues raised.

Having failed to develop the record adequately, the ALJ was not able to fulfill his subsequent fact finding responsibilities. Therefore, rather than making the required findings about the demands of Plaintiff's past relevant work that would relate to the particular limitations found, the ALJ simply recited the VE's response to his hypothetical question and then found that Plaintiff could perform the jobs identified by the VE. The VE's role in supplying vocational information at Step Four is much more limited than his role at Step Five, where he is called upon to give his expert opinion about the claimant's ability to perform work in the national economy. At Step Four, while the ALJ may rely on information supplied by the VE, the ALJ himself must make the required findings on the record, including his own evaluation of the claimant's ability to perform his past relevant work. See *Winfrey*, 92 F.3d at 1025; *Henrie*, 13 F.3d at 360-61.

The ALJ's decision at Step Four **does not** comply with the social security regulations and is not supported by substantial evidence. **Because** the ALJ failed to develop an adequate record and to make the required findings about **the pertinent** demands of Plaintiff's past relevant work, the Court finds that this case must be **reversed** and remanded to the Commissioner. On remand, the ALJ may elicit information about **Plaintiff's** past relevant work from a variety of sources, including testimony or information from **Plaintiff** himself, about the demands of his work as he actually performed it. The ALJ is free to **rely upon** information supplied by a VE or information contained in the Dictionary of Occupational Titles, concerning the demands of Plaintiff's work as it is generally performed in the national **economy**. At any rate, the ALJ should clearly indicate the source of the information upon which **he** relies in making the required findings, set forth specific findings about the mental and **physical** demands of the jobs at issue and evaluate Plaintiff's ability to meet those demands.

This case is **REVERSED AND REMANDED** to the Commissioner for further proceedings consistent with this Order.

DATED this 27th day of NOV., 1996.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 12/2/96

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

ROBERT E. HILL,
SS# 445-60-9857

Plaintiff,

v.

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

Defendant.

CASE NO. 96-C-646-M ✓

FILED

NOV 27 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 27

day of Nov, 1996.

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