

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

CREEK COUNTY RURAL WATER)
DISTRICT NO. 2, an agency and)
legally constituted authority of the)
STATE OF OKLAHOMA,)

Plaintiff,)

vs.)

CITY OF TULSA, a municipality,)
and THE TULSA METROPOLITAN)
UTILITY AUTHORITY, a public)
trust,)

Defendants.)

FILED

JAN 9 1997

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

Case No. 94-C-1052-H

ENTERED ON DOCKET
DATE JAN 10 1997

ORDER OF DISMISSAL

COMES before the Court this 9th day of January, 1997 the
Stipulation Of Dismissal With Prejudice submitted by the parties and after due consideration it
is hereby ordered as follows:

1. This case is hereby dismissed with prejudice with this Court reserving jurisdiction to resolve any dispute which may arise between the parties to relation to or arising from the Settlement Agreement and the Water Purchase Contract entered into by the parties in settlement of this matter.
2. The Court further finds that the terms of the Settlement Agreement and Water Purchase Contract are valid, binding and enforceable against the parties as

written, and specifically that the provision for a 15 year term Water Purchase Contract is valid and enforceable.

SVEN ERIK HOLMES

SVEN ERIK HOLMES
U.S. DISTRICT COURT JUDGE

APPROVED AS TO FORM AND CONTENT:


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ATTORNEY FOR DEFENDANTS

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

~~FILED~~
JAN 28 1997

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

BRIGHT STAR DESIGNS, INC.

Plaintiff,

v.

J. KINDERMAN & SONS, INC.

Defendant.

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Civil Action No. 96-C-777H

ENTERED ON DOCKET

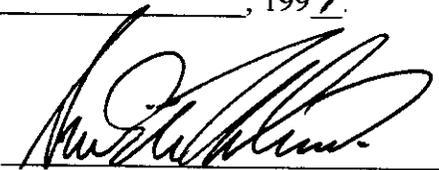
DATE JAN 10 1997

ORDER

On this the 7th day of January, 1997, came before the Court Plaintiff BRIGHT STAR DESIGNS, INC.'S Motion to Dismiss Without Prejudice, and the Court after considering said Motion is of the opinion that same should be granted;

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED that Plaintiff BRIGHT STAR DESIGNS, INC.'S Motion to Dismiss is granted and that all causes of action against J. KINDERMAN & SONS, INC. be dismissed without prejudice.

SIGNED this 7th day of JANUARY, 1997.



U.S. DISTRICT JUDGE

ENTERED ON DOCKET

DATE 1-10-97

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

JAN 09 1997 *PL*

TRAVIS JOHNSON,)
)
 Plaintiff,)
)
 vs.)
)
 WAL-MART STORES, INC.,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-630-K ✓

ORDER

Before the Court is Defendant's Motion for Summary Judgment. According to the Complaint, Plaintiff was a customer at Defendant's Pryor, Oklahoma store on August 2, 1993. While shopping for a gift for a friend, Plaintiff backed up and fell over a box containing shelving which was sitting in the aisle of the store. Plaintiff alleges that he sustained injuries as a result of this incident, and that Wal-Mart was negligent in failing to (1) keep the passageways clear; (2) exercise reasonable care to correct the allegedly unsafe condition; (3) warn Plaintiff of the dangerous condition; and (4) adequately supervise, oversee, or inspect the area. In response, the Defendant asserts that the danger to the Plaintiff was open and obvious, and therefore no duty was owed to the Plaintiff.

Discussion

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most

favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

In order to prevail on a claim for negligence, the Plaintiff must prove that the Defendant owed a duty to the Plaintiff, that the Defendant breached it's duty, and that the Plaintiff suffered injury as a result of that breach. Phelps v. Hotel Management, Inc., 925 P.2d 891, 893 (Okla. 1996). A business owner owes a duty to exercise ordinary care to keep its premises in a reasonably safe condition for use of its invitees and a duty to warn invitees of dangerous conditions upon premises that are either known or should reasonably be known by the owner. *Id.* However, it is well-established that inviters have no duty to warn of dangers which are open and obvious. Kastning v. Melvin Simon & Assoc., Inc., 876 P.2d 239, 240 (Okla. 1994).

In this case, Plaintiff asserts that there are numerous factual issues precluding an entry of summary judgment, and that the facts not in dispute would not lead a reasonable juror to only one conclusion supporting judgment for Defendant. First Plaintiff asserts that a factual dispute exists as to whether or not the box was an open and obvious danger. Dangers are open and obvious

where they are "visible and apparent for all to see." *Jackson v. Land*, 391 P.2d 904, 906 (Okla. 1964). Although the Plaintiff asserts that the box was not in an open and obvious position because it lay parallel to the shelves rather than across the aisle, he admits that he probably would have seen the box if he'd looked in a certain direction. He likewise confessed that there were no obstructions in the aisle which inhibited his view of the box. There were no other customers in the aisle, nor were there any shopping carts. Compare, *Roper v. Mercy Health Center*, 903 P.2d 314, 315 (Okla. 1995) (finding material issue of fact as to open and obvious nature of a light fixture in the center of a hallway where the plaintiff's view was obstructed by pedestrian traffic). Plaintiff does not dispute that the aisle was adequately lighted. Compare, *Byford v. Town of Asher*, 874 P.2d 45, 48 (Okla. 1994) (reversing summary judgment where inadequate lighting made it difficult to judge the depth of rut in alley). Plaintiff's failure to see the box in the aisle is not sufficient evidence that the box was not open and obvious, nor is his assertion that the box lay parallel to the shelves rather than perpendicular. These assertions are insufficient to create a factual dispute about the open and obvious nature of the box.

Alternatively, Plaintiff presents the argument that the clocks on display distracted him, and thus should obviate the open and obvious defense. The Plaintiff cites *Henryetta Construction v. Harris*, 408 P.2d 522 (Okla. 1965) and *Spirgis v. Circle K Stores, Inc.*, 743 P.2d 682 (Okla. 1987) in support of his contention.

While these cases make it clear that Oklahoma recognizes such a defense, they are distinguishable from the case at bar. In *Henryetta*, a bridge inspector was injured when he fell into open drainage inlets on a bridge. Although the plaintiff was aware that the drainage inlets existed, he was distracted by an asphalt roller moving toward him. Likewise, in *Spurgis*, the court found that a material issue of fact existed as to the open and obvious nature of a pothole in a parking lot. The Court found that the Plaintiff had parked his car and was "avoiding automobile traffic" in the driveway of a retail store when he stepped into the pothole and injured his foot and leg. The Court held that the traffic obscured the danger as well as distracting the plaintiff, and thus the pothole, while in an open area, was not obvious.

This case is not one in which the Plaintiff was distracted by traffic or other dangerous situation. There were no throngs of shoppers or teeming crowds. Indeed, Plaintiff admits that he was the only person in the aisle at the time. Plaintiff was in no danger, but rather was "fascinated" by the clock display and thus did not see the box on the floor. This Court does not believe that the Oklahoma Supreme Court would extend the distraction theory to such an extreme level. To do so would, in practice, eliminate altogether the duty of an invitee to any retail store to use reasonable care.

Because the Plaintiff has failed to establish facts which would allow a reasonable person to conclude that the box on the floor was not open and obvious, he is unable to establish that

Defendant breached its duty to him. For the foregoing reasons,
Defendant's Motion for Summary Judgment is GRANTED.

ORDERED this 9th day of January, 1997.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

JAN 10 1997

GINA THOMISON,)
)
Plaintiff,)

vs.)

Case No. 95-C-836-B

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

Defendants.)

FILED

JAN 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereto hereby stipulate that the above styled action should be dismissed in its entirety with prejudice, each party to bear its own costs and attorneys fees.

Dated this 30TH day of December, 1996.

BRIGGS & GATCHELL

By: Robert L. Briggs
Robert L. Briggs, OBA # 10215
406 South Boulder, Suite 400
Tulsa, Oklahoma 74103

DOERNER, SAUNDERS, DANIEL & ANDERSON

By: Rebecca M. Fowler
Rebecca M. Fowler, OBA #13682
320 South Boston, Suite 500
Tulsa, OK 74103 (918) 582-1211

Attorneys for Defendant,
The City of Bartlesville

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

ANGELA DARE, an
individual,

Plaintiff,

vs.

THE HOLMES ORGANISATION, INC. an
Oklahoma Corporation,

Defendant.

FILED

JAN 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-831-BU

FILED ON DOCKET

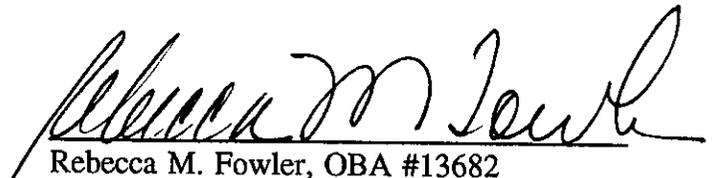
JAN 10 1997

JOINT STIPULATION OF DISMISSAL

Come now the parties, Plaintiff Angela Dare and Defendant The Holmes Organisation, through counsel, and hereby stipulate that the above-styled and numbered cause should be and hereby is dismissed.



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ATTORNEY FOR THE DEFENDANT

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

U.S. DISTRICT COURT
DATE JAN 10 1997

JAMES C. and JILL M. HUMPHREYS,)
)
Plaintiffs,)

v.)

Case No. 96-C-942-H

JOHNYNE FUSELIER, individually;)
JAMES ARTHUR SPARGUR,)
individually; JAMES ARTHUR SPARGUR)
d/b/a SPECIALTY BUILDERS; RICK)
OVERTURF, INDIVIDUALLY; and)
BRET BARNHART, individually and d/b/a)
BRET D. BARNHART CONSTRUCTION)
COMPANY, AN OKLAHOMA)
CORPORATION; and BRYAN McCART,)
individually,)
Defendants.)

FILED

JAN 9 1997

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

ORDER

This matter came before the Court for a hearing on January 8, 1997. During the hearing, Plaintiff's counsel moved to dismiss Defendants Rick Overturf and Bryan McCart from the lawsuit. This motion is hereby granted, and Defendants Rick Overturf and Bryan McCart are dismissed from this case without prejudice.

At the hearing on January 8, Plaintiff's counsel represented to the Court that damages in this case amount to \$39,359.60. Federal law requires that the amount in controversy in diversity cases must exceed \$50,000. 28 U.S.C. § 1332(a). Because the amount in controversy in this case does not exceed \$50,000, this Court lacks jurisdiction. Accordingly, this case is dismissed for lack of

federal jurisdiction, pursuant to 28 U.S.C. § 1332(a).

IT IS SO ORDERED.

This 9TH day of January, 1997.

A handwritten signature in black ink, appearing to read 'Sven Erik Holmes', written over a horizontal line.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 NORA WAGONER,)
)
 Defendant.)

JAN 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

JAN 10 1997

Civil Action No. 96CV-904E

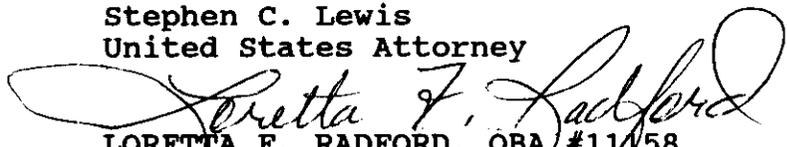
NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action.

Dated this 8th day of January, 1997.

UNITED STATES OF AMERICA

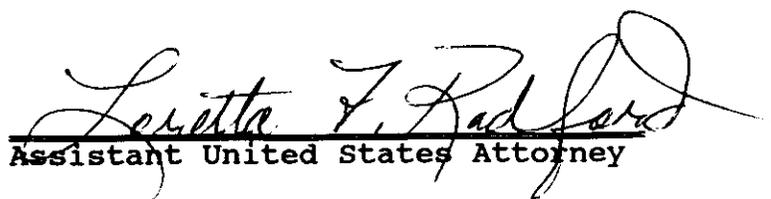
Stephen C. Lewis
United States Attorney



LORETTA F. RADFORD, OBA #11158
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CERTIFICATE OF SERVICE

This is to certify that on the 8th day of January, 1997, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to Nora Wagoner, 824 S. Indianapolis, Tulsa, Oklahoma 74112.


Assistant United States Attorney

COPY

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

FILED

JAN 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RIVER THAMES INSURANCE)
COMPANY,)
)
Plaintiff,)

vs.)

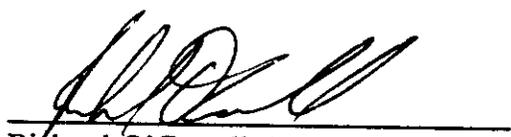
MIKE JACKSON and JOE RUARK,)
individually and as partners, d/b/a Gobblers,)
and DARREN FAULCONER,)
)
Defendants.)

Case No. 96-CV-461C

ENTERED ON EJECT
DATE JAN 10 1997

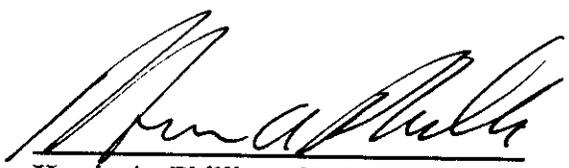
STIPULATION FOR DISMISSAL

Pursuant to Fed.R.Civ.P. 41(a)(1)(ii), the parties stipulate that this matter may be dismissed with prejudice to further litigation.



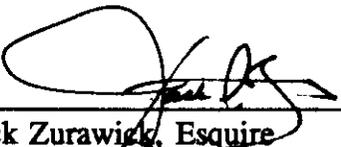
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ATTORNEY FOR
DEFENDANT FAULCONER

Petitioners also assert that the "United States of America" has no authority to prosecute the criminal cases and the Internal Revenue Service has no authority to bring actions against Petitioners. In addition, Petitioners assert that the United States Magistrate Judges and the United States District Court have denied them of their Fifth Amendment due process rights and that the judicial officers of the United States District Court have deprived them of their Sixth Amendment right to counsel of choice. Petitioners further contend that the title 18 statutes referenced in the indictments do not apply to them, that no authority exists for prosecution under 26 U.S.C. § 7212(a) and that no regulation published in the Federal Register has been identified which makes them liable for any tax in the Internal Revenue Code.

Generally, the writ of habeas corpus is to provide a petitioner with post-conviction relief. A habeas corpus petition under 28 U.S.C. § 2241 is used to challenge the execution of a sentence while a habeas corpus petition under 28 U.S.C. § 2255 is used to challenge the validity of a judgment and sentence. Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996). However, section 2241 has been recognized as a potential source of habeas review for state pretrial detainees. Atkins v. Michigan, 644 F.2d 543 (6th Cir.), cert. denied, 452 U.S. 964, 101 S.Ct. 3115, 69 L.Ed.2d 975 (1981); Dickerson v. Louisiana, 816 F.2d 220 (5th Cir.), cert. denied, 484 U.S. 956, 108 S.Ct. 352, 98 L.Ed.2d 378 (1987); see also, Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973). In

order to have the claims reviewed, a state pretrial detainee must establish that he is "in custody" within the meaning of the federal habeas statute, 28 U.S.C. § 2241(c). Capps v. Sullivan, 13 F.3d 350, 353 (10th Cir. 1993). And, although not jurisdictional, he must also establish that he has exhausted his available state remedies. Id. In relation to the exhaustion requirement, a federal court should "abstain from the exercise of [habeas] jurisdiction if the issues raised in the petition may be resolved either by trial on the merits in the state court or by other state procedures available to the petitioner." Id. (quoting, Dickerson, 816 F.2d at 225).

The exhaustion requirement differs depending on the nature of the habeas claims raised by a petitioner. Capps, 13 F.3d at 354. Where the petitioner's claims, if successful, would be dispositive of pending state criminal charges, the claims may be exhausted only by presentment at the upcoming criminal trial in state court. Included in this category are claims which would provide an affirmative defense to the criminal charges, Braden, 410 U.S. at 489, and claims which would dismiss an indictment or otherwise prevent a prosecution. Capps, 13 F.3d at 354; Atkins, 644 F.2d at 546-47.¹ In contrast, where the petitioner's claims would not be dispositive of state criminal charges, the claims may be exhausted

¹ The Court notes that federal courts will review such claims prior to trial if the petitioner can demonstrate "special circumstances." In Braden, the Supreme Court stated that "federal habeas corpus does not lie, 'absent special circumstances,' to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court." 410 U.S. at 489.

by pretrial presentment to the state court. Included in this category is a claim seeking a speedy state court trial. Braden, 410 U.S. at 491; Atkins, 644 F.2d at 547. As the claim does not dispose of the state criminal charge, the federal court will review the claim prior to trial, provided it was first presented to the state court. Braden, 410 U.S. at 491.

The reason for the differing exhaustion requirement is due to federalism and comity. Braden, 410 U.S. at 490-491; see also, Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Where pretrial federal review of a habeas claim will deprive the state court of its ability to adjudicate the criminal charge, federalism requires the federal court to decline review. Where pretrial federal review will not deprive the state court of jurisdiction over the criminal charge, federalism does not require the federal court to decline review as long as the state court is initially given an opportunity to review.

Similar to the court in Moore v. United States, 875 F.Supp. 620, 623 (D. Neb. 1994), this Court finds that the framework applicable to section 2241 petitions filed by state pretrial detainees should be applied to section 2241 applications filed by federal pretrial detainees. As a result, a federal pretrial detainee must establish that he is in custody and that he has exhausted available remedies.

The Court need not address the custody requirement in regard to Petitioners as the Court finds that Petitioners have not satisfied the exhaustion requirement. Petitioners have raised

claims which, if successful, would be dispositive of the underlying criminal charges. Petitioners, however, have not demonstrated any special circumstances to adjudicate the claims at this time. Braden, 410 U.S. at 489. Federalism principles therefore dictate that this Court decline to review the claims until Petitioners have exhausted the claims in the criminal proceedings and subsequent direct appeals.

In addition, the Court finds that considerations of "judge shopping" and "duplicitous litigation" warrant the Court declining to review Petitioners' claims. Moore, 875 F.Supp. at 624. The criminal cases are pending before the Honorable H. Dale Cook. Petitioners have previously filed motions to dismiss based upon jurisdiction which have been denied as frivolous. Petitioners are essentially seeking another bite at the apple through a different district judge. In addition, were the Court to rule on the merits of the petition, two separate appeals on the same issues regarding Petitioners would be before the appellate court. The Court therefore concludes that Petitioners' claims should first be exhausted in the criminal proceedings.

Based upon the foregoing, Petitioners' Petition for a Writ of Habeas Corpus (Docket Entry #1) is **DISMISSED WITHOUT PREJUDICE**.

ENTERED this 9th day of January, 1998.⁷



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

JAN 8 1997

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

ORAL ROBERTS UNIVERSITY,
an Oklahoma corporation,

Plaintiff,

v.

TRAVIS ANDERSON, an individual, and
METROPLEX PROPERTIES, L.L.C., a
Colorado limited liability company,

Defendants.

Case No. 95-CV-583-H ✓

JAN 9 1997

ORDER

This matter comes before the Court on Plaintiff's Motion for Partial Summary Judgment (Docket #9), Plaintiff's Motion for Summary Judgment (Docket #27), and Defendants' Motion for Summary Judgment (Docket #46).

I.

For the purposes of this motion, the facts of this case are not in dispute. Plaintiff Oral Roberts University ("ORU"), as "Seller," and Defendant Travis Anderson, as "Purchaser," entered into a certain Option and Agreement for Purchase and Sale of Real Estate dated September 27, 1994, (the "Agreement"). On October 25, 1994, Mr. Anderson conveyed his interest in the Agreement to Defendant Metroplex Properties, L.L.C., a Colorado limited liability company ("Metroplex"), in which Mr. Anderson owns a majority interest. The three members of Metroplex were Anderson, John Dick, and Howard Messinger. Metroplex did not exercise the option provided in the Agreement on or before January 27, 1995.

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In applicable part, section 2.2 of the Agreement provides as follows:

The term of the Option shall commence as of the date of this Agreement and shall expire at 5:00 PM Colorado local time on the fourth month anniversary date after the execution date of this Agreement ("Option Period"). In the event the Option is not exercised by Purchaser in accordance with the terms set forth in this Agreement, the Option shall automatically expire at the end of the Option Period as provided in this Section 2, and upon such expiration Seller shall return to Purchaser the Option Payment Promissory Note made by Purchaser, and Purchaser shall simultaneously execute and deliver to Seller a recordable instrument releasing the Option and all of Purchaser's rights under this Agreement, but not such rights, if any, as Purchaser may have under this Agreement to receive a return of the Option Payment Promissory Note.

In applicable part, section 2.1 of the Agreement provides as follows:

If Purchaser elects for any reason not to exercise the Option the Option Payment Promissory Note shall be returned to Purchaser, and all Parties shall be released from any further obligations to each other under this Agreement.

Section 13.2 of the Agreement provides the Purchaser with certain remedies, as follows:

In the event that any of Seller's representations or warranties contained herein are, or at or prior to Closing shall be, untrue in any material respect, or if Seller shall default in performing any one of Seller's obligations hereunder, or be in breach in any material respect of any agreement, covenants, term, representation or warranty herein, Purchaser may elect to terminate this Agreement, or to obtain specific performance thereof together with any and all damages to which Purchaser may be entitled to the extent not inconsistent with its remedy of specific performance. In the event Purchaser shall elect to terminate, Purchaser shall have the right to recover its damages and to the refund of the Option Payment. In the event of litigation, the prevailing party shall be entitled to recover its reasonable attorney's fees.

In applicable part, section 14.9 of the Agreement, provides as follows:

This Agreement and all exhibits attached hereto constitute the entire agreement between the Parties pertaining to the subject matter contained herein and supersede all prior and contemporaneous agreements, representations and understandings of either or both Seller and Purchaser. No supplement, modification or amendment to this Agreement nor any assurance, statement or representation shall be binding unless executed in writing by the party to be charged therewith.

II.

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

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

477 U.S. at 322.

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

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

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

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a

jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

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

III.

Plaintiff contends that Metroplex's failure to exercise the option created by the Agreement on or before January 27, 1995, results in the expiration of the option on that date. Defendants respond in the first instance that, under section 13.2 of the Agreement, Defendants may bring an action for damages, notwithstanding Defendants' failure to timely exercise the option. The Court does not agree.

It is settled law in Oklahoma that the interpretation of an unambiguous contract is a question of law for the courts. Devine v. Ladd Petroleum Corp., 805 F.2d 348, 349 (10th Cir. 1986). Contracts must be interpreted so as to give effect to the parties intent at the time of contracting; generally, the terms of the contract indicate the parties' intentions. Provident Life & Accident Ins. Co. v. Ridenour, 838 P.2d 530, 531 (Okl. Ct. App. 1992). The intentions of the parties to a contract must be deduced within the four corners of the instrument. McEvoy v. First Nat'l Bank and Trust Co., 624 P.2d 559 (Okl. Ct. App. 1980). Where no ambiguity exists, intent must be determined from the words used, absent fraud, accident, or pure absurdity. Lindhurst v. Wright, 616 P.2d 450, 453 (Okl. Ct. App. 1980).

In the instant case, the Court finds that the Agreement is clear and unambiguous. Pursuant to section 2.2, the Option Period expired at 5:00 p.m. on January 27, 1994. Purchaser failed to exercise its option on or before that date. Therefore, under section 2.1, following the

return of the Option Payment Promissory Note, "all Parties shall be released from any further obligations to each other under this Agreement."

Defendants' argument that they may seek remedies under section 13.2, notwithstanding the unambiguous terms of Section 2.2 and 2.1, is unavailing. Assuming arguendo that Seller had failed to perform its obligations under the Agreement, the remedies specified in section 13.2 expressly grant Purchaser two choices: "Purchaser may elect to terminate this Agreement, or to obtain specific performance thereof together with any and all damages to which Purchaser may be entitled to the extent not inconsistent with its remedy of specific performance." In this case, Metroplex did not select either choice during the option period. Thus, any remedies specified in the Agreement are unavailable to Metroplex, since the Agreement has expired and is no longer in effect. If Defendants believed that the conduct of Plaintiff was interfering with their ability to receive the benefit of their bargain under the Agreement, section 13.2 clearly contemplates that Defendants should have exercised the option and brought an action for specific performance, plus "any and all damages to which Purchaser may be entitled to the extent not inconsistent with its remedy of specific performance." Accord Bobo v. Bigbee, 548 P.2d 224 (Okla. 1976) (holding that only when an optionee has exercised his option may he be entitled to a decree for specific performance). Simply stated, once the option period expires, the Agreement by its own terms is terminated and the remedies previously available under section 13.2 are null and void.

In the alternative, Defendants argue that ORU is equitably estopped from asserting that the option term expired January 27, 1995, by virtue of certain statements by ORU President Richard Roberts at a meeting on January 18, 1995. The Court rejects this argument. First, there is no evidence in the record that at the meeting on January 18, 1995, Mr. Roberts made any representations that would have modified the obligations of either party under the Agreement.¹

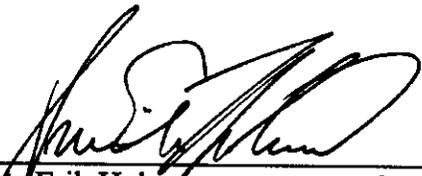
¹ Moreover, the Court notes that Plaintiff's counsel has represented that Mr. Roberts, as President, is not authorized to modify the obligations of ORU without the approval of the ORU Board of Directors.

Second, any purported oral modifications would have no force or effect as a result of section 14.9 of the Agreement, quoted above. Finally, Defendants have identified no authorities, and the Court has been unable to locate any, that would support the argument of equitable estoppel such that "ORU tolled all time for performance by Metroplex under the Agreement." Accordingly, this argument must fail.

Based on the above, the Court holds that, except for the return of the Option Payment Promissory Note, which has since occurred, all rights and obligations, including any otherwise available remedies under section 13.2, expired at 5:00 p.m. on January 27, 1995. The refusal by ORU to perform under the Agreement following January 27, 1995, is not a breach of contract, because no contract was thereafter in effect. Following the return of the Option Payment Promissory Note, under Section 2.1, ORU was released from any further obligations under the Agreement. Therefore, Plaintiff's Motion for Partial Summary Judgment (Docket # 9) and Plaintiff's Motion for Summary Judgment (Docket # 27) are hereby granted. Defendants' Motion for Summary Judgment (Docket # 46) is hereby denied.

IT IS SO ORDERED.

This 8TH day of January, 1997.



Sven Erik Holmes
United States District Judge

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

FILED

JAN 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GEORGE R. WEAVER,
Plaintiff,

vs.

UNITED STATES TRUCK DRIVING SCHOOL,
Defendant.

Case No. 95-C-1251-B

ENTERED ON DOCKET

JAN 09 1997

STIPULATION OF DISMISSAL, WITH PREJUDICE

The parties hereto, by and through their attorneys of record, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), hereby stipulate that this action should be, and the same is hereby dismissed, with prejudice. Each party is to bear his or its own attorney's fees and costs.

NICHOLS, WOLFE, STAMPER, NALLY,
FALLIS & ROBERTSON, INC.

RIGGS, ABNEY, NEAL, TURPEN, P.A.
ORBISON & LEWIS,

Thomas D. Robertson

Patricia Neel

Thomas D. Robertson, OBA No. 7665
Old City Hall Building, Suite 400
124 East Fourth Street
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(918) 584-5182

Patricia Neel, OBA No.
502 West 6th Street
Tulsa, Oklahoma 74119-1010
(918) 587-3161

ATTORNEYS FOR DEFENDANT
UNITED STATES TRUCK DRIVING
SCHOOL, INC.

ATTORNEYS FOR PLAINTIFF
GEORGE R. WEAVER

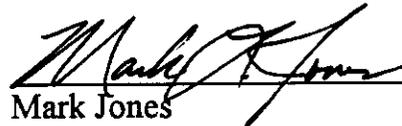
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Louis W. Bullock, OBA #1305
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320 South Boston, Suite 718
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ATTORNEYS FOR PLAINTIFFS



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Assistant Attorney General
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(405) 521-4274



Lynn S. Rambo-Jones
Deputy General Counsel
**OKLAHOMA HEALTH CARE
AUTHORITY**
4545 N. Lincoln Blvd., Suite 124
Oklahoma City, OK 73105
(405) 530-3439
ATTORNEYS FOR DEFENDANTS

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

LLOYD A. SCHERWINSKI and RITA)
SCHERWINSKI,)
)
Plaintiffs,)

vs.)

Case No. 95-C-839-BU

ST. PAUL FIRE AND MARINE)
INSURANCE COMPANY and UNITED)
STATES FIDELITY AND GUARANTY)
COMPANY,)

Defendants.)

ST. PAUL FIRE AND MARINE)
INSURANCE COMPANY,)

Plaintiff,)

vs.)

Case No. 95-C-715-BU

LLOYD A. SCHERWINSKI and RITA)
SCHERWINSKI,)

Defendants.)

FILED

JAN 7 - 1997

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

ENTERED ON DOCKET

DATE JAN - 9 1997

JUDGMENT

This action came before the Court upon the parties' motions for summary judgment, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of St. Paul Fire and Marine Insurance Company and against Lloyd A. Scherwinski and Rita Scherwinski and that St. Paul Fire and Marine Insurance Company recover of Lloyd A. Scherwinski and Rita Scherwinski its costs of action, if any.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that judgment is entered in favor of United States Fidelity and Guaranty Company and

against Lloyd A. Scherwinski and Rita Scherwinski and that United States Fidelity and Guaranty Company recover of Lloyd A. Scherwinski and Rita Scherwinski its costs of action, if any.

Dated at Tulsa, Oklahoma, this 7 day of January, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

JAN 07 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AMERICAN BANK AND TRUST COMPANY, an)
Oklahoma banking corporation,)
)
Plaintiff,)
)
vs.)
)
HAWKEYE BANK OF DES MOINES, IOWA, an Iowa)
banking corporation,)
)
Defendant.)

Case No. 96-C-712-E

ENTERED ON DOCKET
DATE JAN 09 1997

ORDER

Now before the Court is the Motion to Dismiss (Docket #4) of the Defendant Hawkeye Bank of Des Moines, Iowa (Hawkeye).

This claim arises out of Hawkeye's dishonoring of a \$3,000.00 check which its depositor, Michael Johnson, wrote to Trina McGill, a depositor of American Bank and Trust Company (American). American alleges that Hawkeye breached its agreement and was negligent in failing to give American Bank and Trust Company, the depository bank sufficient and timely notice of its intent to dishonor the check. Apparently Hawkeye provided verbal notice of its intent to dishonor to Liberty Bank and Trust Company, the clearing house bank in Tulsa Oklahoma. As a result, American paid out the full amount of the check before it received notice that the check would be dishonored.

Hawkeye argues that this claim should be dismissed pursuant to Fed.R.Civ.P. 12(b)(2) because this Court does not have personal jurisdiction over it due to the fact that it lacks minimum contacts with the state of Oklahoma. In the alternative, Hawkeye asserts that this matter should be transferred to the Central Division of the Southern District of Iowa.

7

Personal Jurisdiction

Hawkeye's first argument is that it lacks sufficient contacts with the State of Oklahoma such that this Court can exercise personal jurisdiction over it. Hawkeye asserts that it has no offices, agents or employees in the State of Oklahoma, that it does not do business in Oklahoma and does not own or lease property in Oklahoma, and that its only connection to Oklahoma was that it notified its transferor, Liberty Bank, which is located in Oklahoma, that the check would be dishonored.

In addressing the jurisdiction argument, American relies on Bank One Chicago, N.A. v. Midwest Bank and Trust Co., 116 S.Ct. 637 (1996) for its assertion that Federal Courts have jurisdiction over claims such as the one made here. American's reliance on Bank One, however, is erroneous in that Bank One addresses the issue of subject matter jurisdiction and not personal jurisdiction.

In this case the issue is whether the court has specific jurisdiction over Hawkeye. Specific jurisdiction "exists when the defendant 'purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.'" Trierweiler v. Croxton and Trench Holding Corporation, 90 F.3d 1523, 1532 (10th Cir. 1996) (quoting Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958)). Specific jurisdiction is established if the defendant purposefully directs his activities at the forum state, and the litigation results from injuries that relate to those activities." Id., at p. 1534. "Purposeful availment analysis turns upon whether the defendant's contacts are attributable to his own actions or solely to the actions of the plaintiff . . . [and generally] requires . . . affirmative conduct by the defendant which allows or promotes the transaction of business within the forum state." Id., at p. 1535 (quoting Decker Coal v. Commonwealth Edison Co., 805 F.2d 834, 840 (9th Cir. 1986)). In this instance, the only

affirmative contact by the defendant is the phone call to Liberty. The Court simply cannot say that the phone call allowed or promoted the transaction of business within Oklahoma. Hawkeye's connection to Oklahoma is, at best, 'merely fortuitous.'

Hawkeye's Motion to Dismiss (Docket #4) is granted.

IT IS SO ORDERED THIS 7th DAY OF JANUARY, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

JAC

FILED
DATE 1-9-97

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

FILED

JAN 7 1997

WILLIAM H. ROBISON, JR.,
Plaintiff,

Phil Lombardi, Clerk
U.S. DISTRICT COURT

-vs-

No. 96-CV-690K

ARBOR J. WILLIS, JR.; BEKINS VAN
LINES CO.; ST. PAUL FIRE & MARINE
INSURANCE COMPANY,
Defendants.

DISMISSAL AS TO ONE DEFENDANT

COMES NOW the Plaintiff and having been advised by the attorneys for the Defendants, Arbor J. Willis, Jr. and Bekins Van Lines Co., that the insurance at the time of the accident was carried by St. Paul Fire & Marine Insurance Company, and not National Union Fire Insurance Company of Pennsylvania, does hereby dismiss its action against National Union Fire Insurance Company of Pennsylvania.

Dated this 7th day of January, 1997.

H. I. Aston
H. I. ASTON OBA #362
Attorney for Plaintiff
3242 East 30th Place
Tulsa, Oklahoma 74114-5831
(918) 749-8523

JURY TRIAL DEMANDED

CERTIFICATE OF MAILING

I hereby certify that on this 7th day of January, 1997, a true and correct copy of the foregoing document was mailed by first class mail with proper postage fully prepaid thereon, to: William S. Leach, RHODES, HIERONYMUS, JONES, TUCKER & GABLE, P. O. Box 21100, Tulsa, OK 74121-1100.

H. I. Aston
H. I. ASTON

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

INETHER L. BREWER,
Plaintiff,
vs.
SUNRIDGE MANAGEMENT GROUP,
Inc. and SR EMPLOYERS, Inc.
Defendants.

)
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EOD 1/8/97

No. 96-CV-568-K ✓

FILED

JAN 07 1997

AL

Phil Lombardi, Clerk
U.S. DISTRICT COURT

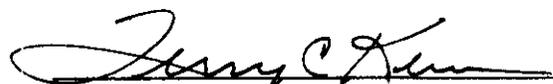
ORDER

Now before the Court is Defendant's Motion to Dismiss for failure of Plaintiff to file a statement that she wishes to represent herself in this matter, or in the alternative to cause entry of appearance of new counsel.

Pursuant to the Court's order of November 19, 1996, allowing for withdrawal of counsel, attorney Ashley Haus Brown was directed to actively serve as counsel by attending all scheduled hearings, preparing necessary orders and adhering to dates previously set by this Court until such time as the conditions set forth in the Order met with full compliance. As of this date, Ms. Brown has failed to respond to Defendant's Motion to Dismiss as required.

The Court hereby ORDERS Ms. Brown to file a responsive motion within five days of the filing date of this ORDER. Failure to comply may result in sanctions and/or dismissal of this cause of action.

ORDERED this 6th day of January, 1997.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCS
1-7-1997

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

RONALD D. WOOD,)
)
 Plaintiff,)
)
 vs.)
)
 GENERAL MOTORS CORPORATION,)
)
 Defendants.)

No. 96-C-887-K ✓

FILED

JAN 07 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 7th day of January, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCS
DATE 1-8-97

MIKE W. WILSON,)
)
 Plaintiff,)
)
 vs.)
)
 KONICA BUSINESS MACHINES,)
)
 Defendant.)

No. 96-C-436-K

FILED

JAN 07 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 7th day of January, 1997.


TERRY S. KERN, Chief
UNITED STATES DISTRICT JUDGE

F I L E D

JAN 07 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

BONNIE L. CAMPBELL,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
Commissioner of Social Security, ¹)
)
Defendant.)

Case No: 95-C-894-W ✓

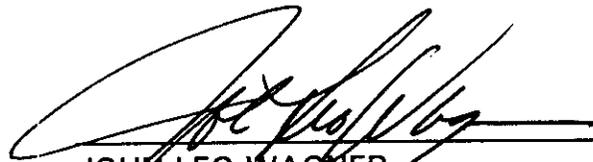
ENTERED ON DOCKET

DATE 1/8 '97

JUDGMENT

Judgment is entered in favor of the plaintiff, Bonnie L. Campbell, in accordance with this court's Order filed January 7, 1997.

Dated this 7th day of January, 1997.



 JOHN LEO WAGNER
 UNITED STATES MAGISTRATE JUDGE

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

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

BONNIE L. CAMPBELL)

Plaintiff,)

v.)

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL
SECURITY,¹)

Defendant.)

JAN 07 1997 *SLC*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-894-W ✓

ENTERED ON DOCKET

DATE 1/8/97

ORDER

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

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Glen E. Michael (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.

lp

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 the residual functional capacity to perform the physical exertional requirements of work, except for lifting over ten pounds frequently or twenty pounds occasionally. He concluded that claimant had no past relevant work and had the residual functional capacity to perform the full range of light work. He found that claimant was 48 years old, which is defined as

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).

a younger individual and had a limited education, but in view of her age and residual functional capacity, the issue of transferability of work skills was not material. Thus he found under the Social Security Regulations that, considering her residual functional capacity, age, education, and work experience, she was not disabled. Having determined that claimant retained the residual functional capacity to perform a full range of light work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ failed to make proper credibility findings regarding claimant's testimony and closely link his findings to the evidence.
- (2) The ALJ's decision that claimant can perform the full range of light work is not supported by substantial evidence, and he erred in relying on a lack of contradictory evidence in reaching this decision.

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

Claimant applied for disability benefits on August 30, 1993, alleging that she had become unable to work on June 28, 1993, due to "degenerative joint disease." (TR 83). She was seen in the emergency room of PHS Indian Hospital on July 8, 1993, with complaints of left knee pain that had started about six months earlier, but no known injury. (TR 112) Laboratory tests were done, and she was discharged with crutches and a prescription for Motrin.

Claimant returned to the hospital clinic on July 12, 1993, and her height was 64 ½ inches, weight was 228, and blood pressure was 130/70. (TR 113). She complained of continuing pain in both knees and also pain in her elbows. (TR 113). The doctor did a rheumatoid profile and took x-rays of her knees. (TR 111, 113). The x-rays showed osteoarthritis of both knees. (TR 116). She was given a Prednisone dose pack and Procardia for high blood pressure. (TR 111).

When seen at the clinic on July 21, 1993, claimant complained of constant hot flashes and trouble sleeping. (TR 111). Her weight was 232 pounds, and her blood pressure was 158/85. (TR 111). The doctor concluded that she had osteoarthritis in her knees, but the rheumatoid profile was negative. (TR 111). She was given prescriptions for Premarin, a hormone replacement, Procardia, Motrin, and Elavil, an antidepressant. (TR 110).

On August 10, 1993, claimant returned to the clinic and complained of "arthritis spreading all over," pain in her legs, arm, back, and fingers, and depression. (TR 110). The doctor found her weight was 236 ¾ pounds, her blood pressure was 146/85, and she was in no acute distress. (TR 110). She was prescribed Motrin and Amitriptyline, the generic name for Elavil. (TR 110).

On August 30, 1993, a clinic doctor completed a medical report to the Social Security Administration and stated that claimant had degenerative joint disease, mild hypertension, menopausal symptoms, and mild depression. (TR 109, 119). Her weight had risen to 241 pounds, and her blood pressure was 147/85. (TR 109). She stated that she still had swelling in her ankles and problems with sleeping. (TR 109).

She was given prescriptions for Lasix, a diuretic, Premarin, Lopressor for high blood pressure, Tofranil, an antidepressant, and Motrin. (TR 109).

Claimant was seen at the clinic on September 27, 1993, and claimed that she had been more depressed and that it seemed like her joints were worse and she could "hardly get around part of the time." (TR 108). She weighed 242 pounds, and her blood pressure was 148/85. (TR 108). The doctor noted that her knee joints were not swollen. (TR 108). Her medications were refilled, and she was given a Depo-Medrol anti-inflammatory injection. (TR 108).

Claimant returned on October 14, 1993, and reported that her feet were a lot better, but her hands and back still bothered her quite a bit. (TR 107). She was sleeping better. (TR 107). Her blood pressure was 150/100, and her weight was 242. (TR 107). Her medications were refilled. (TR 107). On October 26, 1993, she had a PAP Smear, and her weight was 246 pounds and her blood pressure 174/101. (TR 106).

A Residual Physical Functional Capacity Assessment form ("RFC Assessment") dated November 15, 1993, indicated that claimant could occasionally lift fifty pounds, frequently lift twenty-five pounds, and stand, walk, or sit about six hours in an eight-hour workday. (TR 54-61).

On November 21, 1993, claimant was seen in the emergency room at the Indian Hospital, complaining that a tumor under her left eye had burst and she had eye pressure and a headache. (TR 159). Her blood pressure at that time was

203/109 (TR 159). She was treated and, at the time of release, her blood pressure was 144/78. (TR 159).

On November 22, 1993, claimant was seen in the surgery clinic for evaluation of a growth below her left eye, which was diagnosed as an infected cyst, and on November 24, 1993, the cyst, as well as a skin lesion on her cheek, were removed. (TR 156-157). A pathology report dated November 30, 1993, diagnosed the skin on the right side of her nose as intradermal nevus and the skin under her left eye as cystic molluscum contagiosum. (TR 175). She did not keep appointments at the surgery clinic on December 27, 1993, or the medical clinic on January 6, 1994. (TR 154).

On January 24, 1994, claimant was referred to the emergency room after reporting chest pain and pain in her left arm and a blood pressure reading of 230/120 at the clinic. (TR 153). After treatment with medications she was released with a blood pressure of 171/82. (TR 152).

Claimant was examined by Dr. Donald Inbody, a psychiatrist, on February 3, 1994. (TR 126-128) The doctor stated:

Her speech was logical, coherent and sequential with no affective disturbances or associational defects in thinking. No psychotic symptomatology was noted. She was oriented in all spheres and appears to be of average intelligence. She showed no signs of clinical anxiety or panic, but does appear to be somewhat depressed and became tearful on occasion as she described the chronic pain and the limitations on her activities. She denies any suicidal ideation. The sleep pattern has been referred to above and the appetite is good. There are no disturbances in recent or remote memory and her fund of general information is good for her level of formal education as were mathematical computations, similarities and proverbs. She showed no

disturbances in attention and concentration and judgment is felt to be intact.

(TR 127).

Dr. Inbody concluded that claimant had an adjustment disorder with depressed mood, currently being treated with medication, generalized osteoarthritis and generative joint disease, severe hypertension, moderate psychosocial stressors, and a global assessment of functioning of 60, with the highest GAF in the past year of 70.⁴ (TR 127-128).

On February 9, 1994, Dr. Susan Steele evaluated claimant's physical condition for the Social Security Administration. (TR 131-133). Her blood pressure was 170/118, and her weight was 240 pounds. (TR 132). The doctor reported:

Range of motion testing, forward flexion approximately 60 degrees, possibly limited by obesity and inflexibility. There is no evidence of scoliosis and there is minimal pain. Extension is 5 to 10 degrees and there is minimal pain noted there. Lateral bending is 20 degrees bilaterally. Some pulling is noted in the lower back. The patient's heel walking is normal. Toe walking is somewhat weak. Straight leg raising test is negative in the sitting position and in the lying position. . . . There is no evidence of any abnormal deformities of the ankles, knees, hands or fingers, elbows and shoulders. The patient's range of motion with the shoulders is full. . . . Range of motion of the elbows and wrists

⁴The GAF is a "global assessment of functioning." The court in Irwin v. Shalala, 840 F. Supp. 751, 759 n.5 (D. Or. 1993), described the significance of a GAF score:

The Global Assessment of Functioning Scale ("GAF") ranges from 90 (absent or minimal symptoms) to 1 (persistent danger of severely hurting self or others, or unable to care for herself). A score between 41 and 50 is defined as manifesting "serious symptoms" (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job).

are also normal. Her straight leg raising test reveals the patient to go at least 85 degrees on the left and 90 degrees on the right without pain and with the knee flexed, can go up to 110 degrees which is limited by the patient's obesity. Knee flexion is 100 degrees bilaterally with no pain. Cervical spine range of motion is all within normal limits with no pain. The patient is able to manipulate small objects and to oppose her fingers and thumbs well. She does state that this is a good day, that there are other days that she is not able to hold or grasp objects well at all secondary to pain and swelling. Her gait is somewhat staggered. She takes small steps and has a widened stance, but there is minimal instability. The speed is somewhat slowed for normal gait. There is no evidence of imbalance or instability. The patient does not need an assistive device by this examiner's opinion, but the patient does use crutches at home only on an infrequent basis.

(TR 132-133).

The doctor concluded that she had a history of degenerative joint disease, hypertension, uncontrolled at this time, morbid obesity, and tobacco abuse. (TR 133). Dr. Steele did not evaluate claimant's ability to lift weight or sit, walk, or stand for certain lengths of time.

On February 11, 1994, claimant failed to keep her appointment at the clinic. (TR 151). On April 12, 1994, she was seen by the doctor, who reported that her weight was 232 pounds and her blood pressure was 220/110. (TR 150). She told the doctor she had pain in her feet, elbows, and chest, her blood pressure had been up, and she had not been sleeping very well and cried all the time. (TR 150). The doctor concluded that she had depression, hypertension, and degenerative joint disease (TR 150). Her prescriptions were refilled, and the doctor added Fosinopril, an antihypertensive medication. (TR 18).

By June 28, 1994, claimant's weight was 229 pounds and blood pressure was 138/88. (TR 149). She said she was "generally better", but was having headaches. (TR 149). The doctor refilled her prescription and added Darvon to take at night for back pain. (TR 149).

The claimant testified at the hearing on October 19, 1994 that she has pain in her knees, back, hands, shoulders, and feet. (TR 186). She said that her shoulders and knees burn with pain all the time, and that her knees pop. (TR 187-188). She said that her back feels like it is drawing and she cannot sit still very long. (TR 187). She also described the pain in her hands like "broken bones." (TR 188). She said her feet and ankles swell. (TR 188). She contended that she has to use crutches once every two months. (TR 189).

Claimant testified that she felt depressed and weak and cried every other day. (TR 189). She said that she can only sit twenty to thirty minutes, walk from the hearing office to her car, lift five pounds, and stand five to ten minutes. (TR 190-191). She said she could only drive twenty to thirty miles before her knees, back, and hands hurt. (TR 192). She testified that she lives in a small trailer and spends her days at her sister's, who lives five or six blocks away. (TR 194). She does little housework, cooking, or yard work. (TR 194-196). She said she visits her doctor once every twelve weeks, and friends take her to see him. (TR 198).

There is no merit to claimant's first contention that the ALJ failed to make proper credibility findings regarding her testimony and closely link his findings to the evidence in the record. Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995). The

ALJ stated that claimant's subjective complaints had been given "full consideration, both individually and in combination." (TR 18). He noted that the Social Security regulations provided detailed guidance in the evaluation of symptoms, including pain, and these regulations incorporated the "other evidence" parameters set out in Social Security Ruling 88-13 and in controlling case law, including Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987). (TR 18).

Pain, even if not disabling, is a nonexertional impairment to be taken into consideration. Thompson v. Sullivan, 987 F.2d 1482, 1490-1491 (10th Cir. 1993). The Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna, 834 F.2d at 165-66, discussed the factors in addition to medical test results that agency decision makers should consider when judging the credibility of subjective claims of pain greater than that usually associated with a particular impairment.

[W]e have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems . . . [and] the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive.

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

The ALJ adequately linked evidence to his findings that claimant's pain testimony was credible to the extent it was consistent with the performance of light work. He noted that medications controlled claimant's symptoms (TR 19, 107, 110,

132-133, 149, 152, 159), she continued to gain weight in spite of the adverse impact on her problems (she weighed 228 on July 12, 1993 and had gained up to 250 pounds on January 24, 1994) (TR 19, 113, 152-153), her daily activities showed she did not have severe pain (TR 19, 194-198), she had good range of motion of all joints on February 9, 1994 (TR 18, 132), she never alleged side-effects from her medications (TR 19), and no doctors placed any limitations on her ability to stand, walk, sit, push, pull, lift, bend, stoop, or drive a car (TR 20).

However, there is merit to claimant's second contention that the ALJ's decision that claimant can perform light work is not supported by substantial evidence and he erred in relying on a lack of contradictory evidence in coming to this decision. As the ALJ noted, the objective medical evidence showed she has degenerative joint disease. But the ALJ relied on the fact that good range of motion of all joints was found by Dr. Steele on February 9, 1994 (TR 18, 132). While the ALJ stated he was not minimizing the discomfort claimant might occasionally feel and the degenerative changes which x-rays showed in her knees, he concluded that "an individual does not have to be entirely pain free in order to have the residual functional capacity to engage in substantial gainful activity." (TR 20).

The ALJ pointed out that no physician ever placed any limitations on claimant's ability to stand, walk, sit, push, pull, lift, bend, stoop, or drive a car (TR 20). He noted that her limitations had been self-imposed, "as there is no objective medical evidence of any impairment, or combination of impairments, considered singly or in combination, which would in any way affect her ability to engage in a full range of

work-related activities." (TR 20). He pointed out that the osteoarthritis in her knees had been treated conservatively with medication and by injection. (TR 20).

The ALJ also discussed claimant's alleged disability due to high blood pressure (TR 19). He noted that while the records reflected that she had high blood pressure under poor control at times, it was clear that her blood pressure was controllable with medication. (TR 19). He pointed out that her blood pressure would be better stabilized if she followed the universal regimen for treatment of high blood pressure, including a low-salt, low-fat diet, weight loss, and smoking cessation, which she had not elected to do. (TR 19). He also noted that she had not sustained any end organ damage as the result of her hypertension. (TR 19). He concluded that her high blood pressure represented no more than a slight abnormality, having such a minimal affect on her that "it would not be expected to interfere with her ability to work, irrespective of age, education, or work experience and, therefore, would not represent a severe impairment." (TR 19). There is substantial evidence to support these conclusions.

The ALJ further discussed claimant's alleged disability due to depression. (TR 20). He noted that the records indicated that she discussed depression with her treating doctors and been given antidepressant medication. (TR 19). Dr. Jones stated on August 30, 1993, that she had mild depression (TR 109, 119). Dr. Inbody found on February 3, 1994, that she had an adjustment disorder with depressed mood, currently being treated with medicine. (TR 127). Although she had been given antidepressant medication by her doctors, she was never referred to a mental health specialist. (TR 20).

The ALJ found no indication in the record that claimant had a mental or emotional impairment which restricted activities of daily living, produced difficulties in maintaining social functioning, resulted in deficiencies of concentration, persistence, or pace, or caused episodes of deterioration or decompensation in work or work like settings. (TR 20). The ALJ concluded that her depression was situational in nature and did not represent more than a slight abnormality, "having such a minimal affect on the claimant that it would not be expected to interfere with [her] ability to work irrespective of age, education, or work experience and, therefore, the claimant does not have a severe mental impairment." (TR 20).

Light work is defined as "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds [A] job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. 20 C.F.R. § 404.1567(b).

Although the ALJ's opinion thoroughly discussed the evidence, several questions surface. First, claimant testified that she can lift only five pounds. (TR 191). The only other part of the record specifically addressing that issue is the Residual Physical Functional Capacity Assessment form which was administratively generated on November 15, 1993, after a summary review of the evidence then in the file (TR 54-61).⁵ The ALJ found claimant's testimony to not be credible, which

⁵ According to the instructions on the front of the form, it is expected to take "about 20 minutes" to complete the form. The person filling out the form is to take

is within his province. But the court finds no specific evidence in the record supporting the fact that claimant can lift 10 pounds frequently and 20 pounds occasionally, except for the November 15, 1993 RFC Assessment.⁶

The same is true of the walking and standing or sitting requirements of light work. Claimant testified that she can sit only twenty to thirty minutes, stand five to ten minutes, and walk only the short distance from the Social Security hearing office to her car (TR 190-191). No other evidence specifically addresses these issues, except the November 15, 1993, RFC Assessment, but the ALJ found that claimant could do a good deal of walking or standing or sit and do pushing and pulling of arm or leg controls most of the time. The court finds no specific medical evidence in the record supporting the proposition that claimant can do a good deal of walking and standing or sit and use controls for a full work day.

into consideration "all [the] evidence in [the] file," and "cite specific clinical and laboratory findings, observations, lay evidence, etc." Here, the conclusions drawn concerning the claimant's RFC were shown by checked boxes, supplemented only by the following cryptic statement:

Pt. [Patient] who alleges arthritis. Xrays do show deg. [degenerative] changes at knees. Exams have shown no joint deformities, swelling. Good ROM [Range of Motion]. No neuro [neurological] defects. Pain does not further affect RFC [Residual Functional Capacity].

There is no citation to particular medical records where RFC findings were made upon actual examination of the claimant by a physician. In fact, no medical records were referred to at all.

⁶ The RFC Assessment of November 15, 1993 actually indicated that claimant could occasionally lift 50 pounds, frequently lift 25 pounds, and could stand and/or walk, or sit for six hours in an 8-hour workday.

The decision in Thompson, 987 F.2d at 1490, is significant for claimant's case. In Thompson, the ALJ found the claimant's testimony to not be credible and eventually found no disability. The Thompson court noted that a finding of a claimant's noncredibility does not compel a finding of no disability, and then stated:

In making his finding that Ms. Thompson could do the full range of sedentary work, the ALJ relied on the absence of contraindication in the medical records. The absence of evidence is not evidence. The ALJ's reliance on an omission effectively shifts the burden back to the claimant. It is not her burden, however, to prove she cannot work at any level lower than her past relevant work; it is the Secretary's to prove that she can.

Id. (emphasis added).

The facts in Thompson differ from those in this case. However, it appears in both that case, and in the case before the court, that the ALJ rejected claimant's testimony on the issue of how much she could lift, sit, stand, and sit, and arbitrarily came to his own conclusions. Arguably, claimant's testimony was suspect, but it was the only evidence besides the November 15, 1993 RFC Assessment addressing the issue, and the ALJ did not explicitly rely upon that Assessment in reaching his conclusions as to the RFC of the claimant.⁷ Had the ALJ so relied, he would have

⁷ In all fairness, in coming to his conclusions with respect to claimant's RFC, it appears that the ALJ relied on Dr. Steele's report of February 9, 1994 (TR. 131-137), which is not inconsistent with the November 15, 1993 RFC Assessment (TR. 54-61). Given Dr. Steele's very specific findings regarding the claimant's range of motion, it is arguable that an exertional RFC consistent with light work could be inferred. However, Dr. Steele did not fill out a Residual Physical Functional Capacity form, or otherwise record specific conclusions with respect to claimant's RFC (e.g. the amount of weight she could lift, and length of time she could stand, walk and sit during an 8-hour workday). Given that remand is necessary due to the ALJ's reliance on the "grids" in the face of medically established nonexertional impairments, this

been in error, as the basis for the conclusions reflected in the RFC Assessment is not revealed on its face, and it is not accompanied by a medical report, testing data, or the curriculum vitae of an examining physician.

Once the ALJ found that claimant had no past relevant work, the burden was on the Secretary to establish that she could work. Ragland v. Shalala, 992 F.2d 1056, 1057 (10th Cir. 1993). Consequently, the ALJ must point to specific evidence showing that claimant can do light work, which requires lifting 10 pounds frequently and 20 pounds occasionally and doing a good deal of walking or standing or sitting and pushing and pulling arm or leg controls for most of an eight-hour work day.

As already discussed, the court in Thompson also noted that "pain, even if not disabling, is still a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant." 987 F.2d at 1490-1491. Here, it is not clear whether the ALJ found her pain to be insignificant. All claimant's doctors acknowledged that she suffered from pain, she has taken many pain medications, x-rays revealed osteoarthritis of both knees, she occasionally uses crutches, and she testified that she could no longer work because of her pain. This evidence suggests that her pain may be less than disabling but more than insignificant.

court will not attempt to bridge the evidentiary gap as to RFC through logical inference, and will instead simply direct that evidence of claimant's RFC be generated by consultative medical examination upon remand.

If a claimant suffers from nonexertional impairments that limit her ability to perform the full range of work in a specific guideline category, the ALJ is required to utilize testimony of a vocational expert. Reed v. Sullivan, 988 F.2d 812, 816 (8th Cir. 1993).

This case is remanded for additional findings with respect to claimant's RFC by a consultative medical expert, and to obtain testimony by a vocational expert addressing claimant's ability to do particular jobs that fall within the RFC classification supported by the findings of the consultative medical expert. The vocational expert should also determine and quantify the limitation, if any, that claimant's nonexertional impairments will have on her ability to do those jobs.⁸

Dated this 6th day of January, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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⁸ In ordering this remand, the court is not mandating that the commissioner reach a particular result.

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

FILED

JAN 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

USHA KATARIA,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
Commissioner of Social Security,¹)
)
Defendant.)

Case No: 95-C-730-W

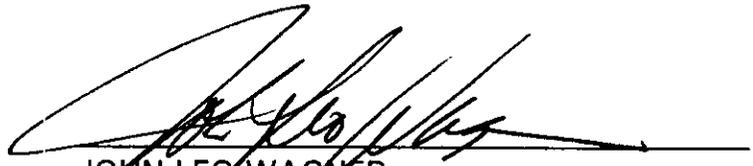
ENTERED ON DOCKET

DATE 1/8/97

JUDGMENT

Judgment is entered in favor of the defendant, Shirley S. Chater, Commissioner of Social Security, in accordance with this court's Order filed January 7, 1997.

Dated this 7th day of January, 1997.


JOHN LEO WAGNER
UNITE STATES MAGISTRATE JUDGE

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

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

F I L E D

JAN 07 1997 *FL*

USHA KATARIA,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-730-W ✓

ENTERED ON DOCKET
DATE 1/8/97

ORDER

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

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge James D. Jordan (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.

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 the residual functional capacity to perform the physical exertional requirements of work, except for prolonged standing, and had no nonexertional limitations. He concluded that she had no past relevant work. He found that she had the residual functional capacity to perform the full range

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).

of sedentary work. He noted that she was 48 years old, which is defined as a younger individual, had a 12th-grade education, and in view of her age and residual functional capacity, the issue of transferability of work skills was not material. Based on the Social Security Regulations, he concluded that, considering her residual functional capacity, age, education, and work experience, she was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ erred in finding that claimant's impairments were not severe because they are controllable with medication.
- (2) The ALJ did not recognize that claimant was unable to get medical treatment because of her inability to pay for it and erroneously based his decision on failure to obtain treatment.

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

Claimant claims she has been unable to work since June 6, 1992, because of bone spurs in both heels, knee pain when walking, shoulder and neck pain, thyroid problems, and stomach pain, vomiting, and weakness (TR 92-93). She was first seen at a clinic on June 26, 1992 for abdominal cramps and dyspeptic symptoms, and the doctor diagnosed dyspepsia and ordered upper GI and small bowel tests (TR 147). The tests were run on June 29, 1992, and were normal (TR 138-144). A pelvic ultrasound and chest x-ray were also unremarkable (TR 137, 149).

Claimant began to receive medical care at Morton Health Clinic on August 31, 1992. The doctor reported that she complained of pain in her heels and that she was taking synthroid for thyroid problems (TR 189). From September to December of 1992, her hypothyroidism was noted and replacement therapy continued (TR 186-188). In the fall of 1992, she was also seen at the Neighbor For Neighbor Health Clinic for dental work, an eye exam and receipt of eye glasses, and treatment of pain, dizziness, drowsiness, and a goiter (TR 155-158).

In January of 1993, claimant saw a podiatrist, who took x-rays and concluded she had heel spur syndrome (TR 181, 183). She continued to complain of a "crawling sensation to skin" and a thyroid scan was done on January 19, 1993, which showed a benign nodular goiter (TR 179, 182). She reported feeling better by January 28, 1993 and was put on synthroid for goiter suppression on February 8, 1993 (TR 177-178). She saw her doctor each month and received medication until June 14, 1993 when the doctor recommended excision of the goiter (TR 175-176). She was also given an appointment for surgery from the Neighbor For Neighbor Clinic on July 1, 1993 (TR 226).

On June 2, 1993, Dr. David Dean did a consultative examination of claimant (TR 160-167). He diagnosed osteoarthropathy of her lumbosacral and cervical spine and shoulder girdles without limitation of range of motion or lumbosacral radiculopathy, peptic ulcer disease without complication, under fair control without medication, a hiatal hernia with no complications, a thyroid goiter being treated with medication, and heel spurs which did not impair her gait (TR 162-163).

A thyroid scan on July 16, 1993 showed an enlargement "suggestive of Grave's disease." (TR 194). On August 1, 1993, the doctor reported claimant was fatigued, had gained weight, and had abdominal swelling, pain, and dyspepsia, and he diagnosed hypothyroid and prescribed a higher dose of synthroid (TR 214). On September 16, 1993, her doctor stated that she had Grave's disease (TR 213).

On August 28, 1994, Dr. Don Nelson reviewed claimant's medical records (TR 231-232). He noted that she had a hypothyroidism from a nontoxic nodular goiter problem which resulted in no medical disabilities, mild hypertension which had led to no organ damage and thus no disability, bone spurs which limited her ability to do work requiring constant standing or walking, ulcer disease controlled by medication, and generalized musculoskeletal pain in her neck, back, and knees, but no findings of any significant musculoskeletal disorder reported in the medical records (TR 231-232). The doctor concluded:

[I]t appears to be some type of subjective complaint of musculoskeletal pain. Further upon reviewing the medical records, I do not find any description anywhere that she reports any chronic disabling loss of function due to these pains other than that described above for her feet. Therefore, upon reviewing the medical record, I could find no objective evidence of total disability for various musculoskeletal pains.

On summary, the patient does not appear to have a significant medical problem that would create a total disability and only partial disability as related to her chronic foot pain in that it would limit the type of work to a nonstanding and nonwalking type of job. Otherwise, no other limitations in work ability seem to be present within the medical records.

(TR 232).

On January 24, 1995, a doctor at Neighbor For Neighbor Clinic noted that claimant had not seen a doctor for some time, but she knew she had diabetes because of her urine and her painful feet (TR 236). The doctor found she had elevated blood sugar and concluded she had peripheral neuropathy and vaginitis and referred her for diabetes tests (TR 235). On January 26, 1995, she was diagnosed with diabetes and was given medication (TR 235).

There is no merit to claimant's contentions. There is much evidence in the record that claimant's conditions are controllable with medication. The Social Security regulations state that benefits will be denied to a claimant who fails without good reason to follow treatment prescribed by his physician if it can restore his ability to work. 20 C.F.R. § 404.1530. Courts deciding 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. Teter v. Heckler, 775 F.2d 1104, 1107 (10th Cir. 1985).

In Teter, the court found that the plaintiff's refusal to undergo back surgery was justified, since the evidence reflected that he would remain thirty to forty percent disabled after surgery, his mental condition would play a role in his recovery, and, although he had become receptive to the idea by the time of his hearing, he could not afford the estimated \$8,000 to \$10,000 it would cost. Id. at 1107.

Under Social Security Ruling 82-59, a claim will be allowed where free community resources are not available, but "[a]ll possible resources (e.g., clinics, charitable and public assistance agencies, etc.), must be explored. Contacts with such resources and the claimant's financial circumstances must be documented." In Murphy v. Sullivan, 953 F.2d 383, 386-387 (8th Cir. 1992), the court found that there was a lack of evidence that plaintiff had been denied medical care because of his financial condition and denied benefits because the failure to seek treatment was not justified. This case was cited with approval by the Tenth Circuit in an unpublished opinion, Galdean v. Chater, 1996 WL 23199 (10th Cir. Jan. 23, 1996).

Claimant is represented by counsel, who has failed to show that claimant has been unable to obtain her medications and medical treatment because of her inability to pay for it. In fact, the medical records are from medical facilities which offer medical care to individuals who have no income or resources. The only evidence in the record that claimant cannot get treatment because of her inability to pay is her own self-serving testimony at the hearing (TR 55-56). There is no evidence that all community medical resources have been explored and she has been denied treatment at those established to serve the indigent. There is also no evidence of claimant's financial condition, such as income tax returns.

There is substantial evidence to support the ALJ's opinion that claimant's impairments are controllable with medication and that they only minimally effect her ability to engage in substantial gainful activity. Several of her complaints are not

substantiated by objective medical evidence. No doctor has found her unable to work.

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

Dated this 7th day of January, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN - 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)

vs.)

LETTIE MAE WESTON BELL aka Lettie)
Mae Weston; UNKNOWN SPOUSE OF)
Lettie Mae Weston Bell aka Lettie Mae)
Weston, if any; JOHN BOWEN, JR;)
UNKNOWN SPOUSE OF John Bowen,)
Jr., if any; PAT ROSE; UNKNOWN)
SPOUSE OF Pat Rose, if any; SERVICE)
COLLECTION ASSOCIATION, INC.;)
CITY OF BROKEN ARROW,)
OKLAHOMA; COUNTY TREASURER,)
Tulsa County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)

Defendants.)

Civil Case No. 96-C 228B ✓

ENTERED ON DOCKET

DATE JAN 08 1997

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 7th day of January

1997. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, SERVICE COLLECTION ASSOCIATION, INC., appears by its Fred A. Pottorf; and the Defendants, LETTIE MAE WESTON BELL aka Lettie Mae Weston, UNKNOWN SPOUSE OF Lettie Mae Weston Bell aka Lettie Mae Weston, if any, John Bowen, Jr., UNKNOWN SPOUSE OF John Bowen, Jr., if any, PAT ROSE, UNKNOWN SPOUSE OF Pat Rose, if any, CITY OF BROKEN

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ARROW, OKLAHOMA, and PRATT MORTGAGE SERVICES, INC., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., signed a Waiver of Summons on March 25, 1996; that the Defendant, PRATT MORTGAGE SERVICES, INC., acknowledged receipt of Summons and Complaint on April 17, 1996, by Certified Mail; that the Defendant, CITY OF BROKEN ARROW, OKLAHOMA, acknowledged receipt of Summons and Complaint on March 25, 1996, by Certified mail.

The Court further finds that the Defendants, LETTIE MAE WESTON BELL aka Lettie Mae Weston, UNKNOWN SPOUSE OF Lettie Mae Weston Bell aka Lettie Mae Weston, if any, JOHN BOWEN, JR., UNKNOWN SPOUSE OF John Bowen, Jr., PAT ROSE and UNKNOWN SPOUSE OF Pat Rose, if any, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning August 29, 1996, and continuing through October 3, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, LETTIE MAE WESTON BELL aka Lettie Mae Weston, UNKNOWN SPOUSE OF Lettie Mae Weston Bell aka Lettie Mae Weston, if any, JOHN BOWEN, JR., UNKNOWN SPOUSE OF John Bowen, Jr., PAT ROSE and UNKNOWN SPOUSE OF Pat Rose, if any, and service cannot be made upon said Defendants by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants,

LETTIE MAE WESTON BELL aka Lettie Mae Weston, UNKNOWN SPOUSE OF Lettie Mae Weston Bell aka Lettie Mae Weston, if any, JOHN BOWEN, JR., UNKNOWN SPOUSE OF John Bowen, Jr., PAT ROSE and UNKNOWN SPOUSE OF Pat Rose, if any. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on April 8, 1996; that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., filed its Answer on April 15, 1996; and that the Defendants, LETTIE MAE WESTON BELL aka Lettie Mae Weston, UNKNOWN SPOUSE OF Lettie Mae Weston Bell aka Lettie Mae Weston, if any, John Bowen, Jr., UNKNOWN SPOUSE OF John Bowen, Jr., if any, PAT ROSE, UNKNOWN SPOUSE OF Pat Rose, if any, CITY OF BROKEN ARROW, OKLAHOMA, and PRATT MORTGAGE SERVICES, INC., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, LETTIE MAE WESTON BELL, is one and the same person as Lettie Mae Weston, and will hereinafter be referred to as "LETTIE MAE WESTON BELL."

The Court further finds that on April 8, 1991, John Bowen, Jr., filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-B-1151 W. On August 8, 1991, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on September 18, 1991. The property was not listed in the real property schedules

The Court further finds that on December 23, 1992, Lettie Mae Weston aka Lettie Mae Bell, filed her voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-B-4413 W. On April 16, 1993, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on February 7, 1995. The property was listed in the real property schedules.

The Court further finds that on July 13, 1983, the Defendant, PAT ROSE, executed and delivered to PRATT MORTGAGE SERVICES, INC., a mortgage note in the amount of \$53,650.00, payable in monthly installments, with interest thereon at the rate of 12.50 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, PAT ROSE, a single person, executed and delivered to PRATT MORTGAGE SERVICES, INC., a real estate mortgage dated July 13, 1983, covering the following described property, situated in the State of Oklahoma, Tulsa County:

Lot Seven (7), Block Three (3), WEST PARK ADDITION to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

This mortgage was recorded on July 18, 1983, in Book 4707, Page 1034, in the records of Tulsa County, Oklahoma. A copy is attached as Exhibit "A" and incorporated. A Corrected Mortgage was recorded on July 21, 1983, in Book 4708, Page 1589, in the records of Tulsa County, Oklahoma, to show the date of acknowledgment.

The Court further finds that on July 13, 1983, PRATT MORTGAGE SERVICES, INC., assigned the above-described mortgage note and mortgage to MORTGAGE INVESTMENT COMPANY of El Paso. This Assignment of Mortgage was recorded on August 1, 1983, in Book 4712, Page 303, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 29, 1983, MORTGAGE INVESTMENT COMPANY OF El Paso, assigned the above-described mortgage note and mortgage to GOVERNMENT NATIONAL MORTGAGE ASSOCIATION. This Assignment of Mortgage was recorded on September 6, 1990, in Book 5275, Page 535, in the records of Tulsa County, Oklahoma. A Second Assignment of Mortgage was recorded on February 11, 1991, in Book 5303, Page 928, in the records of Tulsa County, Oklahoma, to add the legal description.

The Court further finds that on August 17, 1990, GOVERNMENT NATIONAL MORTGAGE ASSOCIATION BY AND THROUGH ITS ATTORNEY-IN-FACT STANDARD FEDERAL SAVINGS BANK, assigned the above-described mortgage note and mortgage to STANDARD FEDERAL SAVINGS BANK. This Assignment of Mortgage was recorded on September 6, 1990, in Book 5275, Page 536, in the records of Tulsa County, Oklahoma. This Assignment of Mortgage was re-recorded on November 5, 1993, in Book 5559, Page 2072, in the records of Tulsa

County, Oklahoma, to reflect the name change after previous recording of this document and to preserve the chain of title.

The Court further finds that on August 17, 1990, STANDARD FEDERAL SAVINGS BANK, assigned the above-described mortgage note and mortgage to THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT, HIS/HER SUCCESSORS AND ASSIGNS. This Assignment of Mortgage was recorded on September 6, 1990, in Book 5275, Page 538, in the records of Tulsa County, Oklahoma. This Assignment of Mortgage was re-recorded on November 5, 1993, in Book 5559, Page 2070, in the records of Tulsa County, Oklahoma, to reflect the name change and to reflect power of attorney recorded after previous recording of this document. A Corrective Assignment of Mortgage was recorded on September 12, 1994, in Book 5658, Page 56, in the records of Tulsa County, Oklahoma.

The Court further finds that a Corrective Assignment was recorded on September 20, 1994, in Book 5658, Page 55, in the records of Tulsa County, Oklahoma. To replace the Assignment of Mortgage recorded on September 6, 1990, in Book 5275, Page 536, and re-recorded on November 5, 1993, in Book 5559, Page 2072.

The Court further finds that on October 20, 1989, the Defendant, PAT ROSE, granted a General Warranty Deed to Lettie M. Bell, this Deed was recorded on October 24, 1989, in Book 5215, Page 1381, in the records of Tulsa County, Oklahoma. The Defendant, LETTIE MAE WESTON BELL, is the current assumptor of the subject indebtedness.

The Court further finds that on April 6, 1990, Lettie M. Bell, a single person, granted a General Warranty Deed to Lettie M. Bell, a single person or John

Bowen, a single person. This Deed was recorded on April 6, 1990, in Book 5245, Page 2291, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 6, 1990, the Defendant, LETTIE MAE BELL, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on September 18, 1991, March 16, 1992 and September 30, 1992.

The Court further finds that the Defendant, LETTIE MAE WESTON BELL, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, LETTIE MAE WESTON BELL, is indebted to the Plaintiff in the principal sum of \$82,316.52, plus interest at the rate of 12.50 percent per annum from March 22, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$26.00 which became a lien on the property as of June 23, 1996; a lien in the amount of \$25.00 which became a lien on the property as of June 23, 1994 and a lien in the amount of \$12.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., has a lien on the property which is the subject matter of this action by virtue of an Execution of a Judgment, in amount of \$1,349.44, plus interest accrued and accruing, dated April 15, 1991 and recorded on April 20, 1992, in Book 5397, Page 2276, 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 Defendants, LETTIE MAE WESTON BELL, UNKNOWN SPOUSE OF LETTIE MAE WESTON BELL, IF ANY, JOHN BOWEN, JR., UNKNOWN SPOUSE OF JOHN BOWEN, JR., IF ANY, PAT ROSE, UNKNOWN SPOUSE OF PAT ROSE, IF ANY, CITY OF BROKEN ARROW, OKLAHOMA, AND PRATT MORTGAGE SERVICES, INC., are in default, and have no right, title or interest in the subject real property.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, Lettie Mae Weston Bell, in the principal sum of \$82,316.52, plus interest at the rate of 12.5

percent per annum from March 22, 1995 until judgment, plus interest thereafter at the current legal rate of 5.61 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$63.00, plus costs and interest, for personal property taxes for the years 1993 and 1994, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., have and recover judgment in the amount of \$1,349.44 for Executed Judgment, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, LETTIE MAE WESTON BELL, UNKNOWN SPOUSE OF LETTIE MAE WESTON BELL, IF ANY, JOHN BOWEN, JR., UNKNOWN SPOUSE OF JOHN BOWEN, JR., IF ANY, PAT ROSE, UNKNOWN SPOUSE OF PAT ROSE, IF ANY, AND PRATT MORTGAGE SERVICES, INC., CITY OF BROKEN ARROW, OKLAHOMA, AND BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, LETTIE MAE WESTON BELL, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell

according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, Service Collection Association, Inc., in the amount of \$1,349.44, plus interest accrued and accruing, in payment of Executed Judgment.

Fifth:

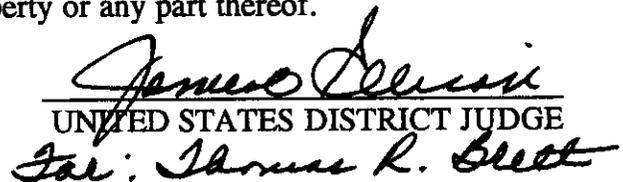
In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$63.00, personal property taxes which are currently due and owing.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all

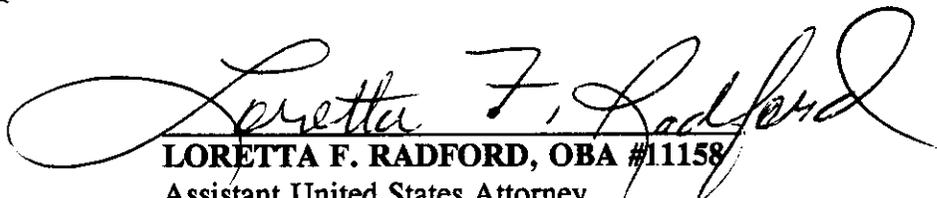
instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

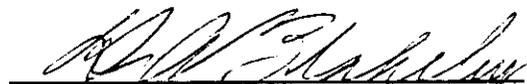
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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


UNITED STATES DISTRICT JUDGE
James R. Best

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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

Judgment of Foreclosure
Civil Action No. 96-C 228B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

CONNIE SMITH for MALCOLM SMITH,)
a minor,)
SS# 459-99-6273)

JAN - 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiff,)

v.)

No. 95-C-1189-J

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

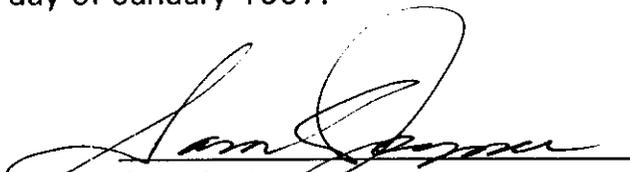
Defendant.)

ENTERED ON DOCKET
DATE 1/8/97

JUDGMENT

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

It is so ordered this 7 day of January 1997.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

CONNIE SMITH for MALCOLM SMITH,)
a minor,)
SS# 459-99-6273)

Plaintiff,)

v.)

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

Defendant.)

JAN - 7 1997 *57E*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 95-C-1189-J /

ENTERED ON DOCKET

DATE 1/8/97

ORDER^{1/}

Plaintiff, Connie Smith for Malcolm Smith, a minor, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts error because (1) the Appeals Council failed to properly consider the opinion of the treating physician, (2) Defendant failed to provide a reason to support the decision that Plaintiff did not meet a Listing,^{3/} and (3) Defendant failed to provide sufficient reasons for the credibility assessment of Ms.

^{1/} This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

^{2/} Plaintiff filed an application for disability and supplemental security insurance benefits on June 24, 1993. [R. at 117]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Glen E. Michael (hereafter, "ALJ") was held July 11, 1994. [R. at 211]. By order dated December 16, 1994, the ALJ determined that Plaintiff was not disabled. [R. at 37-47]. Plaintiff appealed the ALJ's decision to the Appeals Council. On October 27, 1995, the Appeals Council denied Plaintiff's request for review. [R. at 3].

^{3/} 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.

Smith. For the reasons discussed below, the Court **reverses and remands** the decision of the Commissioner.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on June 13, 1988, and was six years old at the time of the hearing.^{4/} [R. at 117, 214-15]. Plaintiff suffers from severe asthma and has been hospitalized on several occasions due to his condition. Plaintiff requests disability based on his asthma.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

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).

^{4/} The transcript of the hearing before the ALJ indicates Plaintiff's date of birth as January 13, 1988, but the majority of the references in the record refer to June 13, 1988. [R. at 214].

"The finding of the Secretary^{5/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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. EVALUATION OF DISABILITY IN CHILDREN

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

if he is unable to engage in any substantial gainful activity
by reason of any medically determinable physical or mental

^{5/} 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."

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

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

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

Id. at § 1382c(a)(3)(B). "In plain words, [the above-quoted sections establish that] a child is entitled to benefits if his impairment is as severe as one that would prevent an adult from working." Zebley, 493 U.S. at 529.

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

disabled. If the minor's impairment is not of Listing severity, the Commissioner must determine whether the impairment is of "comparable severity" to an impairment that would disable an adult. 20 C.F.R. § 416.924(b)-(f).

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

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

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

20 C.F.R. § 416.924(a)(1)-(3).

To determine whether a child has an impairment that is of comparable severity to that which would disable an adult, the Commissioner conducts an Individualized Functional Assessment ("IFA"). 20 C.F.R. § 416.924(f). An IFA is similar to the Residual Functional Capacity ("RFC") assessment performed by the Commissioner when an adult's claim of disability is evaluated. While conducting an IFA, the

Commissioner "will consider the functions, behaviors, and activities that are appropriate to [the claimant's] age. . . ." 20 C.F.R. 416.924a(a)(4).

For preschool children like Plaintiff^{6/}, the following "domains of development or functioning" are evaluated by the Secretary during an IFA:

- (1) Cognitive development, e.g., your ability to understand, to reason and to solve problems, and to use acquired knowledge and concepts;
- (2) Communicative development (includes speech and language), e.g., your ability to communicate by telling, requesting, predicting, and relating information, by following and giving directions, by describing actions and functions, and by expressing your needs, feelings, and preferences in a spontaneous, interactive, and increasingly intelligible manner, using simple sentences in grammatical form;
- (3) Motor development (includes gross and fine motor skills), e.g., your ability to move and use your arms and legs in increasingly more intricate and coordinated activity, and your ability to use your hands with increasing coordination to manipulate small objects during play.
- (4) Social development, e.g., your ability to initiate age-appropriate social exchanges and to respond to your social environment through appropriate and increasingly complex interpersonal behaviors, such as showing affection, sharing, cooperating, helping, and relating to other children as individuals or as a group;
- (5) Personal/behavioral development, e.g., your ability to help yourself and to cooperate with others in taking care of your personal needs, in adapting to your environment, in responding to limits, and in learning new skills;

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

- (6) Concentration, persistence, and pace, e.g., your ability to engage in an activity, such as dressing or playing, and to sustain the activity for a period of time and at a pace appropriate to your age.

20 C.F.R. § 416.924d(h).

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

IV. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff did not meet a Listing. With respect to each of the "domains" outlined above, the ALJ concluded that Plaintiff had no limitation in five of the domains, and a moderate limitation in one domain (motor function). The ALJ concluded that Plaintiff was not disabled.

V. REVIEW

Treating Physician's Report

Plaintiff initially asserts error because the Defendant failed to give a reason for disregarding the opinion of the treating physician. Plaintiff argues that Defendant

ignored the opinion of Herschel J. Rubin, M.D., that Plaintiff suffered from severe asthma.

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).

Plaintiff is correct that the legal standard for the evaluation of the opinion of a treating physician requires that a reason be given if the treating physician's opinion is ignored. However, in this case, the Court cannot conclude that the treating physician's opinion was ignored. The ALJ noted Dr. Rubin's progress notes and treatment record and indicated that Plaintiff was being treated for asthma and had been prescribed medications for his asthma. By letter dated January 23, 1995, Dr. Rubin stated that Plaintiff has had attacks of asthma since early infancy, many of which have been severe. In addition, Dr. Rubin noted that Plaintiff had been recently hospitalized and required medication to control his status. [R. at 36]. Although this letter was not available to the ALJ at the time of his decision, the statements by Dr. Rubin are not necessarily inconsistent with the ALJ's findings. The ALJ does not indicate that Plaintiff does not suffer from asthma. The ALJ found only that, even with asthma, Plaintiff was not disabled.

Listings

Plaintiff asserts that the Defendant erred by failing to give reasons to support Defendant's conclusion that Plaintiff does not meet a Listing. Plaintiff asserts that he meets Listing 3.03B.

Asthma. With:

* * *

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

period of at least 12 consecutive months must be used to determine the frequency of attacks.

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

The following paragraphs are the only mention by the ALJ in his opinion of his evaluation of the Listings.

Based upon full and careful review of the testimony and evidence, the Administrative Law Judge finds that the claimant's impairment(s) does not meet or equal the signs, symptoms, and laboratory findings required for any listed impairment.

[R. at 43].^{7/}

This analysis of the applicability of the Listings is not consistent with the requirements imposed by the Tenth Circuit in Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996).^{8/}

^{7/} Defendant does not specifically address Plaintiff's argument. Defendant asserts only that Plaintiff seems to be challenging the decisions of the Appeals Council, but that the decision of the Appeals Council is not before the Court. Rather, Defendant asserts that if an Appeals Council declines to remand a case for consideration of newly submitted evidence, the only issue before the Court for review is whether the ALJ's decision was supported by substantial evidence. The Court acknowledges that some confusion exists with respect to Plaintiff's argument. However, Plaintiff does reference "Defendant's" failure to give adequate reasons to support the Listings, and Plaintiff specifically relies on Clifton. Regardless, in accordance with Clifton the failure by the Defendant to give any reasons to support the Defendant's decision that Plaintiff did not meet Listing 3.03 cannot constitute substantial evidence.

^{8/} The Court notes that the ALJ's decision was rendered on December 16, 1994. The Appeals Council's decision rendered the ALJ's decision final on October 27, 1995. The Clifton opinion was not decided until March 26, 1996. Thus, neither the Commissioner nor the ALJ had the benefit of the Tenth

In Clifton the ALJ did not discuss the evidence, his reasons for determining that the claimant was not disabled at step three, or even identify the relevant listing. The ALJ merely stated a summary conclusion that the claimant's impairments did not meet or equal any listed impairment. The ALJ in this case did not discuss the medical evidence in connection with his step three conclusion, did not give his specific reasons for determining that claimant was not disabled, and did not identify the applicable Listing. In short, the ALJ in this case made the same type of summary conclusion as the ALJ in Clifton. In Clifton, the Tenth Circuit held that such a bare conclusion was beyond any meaningful judicial review. Clifton, 79 F.3d at 1009.

In particular, the Tenth Circuit held as follows:

Under the Social Security Act,

[t]he Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based.

42 U.S.C. 405(b)(1). . . .

This statutory requirement fits hand in glove with our standard of review. By congressional design, as well as by

Circuit's analysis in Clifton at the time the underlying decision was rendered.

administrative due process standards, this court should not properly engage in the task of weighing evidence in cases before the Social Security Administration. 42 U.S.C. 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive."). . . . Rather, we review the [Commissioner's] decision only to determine whether her factual findings are supported by substantial evidence and whether she applied the correct legal standards. . .

In the absence of ALJ findings supported by specific weighing of the evidence, we cannot assess whether relevant evidence adequately supports the ALJ's conclusion that [the claimant's] impairments did not meet or equal any Listed Impairment, and whether he applied the correct legal standards to arrive at that conclusion. The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence. . . . Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects. . . . Therefore, the case must be remanded for the ALJ to set out his specific findings and his reasons for accepting or rejecting evidence at step three.

Clifton, 79 F.3d at 1009-10 (internal case citations omitted).

Plaintiff's asthma difficulties began in May of 1991, and required various medications and treatment. [R. at 144, 147]. Plaintiff was admitted on April 30 of 1992, and discharged May 2, 1992, for treatment of his asthma. [R. at 164]. X-rays indicated infiltrates in Plaintiff's right lobe. [R. at 172]. A phone interview with the Social Security office indicated that as of April 14, 1993, Plaintiff had last been seen at Saint Francis for treatment of his asthma in February 1993, had had three emergency room visits, and that his last hospitalization occurred in May of 1992. [R. at 155]. Additional submitted records indicated that Plaintiff was admitted for

treatment of his asthma on August 27, 1994, and discharged on August 30, 1994, and was admitted for treatment on April 23, 1995 and discharged April 26, 1995. [R. at 13]. Plaintiff reported that he experienced nearly constant wheezing due to his asthma, that he had attacks every one to two months which varied in severity, and that although he had tried injection therapy it had not been successful. [R. at 9-10]. X-rays from April 28, 1995 indicated that Plaintiff had asthma. [R. at 27].^{9/}

Defendant has provided no reasons to support Defendant's decision that Plaintiff does not meet this Listing. As noted by the Tenth Circuit in Clifton, this Court cannot analyze the evidence to determine whether or not a Listing is met; rather, that is for the determination of the Commissioner. Because the Commissioner did not supply any reasons to support his decision, this case is remanded to provide the Commissioner with that opportunity. By this decision, the Court is in no way expressing an opinion as to whether Plaintiff actually meets or equals Listing 3.03. Rather, the Court is simply remanding this case so that the ALJ can adequately discuss his conclusions in connection with Listing 3.03. Only then can this Court review the ALJ's decision in connection with the Listings.

Credibility of Claimant's Mother

The ALJ noted that the medical evidence and the records submitted from the claimant's teacher did not support claimant's mother's testimony that the claimant

^{9/} The Court is aware that some of this evidence was not before the ALJ when the ALJ rendered his decision. However, as noted by both parties, the submission of the evidence to the Appeals Council means that the evidence is included in the record presently before the Court. Defendant acknowledges that the Court should examine all of the evidence to determine whether the ALJ's decision is supported by substantial evidence.

was irritable and hyperactive. Plaintiff asserts that this credibility evaluation by the ALJ did not include the evidence which was submitted to the Appeals Council, that the Appeals Council did not reevaluate claimant's mother's credibility, and that administrative agencies must give reasons for their decisions.

Plaintiff is correct that administrative agencies must give reasons to support their decisions. However, in this case the ALJ correctly noted that the records from claimant's teacher and the medical records contain no support for claimant's mother's testimony that claimant was hyperactive. The claimant's teacher noted that claimant related well to other adults and children, participated in large and small groups, behaved well, was kind, and shared with others. [R. at 205]. Nothing in the records submitted by Plaintiff after the decision by the ALJ is contrary to the reports upon which the ALJ relied. The Court can only conclude that the ALJ's limited finding with respect to claimant's mother's testimony is supported by substantial evidence.

Due to the failure of the Defendant to provide any reasons or analysis to support the decision that Plaintiff does not meet a Listing, this case is reversed and remanded to the Commissioner. Accordingly, the Commissioner's decision is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

Dated this 7 day of January 1997.


Sam A. Joyner
United States Magistrate Judge

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

F I L E D

JAN - 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHRIS FULTZ and BOB FULTZ,)
)
 Plaintiffs,)
)
 v.)
)
 TERRANCE CHRISTOPHER BANKS,)
)
 Defendant,)
)
 and)
)
 STATE FARM INSURANCE COMPANIES,)
)
 Garnishee.)

No. 95-C-1221-B ✓

ENTERED ON BOOKLET

DATE JAN 0 8 1997

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 7th day of January, 1997, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.

James L. Smith
United States District Judge
For: Thomas L. Brett

422\44\stip-ord.cac\jsg

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(321-1)

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

F I L E D

JAN 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEEANN SNELLGROVE,)
next friend of)
KATHERINE ANNE BOHANNON,)
)
Plaintiff,)
)
-vs-)
)
GREAT AMERICAN FOODS CORP.,)
)
Defendant.)

Case No. 96-C-378-C

ENTERED ON DOCKET
DATE JAN 08 1997

DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs, Katherine Ann Bohannon and Deeann Snellgrove, Parent and Next Friend of Katherine Ann Bohannon, a Minor, and hereby dismiss the above cause of action against the Defendant, Great American Foods Corporation with Prejudice.

Deeann Snellgrove
Deeann Snellgrove

Katherine Anne Bohannon
Katherine Ann Bohannon

Jeff Nix
Jeff Nix
Attorney for Plaintiffs

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

F I L E D

**BIZJET INTERNATIONAL SALES
& SUPPORT, INC. an Oklahoma
corporation,**

Plaintiff,

vs.

**GOODMAN AVIATION, INC.,
a Nevada corporation,**

Defendant.

JAN 7 1997

**Phil Lombardi, Clerk
U.S. DISTRICT COURT**

Case No. 95-C-1160-E

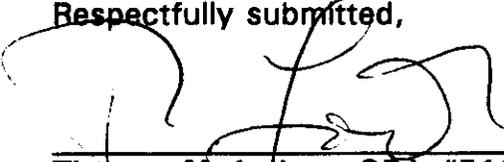
ENTERED ON DOCKET

DATE JAN 0 8 1997

JOINT STIPULATION OF DISMISSAL

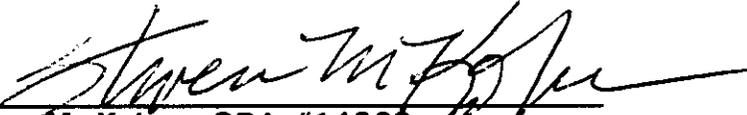
Plaintiff, BizJet International Sales & Support, Inc., and defendant, Goodman Aviation, Inc., pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby stipulate to the dismissal of this proceeding with prejudice to the refile of same.

Respectfully submitted,



**Thomas M. Ladner, OBA #5161
NORMAN & WOHLGEMUTH
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 583-7571**

**ATTORNEYS FOR PLAINTIFF, BIZJET
INTERNATIONAL SALES & SUPPORT, INC.**



**Steven M. Kobos, OBA #14263
NICHOLS, WOLFE, STAMPER, NALLY,
FALLIS & ROBERTSON, INC.
124 East Fourth Street, Suite 400
Tulsa, OK 74103-5010
(918) 584-5182**

**ATTORNEYS FOR DEFENDANT, GOODMAN
AVIATION, INC.**

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

FILED
JAN 7 - 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

PATRICIA TACKETT,)
)
Plaintiff,)
)
vs.)
)
AMERICAN BANK & TRUST COMPANY,)
an Oklahoma Bank,)
)
Defendant.)

Case No. 96-CV-576-BU ✓

ENTERED ON DOCKET ✓

DATE JAN 8 1997 ✓

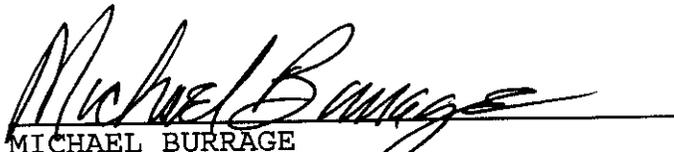
JAN 8 1997

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 7^m day of January, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

In re:

COOPER MANUFACTURING CORP.,
and its affiliates; CHALLENGER RIG &
MANUFACTURING INC., COOPER
OFFSHORE SYSTEMS, INC. and
COOPER SALES CORP.,

Debtors.

PRIDE OIL WELL SERVICE
COMPANY,

Plaintiff,

v.

JON A. BARTON, Trustee,

Defendant,

CONTINENTAL INSURANCE
COMPANY,

Intervenor.

FILED

JAN 7 1997

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

Case No. 84-01061-W
Chapter 11
Adversary No. 94-0217-W

Case No. 96-CV-710-H

RECEIVED

JAN 8 1997

ADMINISTRATIVE CLOSING ORDER

It is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by February 6, 1997 the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 6TH day of January, 1997.


Sven Erik Holmes
United States District Judge

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

In re:

COOPER MANUFACTURING CORP.,
and its affiliates; CHALLENGER RIG &
MANUFACTURING INC., COOPER
OFFSHORE SYSTEMS, INC. and
COOPER SALES CORP.,

Debtors.

WELLTECH, INC.

Plaintiff,

v.

JON A. BARTON, Trustee,

Defendant,

CONTINENTAL INSURANCE
COMPANY,

Intervenor.

FILED

JAN 7 1997

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

Case No. 84-01061-W
Chapter 11
Adversary No. 94-0217-W

Case No. 96-CV-709-H

JAN 8 1997

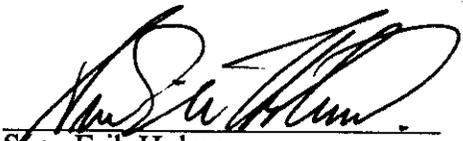
ADMINISTRATIVE CLOSING ORDER

It is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by February 6, 1997 the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 6TH day of January, 1997.


Sven Erik Holmes
United States District Judge

23-

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

FILED
JAN 7 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NORAM GAS TRANSMISSION CO.,
a Delaware Corporation,

Plaintiff,

v.

No. 94-C-773-H

ENTERPRISE RESOURCE CORP.,
an Arkansas Corporation;
ALAN G. MIKELL; and TIDEMARK
EXPLORATION, INC., an
Oklahoma Corporation,

Defendants.

JAN - 8 1997

ORDER

This is an action by Plaintiff Noram Gas Transmission Co. ("NGT") for breach of a contract between Arkla Energy Resources, a division of Arkla, Inc. ("Arkla"), and Defendants Alan G. Mikell and Enterprise Resource Corporation. NGT is the successor in interest of Arkla. The case was tried to the Court on June 24 through June 26, 1996. After considering the evidence presented and the arguments of counsel, the Court adopts the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACTS

1. Plaintiff Noram Gas Transmission Co. is a Delaware corporation and the successor in interest of Arkla Energy Resources, a division of Arkla, Inc., a Delaware corporation.
2. Defendant Alan G. Mikell ("Mr. Mikell") is a citizen of the State of Oklahoma.
3. Defendant Enterprise Resource Corporation ("Enterprise") is an Arkansas corporation with its principal place of business in Fort Smith, Arkansas.

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4. In or about September, 1988, Mr. Mikell and Enterprise acquired an interest in a number of gas wells in the Arkoma Basin, some of which were dedicated to Arkla under various gas purchase contracts that contained "take or pay" provisions.

5. In an effort to resolve a dispute that arose among the parties in connection with these contracts, Arkla, Mr. Mikell, and Enterprise entered into a Settlement Agreement dated April 24, 1989 (the "Agreement").

6. The Agreement provided for a payment by Arkla in the amount of \$2 million (the "Prepayment"), and described how Arkla was to recoup such payment from future production during the period from May 1, 1989, to December 31, 1994 (the "Recoupment Period"). Section 2 of the Agreement provided that such \$2 million payment "shall constitute payment in advance for gas to be delivered hereinafter by Seller [Enterprise and Mr. Mikell] to Buyer [hereinafter referred to as "NGT" for all purposes in these Findings of Fact and Conclusions of Law] from all wells now or hereinafter located in properties now or hereinafter committed to the Contracts (the "Subject Wells")."

7. Section 2(a) of the Agreement provides in its entirety as follows:

Sixty percent (60%) of all volumes of gas delivered from the Subject Wells and from any other wells the parties may mutually agree hereafter, whether or not currently committed to Buyer, and sold by Seller to Buyer, its designee, or both, under the Contracts each month during the period May 1, 1989 and continuing through December 31, 1994, or until such time as the Prepayment is fully recouped or refunded, whichever first occurs (the "Recoupment Period"), shall be considered "Recoupment Gas" and shall be received by Buyer without further payment and the value of such gas, calculated at the price in effect under the applicable contract at the time of the request for delivery, shall be applied against the Prepayment until the Prepayment is fully recouped or refunded.

8. Section 2(b) of the Agreement provides in its entirety as follows:

In addition to the provisions of Subsection (a) above, the parties agree that for any and all months during the Recoupment Period in which Buyer, Buyer's designee or both, request one hundred percent (100%) of Seller's Daily Deliverability for delivery under the Contracts, Buyer shall be entitled to retain and credit towards recoupment of the Prepayment the greater of (i) sixty percent (60%) of the proceeds which would have otherwise been

due for all gas actually purchased in such month(s) or (ii) the proceeds which would have been otherwise due for 850 Mcf per day during the calendar year 1989, 750 Mcf per day during the calendar year 1990, 700 Mcf per day during the calendar year 1991, 650 Mcf per day during the calendar year 1992, 575 Mcf per day during the calendar year 1993, and 500 Mcf per day during the calendar year 1994.

9. Section 2(c) of the Agreement provides in part as follows:

If in any calendar quarter(s) or portion(s) thereof during the Recoupment Period, Buyer, Buyer's designee, or both, request the delivery of and Seller fails for any reason to tender and deliver free and clear of any adverse claims a daily average volume of gas equal to at least the Mcf per day volumes outlined in subsection (b)(ii) above (850 Mcf per day in 1989 to 500 Mcf per day in 1994), then Seller, in addition to all other rights and remedies available to Buyer, shall be required to refund, in cash, an amount equal to the difference between the daily volume set forth in subsection (b)(ii) in effect for such year multiplied by the number of days in such calendar quarter and the volume actually delivered during such calendar quarter, multiplied by the applicable price in effect at the time of the request.

10. Section 2(d) of the Agreement provides in part as follows:

On or before twelve (12) days prior to the end of each month, Buyer, its designee, or both, shall provide to Seller a nomination setting forth the quantity to be requested for delivery during the succeeding month and the estimated price for such gas. In the event Seller rejects said offer and without regard to whether sales are actually made to any purchaser, Buyer shall recoup the Prepayment in the following manner:

- (i) Seller shall assign and deliver to Buyer sixty percent (60%) of the gross proceeds attributable to the sale of a quantity of gas by Seller to such other party equal to the quantity or percentage of deliverability nominated by Buyer and such proceeds shall be applied to the Prepayment.
- (ii) During any month in which Buyer, its designee, or both, have nominated one hundred percent (100%) of Seller's Daily Deliverability for delivery and Seller has rejected AER's nomination, Seller shall assign, deliver or pay to Buyer the greater of (i) sixty percent (60%) of the gross proceeds due from such other purchaser(s) for all gas actually purchased in such month(s); (ii) sixty percent (60%) of an amount equal to the quantity sold to such other purchaser(s) multiplied by the price that would have been payable by Buyer or its designee under the rejected nomination; and (iii) an amount equal to the price then in effect under the Contracts multiplied by the number of days in such month(s) multiplied by 850 Mcf per day during the calendar year 1989; 750 Mcf per day during the calendar year 1990; 700 Mcf per

day during the calendar year 1991; 650 Mcf per day during the calendar year 1992; 575 Mcf per day during the calendar year 1993; and 500 Mcf per day during the calendar year 1994.

- (iii) All proceeds due from Seller pursuant to the terms of Subsection (d)(i) and (d)(ii) above shall be paid to Buyer within seven business days of receipt by Seller but in no event later than forty-five days following the end of the applicable production month or by the end of the month succeeding the production month in the event no sales are made to third parties or the value of such actual sales is less than the amount provided for in Subsection (d)(i) and (d)(ii) above.

- 11. Section 2(e) of the Agreement provides in its entirety as follows:

In the event any of the Contracts are terminated by Seller or upon a judicial determination that Seller has breached its obligations under the Contracts or the Settlement Agreement prior to such time as the Prepayment is fully recouped or refunded, then Seller shall so advise Buyer and immediately refund the unrecouped principal balance of the Prepayment.

- 12. Section 4 of the Agreement provides in part as follows:

Seller shall bear the economic burdens of and shall pay all royalties, overriding royalties, production payments, taxes and other payments and settlements, of whatsoever kind and nature due in respect of the Prepayment and the Recoupment Gas. Seller further agrees to indemnify Buyer and save it harmless from all claims, suits, actions, debts, accounts, damages, costs, losses, attorneys fees and expenses arising out of adverse claims of any and all persons or entities to or against said Recoupment Gas or said Prepayment, as those terms are used herein.

- 13. Approximately thirty-eight (38) gas wells were covered by the Agreement. At the time the parties negotiated the Agreement, the total "daily deliverability" attributable to Enterprise and Mr. Mikell from the thirty-eight (38) wells was greater than the Minimum Volumes. "Daily deliverability" is an estimate of the well's capability of producing natural gas based upon actual tests.

- 14. The Agreement provided that NGT would recover the full amount of the Prepayment made to Enterprise and Mr. Mikell over the course of the Recoupment Period. The cash refunds described in Section 2(c) ensure such recovery in the event that Enterprise and Mr. Mikell fail to deliver sufficient gas.

15. The Agreement provides Enterprise and Mr. Mikell with great flexibility. In accordance with its terms, they were entitled to deliver gas from the thirty-eight (38) wells, deliver gas from other sources, sell gas to third-parties and pay NGT the proceeds, make cash refunds, or some combination of these options.

16. As described more fully below, more than once following the execution of the Agreement NGT communicated to Enterprise and Mr. Mikell its desire to receive one-hundred percent (100%) of "daily deliverability" and at least the Minimum Volumes.

17. During the first several months after the Recoupment Period began on May 1, 1989, Enterprise and Mr. Mikell failed to deliver the Minimum Volumes or to make refunds of cash as required by the Agreement. As a result, in early 1990, Enterprise and Mr. Mikell consented to NGT recouping 100% of their volumes of gas.

18. On February 13, 1990, James Cantwell and Jeff Holloway of NGT met in Tulsa with Mr. Mikell and Steve Kolb, President of Enterprise, to discuss the failure to deliver the Minimum Volumes. At the meeting, NGT presented invoices dated February 13, 1990 to Enterprise and Mr. Mikell for payments due by each through December, 1989, in the amounts of \$29,723.16 and \$29,721.26, respectively. Neither Enterprise nor Mr. Mikell disputed the amounts of the invoices. In addition, James Cantwell advised Enterprise and Mr. Mikell at that meeting that although nominations were being made on the wells subject to the Agreement, there was a standing request for at least the Minimum Volumes from whatever sources the Seller desired. Mr. Cantwell had previously communicated this request to Enterprise and Mr. Mikell by telephone.

19. Tidemark Exploration, Inc. ("Tidemark") guaranteed Mr. Mikell's performance under the Agreement and initially administered the Agreement on behalf of Enterprise and Mr. Mikell. By letter to Tidemark dated March 16, 1990, NGT advised that it had not received payment for the amounts invoiced on February 13, 1990. Attached to this letter were updated

invoices to both Mr. Mikell and Enterprise in the amounts of \$11,980.78 and \$11,975.05, respectively. These invoices were not disputed, but were not paid.

20. By letter to Tidemark dated April 23, 1990, NGT sent additional invoices for the first quarter of 1990 which superseded the invoices of March 16, 1990. These invoices included taxes paid by NGT with respect to the Recoupment Gas. These invoices were not disputed, but were not paid.

21. On January 1, 1991, Webb Energy Resources, Inc. ("Webb Energy"), acting by and through Michael T. Webb ("Mr. Webb"), assumed administration of Enterprise's portion of the Agreement. Tidemark continued to administer the Agreement for Mr. Mikell.

22. In January, 1991, Webb Energy advised NGT that Enterprise was going to market its gas to third parties pursuant to the Agreement.

23. By letter dated April 17, 1991, NGT, acting by and through its attorney John N. Bellinger, advised Mr. Mikell that he had failed to deliver the amounts of gas requested and had failed to pay the cash refunds due under the Agreement. NGT further stated that despite the parties' meeting, the problems had continued and the amount currently past due, calculated through December 31, 1990, was \$48,552.00. NGT demanded that within thirty (30) days Mr. Mikell both pay NGT the \$48,552.00 and provide assurances of his future performance. Mr. Mikell's internal calculations reflected that \$55,926.50 was due to NGT as of December 31, 1990. Mr. Mikell neither paid the amount due nor provided assurances of future performance within thirty (30) days following his receipt of the letter, or at any time thereafter.

24. By letter dated April 17, 1991, NGT, acting by and through its attorney John N. Bellinger, advised Enterprise that it had failed to deliver the amounts of gas requested and had failed to pay the cash refunds due under the Agreement. NGT further stated that despite the parties' meeting, the problems had continued and the amount currently past due, calculated through December 31, 1990, was \$48,272.00. NGT demanded that within thirty (30) days

Enterprise both pay NGT \$48,272.00 and provide assurances of its future performance.

Enterprise did not pay the amount due or provide assurances of future performance within thirty (30) days following its receipt of the letter, or at any time thereafter.

25. By letter of July 2, 1991,¹ Webb Energy advised that Enterprise was not current on its payments to the operators of its wells for their joint interest billings. Webb Energy further advised that Enterprise was unable to pay any portion of the outstanding balance due at that time, and that the financial position of Enterprise was unlikely to change any time in the near future. Webb Energy offered three options as "the only viable way to prevent a continuation of this death spiral."

26. By letter dated August 13, 1991, Webb Energy advised NGT that Enterprise was in arrears on its royalty payments to its lessors and was therefore in danger of losing its oil and gas leases in the units subject to the Agreement.

27. By letters dated August 22, 1991, NGT, acting by and through its attorney John N. Bellinger, advised both Enterprise and Mr. Mikell that they had failed to pay the amounts demanded by NGT's letters of April 17, 1991.

28. By letter dated October 3, 1991, Mr. Mikell responded to the letter of August 22, 1991, stating in part, "We are reviewing the underproduction situation in detail and hope to be prepared to respond in the next few weeks." After sending the letter, Mr. Mikell did not respond further.

29. During the Recoupment Period, James Cantwell and Jeff Holloway, the individuals at NGT responsible for administering the Agreement, had numerous conversations with representatives of Enterprise and Mr. Mikell requesting the Minimum Volumes. James Cantwell believed that Enterprise and Mr. Mikell understood that NGT had requested 100% of "daily deliverability" and at least the Minimum Volumes. On more than one occasion, Mr. Holloway

¹ The date on the first page of this letter, "July 2, 1981," is a typographical error.

advised Enterprise and Mr. Mikell that NGT expected the Minimum Volumes. Mr. Webb believed that NGT clearly communicated its desire for at least the Minimum Volumes.

30. During the Recoupment Period, the total "daily deliverability" attributable to Enterprise and Mr. Mikell declined to a quantity less than the Minimum Volumes. Neither Enterprise nor Mr. Mikell added other sources of gas. During the remaining months of the Recoupment Period, Enterprise and Mr. Mikell did not deliver the Minimum Volumes and did not deliver the volumes of gas nominated each month by NGT.

31. By letter dated August 5, 1994, NGT invoiced Enterprise for amounts due under the Agreement through May, 1994 in the sum of \$367,740.33. At the time Mr. Webb received this invoice, he believed that Enterprise owed NGT a greater sum and advised Enterprise to make a settlement offer. No such offer was made.

32. By letter dated August 5, 1994, NGT invoiced Mr. Mikell for amounts due under the Agreement through May, 1994 in the sum of \$318,958.18. Mr. Mikell did not pay this invoice.

33. During the entire Recoupment Period, neither Enterprise nor Mr. Mikell ever paid a refund under the Agreement.

34. If Mr. Mikell had delivered the Minimum Volumes, the Prepayment would have been fully recovered.

35. The unrecouped principal balance of the Prepayment under the Agreement totals \$412,880.72 from Mr. Mikell, and \$460,900.14 from Enterprise. The record reflects that the prejudgment interest due on the amount from Enterprise is \$96,778.47. The record appears to be silent as to the amount of prejudgment interest due on the amount from Mr. Mikell, if any.

CLAIMS FOR TAXES

36. As NGT received Recoupment Gas from Mr. Mikell, NGT paid the applicable state severance and excise taxes and invoiced Mr. Mikell for the taxes paid on his behalf. Mr.

Mikell did not pay these invoices. On September 12, 1995, NGT invoiced Mr. Mikell in the amount of \$15,742.00 for the total taxes paid by NGT on Recoupment Gas during the Recoupment Period. Mr. Mikell did not pay the invoice.

37. As NGT received Recoupment Gas from Enterprise, NGT paid the applicable state severance and excise taxes and invoiced Enterprise for the taxes paid on its behalf. Enterprise did not pay the invoices. On September 12, 1995, NGT invoiced Enterprise in the amount of \$15,012.64 for the total taxes paid by NGT on recoupment gas during the recoupment period. Enterprise did not pay the invoice.

38. By letter dated September 4, 1992, NGT advised Enterprise that the Oklahoma Tax Commission had made a proposed assessment on the Prepayment. The letter advised Enterprise that it was liable for taxes due on the Prepayment and stated that "if [NGT] is required to pay the taxes, interest and penalty for which you are liable, it will bill you that amount along with any expenses [NGT] incurs in contesting the proposed assessment after its initial protest is filed." Enterprise did not assume responsibility for the assessment.

39. Mr. Joseph Bouso, an employee of NGT, was responsible for responding to the Oklahoma Tax Commission assessment. Mr. Bouso reached a settlement with the Oklahoma Tax Commission in regard to the assessment on the Enterprise Prepayment and NGT paid the Commission \$2,208.77 for taxes and \$4,150.27 for interest. Mr. Bouso calculated that NGT incurred \$8,773.91 in administrative expenses and legal fees related to the Enterprise tax proceedings and settlement.

40. By invoice dated September 12, 1995, NGT requested payment from Enterprise in the amount of \$15,132.45 for taxes, interest and expenses incurred by NGT in regard to the tax assessment on the Enterprise Prepayment. Enterprise did not pay the invoice.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter and the parties. Venue is proper in the Northern District of Oklahoma.

2. The Agreement is a contract for the sale of natural gas and is governed by the Oklahoma Uniform Commercial Code. Arkla Energy Resources v. Roye Realty & Developing, Inc., 9 F.3d 855, 860-61 (10th Cir. 1993).

3. The Court must interpret a contract to give effect to the intention of the parties at the time of contracting. Intention of the parties is determined from the terms of the contract itself. Public Service Co. of Oklahoma v. Burlington Northern R.R. Co., 53 F.3d 1090, 1097 (10th Cir. 1995).

4. The Court should interpret a contract as a harmonious whole, and every word, phrase or part of the contract should be given meaning and significance according to its importance in the context of the contract. Colorado Mill & Elevator Co. v. Chicago, Rock Island & Pacific R.R. Co., 382 F.2d 834, 836 (10th Cir. 1967).

5. If a contract is susceptible to two constructions, the interpretation which is rational and probable is preferred. Phillips Petroleum Co. v. Gable, 128 F.2d 943, 944 (10th Cir. 1942).

6. Terms contained in an unambiguous contract may be explained or supplemented by usage of trade. Okla. Stat. tit. 12A, § 2-202(a). A usage of trade is any practice or method of dealing having such regularity or observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. Okla. Stat. tit. 12A, § 1-205(2).

7. Terms contained in an unambiguous contract may be explained or supplemented by course of performance. Okla. Stat. tit. 12A, § 2-202(a). Where a contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, then any course of performance accepted or

acquiesced in without objection shall be relevant to determine the meaning of the contract. Okla. Stat. tit. 12A, § 2-208(1).

8. Section 2(c) of the Agreement requires a three-step process. First, NGT must request delivery of the minimum daily volume of gas outlined in section 2(b)(ii) of the Agreement. Second, Enterprise and Mr. Mikell must fail to deliver the minimum daily volume. Finally, upon occurrence of those conditions precedent, Enterprise and Mr. Mikell become obligated to refund in cash to NGT an amount equal to the difference between the minimum daily volume and the volume actually delivered multiplied by the price at the time of delivery.

9. James Cantwell, on behalf of NGT, made a standing request to Enterprise and Mr. Mikell that the Minimum Volumes be delivered each month. Jeff Holloway, on behalf of NGT, repeatedly requested that Enterprise and Mr. Mikell deliver the Minimum Volumes.

10. NGT could only nominate from the thirty-eight (38) wells covered by the Agreement and could only nominate the quantity of gas from those wells that Mr. Mikell was entitled to deliver. If the term "request" were defined as a "nomination," when the total daily deliverability attributable to Mr. Mikell's ownership in the thirty-eight (38) wells declined below the Minimum Volumes, NGT could not nominate, and therefore could not request, the Minimum Volumes. Since the Agreement allows Mr. Mikell to bring gas from other sources, a request must be construed as having a broader meaning. A request for the Minimum Volumes includes not only gas nominated from the thirty-eight (38) wells but also gas that could be delivered from any other sources selected by Mr. Mikell. Thus, NGT's repeated oral requests for the Minimum Volumes were sufficient to trigger the refunds due under Section 2(c).

11. As described above, NGT requested delivery of the minimum daily volume of gas as required by Section 2(c) of the Agreement. Enterprise and Mr. Mikell, however, failed to deliver the Minimum Volumes of gas and to make the cash refunds required under Section 2(c).

Accordingly, this failure by Enterprise and Mr. Mikell constitutes a material breach of Section 2(c) of the Agreement.

12. Section 2-718(1) of the Oklahoma Uniform Commercial Code provides:

Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

13. Section 2(e) provides a reasonable amount of damages for breach by Enterprise and Mr. Mikell of their obligations under the Agreement. NGT made the Prepayment to Enterprise and Mr. Mikell, and had the right to recover that sum through receipt of Recoupment Gas or payments of cash. The anticipated harm if Enterprise and Mr. Mikell did not perform was that NGT would not recover the full amount of the Prepayment. A payment of the remaining principal balance of the Prepayment as damages for breach of the Agreement is reasonable under applicable law.

14. Because Enterprise and Mr. Mikell materially breached the Agreement under the express terms of Section 2(e) NGT is entitled to a payment in the amount of the unrecouped principal balance of the Prepayment as damages.

15. The unrecouped principal balance of the Prepayment is \$460,900.14 as to Enterprise and \$412,880.72 as to Mr. Mikell.

16. Mr. Mikell is liable to NGT for his breach of the Agreement for damages in the amount of \$412,880.72, plus prejudgment interest calculated from the time of each quarterly refund not paid, to the extent the record contains a basis upon which to calculate such prejudgment interest. It appears that the record in this matter is silent as to any prejudgment interest due to NGT from Mr. Mikell and therefore no such amount should be included in the final judgment.

17. Mr. Mikell is liable to NGT for taxes under the Agreement in the amount of \$15,742.00.

18. Enterprise is liable to NGT for its breach of the Agreement for damages in the amount of \$460,900.14, plus prejudgment interest, to the extent the record contains a basis upon which to calculate such prejudgment interest. It appears that the record in this matter reflects a calculation of prejudgment interest in the amount of \$96,778.47, and therefore this amount should be included in the final judgment.

19. Enterprise is liable for taxes under the Agreement and NGT is entitled to judgment in the amount of \$30,145.59 on its claim relating to taxes.

No later than ten (10) days from the date of this order Plaintiff shall prepare, and, following review by Defendants, submit a form judgment consistent with these Findings of Fact and Conclusions of Law.

IT IS SO ORDERED.

This 7th of January, 1997.



Sven Erik Holmes
United States District Judge

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

HAWKINS-SMITH, an Idaho General Partnership,
Plaintiff,
vs.
SSI INCORPORATED, UNITED STATES FIDELITY & GUARANTY COMPANY, and INTERNATIONAL ROOFING, INC.,
Defendants,
SSI, INC.,
Third-Party Plaintiff,
v.
MULE-HIDE PRODUCTS CO., INC., and LARRY KESTER d/b/a ARCHITECTS COLLECTIVE,
Third-Party Defendants.

Case No. 95-C-0006-H

[Handwritten signature]
**Phil [unclear] Clerk
U.S. DISTRICT COURT**
JAN - 7 1997 ✓

JUDGMENT

This matter comes before the Court on the request for Judgment to be entered in favor of Plaintiff, Hawkins-Smith, and against Defendant, International Roofing, Inc.

It is Ordered and Adjudged that the Plaintiff, Hawkins-Smith, recover from the Defendant, International Roofing, Inc., the sum of \$258,139.00, together with interest at a rate of 5.46% per annum from the date hereof, costs and a reasonable attorney fee of \$40,000.00.

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DATED this 6TH day of ~~December~~, ^{JANUARY 1997} 1996.



SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

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

HAWKINS-SMITH, an Idaho General Partnership,)
)
)
 Plaintiff,)
)
 vs.)
)
 SSI INCORPORATED, UNITED STATES FIDELITY & GUARANTY COMPANY, and INTERNATIONAL ROOFING, INC.,)
)
 Defendants,)
)
 SSI, INC.,)
)
 Third-Party Plaintiff,)
)
 v.)
)
 MULE-HIDE PRODUCTS CO., INC., and LARRY KESTER d/b/a ARCHITECTS COLLECTIVE,)
)
)
 Third-Party Defendants.)

Case No. 95-C-0006-H ✓

~~RECEIVED~~
 1997
 Clerk
 U.S. DISTRICT COURT
 JAN - 7 1997 ✓

ORDER

The claims alleged by Hawkins-Smith against SSI Incorporated and United States Fidelity & Guaranty Company, and the counter-claim by SSI Incorporated against Hawkins-Smith, concerning the Mingo Market Place, are hereby dismissed with prejudice pursuant to a settlement between Hawkins-Smith and SSI Incorporated.

IT IS SO ORDERED this 6TH day of JANUARY, 1997 ~~December, 1996~~.


 SVEN ERIK HOLMES
 UNITED STATES DISTRICT JUDGE

102

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

HOWARD W. IDDINGS, et. al.,)
)
 Plaintiffs,)
)
 vs.)
)
 BENEFUND, INC., et. al.,)
)
 Defendants and)
 Third-Party)
 Plaintiffs)
)
 vs.)
)
 MARK LOEBER,)
)
 Third Party)
 Defendant.)

Case No. 94-C-1056-H

JAN 1997

FILED

JAN 9 1997

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

**ORDER GRANTING THIRD-PARTY DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

This matter having been heard at the pre-trial conference held on November 5, 1996, the Third-Party Defendant, Mark Loeber ("Loeber") appearing through his counsel, P. David Newsome, Jr., the Defendants and Third-Party Plaintiffs Benefund, Inc., Vernon R. Twyman and John Edwards through their counsel, Joel Wohlgenuth, and the Plaintiffs through their counsel, Steven K. Balman; and

The Court having considered the Motion for Summary Judgment filed by the Third-Party Defendant on August 30, 1996, the Response to the Third-Party Defendant's Motion filed by the Third-Party Plaintiffs on September 24, 1996, the Reply filed by the Third-Party Defendant on October 4, 1996, and the arguments of counsel; and

The Court having concluded on the basis of the motion, response, reply and arguments that there exists no genuine issue of material fact relating to the claim of the Third-Party Plaintiffs against Mr. Loeber.

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Further, the parties have stipulated that:

(i) There is a one-to-one correspondence between the oral statements of Mr. Loeber and the public documents of the defendant Benefund (including, without limitation, the private offering memorandum, documents filed with the Securities and Exchange Commission, and the press releases);

(ii) The statements by Mr. Loeber that are alleged to be actionable by the Plaintiffs against the Defendants and by the Third-Party Plaintiffs against the Third-Party Defendant are contained in paragraph 123 of the Second Amended Complaint;

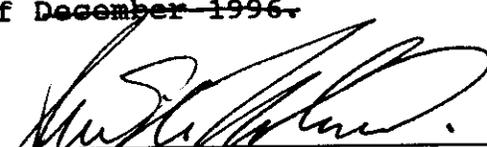
(iii) There are no other statements by Mr. Loeber alleged to be actionable which have come to light during discovery; and

(iv) In the event Mr. Loeber is called as a witness at the trial in this case, he shall not testify as to any statements he made to any of the Plaintiffs in connection with his sales activities for the defendant Benefund, Inc.

In light of the foregoing, it is ORDERED that the Motion for Summary Judgment of Third-Party Defendant Mark T. Loeber is granted; and

IT IS FURTHER ORDERED that in the event Mark T. Loeber is called as a witness at the trial in the case, he shall not be permitted by the Court to testify to any statements made to any of the Plaintiffs in connection with his sales activities for the defendant Benefund, Inc.

DATED this 6TH day of JANUARY, 1997. ~~December 1996.~~


SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

FILED
JAN 2 1997

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

PAUL SALADIN,)
)
 Plaintiff,)
)
 vs.)
)
 TERRY TURNER, individually and)
 d/b/a THE FRENCH HEN)
 RESTAURANT, and d/b/a)
 CAPISTRANO RESTAURANT,)
)
 Defendant.)

No. 94-C-702-K ✓

FILED

JAN 06 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

In accordance with the order filed December 30, 1996, awarding defendant attorney fees and litigation expenses,

IT IS THEREFORE ORDERED that the Plaintiff Paul Saladin recover from the Defendant Terry Turner the sum of \$57,791.62, with post-judgment interest thereon at the rate of 5.61 percent as provided by law.

ORDERED this 3rd day of January, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

1-7-97

JESSE LEE HOWELL,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant and Counterclaim
Plaintiff,

v.

DANIEL L. NICHOLS, and SYDNEY
NICHOLS,

Counterclaim Defendants.

No. 92-C-81-K ✓

FILED

JAN 06 1997

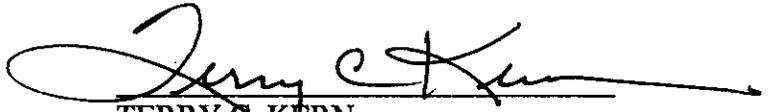
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised that the parties to this action have agreed to a settlement and dismissal with prejudice of all claims, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 3rd day of January, 1997.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED
1-7-97

B & J OPERATING, INC.,)
)
Plaintiff,)
)
vs.)
)
APACHE CORPORATION,)
)
)
)
)
)
Defendant.)

No. 95-C-1170-K ✓

FILED

JAN 06 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

In accordance with the order filed contemporaneously herewith,
awarding defendant attorney fees,

IT IS THEREFORE ORDERED that the Defendant Apache Corporation
recover from the plaintiff B & J Operating, Inc. the sum of
\$18,632.10 with post-judgment interest thereon at the rate of 5.61
percent as provided by law.

ORDERED this 6th day of January, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

25

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

WILMA J. SIMMONS,
SS# 515-50-9556

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security Administration,

Defendant.

JAN - 6 1997 *511*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 95-C-1242-J ✓

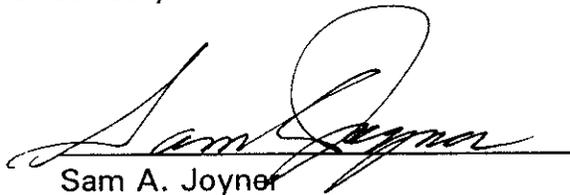
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DATE 1/7/97

JUDGMENT

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

It is so ordered this 6 day of January 1997.



Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

WILMA J. SIMMONS,)
SS# 515-50-9556)

Plaintiff,)

v.)

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

Defendant.)

JAN - 6 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 95-C-1242-J

ENTERED ON DOCKET

DATE 1/7/97

ORDER^{1/}

Plaintiff, Wilma J. Simmons, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because (1) the record does not contain substantial evidence that Plaintiff can perform a significant number of jobs in the economy, and (2) Plaintiff was denied her due process right to counsel. For the reasons discussed below, the Court **affirms** the Commissioner's decision.

^{1/} This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

^{2/} Plaintiff filed an application for disability and supplemental security insurance benefits by application dated March 23, 1994. [R. at 68]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Dana E. McDonald (hereafter, "ALJ") was held October 27, 1994. [R. at 25]. By order dated January 24, 1995, the ALJ determined that Plaintiff was not disabled. [R. at 12]. Plaintiff appealed the ALJ's decision to the Appeals Council. On November 20, 1995, the Appeals Council denied Plaintiff's request for review. [R. at 3].

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or pull an unlimited amount. [R. at 74]. The RFC notes that Plaintiff complained of back pain but was able to flex to sixty degrees. In addition, Plaintiff's gait was reported as stable, her X-rays were normal, and her visual limitations were noted as "none established." [R. at 74]. This RFC was "affirmed as written" on June 23, 1994, by Thurma Feigel, M.D.

Plaintiff was examined by Dan E. Calhoun, M.D., on May 4, 1994. He noted that Plaintiff wears glasses. Plaintiff's vision in her right eye is recorded at 20/70. Her vision in her left eye was 20/30, and her vision with both eyes were 20/30. [R. at 110]. Plaintiff's gait was noted as slow but stable. Plaintiff's grip strength was also noted as good. Dr. Calhoun concluded that Plaintiff was obese, had a history of low back pain, hypertension, and GE reflux.

X-rays of Plaintiff's lumbar spine, dated June 2, 1994, were reported as normal. [R. at 117]. X-rays dated December 6, 1994, were interpreted as indicating a normal spine, normal hips, and normal knees, with no evidence of arthritis. [R. at 145].

Plaintiff was diagnosed by Carl M. Fisher, D.O., with narrow angle glaucoma on September 30, 1992. The record submitted from Plaintiff's eye doctor indicates no specific restrictions or limitations placed upon Plaintiff due to her glaucoma.

Plaintiff was examined by Varsha Sikka, M.D., on December 6, 1994. [R. at 149]. Dr. Sikka noted that Plaintiff's visual acuity without glasses was 20/200, and with glasses was 20/75. [R. at 150]. Plaintiff's range of motion of her cervical spine was reported as normal. [R. at 150]. Plaintiff's range of motion of her lumbosacral spine was reported as within normal limits except that flexion was 85 degrees. [R. at

151]. Dr. Sikka noted that there was no evidence of any arthritis or arthritic changes. [R. at 151]. Plaintiff's gait and heel/toe walk were reported as within normal limits. [R. at 151]. Dr. Sikka concluded that Plaintiff had a history of hypertension, had "chronic pain syndrome," osteoarthritis (per her family physician), and would benefit from physical therapy and conditioning. [R. at 151]. Plaintiff's ability to lift and carry was listed as fifteen pounds. [R. at 154]. Dr. Sikka concluded that Plaintiff's ability to stand, walk, or sit was not impaired. [R. at 154-55].

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

^{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).

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

42 U.S.C. § 423(d)(2)(A).

The 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

^{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."

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

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 procedure. The ALJ noted that medication and therapy have effectively alleviated some of Plaintiff's symptoms. The ALJ referenced several consultative examinations noting that Plaintiff was capable of performing the physical requirements necessary for light work. The ALJ concluded that Plaintiff's blurred vision problems would not interfere with her ability to work. The ALJ found that Plaintiff could perform the jobs of escort driver, telemarketer, and dispatcher based on the testimony of a vocational expert, and concluded that Plaintiff was not disabled.

IV. REVIEW

Substantial Evidence of Alternative Jobs

Plaintiff's Limitations

Plaintiff initially asserts that she suffers from gross obesity, above Listing^{5/} level, which limits her to no prolonged standing or walking. The record does indicate that Plaintiff's weight, approximately 300 pounds, is at the "Listing level" for her height (5'8"). However, Plaintiff does not allege that she meets a Listing, and based on the record Plaintiff does not meet a Listing.^{6/} In addition, although Plaintiff asserts that she is limited to no prolonged standing or walking, the mere existence of Plaintiff's obesity does not dictate such a finding. Plaintiff's gait was reported as stable by each of her examining doctors, and Dr. Sikka indicated that Plaintiff had no standing or walking limitations. [R. at 154]. Regardless, the ALJ presented hypotheticals to the vocational expert which included sit/stand limitations and light or sedentary exertional requirements. Plaintiff additionally notes that she has non-exertional impairments which include pain and vision loss.

^{5/} 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.

^{6/} The Listings for obesity require that an individual meet not only the height and weight requirements, but that the individual also meet one of the other listed physical impairments. See 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 9.09.

Questions to the Vocational Expert

Plaintiff seems to suggest that the ALJ erred by extensively questioning the vocational expert, and that only after such extended questioning did the vocational expert testify that several jobs were available that Plaintiff could perform. Plaintiff refers the Court to no authority. Plaintiff is correct that the nature of the proceeding before the ALJ is non-adversarial. However, as Plaintiff additionally points out in her "due process" argument, an ALJ has a duty to fully develop the record. The Court has reviewed the transcript and the testimony of the vocational expert and concludes that the ALJ did not overstep his boundaries with his questions to the vocational expert, and that Plaintiff was not unfairly treated by such questions.

Contradictions: DOT and Vocational Expert

Plaintiff additionally asserts that the testimony of the vocational expert differed from the Dictionary of Occupational Titles ("DOT"), and that it was therefore error for the ALJ to have relied on the testimony of the vocational expert. Plaintiff relies on Smith v. Shalala, 46 F.3d 45 (8th Cir. 1995), and Johnson v. Shalala, 60 F.3d 1428 (9th Cir. 1995).

In Smith, the ALJ concluded that the Plaintiff had the ability to lift only 20 pounds. The vocational expert testified that the Plaintiff could perform the jobs of hand packager and production assembler. However, the job of hand packager was listed in the DOT as "medium" work requiring the ability to lift between 20 and 50 pounds occasionally. The Eighth Circuit concluded that when expert testimony conflicts with the DOT, the DOT controls. The testimony of the vocational expert,

that the Plaintiff could perform the work of a hand packager although the Plaintiff could not lift more than 20 pounds was therefore discounted. Smith, 46 F.3d at 47.

The Johnson court noted that in prior decisions it had held that the DOT's classification of a particular job as "light" precluded a finding that a person restricted to sedentary work could perform the job. However, the Johnson court held that the DOT provided only a rebuttable presumption, which could be properly rebutted by the testimony by a vocational expert. The court initially noted that the "DOT is not the sole source of admissible information concerning jobs." Johnson, 60 F.3d at 1434 (citations omitted). In addition, the DOT acknowledges that it is not comprehensive, and the social security regulations also provide for the testimony of vocational experts. Id. The court concluded that "in light of the DOT's own disclaimer and the administratively recognized validity of expert testimony by qualified individuals, the expert testimony may properly be used to show that the particular jobs, whether classified as light or sedentary, may be ones that a particular claimant can perform. In fact it seems an eminently appropriate use of the vocational expert's knowledge and experience." Id. at 1435. The court concluded that "because these [job] demands do not exceed the abilities the ALJ found the claimant to possess, the vocational expert rebutted the presumption that the claimant could not perform the occupations classified as light by the DOT." Id. at 1436. See also Conn v. Secretary of Health & Human Services, 51 F.3d 607, 610 (6th Cir. 1995) ("[W]hile the ALJ may take judicial notice of the classification in the Dictionary, the ALJ may accept testimony of a vocational expert that is different from information in the Dictionary of Occupational

Titles. . . . The social security regulations do not require the Secretary or the expert to rely on classifications in the Dictionary of Occupational Titles.”) (citations omitted).

For Plaintiff to be successful in her argument, the Court must conclude: (1) a direct contradiction exists between the DOT and the expert testimony, and (2) the DOT is binding and takes precedence over the testimony of the expert.

In both Johnson and Smith the contradiction between the expert testimony and the DOT involved the classification of the physical requirements for performing a job, and was a “clear” contradiction. This is not true in this case. Plaintiff notes that in this case the vocational expert testified that Plaintiff could perform three jobs: escort driver, dispatcher, and telemarketer.^{7/} Plaintiff further notes that the ALJ found that Plaintiff had no transferable skills. According to Plaintiff the jobs of telephone solicitor and dispatcher have a DOT “SVP of 3” which is therefore “semi-skilled” work and which therefore requires that an individual possess transferable work skills. However, although appealing at first blush, Plaintiff’s argument that the SVP rating is an express contradiction of the vocational expert’s testimony is not at all clear.

In the DOT, SVP stands for “specific vocational preparation.” Each job contains a number which equates to the amount of vocational preparation time that is necessary for the performance of the job. The DOT additionally notes that the vocational preparation can include special vocational training, on the job training,

^{7/} Each of these jobs is listed as a “sedentary” job. The hypothetical to the vocational expert included limitations based on blurry vision, physical requirements, and a sit/stand option.

vocational education, apprenticeship, in-plant training, or experience in other jobs. See Dictionary of Occupational Titles, at 1009 (4th ed. 1991).

The DOT also provides an SVP scale. An SVP of "three" indicates that a job requires more than one month and up to three months of training. In addition, this time "does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job." See Dictionary of Occupational Titles, at 1009 (4th ed. 1991).

The social security regulations provide that the administration takes "administrative notice" of "reliable job information available from various governmental and other publications . . . [including] the Dictionary of Occupational Titles." 20 C.F.R. § 404.1566(d). However, as becomes evident from a comparison of the DOT and the social security regulations, the two are not an exact match.^{8/} The regulations define "unskilled work" as "work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength . . . and a person can usually learn to do the job in 30 days, and little specific vocational preparation and judgment are needed." 20 C.F.R. 404.1569(a) (emphasis added). No specific "time guidelines" are provided for semi-skilled work or skilled work.

^{8/} The DOT also notes that "[o]ccupational definitions in the DOT are written to reflect the most typical characteristics of a job as it occurs in the American economy. Task element statements in the definitions may not always coincide with the way work is performed in particular establishments or localities." See Dictionary of Occupational Titles, at 1009 (4th ed. 1991).

The definition in the regulations for unskilled work, which can include on the job training usually learned within 30 days is not in direct and obvious conflict with an SVP rating of three, which can include on the job training of one month to three months. The Court is, therefore, not convinced that a direct conflict between the regulations and the DOT exists. But see Terry v. Sullivan, 903 F.2d 1273, 1277 (9th Cir. 1990).

In addition, the transcript indicates that the ALJ clearly informed the vocational expert that Plaintiff had no transferable job skills, and that the vocational expert concluded that Plaintiff had no transferable skills and no prior work experience. [R. at 52, 56]. The Court is required to uphold a finding of the Commission if it is based on substantial evidence. In addition, the Court is not in a position to second-guess the evidence from the vocational expert that an individual with no transferable work skills could perform the jobs of dispatcher and telephone solicitor. The Court finds that the testimony of the vocational expert constitutes substantial evidence to support the Commissioner's decision.

Plaintiff's argument further depends upon the Court concluding that if a direct contradiction exists, the DOT controls. Although a few Circuits have decided this issue, the Tenth Circuit has not yet specifically addressed it.^{9/} As noted above, the

^{9/} Plaintiff asserts, and the Court agrees, that this issue has not been specifically addressed in a published Tenth Circuit opinion. Two unpublished decisions in the Tenth Circuit have recognized this issue, but have not addressed it on the merits. See Queen v. Chater, 1995 WL 747683 (10th Cir. Dec. 18, 1995); Turner v. Chater, 1996 WL 718125 (10th Cir. Dec. 13, 1996). One unpublished decision concluded that the DOT "controls." Sanders v. Chater, 1995 WL 749686 (10th Cir. Dec. 19, 1995). This decision is based in part on Campbell v. Bowen, 822 F.2d 1518 (10th Cir. 1987). In that case, the Tenth Circuit noted that

(continued...)

Eighth Circuit has determined that in an express contradiction, the DOT controls;^{10/} the Ninth Circuit permits the DOT to act as a rebuttable presumption which can be rebutted by the testimony of a vocational expert;^{11/} the Sixth Circuit concluded that the DOT was not controlling and an ALJ may rely on the testimony of a vocational expert.^{12/} The Court is persuaded by the conclusion reached by the Sixth Circuit.

The regulations provide only that the administration will take administrative notice of various "reliable job information" sources, which can include the DOT.^{13/} The regulations also provide that a vocational expert can be consulted. 20 C.F.R. § 404.1566(e). In addition, the DOT notes that differences in jobs between localities do exist. And, the vocational expert in this case was presented with the facts that the Plaintiff had no transferable skills and no previous work experience. Consequently, the jobs which the vocational expert testified that Plaintiff can perform were tailored to these qualifications. Furthermore, the cases relied upon by Plaintiff addressed contradictions between the DOT and the expert testimony with respect to the physical

^{9/} (...continued)

the jobs which the vocational expert had identified as "light work" were, under the DOT, "medium" or "heavy." The Campbell Court, however, did not decide the issue of whether the DOT classifications "trump" the testimony of the expert. Id. at 1523 n.3.

^{10/} Smith v. Shalala, 46 F.3d 45 (8th Cir. 1995).

^{11/} Johnson v. Shalala, 60 F.3d 1428 (9th Cir. 1995).

^{12/} Conn v. Sec. of Health & Human Serv., 51 F.3d 607 (6th Cir. 1995).

^{13/} The wording of this regulation is additionally troublesome. It provides that "[w]hen we determine that unskilled, sedentary, light, and medium jobs exist in the national economy (in significant numbers . . .), we will take administrative notice of reliable job information available. . . ." 20 C.F.R. § 404.1566(d). The regulations therefore appear to place two qualifiers on the use of such information. The Commissioner must first make a finding that significant numbers of jobs exist, and second, the information must be reliable.

exertional classification of the job (i.e. sedentary, light, or medium). The regulations and the DOT "match" more directly with respect to these classifications than with respect to comparisons between SVP ratings in the DOT and "transferable skills" as defined in the regulations. The "conflict" between the DOT and an expert's testimony is therefore clearer with respect to physical exertional classifications, than with respect to SVP ratings. The Court is not convinced that a contradiction between the testimony of a vocational expert and the DOT requires the application of the DOT to the exclusion of the testimony of an expert witness.

These two jobs (dispatcher and telemarketer) provide a significant number of jobs in the national economy and therefore provide substantial evidence to support the ALJ's conclusion that Plaintiff is not disabled. See, e.g., Trimiar v. Sullivan, 966 F.2d 1326, 1330 (10th Cir. 1992) (refusing to draw a bright line, but indicating the criteria for consideration in determining whether a significant number of jobs is present); Lee v. Sullivan, 988 F.2d 789, 793 (7th Cir. 1992) (summarizing the various positions of the circuits: Sixth Circuit found 1,350 positions significant; Ninth Circuit found 1,266 positions significant; Tenth Circuit found 850-1,000 potential jobs significant; Eighth Circuit found 500 jobs significant; Eleventh found 174 positions significant). However, the vocational expert additionally testified that Plaintiff would be able to perform the job of "escort driver." The vocational expert's answer was based on the fact that Plaintiff is able to drive but experiences blurry vision. In addition, as noted above, the assessments in the record as to Plaintiff's "visual impairment" vary from indicating "no visual limitations," to recording her eyesight (with correction) at 20/30

and 20/75. Plaintiff asserts that the job of escort driver requires both near and far visual acuity on a frequent basis and therefore cannot be performed by Plaintiff.

As noted by Plaintiff, the escort driver does require near and far acuity to be "frequently present" which is defined as between "one-third and two-thirds of the time." Although Plaintiff claims that her limitations are greater than these requirements, the ALJ observed that Plaintiff currently drives, on occasion, and found only that Plaintiff experiences "blurred vision." This finding is supported by the record.^{14/} Therefore, the Court again chooses not to second-guess the testimony of the expert witness that Plaintiff can perform such a job. Regardless, as noted above, assuming Plaintiff could not perform the job as escort driver, the two other jobs noted above (telemarketer, dispatcher) provide substantial evidence to support the ALJ's conclusion that Plaintiff is not disabled.

Due Process

Plaintiff asserts that the ALJ effectively denied her right to counsel by basing his decision, in part, on post-hearing reports. Plaintiff asserts that the ALJ did send copies of the post-hearing reports to Plaintiff, but that Plaintiff was not represented by an attorney, that the letter accompanying the post-hearing reports did not inform Plaintiff that she had a right to consult an attorney, that the ALJ gave Plaintiff only ten days to respond to the post-hearing reports, and that this combination of factors

^{14/} Although Plaintiff does have narrow angled glaucoma, the record does not support any specific limitations from her glaucoma. In addition, at least one RFC indicates "no visual limitations," and two other RFC's indicate that Plaintiff's eyesight was 20/30 and 20/75. The Court cannot conclude that the ALJ's findings are not supported by substantial evidence.

deprived Plaintiff of a right to counsel. Plaintiff relies primarily on Allison v. Heckler, 711 F.2d 145 (10th Cir. 1983).

In Allison, the Tenth Circuit Court of Appeals addressed the ALJ's reliance on a post-hearing report in denying benefits. The Court noted that no evidence at the hearing established that the claimant was disabled, and that after the hearing the ALJ sent the hearing record to a doctor for review. The ALJ relied on the conclusions in that doctor's report in finding that the claimant was not disabled and in denying benefits. The claimant contended that the ALJ's reliance on the post-hearing report denied her due process. The Court concluded that "[a]n ALJ's use of a post-hearing medical report constitutes a denial of due process because the applicant is not given the opportunity to cross-examine the physician or to rebut the report." Id. at 147. The Court reversed the case, concluding that "[s]hould the Secretary wish to reopen the hearing and properly admit Dr. Harvey's report, Allison must be provided the opportunity to subpoena and cross-examine Dr. Harvey, and to offer evidence in rebuttal." Id.

In this case, the ALJ ordered a consultative examination after Plaintiff's hearing. Plaintiff was examined by Varsha Sikka, M.D., on December 6, 1994. [R. at 149]. However, the ALJ submitted this report to Plaintiff and informed Plaintiff, in a cover letter, that she had a right to submit written comments concerning the reports, that she could submit additional records, that she had a right to request a supplemental hearing, that she had a right to subpoena the doctor(s), that she could submit written

questions for the doctor(s), and that she could request oral examination of the doctor(s). [R. at 158-59].

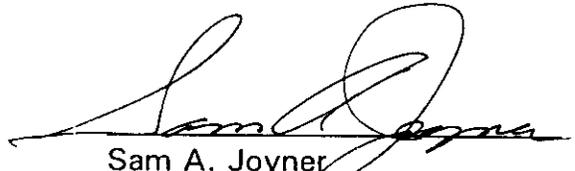
The letter does not specifically inform Plaintiff that she has a right to an attorney. However, Plaintiff was informed, at various levels of the process of her right to representation. By letter dated June 10, 1994, when Plaintiff was informed that her Social Security claim had been denied, Plaintiff was informed that she had the right to representation, including an attorney. [R. at 82-84]. In the letter informing Plaintiff of her denial at the reconsideration stage, dated June 24, 1995, Plaintiff was informed that she had a right to an attorney. [R. at 88-]. Prior to her hearing before the ALJ, in the information sent to Plaintiff regarding the hearing, Plaintiff was informed that she has a right to representation, including an attorney. [R. at 23]. In the "notice" informing Plaintiff that the ALJ had rendered a decision to deny benefits, Plaintiff was again informed that she had the right to an attorney or other representation. [R. at 12-14].

Unlike Allison, Plaintiff was informed of the written reports, and given a chance to respond, cross-examine, or request additional information concerning the reports. In addition, Plaintiff was informed, at various times during the proceeding that she had the right to an attorney. Under these circumstances, the Court cannot find that the submission of the post-hearing report to Plaintiff, without a specific reference in the cover letter accompanying the report that Plaintiff had a right to an attorney, violated Plaintiff's due process rights. See also Mills v. Chater, No. 95-7071, 1995 WL 681483, at *2, n.1 (10th Cir. November 2, 1995) ("[T]he record reveals that Mr. Mills

was notified of the ALJ's intent to rely on this report, received a copy of the report, and was afforded the opportunity to respond to it with a written statement, additional evidence, and questions to be given to the author of the report. Thus the ALJ's compliance with the requirements of Allison renders Mr. Mills' due process argument meritless.").^{15/}

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

Dated this 6 day of January 1997.


Sam A. Joyner
United States Magistrate Judge

^{15/} This is the only issue regarding Plaintiff's right to an attorney and/or due process which Plaintiff raises. The Court additionally notes that the transcript of the hearing before the ALJ indicates that when the ALJ informed Plaintiff of her right to representation she expressed a desire to proceed with an attorney. However, the hearing continued without interruption, and with Plaintiff unrepresented. (R. at 25). Generally, absent compelling circumstances, courts do not inquire into issues which are not raised before the court. See, e.g., Crow v. Shalala, 40 F.3d 323, 324 (10th Cir. 1994). And, as noted, Plaintiff does not raise this issue. In addition, Plaintiff notes in her brief that she choose to forego the right to an attorney during the initial hearing. See Plaintiff's Brief at 9. Finally, the absence of counsel is not sufficient reason alone to justify a remand. See, e.g., Vidal v. Harris, 637 F.2d 710, 713 (9th Cir. 1980) ("Lack of counsel does not affect the validity of the hearing and hence warrant remand, unless the claimant can demonstrate prejudice or unfairness in the administrative proceedings."). The Court is satisfied, after a review of the record, that Plaintiff's lack of counsel at the hearing did not prejudice her case.

UNITED STATES DISTRICT COURT FOR THE **FILED**
NORTHERN DISTRICT OF OKLAHOMA JAN 06 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BUFFORD T. WILSON,
Plaintiff,

vs.

RON CHAMPION,
Defendant.

Case No. 96-CV-212-C ✓

ENTERED ON DOCKET
JAN 07 1997

ORDER

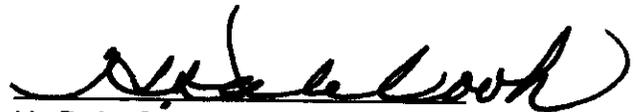
If a state prison's grievance system has been approved by the United States Attorney General ("USAG"), a court may stay a civil rights action for a maximum period of 180 days to require an inmate to exhaust administrative remedies available to him through the state prison's grievance system. 42 U.S.C. § 1997e; Patsy v. Board of Regents, 457 U.S. 496, 509-11 (1982). Oklahoma's prison grievance system has been approved by the USAG. See Exhibit "A" to Doc. No. 5.

Upon filing his Compliant, Plaintiff's claim had not been processed through the Oklahoma Department of Corrections' grievance system. On June 7, 1996, the Court ordered that this action be stayed for 180 days to permit Plaintiff to exhaust his administrative remedies. Plaintiff was directed to notify defense counsel of his intent to proceed with this case, once he had exhausted his administrative remedies. To date, Plaintiff has not done so. Defendant has notified the Court of these facts, and has requested that this case be dismissed. See Doc. No. 11.

This action is hereby dismissed without prejudice due to Plaintiff's failure to prosecute this case and/or comply with the Court's June 7, 1996 Order. Fed. R. Civ. P. 41(b).

IT IS SO ORDERED.

Dated this 6 day of January 1997.



H. Dale Cook
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 06 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENE RENALDO PATTON,

Defendant,

and

ABBOTT LABORATORIES,

Garnishee.

CIVIL ACTION NO. 95-C-989-B

ENTERED ON DOCKET
DATE JAN 07 1997

ORDER DIRECTING DISBURSAL OF GARNISHMENT MONIES

This Court having reviewed the United States' Application for Disbursal of Garnishment Monies finds:

1. Pursuant to the Writ of Continuing Garnishment entered on September 3, 1996, the Garnishee, Abbott Laboratories, has made garnishment payments into the Court's registry deposit fund.

2. A Garnishee Order was issued December 20, 1996, ordering the Garnishee, Abbott Laboratories, to pay twenty-five percent (25%) of Gene Renaldo Patton's income to plaintiff and continue said payment until the debt to the plaintiff is paid in full or until the garnishee, Abbott Laboratories, no longer has custody, possession or control of any property belonging to the debtor, Gene Renaldo Patton, or until further Order of the Court. Payment is to be made to the U.S. Department of Justice and submitted to the U. S. Attorney's Office.

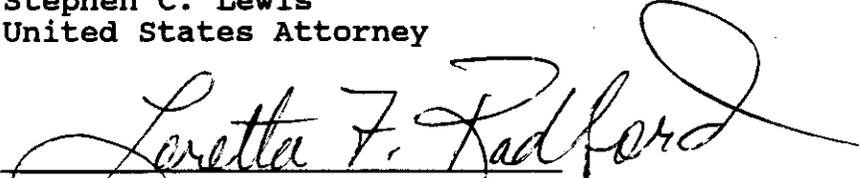
IT IS THEREFORE ORDERED that the United States Court Clerk is to disburse all monies paid into the Court's registry deposit fund as a result of the United States' garnishment on Gene Renaldo Patton.


United States District Judge
In: Thomas L. Smith

Submitted by:

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney


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

LFR/11f

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

B & J OPERATING, INC.,)
)
)
Plaintiff,)
)
vs.)
)
APACHE CORPORATION,)
)
)
Defendant.)

No. 95-C-1170-K

EOD 1/7/97

FILED

JAN 06 1997

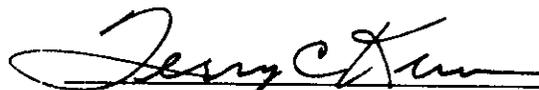
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court is the Motion by the defendant for attorney fees. By Order filed November 21, 1996, the court granted defendant's motion for summary judgment and entered Judgment in defendant's favor. Because this was an action to recover production proceeds, the prevailing party is entitled to attorney fees pursuant to 52 O.S. §570.14(C). Plaintiff has not responded to the motion, filed December 2, 1996, and therefore it is deemed confessed pursuant to Local Rule 7.1(C). The Court has also independently reviewed the motion and finds it appropriate.

It is the Order of the Court that the motion of the defendant for attorney fees is hereby GRANTED. Defendant is awarded fees in the amount of \$18,632.10.

ORDERED THIS DAY OF 6th JANUARY, 1997



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

IN RE: ASBESTOS LITIGATION)

Master File M-1417

CHARLES W. YORK and PAMELA R. YORK)

Plaintiffs,)

vs.)

Case No. 93-C-252-B ✓

FIBREBOARD CORPORATION, et al.,)

Defendants.)

FILE
JAN 06 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENCL. 1
JAN 07 1997

**ORDER OF DISMISSAL WITH PREJUDICE AS TO
DEFENDANT GENERAL REFRACTORIES COMPANY**

NOW ON THIS 2nd day of January, 1996, the
above-styled and numbered cause comes before the undersigned Judge of the United States.

District Court for the Northern District of Oklahoma for the Dismissal With Prejudice as to the
Defendant, **General Refractories Company**, with each party to pay their own costs and attorney
fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the
above-styled and numbered cause be and the same is hereby dismissed, with prejudice, as to the
Defendant, General Refractories Company, with each party to pay their own costs and attorney
fees.

James A. Quinn for
JUDGE OF THE DISTRICT COURT Th. H. Buss
NORTHERN DISTRICT OF OKLAHOMA

28

152 PLW

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

FILED

JAN 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHRIS FULTZ and BOB FULTZ,)
)
Plaintiffs,)
)
v.)
)
TERRANCE CHRISTOPHER BANKS,)
)
Defendant,)
)
and)
)
STATE FARM INSURANCE COMPANIES,)
)
Garnishee.)

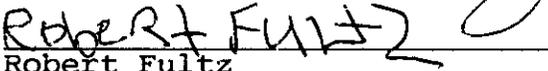
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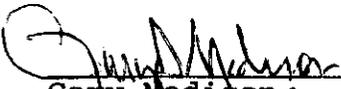
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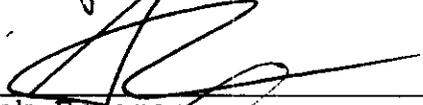
STIPULATION FOR ORDER OF DISMISSAL WITH PREJUDICE

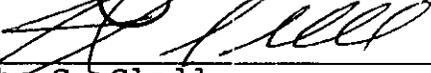
COME NOW the Plaintiffs, Chris Fultz and Robert Fultz, their attorney of record and Garnishee's counsel, and would show the Court that this matter has been compromised and settled and, therefore, moves the Court for an Order Of Dismissal With Prejudice.


Chris Fultz


Robert Fultz


Gary Madison
Attorney for Plaintiffs


Jack Freeman
Attorney for Plaintiffs


John S. Gladd
Attorney for Garnishee

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

FILED

JAN 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DWITT E. FLATT and MARILYN
S. FLATT,)

Plaintiffs,)

vs.)

Case No. 96-CV-654-B

ARCO OIL AND GAS COMPANY,)
ATLANTIC RICHFIELD COMPANY,)
and RDT PROPERTIES, INC.)

Defendants.)

ENTRUSTED TO DOCKET

JAN 06 1997

DISMISSAL WITH PREJUDICE BY STIPULATION

COME NOW all attorneys of record, representing all remaining parties herein, and pursuant to Rule 41 of the Federal Rules of Civil Procedure, and by stipulation, agree to the dismissal of the above-styled and numbered lawsuit, with prejudice to the plaintiff's right of refileing the same, as all issues of law and fact have been fully compromised and settled. Each party shall bear its own attorney fees and costs.



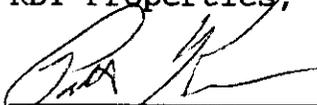
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Attorney for Plaintiffs



JAMES C. DANIEL
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Attorney for Defendant
RDT Properties, Inc.



PATRICK H. KERNAN
401 S. Boston, Ste. 2100
Tulsa, OK 74103
(918) 582-3176

Co-Counsel for Defendant
RDT Properties, Inc.

ctf

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

CREEK COUNTY RURAL WATER)
DISTRICT NO. 2, an agency and)
legally constituted authority of the)
STATE OF OKLAHOMA,)

Plaintiff,)

vs.)

CITY OF TULSA, a municipality,)
and THE TULSA METROPOLITAN)
UTILITY AUTHORITY, a public)
trust,)

Defendants.)

Case No. 94-C-1052-H

FILED

JAN 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAN 6 1997

JAN 6 1997

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff Creek County Rural Water District No. 2, by and through its attorney of record Steven M. Harris and the Defendants City of Tulsa and Tulsa Metropolitan Utility Authority, by and through their attorney of record Larry Simmons, and hereby stipulate and agree the above-styled matter should be dismissed with prejudice, with the Court retaining jurisdiction to resolve any dispute which may arise in the future between the parties in relation to or arising from the Settlement Agreement and the Water Purchase Contract entered into between the parties in settlement of this matter.

Respectfully submitted,

~~DOYLE & HARRIS~~

Steven M. Harris, OBA #3913
Michael D. Davis, OBA #1282
2431 E. 61st St., Suite 260
Tulsa, OK 74136
(918)743-1276
Attorneys for Plaintiff

5/10

11/9

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Larry V. Simmons
Assistant City Attorney
200 Civic Center, Room 316
Tulsa, OK 74103
(918)596-7717
Attorney for Defendants

CERTIFICATE OF MAILING

I do hereby certify that on the 3rd day of January, 1997, I caused a true and correct copy of the above and foregoing instrument to be mailed to the following parties, with proper postage fully prepaid thereon:

LARRY V. SIMMONS
ASSISTANT CITY ATTORNEY
200 CIVIC CENTER, ROOM 316
TULSA, OK 74103
(918)596-7717
ATTORNEY FOR DEFENDANTS

PAT WINKLE, MANAGER
CREEK COUNTY RURAL WATER DISTRICT NO. 2
ROUTE 3 BOX 336B
SAPULPA, OK 74066

JAMES R. UNRUH
9 EAST 4TH STREET, SUITE 300
TULSA, OK 74103

585-8.176:nw



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

JEAN PROCTOR, AS ADMINISTRATOR OF)
THE ESTATE OF RONALD PROCTOR AND)
AS MOTHER AND NEXT FRIEND OF RANDY)
LEE PROCTOR, ROBERT WAYNE PROCTOR)
AND CAMILIA D. JOHNSON AS MOTHER)
AND NEXT FRIEND OF MARSHA LEANN)
PROCTOR AND MELISSA KAY PROCTOR,)

Plaintiffs,)

vs.)

THE UNITED STATES OF AMERICA AND)
JOSEPH J. BACK, D.O.,)

Defendants.)

F I L E D

JAN 03 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-1017-E ✓

ENTERED ON JAN 06 1997

ORDER

Now before the Court is the Motion for Summary Judgment (Docket #12) of the Defendant Dr. Joseph J. Back, D.O., and the Cross Motion for Summary Judgment (Docket #14) of the Defendant United States of America. The issue raised by both motions in this medical malpractice action is whether Dr. Back is a federal employee for purposes of his coverage under the Federal Tort Claims Act (FTCA). The parties agree that, if Dr. Back was as employee for purposes of the FTCA, he would not be a proper party to this action.

Dr. Back was performing radiology services at W.W. Hastings Indian Hospital (Hastings) at the time the alleged malpractice occurred. He was performing those services pursuant to a service requisition agreement between his corporation, Diagnostic Imaging Associates, and Hastings. In essence, Dr. Back was "filling in" for Hastings staff radiologist Rose Garrett while she was on

vacation.

Dr. Back argues that, pursuant to the terms of the Indian Healthcare Act, 25 U.S.C. §1680c(d), he is an employee of the federal government for purposes of the FTCA. 25 U.S.C. §1680c(d) provides:

Hospital privileges in health facilities operated and maintained by the Service or operated under a contract entered into under the Indian Self-Determination Act (25 U.S.C.A. §450f et seq.) may be extended to non-Service health care practitioners who provide services to persons described in subsection (a) or (b) of this section. Such non-Service health care practitioners may be regarded as employees of the Federal Government for purposes of section 1346(b) and chapter 171 of Title 28, (relating to Federal tort claims) only with respect to acts or omissions which occur in the course of providing services to eligible persons as a part of the conditions under which such hospital privileges are extended.

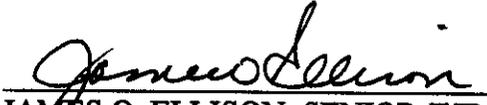
It is undisputed under the facts of this case that plaintiff's decedent was an "eligible indian" for the purposes of this statute.

The government argues that a statute must be clear, compelling, and unequivocal in its waiver of sovereign immunity, and that §1680c(d) is not sufficiently clear or compelling in that it uses the word "may" instead of "shall." Similarly, it argues that the clear language of the statute does not provide that Dr. Back is an employee of the government for purposes of the FTCA in that under the language of §1680c(d), an "IHS facility may extend FTCA coverage to a health care practitioner who agrees to provide services to 'ineligible persons.'" The government asserts that such bargaining did not occur when Dr. Back was granted privileges in 1992, and that FTCA coverage is therefore not extended under these facts.

First, the Court finds that the issue is not whether §1680c(d) "waives sovereign immunity." The issue is whether under the terms of §1680c(d), the waiver of sovereign immunity found in the FTCA applies to doctors in the position of Dr. Back. Under the plain language of §1680c(d), the Court is convinced that is to be regarded as an employee of the federal government in that he was in the process of providing services to an eligible person.

Dr. Back's Motion for Summary Judgment (Docket #12) is granted. The government's Cross Motion for Summary Judgment (Docket #14) is denied.

IT IS SO ORDERED THIS 3RD DAY OF January ~~OCTOBER~~, 1998.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

510
1/2/97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JAN - 6 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

MELVIN E. EASILEY aka Melvin)

Easiley; DENISE L. EASILEY; CITY OF)

GLENPOOL, Oklahoma; COUNTY)

TREASURER, Tulsa County, Oklahoma;)

BOARD OF COUNTY)

COMMISSIONERS, Tulsa County,)

Oklahoma,)

Defendants.)

Civil Case No. 95-C 437B

ENTERED ON COURT
JAN 0 6 1997

ORDER OF DISBURSAL

NOW on the 6th day of Jan, 1996, there came on for

consideration the matter of disbursal of \$57,500.00 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 \$57,500.00 should be disbursed as follows:

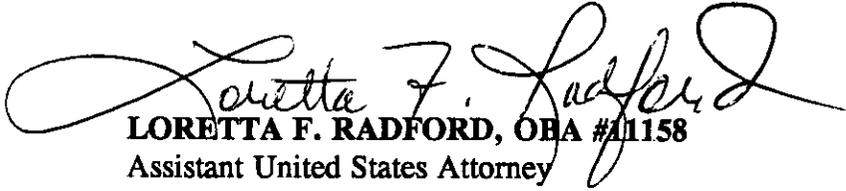
United States Marshal's Costs	\$406.10
Executing Order of Sale	3.00
Advertising Sale Fee	3.00
Conducting Sale	3.00
Appointing Appraisers	6.00
Appraisers' Fees	225.00
Publisher's Fee	176.10
United States Department of Justice Credit for Judgment of \$113,590.87	\$57,093.90

James H. Bell
UNITED STATES DISTRICT JUDGE
En: James H. Bell

22

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK 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

SOL

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

1-5-97

CORINE CHILLIOUS,)
)
Plaintiff,)
)
vs.)
)
FARMERS ALLIANCE MUTUAL)
INSURANCE COMPANY, a)
foreign insurance carrier,)
)
Defendant.)

Case No.: 96-C-433K

FILED

JAN 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

COME NOW the parties by and through their respective attorneys, and pursuant to
F.R.C.P. 41(a)(1), hereby stipulate to the dismissal with prejudice of the above captioned.

Respectfully submitted,

CORINE CHILLIOUS

By: 

James R. Frasier, OBA #3108
Everett R. Bennett, Jr., OBA #11224
FRASIER, FRASIER & HICKMAN
1700 Southwest Blvd., Ste. 100
P.O. Box 799
Tulsa, OK 74101
Attorneys for Plaintiff, Corine Chillious

and

FARMERS ALLIANCE MUTUAL INSURANCE CO.

By: 

Scott D. Cannon, OBA #10755
WAGNER, STUART & CANNON
902 South Boulder
Tulsa, OK 74119-2034
(918) 582-4483
Attorney for Defendant, Farmers Alliance

18

c/5

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

FILED

JAN 02 1997

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

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

CIVIL ACTION NO. 96-CV-934-B ✓

THE SUM OF ONE THOUSAND)
FOUR HUNDRED FORTY AND)
NO/100 DOLLARS (\$1,400.00))
IN UNITED STATES CURRENCY;)

ENTERED ON DOCKET

DATE JAN 03 1997

1991 Plymouth Laser,)
VIN #4P3CS34T8ME085013;)

1992 Nissan Maxima,)
VIN #JN1HJ01F3NT012803;)

ORDER OF PARTIAL DISMISSAL:

1992 NISSAN MAXIMA
VIN #JN1HJ01F3NT012803

1970 Chevrolet Purple Camaro,)
VIN #12487L513987;)

1989 Buick Regal,)
VIN #2G4WB14W9K1436227;)

1985 Oldsmobile Cutlass,)
VIN #1G3AM1932FD397319;)

1976 GMC Red & White Pickup,)
VIN #TCL146S524232;)

1982 Oldsmobile Cutlass,)
VIN #1G3AX69Y7CM141401;)

1981 Ford Mustang,)
VIN #1FABP13B4BF202451;)

1986 Black Pontiac Firebird,)
VIN #1G2FW87H6GL202504;)

1994 Ford Thunderbird,)
VIN #1FALP6241RH220862;)

1995 Chevrolet Monte Carlo,)
VIN #2G1WW12M1S9126450;)

27

1989 GMC 1-Ton Pickup,
VIN #2GTHC39N6K1529969;

1980 Chevrolet Impala,
VIN #1L47JAC127726;

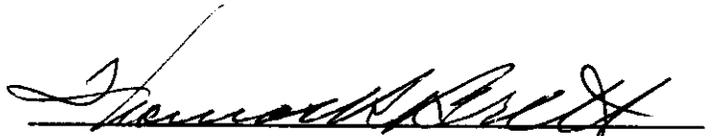
Defendants.

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ORDER OF PARTIAL DISMISSAL

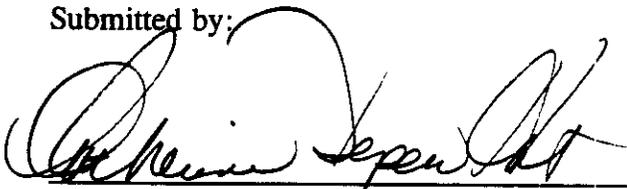
This matter, coming on before the undersigned Judge of the District Court of the Northern District of Oklahoma, this 2nd day of January, 1997, upon the plaintiff's Motion for Partial Dismissal as to the 1992 Nissan Maxima VIN #JN1HJ01F3NT012803. The government has released custody of the vehicle to the registered owner, Sharon Lazenby, for the reason that she appears to be an innocent owner. The only party having filed any claims to the vehicle is American Airlines Employees Federal Credit Union, having filed its lienholder's claim.

IT IS, THEREFORE, ORDERED AND ADJUDGED by the Court that the 1992 Nissan Maxima VIN #JN1HJ01F3NT012803 is hereby dismissed, without prejudice and without any costs, except the cost of towing, one day storage and any storage fees incurred after the release of the vehicle.



JUDGE OF THE DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Submitted by:



CATHERINE DEPEEW HART
Assistant United States Attorney

F I L E D

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JAN 03 1997

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 EDWIN C. BELL,)
)
 Defendant,)
)
 and)
)
 HYSpan PRECISION PRODUCTS,)
 INC.,)
)
 Garnishee.)

CIVIL ACTION NO. 91-C-874-B

ENTERED ON DOCKET

DATE JAN 03 1997

ORDER DIRECTING DISBURSAL OF GARNISHMENT MONIES

This Court having reviewed the United States' Application for Disbursal of Garnishment Monies finds:

1. Pursuant to the Writ of Continuing Garnishment entered on August 28, 1996, the Garnishee has made garnishment payments into the Court's registry deposit fund.

2. A Garnishee Order was issued December 23, 1996, ordering the Garnishee to pay twenty-five percent (25%) of the debtor's income to plaintiff and continue said payment until the debt to the plaintiff is paid in full or until the garnishee no longer has custody, possession or control of any property belonging to the debtor or until further Order of the Court. Payment is to be made to the U.S. Department of Justice and submitted to the U. S. Attorney's Office.

IT IS THEREFORE ORDERED that the United States Court Clerk is to disburse all monies paid into the Court's registry deposit fund as a result of the United States' garnishment on Edwin C. Bell.

Thomas R. Brett

United States District Judge
By: James C. Cullen

Submitted by:

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

Loretta F. Radford

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

RECEIVED

JAN 02 1997

U.S. ATTORNEY
N.D. OKLAHOMA

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

FILED
DATE 1-3-97

CARLA JANNETTA HUBBARD,)
Individually and as Mother and Next)
friend of LATOYA AUSTIN, a)
minor,)

Plaintiffs,)

vs.)

UNITED STATES OF AMERICA,)

Defendant.)

Case No. 96-CIV-1051-K

FILED

JAN 2 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

COME NOW the parties to the above-styled and numbered cause and stipulate to the dismissal of the claim of Carla Hubbard and LaToya Austin in the above-styled and numbered cause, pursuant to Federal Rule of Civil Procedure 41(a).

Respectfully submitted,
FRASIER, FRASIER & HICKMAN

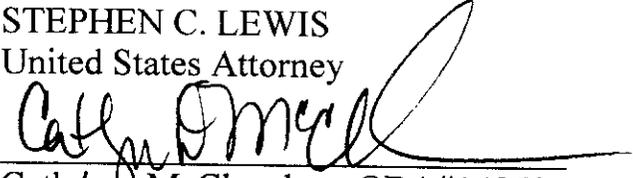
By: Karen Goins
Karen Goins OBA#3108
1700 Southwest Boulevard
P.O. Box 799
Tulsa, OK 74101-0799
(918) 584-4724
Attorneys for Plaintiffs

And

015

STEPHEN C. LEWIS
United States Attorney

By:


Catheryn McClanahan, OBA#14853
Assistant United States Attorney
333 W. 4th St., Suite 3460
Tulsa, OK 74103
(918) 581-7463

SR

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

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

CIVIL ACTION NO. 97-CV-1-H ✓

A TRACT OF LAND IN SECTION)
34, TOWNSHIP 18 NORTH, RANGE)
7 EAST, CREEK COUNTY,)
OKLAHOMA, CONTAINING)
APPROXIMATELY 20.0 ACRES,)
MORE OF LESS,)
(Located at Route 1,)
Box 200, Drumright,)
Oklahoma), AND ALL BUILDINGS,)
APPURTENANCES, AND)
IMPROVEMENTS THEREON,)

Defendant.)

RECEIVED
JAN - 3 1997 ✓

FILED

JAN 2 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

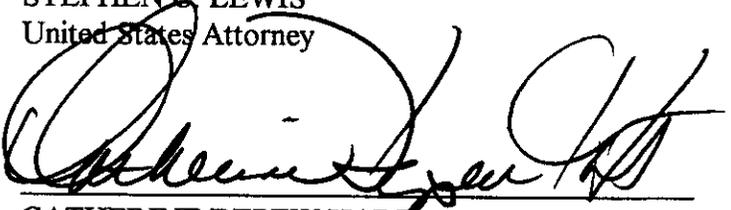
NOTICE OF DISMISSAL

Plaintiff, the United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Catherine Depew Hart, Assistant United States Attorney, hereby gives notice that, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the above-styled action is dismissed without prejudice and without costs.

DATED this 2nd day of January, 1997.

Respectfully submitted,

STEPHEN C. LEWIS
United States Attorney


CATHERINE DEPEW HART
Assistant United States Attorney

2

C15.

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

FILED
DATE JAN 03 1997

IN RE: ASBESTOS LITIGATION

) Master File M-1417
) ASB(I)
)

CHARLES W. YORK and PAMELA R. YORK,

Plaintiffs,

vs.

) Case No. 93-C-252-B ✓
)
)

FIBREBOARD CORPORATION, et al.,

Defendants.

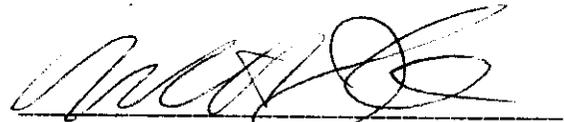
FILED
JAN 2 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION FOR DISMISSAL

Plaintiffs, Charles W. York and Pamela R. York, and Defendant, General Refractories Company, hereby stipulate, by and through their attorneys of record, that the Complaint and claims of Plaintiffs may be dismissed with prejudice to refile, pursuant to Rule 41 of the Federal Rules of Civil Procedure, with the parties to bear their own costs and attorneys' fees.

UNGERMAN & IOLA

By:



Mark H. Iola, OBA #4553
1323 East 71st Street, Suite 300
P.O. Box 701917
Tulsa, OK 74170-1917
(918) 495-0550

ATTORNEYS FOR PLAINTIFFS

MONNET, HAYES, BULLIS, THOMPSON
& EDWARDS

By: Randall A. Breshears
Randall A. Breshears, OBA #1101
1719 First National Center West
Oklahoma City, OK 73102
(405) 232-5481

ATTORNEYS FOR DEFENDANT,
GENERAL REFRACTORIES COMPANY

CERTIFICATE OF MAILING

This will certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, this 24 day of December, 1996, to:

Stephen S. Boaz, Esq.
Boaz & Associates, P.C.
Three Corporate Plaza
3613 N.W. 56th Street, Suite 300
Oklahoma City, OK 73112
Attorneys for Anchor Packing Company

Benjamin J. Butts, Esq.
31st Floor, 210 Park Avenue
Oklahoma City, OK 73102
Attorney for Crown Cork and Seal Co., Inc.

Mike Edwards, Esq.
Logan Building, Suite 132
3840 South 103rd East Avenue
Tulsa, OK 74146
Attorney for CCR

Chuck Kalinoski, Esq.
Suite 1100, Two Ruan Center
601 Locust Street
Des Moines, IA 50309
Attorney for CCR

Joe Lampo, Esq.
700 West 47th Street, Suite 1100
Kansas City, MO 64112-1892
Attorney for Owens-Illinois, Inc. and
Pittsburgh Corning

Murray Abowitz, Esq.
10th Floor, 15 North Robinson
Oklahoma City, OK 73102
Attorney for Keene Corp.

Dru L. McQueen, Esq.
320 South Boston, Suite 500
Tulsa, OK 74103-1725
Attorney for W.R. Grace & Co.

Richard Carpenter, Esq.
Suite 202, 624 South Denver
Tulsa, OK 74119
Attorney for Grant Wilson

Dixie Coffey, Esq.
101 North Broadway, 8th Floor
Oklahoma City, OK 73102
Attorney for Flintkote Co.

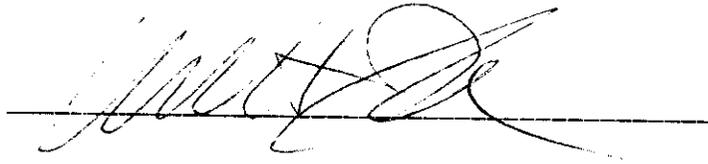
Kaiser Refractories -- Elsie Draper
c/o Gable, Gotwals
Suite 2000, 15 West 6th Street
Tulsa, OK 74119-5447

Scott M. Rhodes, Esq.
Pierce Couch Hendrickson Baysinger & Green
P.O. Box 26350
Oklahoma City, OK 73126
Attorneys for Owens-Corning Fiberglas Corp.

J.R. "Randy" Baker
Holloway, Dobson, Hudson & Bachman
One Leadership Square, Suite 900
Oklahoma City, OK 73102
Attorneys for Harbison-Walker Corp.

W. Michael Hill, Esq.
Dan W. Ernst, Esq.
Secrest & Hill
7134 South Yale, Suite 900
Tulsa, OK 74136
Attorneys for John Crane, Inc.

Jacqueline O'Neil Haglund, Esq.
525 South Main, Suite 1400
Tulsa, OK 74103-4409
Attorney for Foster Wheeler Corp.

A handwritten signature in black ink, appearing to read "W. Michael Hill", is written over a horizontal line. The signature is stylized and cursive.

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

LA SOUND INTERNATIONAL, INC.,)
a Nevada corporation,)
)
Plaintiff,)

ENTERED ON DOCKET
DATE JAN 02 1997

vs.)

Case No. 96-C-0118-B ✓

RICHARD C. BERTSCH, an)
individual; and METROSOUND U.S.A,)
INC., a California corporation,)
)
Defendants and)
and Third Party)
Plaintiffs,)

FILED

DEC 31 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

vs.)

GENE LUM, an individual,)
NORA LUM, an individual,)
MICHAEL BROWN, an individual, and)
JOHN DOE(S),)
)
Third Party)
Defendants.)

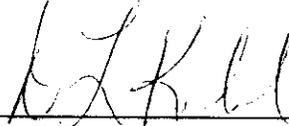
STIPULATION OF DISMISSAL

Pursuant to Rule 41 of the Federal Rules of Civil Procedure, all parties except Metrosound USA, Inc. hereby stipulate that this action may be dismissed with prejudice (except as to any claims between LA Sound International, Inc. and Metrosound USA, Inc.), with each party to bear its own costs and attorneys' fees, and move the Court to enter the Order of Dismissal submitted herewith.

Metrosound USA, Inc. is not a party to this stipulation because it is a debtor in a bankruptcy proceeding pending in the United States Bankruptcy Court for the Central District of California filed on April 1, 1996 (Case No. LA96-20139 ES, Chapter 7); Metrosound USA, Inc. has not appeared in this action since it filed its bankruptcy petition, and it is requested that the action be dismissed without prejudice as to any claims between LA Sound International, Inc., and

Metrosound USA, Inc.

WHEREFORE, the Court is moved to enter the Order of Dismissal submitted herewith.



Donald L. Kahl
T. Lane Wilson
Hall, Estill, Hardwick,
Gable, Golden & Nelson, P.C.
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0400

ATTORNEYS FOR PLAINTIFF AND THIRD
PARTY DEFENDANTS



James M. Sturdivant, OBA #8723
John Henry Rule, OBA #7824
GABLE GOTWALS MOCK SCHWABE INC.
2000 Boatmen's Center
15 West Sixth Street
Tulsa, Oklahoma 74119-5447
(918) 582-9201

ATTORNEYS FOR DEFENDANT
RICHARD C. BERTSCH

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

LA SOUND INTERNATIONAL, INC.,)
a Nevada corporation,)

Plaintiff,)

vs.)

RICHARD C. BERTSCH, an)
individual; and METROSOUND U.S.A,)
INC., a California corporation,)

Defendants and)
and Third Party)
Plaintiffs,)

vs.)

GENE LUM, an individual,)
NORA LUM, an individual,)
MICHAEL BROWN, an individual, and)
JOHN DOE(S),)

Third Party)
Defendants.)

ENTERED ON DOCKET
DATE JAN 02 1997

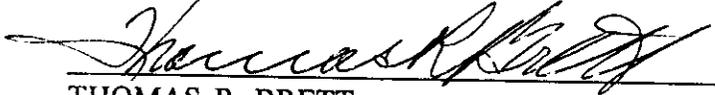
Case No. 96-C-0118-B

FILED
DEC 31 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

Pursuant to stipulation of all parties except Metrosound USA, Inc., this action is hereby dismissed with prejudice, with each party to bear its own attorney's fees and costs, and the Order Granting Preliminary Injunctive Relief entered herein on August 8, 1996 is hereby vacated; provided, however, this dismissal is without prejudice with respect to any claims between LA Sound International, Inc. and Metrosound USA, Inc.

DATED this 31st day of Dec, 1996.



THOMAS R. BRETT
Senior United States District Judge

Handwritten initials

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

NICHOLAS ROHMILLER, JOHN P
ROHMILLER, and RICHARD W.
LOWRY, Trustees under the Rohmiller
Title Holding Trust Agreement,

Plaintiff,

vs.

PEABODY COAL COMPANY,
a Delaware Corporation,

Defendant.

JAN - 2 1997 FILED

DEC 31 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-1180-H

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, the parties hereby stipulate that this action shall be dismissed with prejudice, with each party to bear its own costs and attorneys fees, and move the Court to enter the Order of Dismissal submitted herewith.

Respectfully Submitted,

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

By: _____

CV
Claire V. Eagan, OBA # 554
T. Lane Wilson, OBA #16343
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0400

ATTORNEYS FOR DEFENDANT PEABODY
COAL COMPANY

CB

LOGAN & LOWRY, P.C.

By: Donna L. Smith

J. Duke Logan, OBA #5496

Donna L. Smith, OBA #12865

Robert Alan Rush, OBA #13342

P. O. Box 558

Vinita, OK 74301-0558

(918) 256-7511

ATTORNEYS FOR PLAINTIFFS

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

F I L E D

DEC 31 1996

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

In re)
)
)
HOME-STAKE PRODUCTION COMPANY)
SECURITIES LITIGATION)

)
)

Case No. 73-C-382-E

M.D.L. Docket No. 153

ENTERED ON DOCKET

DATE JAN 02 1997

ORDER AND FINAL JUDGMENT

A Stipulation of Settlement having been entered into by the parties herein on November 26, 1996, and the Court having found the terms of the Stipulation of Settlement to be fair, reasonable and adequate, and the Court having expressly determined that there is no just reason for delay in the entry of final judgment, and that a final judgment should be entered as, and be deemed, a final judgment in accordance with Fed.R.Civ.P. 54(b),

And defendant Wynema Anna Cross, Executrix of the Estate of Norman C. Cross, Jr., and the related released persons, entities, and organizations defined in the Stipulation of Settlement, hereinafter the "Settling Defendant," and Continental Casualty Company, and the related released persons, entities, and organizations defined in the Stipulation of Settlement, hereinafter the "Settling Insurer," having expressly denied any liability and any wrongdoing of any description or any deficiencies, faults, errors or omissions of any nature whatsoever; having entered into the Stipulation of Settlement solely for the purpose of terminating this litigation with the Settling Plaintiffs (as defined in the Stipulation of Settlement), and to avoid the cost, expense and effort required to continue to participate in such complex and protracted litigation; and not admitting or conceding the validity of any of the claims asserted against them, any liability to any of the plaintiffs or others, or any wrongdoing, deficiencies, faults, errors or omissions of any nature whatsoever,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

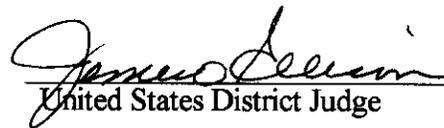
1. The claims asserted in this action against the Settling Defendant by Thomas H. Thorner and the members of the 1969 Program Class, and by Carolyn N. Grohne, Trustee of The Grohne Family Trust and the members of the 1970 Program Class, and any other person having a beneficial interest in the claims asserted by them, are hereby dismissed with prejudice.

2. The garnishment claims asserted against the Settling Insurer by Thomas H. Thorner and the members of the 1969 Program Class, and by Carolyn N. Grohne, Trustee of The Grohne Family Trust and the members of the 1970 Program Class, and any other person having a beneficial interest in the claims asserted by them, are hereby dismissed with prejudice.

3. All claims asserted or which could have been asserted in the above-captioned action or otherwise, by or on behalf of the Settling Plaintiffs against the Settling Defendant and/or the Settling Insurer, or by or on behalf of the Settling Defendant against the Settling Insurer, relating to the purchase or other acquisition, ownership or retention of units in the 1969 and 1970 Home-Stake Programs are hereby dismissed with prejudice, all parties to bear their own costs.

4. Jurisdiction is hereby reserved by the Court over the consummation of the compromise and settlement provided for in the Stipulation of Settlement and all matters related thereto.

Dated: Tulsa, Oklahoma
December 30, 1996


United States District Judge

JUDGMENT ENTERED:

Clerk

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

FILED

DEC 31 1996

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

In Re:

HOME-STAKE PRODUCTION COMPANY
SECURITIES LITIGATION

Case No. 73-C-382-E
(MDL-153)

ENTERED ON DOCKET

DATE JAN 02 1997

**ORDER VACATING ALL PRIOR DOCUMENT DEPOSITORY & RETENTION ORDERS
PERTAINING TO THE HOME-STAKE PRODUCTION COMPANY
AND TO THE RELATED SECURITIES LITIGATION
AND AUTHORIZING THE DESTRUCTION
AND DISCARDING OF SUCH DOCUMENTS**

NOW on this 30th day of December, 1996, the Joint Application for Order Vacating All Prior Document Depository and Retention Orders Pertaining to the Home-Stake Production Company and to the Related Securities Litigation ("Joint Application") coming on for hearing, and the Court having reviewed the Joint Application and being fully advised in the premises:

FINDS that Notice of the Hearing on this matter was provided to all interested persons by mailing to them on the 19th day of December, 1996, a copy of the Order Setting Hearing and Notice of Hearing on the Joint Application. The Court further

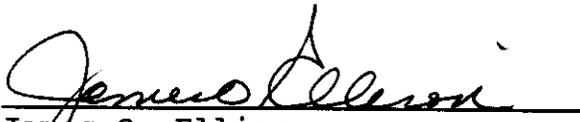
FINDS that no objections to the relief requested in the Joint Application have been filed and that no parties present at this hearing on December 30, 1996, have objected to the relief requested in the Joint Application. The Court further

FINDS that it is in the best interest of all concerned that the relief requested in the Joint Application be granted. It is

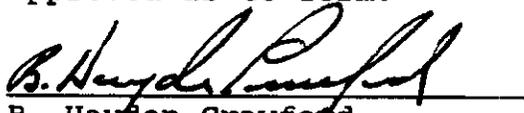
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therefore

ORDERED, ADJUDGED AND DECREED THAT all prior documentary depository and/or retention orders be and they are hereby vacated, and that all parties are authorized to destroy and/or discard, at their discretion, any or all documents and materials in their possession related to the Home-Stake Securities Litigation and to the operations of the Home-Stake Production Company.


James O. Ellison
Senior United States District Judge

Approved as to form:


B. Hayden Crawford
Attorney for Wynema Anna Cross,
Executrix for the Estate of Norman C. Cross, Jr.


William H. Hinkle
Member, Plaintiffs' Committee of Counsel

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

FILED

LLOY C. LOLLIS,
SSN: 444-74-2459.

Plaintiff,

v.

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

Defendant.

DEC 31 1996

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

CASE NO. 95-C-1036-M

ENTERED ON DOCKET

DATE

1/2/97

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 31ST day of Dec., 1996.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

LLOY C. LOLLIS,
SSN: 444-74-2459,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner
Social Security Administration,

Defendant.

NO. 95-C-1036-M

DEC 31 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 1/2/97

ORDER

Plaintiff, Lloy C. Lollis, seeks judicial review of a decision of the Commissioner of Health & Human Services denying Social Security disability benefits. 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 Commissioner 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 Commissioner 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 more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389,

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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 before the Commissioner 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 of the effort would serve no useful purpose.

Ms. Lollis initially filed an application for Disability Insurance Benefits on January 16, 1990 which was denied April 10, 1990. No further action was taken by Plaintiff on that application. Ms. Lollis again applied for disability benefits on September 14, 1992 stating an onset date of disability of April 19, 1991. Her application was denied by the Social Security Administration on December 14, 1992. The denial was affirmed on reconsideration. A hearing before an ALJ was held April 20, 1994. The ALJ rendered a denial decision on November 3, 1994. In the denial decision, the ALJ determined that Plaintiff is able to return to her past relevant work as a mail room clerk or cashier. Accordingly, the ALJ found Plaintiff was not "disabled" within the meaning of the Social Security Act. Plaintiff appealed the ALJ's decision to the Social Security Appeals Council and twice submitted additional evidence. The Appeals Council affirmed the findings of the ALJ on August 17, 1995 and again on November 3, 1995.

The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Plaintiff alleges that the ALJ's findings concerning the degree of functional loss resulting from her mental impairment are based on incorrect legal standards, are otherwise not supported by substantial evidence and that the ALJ's finding that she retained the capacity to perform her past relevant work is based on an improper legal analysis. Defendant's response brief addresses neither contention and argues instead that Plaintiff's claim is barred by Public Law No. 104-121, 110 Stat. 847 (1996),¹

The record in this case is voluminous, containing medical records spanning twenty-three years. According to the record, situational depression was first diagnosed on February 10, 1980 when Plaintiff was 17 years old. [R. 239-244]. She was hospitalized at St. Francis Hospital after attempting suicide. [R. 239]. The prognosis at that time, written by Ronald C. Passmore, M.D., was "Guarded to fair, depending on how she follows through and what her breaks are." [R. 240]. Plaintiff was again hospitalized for situational depressive reaction with excessive alcohol use in May 1981, at the age of 18. [R. 247-250]. She underwent 6 months of therapy with Dr. Passmore and was prescribed Pamelor, Tagamet and Antalze. [R. 290-298].

¹ P.L. 104-121, entitled "Denial of Disability Benefits to Drug Addicts and Alcoholics" was enacted on March 29, 1996. It provides in pertinent part:

An individual shall not be considered to be disabled for purposes of this title if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled.

She was hospitalized again in December 1981 for chronic situational depression with drug abuse by Dr. Passmore. [R. 259].

On July 3, 1987, Plaintiff was admitted to Brookhaven Hospital with a diagnosis of major depression and "likely has an underlying borderline personality." [R. 422-498]. Mark Kelley, M.D. and Tom Hoffman, Ph.D. were her treating physicians for depression and job-related difficulties. [R. 425]. Dr. Kelley stated that Plaintiff "has chronic stresses related to family and household problems that are dating back to childhood. These stresses are Level 5. Patient's best level of functioning during the past year has been to a 70 level. Current level of functioning is 35." [R. 422]. She was discharged on July 7, 1987 with an unchanged diagnosis. [R. 420]. Dr. Hoffman wrote:

There is evidence of a moderate level of pathology in the overall personality structure of this woman. She is likely to have a checkered history of disappointments in her personal and family relationships. Deficits in her social attainments may be notable, as is a tendency on her part to precipitate self-defeating vicious circles. Earlier hopes for herself may have met with frustrating setbacks, and efforts to achieve a consistent niche in life may have failed. Although she is frequently able to function on a satisfactory ambulatory basis, she may evidence a persistent emotional dyscontrol with periodic psychotic episodes. Recent life changes and authority difficulties: family tensions, work upsets may be exacerbating the present emotional state. Patient is experiencing a severe mental disorder.

[R. 470]. The discharge treatment plan was for Plaintiff to return home, return to her job and to attend ACA (Adult Children of Alcoholics) meetings. [R. 434]. Plaintiff was then 24 years old.

On April 9, 1989, Plaintiff was again admitted to St. Francis Hospital by Dr. Passmore. [R. 270-271]. Although she was initially treated in the emergency room for abdominal pain, she was admitted to psychiatry for situational anxiety with some somatoform reaction. [R. 270]. Dr. Passmore wrote:

She had a conversion of some sorts about three weeks ago when she became very involved with religion and church and she is now carrying her Bible with her everywhere. She has stopped drinking completely.

[R. 270]. Her treatment course was to "try to help her adapt to her job and deal with the problems at home. She is finding them overwhelming at this time." [R. 271]. She was hospitalized twice more in 1989 for anxiety disorder and medication adjustment [R. 280-285, 288-305]. On January 3, 1990, Plaintiff was admitted to St. Francis Hospital with depression and alcoholism by Peter Lantz, M.D. She was planning to commit suicide by wrecking her car. She was experiencing auditory hallucinations, perceptual distortions, disorganized thinking, thought broadcasting, thought alienation and a paranoid delusion. Her hospital course was "stormy" with intermittent periods of anger and depression. She was diagnosed with schizoaffective disorder, alcohol dependence and borderline personality disorder. Because of the "dual diagnosis" she was referred to West Oaks Psychiatric Hospital in Houston, Texas. [R. 306-314].

Plaintiff's treating physician at West Oaks was Jason Baron, M.D. Her treatment program there was marked with tremendous lability of mood swings. She was discharged from West Oaks after 37 days of treatment with a final diagnosis of alcohol dependency, severe; major depression, recurrent episode with psychotic

features; probable paranoid schizophrenia versus possible bipolar disorder mixed; current GAF 45. [R. 315-323]. Dr. Baron recommended that Plaintiff continue care on an outpatient basis with Dr. Billie Ford, a psychiatrist in Tulsa. [R. 316]. On November 18 of that same year, Plaintiff called Dr. Ford stating that she was going to kill herself, that she had a handful of pills and admitted that she had been drinking ever since her return from Houston. She was admitted to Tulsa Regional Medical Center for a three week program of detox and treatment. [R. 515-519]. On November 21, 1990, Plaintiff left the hospital before completing the program and against medical advice. Dr. Ford rated her prognosis "poor" and "fired her" from his service, suggesting that she seek treatment with a different psychiatrist. [R. 512-514].

Eight months later, Plaintiff sought treatment at Medical Care Associates. [R. 395-396]. It was noted at that time that Plaintiff had been involved with the Alcoholics Anonymous program and had been "off" alcohol for six months. During the next two years, she received treatment at Medical Care Associates for various physical ailments and for anxiety. Her treating physician, Kent G. Farish, M.D., prescribed prozac, lithium and lithobid. [R. 384-394, 403-405].

Candy Ting, D.O. saw Plaintiff for the first time on February 23, 1993 for sore throat, coughing, congestion and a groin bump. [R. 407]. Dr. Ting noted that Plaintiff gave a history of mental and manic depression problems and that she had not seen a psychiatrist for over a year because of "insurance problems." [R. 408]. Dr. Ting renewed Plaintiff's prescriptions of Tegretol, Prozac and added a night time dose of Elavil to help Plaintiff sleep. [R. 418-419]. On November 8, 1993, Dr. Ting added a

prescription for Bellergal, stating Plaintiff was under a lot of stress and had severe depression. [R. 417].²

In April 1994, Plaintiff was treated at Tulsa Regional Medical Center's Behavioral Health Services Dept. [R. 87-89]. Therapy notes indicate that Plaintiff continued to experience stress, depression, suicidal thoughts and alcoholism. The screening report noted that Plaintiff's family doctor, Dr. Kent Farish, had ruled out physical causes of chest pain and set an appointment for a psychiatrist to evaluate her medication. On June 4, 1994, a counselor noted that on this "first post hospital visit" Plaintiff was staying sober, getting some things accomplished and sleeping better. [R. 97].

Dr. M.D. Dubriwny noted on January 5, 1995, that Plaintiff was "back to drinking, some sense of hopelessness, very dysfunctional relationship with boyfriend, on disability from Post Office." He continued her prescription for Prozac. [R. 96]. Treatment notes of January 9, 1995 and January 20, 1995 documented Plaintiff's struggle with maintaining abstinence from mind\mood altering chemicals but that she was continuing to attend AA meetings. [R. 90-102].

On April 15, 1995, Plaintiff was brought to St. Francis Hospital's emergency room by ambulance. [R. 17-20]. She had overdosed on amitriptiline. She was unresponsive but breathing on her own. She was admitted to the hospital and taken to the Intensive Care Unit. Her treating physician, Jacqueline Petray, M.D. noted on

² Medical records referenced from this point on were submitted to the SSA Appeals Council after the ALJ's decision was rendered.

the second day of hospitalization that Dr. Michael Dubriwny felt that Plaintiff was going through alcohol withdrawal and that she "suffers from severe anxiety". Dr. Petray's discharge summary noted that "this particular ingestion was precipitated when pt. got upset." She was discharged to home and told to report the next day to Tulsa Regional Medical Center's Outpatient Behavioral Health Clinic. She was prescribed Premarin, Librium and Bactrim and "was strongly encouraged not to drink." [R. 21-26].

Plaintiff had been examined for the Social Security Administration on November 30, 1992, by Vanessa Werlla, M.D., a psychiatrist. Dr. Werlla conducted a Mental Status Examination and reviewed the medical records from West Oaks Hospital. Her diagnostic impression was that Plaintiff "carries a past history of bipolar disorder which is most probably in partial remission at this time. Without having any more mental health records to review that one hospitalization, it is difficult to conclusively make this diagnosis. Based on the patient's presentation today and her description of her past illness, it seems that is a likely diagnosis." [R. 397-402].

Plaintiff's application for Disability Insurance Benefits stated that she became unable to work because of a disabling condition on April 19, 1991. For purposes of insurance benefits, Plaintiff must prove her disabling condition existed before the expiration of the date she was last insured, December 31, 1993. The ALJ's decision, dated November 4, 1994, was based upon the medical records he possessed at the time, Plaintiff's testimony at the hearing conducted on April 20, 1994 and the

testimony of a vocational expert at the hearing. He also had the transcription of the telerecorded report by Vanessa Werlla, M.D., the consultative psychiatrist.

The ALJ determined that Plaintiff is suffering from depression controlled by medication and that she has the ability to perform work at the full range of light and sedentary exertional levels. He decided that she can return to her past relevant work as a mail room clerk or cashier and that she is, therefore, not under a disability.

The Court finds the ALJ's decision flawed in several respects, which requires remand of the case.

Treating Physicians

The ALJ concluded that the opinions of Dr. Farish and Dr. Ting concerning Plaintiff's mental status and diagnosis related thereto, are not entitled to significant weight for the reason that they are not psychiatrists, but general practitioners. [R. 116].

It is well established that the Commissioner must give controlling weight to the opinion of a treating physician if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. However, good cause must be given for rejecting the treating physician's views and, if the opinion of the claimant's physician is to be disregarded, specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ, *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987); *Byron v. Heckler*, 742

F.2d 1232, (10th Cir. 1984) . Furthermore, when treating physicians' findings or opinions are inconsistent with a consultative examiner's report, the ALJ's task is to examine the consultative examiner's report to see if it outweighs the treating physicians' report, not the other way around. See *Goatcher v. United States Dept. of Health & Human Servs.*, 52 F.3d 288, 290 (10th Cir. 1995) citing *Reyes v. Bowen*,, 845 F.2d 242 (10th Cir. 1988). Here, the ALJ did not give an adequate basis for rejecting the diagnosis of Plaintiff's treating physicians.

In concluding that Plaintiff suffered only from depression and not a bipolar disorder, the ALJ relied on the report of Dr. Werlla, who did not rule out bipolar disorder but rather stated that a bipolar disorder was most likely in partial remission. [R. 402]. Dr. Werlla's report does not provide an adequate basis for concluding that Plaintiff suffers only from depression.

Credibility Determination

Plaintiff testified at the hearing on April 20, 1994 that her bouts with depression, paranoia, suicide attempts and inability to cope with job stress kept her from working after April 19, 1991. [R. 135-137]. The ALJ found that "the claimant's testimony is credible to the extent that it is consistent with a residual functional capacity of sedentary and light limited by depression for which medicine is being taken." [R. 116].

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 (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"); *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. Plaintiff was entitled to have her nonmedical objective and subjective testimony evaluated by the ALJ and weighed alongside the medical evidence. An ALJ may not ignore the evidence and make no findings. *See Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Kepler v. Chater*, 68 F.3d 387 (10th Cir. 1995).

The ALJ's statement that Plaintiff "can perform a residual functional capacity of sedentary and light limited by depression for which medicine is being taken" indicates that he assumed that the medications issued by Dr. Farish and Dr. Ting during the relevant time frame must have been controlling Plaintiff's mental problems. However, both Dr. Farish and Dr. Ting noted that Plaintiff was having a terrible problem with getting medications regulated, had been experiencing mood swings that "she can't handle", [R. 384], experiencing worsening of her manic symptoms, [R. 387], was getting anxious, [R. 389], experiencing "heart racing", [R. 390], under

stress, [R. 417], and continuing complaints of stress and depression. [R. 418]. This evidence is consistent with Plaintiff's extensive medical treatment history and lend credence to her testimony regarding her inability to work during the relevant time period.

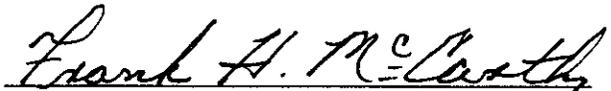
This case must be remanded to the Commissioner for a proper credibility determination.

The Commissioner has raised the defense of Public Law No. 104-121, 110 Stat. 847 (1996). As noted by defendant, the key factor in determining whether drug addiction or alcoholism is material is whether the claimant would still be found disabled if the alcohol or drug use were to stop. 20 C.F.R. § 404.1535. Application of this law involves factual determinations which are not within the province of this Court to make. Therefore, upon remand, the Commissioner is instructed to assess what affect, if any, this law has upon Plaintiff's claim for benefits and to make her determination accordingly.

The Commissioner is directed, upon remand, to make credibility determinations and to reconsider the medical evidence under the appropriate legal standards required by the regulations and case law. In remanding this case the Court does not dictate the result, nor does it suggest that the record is insufficient. Rather, remand is ordered to assure that a proper analysis is performed and the correct legal standards are invoked in reaching a decision based on the facts of the case. *Kepler*, 68 F.3d at 391.

THE CASE IS REMANDED to the Commissioner for a full consideration of Plaintiff's claim of disability under established legal standards as outlined above.

SO ORDERED this 31ST day of Dec., 1996.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

FILED

DEC 31 1996

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

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

PAUL E. SHIRLEY
442-54-0057

Plaintiff,

vs.

Case No. 95-C-1206-M

SHIRLEY S. CHATER, Commissioner
Social Security Administration,

Defendant,

ENTERED ON DOCKET

DATE 1/2/97

JUDGMENT

Judgment is hereby entered for the Defendant and against Plaintiff. Dated this
31 day of December, 1996.

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

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

FILED

PAUL E. SHIRLEY
442-54-0057

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner
Social Security Administration,

Defendant,

Case No. 95-C-1206-M ✓

ENTERED ON DOCKET

DATE

DEC 31 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

1/2/97

Plaintiff, Paul E. Shirley, seeks judicial review of a decision of the Commissioner of Health & Human Services denying Social Security disability benefits.¹ 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 Commissioner 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 Commissioner 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 more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might

¹ Plaintiff's applications for SSI and for disability benefits were denied September 8, 1993, and the denials were affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held December 6, 1994. By decision dated December 16, 1994 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on October 27, 1995. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (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 Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991).

Plaintiff was born December 27, 1951 and was 43 years old at the time of the hearing. He is a high school graduate with some college credit and past relevant work as a machinist and gunsmith. Plaintiff has alleged disability since March 7, 1991, due to chest pain, severe anxiety attacks, shortness of breath, and depression. The ALJ found that although Plaintiff was unable to perform his past relevant work, he was capable of performing a wide range of light work. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: failed to consider the combined effects of his anxiety/panic disorder and cardiac disease on his ability to perform work; ignored the opinion of his treating psychiatrist; and failed to pose a proper hypothetical question to the vocational expert. The Court has meticulously reviewed the record of the proceedings and the undersigned United States Magistrate Judge finds that the decision of the Commissioner is supported by substantial evidence and is therefore AFFIRMED.

Plaintiff has been under the care of a psychiatrist, Charles H. Hill, M.D. since September 8, 1993, for the treatment of a panic disorder without agoraphobia. Dr. Hill's treatment notes, [R. 438-443], reflect that as of September 8, 1993, Dr. Hill rated Plaintiff's Global Assessment of Functioning ("GAF") at over 70 which involves some mild symptoms and some difficulty in social, occupational or school functioning but generally indicates that Plaintiff was functioning pretty well and has some meaningful interpersonal relationships. See The American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, p. 12 (3rd Edition, revised, 1987) ("DSM-III-R"). The notes repeatedly report that patient is "doing well." The last entry is dated April 27, 1994 and states that Plaintiff is "doing excellent." [R. 438]. On October 21, 1994, Dr. Hill wrote a report expressing his opinion that the combination of Plaintiff's cardiac disease and this anxiety disorder "make if [sic] very difficult for this gentleman to pursue work." [R. 601].

The regulations provide that a treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments including the claimant's symptoms, diagnosis and prognosis, and any physical and mental restrictions. See 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). The Commissioner will give controlling weight to that type of opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). A treating physicians' opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. Specific, legitimate reasons for rejection of the opinion must

be set forth by the ALJ. *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987). Plaintiff argues that the decision must be reversed because, "the ALJ gave no reason to reject Dr. Hill's diagnosis concerning the nature of Mr. Shirley's impairments and their combined effects." [Dkt. 7, p. 3]. The ALJ did not reject any *diagnosis* by Dr. Hill. Further, Dr. Hill did not express the opinion that Plaintiff could not do work activities; he said it was difficult, not impossible, for Plaintiff to *pursue work*. Since the Court does not view Dr. Hill's report as stating an opinion that Plaintiff could not work, the Court finds no error in the ALJ's failure to give reasons for rejecting this "opinion."

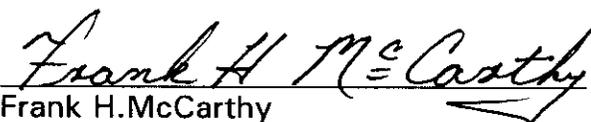
Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Commissioner's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, in posing a hypothetical question, the ALJ 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 Court finds that the limitations included in the hypothetical question posed by the ALJ are supported by substantial evidence. As a result, the Court finds that the ALJ's hypothetical summarizing claimant's residual functional capacity was correct. In addition, the Court notes that the vocational expert testified that, even if Plaintiff's testimony was credible there is work that he could perform. [R. 88].

The hypothetical posed by the ALJ included the limitations resulting from Plaintiff's anxiety/panic disorder and his cardiac disease. [R. 26, 85]. Thus, the ALJ

properly considered the combined effects of Plaintiff's impairments on his ability to perform work.

The Court finds that the ALJ evaluated the record in accordance with the correct legal standards established by the Commissioner and the courts. The Court also finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner is AFFIRMED.

DATED this 31ST day of December, 1996.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE