

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

LINDSEY K. SPRINGER, et. al.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA, et. al.,
Defendants.

Case No. 96-CV-838-H

FILED

JAN 29 1997

Phil Lombard
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE JAN 31 1997

MAGISTRATE'S REPORT AND RECOMMENDATION

Plaintiffs' MOTION FOR PRELIMINARY INJUNCTION [Dkt. 3] has been referred to the undersigned United States Magistrate Judge for report and recommendation.

Plaintiffs seek to enjoin the defendants in their "official capacities from participating in furtherance of their conduct in measuring, calculating, assessing, billing, reviewing, auditing, investigating or otherwise attempt [sic] to gain information relating to the U.S. obligations (12 U.S.C. § 411; 18 U.S.C. § 8), and or the securities [18 U.S.C. § 8, 26 U.S.C. 165(g), 15 U.S.C. 77(c)] which would otherwise flow to the Plaintiffs." [Dkt. 4, ¶ 10].

Plaintiffs acknowledge that the Anti-Injunction Act, 26 U.S.C. § 7421, prohibits maintenance of suits such as the present one which seek to restrain the assessment or collection of taxes. However, Plaintiffs claim to fall within the judicially created exception announced in *Enochs v. Williams Packing and Navigation Co.*, 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962).

In *Williams Packing*, the Supreme Court stated that: "the object of § 7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking

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

FILED

JAN 30 1997

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

AMY D. ERWIN,)
)
 Plaintiff,)
)
 vs.)
)
 MARVIN RUNYON, Postmaster General,)
)
 Defendant.)

Case No. 96-C-177-B

JAN 31 1997

ORDER

Before the Court is the motion for summary judgment filed by defendant, Marvin Runyon, Postmaster General (hereinafter referred to as "USPS") (Docket No. 5).

Plaintiff Amy D. Erwin ("Erwin") brings this action under the Pregnancy Discrimination Act, an amendment to Title VII, 42 U.S.C. §2000e(k), claiming that her former employer, the United States Postal Service ("USPS"), discriminated against her because she was pregnant. Erwin claims that the USPS refused her request for light duty assignment when she suffered complications from her pregnancy. On August 21, 1995, Defendant USPS moved for summary judgment on the grounds that (1) Erwin cannot establish a prima facie case of pregnancy discrimination; and (2) Erwin has presented no evidence that the USPS's reason for denying her light duty was pretextual.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). 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 sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

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

Id. at 252. 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 v. Zenith*, 475 U.S. 574, 585 (1986).

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 must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

Title VII prohibits an employer from discriminating against an employee with respect to terms, conditions, or privileges of employment based on the employee's sex. 42 U.S.C. §2000e-2(a). In 1978, the Pregnancy Discrimination Act ("PDA") added the following amendment to Title VII:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits

under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work

42 U.S.C. §2000e(k). The purpose of the PDA was “to prevent the differential treatment of women in all aspects of employment based on the condition of pregnancy.” *EEOC v. Ackerman, Hood & McQueen, Inc.*, 956 F.2d 944 (10th Cir. 1992) (quoting *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 646 (8th Cir. 1987)).

Where, as here, there is no direct evidence of discrimination, “[c]laims made under the PDA are analyzed under the disparate treatment analysis applied in Title VII cases.” *Ackerman*, 956 F.2d at 947. Thus, Erwin must first meet her initial burden of establishing a prima facie case of pregnancy discrimination. Once she establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). “At the summary judgment stage, it then becomes the plaintiff’s burden to show that there is a genuine dispute of material fact as to whether the employer’s proffered reason for the challenged action is pretextual - i.e. unworthy of belief.” *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995).

To establish a prima facie case under the PDA, Erwin must show that

(1) she belongs to the protected class; (2) she was qualified for the position or satisfactorily performed the duties required of the position; (3) she suffered an adverse effect on her employment; and (4) her position remained open and was ultimately filled by a nonpregnant employee, or that the [adverse employment action] occurred in other circumstances giving rise to an inference of unlawful discrimination, such as evidence that the employer treated plaintiff differently than similarly situated nonpregnant employees.

Dodd v. Riverside Health System, Inc., 1996 WL 29246 at **1 (10th Cir. 1996) (citing *McDonnell Douglas*, 411 U.S. at 802; *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); and *Ackerman*, 956 F.2d at 947-48).

The undisputed facts are as follows. Erwin was hired by the USPS as a transitional letter carrier on January 22, 1994. Transitional employees are temporary employees hired for a period of time (not to exceed 359 days) for the purpose of assisting in the USPS's transition to automation. As such, they are in a different classification than "career" employees; career employees consist of full-time regular and part-time flexible employees. Because they are "fill-gap" employees, transitional employees are not guaranteed any number of work hours and can be assigned a variety of jobs throughout the contract employment period. From the time of her hiring, Erwin performed the same job duties: sorting and delivering mail on a regular delivery route, and collecting and unloading public mail boxes.

Some of the provisions of the collective bargaining agreement between the USPS and the American Postal Workers Union, AFL-CIO ("CBA") are applicable to transitional postal employees; Article XIII is not. Article XIII, Section 2A provides in pertinent part that

[a]ny full-time regular or part-time flexible employee recuperating from a serious illness or injury and temporarily unable to perform the assigned duties may voluntarily submit a written request to the installation head for temporary assignment to a light duty or other assignment.

In compliance with this provision, the USPS grants light duty assignments to pregnant career employees (full-time regular or part-time flexible) who submit a written request in accordance with the procedure outlined in Article XIII. It is USPS policy, however, to deny any request for light duty to transitional employees who are pregnant (or otherwise temporarily unable to perform assigned duties).

On April 29, 1994, due to complications with her pregnancy, Erwin presented a written request for light duty assignment supported by a physician's statement restricting her job performance to lifting no more than thirty pounds and standing/walking no more than five hours/day. Erwin

claims that these medical restrictions would only have precluded her from mailbox collection duties, which entailed lifting mailbags weighing more than thirty pounds and amounted to no more than ten hours/week. Erwin states that she would have been able to continue her delivery route, work approximating thirty hours/week. The USPS, however, denied her request.

The USPS contends that Erwin has not established element (4) of a prima facie case: she has failed to present any evidence giving rise to an inference of unlawful discrimination. The USPS claims that it denied Erwin's request for light duty because she was a transitional employee, and there is no evidence that it treated Erwin differently from other transitional employees. In short, the USPS denied Erwin light duty assignment based upon her employment classification rather than type of disability. Thus, Erwin cannot show that she was discriminated against due to her pregnancy.

Erwin concedes there is no evidence of disparate treatment among transitional employees; *i.e.*, the USPS does not treat pregnant transitional employees any differently than nonpregnant transitional employees. Rather, Erwin argues that the CBA does not preclude transitional employees from receiving light duty and "[s]ince the Postal Service has been granting light duty to other pregnant employees and other employees with temporary disabilities pursuant to the existing Collective Bargaining Agreement, the denial of light duty to the Plaintiff, a Transitional employee, constituted discrimination on the part of the Defendant as against the Plaintiff." *Plaintiff's Response to Defendant's Motion for Summary Judgment*, p. 5 (Docket No. 14).

Erwin's argument, however, supports the USPS's position that the claimed discrimination is based on employment classification and not pregnancy. "Neither the [PDA] nor Title VII prohibits unfair treatment in general, only unfair treatment based on one of the protected classifications." *Dodd*, 1996 WL 29246 at **2. Transitional employment status is not a protected classification. The

PDA “requires the court to compare treatment between pregnant persons and ‘other persons not so affected but similar in their ability or inability to work.’” *Ackerman*, 956 F.2d at 948. Erwin neither claims nor presents any evidence that the USPS treats pregnant career employees any differently than nonpregnant career employees in the assignment of light duty. Further, Erwin concedes that pregnant transitional employees are treated the same as nonpregnant transitional employees in that all transitional employees are denied light duty. While employment classification can form the basis of a Title VII claim, particularly in disparate impact cases in which “‘clearly identifiable employment requirements or criteria, regardless of whether there was intent to discriminate, resulted in a less favorable impact on a protected group,’” *Hawkins v. Bounds*, 752 F.2d 500, 503 (10th Cir. 1985) (quoting *Coe v. Yellow Freight System, Inc.*, 646 F.2d 444, 450 (10th Cir. 1981)), there is no such showing here.¹ Thus, the Court concludes that Erwin has failed to present any evidence giving rise to an inference of unlawful discrimination.

Even if Erwin had presented a prima facie case, she did not rebut the USPS’s legitimate, nondiscriminatory reason for denying her light duty by showing that there is a genuine issue of material fact as to whether the reason was a pretext. The USPS maintains that it has consistently denied any request for light duty made by transitional employees, whatever the medical reason, because it is prohibited from assigning light duty to transitional employees under Article XIII of the CBA.

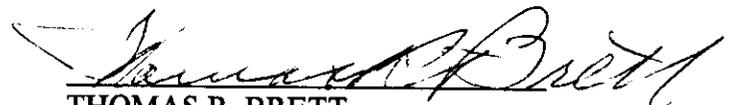
¹In Title VII cases which challenge the effects of bona fide seniority systems, claims “may not be based upon assertions of disparate impact; rather, a plaintiff must prove intentional discrimination and therefore may claim only disparate treatment.” *Hiatt v. United Transportation Union*, 65 F.3d 838, 842 (10th Cir. 1995). The USPS, however, has not raised the issue of seniority in its summary judgment motion and concedes there is nothing in the record indicating that granting light duty to transitional employees would have any effect on the union’s seniority system.

The Court disagrees with the USPS's reading of the CBA. Article XIII only addresses the USPS's obligation to provide light duty to career employees (full-time regular and part-time flexible employees) who meet the requirements of the provision; it in no way refers to transitional employees. Nor does the fact that Article XIII was not adopted for transitional employees by the Board of Arbitrators prohibit the USPS from granting light duty to transitional employees. In sum, while the CBA does not impose any obligation on the USPS to provide light duty for transitional employees, it does not preclude it from doing so.

The Court's rejection of the USPS's interpretation of the CBA, however, does not save Erwin from her burden of establishing pretext. An incorrect interpretation of the CBA, by itself, is insufficient to establish discriminatory intent. *See Daubert v. United States Postal Service*, 733 F.2d 1367, 1370 (10th Cir. 1984). Erwin has presented no evidence that a discriminatory reason more likely motivated the USPS, or that the USPS's refusal to grant Erwin light duty based on its interpretation of the CBA is "unworthy of belief." *Randle*, 69 F.3d at 451. The Court, therefore, finds that Erwin has failed to meet her burden to show that there is a genuine issue of material fact as to whether the USPS's proffered reason is pretextual.

For the reasons stated above, the Court grants defendant's motion for summary judgment. (Docket No. 5).

IT IS SO ORDERED THIS 30th DAY OF JANUARY, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 1-31-97

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

GEORGE L. SALLEE, JR.,)
)
Plaintiff,)
)
vs.)
)
EVANS & ASSOCIATES, a)
Delaware corporation,)
)
Defendant.)

No. 95-C-788-K

FILED

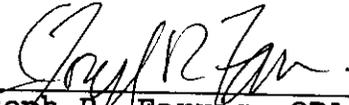
JAN 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL

Pursuant to 41 F.R.C.P., the parties jointly stipulate that this matter, including all counterclaims, be dismissed with prejudice, with each party to bear its own attorneys' fees and costs pursuant to a Settlement Agreement entered as of December 31, 1996.

FELDMAN, FRANZEN, WOODARD,
FARRIS & TAYLOR

By 
Joseph R. Farris, OBA #2835
525 South Main, Suite 1400
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918/583-7129 (Phone)
918/584-3814 (Fax)
ATTORNEYS FOR PLAINTIFF
GEORGE L. SALLEE, JR.

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

By 
Claire V. Eagan, OBA #554
Susan L. Gates, OBA #11365
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
918/594-0400
ATTORNEYS FOR DEFENDANT
EVANS & ASSOCIATES

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

F I L E D

JAN 30 1997

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

State of Oklahoma, ex rel.)
Department of Transportation,)

Plaintiff,)

vs.)

Case No. CV-96-650BU

United States Department of Interior, Bureau)
of Indian Affairs on behalf of the Heirs of David)
CrowChief, Pawnee Allottee 247; and the)
Pawnee County Treasurer,)

Defendants.)

ENTERED ON DOCKET

DATE JAN 31 1997

AGREED JOURNAL ENTRY

This action came on for consideration before the Honorable Michael Burrage Judge of the District Court, and the issues having been considered,

The Court finds that the parties have stipulated and agreed that the defendants' recovery of just compensation should be fixed in the amount of One Thousand Eight Hundred Sixty One and no/100 Dollars (\$1,861.00). The Court further finds that the plaintiff has previously deposited with the Clerk of this Court on October 10, 1996 the sum of One Thousand and no/100 Dollars (\$1,000.00), to the credit of the defendants, pursuant to the Report of Commissioners. Further, the Court finds and orders that any disbursement(s) to be made to any defendant herein pursuant to this final order shall be made only upon proper application of said defendant, and any such application which fails to include a disbursement to the defendant County Treasurer for the payment of all applicable taxes accrued prior to this taking shall be made only upon proof that all such taxes have been paid, or upon express written approval of counsel for the County Treasurer.

Service of process has been perfected as provided by law on all defendants having compensable interest in the property, and on defendants having lien and/or mortgage claims or claims of title against the property. Defendants, having not plead or answered herein, or filed exceptions to the Report of

Commissioners, or Demand for Jury Trial, have, therefore, defaulted and waived their right to contest the taking herein or to object to the ultimate award of compensation to be paid to the defendants for the acquisition of the property.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff's acquisition of the property(ies) described on the attachment(s) hereto, in fee simple unless stated otherwise on the attachments, excluding minerals other than the right to remove and use any and all roadbuilding materials, together with all other relief prayed for by plaintiff in its petition, is hereby granted, approved, and confirmed.

IT IS FURTHER ORDERED that the just compensation to which Defendant(s) are entitled is hereby fixed at One Thousand Eight Hundred Sixty One and no/100 dollars (\$1,861.00) leaving a balance of Eight Hundred Sixty One and no/100 dollars (\$861.00) to be paid to the Defendant(s).

This judgment has been approved by all parties, other than those who are in default or have filed a disclaimer of any interest in the action, and the party submitting it to the Court shall mail a file-stamped copy of the judgment to all parties.

DATE: 1-30-97

s/ MICHAEL BURRAGE

JUDGE OF THE DISTRICT COURT

Approved:

Becky McDowen
BECKY D. McDOWEN, OBA# 13138
Attorney for Plaintiff
200 N.E. 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-2681

Wyn Dee Baker
WYN DEE BAKER, OBA #465
Attorney for Defendant
Assistant U.S. Attorney
333 W. 4th Street, Suite 3460
Tulsa, OK 74103-3809
(918) 581-7463

ERSTP-59C(179)
14116(06)
Parcel 1
6/12/96

A strip, piece or parcel of land lying in part of the SE $\frac{1}{4}$ of Section 2, T 21 N, R 4 E, in Pawnee County, Oklahoma. Said parcel of land being described by metes and bounds as follows:

Beginning at the point where present Northerly right-of-way line of U.S. Highway No. 64 intersects the West line of said SE $\frac{1}{4}$ a distance of 1442.38 feet South of the Northwest corner of said SE $\frac{1}{4}$, thence Northeasterly along said right-of-way line a distance of 688.81 feet, thence N 50°27'50" E a distance of 207.42 feet, thence N 65°50'25" E a distance of 217.25 feet, thence Northeasterly on a curve to the right having a chord bearing of N 69°08'18" E and having a radius of 2959.79 feet a distance of 340.73 feet, thence South a distance of 165.80 feet to a point on the present Southerly right-of-way line of U.S. Highway No. 64, thence Northeasterly along said Southerly right-of-way line a distance of 262.40 feet, thence Southwesterly on a curve to the left having a chord bearing of S 71°18'35" W and having a radius of 2769.79 feet a distance of 528.81 feet, thence S 65°50'25" W a distance of 217.25 feet, thence S 81°12'59" W a distance of 207.42 feet to a point on said Southerly right-of-way line, thence Southwesterly along said Southerly right-of-way line a distance of 724.14 feet to a point on the West line of said SE $\frac{1}{4}$, thence North along said West line a distance of 87.45 feet to point of beginning.

Containing 1.68 acres, more or less of new right-of-way, the remaining area included in the above description being 2.60 acres of right-of-way occupied by the present highway.

All bearings contained in this description are based on the Oklahoma State Plane Coordinate System and are not astronomical bearings.

NOTE!! EXISTING FENCE IN THE TAKE AREA IS NOT TO BE CONSIDERED AS A VALUE FACTOR BECAUSE A NEW REPLACEMENT FENCE WILL BE INSTALLED BY THE STATE DURING CONSTRUCTION AT NO COST TO THE LANDOWNER.

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

BC
CRE
CSW
JBC

ROBERT DEWAYNE)
LAMPKIN,)
)
Plaintiff,)

v.)

Case No. 93-C-200-E ✓

McDONNELL DOUGLAS-)
TULSA, a division of McDONNELL)
DOUGLAS CORPORATION, et al ,)
)
Defendants.)

FILED
JAN 29 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

SUPERSEDEAS BOND

Know all men by these presents:

JAN 30 1997

That International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and Local No. 1093 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), as principals, and Fidelity and Deposit Company of Maryland, as surety, a corporation authorized to transact business in the State of Oklahoma and having power under the statutes of Oklahoma to execute bonds and undertakings in judicial proceedings, as surety, are held and firmly bound unto Robert Dewayne Lampkin in the sum of \$13,371.98 with interest thereon at the rate of 5.60% per anum from April 10, 1996, until paid, and any further costs which may be assessed, for the payment of which, well and truly to be made, we do hereby bind ourselves, our successors and

assigns.

The condition of the foregoing obligation is such that:

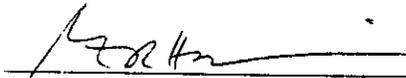
WHEREAS, on the 13th day of May, 1996, judgment was filed in this Court in favor of Robert Dewayne Lampkin and against the principals herein for the sum of \$13,371.91, with interest thereon from April 10, 1996, at 5.6% per anum until paid; and,

WHEREAS, the said principals are appealing from said judgment to the United States Court of Appeals for the Tenth Circuit and give this undertaking in order that execution of the judgment shall be stayed pending the determination of the cause on appeal or on certiorari to the U.S. Supreme Court thereafter;

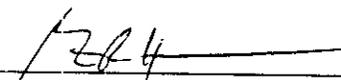
Now, therefore, if the said principals shall well and truly pay the amount of the aforesaid judgment, providing said judgment shall be finally affirmed in whole or in part, within ten (10) days of such affirmance in that event this obligation shall be null and void; otherwise to remain in full force and effect; in such later event, surety agrees the Appellate Court may enter judgment on the Supersedeas Bond without the necessity of further application by Robert D. Lampkin.

Signed this 17 day of January, 1997.

International Union, United Automobile, Aerospace
and Agricultural Implement Workers of America
(UAW), principal

By: 
Authorized Officer Agent

Local 1093 of the International Union, United
Automobile, Aerospace and Agricultural Implement
Workers of America (UAW), principal

By: 
Authorized Agent

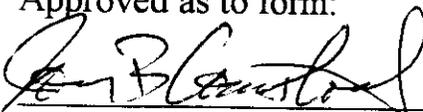
Fidelity & Deposit Company of Maryland, Surety

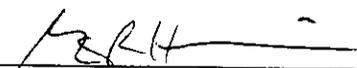
By: 
Attorney in Fact

Approved this 27th day of January, 1997.

By: 
James O. Ellison, United States District Judge

Approved as to form:


Jon B. Comstock, Attorney for Plaintiff


Steven R. Hickman, Attorney for Principals

Power of Attorney
FIDELITY AND DEPOSIT COMPANY OF MARYLAND

HOME OFFICE, BALTIMORE, MD

KNOW ALL MEN BY THESE PRESENTS: That the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation of the State of Maryland, by C. M. PECOT, JR., Vice-President, and C. W. ROBBINS, Assistant Secretary, in pursuance of authority granted by Article VI, Section 2, of the By-Laws of said Company, which are set forth on the reverse side hereof and are hereby certified to be in full force and effect on the date hereof, does hereby nominate, constitute and appoint Thomas K. Baker, Barbara W. Crawford, Cindi L. Smith and C. Gene Quarles, all of Tulsa, Oklahoma, EACH.....

its true and lawful agent and Attorney-in-Fact, to make, execute, seal and deliver, for, and on its behalf as surety, and as its act and deed: any and all bonds and undertakings.....

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Md., in their own proper persons. This power of attorney revokes that issued on behalf of Thomas K. Baker, etal dated June 9, 1994.

The said Assistant Secretary does hereby certify that the extract set forth on the reverse side hereof is a true copy of Article VI, Section 2, of the By-Laws of said Company, and is now in force.

IN WITNESS WHEREOF, the said Vice-President and Assistant Secretary have hereunto subscribed their names and affixed the Corporate Seal of the said FIDELITY AND DEPOSIT COMPANY OF MARYLAND, this 10th day of March, A.D. 1995



FIDELITY AND DEPOSIT COMPANY OF MARYLAND

C. W. Robbins
Assistant Secretary

By *C. M. Pecot, Jr.*
Vice President

STATE OF MARYLAND
COUNTY OF BALTIMORE

ss:

On this 10th day of March, A.D. 1995, before the subscriber, a Notary Public of the State of Maryland, duly commissioned and qualified, came C. M. PECOT, JR., Vice-President and C. W. ROBBINS, Assistant Secretary of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, to me personally known to be the individuals and officers described in and who executed the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposed and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official Seal the day and year first above written.



Carol J. Fader
CAROL J. FADER

Notary Public

My Commission Expires August 1, 1996

CERTIFICATE

I, the undersigned, Assistant Secretary of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, do hereby certify that the original Power of Attorney of which the foregoing is a full, true and correct copy, is in full force and effect on the date of this certificate; and I do further certify that the Vice-President who executed the said Power of Attorney was one of the additional Vice-Presidents specially authorized by the Board of Directors to appoint any Attorney-in-Fact as provided in Article VI, Section 2, of the By-Laws of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

This Certificate may be signed by facsimile under and by authority of the following resolution of the Board of Directors of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND at a meeting duly called and held on the 16th day of July, 1969.

RESOLVED: "That the facsimile or mechanically reproduced signature of any Assistant Secretary of the Company, whether made heretofore or hereafter, wherever appearing upon a certified copy of any power of attorney issued by the Company, shall be valid and binding upon the Company with the same force and effect as though manually affixed."

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of the said Company, this 25th day of December, 1994

J. Gregory Hamilton
Assistant Secretary

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

FILED

JAN 29 1997



Phil Lombardi, Clerk
U.S. DISTRICT COURT

DOLPHUS E. SCHIRMER)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

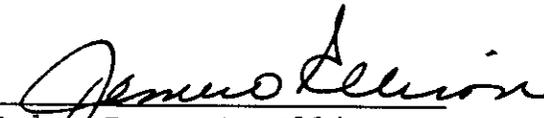
Civil No. 91-C-658-E

~~REDACTED~~
JAN 30 1997

ORDER

Pursuant to the Order and Judgment of the Tenth Circuit Court of Appeal, dated January 20, 1995, it is hereby,

ORDERED AND ADJUDGED that this case is dismissed for lack of subject matter jurisdiction, each party to bear their own litigation costs, any possible attorney's fees or other expenses of this litigation.


Judge James O. Ellison
United States District Court

25

ORIGINAL

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

FILED
JAN 29 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

A. F. ALHAJJI,

Plaintiff,

vs.

SPAGHETTI WAREHOUSE,

Defendant.

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§
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§
§
§
§
§
§

No. 96CV 669K
Title VII, Sec. 1981 Case
Arising in Tulsa County

JURY TRIAL DEMANDED

ENTERED ON DOCKET

STIPULATION OF DISMISSAL

DATE JAN 30 1997

COMES NOW, A. F. Alhaji, Plaintiff in the above-entitled action (hereinafter "Plaintiff Alhaji"), and Spaghetti Warehouse, Inc. (hereinafter "Defendant Spaghetti Warehouse") to stipulate to a dismissal of Plaintiff Alhaji's claims against Spaghetti Warehouse.

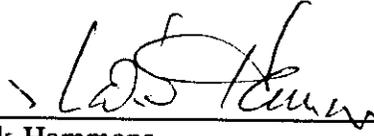
Plaintiff Alhaji and Defendant Spaghetti Warehouse advise the Court that all matters in controversy have been fully and finally settled and compromised.

THEREFORE, IT IS HEREBY STIPULATED, by and between counsel for Plaintiff Alhaji and counsel for Defendant Spaghetti Warehouse that all of Plaintiff Alhaji's claims asserted against Defendant Spaghetti Warehouse in the above-entitled action shall be dismissed with prejudice, each party to bear its own costs of Court and attorneys' fees and request the Court to enter the Order of Dismissal with Prejudice accompanying this pleading.

DATED: January 27th, 1997.

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Respectfully submitted,

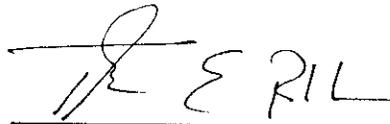


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HUTCHESON & GRUNDY, L.L.P.

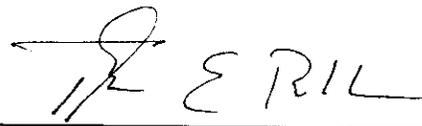
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**ATTORNEYS FOR DEFENDANT
SPAGHETTI WAREHOUSE, INC.**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent by Certified Mail, Return Receipt Requested, to Plaintiff's attorney, Mark Hammons, Hammons & Associates, 401 North Hudson, Lower Level, Oklahoma City, Oklahoma 73102, this 27~~th~~ day of January, 1997.


Thomas E. Reddin

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JEAN A. RODGERS aka JEAN
RODGERS; VETERINARY PRODUCTS,
INC.; LONGVIEW LAKE
ASSOCIATION, INC.; COUNTY
TREASURER, Tulsa County, Oklahoma;
BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

JAN 29 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT



JAN 30 1997

Civil Case No. 95-C 1075B

ORDER OF DISBURSAL

NOW on the 29th day of Jan, 1997, there came on for consideration the matter of disbursal of \$63,712.00 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 \$63,712.00 should be disbursed as follows:

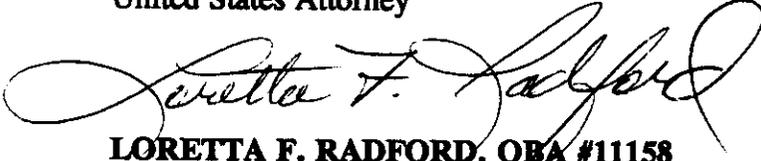
United States Marshal's Costs		\$396.87
Executing Order of Sale	3.00	
Advertising Sale Fee	3.00	
Conducting Sale	3.00	
Appointing Appraisers	6.00	
Appraisers' Fees	225.00	
Publisher's Fee	156.87	
United States Department of Justice Credit for Judgment of \$112,095.68		\$63,315.13

Shawna D. Grest
UNITED STATES DISTRICT JUDGE

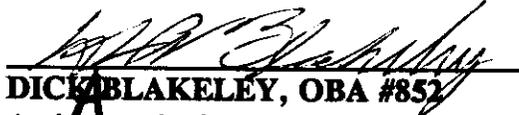
23

APPROVED AS TO FORM AND CONTENT:

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United States Attorney



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

LFR/flv

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JAN 28 1997 *SAC*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RUTH CROSSNO,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER, Commissioner,)
Social Security Administration,)
)
Defendant.)

Civil Action No. 94-C-974-J ✓

ENTERED ON DOCKET
DATE 1/30/97

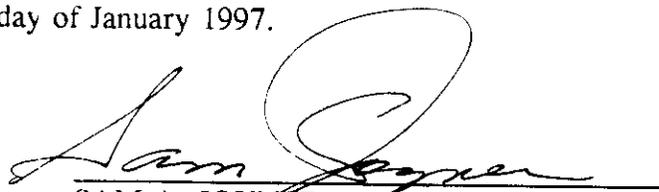
ORDER

On December 17, 1996, this Court remanded the above-referenced matter to the appropriate Administrative Law Judge for further proceedings consistent with the Court of Appeals' Order and Judgment entered on October 17, 1996. No appeal was taken from this Order and the same is now final.

Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on or around January 6, 1997, the parties have stipulated that an award in the amount of \$4,852.75 for attorney fees and \$312.42 costs for a total of \$5,165.17 for all work done before the district court and the Tenth Circuit Court of Appeals is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees and costs under the Equal Access To Justice Act in the amount of \$4,852.75 attorneys fees and \$312.42 costs. If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 28 day of January 1997.



SAM A. JOYNER
United States Magistrate Judge

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

ENTERED ON DOCKET
DATE: 1/30/97

MARIA SANCHEZ,)
an individual,)
)
Plaintiff,)
)
vs.)
)
HAWKINS PRO-CUTS, INC.,)
a Texas corporation, and)
BOB DANE, an Individual,)
d/b/a ProCuts,)
)
Defendants.)

96-C-264-K ✓

FILED

JAN 29 1997

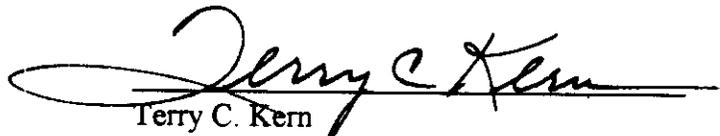
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action came on for consideration before the Court and jury, Honorable Terry C. Kern, Chief Judge, presiding, and the verdict having been duly rendered,

IT IS THEREFORE ORDERED that judgment is hereby entered in favor of the Defendant, Bob Dane d/b/a ProCuts, and against the Plaintiff, Maria Sanchez.

ORDERED this 28 day of January, 1997.


Terry C. Kern
United States District Judge

42

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

ENTERED ON DOCKET
DATE 1-30-97

MARINE MIDLAND BANK,)
)
Plaintiff,)
)
vs.)
)
TULSA LITHO COMPANY, et al.)
)
Defendants.)

No. 96-C-401-K

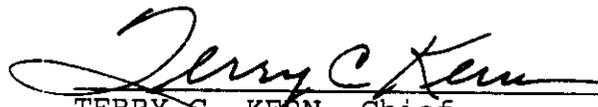
FILED
JAN 29 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

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 28 day of January, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

F I L E D

JAN 29 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MYRNA S. OINES,)

Plaintiff,)

v.)

Case No. 96-C-29-K

SHIRLEY S. CHATER,)

COMMISSIONER OF SOCIAL)

SECURITY,¹)

Defendant.)

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

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

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

9

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 and nonexertional requirements of light work, except for lifting over ten pounds frequently or twenty pounds occasionally and work that is performed in a high-stress environment. The ALJ concluded that she was unable to perform her past relevant work as a secretary, administrative assistant, or child

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).

care provider. The ALJ found that she was 58 years old, which is defined as advanced age, had a high school education, and had acquired work skills, such as using the telephone, typing, filing, recordkeeping, and using office machines, which she demonstrated in past work, and which, considering her residual functional capacity, could be applied to meet the requirements of semi-skilled work functions of other work. The ALJ concluded that, although her additional nonexertional limitations did not allow her to perform the full range of light work, there were a significant number of jobs in the national economy which she could perform, such as general clerical worker, both light and sedentary. Having determined that there were a significant number of jobs in the national economy that claimant could perform, 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:

- (1) There was no adequate reason given for the Appeals Council's failure to reopen the case in light of new medical evidence which included a questionnaire answered by her counselor and a 1995 echocardiogram.
- (2) The ALJ gave no reason for failing to give claimant's counselor's records controlling weight.
- (3) The ALJ incorrectly assessed the testimony regarding claimant and her granddaughter.
- (4) The ALJ's decision that claimant can do light work is not supported by substantial evidence.

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 contends that she has been unable to work since October 15, 1993 because of a heart ailment (mitral stenosis and atrial fibrillation) and inability to handle stress (TR 80). She underwent surgery in March of 1983 for adenocarcinoma of the right breast (TR 119). On March 8, 1983, she began cytotoxic chemotherapy (TR 119). On December 7, 1984, Dr. Lee Newcomer noted that she had completed six months of chemotherapy, was in remission, and had no complaints or pulmonary symptoms (TR 115). On March 27, 1987, Dr. Newcomer noted that she had no complaints (TR 113) and on November 5, 1987 he stated that she was totally free of disease (TR 111). On October 16, 1989, Dr. Newcomer stated that the claimant was doing well and her only complaint was hot flashes (TR 105).

On March 27, 1987, Dr. Newcomer observed that claimant had been noted to have "a mitral valve click and, on echocardiogram, was found to have mitral valve disease," but she had "absolutely no complaints." (TR 113). She went back to work and worked until October of 1993 (TR 84).

Claimant was admitted to the hospital on September 4, 1992 for "dyspnea on exertion, severe fatigue, and two episodes of chest tightness." (TR 133). An echocardiogram done on September 4, 1992 revealed:

The aortic root is normal in size. The aortic valve is tricuspid. The aortic valve leaflets are thick and echodense suggesting fibrosis and possible calcification. The valve does not appear to be significantly

stenotic. The left atrium is significantly dilated and measures 5.8 cm. No abnormal echoes are noted to originate from within the left atrium. The mitral valve leaflets are thick and echodense. The tip of the anterior mitral leaflet is markedly thickened and tethered. The body of the anterior mitral leaflet demonstrates better mobility. The posterior mitral leaflet is essentially immobile. This is consistent with rheumatic mitral stenosis. The left ventricular cavity is normal in size. Left ventricular walls are of normal thickness and demonstrate a relatively normal contraction pattern in systole. The right ventricular cavity is normal in size with normal right ventricular anterior wall motion. The tricuspid and pulmonic valves are partially imaged and appear normal. There is a small pericardial effusion.

Doppler studies including color flow mapping shows evidence of mild mitral regurgitation. Diastolic flow across the mitral valve is turbulent with a maximum flow velocity of 2 meters per second. The calculated mitral valve area by pressure half-time was 1 square centimeter. The mean mitral valve gradient is estimated at 8.5 mm of mercury. Aortic insufficiency is also identified. Systolic flow across the aortic valve shows no significant aortic valve gradient. Some tricuspid regurgitation was also identified.

(TR 141). She was discharged on September 8, 1992 with a diagnosis of rapid atrial flutter with congestive heart failure and old rheumatic heart disease with mitral stenosis (TR 129). The doctor prescribed Quinaglute, Lanoxin, and Coumadin (TR 129). Dr. Roger Paul reported on December 28, 1992 that she had been doing well and having no dyspnea or chest pain (TR 150).

On March 23, 1993, Dr. Bradley Lowery reported that claimant had no complaints and just needed her medications refilled (TR 185). On June 29, 1993, Dr. Lowery found that she was not having any problems except occasional palpitations which caused no distress (TR 180). On September 17, 1993, Dr. Lowery stated that an EKG showed an "atrial fibrillation with a rate of about 60 and no significant change

from previous EKGs (TR 176). On December 29, 1993, Dr. Lowery found that she was not having any more problems than usual except mild fatigue (TR 171).

Dr. Donald Inbody did a psychological evaluation of claimant for the Social Security Administration on April 6, 1994 (TR 160-162). She denied any specific psychiatric problems, but admitted that she gets some stress and anxiety when she feels out of control (TR 160). She told the doctor she had never seen a psychiatrist or had any depression or suicidal ideation (TR 160). She felt more hyped up and nervous, occasionally had some disturbances in attention and concentration, and had been told to avoid being in crowds and risking respiratory infections (TR 160). Dr. Inbody concluded as follows:

[T]his is a pleasant, neatly attired female who is cheerful and cooperative in interview. 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 did not appear to be particularly anxious, nor did she show any clinical signs of depression. Sleep pattern and appetite have been referred to above. There are no disturbances in recent and remote memory and her fund of general information is good as were mathematical computations, similarities and proverbs. There were no disturbances in attention and concentration and judgement is felt to be intact.

Dr. Inbody found that claimant had an adjustment reaction with anxious mood, moderate psychosocial stressors, and her "[c]urrent global assessment of functioning is 70, and the highest GAF in the past year is 70."⁴ (TR 161-162).

⁴ 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")

On May 20, 1994, Dr. Lowery reported that claimant had hives on her face and neck "possibly secondary to anxiety." (TR 169). Valium was prescribed for two days, and the rash cleared up (TR 169). On August 1, 1994, she had colon problems, and a proctosigmoidoscopy showed mild irritation (TR 168).

Dr. Lowery reported on September 9, 1994, that claimant was having occasional palpitations and some sharp chest pain which lasted only a few seconds (TR 197). An EKG showed no change from the one in March of 1994 (TR 197). The doctor stated that her complaint was "more of a feeling of the sensation of the atrial fibrillation." (TR 197).

Judy Wilson, a nurse, reported in a short letter that she had been seeing claimant for four months to talk about the difficulties of dealing with stress and its physical manifestations (TR 188). Ms. Wilson stated that claimant experienced a high level of stress whenever she had to function "in a group of people, such as a working environment." (TR 188). Ms. Wilson stated that stress triggered "a variety of incapacitating physical symptoms related to her heart condition, such as: chest pain, sweating, shortness of breath, cold sweats and nausea" (TR 188). Ms. Wilson stated that these symptoms caused claimant to feel anxious and depressed about returning

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).

to work (TR 188). Ms. Wilson stated that, although the claimant had made progress in coping with her anxiety and depression, "I have no reason to doubt that she will still continue to suffer from the overwhelming symptomatology stemming from her medical condition whenever she does experience increased stress levels" (TR 188).

The next month, on November 18, 1994, claimant was awarded custody of her six-year-old granddaughter following a hearing to determine her capacity to serve (TR 196). Dr. Lowery approved this since her heart was "giving her no acute problems at this time" (TR 196).

On December 9, 1994, Dr. Lowery reported that claimant was having no palpitations or other problems (TR 195). An echocardiogram on May 23, 1995 was comparable to the one on September 4, 1992, showing as follows:

This is a complete and technically adequate echocardiographic evaluation. It demonstrates moderately thickening of the mitral leaflets with limited excursion and evidence of severe mitral stenosis and mild mitral regurgitation. The aortic valve appears to be normal. There is mild aortic insufficiency. The tricuspid valve is normal with moderate tricuspid insufficiency. The left ventricle appears to be normal in size with normal wall thickness and preserved systolic function. Right ventricle appears to be normal. The left atrium is markedly dilated. Right atrium is moderately dilated. Central venous pressure appears to be moderately elevated. Pulmonary arterial pressure is also moderately elevated. A small pericardial effusion is seen with no evidence of hemodynamic compromise.

(TR 221).

On February 8, 1995, Judy Wilson answered a questionnaire on claimant's residual functional capacity (TR 213-219). She found that claimant was moderately impaired in her ability to deal with general public such as bus drivers, neighbors, or

clerks in stores (TR 215). She found that claimant was extremely impaired in her ability to complete a normal workday, because she suffered "[e]xtreme fatigue in a.m. and afternoon time periods with resultant impairment, in short term memory and concentration." (TR 215). She concluded that claimant was extremely impaired in her ability to concentrate and attend to a task over an eight-hour period and her ability to perform routine tasks on a sustained basis over an eight-hour day for a number of weeks without frequent absences (TR 216). She found that claimant had marked impairment in her ability to perform routine tasks on a regular basis without frequent absences, to maintain continuous performance to complete a task, and to work a normal eight-hour workday without psychologically based interruptions or distractions (TR 216-217). Ms. Wilson stated: "[v]arious medical problems result in dysphoric conditions: [increased] stress can result in anxiety/fear due to heart palpitations and tachycardia. - Spastic colon activity can lead to shame and anxiety - both can [sic] viewed as distractions." (TR 217). Finally, she concluded that claimant had extreme impairment in her ability to tolerate customary work pressures in a work setting where there are certain production requirements and demands and had not been able to function outside of a highly supportive living situation for the past two years (TR 218).

While Ms. Wilson found that claimant's psychiatric condition precluded her from working, Dr. Ron Smallwood found on December 29, 1993 that she had no medically determinable psychological impairments (TR 50) and the ALJ completed a psychiatric review technique form on March 8, 1995 and found that her depression

only slightly restricted her daily activities and social functioning and her deficiencies of concentration often caused her to fail to complete tasks in a timely manner (TR 33-35).

At a hearing on February 1, 1995, claimant testified that she has been guardian of her 6-year-old granddaughter for several months (TR 225-226). She claimed caring for the child did not involve stress like that involved in outside employment (TR 232-233). She said she was unable to work because her heart problems cause her to get very tired and she has difficulty bending over or working because she gets out of breath (TR 230). She stated that she takes a nap at 10:30 a.m. and 2:00 p.m. every day (TR 235). She testified that she can walk about half a block, then has to rest (TR 236). She stated that she feels dizzy twice a week and that five to six times a year she gets so dizzy that she falls (TR 236-237). She testified that she has had a spastic colon since age 25 (TR 239). She stated that her medication helps her, but she still has a "flareup" of diarrhea occasionally (TR 240). She stated that she began taking Prozac in September 1994 for depression because of her "trouble dealing with problems." (TR 242-243). She stated that she saw Judy Wilson for counseling eight to ten times from July to October 1994, but had not seen her since October 1994 (TR 243, 246).

There is no merit to claimant's first and second contentions that there was no adequate reason given for the Appeals Council's failure to reopen the case in light of new medical evidence or given by the ALJ when he did not give claimant's counselor's records controlling weight. The Appeals Council reviewed the additional

evidence submitted by claimant's counsel after the ALJ's decision, which included a questionnaire answered by Judy Wilson on February 8, 1995 and a May 23, 1995 echocardiogram, but concluded these did not provide "a basis for changing the ALJ's decision" (TR 4). The 1995 echocardiogram did not show "worsening" mitral stenosis in May of 1995, but rather showed that the stenosis existed, as the 1992 echocardiogram reflected (TR 141, 220-221).

The ALJ discussed Judy Wilson's October 17, 1994 one-page letter concerning claimant's inability to deal with stress (TR 26-27, 188) and, in fact, gave it great weight when he concluded that her residual functional capacity for light work was reduced by her inability to perform work in a high-stress environment (TR 31). He did not have knowledge of Ms. Wilson's February 8, 1995 answers to the questionnaire when he reached his decision.

The court finds that Ms. Wilson's opinions in the questionnaire are highly suspect, because she is an RN and not a Ph.D. psychologist and only saw claimant eight to ten times over a four-month period from July to October, 1994. She had not seen claimant for four months when she answered the questionnaire. Her knowledge of claimant's medical problems was clearly based on claimant's subjective complaints, not objective medical findings. There was no documentation supporting her conclusions or showing a treatment regimen. There was adequate reason for the Appeal Council to conclude that the questionnaire did not provide a basis for changing the ALJ's decision. Her conclusions are completely at odds with all other doctors who have treated or evaluated claimant, including Dr. Inbody and Dr.

Smallwood, trained psychologists. A treating doctor's opinion may be disregarded if it is brief, conclusory, and unsupported by medical evidence. Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987).

There is also no merit to claimant's third contention that the ALJ incorrectly assessed the testimony regarding claimant and her granddaughter. The ALJ stated:

The claimant testified at the hearing that she was awarded custody of her 6-year-old granddaughter in November 1994. Since that time, she has been the person primarily responsible for the care of the 6-year-old. Among other daily activities, the claimant takes the child to school every day and also picks her up The claimant is able to care for her 6-year-old grandchild and maintain her household Although the vocational expert also testified that a degree of vocational adjustment would be required, the Administrative Law Judge finds that the claimant clearly has the capacity to make the adjustment. The claimant's adaptability is perhaps best indicated by her admirable willingness to assume a very challenging role as a caregiver to her granddaughter. The claimant correctly pointed out that there are differences in the stress of caring for a child versus the stress to be encountered in an office environment, and having to report to work each day. The issue, however, is the claimant's adaptability to the stress. The claimant has demonstrated her ability to make that adjustment to the lower stress that she would encounter, as compared to the kind of stress she faced in the past.

(TR 28, 29, 30). This assessment of claimant's testimony regarding the care of her granddaughter was accurate. Claimant's treating physician approved the claimant's guardianship of the child, finding that her health condition would allow her to take on such a responsibility (TR 196).

Finally, there is no merit to claimant's fourth contention that the ALJ's decision that claimant can do light work is not supported by substantial evidence. "Residual functional capacity" is defined by the regulations as what the claimant can still do

despite his or her limitations. Davidson v. Secretary of Health & Human Servs., 912 F.2d 1246, 1253 (10th Cir. 1990). The Secretary has established categories of sedentary, light, medium, heavy, and very heavy work, based on the physical demands of the various kinds of work in the national economy. 20 C.F.R. § 404.1567. This regulation provides that:

"Light work" involves "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it 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. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

Substantial evidence supports the ALJ's finding that claimant can do light work, reduced by her inability to work in a high-stress environment. No medical doctor or assessor has found that she cannot lift twenty pounds or do a good deal of walking or standing if she is able to rest occasionally.

Her daily activities show no significant limitations. As the ALJ noted, on November 9, 1992, she stated that each day she cooked for one hour and cleaned for one hour, shopped one hour every third day, wrote letters two hours once a week, read for one hour, sewed cloth toy animals for seven grandchildren, did crewel embroidery for one hour a day, walked and stretched one hour twice a week, and drove a car when necessary for visiting, shopping, doctor's visits, and errands (TR 28, 83). On December 27, 1993, she stated that during an average day she fed the

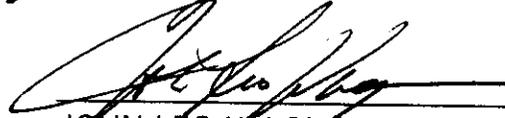
dog, made the bed, did dishes left from the night before, watched television, took a shower, called her mother, made three meals, took naps, ran errands, wrote letters, read, sewed, did stretching exercises, and listened to music (TR 28, 88).

The ALJ properly considered claimant's fatigue, as the court did in Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). In that case, the court examined the plaintiff's contention that the ALJ ignored his complaints of disabling fatigue and concluded that the ALJ properly considered objective evidence in the record, such as claimant's recounting of his daily activities, in making his assessment, and noted that credibility is the province of the ALJ. Id. The court concluded that "[n]o medical evidence supports claimant's allegations of fatigue; his testimony alone cannot establish a nonexertional impairment." Id. This is also true in the case at bar.

The jobs of general and sedentary clerical worker which the ALJ found claimant could perform do not require physical abilities which the medical evidence shows claimant lacks. Only claimant's self-serving testimony conflicts with the ALJ's conclusions. She admitted at the hearing that she started having real problems with depression after the 1983 cancer surgery, and she worked for years after that (TR 80, 243). She also worked for many years after her heart condition was identified in 1987 (TR 80, 113). She is able to participate in many activities during the day and care for a young child (TR 83, 88, 225-226). Her treating physicians reported no significant complaints during 1993 and 1994 (TR 120, 176, 180, 185, 195, 196).

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

Dated this 28th 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

F I L E D

LOIS D. CLARK,
SS# 444-56-6974

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security Administration,

Defendant.

JAN 28 1997 *SJC*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-227-J ✓

ENTERED ON BOOKS
DATE 1/23/97

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 28 day of January 1997.



Sam A. Joyner
United States Magistrate Judge

15

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

LOIS D. CLARK,
SS# 444-56-6974

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security Administration,

Defendant.

JAN 28 1997 *SAE*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-227-J ✓

ORDER^{1/}

ENTERED ON BOOKS
DATE 1/30/97

Plaintiff, Lois D. Clark, 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 ALJ did not properly consider the opinion of Plaintiff's treating physician, (2) the ALJ used an incorrect legal standard in the evaluation of Plaintiff's pain, (3) the ALJ's determination of Plaintiff's residual functional capacity was incorrect, (4) the hypothetical question posed by the ALJ to the vocational expert did not contain all of Plaintiff's restrictions, and (5) the ALJ's decision was not supported by the record. For the reasons discussed below, the Court **reverses and remands** the decision of the Commissioner.

^{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 January 24, 1994. [R. at 85]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Dana McDonald (hereafter, "ALJ") was held February 24, 1995. [R. at 42]. By order dated March 24, 1995, the ALJ determined that Plaintiff was not disabled. [R. at 21-36]. Plaintiff appealed the ALJ's decision to the Appeals Council. On February 6, 1996, the Appeals Council denied Plaintiff's request for review. [R. at 4].

14

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on August 3, 1955, and was 39 years old at the time of her hearing. [R. at 46]. Plaintiff completed high school, and enrolled in several secretarial courses at Tulsa Junior College. [R. at 53]. Plaintiff testified that she was unable to complete the courses due to her back pain. Plaintiff's most recent work experience was as a waitress. [R. at 50].

Plaintiff testified that she was unable to work due to degenerative disk disease in her back, pain and spasms in her back, surgery on her right knee, arthritis, and cramps in her hands.

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

^{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).

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

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

42 U.S.C. § 423(d)(2)(A).

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

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary^{4/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff was not disabled at Step Five of the sequential evaluation process. The ALJ concluded that Plaintiff had the residual functional capacity to perform work which required no lifting over ten pounds frequently or twenty pounds occasionally, no prolonged standing or sitting, and no repetitive use of her right hand. The ALJ discounted a letter submitted from Plaintiff's

^{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."

treating physician noting that it did not necessarily contradict the ALJ's conclusions. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff could work as a cashier, a hand packager, and a telephone solicitor/answerer.

IV. REVIEW

Plaintiff's Treating Physician

Plaintiff asserts that the ALJ improperly discounted the opinion of one of Plaintiff's treating physicians, Dr. Zeiders. According to Plaintiff, Dr. Zeiders concluded that Plaintiff's impairments "prevent her from engaging in any substantial type of employment." *Plaintiff's Brief at 4*. Plaintiff states that the ALJ improperly concluded that the statement by Dr. Zeiders referred to an unsuccessful work attempt by Plaintiff, and that Dr. Zeiders would not necessarily conclude that Plaintiff was prohibited from engaging in less "substantial" work.

Plaintiff is correct that a treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). 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).

In this case, the ALJ noted that

On November 28, 1994, Dr. Zeiders [a treating physician] stated "It is my professional opinion that her impairments prevent her from engaging in any substantial type employment". There is ambiguity in this opinion, as the doctor does not indicate what he means by "substantial type" employment. The letter was written at a time when the claimant was working part-time at the Railhead Cafe as a waitress. This was work of which he was aware because his own treatment notes contain reference to it. [The regulations] state, in pertinent part, that the opinions of treating physicians are given controlling weight in determining disability when they are well supported by medically acceptable clinical and diagnostic techniques and are not inconsistent with the other substantial evidence. Dr. Zeiders' treatment records reflect his opinion that the claimant had a capacity to perform certain work, work which he describes as sedentary. For example, on August 21, 1992, Dr. Zeiders stated that the claimant was going to school and majoring in secretarial work and "I would think that she would look more for a job in that line". . . . Finally, on January 3, 1994, Dr. Zeiders stated "She has sought paralegal help in her effort to obtain social security and I think at her age she may have some difficulty. . . . The Administrative Law Judge finds that to the extent that Dr.

Zeiders' letter of November 28, 1994, indicates that the claimant is not physically able to perform work, it is opinion contrary to the record considered as a whole.

[R. at 31-32 citations omitted].

Although the ALJ has provided some of his reasons for rejecting the opinion of the treating physician, the problem underlying the analysis of the ALJ and that of Plaintiff is that both parties misread Dr. Zeiders' letter. On November 28, 1994, Dr. Zeider wrote,

[Plaintiff] is a 39 year old married white female who is presently under treatment for problems relating to her back and to her right knee. The diagnosis involving her lower back is degenerative disc disease involving the 2 levels of the lower lumbar region. . . . The problem relating to her right knee is that of deterioration of the medial compartment of her right knee resulting in chronic arthritis. . . . **It is my professional opinion that her impairments prevent her from engaging in any sustainable [sic] type employment and that this would only aggravate her symptoms and result in her need for increasing medication and treatment.**

[R. at 225 emphasis added]. Both Plaintiff and the ALJ base their arguments and conclusions related to a statement, attributed to Dr. Zeiders, that Plaintiff could not engage in any "substantial type of employment." However, Dr. Zeiders' statement is that Plaintiff could not engage in any "sustainable type of employment." Furthermore, in his RFC evaluation, Dr. Zeiders noted that, in an eight hour workday, Plaintiff would be able to sit for three hours, stand for one hour and walk for one hour -- this totals five hours, which is obviously not the equivalent of an eight hour day.

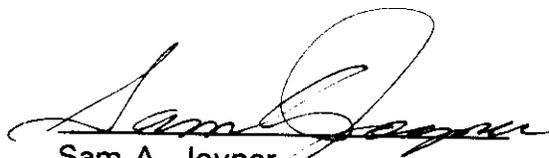
The ALJ discounts or explains Dr. Zeiders' opinion, in part, as reflective of the type of work that Plaintiff was performing at the time (*i.e.* Plaintiff's unsuccessful work attempt as a waitress), and as not inconsistent with the performance by Plaintiff of sedentary work. However, Dr. Zeiders' letter, rather than focusing on the "type" (*i.e.* sedentary or light) of work in which Plaintiff was engaged, states that Plaintiff cannot perform sustained activity. Dr. Zeiders' RFC assessment supports the use of "sustained" rather than "substantial" in his letter because he concludes that Plaintiff could perform activities (*i.e.* walk, stand, sit) totaling only five hours in an eight hour work day.

The ALJ does provide several reasons for discounting Dr. Zeiders' opinion. (For example, in April of 1994, Dr. Zeider noted that if Plaintiff can get a "sit down type of job" she should "take it"). However, the ALJ's opinion was based on a misreading of Dr. Zeider's letter. On remand, the ALJ should evaluate Dr. Zeider's letter, considering the degenerative nature of Plaintiff's condition and the various factors outlined by the Tenth Circuit Court of Appeals in Goatcher.

The misinterpretation of the letter from Dr. Zeider undermines the consideration by the Court of the remaining issues of error raised by Plaintiff. The Court in no way expresses any opinion as to the ultimate issue of Plaintiff's disability, or as to the appropriate weight that the ALJ should give to Dr. Zeiders' letter on remand. These issues are appropriately addressed only by the ALJ on remand.

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

Dated this 28 day of January 1997.

A handwritten signature in black ink, appearing to read "Sam Joyner", written in a cursive style.

Sam A. Joyner
United States Magistrate Judge

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

CARL ELDRIDGE,)
)
) Plaintiff,)
)
) v.)
)
) SHIRLEY S. CHATER,)
) COMMISSIONER OF SOCIAL)
) SECURITY,¹)
)
) Defendant.)

FILED

JAN 28 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-44-B

ENTERED ON DOCKET

DATE JAN 29 1997

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

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

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Leslie S. Hauger, Jr. (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 was impaired by low back pain and left quadriceps weakness, severe enough to reduce his ability to work. The ALJ concluded that claimant had the residual functional capacity to perform a full range of sedentary work of an unskilled nature, subject to no prolonged stooping or bending. He found that claimant's impairments and residual functional capacity

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).

precluded him from performing his past relevant work. The ALJ considered claimant's impairments, residual functional capacity, age, education and work experience, and found that there existed occupations in the national economy in significant numbers that claimant could perform. Having determined that there were jobs in the national economy that claimant could perform, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ's finding that claimant was not disabled was not based on substantial evidence, because the ALJ improperly rejected claimant's allegations of pain as not fully credible.
- (2) The ALJ erroneously based his conclusions on the vocational expert's response to a hypothetical question which did not include mention of claimant's pain or inability to sit or stand for extended periods.

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 contends that he has been unable to work since October of 1993 because of thigh and back problems (TR 64). On October 23, 1992, he fell off a horse and lacerated the lateral aspect of his left thigh (TR 81). The laceration was a deep longitudinal one severing some of the subcutaneous nerves, part of the vastus lateralis, the iliotibial band, and the rectus femoris, lacerating the periosteum, and scraping the bone itself (TR 81). He had surgery and the nonviable muscle and other

bodies were removed, the blood vessels separated and fulgurated, and the bone cleaned (TR 83). He went through rehabilitation until January 4, 1993 and made slow progress (TR 84-93).

On January 25, 1993, he was seen for constant deep pain and a bone scan was ordered (TR 95). This revealed osteomyelitis involving the patella and possibly the proximal fibula, and an inflammatory process involving the lateral compartment of the knee joint as well. (TR 95, 97, 104). He was admitted for incision and drainage of the left thigh (TR 95-99). He began physical therapy on February 16, 1993 (TR 95). His knee joint was found to be normal in x-rays done on April 19, 1993, except for a small lucent area above the joint which was a residual from the earlier infection (TR 103).

On May 17, 1993, claimant's thigh had healed "about as much as it is going to heal." (TR 178). His doctor reported that he had a strength loss in the thigh muscles, especially in the vastus lateralis and the tibial band, of 30% as compared to the unaffected right side, but his range of motion was fairly good "if one allows him to complain of pain under the patella every time he moves his knee and puts weight on his leg." (TR 78). His doctor stated: "[H]e has achieved maximum medical benefit. We are going to discharge him from follow up." (TR 178). He returned to work at a livestock auction from July to October, 1993 (TR 56).

Claimant complained of back pain in October of 1993, and x-rays showed "a transitional vertebra at L-5. No fractures or other acute abnormalities are demonstrated, however." (TR 102). His doctor reported on November 1, 1993 that

"Mr. Eldridge's back problem and dysesthesia has not really yielded very much. He continues to have pain and in many ways could be worse. He is having a sensation of dysesthesia and tingling in the area of the L-3-4 and 4-5 root on his left side" (TR 179). X-rays on November 1, 1993 showed a herniated nucleus pulposis at L4-L5 in the midline, extending slightly more to the left than the right (TR 101).

Dr. Vincent Runnels reported on November 16, 1993 that claimant had a limited range of motion of the back, extension at 10 degrees caused some radiation of pain to his left knee, flexion was limited, and he could come within one foot of touching his toes (TR 159). Straight leg raising and a neurologic exam were negative, but at 90 degrees straight leg raising caused some pain on the left (TR 159). Claimant was treated with a shot of cortisone IM, a prescription for Wygesic and Lodine, a lumbar supporter, and two weeks of bedrest (TR 159).

A lumbrosacral MRI done on November 17, 1993, was abnormal, as shown by:

- 1) Degeneration and prominent central bulging of the L5-S1 disc with the nerve root not well appreciated at this level, although the images more inferiorly did not suggest nerve root impingement or significant spinal stenosis.
- 2) Bulging of the L4-5 disc more prominently towards the left, possibly causing a lateral recess stenosis although the neuroforamina appeared patent.
- 3) Bulging of the L3-4 disc more prominently towards the right, causing some indentation upon the thecal sac, but the neuroforamina appeared normal and there did not appear to be significant spinal stenosis.

It is uncertain if either the L5-S1 or L4-5 discs on the left are significant enough to be causing a radicular syndrome.

(TR 108).

On December 27, 1993, Dr. Runnels reported that claimant continued to have severe left hip pain and leg numbness and was unimproved in spite of bedrest, a cortisone shot, bent knee tricks, and other usual measures, and had actually gotten worse the last two weeks with increased stiffness and constant pain (TR 160). Surgery was recommended (TR 144, 160). A left L4-5 hemilaminotomy and discectomy was performed on February 15, 1994, and at the time of discharge, he was without headache or leg pain and was ambulating without difficulty (TR 110).

On February 25, 1994, Dr. J. B. Blankenship reported that claimant was doing well (TR 164). The doctor said he was having some intermittent aching in his legs, which was to be expected, and told him to increase his activity (TR 164). However, claimant began to experience more pain and on March 28, 1994, a lumbosacral MRI showed:

- 1) Status post left L4 laminectomy with L4-5 discectomy with residual scar in the left lateral recess region with one very small area of non-enhancement, suggests very small amount of residual tissue or poorly enhancing scar. There is no appreciable significant mass effect at this level with the neuroforamina being patent.
- 2) Diffuse bulging of L5-S1 disc more prominently in the midline, but slightly more prominent towards the left as compared to the right. The amount of bulging does not appear to be significantly changed from the previous study in November 1993 prior to this person's discectomy.
- 3) Mild bulging of the right L3-4 disc without apparent change from preoperative study.
- 4) By this test, I am unable to see any definite nerve root compression to explain this patient's continued left sided symptoms.

(TR 154).

On April 11, 1994, Dr. Blankenship placed him on Day Pro and stated: "[a]t present I don't think further surgery would be of benefit although I told him we might need to pursue other options when I see him back." (TR 166).

On May 5, 1994, Dr. Blankenship reported that claimant was not doing any better, but the only other surgical option since there was no evidence of a recurrent disc of any significance would be to consider a fusion (TR 141). The doctor found it was too early to consider this "since with some continued medications and physical therapy he might improve to the point that we can get him up to being able to retrain him to do some other type of work. I told him I would like to see him back in 2 months." (TR 141).

On July 8, 1994, Dr. Blankenship reported that claimant was still having a marked degree of lower back pain and muscle spasms (TR 140). The doctor stated:

He has lost some weight although not quite as much as I would like for him to and I've encouraged him over the next 2 months to lose another 10#-15#. He is walking but not to the degree that he needs to be and I've encouraged him to get his walking up to 2 miles a day and to do the exercises we had outlined to him 2 months ago. He's off his non-steroidals now and was actually having some stomach discomfort on these so I don't think restarting those would be of benefit. I do think a muscle relaxer might be helpful so I've placed him on some Flexeril for this. I don't foresee in the near future being able to get him back to the type of work that he was doing, riding horses, prior to this disc herniation. I do feel any sedentary type work that would not involve any lifting over 20# and no prolonged stooping or bending would be possible. If there is a job that you could find with his previous employer or some other type of work, please feel free to call me and give me the specifics and we can see if this would be okay.

(TR 140) (emphasis added).

On September 22, 1994, x-rays showed "[c]ongenital variant of partial sacralization of the L5 segment. Otherwise, normal appearing lumbar spine" (TR 152). His doctor stated on that date that he still complained of back pain (TR 152).

Dr. Blankenship concluded:

He's lost about ten pounds, but is not exercising or walking due to his muscle spasms. Since we've tried physical therapy in the past, I told him I felt our best chance of getting him markedly improved would be a referral to the Dolorology Clinic. I've already assigned him an impairment rating and instructed his workers' comp carrier that I don't think he's going to be able to get back to his previous type work.

(TR 156).

Dr. Blankenship completed a residual functional capacity assessment on March 14, 1994 and found that claimant could occasionally lift fifty pounds, frequently lift twenty-five pounds, stand, walk, or sit about six hours in an eight-hour workday, and had unlimited ability to push and/or pull.

At a hearing on February 9, 1995, claimant stated that he does not watch television, reads very little, does some work around the house, helps his wife teach the children at home, and does no yard work (TR 193-194). He can lift a bag of groceries if it is not too heavy (TR 194). He can stand 15-20 minutes, walk 30 minutes, and sit a short time (TR 195). However, the ALJ noted that he sat more than 30 minutes during the hearing and last saw a doctor in September 1994. (TR 15).

There is no merit to claimant's first contention that the ALJ's finding that claimant was not disabled was not based on substantial evidence, because the ALJ

improperly rejected claimant's allegations of pain as not fully credible. Courts generally treat credibility determinations made by an ALJ as binding upon review. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we 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).

The ALJ noted that the social security regulations and case law in Luna v. Bowen, 834 F.2d 161, 165-166 (10th Cir. 1987), set out the considerations to determine if complaints of pain are credible, such as persistent attempts to find relief, use of a cane or crutches, regular contacts with doctors, daily activities, and use of medications. The ALJ considered all of these and stated:

After such due considerations, the primary reasons that I find claimant's allegations to not be fully credible are, but are not limited to, the objective findings, or the lack thereof, by treating and examining physicians, the lack of medication for severe pain, the frequency of treatments by physicians and the lack of discomfort shown by claimant that [sic] the hearing.

Even more specifically, the claimant suffered an injury to his left thigh which necessitated surgical repair twice. The claimant had a 30% disability for that injury assessed by Dr. Garbutt, a treating physician. The claimant was left with reduced strength in his left quadriceps muscle. The claimant's back problems were treated by Dr. Blankenship, a treating physician, with a hemilaminotomy and diskectomy. The claimant had no leg pain, Dr. Blankenship gave the claimant a 10% impairment and wrote that he could perform sedentary work with no lifting over 20 pounds with no prolonged stooping or bending. The objective medical evidence of the claimant's treating physicians demonstrates that the claimant has the ability to perform sedentary work-related activities despite his complaints of pain and limitation which are not supported to the level he alleges. Further diminishing the claimant's credibility is the fact that the claimant takes on [sic]

prescription medications, was able to sit longer than he testified to, and has not seen a doctor since September 1994.

Considering all of the evidence, and the criteria of SSR 88-13, I find that claimant has a residual functional capacity to perform a full range of light work subject to no prolonged stooping or bending.

(TR 16-17).

There is substantial evidence to support the ALJ's conclusion that claimant's allegations of disabling pain were not credible. The medical evidence shows that, while he suffers some pain, his thigh and back conditions were successfully treated with surgery. He returned to work after his thigh healed (TR 56). No doctor has found that he is permanently unable to work due to pain, he has been told to exercise, and Dr. Blankenship concluded that he could indeed do sedentary work (TR 140). There is no evidence that he uses a cane or crutches, and he is able to help around the house, home school his children, and carry groceries if they are not too heavy (TR 194). He admitted that his doctor has told him to walk (TR 195).

The ALJ did not err in concluding that claimant's daily activities, the lack of objective medical findings by treating doctors, the lack of medication for severe pain, and the length of time that claimant sat at the hearing suggested that he was not in constant, disabling pain. The claimant's allegations of disabling pain and limitations are not supported by any medical evidence. The Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical

testimony as to the severity of the pain. "To establish disabling pain without the explicit confirmation of treating physicians may be difficult." Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988). Unsubstantiated subjective evidence is not sufficient to prove disability. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990).

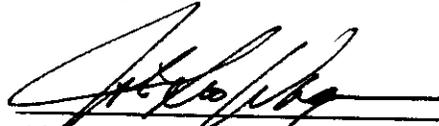
There is also no merit to claimant's contention that the ALJ erroneously based his conclusions on the vocational expert's response to a hypothetical question which did not include mention of claimant's pain or inability to sit or stand for extended periods. It is true that "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

Initially the ALJ established that the vocational expert was familiar with the regulation pertaining to disability (TR 215). The ALJ's hypothetical question assumed that claimant could do sedentary work, with no prolonged stooping or bending (TR 215). Claimant's representative at the hearing was only able to elicit favorable testimony from the vocational expert by asking the expert to assume impairments that the ALJ properly deemed unsubstantiated (TR 217-218). These opinions, based on

unsubstantiated assumptions, were not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993).

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

Dated this 28th day of January, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\ORDERS\ELDRIDGE.WPD

ENTERED ON DOCKET
DATE 1-29-97

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

FILED

JAN 27 1997

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

ELECTRICAL POWER SYSTEMS, INC.,)
)
 Plaintiff,)
 v.)
)
 CEGELEC AUTOMATION, INC.)
)
 Defendant.)

Case No. 95-C-1097-H ✓

JUDGMENT

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

The Court entered a judgment in this case on November 1, 1996, ordering Defendant to make payment to Plaintiff in the amount of \$125,000.00, in accordance with a jury verdict returned on October 24, 1996. On January 9, 1997, the Court entered an Order granting Defendant's Motion for New Trial, subject to remittitur of \$11,459.02 by Plaintiff, thereby reducing the total judgment recovered by Plaintiff to \$113,540.98. Plaintiff has acknowledged and accepted the remittitur of \$11,459.02.

IT IS THEREFORE ORDERED that Defendant make payment to Plaintiff in the amount of \$113,540.98.

IT IS SO ORDERED.

This 27TH day of January, 1997.


Sven Erik Holmes
United States District Judge

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

ALICE REBECCA WALLACE,)
individually and as)
administrator of the estate)
of JOSHUA JON-JOSEF LUNA,)
)
Plaintiffs,)
)
vs.)
)
THE CITY OF BROKEN ARROW,)
et al.,)
Defendants.)

No. 96-C-469-K ✓

ENTERED ON DOCKET
DATE JAN 28 1997

FILED

JAN 27 1997 *mw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of the defendant Kelly Harper for summary judgment and plaintiff's motion to dismiss. Plaintiff is administrator of the estate of the deceased Joshua Jon-Josef Luna. The complaint alleges that on or about May 25, 1995, deceased was at a party in Broken Arrow, Oklahoma, wearing oversized, loose-fitting pants. Police officers arrived at the party around 3 a.m., and began mocking deceased's attire. One officer allegedly seized hold of deceased's pants, and jerked them upward violently, rupturing deceased's scrotum. Deceased was placed under arrest, and allegedly was not given medical care, although he requested it. (The deceased was subsequently killed in an automobile accident having no relation to these allegations). Plaintiff sues the city, the chief of police and three police officers under 42 U.S.C. §1983 and state law.¹

¹By Order filed November 4, 1996, the Court granted plaintiff's motion for joinder of defendants, which sought to add four other party defendants. Plaintiff has never filed an amended complaint or obtained service upon these additional parties.

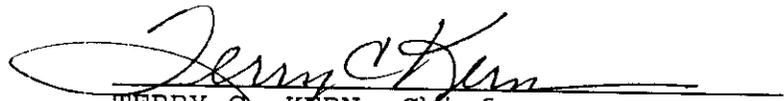
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In the present motion by defendant Harper, he asserts that he had absolutely no contact with deceased during the relevant time period. He asserts his only exposure to this case was the preparation of reports and other paperwork and transportation of charges against the deceased to the Tulsa County District Attorney's Office. In her response, plaintiff concedes Harper had no involvement and moves to dismiss.

It is the Order of the Court that the motion of the plaintiff to dismiss defendant Kelly Harper (#42) is hereby GRANTED. This action is dismissed as to defendant Kelly Harper with prejudice.

It is the further Order of the Court that the motion of defendant Harper for summary judgment (#29) is hereby declared moot.

ORDERED this 24 day of January, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

FILED ON DOCKET

DATE JAN 28 1997

CIDNEY GARCIA,
Plaintiff,
vs.
SHIRLEY S. CHATER,
Commissioner of Social Security,
Defendant.

No. 95-C-448-K

FILED

JAN 27 1997

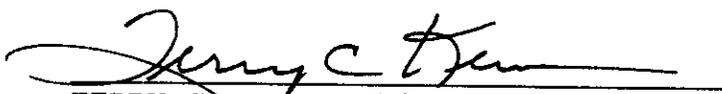
Phil Lombardi, Clerk
U.S. DISTRICT COURT

J U D G M E N T

This matter came before the Court for consideration of the appeal of Plaintiff to the Secretary's denial of Social Security disability benefits. The issues having been duly considered, a decision having been rendered, and in accordance with the Order entered contemporaneously herewith, affirming the Secretary's decision

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

IT IS SO ORDERED THIS 27 DAY OF JANUARY, 1997.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

20 C.F.R. §416.920(f).

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

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

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

The plaintiff asserts two errors by the ALJ and the Magistrate Judge. First, the plaintiff contends she should have been found disabled at step three, as her condition met the criteria under 20 C.F.R. Pt. 404, Subpt. P, App.1, §1.03. This section describes the disability of "arthritis of a

major weight-bearing joint". At a minimum, plaintiff argues, the proceeding should be remanded because the ALJ did not adequately articulate his reasoning on this issue, as required by Clifton v. Chater, 79 F.3d 1007 (10th Cir.1996).

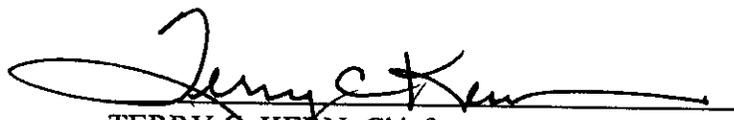
The ALJ's finding of no per se disability is indeed presented in conclusory fashion in the *second* opinion, from which plaintiff has appealed. However, the second opinion explicitly incorporates by reference the ALJ's first opinion in this proceeding, which was subsequently remanded by the Appeals Council. In the first opinion, the ALJ described essentially those items of evidence mentioned by the Magistrate Judge in recommending the decision be affirmed: claimant had had reconstructive surgery on her ankle several times, but was able to work and bear weight upon it; her gait was slow, but reasonably stable and safe. The ALJ also stated he carefully reviewed the available medical reports. (Tr. 166). This Court concludes the ALJ's opinion, while not extensively detailed, adequately articulates his examination of the evidence and his reasoning. The Court finds, as did the Magistrate Judge, substantial evidence supports the conclusion as to step three of the evaluation..

The plaintiff next contends the ALJ erred in evaluating the plaintiff's subjective complaints of pain. The Court disagrees. The ALJ evaluated the factors listed in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir.1987), and plaintiff has not demonstrated the necessity of overturning the ALJ's credibility determination. See, e.g., Talley v. Sullivan, 908 F.2d 585, 587 (10th Cir.1990). One argument by plaintiff deserves specific mention. The ALJ cited plaintiff's failure to use prescription medication as one factor in discounting her complaints of pain. In her objection, plaintiff contends she has no money and cannot afford such medication. However, Social Security Ruling 82-59 requires a claimant to document she has explored "[a]ll possible resources", such as charitable and

public assistance agencies. No such documentation has been made.

It is the Order of the Court that the objection of the plaintiff to the Report and Recommendation of the Magistrate Judge is hereby DENIED. The decision of the Commissioner is AFFIRMED.

SO ORDERED THIS 24 DAY OF JANUARY, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 27 1997



Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
DAVID L. DECKARD aka David Lee)
Deckard; EVELYN M. DECKARD aka)
Evelyn Marie Deckard; CITY OF)
CLAREMORE, Oklahoma; COUNTY)
TREASURER, Rogers County, Oklahoma;)
BOARD OF COUNTY)
COMMISSIONERS, Rogers County,)
Oklahoma; STATE OF OKLAHOMA, ex)
rel. DEPARTMENT OF HUMAN)
SERVICES,)
)
Defendants.)

Civil Case No. 95 C 617B ✓

JAN 27 1997

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27 day of Jan,
1996. 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, Rogers County, Oklahoma, and BOARD OF
COUNTY COMMISSIONERS, Rogers County, Oklahoma, appear by Michele L. Schultz,
Assistant District Attorney, Rogers County, Oklahoma; the Defendant, CITY OF
CLAREMORE, OKLAHOMA, appears not having previously filed a Disclaimer; and the
Defendants, DAVID L. DECKARD aka David Lee Deckard, EVELYN M. DECKARD aka
Evelyn Marie Deckard and STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN
SERVICES, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, DAVID L. DECKARD aka David Lee Deckard, signed a Waiver of Summons on August 3, 1995; that the Defendant, CITY OF CLAREMORE, OKLAHOMA, acknowledged receipt of Summons and Complaint on July 7, 1995, by Certified Mail; that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, acknowledged receipt of Summons and Complaint on September 11, 1995, by Certified Mail; that Defendant, COUNTY TREASURER, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on July 10, 1995, by Certified Mail; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on July 10, 1995, by Certified Mail.

The Court further finds that the Defendant, EVELYN M. DECKARD aka Evelyn Marie Deckard, was served by publishing notice of this action in the Claremore Daily Progress, a newspaper of general circulation in Rogers County, Oklahoma, once a week for six (6) consecutive weeks beginning October 1, 1996, and continuing through November 5, 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 Defendant, EVELYN M. DECKARD aka Evelyn Marie Deckard, and service cannot be made upon said Defendant by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, EVELYN M. DECKARD aka Evelyn Marie Deckard. 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 party served by publication with respect to her present or last known place of residence and/or mailing address. 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 Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, filed their Answer on July 13, 1995; that the Defendant, CITY OF CLAREMORE, OKLAHOMA, filed its Disclaimer on August 9, 1995; and that the Defendants, DAVID L. DECKARD aka David Lee Deckard, EVELYN M. DECKARD aka Evelyn Marie Deckard and STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, DAVID L. DECKARD, is one and the same person as David Lee Deckard, and will hereinafter be referred to as "DAVID L. DECKARD." The Defendant, EVELYN M. DECKARD, is one and the same person as Evelyn Marie Deckard, and will hereinafter be referred to as "EVELYN M. DECKARD." The Defendants, DAVID L. DECKARD and EVELYN M. DECKARD, were granted a Divorce in Rogers County, Oklahoma, Case No. FD D-89-9, on February 23, 1989. The Defendants, DAVID L. DECKARD and EVELYN M. DECKARD, are both single unmarried persons.

The Court further finds that on June 6, 1986, the Defendants, DAVID L. DECKARD and EVELYN M. DECKARD, executed and delivered to MIDFIRST MORTGAGE CO., their mortgage note in the amount of \$53,924.00, payable in monthly installments, with interest thereon at the rate of 9.0 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, DAVID L. DECKARD and EVELYN M. DECKARD, then husband and wife, executed and delivered to MIDFIRST MORTGAGE CO., a real estate mortgage dated June 6, 1986, covering the following described property, situated in the State of Oklahoma, Rogers County:

Lot 20 in Block 1 of SPRING MILL SOUTH II, an Addition to the City of Claremore, Rogers County, Oklahoma, according to the recorded Plat thereof.

This mortgage was recorded on June 20, 1986, in Book 733, Page 685, in the records of Rogers County, Oklahoma.

The Court further finds that on July 1, 1986, MIDFIRST MORTGAGE CO., assigned the above-described mortgage note and mortgage to MIDLAND MORTGAGE CO., AN OKLAHOMA CORPORATION, its successors and assigns. This Assignment of Mortgage was recorded on December 5, 1986, in Book 747, Page 198, in the records of Rogers County, Oklahoma.

The Court further finds that on June 19, 1989, Midland Mortgage Co., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on June 26, 1989, in Book 809, Page 838, in the records of Rogers County, Oklahoma.

The Court further finds that on June 12, 1989, the Defendant, DAVID L. DECKARD, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on July 11, 1990, and July 1, 1991.

The Court further finds that on September 12, 1991, David Lee Deckard filed his voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-03199-C. On October 4, 1995, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on *.

The Court further finds that the Defendant, DAVID L. DECKARD, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, DAVID L. DECKARD, is indebted to the Plaintiff in the principal sum of \$79,790.44, plus interest at the rate of 9.0 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, DAVID L. DECKARD, EVELYN M. DECKARD and STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, are in default, and have no right, title or interest in the subject real property.

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

The Court further finds that the Defendant, CITY OF CLAREMORE, OKLAHOMA, Disclaims any right, title, or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem. against the Defendant, DAVID L. DECKARD, in the principal sum of \$79,790.44, plus interest at the rate of 9.0 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.61 percent per annum until paid, plus the costs of this, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, DAVID L. DECKARD, EVELYN M. DECKARD, CITY OF CLAREMORE, OKLAHOMA, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, COUNTY TREASURER and BOARD OF COUNTY

COMMISSIONERS, Rogers 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, DAVID L. DECKARD, 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;

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

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

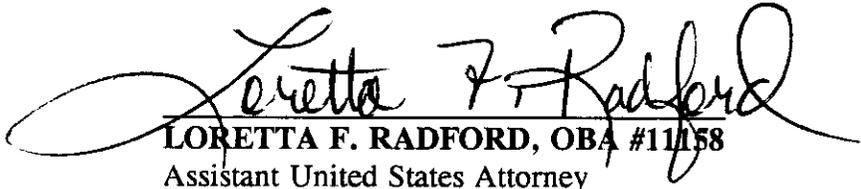
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this

judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney

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


MICHELE L. SCHULTZ, OBA #13771

Assistant District Attorney
219 S. Missouri, Room 1-111
Claremore, OK 74017
(918) 341-3164
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Rogers County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 617B

LFR:flv

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

FILED

JAN 27 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROYAL EQUIPMENT, INC., a)
Delaware corporation,)

Plaintiff,)

vs.)

No. 96-C-801-K

CYPRESS EQUIPMENT FUND, LTD.,)
a Florida limited)
partnership,)

Defendant.)

ENTERED ON DOCKET

DATE JAN 28 1997

ORDER

Before the Court is the Defendant's Motion to Dismiss (docket # 10), Plaintiff's Motion For Leave to File Amended Complaint (docket # 18), and Plaintiff's Objection to Magistrate's Order (docket # 26).

Statement of Facts

In the summer of 1992, Defendant and Plaintiff negotiated and executed an agreement to remanufacture and sell large mining trucks. At least some of the negotiation "discussions" took place via facsimile between Cypress Equipment Fund, Ltd.'s ("Cypress") Steve Harwood in San Francisco, California, and Royal Equipment, Inc.'s ("REI") Dave Kintigh in Tulsa, Oklahoma. Appendix to Plaintiff's Response and Objection to the Defendant's Motion to Dismiss, Exhibit 3. Cypress is a limited partnership with its principal place of business in San Francisco, California. Cypress, as owner of at least one truck known in the mining industry as a Unit Rig Model MK-30, engaged the services of Royal Equipment, Inc. ("REI"), to "arrange for and supervise the remanufacturing of the

Trucks such that the Trucks as remanufactured are saleable to third parties." *Remanufacturing Service Agreement* ("the Remanufacturing Agreement"), *Recitals 1*. REI is a remanufacturing company with its principal places of business in New York and Tulsa, Oklahoma.

Pursuant to the agreement, any trucks acquired for manufacturing purposes were to be transported to REI's shop in Gillette, Wyoming, where they were to be dismantled and inspected. *Remanufacturing Agreement* ¶ 1.2. Upon completion of the inspection, REI was to prepare a remanufacturing budget, and, if the budget was approved, was to implement the remanufacturing process. *Id.* ¶ 1.3. If the remanufacturing budget was not approved by Cypress, REI agreed to store the trucks at its premises free of charge for 180 days. *Id.* ¶ 1.3. Once a remanufacturing budget was approved by Cypress, REI agreed to develop a plan for the remarketing of the remanufactured truck. *Id.* at ¶ 1.4. If such a plan was approved, it would be implemented, and REI would be responsible for storing and maintaining the truck free of charge pending the final sale and disposition of the remanufactured truck. *Id.* ¶ 1.5. Pursuant to the Remanufacturing Agreement, REI was to keep Cypress informed of its progress on at least a bi-weekly basis. *Id.*

In addition to the above provisions, the Remanufacturing Agreement allowed either party to the agreement to terminate the agreement on thirty days notice if the first truck had not been sold within one year after substantial completion of its remanufacture. *Id.* ¶ 10.1.4. If a termination of the agreement

occurred pursuant to paragraph 10.1.4, Cypress had several options. First, it could elect to have REI continue the dismantling or remanufacturing of any truck which was in the process of being dismantled or remanufactured at the time the agreement was terminated. Second, Cypress had the option, upon written notice within thirty days of the termination of the agreement, of paying REI the unreimbursed remanufacturing costs, which would cut off REI's right to receive any proceeds from the sale of the truck. *Id.* ¶¶ 10.2.1, 10.2.2(i). If Cypress failed to exercise the option to reimburse REI, under the agreement, REI would then have thirty days to exercise an option to acquire title to the truck from Cypress. *Id.* ¶ 10.2.2 (ii).

Of particular significance in this case, the Remanufacturing Agreement contained a clause whereby the parties agreed to arbitrate "[a]ny dispute or controversy among the parties hereto arising under or in connection with this Agreement, or the breach thereof, including whether any matter shall be subject to arbitration pursuant to this provision . . .". *Remanufacturing Agreement* ¶ 7. Any arbitration awarded would then be entered in a court of competent jurisdiction in California. *Id.* Additionally, the Remanufacturing Agreement provided that, unless other arrangements were made via written notice, notice, demands or other communications were to be given and delivered Cypress in San Francisco, and to REI in New York, and that the Agreement was to be construed and enforced under California law. *Id.* ¶ 12(a), (f).

During the course of the agreement, Cypress and REI

communicated frequently by facsimile regarding progress on various marketing, acquisition, and remanufacturing processes. *Appendix to Plaintiff's Response and Objection to the Defendant's Motion to Dismiss, Exhibits 12-40.* This correspondence normally occurred between Cypress' Matt Chun in San Francisco, and REI's Dave Kintigh in Tulsa. The facsimile transmissions indicate that several telephone conversations took place between these two individuals as well.

On February 17, 1995, Cypress notified REI that it intended to terminate the Remanufacturing Agreement pursuant to paragraph 10.1.4, and that it did not intend to exercise its option to reimburse REI and cut off REI's rights to sale proceeds pursuant to paragraph 10.2.2(i) of the Remanufacturing Agreement. *Exhibit B, Complaint.* Cypress further notified REI that it had the option under paragraph 10.2.2 (ii), to acquire the title to the truck from Cypress. *Id.* The letter indicated the purchase price that was being offered to REI, and indicated that the option to purchase would remain open until April 18, 1995. *Id.*

REI asserts that it never exercised its option to purchase the truck under the Remanufacturing Agreement, but rather entered into a separate Letter Agreement by which REI agreed to purchase the truck. *Exhibit C, Complaint.* According to the Complaint, the Letter Agreement was negotiated via telephone between REI in Tulsa, Oklahoma and Cypress in San Francisco, California. The Letter Agreement contains no arbitration clause. *Id.*

On April 7, 1995, Cypress forwarded to REI in Tulsa, a

proposed Purchase Agreement which, among other things, set forth the purchase price agreed upon in the Letter Agreement, and terminated the parties' obligations under the Remanufacturing Agreement. *Complaint, Exhibit D.* The Purchase Agreement specifically saved the provisions of the Remanufacturing Agreement pertaining to the arbitration of disputes. *Id.* ¶ 4.1. This Purchase Agreement was never executed, and the truck at issue remains unsold and is currently being stored in Gillette, Wyoming.

Procedural History

Although it is unclear what occurred from April 30, 1995 to March 5, 1996, it is clear that on March 5, 1996, Cypress filed a Demand for Arbitration and a Complaint before the American Arbitration Association ("AAA") in San Francisco, California, seeking declaratory relief as to the ownership of the unsold truck and damages for breach of contract, conversion, and interference with prospective economic advantage. *Complaint, Exhibit E: Complaint Filed with AAA.* According to the Complaint filed with the AAA ("AAA Complaint"), REI was unable to comply with the terms of the Letter Agreement, refused to proceed with the purchase of the truck, and continued to attempt to sell the truck to a third party. *AAA Complaint* ¶ 13. Cypress further asserted that it informed REI in September of 1995 that REI had no right to retain or sell the truck. *Id.* ¶ 14. Cypress alleged that it made numerous subsequent attempts to obtain possession or control over the truck, which were all frustrated by REI. *Id.* ¶ 15.

REI asserts that the disagreement with Cypress was not subject

to arbitration since the Remanufacturing Agreement containing the arbitration clause was terminated by Cypress. REI further states that it did not participate in the arbitration process, and that it only appeared in order to object to the jurisdiction and authority of the arbitrator. On August 23, 1996, an arbitration hearing on the matter was held in which REI was not physically present. *Complaint ¶ 19.* REI filed the Complaint in this action on September 4, 1996, seeking declaratory judgment that the dispute between the parties is not subject to arbitration.

On September 25, 1996, AAA informed the parties that an arbitration award would be entered prior to October 24, 1996. *Plaintiff's Application for a Temporary Restraining Order and Preliminary Injunction, and Brief in Support, Royal Equipment, Inc. v. American Arbitration Association, Inc., 96-cv-907-B, at 2.* REI filed an Application for a Temporary Restraining Order in this Court on October 3, 1996 seeking to restrain AAA from issuing an arbitration award pending resolution of its declaratory action against Cypress. *Royal Equipment, Inc. v. American Arbitration Association, 96-CV-907-B (N.D. Okla. 1996).* That same day, the arbitrator entered an award which declared Cypress the owner of the truck, and awarded Cypress \$95,000 in damages. *Notice of Motion and Motion of Cypress Equipment Fund ltd. to Dismiss for Lack of Personal Jurisdiction, Exhibit A.* REI subsequently dismissed the action against AAA, and Cypress filed for confirmation of the arbitration award with the United States District Court for the Northern District of California ("California District Court") on

October 18, 1996. *Id.*, Exhibit B.

On November 14, 1996, Cypress filed a Motion to Dismiss this action for lack of jurisdiction. Additionally, Cypress filed a Motion for a Protective Order preventing REI from conducting discovery pending a ruling by this Court on the Motion to Dismiss, or pending resolution of the confirmation in the California District Court. A status conference and hearing on Cypress' Motion for a Protective Order and REI's Motion to Compel discovery in the declaratory action before this Court was held before Magistrate Frank McCarthy on December 9, 1996. Pursuant to that hearing, Magistrate McCarthy suspended discovery in this matter pending a decision on the Motion to Dismiss in this case or pending a resolution of the arbitration confirmation in the California District Court.

On December 5, 1996, REI filed a Motion for Leave to File Amended Complaint reasserting a claim for declaratory relief regarding the arbitrability of the dispute, and additionally asserting claims for Breach of Contract and for recovery under Quantum Meruit for recovery of costs incurred as a result of remanufacturing, insuring and preserving the truck.

Cypress obtained confirmation of the arbitrator's award in the United States District Court for the Northern District of California on January 13, 1997.

Discussion

I. *REI's Motion for Leave to Amend*

Pursuant to *Fed. R. Civ. Pro.* 15(a), a party may request leave

to amend a pleading, and such leave should be "freely given when justice so requires." Although courts have typically construed Rule 15 liberally, leave to amend may be denied where the matter asserted is the subject matter of another pending suit, when the claim sought to be added is barred by a judgment in a previous action, or when the claim could not survive a motion to dismiss. See Charles A. Wright, et al., 6 *Federal Practice and Procedure Civil 2d*, § 1487 at 643 (West 1990) and cases cited therein.

In this case, Plaintiff's Proposed Amended Complaint reasserts a claim for declaratory judgment as to the arbitrability of the dispute between the parties. This claim cannot be pursued in an amended complaint, nor in the original complaint because the claim is moot. An arbitration award has been entered by AAA, and has been confirmed by the California District Court. This Court no longer has the authority to determine the arbitrability of the dispute between REI and Cypress. REI had an opportunity to dispute AAA's jurisdiction both before the arbitrator and before Judge Chesney in the California District Court, and both forums determined that REI had waived its right to object to the arbitrator's jurisdiction. *Cypress Equipment Fund, Ltd. v. Royal Equipment, Inc.*, No. C-96-3783-MMC at 22 (N.D. Cal. 1997). While the standard governing arbitrability might be more stringent after an award has been entered, REI had from March 1996 to file a declaratory action with this Court, but chose to wait until after an arbitration hearing on the matter had been held. This issue is moot, and may not be further pursued in this Court. Plaintiff's

Motion for Leave to File Amended Complaint is DENIED as to a claim for declaratory relief.

Plaintiff's second and third claims under the Proposed Amended Complaint are likewise barred. In Count 2 of the Proposed Amended Complaint, Plaintiff states a claim for breach of an oral contract in which Cypress allegedly agreed to settle the dispute with REI prior to the arbitration hearing. In Count 3, Plaintiff seeks to recover costs incurred as a result of the remanufacturing, insuring, and maintenance of the truck in dispute.

These claims fail for a number of reasons. "A party whose claims have been decided in arbitration may not then bring the same claims under new labels." *Schattner v. Girard, Inc.*, 668 F.2d 1366 (D.C. Cir. 1981). "The same is true of claims that *should* have been submitted to arbitration, even if they were not actually heard . . ." This Court believes that Count 2 of the Proposed Amended Complaint is yet another attempt by REI to avoid full payment of the arbitration award, to create jurisdiction over a settled dispute in this forum, and continue litigation which is now at a close. Additionally, the Court finds that the dispute alleged in Count 2 of the Proposed Amended Complaint falls squarely within the language of the arbitration clause as "[a]ny dispute or controversy among the parties hereto arising under or in connection with this Agreement, or the breach thereof, including whether any matter shall be subject to arbitration pursuant to this provision . . .".

Similarly, the issues raised in Count 3 of the Proposed Amended Complaint fall within the very heart of the matter

litigated in arbitration and confirmed by the California District Court. The Arbitration Complaint specifically requests that the arbitrator determine the rights, responsibilities, and obligations of the parties as provided for in the Remanufacturing Agreement. The claims in Count 3 of the Proposed Amended Complaint specifically seek recovery of obligations which are expressly provided for within the confines of the Remanufacturing Agreement: insurance, storage, and costs of remanufacture and maintenance. The rights and obligations of the parties under the Remanufacturing Agreement were determined by the arbitrator, and therefore REI is estopped from pursuing such claims. Even if REI were not estopped from pursuing recovery for expenditures incurred under the Remanufacturing Agreement, REI's claim should have been filed with the California District Court as a motion to modify the arbitration award. Arbitration Act, 9 U.S.C. § 11. This Court is not the proper forum for such a claim.

For the foregoing reasons, REI's Motion for Leave to File Amended Complaint is DENIED as to Proposed Count 2 and 3.

II. *Defendant's Motion to Dismiss*

Defendant has filed a Motion to Dismiss the original Complaint asserting that this Court does not have jurisdiction over Cypress. Cypress particularly relies upon the fact that none of its agents ever physically entered the State of Oklahoma. This Court disagrees with Defendant's assertions that there are insufficient contacts with this forum to put Cypress on notice that it might be "haled into court" in Oklahoma. It is well established that "modern

commercial transactions often involve little contact with the forum beyond that of mail and telephone communications." *Continental American Corp. v. Camera Controls Corp.*, 692 F.2d 1309, 1314 (10th Cir. 1982). Thus lack of physical presence within a forum is not dispositive. At least some of the original Remanufacturing Agreement was negotiated via telephone between a Cypress representative in San Francisco and a REI representative in Tulsa. While this standing alone does not justify the imposition of jurisdiction over disputes arising out of the Remanufacturing Agreement, it is clear that a great deal of communication took place via facsimile and telephone between Cypress' Matt Chun in San Francisco and REI's Dave Kintigh in Tulsa. While telephone calls and facsimile transmissions alone are not necessarily sufficient to establish minimum contacts, *Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1077 (10th Cir. 1995), the key inquiry is whether the defendant purposely availed itself of the privilege of conducting activities with the forum State. *Rambo v. American Southern Ins. Co.*, 839 F.2d 1415, 1419 (10th Cir. 1988). The Constitution¹ seeks to protect defendants from being haled into court solely as the result of "random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." *Id.* The numerosity of these communications in combination with the fact that these conversations were clearly integral to the business relationship and execution of the ongoing contractual relationship

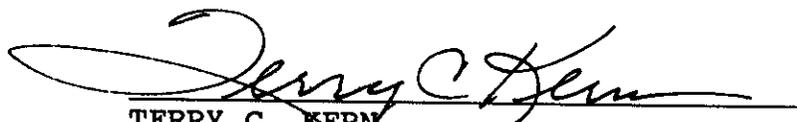
¹ Oklahoma's long arm statute provides for jurisdiction to the extent allowed by Due Process.

between the parties convinces this Court that establishing jurisdiction over Cypress in this matter would not offend Due Process. For these reasons, Defendant's Motion to Dismiss (docket # 10) is hereby DENIED.

Despite denial of Defendant's Motion to Dismiss, the Court has determined that the Court is without jurisdiction in this matter as the Complaint fails to state a justiciable case or controversy. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78, 110 S. Ct. 1249, 1253, 108 L.Ed.2d 400 (1990); *American Booksellers Assoc., Inc. v. Schiff*, 868 F.2d 1199 (10th Cir. 1989). The Original Complaint filed by REI seeking declaratory relief is therefore DISMISSED with prejudice pursuant to *Fed. R. Civ. Pro* 12(h)(3).

REI's Objection to the Magistrate's Order (docket # 26) is moot, and thus DENIED.

ORDERED this 24 day of January, 1997.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

and received a life sentence from Rogers County (Oklahoma) Associate District Judge Edwin D. Carden. Despite being detained in the Rogers County Jail for thirteen (13) days following his conviction, Petitioner did not attempt to withdraw his guilty plea, nor did he file a notice of appeal within the statutory time.

On September 6, 1994, some eight years after the date of his Oklahoma first degree murder conviction, petitioner filed a letter requesting post-conviction relief from his conviction in CRF-85-231 with the Rogers County District Court. On September 29, 1994, Petitioner filed a motion for Writ of Habeas Corpus, a motion for leave to appeal out of time, a motion to withdraw guilty plea (and a brief in support of each), a certificate of mailing, a pauper's affidavit, and a motion for appointment of counsel. Petitioner next filed an application for extension of time and brief in support of motion for transcript at public expense on October 3, 1994.

On October 6, 1994, Rogers County District Judge Jack Mayberry denied all Petitioner's motions without entering findings of fact and conclusions of law. Before doing so, Judge Mayberry entertained and granted the oral motion to withdraw of Petitioner's appointed trial counsel, Jack Gordon Jr. Unsatisfied with the disposition of his several motions before the Rogers County District Court, Petitioner filed a Writ of Mandamus in the Oklahoma Court of Criminal Appeals seeking an Order mandating the Rogers County District Court to enter findings of fact and conclusions of law concerning the denial of his motions. The Oklahoma Court of Criminal Appeals so ordered and the Rogers County District Court eventually complied.

The Oklahoma Court of Criminal Appeals affirmed the Rogers County District Court's denial of Petitioner's post-conviction motions on December 7, 1995. The instant Petition for Writ of Habeas Corpus was filed January 22, 1996.

*Analysis*¹

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986). The exhaustion doctrine is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994) (*quoting* Rose v. Lundy, 455 U.S. 509, 518 (1982)).

This Court finds Petitioner has failed to exhaust his remedies available in the courts of the State of Oklahoma in that his instant Petition contains a heretofore unexhausted claim of ineffective assistance of counsel. The unexhausted claim is set forth as Proposition II of the instant Petition for Writ of Habeas Corpus and raises the ineffective assistance claim based on a perceived conflict of

¹On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act, H.R.Rep. No. 104-518, 104th Cong., 2d Sess., which provides new standards for analyzing a petition for a writ of habeas corpus. The Court does not believe that the new provisions set out in section 105 apply to petitions, like the one at hand, which were filed before the passage of the Act. Although Congress specifically mandated that the new procedures for habeas corpus petitions involving capital punishment are to apply to all pending and subsequently filed cases, Congress declined to include such language in section 105, and therefore the Court infers that retroactivity was not intended. In any event, even if the Court viewed the statute as lacking the clear intent favoring retroactive application, the Court believes section 105 would have a truly retroactive effect and therefore be subject to the "traditional presumption" against retroactive application of a statute." Landgraf v. USI Film Prods., 511 U.S. 244 (1994). Therefore, the 1996 amendments to section 2254 do not apply to the instant case.

interest between Petitioner's court-appointed counsel and the victim's husband. Apparently, the claim arose from the following dialogue between Rogers County District Judge Jack Mayberry and Petitioner's counsel, Jack Gordon Jr., at the October 6, 1994 hearing on Petitioner's various motions:

I represented Mr. Hylock (sic) many years ago in a murder case here in Rogers County. If it please the Court, I do not want to do that anymore. He killed Don Reynold's wife. Don is my friend. I did it once and I don't want to do it again.

* * * *

I just wanted to make sure that everyone understood that I did not want appointed again. It was almost more than I could stand the first time. Thank you, sir.

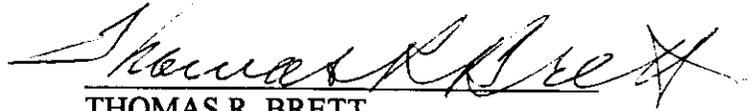
Transcript of Proceedings of October 6, 1994, Petitioner's Ex. A, p. 3, lines 6-11, p. 4, lines 7-10.

Obviously, the unexhausted ineffective assistance claim was not raised in the Rogers County District Court as the underlying basis of the claim was not revealed until after the Petition for Writ of Habeas Corpus was filed with the Rogers County Court. Further, Petitioner did not include this claim in his Petition in Error before the Oklahoma Court of Criminal Appeals. *See* Response to Petition for Writ of Habeas Corpus, Ex. B.

Pursuant to 28 U.S.C. § 2254 (b), the Court hereby **DISMISSES WITHOUT PREJUDICE** the Petition for Writ of Habeas Corpus for failure to exhaust the remedies available in the courts of the State of Oklahoma.²

²There is serious question concerning the viability of Petitioner's remaining claims in light of Coleman v. Thompson, 501 U.S. 722, 112 L.Ed.2d 305, 111 S.Ct. 2546 (1991).

IT IS SO ORDERED this 27 day of Jan, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

JAN 27 1997

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

TERRI L. PAUL,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER, Commissioner of)
 Social Security,)
)
 Defendant.)

No. 96-C-875-M ✓

ENTERED ON DOCKET

DATE 1/28/97

ADMINISTRATIVE CLOSING ORDER

This case was previously remanded to the Commissioner of Social Security (Commissioner) under sentence six of 42 U.S.C. §405(g). In accordance with N.D. LR 41, it is hereby ordered that the Clerk administratively close this action. This case may be reopened for final determination upon application of either party once the proceedings before the Commissioner are complete.

IT IS SO ORDERED.

Dated this 27th day of January, 1997.

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

8

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

FILED

JOHN M. SLOAN,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,¹

Defendant.

JAN 27 1997 *SLA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No: 95-C-604-W ✓

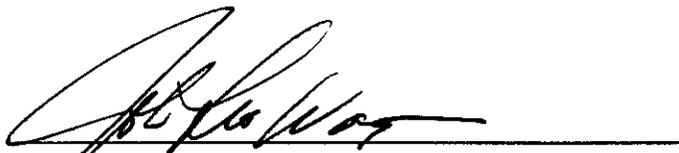
ENTERED ON DOCKET

DATE 1/28/97

JUDGMENT

Judgment is entered in favor of the Defendant, Shirley S. Chater, in accordance with this court's Order filed January 27, 1997.

Dated this 27th 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.

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

F I L E D

JAN 27 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN M. SLOAN,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

Case No. 95-C-604-W ✓

ENTERED ON DOCKET
DATE 1/28/97

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 disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

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

19

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 10 pounds frequently or 20 pounds occasionally, and was unable to perform his past relevant work as a mechanic, truck driver, and electrical maintenance. The ALJ concluded that claimant 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 light work, was 46 years old, which is defined as a younger individual, had a high school education, and therefore under the Social Security Regulations was not disabled. He concluded that, on or before December 31, 1992, the date claimant was last insured, there were a significant number of jobs in the national economy which he could perform despite his impairment, such as order filler/inventory, stock/inventory clerk, and battery inspector. Having determined that there were a significant number of jobs in the national economy that claimant could perform, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ failed to fully develop the record, because he did not obtain claimant's 1969 and 1976 treatment records concerning his schizophrenia and head injury.
- (2) The ALJ failed to conclude that claimant met the Listing of Impairments for a mental illness, § 12.03.
- (3) The ALJ erred in failing to include a mental impairment in his hypothetical question to the vocational expert and ignored the testimony of the vocational expert that, if claimant had a mental impairment, he could not perform work in the national economy.

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 alleges that he has been unable to work since 1987, because of back pain and leg numbness and a mental impairment. The medical evidence establishes that he has a back impairment consisting of a marked disc bulge at L4-5. A CAT

scan of his lumbar spine on June 20, 1988, revealed “[b]ilateral spondylolysis of L5 with a Grade I spondylolisthesis of L5 on S1 with pseudodisc effect, moderate diffuse annular bulge of the L4-5 intervertebral disc and mild diffuse annular bulge of the L3-4 intervertebral disc, [and] moderate facet hypertrophy of L4-5 and mild facet hypertrophy of L5-S1 and L3-4.” (TR 220).

A second CAT scan on September 17, 1992 revealed “[m]inimal degenerative change in lower lumbar spine [and] partial wedging of T10, T11, T12 vertebra which I suspect is chronic given degenerative spurring.” (TR 219). A third CAT scan on October 7, 1992 showed “[f]acet joint hypertrophy causing a slight lateral recessed stenosis at L3-4. Central disc bulge at L4-5, slightly worse on the right than on the left. No significant pathology detected at L5-S1.” (TR 218).

A residual physical functional capacity assessment was performed by Dr. Vallis Anthony on December 18, 1992 (TR 86-92). The doctor noted that claimant had chronic back pain, a disc bulge at L4-5, some facet hypertrophy, and decreased range of motion, but intact reflexes (TR 87). The doctor concluded that claimant could lift 50 pounds occasionally and 25 pounds frequently, stand and/or walk about six hours in an eight-hour workday, sit about six hours in an eight-hour workday, and do unlimited pushing and/or pulling (TR 87). Claimant’s pain limited his stooping and crouching to only occasionally (TR 88).

On October 4, 1993, Dr. W.S. Dandridge examined claimant and took x-rays (TR 189-190). The doctor noted that claimant walked without any abnormality relative to his gait and stood erect with level iliac crests (TR 189). The doctor stated:

[P]atient has increased lordotic curve with moderate dorsal kyphotic deformity. SLR is negative bilaterally and there is a well healed incisional scar over the medial aspect of the left knee at previous site of surgery for medial meniscus. The patient has deformity of the fourth toe of each foot which appears to be absence of the phalanges of these two toes. He has excellent strength in dorsal flexion and plantar flexion of the remaining toes of each foot. There is excellent strength of both lower extremities. The patient is able to raise his weight on his toes and rock back on his heels and is able to squat down and raise his weight without any assistance. There is voluntary restricted forward flexion in the dorsal lumbar and lumbosacral areas. No muscle spasms elicited over the cervical dorsal or lumbar areas except those associated with the dorsal kyphotic and increased lordotic deformities. . . . The reflexes of the upper and lower extremities are within physiologically normal limits. No sensory changes of the upper or lower extremities. . . . X-rays taken of the lumbar spine in the AP and lateral projections disclosed the hip joints to be negative. The sacroiliac joints are negative. A moderate increase in the lordotic curve. The intervertebral disc spaces between the lumbar vertebra are all within normal limits. Residuals of old, well healed compression fracture D 10-11-12. Diagnosis: Trochanteric bursitis right hip. Residuals of old, well healed compression fracture D 10-11-12.

(TR 189-190).

Dr. Dandridge also found that claimant could lift 10 pounds frequently and 25 pounds occasionally, and sit, stand, and walk thirty minutes in an eight-hour day (TR 194). Medical records show that he has complained of back pain and numbness in his legs since 1987 and been treated with medications (TR 140-172). In 1991, he reported that he was doing well and exercising (TR 148-149). On September 9, 1992, he reported that he had "re-injured" his back, but had been doing well until then, and he had not seen a doctor for a year (TR 143-144). His insured status ended on December 31, 1992 (TR 18). On March 10, 1993, he told his doctor his

back pain had improved (TR 211). Dr. Dandridge examined him seven months later (TR 189-190).

Claimant was hospitalized in 1969 while in the military and diagnosed with paranoid schizophrenic reaction, undifferentiated type, stabilized prior to his release (TR 201-207). Medical records attached to plaintiff's brief show the history of this treatment in 1969, that he was seen five times for schizophrenia and depression by Dr. John Gray in 1969, and that he had an injury to his skull following a fight in 1976 (Exhibits to Plaintiff's Brief, Docket #13). There is no report that he was treated with counseling or medication from 1969 until 1986 and he worked during that period. In 1986, his brother committed suicide and he was placed on medications for anxiety (TR 52-53, 55, 175, Attachment #2 to Plaintiff's Brief, Docket #13).

A psychological review technique assessment was completed by Dr. Janice Boon on March 17, 1993 (TR 93-101). Dr. Boon found "no medically determinable mental impairment" and no restrictions of activities of daily living, difficulties in maintaining social functioning, deficiencies of concentration, persistence, or pace, or episodes of deterioration in the workplace (TR 100-101).

On January 3, 1994, Dr. John Hickman conducted a mental evaluation and concluded that claimant had a somatoform pain disorder, undifferentiated schizophrenia in remission, a history of minimal mental degenerative changes, marked degree of psychosocial stressors from isolation, a poor social network, difficulty in maintaining employability, and chronic pain (TR 225). The doctor gave claimant a

global assessment of functioning ("GAF") score of 60 (TR 225).⁴ The doctor concluded:

On the WAIS-R, Mr. Sloan obtained a V.I.Q. of 90, a P.I.Q. of 89, F.S.I.Q. of 89 Mr. Sloan does not seem to have developed average mental abilities. He is functioning in the dull normal range of mental ability rather uniformly. He is having mild deficiencies in his ability to use language as a basis of reasoning and judgment and auditory attention skills. He is also having difficulty attending to relevant details of his environment. Mr. Sloan's responses to the MMPI indicated that he had a little difficulty being completely open and frank about himself, but was consistent in his responses although he tended to over report his difficulties. His profile is a valid one which contains some elevations on four of the clinical scales, mild to moderate elevations on three other ones. He achieved a 103284 profile. Among the supplementary scales there are elevations on the repression scale, on the adjustment scale, post-traumatic stress scales. There is also elevation on the health concern scales, cynicism, social discomfort, work and family conflict scales. He is also reporting that he has attempted to end his own life before, that at times he gets so frustrated he feels assaultive [sic]. [He] could benefit from further educational and vocational training. He does complain of chronic pain that limits his vocational activities. There is no evidence in the medical records to indicate that his physical functioning would preclude gainful employment. His perception of pain seems to be intensified by his psychological functioning in which he converts a lot of his anxiety, depression and stress into physical symptoms. He also appears to be having some delusional thoughts. This will be his greatest area of impairment and might preclude from successful employment; however, his difficulties with reality testing might be greatly improved by

⁴ The court in Irwin v. Shalala, 40 F.Supp. 751, 759 n.5 (D. Or. 1993), described the significance of this 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).

appropriate psychological intervention. He might well benefit from continued psychiatric treatment both for improvement of his perception of pain, as well as improved thinking. Mr. Sloan is competent to handle his own funds. He might have some difficulty interacting with the public due to his blunt affect, social discomfort. He is capable of doing simple or moderately complicated routine jobs that do not stress social functioning or require heavy lifting.

(TR 225-226).

There is no merit to claimant's first contention that the ALJ failed to fully develop the record. It is true that both claimant and the ALJ bear responsibility for developing the evidentiary record. The claimant "must produce medical evidence showing that you have an impairment(s) and how severe it is during the time you say that you are disabled." 20 C.F.R. § 404.1512(c). The ALJ must, before deciding that a claimant is not disabled, "develop your complete medical history for at least the 12 months preceding the month in which you file your application unless there is a reason to believe that development of an earlier period is necessary We will make every reasonable effort to help you get medical reports from your own medical sources when you give us permission to request the reports." 20 C.F.R. § 404.1512(d). See also, Baca v. Dept. of Health & Human Servs., 5 F.3d 476, 479-480 (10th Cir. 1993).

Here the medical evidence was fully developed for the year preceding claimant's application, that is, the year 1992. The evidence which claimant complains the ALJ did not obtain pertained to the years 1969 and 1976, well before 1987 when claimant contends he became disabled. The court does not find the

ALJ's failure to obtain these reports nearly twenty years after the fact to be a violation of his duty to develop the record.

Although the ALJ commented during the hearing that the claimant's attorney could further supplement the records (TR 72), how much evidence to gather is a subject on which the court generally respects the ALJ's judgment. Luna v. Shalala, 22 F.3d 687, 692 (7th Cir. 1994). "Moreover, a significant omission is usually required before this court will find that the Secretary failed to assist . . . in developing the record fully and fairly." Id. There was no significant omission here. The ALJ was aware that claimant was treated for a schizophrenic reaction in April of 1969 (TR 14). The skull injury in 1976 was not disabling and claimant was able to work until 1987.

There is also no merit to claimant's contention that the ALJ should have found that claimant met the Listing of Impairments for a mental illness, § 12.03. When evidence of a disabling mental impairment is presented, the ALJ must follow the procedure outlined in 20 C.F.R. § 404.1520. Cruse v. Dept. of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1995); Tibbits v. Shalala, 883 F.Supp. 1492, 1498 (D. Kan. 1995). This procedure first requires him to determine the presence or absence of "certain medical findings which have been found especially relevant to the ability to work," sometimes referred to as the "Part A" criteria of the Listings. 20 C.F.R. § 404.1520a(b)(2). He must then evaluate the degree of functional loss resulting from the impairment, using the "Part B" criteria of the Listing. 20 C.F.R. § 404.1520a(b)(3). To record his conclusions, he prepares a document called a

Psychiatric Review Technique Form ("PRT form"), which tracks the listing requirements and evaluates the claimant under the Part A and B criteria.

In this case, the ALJ noted that claimant had alleged that he is disabled, in part, due to depression. The ALJ said:

[b]ased on the medical evidence on or prior to December 31, 1992, the claimant has never been diagnosed with depression. On April 16, 1969, the claimant was treated in the service for schizophrenic reaction, undifferentiated type. There is no mention after this date of any type of mental impairment. The claimant has not sought treatment for depression and is not taking any type of antidepressant medication. The Administrative Law Judge finds that, based on the medical evidence on or prior to December 31, 1992, the claimant's alleged depression was mild and would not have had any effect on his ability to perform work-related activities.

(TR 17). The ALJ filled out a PRT form, finding in "Part A" that claimant had undifferentiated schizophrenia, in remission, and a somatoform disorder, which led him to conclude in "Part B" that claimant had no restrictions of activities of daily living, slight difficulties in maintaining social functioning, no deficiencies of concentration, and never had experienced episodes of deterioration in a work setting (TR 20-23). There is substantial evidence in the record to support these conclusions.

As claimant notes, the court in Cruse discussed a "Medical Assessment Of Ability To Do Work-Related Activities (Mental) Form" ("MAAWRA" form), which asks for evaluations of a claimant's abilities in three work-related areas: making occupational adjustments, making performance adjustments, and making personal-social adjustments. 49 F.3d at 618. The court noted that, rather than evaluating the severity of a claimant's functional impairments using the same terms as the listing

requirements, the mental assessment forms evaluate the claimant's abilities as "unlimited/very good," "good," "fair," and "poor or none." *Id.* The court concluded that the forms' definition of "fair" was misleading and that "seriously limited but not precluded" was essentially the same as the listing requirements' definition of the term "marked." *Id.* A "marked" impairment represents a degree of disability that satisfies two of the four listing requirements. *Id.*

Under the law in *Cruse*, it is true that Dr. Hickman found that claimant met "Part B" of Listing § 12.03, when he checked "fair" on two traits on the MAAWRA form (TR 227-228). However, Dr. Hickman did not find that claimant had an impairment under "Part A." In fact, he concluded that in all likelihood claimant could work, especially if he received psychiatric treatment (TR 226). Claimant worked for years after his 1969 schizophrenic episode, and the only evidence in the record of a mental problem since then was his "delusional" testimony at the hearing that Dr. Dandridge tried to give him a shot of sodium pentothal against his will (TR 46, 58-59).

Finally, there is no merit to the claimant's contention that the ALJ failed to include a mental impairment in his hypothetical question to the expert and ignored the vocational expert's testimony that claimant could not hold a job if he had the mental impairment he claimed. It is clear that the ALJ included pain in his hypothetical questions (TR 66).

"[T]estimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the

Secretary's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

The ALJ considered the testimony at the hearing and found that it was inconsistent with the record as a whole (TR 16). "Objective findings show the ability to perform light work activity. The claimant has restricted his lifestyle, but the record does not show any necessity to limit his activities to this degree. (TR 16). The ALJ concluded that claimant had never been diagnosed with depression and had not been found to have any type of mental impairment after 1969 (TR 17).

Initially, the ALJ established that the vocational expert had been present for all of the testimony and studied the record. (TR 63). The ALJ and claimant's representative at the hearing were only able to elicit favorable testimony from the vocational expert by asking him to assume impairments that the ALJ properly deemed unsubstantiated and to assume claimant's testimony was credible.⁵ (TR 70-72). The

⁵ The dialogue between the vocational expert and claimant's counsel went as follows:

Q I'd like to amend that part of that hypothetical, that if we had a worker who was -- who had a history of being discharged from the service because of lack of ability to receive supervision, and also was fired from two jobs because of fighting --

A Right.

expert's responses, based on unsubstantiated assumptions, were not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993). It was proper for the ALJ to limit the hypothetical questions to those impairments which were actually supported in the record. Jordan v. Heckler, 835 F.2d 1314, 1316 (10th Cir. 1987).

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

Dated this 24th day of January, 1997.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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Q -- and left other jobs because of a realization that that situation was imminent, how would that affect that first hypothetical?

A It would appear to me that it would certainly be a problem with employment. The only one that would even question -- that I would even question would be his job in the maintenance where he said he was pretty well left alone by everyone, you know. But still, you have to have some direction and supervision on any job, and so if you had trouble that to that point where he quit that, then that would sure be an example of what you're talking about, I think.

Q And about the job where he was pretty much left alone, is that a common practice?

A No.

Q So that would be a rare instance where someone would have that kind of latitude --

A Right.

Q -- you know, lateral ability to do what they want. That would be an exceptional situation.

A Very infrequent, right.

(TR 71-72).

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

F I L E D

BILLY J. STANBRO,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

JAN 27 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-357-W ✓

ENTERED ON DOCKET

DATE 1/28/97

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 disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Stephen C. Calvarese (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 and nonexertional requirements of work, except for more than occasional lifting of up to 20 pounds, more than frequent lifting or carrying of up to 10 pounds, or prolonged walking, standing, and sitting, and subject to decreased ranges of motion of the back, right elbow, and right knee and 50%

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).

decreased grip strength of the right hand. The ALJ concluded that claimant was unable to perform his past relevant work as a carpenter, heavy equipment operator, auto mechanic, and concrete finisher. The ALJ found that claimant's residual functional capacity for the full range of light work was reduced by the need to alternate sitting and standing, subject to decreased ranges of motion of the back, right elbow, and right knee and 50% decreased grip strength of the right hand. The ALJ concluded that the claimant was 39 years old, which was defined as a younger individual, had an eleventh grade limited education, and did not have any acquired work skills, which were readily transferable to the skilled or semiskilled work functions of other work. The ALJ found that, although claimant's limitations did not allow him to perform the full range of light work, there were a significant number of jobs in Oklahoma and the national economy which he could perform, such as security guard, dispatcher, and telephone sales. Having determined that claimant can do a significant number of jobs that exist in the national economy, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ failed to consider the problems claimant has with his left wrist and elbow.
- (2) The ALJ erred in stating that there is medical care available at public facilities for those who cannot pay for the care.
- (3) The ALJ erred in relying on claimant's choice of conservative treatments for pain, use of inexpensive medications, and daily activities to find his complaints of pain not credible, instead of

citing specific inconsistencies between his testimony and the evidence.

- (4) The ALJ erred in finding that claimant can do light work, when he cannot sit for prolonged periods and must stand frequently to alleviate his back pain, but his right knee prevents him from standing up straight.

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 alleges that he has been unable to work since May 1, 1992 because of pain, swelling, and decreased motion in his right knee and elbow, left wrist, hips, and back, and headaches (TR 34-36, 107). He was treated for tennis elbow in the fall of 1988 and spring of 1989 and had a lateral release and arthrotomy of his right elbow on August 28, 1989 (TR 176). He fractured the elbow in February of 1990 and underwent a soft tissue procedure after that (TR 224). He had a right elbow arthroscopy and arthroscopic excision of cornoid process and osteophytes on April 28, 1993 (TR 215-229). By July 9, 1993, his doctor found that his elbow was "relatively pain free." (TR 135). A residual physical functional capacity assessment in September 1993 showed he was unable to strongly grip with his right hand (TR 75, 77).

Claimant had a cyst removed from his right knee in 1975 (TR 154) and orthroscopic surgery on the knee for a probable torn meniscus on September 1, 1988, from which he recovered well (TR 177). On April 18, 1988, he reported suffering low back pain and the doctor diagnosed L-5 nerve root irritation (TR 206).

CAT scans on September 11, 1989 showed a herniated disk at L5-S1 and on January 25, 1991, showed probable disk herniation at L5-S1 (TR 174, 200-201).

Claimant's doctor concluded that he had "chronic lateral humeral epicondylitis" in his left elbow on April 7, 1994, after taking x-rays which were normal and finding 120 degrees of flexion of the elbow (TR 189), but Dr. David Dean reported that he had a full range of motion in that elbow eight months earlier (TR 145).

On August 18, 1993, Dr. Dean did a consultative examination of claimant and concluded:

Examination of the right elbow joint reveals well healed scars present over the right elbow joint from previous arthrotomy and arthroplasty. There is limitation of full flexion to 90 degrees on the right and limitation of full extension to 170 degrees. Grip in the right hand is diminished by 50 percent, but fine motor movements are intact in the right hand. No erythema, swelling or tenderness is noted in the right elbow joint. Pronation and supination are within normal limits; however, pain is experienced at the extremes of pronation and supination with that motion in the right elbow joint. Examination of the right knee joint reveals limitation of full flexion to 80 degrees with limitation of full extension to 170 degrees. Thus, there is instability of the right knee joint due to inability to completely fix the right knee joint in full extension. No significant gait disturbance is noted, however. The joint otherwise is entirely stable, but crepitus is noted throughout the range of motion of the joint. There are well healed scars present from previous arthrotomy and arthroscopic arthroplasty. LUMBOSACRAL SPINE EXAMINATION: There is significant limitation of range of motion of the lumbosacral spine due to pain, but no motor, sensory, or reflex deficit is noted in either lower extremity. Straight leg raising signs are positive, however, in sitting and lying positions.

(TR 142-143).⁴

⁴ This report does not support claimant's contention in a footnote that his right knee "meets or nearly meets" Listing § 1.03(A) or (B). This listing pertains to "arthritis of a weight-bearing joint" and requires:

The residual functional capacity assessment in September of 1993 noted that claimant had no joint deformities or swelling and had reduced flexion in his elbow, knee, and spine and reduced grip in his right hand (TR 74-80). The doctor concluded that claimant could occasionally lift twenty pounds and frequently lift ten pounds, stand, walk, or sit six hours in an eight-hour day, and push and pull hand or foot controls, except right hand controls requiring a strong grip (TR 75).

At a hearing on May 6, 1994, claimant testified that he has headaches three times a week, cannot extend or bend his right elbow, has had swelling in his left elbow for eight to nine months, has swelling in his left wrist and receives injections for it, and has pain in his hips which prevents him from sitting or walking for more than 20-25 minutes (TR 34-36). He also contended that his right knee gets stiff if bent more than 30 minutes, and he has had injections to keep it from swelling (TR

Arthritis of a major weight-bearing joint (due to any cause):

With history of persistent joint pain and stiffness with signs of marked limitation of motion or abnormal motion of the affected joint on current physical examination. With:

- A. Gross anatomical deformity of hip or knee (e.g, subluxation, contracture, bony or fibrous ankylosis, instability) supported by X-ray evidence of either significant joint space narrowing or significant bony destruction and markedly limiting ability to walk and stand; or
- B. Reconstructive surgery or surgical arthrodesis of a major weight-bearing joint and return to full weight-bearing status did not occur, or is not expected to occur, within 12 months of onset.

36). His left knee bothers him if he stands very long (TR 36). He claimed he could only stand for 20-25 minutes and walk two blocks (TR 36-37). He can only do a job where he alternates sitting and standing (TR 37). He cannot squat or bend and cannot flex his right elbow (TR 38). He can lift 25 pounds with his left arm (TR 38).

There is no merit to claimant's first contention that the ALJ erred in failing to consider the impairment that results from problems claimant has with his left wrist and elbow. Dr. Dean found on August 18, 1993 that claimant's left elbow had a full range of motion (TR 145). He only complained to Dr. Bradford Boone once on May 4, 1994 about left elbow pain "when performing repetitive activities," and the doctor found "very minimal flexion contracture, flexion to about 115-120 degrees, no pain with hyperflexion or extension overload maneuvers. . . ." (TR 189). Based on normal x-rays, the doctor's diagnosis was chronic lateral humeral epicondylitis in claimant's left elbow, and he recommended conservative treatment with stretching exercises, bracing, and anti-inflammatories, and a recheck in six months. (TR 189). The doctor did not suggest that the condition was disabling in any way.

It is true that the ALJ did not mention the single report concerning left elbow pain, but he did not err in finding no disabling impairment in claimant's left wrist and elbow because the objective medical evidence does not substantiate claimant's subjective claims of such an impairment. There is no medical record of him receiving injections in his left wrist, as he claimed (TR 35). Unsubstantiated subjective evidence is not sufficient to prove disability. Diaz v. Secretary of Health & Human

Servs., 898 F.2d 774, 777 (10th Cir. 1990). Claimant admitted at the hearing that he can lift twenty-five pounds with his left arm (TR 38).

There is also no merit to claimant's second and third contentions that the ALJ erred in stating that there are public medical facilities available to those who do not have insurance or are unable to pay for care and relying on claimant's choice of conservative treatments for pain to find his complaints not credible (TR 16).⁵ There

⁵The ALJ noted that the social security regulations and case law in Luna v. Bowen, 834 F.2d 161, 165-166 (10th Cir. 1987), set out the considerations which must be noted to determine if complaints of pain are credible, such as persistent attempts to find relief, use of a cane or crutches, regular contacts with doctors, daily activities, and use of medications. The ALJ considered all of these and gave

great weight to the activities of daily living that claimant was capable of performing despite his impairments. In May 1993, claimant was capable of occasionally helping with the laundry and housecleaning using his left arm. He visited with family and friends weekly. He could drive a pickup truck two to three times per week. Apparently, the severity of his pain did not require strong prescription pain medication. Medication and therapy have been effective in alleviating some of claimant's symptoms, and the record does not show significant side-effects from his medication regimen. Although claimant takes over-the-counter medication for relief of his symptoms, those medications do not preclude claimant from functioning at his residual functional capacity and claimant would remain reasonably alert to perform required functions in the work setting. The record does not show lifting up to 20 pounds occasionally would precipitate or aggravate claimant's condition.

The record does not reflect functional restrictions by claimant's treating physicians that would preclude a wide range of light work activity. At the hearing, claimant testified that he was right hand dominant. He did not take prescription medication due to the cost. However, claimant further testified that his wife worked at a bank. Moreover, if claimant were in the constant and disabling painful condition as alleged, it is reasonable to assume claimant would exhaust every means possible to obtain relief of that pain. There are public facilities available to those who do not have insurance or who are unable to pay for medical care.

is no doubt that public facilities exist (claimant admits that the OU and OSU clinics charge on a sliding scale "with a \$10.00 minimum per visit"). There is no evidence in the record that claimant sought treatment at such a clinic and was refused services because he could not pay for them. Claimant admitted at the hearing that he worked for his father in the summer of 1993 for three weeks and made \$150.00 a week, sold a house and twenty acres on February 24, 1994, and has a wife who works at a bank, so his claim of poverty is somewhat suspect.

The ALJ did not err in concluding that claimant's behavior in seeking pain relief and his daily activities suggested that he was not in constant, disabling pain. He clearly discussed inconsistencies between claimant's testimony and the medical record. The claimant's allegations of disabling pain and limitations are not supported by any medical evidence. The Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir.

Although he stated he took 6 to 15 Advil and Tylenol pills a day, the absence of strong pain medication is inconsistent with severe and intractable pain. Although claimant said he was scheduled for back surgery for a ruptured disc, he canceled it because he knew too many people who had unsuccessful back surgery. Since back surgery is considered a "very risky" procedure (20 CFR 404.1530(c)(4) and 416.930(c)(4)), claimant cannot be determined not disabled for failure to follow prescribed treatment. However, choosing conservative treatment over surgery, in conjunction with no strong prescription medication, suggests that claimant's pain is mild to moderate and not intractable pain.

(TR 15-16).

1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. "To establish disabling pain without the explicit confirmation of treating physicians may be difficult." Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988).

Finally, there is no merit to claimant's contention that the ALJ erred in finding that claimant can do light work, when he cannot sit for prolonged periods and must stand frequently to alleviate his back pain, but his right knee prevents him from standing up straight. "Residual functional capacity" is defined by the regulations as what the claimant can still do despite his or her limitations. Davidson v. Secretary of Health & Human Servs., 912 F.2d 1246, 1253 (10th Cir. 1990). The Secretary has established categories of sedentary, light, medium, heavy, and very heavy work, based on the physical demands of the various kinds of work in the national economy. 20 C.F.R. § 404.1567. This regulation provides that:

"Light work" involves "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it 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. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

Substantial evidence supports the ALJ's finding that claimant can do light work, limited as follows: the need to alter positions from sitting to standing and decreased range of motion of the back, right elbow and right knee, and decreased

right grip (TR 18). Neither the ALJ nor any doctor or assessor has found that he cannot lift twenty pounds (he admitted he can lift 25 pounds (TR 38)) or do a good deal of walking or standing if he is able to alternate sitting and standing occasionally. The jobs of security guard, dispatcher, and telephone sales which the ALJ found claimant could perform do not require physical abilities which the medical evidence shows claimant does not possess. Only claimant's self-serving testimony conflicts with the ALJ's conclusions.

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

Dated this 26th day of January, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

BILLY J. STANBRO,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 Commissioner of Social Security,¹)
)
 Defendant.)

JAN 27 1997 *SAC*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No: 95-C-357-W ✓

ENTERED ON DOCKET

DATE 1/28/97

JUDGMENT

Judgment is entered in favor of the Defendant, Shirley S. Chater, in accordance with this court's Order filed January 27, 1997.

Dated this 27th 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.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 27 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 LEE A. MORGAN aka LEE A. BOWERS;)
 TOM BOWERS; FOX & JACOBS, INC.;)
 CITY OF BROKEN ARROW, Oklahoma;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
 Defendants.)

Civil Case No. 96 C 241B

JAN 27 1997

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27 day of Jan, 1996. 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, CITY OF BROKEN ARROW, OKLAHOMA, appears by Michael R. Vanderburg, City Attorney; and the Defendants, LEE A. MORGAN aka Lee A. Bowers, TOM BOWERS, and FOX & JACOBS, INC., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, LEE A. MORGAN aka Lee A. Bowers, was served with process a copy of Summons and Complaint on June 5, 1996; that the Defendant, TOM BOWERS, was served with process a copy of Summons and Complaint on April 24, 1996; that the Defendant, CITY

OF BROKEN ARROW, OKLAHOMA, was served a copy of Summons and Complaint on March 29, 1996, by Certified Mail.

The Court further finds that the Defendant, FOX & JACOBS, INC., was 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 Defendant, FOX & JACOBS, INC., and service cannot be made upon said Defendant by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, FOX & JACOBS, INC.. 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 its present or last known place of residence and/or mailing address. 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 Defendant 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 10, 1996; that the Defendant, CITY OF BROKEN ARROW, OKLAHOMA, filed its Answer on May 21, 1996; and that the Defendants, LEE A. MORGAN aka Lee A. Bowers, Tom Bowers, and FOX & JACOBS, 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, LEE A. MORGAN, is one and the same person as Lee A. Bowers, and will hereinafter be referred to as LEE. A. MORGAN.

The Court further finds that on April 6, 1983, the Defendant, LEE A MORGAN, executed and delivered to FIRST CONTINENTAL MORTGAGE CO., her mortgage note in the amount of \$57,800.00, payable in monthly installments, with interest thereon at the rate of 12 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, LEE A. MORGAN, A SINGLE PERSON, executed and delivered to FIRST CONTINENTAL MORTGAGE CO., a real estate mortgage dated April 6, 1983, covering the following described property, situated in the State of Oklahoma, Tulsa County:

LOT TWENTY-SEVEN (27), BLOCK NINE (9),
WINDSOR ESTATES, AN ADDITION TO THE CITY
OF BROKEN ARROW, TULSA COUNTY, STATE OF
OKLAHOMA, ACCORDING TO THE RECORDED
PLAT THEREOF.

This mortgage was recorded on April 12, 1983, in Book 4683, Page 569, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 15, 1984, FIRST CONTINENTAL MORTGAGE COMPANY assigned the above-described mortgage note and mortgage to

THE RICHARD GILL COMPANY. This Assignment of Mortgage was recorded on September 18, 1984, in Book 4817, Page 153, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 2, 1986, The RICHARD GILL COMPANY assigned the above-described mortgage note and mortgage to BANCPLUS MORTGAGE CORP. This Assignment of Mortgage was recorded on November 12, 1986, in Book 4982, Page 317, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 3, 1989, BANCPLUS MORTGAGE CORP. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development his successors and assigns. This Assignment of Mortgage was recorded on April 14, 1989 in Book 5177, Page 1982, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 30, 1988, the Defendant, LEE A. MORGAN, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on August 24, 1990, July 30, 1991, September 13, 1991, and December 3, 1991.

The Court further finds that the Defendant, LEE A. MORGAN, 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, LEE A. MORGAN, is indebted to the Plaintiff in the principal sum of \$111,171.81, plus interest at the rate of 12 percent per annum from March 21, 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 Defendants, LEE A. MORGAN, TOM BOWERS, and FOX & JACOBS, INC., are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, CITY OF BROKEN ARROW, OKLAHOMA, claims no right, title or interest, in the subject real property, except insofar as it is the lawful holder of certain easements contained in the plat.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, LEE A. MORGAN, in the principal sum of \$111,171.81, plus interest at the rate of 12 percent per annum from March 21, 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 Defendants, LEE A. MORGAN, TOM BOWERS, FOX & JACOBS, COUNTY TREASURER 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 the Defendant, CITY OF BROKEN ARROW, OKLAHOMA, has no right, title or interest, in the subject real property, except insofar as it is the lawful holder of certain easements contained in the plat.

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

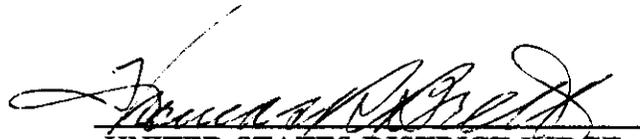
First:

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

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

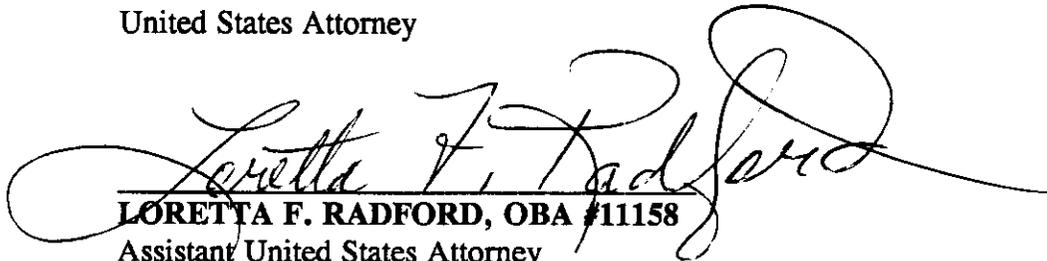
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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


UNITED STATES DISTRICT JUDGE

APPROVED:

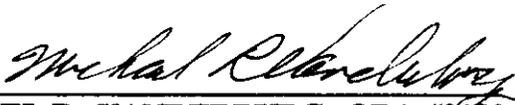
STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158
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Board of County Commissioners,
Tulsa County, Oklahoma



MICHAEL R. VANDERBURG, OBA #9180

CITY ATTORNEY BROKEN ARROW, OKLAHOMA
220 S. First Street
Broken Arrow, OK 74012

Judgment of Foreclosure
Civil Action No. 96-C 0241B

LFR:flv

not require the cancellation of the proportionality review or a dismissal of this action. The undersigned Magistrate Judge recommends that Respondent's motion [Doc. No. 45-1] be **DENIED**.

THE 1996 ACT: APPLICATION TO PENDING PROCEEDINGS

Petitioner filed his Petition for a writ of habeas corpus on May 8, 1995. [Doc. No. 1-1]. The 1996 Act was passed on April 24, 1996. In Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994), the Supreme Court explained the appropriate method to analyze whether a statute should be applied retroactively.

The initial inquiry is whether the statute specifically provides for retroactive application. With respect to the 1996 Act, Congress specifically mandated that the procedures for habeas corpus petitions involving capital punishment applied to all pending and subsequently filed cases. ("Chapter 154 of title 28, United States Code . . . shall apply to cases pending on or after the date of enactment of this Act.") However, Congress did not put any such similar language in the amendments to § 2254, which governs the type of proceeding currently before the Court.

Absent a specific provision in the 1996 Act as to its applicability, a court must examine whether the application of the statute would have retrospective effect. The Supreme Court has established that "a statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based on prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed

before its enactment." Landgraf v. USI Film Products, 114 S. Ct. 1483, 1499 (1994) (citation and footnote omitted).¹

The Seventh Circuit Court of Appeals, in Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996), *cert granted in part* 1997 WL 8539 (Jan. 10, 1997), addressed the applicability of § 2254(d)(1) of the 1996 Act to pending habeas cases, relying on the Supreme Court standard in Landgraf. Lindh focused on the expectations of the prisoner, the historical practice in applying statutory changes, and the specific language of the Act (the Act forbids issuance of a writ unless certain conditions are met, which is prospective). The Seventh Circuit notes that although Congress did not specify that it intended to apply section 2254(d)(1) retrospectively, section 2254(d)(1) does not attach new consequences to pending petitions for habeas corpus. Lindh concludes that 2254(d)(1) applies to pending petitions. See also Moore v. Johnson, 101 F.3d 1069 (5th Cir. 1996) (1996 Act applies retroactively because Congress did not specify whether it should and application would not deny the petitioner a substantive right); but see Boria v. Keen, 90 F.3d 36, 37 (2d Cir. 1996) (holding that the 1996 Act was not applicable to a pending case because it would result in retroactive application of the statute in violation of Landgraf).

^{1/} In Moore v. Johnson, 101 F.3d 1069, 1073 (5th Cir. 1996), the Fifth Circuit Court of Appeals noted "If the statute affects the substantive rights of the parties (*i.e.*, impairs rights a party possessed when he acted, increased a party's liability for past conduct, or imposes new duties with respect to transactions already completed), it is deemed to have a 'retroactive effect' and we presume that the statute is not to be applied retroactively unless Congress so specifies."

The Court is persuaded by the reasoning of the Seventh Circuit Court of Appeals in Lindh, and concludes that § 2254(d)(1) of the 1996 Act applies to the case currently pending before the Court.

Petitioner references several Tenth Circuit Court of Appeals decisions, and asserts, based on those decisions, that the Tenth Circuit has concluded that the 1996 Act should not apply to pending habeas cases. However, none of the decisions which Plaintiff relies upon specifically address § 2254(d)(1), which is the portion of the statute applicable to Petitioner's case.

In Edens v. Hannigan, 87 F.3d 1109, 1112 n.1 (10th Cir. 1996), the Tenth Circuit noted that "under these facts we conclude that the new law does not apply to this case." However, the footnote in Edens addresses the issuance of a certificate of appealability, which is § 2253 of the Act. The prior version of § 2253 required the issuance of a certificate of probable cause. In Edens, the certificate of probable cause was issued by the district court on October 17, 1994, prior to the passage of the 1996 Act. Therefore, not only does Edens address a different section of the 1996 Act (§ 2253 as compared to § 2254), but in Edens, the action (issuance of a certificate of probable cause) had already taken place before the passage of the Act. Therefore, the 1996 Act did not apply because the portion of the 1996 Act which concerned the court, the certificate of probable cause/appealability, had already issued. In Edens, although the petition for appeal was filed prior to the passage of the 1996 Act, the action which the Petitioner requested that the Court take, had already taken place -- that is the issuance of the certificate of cause/appealability. See also United States

v. Ruth, 100 F.3d 111, 112 n.1 (10th Cir. 1996) (“We note that Ruth filed his notice of appeal on April 12, 1996. This date is prior to [the enactment of 1996 Act]. The statute now requires a federal prisoner appealing a denial of a section 2255 petition to obtain a certificate of appealability. We do not read the statute to call for the dismissal of appeals that were properly filed before its enactment, and we must therefore conclude that [Ruth’s] appeal must be resolved on the merits.”) (citations omitted).

Petitioner additionally relies on Hatch v. Oklahoma, 92 F.3d 1012 (10th Cir. 1996). In Hatch, the petitioner filed a second habeas petition and asserted that the 1996 Act should not apply to his successive petition because application would constitute retroactive application of the Act. The Tenth Circuit concluded that the petitioner filed the application for his second petition more than two months after the passage of the Act, and therefore application of the Act would not have a retroactive effect. The Tenth Circuit additionally noted that “[t]he 1996 Act does not contain an effective date provision for the amendments to 28 U.S.C. § 2244 which are at issue in this case. We assume, therefore, that the amendments became effective on April 24, 1996, the date the law was enacted.” Id. at 1014 n.2. However, this statement does not answer the question of whether, under the facts currently before this Court, the 1996 Act should be applied. The Tenth Circuit concluded only that the “effective date” of the 1996 Act is the date of its passage. The Circuit did not address the retroactive effect, if any of the § 2254 provision of the 1996 Act.

In Lennox v. Evans, 87 F.3d 431 (10th Cir. 1996), the Tenth Circuit concluded that in a § 2254 case, the 1996 Act applied with respect to the provisions in § 2253. The Tenth Circuit concluded that § 2253 of the 1996 Act merely codified existing law (the Barefoot standard) and therefore application of the 1996 Act would not have retroactive effect. The Court based its analysis on Landgraf, and noted that “we must apply the new amendments to Petitioner’s application for a certificate of probable cause unless to do so would have retroactive effect.” Id. at 432.

In United States v. Lopez, 100 F.3d 113 (10th Cir. 1996), the Tenth Circuit addressed the retroactive effect of § 2253 with respect to a petition filed under § 2255 (the federal habeas provision). Prior to the passage of the 1996 Act, a petitioner bringing a § 2255 application was not required to obtain a certificate of appealability. The Tenth Circuit concluded that both the time limitations and the requirement of a certificate of appealability, which were imposed by the 1996 Act, did have retroactive effect, and therefore declined to apply § 2253 of the 1996 Act to cases appealed prior to the passage of the 1996 Act. See also Herrera v. United States 96 F.3d 1010 (7th Cir. 1996).

Each of the Tenth Circuit cases addresses the applicability of the 1996 Act, in consideration of Landgraf, and with regard to the specific provision of the 1996 Act which is involved. The Tenth Circuit has not yet addressed § 2254(d)(1) of the 1996 Act, and the analysis of the prior Tenth Circuit cases does not persuade this Court that the Tenth Circuit would conclude that § 2254(d)(1) of the 1996 Act should not be

applied. The Court remains persuaded by the analysis of the Seventh Circuit in Lindh, and recommends that the District Court find that the 1996 Act applies to this appeal.

However, the determination that the 1996 Act applies to this appeal does not translate into a dismissal of this appeal and a cancellation of the proportionality review. A determination that the 1996 Act applies simply means that the Court should apply the Act.

"CLEARLY ESTABLISHED FEDERAL LAW": THE 1996 ACT

The 1996 Act adds a § 2254(d) provision that specifies the appropriate treatment by the federal court of the legal and factual determinations by state courts.

Section 2254(d), as amended, provides as follows:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim ---

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (emphasis added).

Respondent argues that, under the 1996 Act, a proportionality review is not required in this case because the "Supreme Court has not decided that prisoners in non-capital cases are entitled to a proportionality review." Motion to Cancel

Evidentiary Hearing, July 1, 1996 [Doc. No. 22-1] at 7. Respondent asserts that a proportionality review of Petitioner's sentence is therefore not proper because no "clearly established federal law" provides for such a review. Respondent refers to the Supreme Court decision in Harmelin v. Michigan, 501 U.S. 951 (1991).

Petitioner was sentenced in April of 1985. See [Doc. No. 1-1] at 1. At the time of Petitioner's sentence, the Supreme Court had clearly recognized the right to a proportionality review in non-capital cases. In Solem v. Helm, 463 U.S. 277, 284 (1983), in considering the constitutionality of a mandatory life sentence imposed pursuant to a South Dakota recidivist statute, the Supreme Court recognized that the Eighth Amendment requires that a sentence not be disproportionate to the severity of the crime or involve unnecessary infliction of pain. In so holding, the Court articulated three factors to be considered in conducting such a proportionality review: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions. Id. at 292. The Court noted, however, that in reviewing the proportionality of a sentence, a court should "grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." Solem, 463 U.S. at 290. Under the Solem three-factor test, the Court found that the mandatory life sentence imposed pursuant to South Dakota's recidivist statute violated the Eighth Amendment's prohibition against cruel and unusual punishment.

The Supreme Court's most recent consideration of the constitutionality of a mandatory life sentence was in Harmelin v. Michigan, 501 U.S. 957 (1991). In Harmelin, the petitioner was convicted under a Michigan statute for possessing more than 650 grams of cocaine and was sentenced to a mandatory term of life in prison without the possibility of parole. 501 U.S. at 961. The petitioner's main contention was that the life sentence was "significantly disproportionate" to the crime committed.

Although the Harmelin Court upheld the sentence by a 5-4 vote, the majority split on the appropriateness of the "proportionality" principle in non-capital cases. Justice Scalia, joined by Chief Justice Rehnquist, argued that "Solem was simply wrong; the Eighth Amendment contains no proportionality guarantee." Harmelin, 111 S. Ct. at 2686. In support of this conclusion, Justice Scalia conducted an extensive historical survey of the Cruel and Unusual Punishment Clause, and found, "The Eighth Amendment is not a ratchet, whereby a temporary consent on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered conditions." Id. at 990. Justice Scalia found, therefore, that although proportionality review would still remain important for death penalty cases, "we will not extend it further" except in very rare instances." Id. at 994. Justice Kennedy, joined by Justices O'Connor and Souter, concluded that the "Eighth Amendment proportionality principle also applies to noncapital sentence," but found that "our proportionality decisions . . . require us to uphold petitioner's sentence." Id. at 997. Justice Kennedy wrote that "though our decisions recognize a proportionality principle, its precise contours are unclear." Id. at 998. Justice Kennedy concluded

that “[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” Id. at 1001. Justice White, joined by Justices Blackmun and Stevens, concluded that the standards of Solem should be applied, and wrote that “the statutorily mandated punishment at issue here . . . fails muster under Solem and, consequently, under the Eighth Amendment to the Constitution.” Id. at 2716. Justice Marshall wrote that he agreed with Justice White’s opinion with the exception that, in Justice Marshall’s opinion, “capital punishment is in all instances unconstitutional.” Id. at 1027. Justice Marshall agreed, however, “that the Eighth Amendment also imposes a general proportionality requirement.” Id. at 1028.

Solem is clear--the right to proportionality review exists in non-capital cases. By a 5-4 vote in Harmelin, the Justices agreed to modify or overrule Solem. However, only two Justices wrote that no right to a proportionality review exists in a non-capital case. The remaining seven Justices agree that such a right exists. The confusion caused by Harmelin concerns the applicable standard that a court should apply when conducting such a review. Justices White, Blackmun, Stevens, and Marshall would continue to apply the factors outlined by Solem. Justices Kennedy, O’Connor, and Souter suggest that a more stringent standard than Solem is required.

A clear plurality, or seven Justices “agree” that, in a non-capital case a petitioner has a right to a proportionality review. The mere fact that the “standard” a court should use when conducting a proportionality review has been muddled by Harmelin does not mean that, because of Harmelin, a petitioner no longer has a right

to such a review in a non-capital case. The Court concludes that the “clearly recognized Federal law, as determined by the Supreme Court” recognizes the right to a proportionality review in non-capital cases. Therefore Respondent’s Motion to Cancel the Proportionality Review and to Dismiss the Petition for Writ of Habeas Corpus should be denied.

EFFECT OF APPLYING THE 1996 ACT

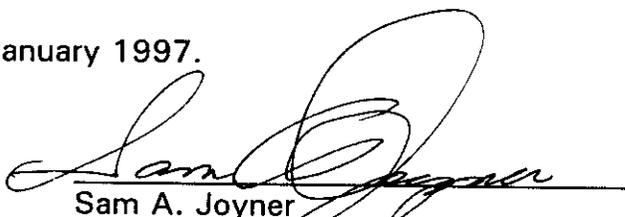
Application of the 1996 Act requires the Court to apply a different standard when reviewing an application for habeas. Specifically, a court is prohibited from issuing a writ unless the state court adjudication “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” Both the Seventh Circuit in Lindh and the Fifth Circuit in Moore have, to a limited degree, discussed the effect that application of § 2254(d)(1) of the 1996 Act has on the standard of review undertaken by the federal court. However, neither the Petitioner nor the Respondent has had the opportunity to brief the issue of what the appropriate standard of review under the 1996 Act is, and what effect, if any, application of that standard of review will have to the Petitioner’s pending application. Therefore, the Magistrate Judge recommends that Petitioner be granted 15 days within which to file such a brief, if necessary, that Respondent be granted 15 days to file any necessary response, and that Petitioner be granted 10 days to file any reply.

RECOMMENDATION

The United States Magistrate Judge recommends that the District Court **DENY** Respondent's Motion to Cancel the Proportionality Review and Dismiss the Petition for Writ of Habeas Corpus. [Doc. No. 45-1]. The Magistrate Judge recommends that the District Court find that the 1996 Act does apply to the pending proceeding, but that application of the 1996 Act does not require a dismissal of Petitioner's petition. The Magistrate Judge additionally recommends that the parties be given additional time within which to brief any additional issues addressing the applicable standard of review (due to the applicability of the 1996 Act, and the status of the applicable Supreme Court law).

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

Dated this 23 day of January 1997.


Sam A. Joyner
United States Magistrate Judge

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

DANA's AGAIN, INC.,)
)
Plaintiff,)
)
vs.)
)
STATE FARM FIRE AND CASUALTY)
COMPANY,)
)
Defendant.)

Case No. 96-CV-721-BU

FILED

JAN 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JAN 27 1997

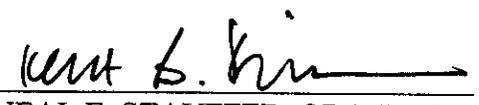
**JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE OF
DEFENANT STATE FARM FIRE AND CASUALTY COMPANY'S COUNTERCLAIM
AGAINST DANA FERGUSON D/B/A DANA'S BOUTIQUE AND SALON**

Come now the parties, plaintiff Dana's Again, Inc. (formerly Dana Ferguson d/b/a Dana's Boutique and Salon) and defendant State Farm Fire and Casualty Company (State Farm), and pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure, hereby stipulate to dismiss State Farm's counterclaim against Dana Ferguson d/b/a Dana's Boutique and Salon in the above-entitled action without prejudice, with each party to bear their respective costs and attorneys fees.

Respectfully submitted,

STAUFFER, RAINEY, GUDGEL
& HARMON, P.C.

By: 
JOSEPH F. CLARK, JR., OBA #1706
Pratt Tower - 6th Floor
125 West Fifteenth Street
Tulsa, Oklahoma 74119
(918) 583-5538

By: 
NEAL E. STAUFFER, OBA #13618
KENT B. RAINEY, OBA #14619
1100 Petroleum Club Bldg.
601 South Boulder
Tulsa, Oklahoma 74119
(918) 592-7070

Attorney for Plaintiff, Dana Ferguson d/b/a
Dana's Boutique & Salon and Dana's Again,
Inc.

Attorneys for Defendant, State Farm Fire and
Casualty Company.

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

ENTERED ON DOCKET

DATE JAN 27 1997

ANGEL ALEXANDER,)
)
Plaintiff,)
)
vs.)
)
STATE BANK & TRUST, N.A.)
an Oklahoma corporation,)
)
Defendant.)

Case No. 96-C-286-BU

F I L E D

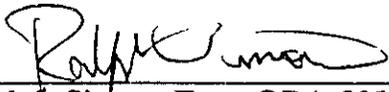
JAN 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

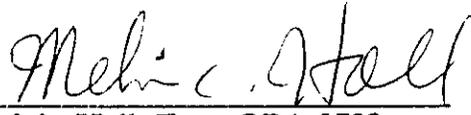
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiff and the Defendant jointly stipulate and agree that this action should be and is hereby dismissed with prejudice. Each party has agreed to bear its own costs, attorneys fees, and costs.

Dated this 22nd day of January, 1997.



Ralph Simon, Esq., OBA 8254
403 South Cheyenne, Suite 1200
Tulsa, Oklahoma 74103-3087
ATTORNEY FOR PLAINTIFF



Melvin Hall, Esq., OBA 3728
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
5801 N. Broadway, Ste. 101
Oklahoma City, Oklahoma 73118
ATTORNEY FOR DEFENDANT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 24 1997

Printed on Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff

v.

ALETA L. BEZZIC-MIDDLETON,

Defendant.

)
)
)
)
) Civil Action No. 96CV1081BU
)
)

ENTERED ON DOCKET

DATE JAN 27 1997

DEFAULT JUDGMENT

This matter comes on for consideration this ⁿ24 day of January, 1997, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Aleta L. Bezzic-Middleton, appearing not.

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

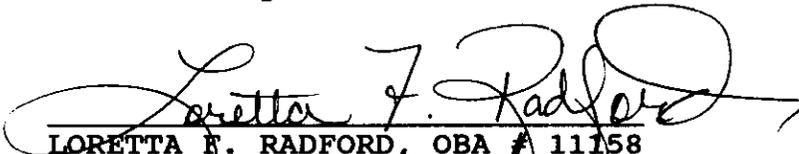
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Aleta L. Bezzic-Middleton, for the principal amount of \$78,218.86, plus accrued interest of \$2,411.05 as of September 30, 1996, plus

interest thereafter at the rate of 8.25 percent per annum until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$120.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.61 percent per annum until paid, plus costs of this action.

s/ MICHAEL BURKAGE

United States District Judge

Submitted By:


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

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

NANETTE HALL,)
)
Plaintiff,)
)
vs.)
)
STATE BANK & TRUST, N.A.)
an Oklahoma corporation,)
)
Defendant.)

ENTERED ON DOCKET

DATE JAN 27 1997

Case No. 96-C-287-B

F I L E D

JAN 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

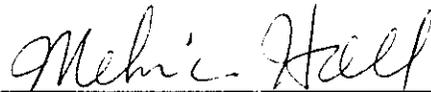
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiff and the Defendant jointly stipulate and agree that this action should be and is hereby dismissed with prejudice. Each party has agreed to bear its own costs, attorneys fees, and costs.

Dated this 22nd day of January, 1997.



Ralph Simon, Esq., OBA 8254
403 South Cheyenne, Suite 1200
Tulsa, Oklahoma 74103-3087
ATTORNEY FOR PLAINTIFF



Melvin Hall, Esq., OBA 3728
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
5801 N. Broadway, Ste. 101
Oklahoma City, Oklahoma 73118
ATTORNEY FOR DEFENDANT

512

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

FILED

JAN 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOSEPH VAUGHN,

Plaintiff,

vs.

Case No. 96-C-331H

GLENPOOL UTILITY SERVICES
AUTHORITY, a public trust,

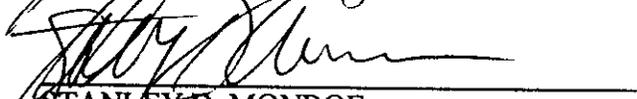
Defendant.

ENTERED ON DOCKET
DATE JAN 27 1997

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, Joseph Vaughn, and Defendant, Glenpool Utility Services Authority, and stipulate that the above styled cause may be dismissed with prejudice, and Plaintiff agrees that all rights, titles, claims or other proceedings which he may have, known and unknown, asserted or unasserted, against the Glenpool Utility Services Authority and/or its beneficial interest, City of Glenpool, Oklahoma may be dismissed. The Plaintiff stipulates that all claims or causes of action which he may have against Tom Laust, Dan Gibson, Patricia Morris or Jim McClain as well as any and all other supervisors, employees, or members of the Board of Trustees for the Glenpool Utility Services Authority may be released. Such Dismissal is with prejudice.


JOSEPH VAUGHN, Plaintiff


STANLEY D. MONROE
525 S. Main, Suite 600
Tulsa, Oklahoma 74103-4509
(918) 592-1144
Attorney for Plaintiff


PHIL FRAZIER
1424 Terrace Drive
Tulsa, Oklahoma 74104
(918) 744-7200
Attorney for Glenpool Utility Services Authority

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

ENTERED ON DOCKET

DATE 1-27-97

ALICE REBECCA WALLACE,
individually and as
administrator of the estate
of JOSHUA JON-JOSEF LUNA,

Plaintiffs,

vs.

THE CITY OF BROKEN ARROW,
et al.,

Defendants.

No. 96-C-469-K

FILED

JAN 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

Before the Court is the motion of the defendant Juan Jenkins for summary judgment. Plaintiff is administrator of the estate of the deceased Joshua Jon-Josef Luna. The complaint alleges that on or about May 25, 1995¹, deceased was at a party in Broken Arrow, Oklahoma, wearing oversized, loose-fitting pants. Police officers arrived at the party around 3 a.m., and began mocking deceased's attire. One officer allegedly seized hold of deceased's pants, and jerked them upward violently, rupturing deceased's scrotum. Deceased was placed under arrest, and allegedly was not given medical care, although he requested it. (The deceased was subsequently killed in an automobile accident having no relation to these allegations). Plaintiff sues the city, the chief of police and three police officers under 42 U.S.C. §1983 and state law.²

¹In motion briefing, plaintiff admits the proper date is May 25, 1994.

²By Order filed November 4, 1996, the Court granted plaintiff's motion for joinder of defendants, which sought to add four other party defendants. Plaintiff has never filed an amended

In the present motion by defendant Jenkins, he presents a different factual background. He asserts that the deceased and three other young men were riding in a car when they came in contact with a thirteen year old female named Cassie Dawn Nelson. One or more of the young men brandished weapons and pointed them at Nelson. The car drove off, and the incident was reported to the police. Defendant Jenkins arrived at the scene and, while he was interviewing Nelson, the car drove by and was identified by Nelson. After securing "backup" officers, Jenkins stopped the vehicle and the four young men were arrested.

As a precaution, in view of the weapons involved, the officers had the young men exit the car one at a time, place their hands behind their head, and walk backward to the officers. At one point, one officer (not Jenkins) grabbed the deceased by the belt ostensibly to guide his steps. No testimony exists in the record that the belt was grabbed violently or that plaintiff yelled in pain. The suspects, including the deceased, were booked into the Broken Arrow Police Station on the morning of May 25, 1994. During the booking procedures, the deceased made no mention of an injury. The deceased was eventually released to the custody of his mother.³

complaint or obtained service upon these additional parties.

³Plaintiff lists as an undisputed fact that "several hours after Plaintiff Luna was booked into the Broken Arrow Police Station, he was transported to the Emergency Room of Broken Arrow Medical Center." Plaintiff has failed to comply with Local Rule 56.1(A), which requires specific reference to the record which supports such an assertion of fact. The Court is unable to determine if Luna was taken to the doctor by his mother or the Broken Arrow police.

At the Broken Arrow Medical Center, Luna was diagnosed with a left scrotal hemorrhage.

Plaintiff concedes Jenkins was merely the "officer in charge" at the arrest scene, and did not make physical contact with the deceased. Plaintiff correctly notes this does not foreclose liability. It is established "a law enforcement official who fails to intervene to prevent another law enforcement official's use of excessive force may be liable under § 1983." Mick v. Brewer, 76 F.3d 1127, 1136 (10th Cir.1996). However, plaintiff must show that the non-intervening officer "had reason to know: (1) that excessive force was being used, (2) that a citizen has been unjustifiably arrested, or (3) that any constitutional violation has been committed by a law enforcement official; and the officer had a realistic opportunity to intervene to prevent the harm from occurring." Yang v. Hardin, 37 F.3d 282, 285 (7th Cir.1994).

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971

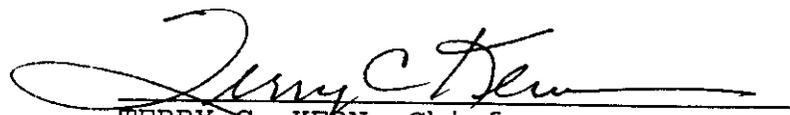
F.2d 492, 494 (10th Cir. 1992).

Plaintiff has failed to demonstrate the existence of a genuine issue of material fact. Even assuming the deceased was injured when the other officer grabbed his belt, no evidence has been presented which would have reasonably put Jenkins on notice that excessive force was being used. Plaintiff has not quoted any witness who testified the belt was grabbed violently or that Luna exhibited any pain. Plaintiff has pointed to nothing in the record from which a reasonable officer could have inferred constitutional rights were being violated or that intervention was necessary.

Similarly, plaintiff has not shown Jenkins had knowledge of either Luna's condition or the fact that Luna requested and was denied medical care. These are prerequisites to a "deliberate indifference to medical needs" claim. See Mitchell v. Maynard, 80 F.3d 1433, 1444 (10th Cir.1996). Plaintiff's claims under §1983 fail. In her response, plaintiff has disavowed asserting any state law claim against Jenkins. Accordingly, summary judgment is appropriate.

It is the Order of the Court that the motion of the defendant Juan Jenkins for summary judgment (#27) is hereby GRANTED.

ORDERED this 24th day of January, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE



SAB
1/22/97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 1-27-97

_____))
 JOHANNA D. PRYOR, et al.))
))
 Plaintiffs,))
))
 v.))
))
 PIZZA HUT OF AMERICA, INC.))
))
 Defendant.))
 _____)

Case No. 96 C 432K ✓

F I L E D

JAN 24 1997 M

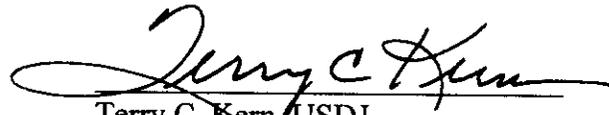
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CONSENT ORDER OF DISMISSAL

COME NOW the parties to this action, by and through their respective counsel, and having advised the Court that they have settled all their differences and are jointly requesting that this matter be dismissed with prejudice, with each party to bear their own fees and expenses, the Court finds that there is good cause for the granting of such request.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED this 23 day of January, 1997, that this matter be, and hereby is DISMISSED WITH PREJUDICE, with each party to bear their own attorneys fees, expenses and costs.

SO ORDERED.


Terry C. Kern / USDJ

WE ASK FOR AND CONSENT TO THE ENTRY OF THIS ORDER:



James M. Coleman

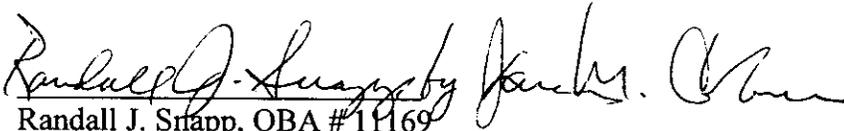
CONSTANGY, BROOKS & SMITH, LLC

1300 North Seventeenth Street

Suite 990

Arlington, Virginia 22209-3802

(703) 527-0900



Randall J. Snapp, OBA #11169

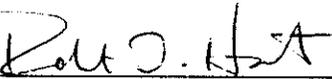
CROWE & DUNLEVY

321 South Boston, Suite 500

Tulsa, Oklahoma 74103-3313

(918) 592-9800

ATTORNEYS FOR DEFENDANT PIZZA HUT OF AMERICA, INC.



Robert D. Hart, OBA # 16358

ROWE & HART

8555 N. 117 E. Avenue, Ste. B

Owasso, Oklahoma 74055

(918) 272-2990

ATTORNEY FOR PLAINTIFFS JOHANNA D. PRYOR, THERON H. GAYLORD, AMBER HART, AND CHARLES HARLAN

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 1-27-97

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 WILLIAM R. MILLER,)
)
 Defendant.)

CIVIL ACTION NO. 96-C-819K

FILED

JAN 24 1997 *M*

AGREED JUDGMENT

Phil Lombardi, Clerk
U.S. DISTRICT COURT

This matter comes on for consideration this 27 day of January, 1997, the Plaintiff, United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, William R. Miller, appearing pro se.

The Court, being fully advised and having examined the court file, finds that the Defendant, William R. Miller, acknowledged receipt of Summons and Complaint on 12-5-96. The Defendant has not filed an Answer but in lieu thereof has agreed that William R. Miller is indebted to the Plaintiff in the amount alleged in the Complaint and that judgment may accordingly be entered against William R. Miller in the principal amount of \$1,000.00, plus administrative costs in the amount of \$165.00, plus accrued interest in the amount of \$45.42, plus interest thereafter at the rate of 6% per annum until judgment, plus a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of

\$120.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the legal rate until paid, plus the costs of this action.

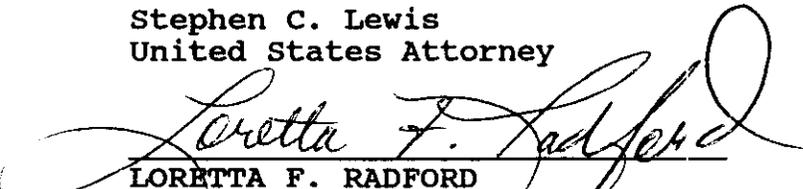
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of \$1,000.00, plus administrative costs in the amount of \$165.00, plus accrued interest in the amount of \$45.42, plus interest thereafter at the rate of 6% per annum until judgment, plus a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$120.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the legal rate until paid, plus the costs of this action.


UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney


LORETTA F. RADFORD
Assistant United States Attorney


William R. Miller

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

ENTERED ON DOCKET
DATE 1-27-97

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

FILED
No. 96-CV-568-K
JAN 24 1997
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. Ms. Brown, pursuant to Order of this Court filed a responsive motion to Defendant's Motion to Dismiss wherein she advised the Court that, despite repeated attempts on the part of Ms. Brown, the Plaintiff has refused to contact her regarding pursuit of this case. Ms. Brown requested that the Court grant further time to contact the Plaintiff, or in the alternative, that the Court dismiss the case without prejudice.

Based upon the submissions of counsel, the Court finds that dismissal of this case is a particularly appropriate remedy in

26

light of Plaintiff's failure to adhere to a direct Order from this Court. Therefore, this case is DISMISSED WITHOUT PREJUDICE.

ORDERED this 24 day of January, 1997.

A handwritten signature in black ink, appearing to read "Terry G. Kern", written over a horizontal line.

TERRY G. KERN
UNITED STATES DISTRICT JUDGE

FILED

DISTRICT COURT

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

FILED

JAN 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDSEY K. SPRINGER,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES, SECRET)
SERVICE, AGENT WILLIAM BILL)
GREER, AGENT ROY KELLERMAN,)
THE 1963-64 WARREN)
COMMISSION,)
)
Defendant.)

No. 96-C-893-K ✓

ENTERED ON DOCKET
DATE 1-27-97

ORDER

NOW before the Court is the motion (Docket #4) of Defendant, United States of America, to dismiss pursuant to Rule 12(b)(6) the complaint of Plaintiff, Lindsey K. Springer. Plaintiff was directed by this Court to respond within five days of the order dated January 10, 1997. However, Plaintiff did not respond in a timely manner.¹ For the reasons stated herein, the Court grants the motion to dismiss.

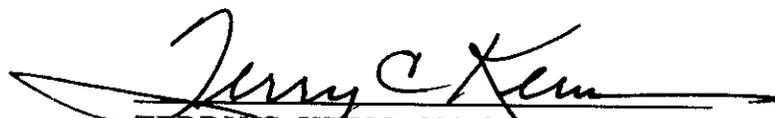
First, the Court must address whether or not Plaintiff has standing to raise his claims. Because the Constitution limits the jurisdiction of federal courts to cases and controversies, this Court is required to determine that a plaintiff has standing to bring a suit. Skrzypczak v. Kauger, 92 F.3d 1050, 1052 (10th Cir. 1996). A party has standing when (1) he or she has suffered an injury in fact, (2) there is a causal connection between the injury and the conduct

¹ A review of Plaintiff's untimely submitted response does not affect the decision of the Court. Plaintiff has failed to show standing to bring this claim.

complained of, and (3) it is likely that the injury will be redressed by a favorable decision. Id at 1153. A plaintiff must support the elements of standing 'with the manner and degree of evidence required at the successive stages of litigation.' Id. quoting Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2137 (1992).

The Court holds that Plaintiff lacks standing because the complaint fails to allege an injury in fact. Injury in fact requires invasion of a legally-protected interest. Defenders of Wildlife, 112 S.Ct. at 2136. Accordingly, Defendants motion to dismiss (docket #4) is granted.

ORDERED this 24 day of January, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

ENTERED ON DOCKET
DATE 1-27-97

ALICE REBECCA WALLACE,)
)
)
Plaintiff,)
)
)
vs.)
)
)
THE CITY OF BROKEN ARROW,)
et al.,)
)
Defendants.)

No. 96-C-469-K ✓

FILED

JAN 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendants City of Broken Arrow, J.R. Stover and Juan Jenkins, and against the Plaintiff.

ORDERED THIS DAY OF 24th JANUARY, 1997


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

ALICE REBECCA WALLACE,)
individually and as)
administrator of the estate)
of JOSHUA JON-JOSEF LUNA,)
)
Plaintiffs,)
)
vs.)
)
THE CITY OF BROKEN ARROW,)
et al.,)
Defendants.)

No. 96-C-469-K ✓

ENTERED ON DOCKET
DATE 1-27-97

FILED

JAN 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of defendants City of Broken Arrow ("Broken Arrow") and J.R. Stover for summary judgment. Plaintiff is administrator of the estate of the deceased Joshua Jon-Josef Luna. The complaint alleges that on or about May 25, 1995¹, deceased was at a party in Broken Arrow, Oklahoma, wearing oversized, loose-fitting pants. Police officers arrived at the party around 3 a.m., and began mocking deceased's attire. One officer allegedly seized hold of deceased's pants, and jerked them upward violently, rupturing deceased's scrotum. Deceased was placed under arrest, and allegedly was not given medical care, although he requested it. (The deceased was subsequently killed in an automobile accident having no relation to these allegations). Plaintiff sues the city, the chief of police and three police

¹In motion briefing, plaintiff admits the proper date is May 25, 1994.

54

officers under 42 U.S.C. §1983 and state law.² The claims against Broken Arrow and Police Chief Stover involve alleged failure to train and supervise Broken Arrow police officers.

Defendants present a different factual background. They assert that the deceased and three other young men were riding in a car when they came in contact with a thirteen year old female named Cassie Dawn Nelson. One or more of the young men brandished weapons and pointed them at Nelson. The car drove off, and the incident was reported to the police. Defendant Juan Jenkins arrived at the scene and, while he was interviewing Nelson, the car drove by and was identified by Nelson. After securing "backup" officers, Jenkins stopped the vehicle and the four young men were arrested.

As a precaution, in view of the weapons involved, the officers had the young men exit the car one at a time, place their hands behind their head, and walk backward to the officers. At one point, one officer (not Jenkins) grabbed the deceased by the belt ostensibly to guide his steps. No testimony exists in the record that the belt was grabbed violently or that plaintiff yelled in pain. The suspects, including the deceased, were booked into the Broken Arrow Police Station on the morning of May 25, 1994. During the booking procedures, the deceased made no mention of an injury.

²By Order filed November 4, 1996, the Court granted plaintiff's motion for joinder of defendants, which sought to add four other party defendants. Plaintiff has never filed an amended complaint or obtained service upon these additional parties.

The deceased was eventually released to the custody of his mother.³ At the Broken Arrow Medical Center, Luna was diagnosed with a left scrotal hemorrhage.

Established principles exist in this area of the law. A city can be sued if it allegedly caused a constitutional tort as a result of an unconstitutional policy or custom. City of St. Louis v. Praprotnik, 485 U.S. 112, 121-22 (1988). There must be a causal link between a municipal policy or custom and the alleged constitutional deprivation. City of Canton v. Harris, 489 U.S. 378, 385 (1989). Inadequacy of police training is a basis for §1983 liability only where a failure to train amounts to a policy or custom, and thus deliberate indifference to the rights of the person with whom police came into contact. City of Canton, 489 U.S. at 388-89. Ordinarily, "[p]roof of a single incident of unconstitutional activity is not sufficient to impose [municipal] liability." Butler v. City of Norman, 992 F.2d 1053, 1055 (10th Cir.1993).

Even if the officer who grabbed Luna's belt used excessive force, plaintiff has failed to set forth any facts establishing a policy or custom of inadequate training on the use of force and deliberate indifference to constitutional rights. Plaintiff has

³Plaintiff lists as an undisputed fact that "several hours after Plaintiff Luna was booked into the Broken Arrow Police Station, he was transported to the Emergency Room of Broken Arrow Medical Center." Plaintiff has failed to comply with Local Rule 56.1(A), which requires specific reference to the record which supports such an assertion of fact. The Court is unable to determine if Luna was taken to the doctor by his mother or the Broken Arrow police.

also failed to show a pattern or practice of failure to train amounting to deliberate indifference to the medical needs of those incarcerated. Likewise, no evidence has been adduced that Stover, in his supervisory position as chief of police, was responsible for or acquiesced in Broken Arrow's policy of indifference in the supervision and discipline of officers, and that this policy caused plaintiff's injuries.

"A supervisor may be held liable for the unconstitutional acts of an inferior upon proof of actual knowledge of or acquiescence in the constitutional deprivations." Williams v. Denver, 99 F.3d 1009, 1020 n.12 (10th Cir.1996). Again, plaintiff's proof is lacking. No showing has been made that Stover had actual knowledge or acquiesced in any use of excessive force. Stover testified in his deposition he saw an investigative report of the incident, including Luna's medical reports, but the Court sees no specification of time. (Stover depo. at 54). Clearly, Stover saw the report days or weeks after the incident. This does not establish Stover's personal involvement in the incident, which is necessary for supervisor liability.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,

249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

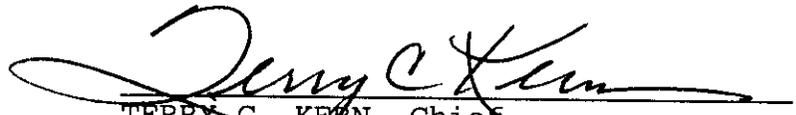
Plaintiff has failed to demonstrate the existence of a genuine issue of material fact. Aside from the medical report of the scrotal injury, the only factual support of plaintiff's version of events is an affidavit executed by plaintiff herself, in which she relates statements her deceased son purportedly made to her, detailing the officer's use of excessive force. Defendants argue for exclusion of this affidavit on the ground the deceased's statements are inadmissible hearsay. The Court need not resolve this issue, because even considering the affidavit for summary judgment purposes, no factual issue requiring a jury's resolution has been presented as to Broken Arrow and Stover.

Plaintiff has conceded she did not file the notice required under the Oklahoma Political Subdivision Tort Claims Act, and therefore those claims will also be dismissed.

It is the Order of the Court that the motion of the defendants City of Broken Arrow and J.D. Stover for summary judgment (#9) is hereby GRANTED.

The pending motions relating to extensions of time and expedited ruling, specifically docket numbers 18, 38, 43 and 44 are declared moot.

ORDERED this 24th day of January, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 1-27-97

UNITED STATES OF AMERICA,
on behalf of Rural Housing Service,
formerly Farmers Home Administration,

Plaintiff,

v.

LONNIE KELLY;
STATE OF OKLAHOMA *ex rel.*
Oklahoma Tax Commission;
SEARS, ROEBUCK AND COMPANY;
COUNTY TREASURER, Ottawa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Ottawa County, Oklahoma,

Defendants.

FILED

JAN 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 96-CV-799-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 23 day of January,
1997. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern
District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the
Defendants, County Treasurer, Ottawa County, Oklahoma, and Board of County
Commissioners, Ottawa County, Oklahoma, appear by Ben Loring, District Attorney, Ottawa
County, Oklahoma; the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission,
appears not, having previously filed its Disclaimer; the Defendant, Sears, Roebuck and
Company, appears by its attorney J. Michael Morgan; and the Defendant, Lonnie Kelly,
appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, Lonnie Kelly, was served by a United States Deputy Marshal with Summons and Complaint on November 4, 1996.

It appears that the Defendants, County Treasurer, Ottawa County, Oklahoma, and Board of County Commissioners, Ottawa County, Oklahoma, filed their Answer on September 13, 1996; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Disclaimer on October 24, 1996; that the Defendant, Sears, Roebuck and Company, filed its Answer on October 23, 1996; and that the Defendant, Lonnie Kelly, has failed to answer and his default has therefore been entered by the Clerk of this Court.

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

Lot 9 in Block 9 in MIDWAY VILLAGE ADDITION, PLAT NO. 3, to the Town of North Miami, now Commerce, Ottawa County, Oklahoma, according to the recorded plat thereof. Subject, however, to any valid outstanding easements, rights-of-way, mineral leases, mineral reservations, and mineral conveyances of record.

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of Michelle Darlene Kelly and of judicially terminating the joint tenancy of Lonnie Kelly and Michelle Kelly.

The Court further finds that Lonnie Kelly and Michelle Kelly aka Michelle Darlene Kelly (hereinafter referred to by either name) became the record owners of the real property involved in this action by virtue of that certain Warranty Deed dated March 16,

1984, from Neal Hall, a single person, to Lonnie Kelly and Michelle Kelly, husband and wife, as joint tenants, the survivor to take all, and not as tenants in common, which Warranty Deed was filed of record on March 16, 1984, in Book 431, Page 98, in the records of the County Clerk of Ottawa County, Oklahoma.

The Court further finds that Michelle Darlene Kelly died on January 1, 1991, in the City of Commerce, Ottawa County, Oklahoma. Upon the death of Michelle Darlene Kelly, the subject property vested in her surviving joint tenant, Lonnie Kelly, by operation of law.

The Court further finds that on March 16, 1984, Lonnie Kelly and Michelle Kelly, now deceased, executed and delivered to the United States of America, acting through Farmers Home Administration, now known as Rural Housing Service, their promissory note in the amount of \$43,250.00, payable in monthly installments, with interest thereon at the rate of 11.875 percent per annum.

The Court further finds that as security for the payment of the above-described note, Lonnie Kelly and Michelle Kelly, now deceased, who were then husband and wife, executed and delivered to the United States of America, acting through Farmers Home Administration, now known as Rural Housing Service, a real estate mortgage dated March 16, 1984, covering the above-described property, situated in the State of Oklahoma, Ottawa County. This mortgage was recorded on March 16, 1984, in Book 431, Page 99, in the records of Ottawa County, Oklahoma.

The Court further finds that on June 4, 1984, August 2, 1984, June 5, 1985, June 18, 1986, June 30, 1987, June 23, 1988, July 19, 1989, and July 10, 1990, Lonnie Kelly and Michelle Kelly, now deceased, executed and delivered to the United States of

America, acting through Farmers Home Administration, now known as Rural Housing Service, Interest Credit Agreements pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on February 21, 1992, Lonnie Kelly executed and delivered to the United States of America, acting through Farmers Home Administration, now known as Rural Housing Service, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on February 14, 1992, Lonnie Kelly executed and delivered to the United States of America, acting through Farmers Home Administration, now known as Rural Housing Service, a Reamortization and/or Deferral Agreement pursuant to which the entire debt due on that date was made principal.

The Court further finds that the Defendant, Lonnie Kelly and Michelle Kelly, now deceased, made default under the terms of the aforesaid note, mortgage, interest credit agreements and reamortization and/or deferral agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Lonnie Kelly, is indebted to the Plaintiff in the principal sum of \$45,679.21, plus accrued interest in the amount of \$15,016.36 as of July 11, 1995, plus interest accruing thereafter at the rate of 11.875 percent per annum or \$14.8613 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of \$21,716.00, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that Plaintiff is entitled to a judicial determination of the death of Michelle Darlene Kelly and to a judicial termination of the joint tenancy of Lonnie Kelly and Michelle Kelly in the subject real property.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendant, Sears, Roebuck and Company, has a lien on the property which is the subject matter of this action by virtue of a judgment lien in the principal amount of \$202.44, with interest, filed of record with the County Clerk of Ottawa County on April 20, 1992.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Ottawa County, Oklahoma, claim no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the death of Michelle Darlene Kelly be and the same is hereby judicially determined to have occurred on January 1, 1991, in the City of Commerce, Ottawa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the joint tenancy of Lonnie Kelly and Michelle Kelly in the above-described real property be and the same is hereby judicially terminated as of the date of the death of Michelle Darlene Kelly on January 1, 1991.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of Rural Housing Service, have and recover in rem judgment against the Defendant, Lonnie Kelly, in the principal sum of \$45,679.21, plus accrued interest in the amount of \$15,016.36 as of July 11, 1995, plus

interest accruing thereafter at the rate of 11.875 percent per annum or \$14.8613 per day until judgment, plus interest thereafter at the current legal rate of 5.61 percent per annum until paid, and the further sum due and owing under the interest credit agreements of \$21,716.00, plus interest on that sum at the current legal rate of 5.61 from judgment until paid, plus the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Sears, Roebuck and Company, have and recover judgment in the principal amount of \$202.44, with interest, by virtue of a judgment lien filed of record with the County Clerk of Ottawa County on April 20, 1992.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, State of Oklahoma ex rel. Oklahoma Tax Commission and County Treasurer and Board of County Commissioners, Ottawa 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, Lonnie Kelly, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

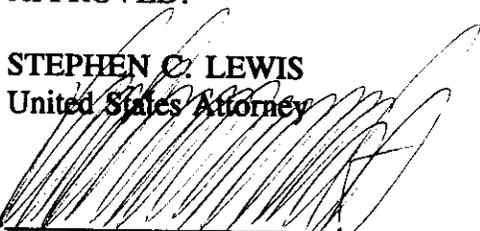
In payment of the judgment rendered herein in favor of the Defendant, Sears, Roebuck and Company.

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

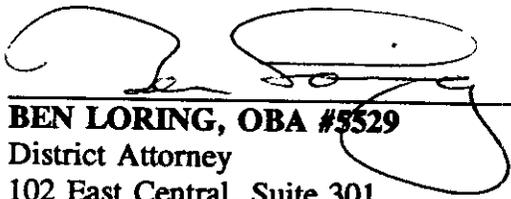
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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


UNITED STATES DISTRICT JUDGE

APPROVED:


STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
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BEN LORING, OBA #5529

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102 East Central, Suite 301

Miami, Oklahoma 74354

(918) 542-5547

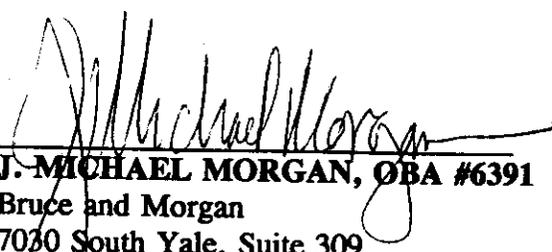
Attorney for Defendants,

County Treasurer and

Board of County Commissioners,

Ottawa County, Oklahoma

Judgment of Foreclosure
Case No. 96-CV-799-K (Kelly)



J. MICHAEL MORGAN, OBA #6391

Bruce and Morgan

7030 South Yale, Suite 309

Tulsa, Oklahoma 74136-5712

(918) 492-4172

Attorney for Defendant,

Sears, Roebuck and Company

Judgment of Foreclosure
Case No. 96-CV-799-K (Kelly)

FB:cas

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

KELLEE JO BEARD, by her parents and
next friends, Patty and Bill Beard, *et al.*,

Plaintiffs,

vs.

THE HISSOM MEMORIAL CENTER, *et al.*,

Defendants.

FILED

JAN 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 87-C-704-E

JAN 27 1997

ORDER

On July 9, 1996, this Court ordered an audit to be conducted of the Compliance Office in order that there might be a full public accounting of all expenditures by that office. The Court reserved the question of the liability for the cost of that audit. That audit has now been completed by the accounting firm of Carlson & Cottrell, C.P.A.'s, which was retained by the Oklahoma Department of Education for that task. Before the Court at this time is the question of the payment of the Four Thousand Six Hundred Dollars (\$4,600) due for the completion of that audit. The Court has considered the views of the parties, and without objection hereby orders that half of this amount (\$2,300) be taxed against the Oklahoma Department of Education as the cost of this matter. This sum is to be paid directly by the State Department of Education. The balance of Two Thousand Three Hundred Dollars (\$2,300) owed to Carlson & Cottrell, C.P.A. shall be paid from the Compensatory Education Fund. The parties have stated that they have no objections to this order.

424

IT IS SO ORDERED this 22nd day of January, 1997.


UNITED STATES ~~MAGISTRATE~~
Judge

AuditPmt.Ord

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 27 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JIMMIE L. CARR; MARSHA K. CARR;)
 ASSOCIATES NATIONAL MORTGAGE)
 CORPORATION; CHARLES F. CURRY)
 COMPANY; TULSA MUNICIPAL)
 EMPLOYEES FEDERAL CREDIT)
 UNION; COUNTY TREASURER, Osage)
 County, Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Osage County,)
 Oklahoma,)
)
 Defendants.)

ENTERED ON RECORDED
DATE JAN 27 1997

Civil Case No. 96 C 0209B ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27 day of Jan, 1996. 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, Osage County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, appear by John S. Boggs, Assistant District Attorney, Osage County, Oklahoma; the Defendant, ASSOCIATES NATIONAL MORTGAGE CORPORATION and CHARLES F. CURRY COMPANY, appear not having previously filed a Disclaimer; the Defendant, JIMMIE L. CARR, appears not having previously filed a Disclaimer; and the Defendants, TULSA MUNICIPAL EMPLOYEES FEDERAL CREDIT UNION and MARSHA K. CARR, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, JIMMIE L. CARR, was served with process a copy of Summons and Complaint

12

on July 3, 1996; that the Defendants, ASSOCIATES NATIONAL MORTGAGE CORPORATION and CHARLES F. CURRY COMPANY, signed a Waiver of Summons on March 21, 1996; that the Defendants, TULSA MUNICIPAL EMPLOYEES FEDERAL CREDIT UNION, signed a Waiver of Summons on March 18, 1996.

The Court further finds that the Defendant, MARSHA K. CARR, was served by publishing notice of this action in the Pawhuska Journal-Capital, a newspaper of general circulation in Osage County, Oklahoma, once a week for six (6) consecutive weeks beginning September 11, 1996, and continuing through October 16, 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 Defendant, MARSHA K. CARR, and service cannot be made upon said Defendant by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, MARSHA K. CARR. 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 her present or last known place of residence and/or mailing address. 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 Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Osage County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, filed their Answer on March 15, 1996; that the Defendants, ASSOCIATES NATIONAL MORTGAGE CORPORATION and CHARLES F. CURRY COMPANY, filed their Answer and Disclaimer on April 4, 1996; that the Defendant, JIMMIE L. CARR, filed his Disclaimer on August 6, 1996; and that the Defendants, MARSHA K. CARR and TULSA MUNICIPAL EMPLOYEES CREDIT UNION, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on September 4, 1987, Jimmie Lee Carr and Marsha Kaye Carr filed their voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 87-2431. On March 12, 1990, the United States Bankruptcy Court for the Northern District of Oklahoma dismissed the case and the Final Decree was filed on November 8, 1990.

The Court further finds that on January 17, 1979, the Defendants, JIMMIE L. CARR and MARSHA K. CARR, executed and delivered to CHARLES F. CURRY COMPANY, their mortgage note in the amount of \$25,750.00, payable in monthly installments, with interest thereon at the rate of 9½ percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, JIMMIE L. CARR and MARSHA K. CARR, husband and wife, executed and delivered to CHARLES F. CURRY COMPANY, a real estate mortgage dated

January 17, 1979, covering the following described property, situated in the State of Oklahoma, Osage County:

Lot Fourteen (14), Block Six (6), COUNTRY CLUB HEIGHTS, Blocks Five (5), to Eleven (11), inclusive an Addition to Tulsa, Osage County, State of Oklahoma, according to the recorded Plat thereof.

This mortgage was recorded on January 24, 1979, in Book 553, Page 480, in the records of Osage County, Oklahoma.

The Court further finds that on, May 16, 1990, the Defendant, CHARLES F. CURRY COMPANY, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development, of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on May 24, 1990, in Book 5255, Page 449, in the records of Tulsa County, Oklahoma. This Assignment was erroneously filed in Tulsa County, Oklahoma and should have been filed in Osage County, Oklahoma.

The Court further finds that on June 1, 1990, the Defendant, JIMMIE L. CARR, 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 December 1, 1990, June 1, 1991, and August 1, 1992.

The Court further finds that the Defendants, JIMMIE L. CARR and MARSHA K. CARR, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, JIMMIE L. CARR and

MARSHA K. CARR, are indebted to the Plaintiff in the principal sum of \$38,342.76, plus interest at the rate of 9½ percent per annum from March 24, 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 Defendants, COUNTY TREASURER, Osage County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, have a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$32.65 which became a lien on the property as of 1986; a lien in the amount of \$36.72 which became a lien on the property as of 1987; a lien in the amount of \$37.45 which became a lien on the property as of 1988; a lien in the amount of \$36.84 which became a lien on the property as of 1989; a lien in the amount of \$40.55 which became a lien on the property as of 1990; a lien in the amount of \$41.17 which became a lien on the property as of 1992; a lien in the amount of \$19.97 which became a lien on the property as of 1993, plus penalties and fees. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, MARSHA K. CARR and TULSA MUNICIPAL EMPLOYEES FEDERAL CREDIT UNION, are in default and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, JIMMIE L. CARR, ASSOCIATES NATIONAL MORTGAGE CORPORATION and CHARLES F. CURRY COMPANY, disclaim any right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, JIMMIE L. CARR and MARSHA K. CARR, in the principal sum of \$38,342.76, plus interest at the rate of 9½ percent per annum from March 24, 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 Defendants, COUNTY TREASURER, Osage County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, have and recover judgment in the amount of \$245.35, plus costs and interest, for personal property taxes for the years 1986-1990 and 1992-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, JIMMIE L. CARR, MARSHA K. CARR, ASSOCIATES NATIONAL MORTGAGE CORPORATION, CHARLES F. CURRY COMPANY and TULSA MUNICIPAL EMPLOYEES FEDERAL CREDIT UNION, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, JIMMIE L. CARR and MARSHA K. CARR, 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 appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

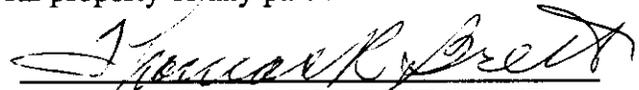
In payment of Defendants, COUNTY TREASURER, Osage County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, in the amount of \$245.35, plus penalties and fees, for personal property taxes which are currently due and owing.

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

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

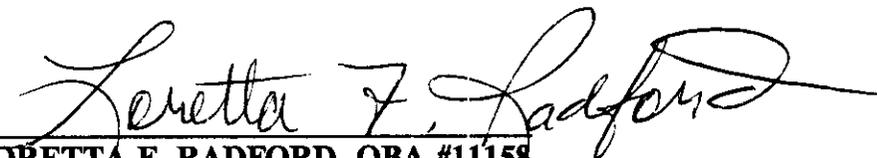
instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

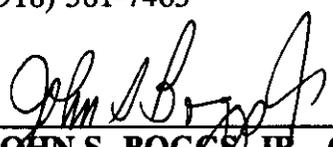
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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


JOHN S. BOGGS, JR., OBA #0920
Assistant District Attorney
District Attorneys Office
Osage County Courthouse
Pawhuska, OK 74056
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Osage County, Oklahoma

Judgment of Foreclosure
Civil Action No. 96-C-0209B

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

F I L E D

JAN 23 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GARY G. WALKER,)

Plaintiff,)

v.)

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

Defendant.)

Case No: 95-C-567-W

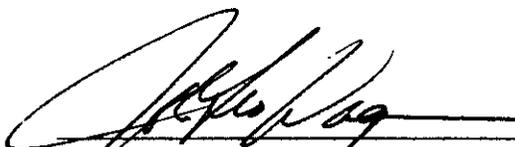
ENTERED ON DOCKET

DATE 1/27/97

JUDGMENT

Judgment is entered in favor of the plaintiff, Gary G. Walker, in accordance with this court's Order filed January 23, 1997.

Dated this 23rd 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.

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

F I L E D

GARY G. WALKER,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

JAN 23 1997 *SAL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-567-W ✓

ENTERED ON DOCKET

DATE 1/27/97

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 disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Dana E. McDonald (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 concluded that claimant's testimony was credible to the extent that it was consistent with the performance of light work activity with no prolonged walking or standing or exposure to dust, allergens, fumes, smoke, gases, chemicals, and temperature extremes, and that did not require bilateral high frequency

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).

hearing. He found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for lifting over ten pounds frequently or twenty pounds occasionally, prolonged walking or standing, exposure to dust, allergens, fumes, smoke, gases, chemicals, and temperature extremes, and jobs that require bilateral high frequency hearing.

The ALJ concluded that claimant was unable to perform his past relevant work as an assistant fire marshal, firefighter, or security officer. He found that claimant was 51 years old, which is defined as closely approaching advanced age, had a high school education, and had acquired work skills which he demonstrated in past work, and which, considering his residual functional capacity, could be applied to meet the requirements of light work functions of other work.

Although claimant's additional nonexertional limitations did not allow him to perform the full range of light work, the ALJ concluded that there were a significant number of jobs in the national economy which he could perform, such as fire extinguisher/examiner, community service officer, and dispatcher. Having determined that there were a significant number of jobs in the national economy that claimant could perform, he concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ failed to consider claimant's inability to deal with stress, a nonexertional impairment.
- (2) The ALJ failed to show that claimant could do alternative work that exists in the national economy by relying on a vocational

expert's testimony which contradicted the Dictionary of Occupational Titles and did not include a significant number of jobs which claimant could actually perform.

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 worked as a firefighter for eighteen years (TR 36). In July 1988, he suffered a heart attack and underwent bypass surgery (TR 196-218). By August 20, 1988, a treadmill electrocardiogram was normal (TR 235-253, 331).

On February 20, 1989, Dr. Charles McCarty wrote as follows:

[I]t is our feeling that Mr. Walker is trainable for any number of other jobs. It is my feeling that based upon his past history and significant heart disease that he should probably be considered as totally disabled at his present occupation as a firefighter. It is felt as though where lives are at stake and sudden stressful situations are encountered and when faced with sudden hazardous conditions his cardiovascular response may be unpredictable. It is my opinion that he should be considered totally disabled from his present occupation.

I do feel as though Mr. Walker is trainable in any number of different occupations but as far as a firefighter he is totally disabled.

(TR 256-257).

His treating physician, Dr. Jose Medina, concluded on August 18, 1989, that "this patient with significant coronary artery disease should not engage in firefighting in view of the strenuous and sudden physical and stressful activities that firefighters may encounter. The patient could be retrainable for other occupations that demand less physical or emotional stress." (TR 231).

Claimant was examined by Dr. John Hallford on January 2, 1990 for workers' compensation purposes, and the doctor concluded that he had incurred 25% permanent partial impairment of the whole person as a result of his heart attack and would not be able to return to work as a firefighter and thus needed "some kind of vocational retraining or rehabilitation to help him find a job suitable to his condition and associated restrictions." (TR 377). In April 1990, Dr. Richard Cooper conducted a "benign physical exam," but noted a history of chest tightness when claimant was under stress (TR 276-277). In May of 1990, a routine chest x-ray showed a density in claimant's right lung (TR 321), a biopsy was done (TR 289-293), and he underwent a right upper lobe resection of his lung (TR 294-295). No radiation or chemotherapy was found to be necessary (TR 295).

On July 26, 1991, claimant had a negative treadmill test (TR 333, 373). However, on November 30, 1992, Dr. Hallford found he was 100% permanently totally disabled for workers' compensation purposes "since he states he was forced to take a disability retirement subsequent to his on the job heart attack and has not worked since that time." (TR 376).

On February 1, 1993, Dr. LeRoy Young concurred that claimant had a small permanent partial disability based on his heart problem and a small hearing loss, but he was not permanently totally disabled (TR 384). On March 15, 1993, Dr. Kenneth Trinidad concluded that claimant had a 28.75 percent permanent partial impairment for workers' compensation purposes, but was not permanently totally disabled (TR 384). Claimant's insured status ended on December 31, 1993 (TR 14, 22).

There is merit to claimant's contentions. There is substantial evidence in the record of the dangers of stress to claimant's health; yet the ALJ did not find that he had such a limitation and did not include it in his hypothetical question to the vocational expert (TR 16, 60-61). This failure to include in his hypothetical inquiry to the vocational expert any limitation in this regard violated the established rule that such inquiries must include all (and only) those impairments borne out by the evidentiary record. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Gay v. Sullivan, 986 F.2d 1336, 1340-41 (10th Cir. 1993) (following Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991)).

Claimants with acute heart disease may be effectively disabled by the effect of stress, but the dangers of stress to the claimant's health must be documented by treating physicians or at least supported in some meaningful way by the claimant's own testimony. Clark v. Bowen, 668 F.Supp. 1357 (N.D. Cal. 1987); Bradley v. Bowen, 800 F.2d 760 (8th Cir. 1986); Donnelly v. Heckler, 651 F.Supp. 150 (W.D. Penn. 1986).

In Bradley, 800 F.2d at 762-63, the plaintiff's doctor stated that he had a "clinically important [heart] rhythm disturbance and that activity worsens it" and this could be lethal for him. In addition, he suffered from depression and had blackout spells and emphysema. No doctor who examined him indicated he was able to work. In Donnelly v. Heckler, 651 F.Supp. at 152, the plaintiff suffered from severe angina, brought on by stress and other factors despite medical treatment, and "life threatening arrhythmias." In Clark v. Bowen, 668 F.Supp. at 1360, the court did not

find disability related to stress, because "the opinions of [plaintiff's] treating doctors are conspicuous by their absence" of any mention of stress danger.

In Henrie v. U.S. Dept. of Health & Human Servs., 13 F.3d 359, 360-361 (10th Cir. 1993), the Tenth Circuit noted that plaintiff's emotional problems made it impossible for her to handle stress and concluded that the ALJ erred in failing to determine the stress level of any job he might find her capable of performing.

There is merit to claimant's contention that the ALJ failed to show that claimant could handle the stress involved in the alternative jobs the ALJ found he could perform. Once the ALJ found that claimant could not return to his past relevant work, the burden shifted to her to establish by substantial evidence that he could do other work. Ragland v. Shalala, 992 F.2d 1056, 1057 (10th Cir. 1993).

The vocational expert opined that claimant could be a community service officer or dispatcher (TR 62-63). However, claimant's counsel has submitted portions of the "Social Security Plus 2" computer program concerning the Dictionary of Occupational Titles, which show that the jobs of community service officer and dispatcher require effective performance under stress (Attachments to Plaintiff's Brief, Docket #5). There was not substantial evidence that claimant could perform the demands of these alternative jobs. While many doctors have indicated that claimant is able to work, the testimony of the vocational expert as to which jobs he can perform is clearly defective.

This case is remanded for further testimony by a vocational expert regarding the jobs which claimant is able to do in the national economy given his inability to handle stress.

Dated this 22nd day of January, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\ORDERS\SSIWALKER.REV

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JAN 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
ROBYN RENE UNFER; FLOYD)
WILLIAM FULLINGIM; LINDA)
DIANNE FULLINGIM; COUNTY)
TREASURER, Tulsa County, Oklahoma;)
BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

ENTERED IN COURT
JAN 27 1997

Civil Case No. 95-CV 893E

ORDER OF DISBURSAL

NOW on the 22nd day of Jan, 1997, there came on for consideration the matter of disbursement of \$29,000.00 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 \$29,000.00 should be disbursed as follows:

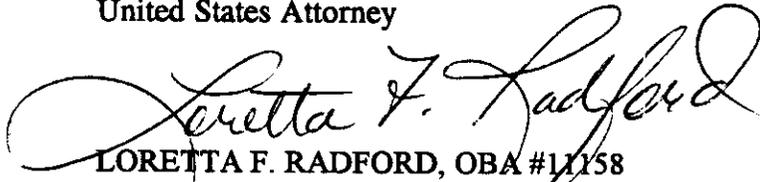
United States Marshal's Costs		\$ 467.07
Executing Order of Sale	\$ 3.00	
Advertising Sale Fee	3.00	
Conducting Sale	3.00	
Appointing Appraisers	6.00	
Appraisers' Fees	225.00	
Publication for Sale	182.07	
Publication for Confirmation Hrg.	45.00	
U.S. Department of Justice		\$28,532.93
Service by Publication	\$ 273.05	
Applied to Judgment of HUD	28,259.88	

James L. ...
UNITED STATES DISTRICT JUDGE

23

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in cursive script that reads "Loretta F. Radford". The signature is written in black ink and is positioned above the typed name and address.

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

LFR/esf

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

FILED

JAN 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Plaintiffs,)

v.)

No. 89-C-843-E

SOONER FEDERAL SAVINGS)
AND LOAN ASSOCIATION;)
W.R. HAGSTROM;)
EDWARD L. JACOBY; and)
DELOITTE, HASKINS & SELLS,)

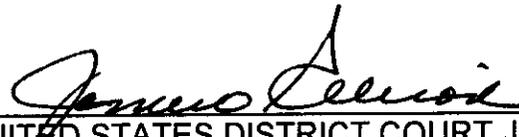
Defendants.)

JAN 24 1997

AGREED ORDER OF DISMISSAL

Upon the joint application of the Plaintiffs and the Defendant, FDIC, as Receiver for Sooner Federal Savings and Loan Association [statutory successor to the Resolution Trust Corporation (RTC), as Receiver for Sooner Federal Savings and Loan Association], for good cause shown the Court finds that the Defendant, FDIC, as Receiver for Sooner Federal Savings and Loan Association, should be and is hereby dismissed without prejudice from these proceedings, each party to bear its own costs and attorney fees.

IT IS SO ORDERED THIS 22nd day of January, 1997.


UNITED STATES DISTRICT COURT JUDGE

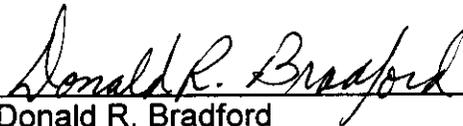
363

APPROVED:



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Attorneys for FDIC, Statutory
Successor to the RTC, Receiver
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Loan Association



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Attorneys for Plaintiffs

W. 40 20

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

FILED

JAN 23 1997

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

JOSEPH AND JUDITH JABOUR,)
)
Plaintiffs,)
)
vs.)
)
COUNTRY MUTUAL INSURANCE)
COMPANY,)
)
Defendant.)

Case No. 96-C-1099-BU ✓

ENTERED ON DOCKET

DATE JAN 24 1997

ORDER

This matter came before the Court on January 21, 1997 for case management conference. At the conference, the Court advised the parties that it lacked subject matter jurisdiction over this matter and that this matter must be remanded to state court. The following sets forth the Court's written reasons.

On November 27, 1996, Defendant removed this action from the District Court of Tulsa County, Oklahoma, pursuant to 28 U.S.C. § 1441(a). In its Notice of Removal, Defendant asserted that the Court has jurisdiction over this action by reason of diversity of citizenship and amount in controversy pursuant to 28 U.S.C. § 1332(a).

In order for a federal court to have original jurisdiction in a diversity case, the amount in controversy must exceed \$50,000.00. 28 U.S.C. § 1332(a).¹ The amount in controversy is generally

¹ Congress recently increased the amount in controversy requirement for diversity jurisdiction to \$75,000.00. Federal Courts Improvement Act of 1996, Pub.L.No. 104-317, § 205, 110 Stat. 3847, 3850 (1996) (effective January 17, 1997). However, at the time the Notice of Removal was filed, the amount in controversy was \$50,000.00.

3

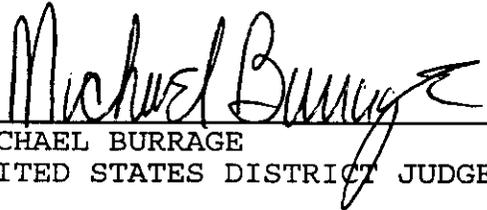
determined by the allegations in the complaint, or, where they are not dispositive, the allegations in the petition for removal. Laughlin v. Kmart Corporation, 50 F.3d 871, 873 (10th Cir.), cert. denied, 116 S.Ct. 174 (1995). "The burden is on the party requesting removal to set forth, in the notice of removal itself, the "underlying facts supporting [the] assertion that the amount in controversy exceeds \$50,000.'" Id. (quoting Gaus v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992) (emphasis in original)). Furthermore, there is a presumption against removal jurisdiction. Id.

In the instant case, Plaintiffs' Petition does not set forth allegations which establish the requisite jurisdictional amount. The Petition merely seeks judgment against Defendant "in excess of TEN THOUSAND (\$10,000.00) DOLLARS" for each of Plaintiff's claims of breach of contract and breach of the implied duty of good faith and fair dealing. Consequently, Defendant bears the burden of actually proving the facts to support the jurisdictional amount. Gaus, 980 F.2d at 566-67. Here, Defendant, in the Notice of Removal, has not offered any underlying facts to support the Court's exercise of diversity jurisdiction. Defendant has only alleged in the Notice of Removal that "[t]he matter in controversy, between Plaintiffs and Defendant, exceeds Fifty Thousand Dollars and No/100ths Dollars (\$50,000.00) exclusive of interests and costs." This allegation does not, however, satisfy Defendant's burden of setting forth, in the removal petition itself, the underlying facts supporting its assertion that the amount in

controversy exceeds \$50,000.00.

Section 1447(c) of Title 28 of the United States Code provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. 28 U.S.C. § 1447(c). As the Court finds that it lacks subject matter jurisdiction over this matter, the Court hereby **REMANDS** this matter to state court. The Clerk of the Court is directed to mail a certified copy of this order to the Clerk of the District Court of Tulsa County, Oklahoma.

ENTERED this 23rd day of January, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

JAN 23 1997

PHYLLIS M. RASKIN, *et al.*,)
)
Appellants,)
)
vs.)
)
PATRICK J. MALLOY, III, and)
RASKIN RESOURCES, INC.,)
)
Appellees.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-642-H ✓

Consolidated with
96-CV-783-H

ENTERED ON DOCKET

DATE JAN 21 1997 ✓

REPORT AND RECOMMENDATION

This is a bankruptcy appeal, centered around the sale of the Woodland Hills Cinema and the Service Merchandise building ("the Property"), located near 71st Street and Memorial in Tulsa, Oklahoma. The Property was sold to Gary L. Richardson for \$3,225,000.00. Appellants appeal from the following orders of bankruptcy judge, Stephen J. Covey: (1) order denying Appellants' motion for relief from the order converting Raskin Resources, Inc.'s bankruptcy from a chapter 11 bankruptcy to a chapter 7 bankruptcy, and (2) order denying Appellants' motion to vacate the order approving the sale of the Property to Mr. Richardson.

Now before the Court is Patrick J. Malloy's, the bankruptcy trustee's, motion to dismiss this appeal as moot pursuant to 11 U.S.C. § 363(m). [Doc. No. 2]. For the reasons outlined below, the undersigned recommends that the trustee's motion be **GRANTED IN PART AND DENIED IN PART.**

I. FACTUAL BACKGROUND

Prior to the underlying bankruptcy proceedings, the Property was owned by Appellee, Raskin Resources, Inc. ("Raskin Resources"). Howard Raskin, not a party to this action, was the principal behind Raskin Resources. Appellants were stockholders of Raskin Resources and are the wife and children of Howard Raskin.

Raskin Resources filed a voluntary petition for bankruptcy under chapter 11 of the Bankruptcy Code (i.e., a reorganization) on January 12, 1993. Three years later, on January 19, 1996, Judge Covey, on the trustee's motion, converted Raskin Resources's chapter 11 bankruptcy to a chapter 7 bankruptcy (i.e., a liquidation) based on the inability of Raskin Resources to come up with a reorganization plan. The Property was sold by the bankruptcy trustee as part of Raskin Resources' chapter 7 liquidation on July 16, 1996. Appellants seek to overturn the sale of the Property to Mr. Richardson primarily because they believe that there was a buyer willing to pay more for the Property than Mr. Richardson. Appellants allege that Mark Morrow and David Swezey were ready and willing to pay \$3,650,000.00 for the Property (i.e., \$425,000 more than Mr. Richardson's offer).

Appellants advance two legal theories for overturning the sale of the Property to Mr. Richardson. First, Appellants argue that they were not given the notice required by Fed. R. Bank. P. 2002 when Judge Covey converted Raskin Resources' chapter 11/reorganization bankruptcy to a chapter 7/liquidation bankruptcy.^{1/} Appellants argue

^{1/} Section 1112 of the Bankruptcy Code provides that "on request of . . . the United States trustee . . . , and after **notice and a hearing**, the court may convert a case under [chapter 11] to a case under chapter (continued...)

that failure to provide them with notice of the conversion violated their due process rights under the Fifth Amendment to the United States Constitution. Appellants argue further that the lack of notice to them of the conversion from chapter 11 to chapter 7 deprived Judge Covey of jurisdiction to act and rendered null and void any orders entered after the date of the unlawful conversion.

Second, Appellants argue that Mr. Richardson was not a good faith purchaser. Appellants allege that the trustee hired a Mr. Krissman to market the Property. Appellants allege that Mr. Krissman is Mr. Richardson's property manager. Appellants allege that because Mr. Krissman was acting as the both the trustee's and the buyer's agent with respect to the Property, there was an unlawful conflict of interest. Appellants also allege that Mr. Krissman was aware of the higher bid from Messrs. Morrow and Swezey and Mr. Krissman purposefully failed to present this higher bid in a timely manner to the trustee. Appellants argue that these circumstances prevent Mr. Richardson from being a good faith purchaser.

^{1/} (...continued)

7 . . . for cause" 11 U.S.C. § 1112(b) (emphasis added). To effectuate § 1112's notice requirement, Bankruptcy Rule 2002 provides as follows:

Notice to Equity Security Holders. In a chapter 11 reorganization case, unless otherwise ordered by the court, the clerk, or some other person as the court may direct, shall in the manner and form directed by the court give notice to all equity security holders of . . . (4) the hearing on the dismissal or conversion of a case to another chapter

Fed. R. Bankr. P. 2002(d)(4). According to N.D. Bankr. LR 2002(c), the bankruptcy court has directed that the party filing a motion to convert a chapter 11 case to another chapter is to give the notice required by Fed. R. Bankr. P. 2002(d)(4). The trustee was, therefore, required to give Appellants notice that he had requested the bankruptcy court to convert Raskin Resources' chapter 11 bankruptcy to a chapter 7 bankruptcy.

II. DISCUSSION

The United States Constitution prohibits federal courts from issuing advisory opinions. U.S. Const. art. III, § 2. If it is impossible for an appellate court to grant the relief requested by an appellant, the court would only be able to declare rules of law which would have no practical effect. An appellate court will, therefore, dismiss as moot an appeal in which it cannot grant the relief requested. In re Osborn, 24 F.3d 1199, 1203 (10th Cir. 1994) (citing Mills v. Green, 159 U.S. 651, 653 (1895); and Church of Scientology of California v. United States, 113 S. Ct. 447, 449 (1992)); and Beattie v. United States, 949 F.2d 1092, 1093 (10th Cir. 1991) (holding that a lack of mootness is a constitutional prerequisite to the jurisdiction of a federal court).

The trustee has moved to dismiss this appeal as moot pursuant to 11 U.S.C. § 363(m). The trustee argues that § 363(m) prevents this court from granting the relief Appellants request (i.e., voiding of the sale of the Property). Section 363(m) provides as follows:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this subsection of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale were stayed pending appeal.

11 U.S.C. § 363(m). See also 12 O.S. § 774 (which in Oklahoma prevents a court from undoing a sale of property completed in satisfaction of a judgment).

The primary purpose of § 363(m) is to protect the finality of bankruptcy sales.

Finality is important because it minimizes the chance that purchasers will be dragged into endless rounds of litigation to determine who has what rights in the property. Without the degree of finality provided by [§ 363(m)'s] stay requirement, purchasers are likely to demand a steep discount for investing in the property [of a bankruptcy debtor].

In re Sax, 796 F.2d 994, 998 (7th Cir. 1986) (internal citations omitted). See also In re Osborn, 24 F.2d at 1203 (holding that § 363(m) is designed to “protect the public’s interest in finalizing bankruptcy sales to encourage buyers to purchase the debtor’s property, to prevent injury to creditors, and to insure that adequate sources of financing remain available. . .”); and In re CF & I Fabricators of Utah, Inc., 169 B.R. 984, 991 (D. Utah 1994).

The request for a stay of the sale order is not simply another formality to be observed in perfecting an appeal. A stay serves to maintain the status quo pending appeal, thereby preserving the ability of the reviewing court to offer a remedy and holding at bay the reliance interests in the judgment that otherwise militate against reversal of the sale. . . . Once the sale has gone forward, the positions of the interested parties have changed, and even if it may yet be possible to undo the transaction, the court is faced with the unwelcome prospect of ‘unscrambl[ing] an egg.’

In re CGI Indus., Inc., 27 F.3d 296, 299 (7th Cir. 1994) (citations omitted).

Section 363(m) only applies where an asset of the bankruptcy debtor has been sold under § 363(a) or (b). If § 363(m) applies to an appeal, it moots that appeal if the remedy being sought by the appellant affects the validity of the bankruptcy sale at issue. Stated differently, even if § 363(m) applies, it will not moot an appeal if

state law or the Bankruptcy Code itself provides a remedy which does not affect the validity of the bankruptcy sale at issue. See In re Osborn, 24 F.3d at 1203-1204 (holding under the specific facts at issue that the constructive trust law of Texas supplied a remedy which did not affect the validity of the bankruptcy sale). The only remedy which Appellants seek in this case is the voiding of the sale of the Property to Gary Richardson. This is clearly a remedy which would affect the validity of the sale of the Property to Mr. Richardson.

The trustee argues that this appeal is moot because § 363(m) applies and § 363(m) prevents this Court from granting the remedy requested by Appellants. The Court agrees with the trustee that if § 363(m) applies to the issues raised by this appeal, this appeal is moot because § 363(m) would prevent this Court from voiding the sale to Mr. Richardson. The Court must decide, therefore, whether § 363(m) applies to the issues raised by this appeal.

Section 363(m) does not apply to an appeal if the bankruptcy sale at issue was stayed pending appeal. Appellants requested a stay of the sale of the Property from Judge Covey. Judge Covey granted the stay on the condition that Appellants post a \$3,225,000.00 supersedeas bond (i.e., a bond in the amount of Mr. Richardson's offer for the Property). Appellants appealed Judge Covey's stay order to this Court and requested this Court to reduce the supersedeas bond amount. Appellants motion was denied in this Court and Judge Covey's original bond amount was left undisturbed. See Raskin v. Raskin Resources, Inc., 96-CV-642 (N.D. Okla. Jul. 15, 1996). Appellants failed to post the required bond and the sale of the Property was closed

July 16, 1996. There was, therefore, no stay of the sale of the Property pending appeal, and absent some exception, § 363(m) applies to this appeal.^{2/}

A. Appellants' Due Process Claims

Because Appellants failed to obtain a stay of the sale pending appeal, the plain language of § 363(m) prevents this Court from voiding the sale of the Property to Mr. Richardson.^{3/} Appellants argue for an exception to the plain language of § 363(m). Appellants argue that when constitutional rights are at issue (i.e., the right to due process of law), § 363(m) does not apply and an appellate court should review the alleged constitutional violations. Specifically, Appellants argue that this Court must choose between enforcing § 363(m)'s policy of finality and protecting constitutional rights. Appellants argue that "[c]onstitutional considerations make the choice an easy one, namely that constitutional due process and proper notice outweigh any need for expediency." Appellant's Brief, p. 4 (emphasis omitted). As support for this argument, Appellants rely primarily on In re Ex-Cel Concrete Co., Inc., 178 B.R. 198 (9th Cir. 1995).

^{2/} The Court has some concern about the fact that a bankruptcy court's denial of a motion to stay a sale would effectively deprive an interest holder of his right to appeal. A bankruptcy court should consider as a factor the ultimate loss of appellate review when it rules on a motion to stay a sale. The Court's concern is lessened by the fact that the interest holder may file a motion for a stay with this Court or the Bankruptcy Appellate Panel if the bankruptcy court denies a stay. This Court and the Appellate Panel must also consider the threatened loss of appellate review when ruling on a motion to stay a sale. See In re Sullivan Central Plaza I, 914 F.2d 731, 733 n.5 (5th Cir. 1990).

^{3/} The Court notes that § 363(m) only applies when the sale is to a good faith purchaser and Appellants argue that Mr. Richardson was not a good faith purchaser. This issue will be discussed below. See I(C), *infra*.

The undersigned does not recommend the adoption of a general exception to § 363(m) for all cases in which the sale of property from a bankruptcy estate is challenged on constitutional grounds. A general "constitutional violation" exception to § 363(m)'s prohibition against voiding a completed bankruptcy sale could easily swallow the rule. Virtually any dispute can be clothed in constitutional dress. See, e.g., Sumwalt v. Equity Securities, 1992 W.L. 38610, at *2 (9th Cir. 1992).

In Sumwalt, the appellants argued that their due process rights had been violated in connection with the sale of property from their bankruptcy estate. The appellants' due process arguments were based on the bankruptcy judge's alleged refusal to recuse himself and on the judge's alleged refusal to determine whether the sale at issue was a core or non-core matter. The appellants in Sumwalt did not obtain a stay of the sale. The court in Sumwalt found appellants' appeal moot, despite the fact that appellants were arguing that their constitutional rights had been violated. Id. at *1-2.

While the undersigned finds that a general "constitutional violation" exception to § 363(m) is not appropriate, there is one exception based on the lack of notice, which must necessarily be recognized. Section 363(m) permits an interested party to raise on appeal any issues, including alleged constitutional violations, in connection with the sale of property from a bankruptcy estate so long as that party obtains a stay of the sale pending appeal. To exercise its right to appeal, an interested party must have at least some notice that a sale of property from the bankruptcy estate is about to be completed. Absent such notice, an interested party would not know that her

obligation to seek a stay of the sale had been triggered. The undersigned finds, therefore, that there must be an exception to § 363(m)'s mootness rule when an interested party alleges that she did not receive sufficient notice of the sale in order to protect her right to appeal by seeking a stay of the sale. See Sumwalt, 1992 W.L. 38610, at *1; In re Moberg Trucking, Inc., 112 B.R. 363, 363 (B.A.P. 9th Cir. 1990).

Appellants do not argue that they were unable to protect their right to appeal by seeking a stay under § 363(m) because they lacked sufficient notice of the sale of the Property to alert them to the fact that they needed to obtain a stay. Appellants did in fact seek a stay. A stay was granted on the condition that Appellants enter a supersedeas bond, which they did not do. The fact that Appellants sought a stay demonstrates that they had sufficient notice prior to the sale of the Property to allow them to protect their right to appeal by seeking a stay of the sale. Appellants' appeal does not, therefore, fall into the exception to § 363(m)'s mootness rule for lack of notice sufficient to alert a party that he needs to seek a stay of a bankruptcy sale.

Appellants rely exclusively on Ex-Cel Concrete. The court in Ex-Cel Concrete did hold that it would not allow "considerations, such as the exigent needs of the bankruptcy system or the innocence or good faith of third parties involved in bankruptcy sales, to justify departures from due process standards in adjudicating property rights." Ex-Cel Concrete, 178 B.R. at 205. Appellants rely on this language to support their argument that any claimed violation of the right to due process must be considered by an appellate court, despite § 363(m)'s mootness rule. The

undersigned does not agree that the court's language in Ex-Cel Concrete should be given such a broad interpretation.

In Ex-Cel Concrete, Mr. and Mrs. McConnell and their business, Ex-Cel Concrete Company ("Ex-Cel"), filed a chapter 11 bankruptcy. Citicorp Mortgage, Inc. ("Citicorp") held a first position lien on the McConnell's residence. Ex-Cel held a second position lien on the McConnell's residence. Both the McConnell and Ex-Cel bankruptcies were converted from chapter 11 to chapter 7 bankruptcies, and a trustee was appointed for both the McConnell estate and the Ex-Cel estate. The trustee of the McConnell estate abandoned the residence to the McConnells and the trustee of the Ex-Cel estate caused Ex-Cel to foreclose its second position lien and take title to the McConnells' residence. The trustee of the Ex-Cel estate then filed a motion to sell the McConnells' residence free and clear of any liens. Ex-Cel Concrete, 178 B.R. at 199-200.

Citicorp, holder of the first position lien on the McConnells' residence, was never given notice of the Ex-Cel trustee's motion to sell the residence. The bankruptcy court held a hearing and approved the sale of the McConnells' residence. The Ex-Cel trustee sold the residence for a price which was not sufficient to satisfy Citicorp's first position lien. Citicorp learned of the sale only when the closing agent for the sale, Lawyers Title Insurance Company, requested a payoff demand from Citicorp. Citicorp's lawyer and the Ex-Cel trustee's lawyer then corresponded and from the tone of the last letter received by Citicorp's lawyer from the trustee's lawyer, Citicorp assumed that the sale would not close without its consent. Citicorp's belief that the

sale would not close without its consent was justified in light of 11 U.S.C. § 363(f). Section 363(f) authorizes the sale of property free and clear of liens under five enumerated circumstances. The only relevant circumstance under the facts of Ex-Cel Concrete was the consent of Citicorp. 11 U.S.C. § 363(f)(2). Believing that the sale would not close without its consent, Citicorp did not submit a payoff demand. The sale of the McConnell's residence was closed two days later. Ex-Cel Concrete, 178 B.R. at 200-201.

Citicorp filed a motion with the bankruptcy court to set aside the order authorizing the sale of the McConnells' residence. This motion was filed two months after the sale had closed. Apparently, it took Citicorp that long to learn that the sale had closed without Citicorp's consent. The bankruptcy court denied Citicorp's request, finding that because the sale of the McConnells' residence had closed, § 363(m)'s mootness rule applied. Citicorp appealed and the Bankruptcy Appellate Panel for the Ninth Circuit considered Citicorp's appeal on the merits, finding that § 363(m)'s mootness rule did not apply under the circumstances presented. Ex-Cel Concrete, 178 B.R. at 204-205.

The court's holding in Ex-Cel Concrete is a specific application of the exception to § 363(m)'s mootness rule recognized and discussed above. That is, Ex-Cel Concrete is a situation where an interested party failed to receive satisfactory notice that a sale of property was about to close. Because Citicorp was not on sufficient notice of the closing of the sale of the McConnells' residence, Citicorp could not be expected to obtain a § 363(m) stay of the sale in order to preserve its right to appeal.

The undersigned finds the court's holding in Ex-Cel Concrete persuasive to the extent that the court recognizes an exception to § 363(m)'s mootness rule where an interested party, due to lack of sufficient notice of the closing of a sale, is unaware of the need to obtain a stay of the sale to preserve its right to appeal. The undersigned disagrees with the court's holding in Ex-Cel Concrete to the extent that it allows for a general exception to § 363(m)'s mootness rule for all cases in which the sale of property from a bankruptcy estate is challenged on constitutional grounds. See Sumwalt v. Equity Securities, 1992 W.L. 38610, at *2 (9th Cir. 1992) (refusing to adopt such a general exception to § 363(m)'s mootness rule).

B. Appellants' Jurisdictional Claims

Appellants argue that the bankruptcy court lost jurisdiction the moment Judge Covey converted Raskin Resources' bankruptcy from a chapter 11 to a chapter 7 bankruptcy without notice to Appellants.^{4/} Appellants present no argument or authority to support their claim that a lack of notice of a conversion motion to a debtor corporation's shareholders deprives a bankruptcy court of jurisdiction. Lack of notice to an interested party may result in the denial of a constitutional right (i.e., the interested party's right to due process) for which a remedy may be sought. The remedy for a denial of due process might include the voiding of any order entered by a court at a time when the interested party lacked notice. Orders voided as a remedy for a denial of due process are not traditionally viewed as void because the court

^{4/} See 11 U.S.C. § 1112(b) (which requires notice to equity security holders of a conversion of a chapter 11 bankruptcy).

lacked jurisdiction. Rather, they are voided as a remedy for a constitutional violation. Even if the Appellants' argument that the bankruptcy court acted without jurisdiction after the conversion is correct, Appellants' appeal of the jurisdictional issue is still mooted by § 363(m). Jurisdictional flaws, like general constitutional flaws, do not create an exception to § 363(m)'s mootness rule. See In re Sax, 796 F.2d 994, 998 (7th Cir. 1986); In re Gilchrist, 891 F.2d 559, 561 (5th Cir. 1990)

Appellants filed a motion to vacate Judge Covey's conversion order due to their lack of notice. Judge Covey held a hearing and determined that because Appellants were non-participating, non-investing shareholders in Raskin Resources and because Appellants were the wife and children of the principal officer of Raskin Resources (i.e., Howard Raskin), notice to Howard Raskin was constitutionally permissible notice to Appellants. Judge Covey then proceeded to exercise his jurisdiction over Raskin Resources' assets by approving the sale of the Property to Mr. Richardson. Judge Covey continued to exercise jurisdiction over Raskin Resources and its estate after the conversion. It must be presumed, therefore, that Judge Covey believed he retained jurisdiction after the conversion, despite the lack of actual notice to Appellants.

The Fifth and Seventh Circuits have refused to create an exception to § 363(m)'s prohibition on voiding a completed bankruptcy sale even when a bankruptcy's court's subject matter jurisdiction is being challenged. In re Sax, 796 F.2d 994, 998 (7th Cir. 1986); In re Gilchrist, 891 F.2d 559, 561 (5th Cir. 1990) (adopting the reasoning in Sax). In Sax, the bankruptcy court approved the sale of a yacht. Appellants did not obtain a stay of the sale and the yacht was sold. Appellants

brought an appeal and argued that § 363(m) did not apply because the bankruptcy court lacked subject matter jurisdiction when it sold the yacht because the yacht was not property of the bankruptcy debtor's estate. Id. The Seventh Circuit found appellants appeal moot with the following discussion:

The appellants raise the jurisdictional argument as if it somehow negates or excuses their failure to obtain a stay. It does not. This appeal is moot because [appellants] failed to obtain a stay, so we cannot reach the question of whether the bankruptcy court had jurisdiction to order and approve the sale.

The bankruptcy court made the determination that it had jurisdiction; an issue which it had jurisdiction to decide. Despite the maxim that 'subject matter jurisdiction can be raised at any time,' valid procedural rules cannot be ignored just because the jurisdictional decision is being challenged rather than the decision on the merits. To accept [appellants'] argument would be to ignore valid procedural requirements.

Id. at 998 (internal citations omitted).^{5/}

Appellants' jurisdictional argument in this case is no different than the jurisdictional argument raised by the appellant in Sax. Like the bankruptcy judge in Sax, Judge Covey held a hearing and determined he had jurisdiction despite Appellants' lack of actual notice of the trustee's motion to convert. Section 363(m) defines how Appellants were to perfect an appeal from Judge Covey's jurisdictional decision. Like the appellant in Sax, Appellants in this case did not fulfill § 363(m)'s procedural requirement by obtaining a stay of the sale of the Property. Section §

^{5/} Appellants have not argued that § 363(m) is not a valid procedural rule. For a discussion of the constitutionality of § 363(m)'s stay requirement, see More Light Investments v. Brown, 25 B.R. 1005, 1008-1009 (D. Mass. 1982).

363(m)'s valid procedural requirements cannot be ignored just because the decision Appellants wished to appeal was a jurisdictional decision and not a decision on the merits. Sax, 796 F.2d at 998; Gilchrist, 891 F.2d at 561.

C. Appellants' Bad Faith Claims

Appellants allege that the trustee hired a Mr. Krissman to market the Property and that Mr. Krissman is Mr. Richardson's property manager. Appellants argue that because Mr. Krissman was acting as the both the trustee's and the buyer's agent with respect to the Property, there was an unlawful conflict of interest. Appellants allege further that Mr. Krissman was in possession of a higher bid on the Property from Messrs. Morrow and Swezey and that Mr. Krissman in order to ensure that Mr. Richardson's bid was accepted purposefully failed to timely present the Morrow/Swezey bid to the trustee. Appellants argue that Mr. Krissman's alleged conflict of interest, coupled with his failure to timely deliver the Morrow/Swezey bid, prevent Mr. Richardson from being a good faith purchaser.

By its own terms, § 363(m) applies only when property of a bankruptcy estate has been purchased by a good faith purchaser. In Re Bel Air Associates, Ltd., 706 F.2d 301, 305 (10th Cir. 1983) (interpreting § 363(m)'s predecessor, Fed. R. Bankr. P. 805). Although appellate courts are hesitant to overcome § 363(m)'s mootness rule, an appellate court will void a completed bankruptcy sale if the purchaser was not a good faith purchaser. Plotner v. AT&T, 172 B.R. 337, 341 (W.D. Okla. 1994). Neither the Bankruptcy Code nor the Bankruptcy Rules define a good faith purchaser. The Tenth Circuit has, however, held that a "good faith purchaser" is one who buys

in "good faith" and for "value."^{6/} In re Bel Air, 706 F.2d at 305. The type of conduct which will destroy a purchaser's good faith involves "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." Id. at 305, n. 11 (citing In re Rock Indus. Machinery Corp., 572 F.2d 1195, 1198 (7th Cir. 1978)).

With respect to the trustee's motion to dismiss, the parties attached and made reference to the applicable bankruptcy court orders and excerpts from transcripts of proceedings before the bankruptcy court. However, the complete and official record on appeal from the bankruptcy court clerk has not been received by this Court. Due to the lack of a complete record, the undersigned is not able to make a recommendation with regard to the ultimate issue of whether or not Mr. Richardson was a good faith purchaser. Additional briefing will be required. The trustee's motion to dismiss must, therefore, be denied solely with respect to Appellants' claim that the sale of the Property was not made to a good faith purchaser.

Because it has not yet been delivered to this Court, the undersigned has not had an opportunity to review the entire record of the proceedings below. The undersigned is, therefore, unable to determine whether Mr. Richardson has had an opportunity to be heard regarding Appellants' allegation that he did not act in good faith when he purchased the Property from the trustee. Because Mr. Richardson has an interest in the outcome of this appeal and because he is not a party to this appeal, the

^{6/} In the bankruptcy context, a purchaser is deemed to have paid "value" if he paid at least 75% of the appraised value of the asset in question. In re Bel Air, 706 F.2d at 305, n. 12 (citing several cases). Appellants have not alleged that Mr. Richardson failed to give "value" for the Property.

undersigned recommends that the Court Clerk be directed to provide Mr. Richardson with notice of all further proceedings in this appeal so that Mr. Richardson may determine how best to protect his interest, if any, in the Property.

The undersigned recommends that the trustee's motion to dismiss be denied with respect to Appellants' claim that Mr. Richardson is not an good faith purchaser. The undersigned still has specific concerns regarding the state of the bankruptcy record with regard to Appellants' good faith claim. In particular, the parties are directed to address the following issues in their briefs:⁷¹

1. Whether Appellants waived their right to appeal Mr. Richardson's lack of good faith by failing to (1) include that issue in the Statement of Issues required by Fed. R. Bankr. P. 8006, and/or (2) raise the issue before Judge Covey during the hearing on Appellants' motion for relief from the order approving the sale of the Property and the order converting Raskin Resources' bankruptcy from a chapter 11 to a chapter 7 bankruptcy. See, e.g., In re Robinson, 987 F.2d 665, 669 (10th Cir. 1993); In re Freeman, 956 F.2d 252, 255 (11th Cir. 1992); In re Gilchrist, 891 F.2d 559, 561 (5th Cir. 1990); and In re Winters, 1994 W.L. 397939, at *3-5 (N.D. Ill. 1994).
2. Whether Judge Covey made a specific finding of good faith and whether an adequate record with regard to Mr. Richardson's alleged bad faith was developed in the bankruptcy court and the need, if any, for a remand to the bankruptcy court for specific findings by the bankruptcy court with regard to Mr. Richardson's good faith. See, e.g., In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 149-150 (3rd Cir. 1986); In re Plotner, 172 B.R. 337, 341 (W.D. Okla. 1994); and In re Tempo Technology Corp., 202 B.R. 363 (D. Del. 1996).

⁷¹ Once the record on appeal has been received from the bankruptcy court clerk, the clerk of this Court will send the parties a letter, setting a briefing schedule. See Rule B-10 of the District Court Rules for Bankruptcy Practice and Procedure, Miscellaneous Order M-128, filed April 11, 1985.

3. If a party advances the argument that this case should be remanded for additional fact finding, that party should address the procedural aspects of such a remand. In other words, the party requesting a remand should address whether the remand should be for an adversary proceeding under Fed. R. Bankr. P. 7001 to determine if Mr. Richardson was a good faith purchaser or whether the case should be remanded in some other procedural context. See, e.g., In re Moberg Trucking, Inc., 112 B.R. 362, 363-64 (B.A.P. 9th Cir. 1990); and Sumwalt v. Equity Securities, 1992 W.L. 38610, at *1-2 (9th Cir. 1992).
4. Obviously the parties must also address the underlying legal merits of Appellants' claim. That is, if Appellants' version of the facts are true, do those facts support a legal conclusion that Mr. Richardson was not a good faith purchaser as that term is defined by the Tenth Circuit in In re Bel Air Associates, Ltd., 706 F.2d 301, 305, n. 11 (10th Cir. 1983).

CONCLUSION

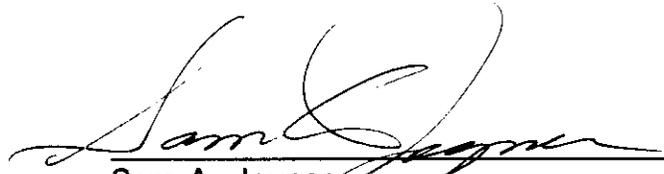
The trustee's motion to dismiss (doc. no. 2) this appeal as moot pursuant to 11 U.S.C. § 363(m) is **GRANTED IN PART AND DENIED IN PART**. The trustee's motion is granted as to all issues except the issue of whether Gary L. Richardson was a good faith purchaser of the Woodland Hills Cinema and the Service Merchandise building located near 71st Street and Memorial in Tulsa, Oklahoma. Once the record on appeal has been received by this Court from the bankruptcy court clerk, the parties shall brief the specific issues identified in this Report and Recommendation.

TIME FOR OBJECTIONS

If the parties so desire, they may file with the District Judge assigned to this case, within 10 days from the date they are served with a copy of this Report and Recommendation, objections to the undersigned's recommended disposition of this action. See 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b).

IT IS SO ORDERED.

Dated this 23 day of January 1997.


Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 24th Day of January, 1997.

C. Paulella, Deputy Clerk.

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

FILED
JAN 22 1997

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

NORAM GAS TRANSMISSION COMPANY,)
a Delaware corporation,)
)
Plaintiff,)
)
v.)
)
ENTERPRISE RESOURCE CORPORATION,)
an Arkansas corporation; and ALAN G.)
MIKELL,)
Defendants.)

Case No. 94-C-773-H

ENTERED ON DOCKET
JAN 23 1997
DATE _____

JUDGMENT

This case was tried to the Court on June 24 through June 26, 1996. By Order filed on January 7, 1997, the Court adopted Findings of Fact and Conclusions of Law which are incorporated by reference herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff, NorAm Gas Transmission Company, is awarded judgment in its favor against defendant, Alan G. Mikell, as follows:

(A) In the amount of Three Hundred Ninety-Seven Thousand One Hundred Thirty-Eight and 72/100 Dollars (\$397,138.72) for breach of contract; and

(B) In the amount of Fifteen Thousand Seven Hundred Forty-Two and 00/100 Dollars (\$15,742.00) for breach of his obligation to pay taxes.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff, NorAm Gas Transmission Company, is awarded judgment in its favor against defendant, Enterprise Resource Corporation, as follows:

(A) In the amount of Four Hundred Forty-Five Thousand Eight Hundred Eighty-Seven and 50/100 Dollars (\$445,887.50) for breach of contract;

119

(B) In the amount of Thirty Thousand One Hundred Forty-Five and 59/100 Dollars (\$30,145.59) for breach of its obligation to pay taxes; and

(C) In the amount of Ninety-Six Thousand Seven Hundred Seventy-Eight and 47/100 Dollars (\$96,778.47) for prejudgment interest.

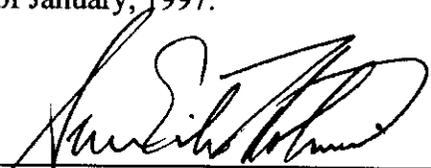
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff, NorAm Gas Transmission Company, is granted judgment in its favor on the counterclaims of defendant, Alan G. Mikell.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff, NorAm Gas Transmission Company, is granted judgment in its favor on the counterclaims of defendant, Enterprise Resource Corporation.

IT IS FURTHER ORDERED that awarding of costs and attorneys' fees is reserved pending application in accordance with Local Rules 54.1 and 54.2.

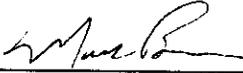
IT IS FURTHER ORDERED that post-judgment interest will accrue at the statutory rate on the amounts awarded pursuant to this Judgment.

IT IS SO ORDERED this 22nd day of January, 1997.



Hon. Sven Erik Holmes
United States District Judge

APPROVED AS TO FORM:



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Claire V. Eagan, Esq.
Mark Banner, Esq.
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COUNSEL FOR DEFENDANTS

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

BOBBY R. WORKMAN,
441-62-5501

Plaintiff,

vs.

SHIRLEY S. CHATER,
Commissioner Social
Security Administration,

Defendant.

FILED

JAN 22 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-862-BU

ENTERED ON DOCKET

DATE JAN 23 1997

JUDGMENT

Pursuant to the Court's Order, judgment is hereby entered in favor of Defendant, Shirley S. Chater, Commissioner of the Social Security Administration, and against Plaintiff, Bobby R. Workman.

ENTERED this 22nd day of January, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA **FILED**

BOBBY R. WORKMAN,)
 441-62-5501)
)
 Plaintiff,)
)
 vs.)
)
 SHIRLEY S. CHATER,)
 Commissioner Social)
 Security Administration,)
)
 Defendant.)

JAN 22 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-862-BU

ENTERED ON DOCKET

DATE JAN 23 1997

ORDER

On December 27, 1996, United States Magistrate Judge Frank H. McCarthy issued a Report and Recommendation, wherein he recommended that the decision of the Commissioner of the Social Security Administration denying Social Security disability benefits be affirmed. In the Report and Recommendation, Magistrate Judge McCarthy advised Plaintiff that any objections to the Report and Recommendation must be filed within ten (10) days after being served with a copy of the Report and Recommendation. To date, Plaintiff has not filed any written objections to Magistrate Judge McCarthy's Report and Recommendation and has not filed any request for an extension of time within which to file any written objections.

With no written objections being filed, the Court, pursuant to 28 U.S.C. § 636(b)(1), accepts Magistrate Judge McCarthy's Report and Recommendation in its entirety.

Accordingly, the Report and Recommendation (Docket Entry #13) issued by United States Magistrate Judge Frank H. McCarthy is

AFFIRMED. The decision of Defendant, Shirley S. Chater, Commissioner of the Social Security Administration, denying Social Security disability benefits is **AFFIRMED.**

ENTERED this 22nd day of January, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

JAN 22 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LARRY DALE,)
)
Plaintiff,)
)
vs.)
)
RONALD J. CHAMPION and)
MARY CARTER,)
)
Defendants.)

No. 95-C-190-B ✓

CONSOLIDATED WITH

LARRY DALE,)
)
Plaintiff,)
)
vs.)
)
BRAD PAYAS, and PAULA POTTS,)
)
Defendants.)

No. 95-C-191-B

ENTERED IN COURT

JAN 23 1997

ORDER

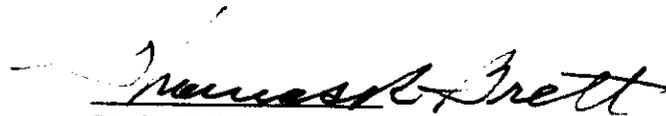
Before the Court is the Motion for Reconsideration filed by the plaintiff Larry Dale ("Dale") (Docket No. 12). Pursuant to Fed.R.Civ.P. 59(e), Dale asks the Court to set aside its grant of summary judgment to defendants. Specifically, Dale urges that the Court should not have granted summary judgment without allowing him to conduct discovery of past instances of similar complaints by other prisoners at Dick Connor Correctional Center. The complaint which Dale asserted in these consolidated actions is that defendants showed deliberate indifference to his alleged legitimate and serious medical needs by allowing an alleged unpracticed person to draw blood from his arm in a routine medical examination. In granting defendants summary judgment, the Court concluded the

following:

Even if the Plaintiff's blood had been unartfully drawn, causing temporary pain, such an allegation would fail to demonstrate that the pain or deprivation was sufficiently serious to invoke the Eighth Amendment's cruel and unusual punishment prohibition. Further, the Plaintiff has totally failed to establish the subjective element required. In addition, even if Plaintiff could have established that the State official drawing his blood was negligent in performing that procedure, such would be insufficient to establish an Eighth Amendment violation since neither simple nor gross negligence meets the deliberate indifference standard required for a violation of the cruel and unusual punishment clause of the Eighth Amendment.

March 11, 1996 Order (Docket No. 10). Given the failure of the allegations to rise to a constitutional violation, evidence of other instances of unartful blood drawings by defendants would not have saved Dale's claim from summary dismissal. Accordingly, the Court denies Dale's motion to reconsider (Docket No. 12).

ORDERED this 15th day of January, 1997.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

JAN 22 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CARRIE JONES,

Plaintiff,

vs.

TULSA FEDERAL EMPLOYEES
CREDIT UNION, an Oklahoma
corporation.

Defendant.

No. 96-C-930-B ✓

ENTERED ON DOCKET

JAN 23 1997

ORDER

Before the Court is the Motion to Dismiss filed by defendant Tulsa Federal Employees Credit Union ("TFECU") (Docket No. 2). In her complaint, plaintiff Carrie Jones ("Jones") alleges three claims: (1) employment discrimination based on sexual harassment in violation of the Civil Rights Act of 1964 as amended ("Title VII"), 42 U.S.C. §2000e-2, *et seq.*; (2) wrongful discharge in violation of the public policy of the state of Oklahoma, *Burk v. K-Mart*, 770 P.2d 24 (Okla. 1989); and (3) intentional infliction of emotional distress. Pursuant to Fed.R.Civ. P. 12(b)(6), TFECU seeks the dismissal of Jones' second claim for relief. TFECU argues that under *List v. Anchor Paint Mfg. Co.*, 910 P.2d 1011 (Okla. 1996), Jones cannot state a common law claim for wrongful discharge. The Court agrees.

In *List*, the Oklahoma Supreme Court precluded a *Burk* claim based on age discrimination, holding that the Age Discrimination in Employment Act of 1967 ("ADEA") provided plaintiff's exclusive remedy. In so holding, the court reasoned that the ADEA provided an adequate remedy, including a right to a jury trial, compensatory and punitive damages, and plaintiff's claim was based

8

“solely on his status,” and not his conduct. *List, supra*.

Like the plaintiff in *List*, Jones has comprehensive remedies under Title VII should she prevail on her claims of sexual harassment and retaliatory discharge, which include a right to jury trial, compensatory and punitive damages. See 42 U.S.C. §1981a(a)(1). Jones, however, argues that this case is distinguishable from *List* as she was not discharged based solely on her gender, but also on her written complaint to management about her sexual harassment by two TFECU employees. Jones asserts that this latter allegation states a claim based on retaliation for something that she did, and thus, the Court should be guided by *Groce v. Foster*, 880 P.2d 902 (Okla. 1994), and not *List*.¹

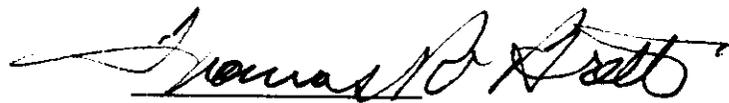
The Oklahoma Supreme Court in *List* premised its holding that plaintiff’s ADEA remedy was exclusive on the following two findings: (1) plaintiff’s statutory remedy was adequate and (2) plaintiff’s claim was based “solely on his status.” In so holding, the *List* court distinguished conduct-based (as in *Groce*) from status-based claims (as in *List*), including the former in and excluding the latter from a *Burk* remedy, even if plaintiff has an adequate statutory remedy. Whatever the Oklahoma Supreme Court’s intention in making this distinction, the Court does not believe the *List* court intended a finding of a conduct-based claim under the circumstances here: (1) Jones was discharged for complaining about sexual harassment; (2) Jones complained because she was sexually harassed; and (2) sexual harassment is actionable as a form of gender discrimination. The gravamen of Jones’ claim is clearly gender discrimination, a status-based claim. What Jones, in essence, argues is that the act of complaining about the sexual harassment converts an otherwise status-based to a conduct-based wrongful discharge claim. Yet in most cases of sexual harassment, the employee’s complaint to management about the sexual harassment is an element of her claim or at least evidence

¹ The *List* court distinguished *Groce* as “[a]n example of a discharge arising from retaliation to an employee’s conduct, rather than his status.” The plaintiff in *Groce* alleged that he was discharged in retaliation for bringing suit against one of his employer’s customers for his personal injuries.

of unwelcomeness. To interpret the second *List* factor as Jones urges in this case would blur any real distinction between conduct and status. And the Court declines to do so.

Accordingly, the Court dismisses Jones' *Burk* claim for failure to state a claim, thereby granting TFECU's motion to dismiss (Docket No. 5).

ORDERED this 15th day of January, 1997.

A handwritten signature in black ink, appearing to read "Thomas R. Brett", written in a cursive style.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

JAN 21 1997

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

P. CHIMA NWAOKELEME,)
)
) Plaintiff,)
 vs.)
)
) STORY WRECKER, INC.,)
) OF NORTH ELWOOD)
) TULSA, OKLAHOMA,)
)
) Defendant.)

Case No. 96-C-1151-BU ✓

ENTERED ON DOCKET

DATE JAN 22 1997

ORDER

On January 17, 1997, the plaintiff, P. Chima Nwaokeme, filed a pleading entitled "Order." Having reviewed the pleading, the Court concludes that it should be construed as a motion, pursuant to Rule 60(b), Fed. R. Civ. P., to vacate the Court's December 19, 1996 Order, dismissing the plaintiff's complaint for lack of subject matter jurisdiction.

On December 12, 1996, the plaintiff, pro se, filed a complaint seeking the release and delivery by the defendant, Story Wrecker, Inc. of North Elwood, Tulsa, Oklahoma, of a 92 Lexus SC 400 and seeking damages against the defendant in the amount of \$193,800.00. Upon initial review of the complaint, the Court found that it lacked subject matter jurisdiction over this case and that the plaintiff's complaint must be dismissed in its entirety. Specifically, the Court found that the plaintiff's complaint did not provide a basis for subject matter jurisdiction. The plaintiff had also not alleged a claim against the defendant which arises under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. Thus, no federal question was presented. In

addition, the plaintiff had not alleged that he and the defendant were of diverse citizenship, that is, citizens of different states. 28 U.S.C. § 1332. Therefore, no diversity of citizenship was presented.

Rule 60(b), Fed. R. Civ. P., provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have been prospective application; or (6) any other reason justifying relief from the operation of the judgment.

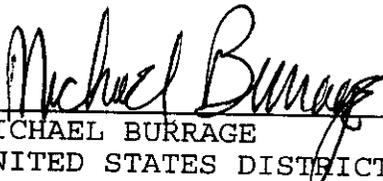
The plaintiff's motion appears to assert that the Court erroneously determined that it lacked subject matter jurisdiction over his complaint. The only basis for vacating the Court's final order would have to fall under Rule 60(b)(6). Although Rule 60(b)(1) provides that a court may relieve a party from a judgment for the reason of "mistake," a court's mistake in the law when entering judgment does not justify setting it aside. Collins v. City of Wichita, 254 F.2d 837, 839 (10th Cir. 1958). In addition, although Rule 60(b)(4) provides that a court may relieve a party from a judgment if it is void, "[a] judgment is not void merely because it is erroneous." 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2862, p. 326. Therefore, even if the plaintiff were correct in his assertion that the Court's decision was erroneous, Rule 60(b)(4) would not serve as a basis for

vacating the Court's December 19, 1996 Order.

Rule 60(b)(6) provides that the court may relieve a party from a final order for any other reason justifying relief from the operation of a judgment. The Court has reviewed the plaintiff's motion and has again reviewed the plaintiff's complaint. Having done so, the Court finds no reason to justify vacating its dismissal of the plaintiff's complaint. The Court still concludes that it lacks subject matter jurisdiction over the plaintiff's complaint.¹

Based upon the foregoing, the plaintiff's pleading entitled "Order" which the Court construes as a motion, pursuant to Rule 60(b), Fed. R. Civ. P., to vacate the Court's December 19, 1996 Order is DENIED.

Entered this 21^{at} day of January, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

¹ Even if the Court were to construe the plaintiff's pleading as a motion for new trial under Rule 59(a), Fed. R. Civ. P., or a motion to alter or amend judgment under Rule 59(e), Fed. R. Civ. P., and find that the motion had been timely filed, the Court concludes that the plaintiff would not be entitled to relief as the Court, as stated, still concludes that it lacks subject matter jurisdiction over the plaintiff's complaint.

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

FILED

JAN 21 1997

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

NORDAM GROUP, INC.,)
)
Plaintiff,)
)
vs.)
)
AVIATION PARTNERS, INC.,)
)
Defendant.)

Case No. 96-C-978-BU ✓

ENTERED ON DOCKET

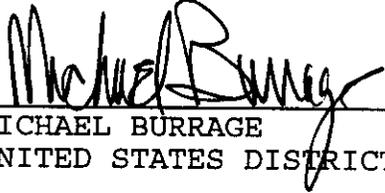
DATE 1-22-97

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 21st day of January, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

JAN 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THOMAS E. RICKY,

Plaintiff,

v.

MAPCO INC., a Delaware
Corporation,

Defendant.

Case No. CIV-91-879-E

ENTERED FOR FILING

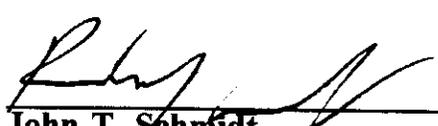
JAN 22 1997

JOINT STIPULATION OF DISMISSAL

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiff, Thomas E. Ricky, hereby stipulates with the Defendant, MAPCO Inc., that this action shall be dismissed with prejudice as to Defendant MAPCO Inc. The parties have entered a confidential settlement agreement and mutual release which resolves all issues including those related to fees and costs of the respective parties.

Respectfully submitted,


Karen L. Long, OBA #5510
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 700
Tulsa, Oklahoma 74103
(918) 585-9211
Attorneys for Plaintiff, Thomas E. Ricky


John T. Schmidt
Randolph L. Jones, Jr.
CONNER & WINTERS
2400 First National Tower
15 E. 5th Street
Tulsa, OK 74103-4391
Attorneys for Defendant, MAPCO Inc.

122

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

F I L E D

JAN 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RON RICHARDSON,)
)
Plaintiff,)
)
v.)
)
MARKETING SPECIALIST SALES CO.)
INC., a foreign corporation,)
)
Defendant.)

Case No. 95-C-404-W ✓

ENTERED ON DOCKET

DATE 1/22/97

ORDER

This order pertains to Defendant's Motion to Reurge and Supplement Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted, Alternatively Motion for Summary Judgment (Docket #40), and Plaintiff's Motion for Extension of Time to Respond to Defendant's Motion for Summary Judgment (Docket #42). A pretrial conference was held on October 7, 1996.

Plaintiff's Motion for Extension of Time to Respond to Defendant's Motion for Summary Judgment (Docket #42) is denied. Plaintiff's counsel, Jeff Nix, orally responded to the motion for summary judgment in court and the court excused his failure to file a brief in response to the motion. Mr. Nix reported that his client had refused to maintain contact with him and had failed to provide lists of witnesses and evidence to him.

This case was filed on May 3, 1995, and the court denied defendant's motion to change venue and motion to dismiss or for summary judgment on October 30, 1995. The court granted defendant the right to re-urge the motion for summary judgment following discovery. Mr. Nix did not enter his appearance as counsel of

record for plaintiff until July 15, 1996.

Defendant's Motion to Reurge and Supplement Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted, Alternatively Motion for Summary Judgment (Docket #40) is granted. Summary judgment is appropriate if the moving party can demonstrate that there is no genuine issue as to any material fact, and entitlement to judgment as a matter of law. Rule 56(c), Fed.R.Civ.P.¹

¹The court applies the well-established framework for analysis of summary judgment motions. "[T]he plain language of Rule 56(c) [Fed.R.Civ.P.] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If there is a complete failure of proof concerning an essential element of the non-movant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. Id. at 323.

A party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must affirmatively prove specific facts showing that there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The Court stated that "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252.

The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts". Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 (1986).

The record must be construed liberally in favor of the party opposing the summary judgment, but "conclusory allegations by the party opposing ... are not sufficient to establish an issue of fact and defeat the motion." McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384 (10th Cir. 1988).

Plaintiff is not a "handicapped person" under Okla. Stat. tit. 25, § 1301(4), which states: "[h]andicapped person" means a person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such an impairment or is regarded as having such an impairment; . . ."

The record shows no basis in fact for a finding of handicap discrimination. Plaintiff suffered a back injury and was temporarily disabled as a result, but he was able to perform work as a sales representative identical to that he did for defendant within ten months of his injury. Defendant provided reasonable accommodation of plaintiff's disability when he returned to work, but even with such accommodation he failed to perform his job properly. The reason for his job termination was poor job performance. There is no genuine issue of material fact left for trial.

The motion for summary judgment is decided on the basis of the merits of plaintiff's case, not on any technicalities which defendant has shown to the court and plaintiff's counsel has admitted. In reviewing the history of this case, the court finds that plaintiff has failed to exert even minimal efforts to prosecute the action. He has failed to provide his two different attorneys with his phone number and with exhibit and witness lists. Based on his failure to respond to discovery requests and provide his counsel with materials to respond to defendant's motion for summary judgment, this is a clear case where the court could have dismissed the case based on plaintiff's failure to respond under Local Rule 7.1(C).

Defendant seeks costs and fees as the prevailing party in this case pursuant

to Okla. Stat. tit. 25, § 1901(D). The request is granted. Courts have noted that it is necessary to be cautious when a prevailing defendant in an employment civil rights case seeks attorney's fees against the plaintiff, because employees who have a good faith belief that they are being unlawfully discriminated against should not be discouraged from litigating their claims. Gordon v. Hercules, Inc., 715 F.Supp. 1033, 1033 (D. Kan. 1989). The Supreme Court stated in Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978), as follows:

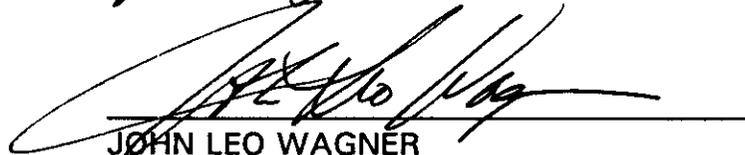
[I]t is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable.

Hindsight logic is not required to conclude that, at the time that plaintiff filed this action on May 3, 1995, his back was no longer injured and he had been working as a sales representative since April, 1994. The court concludes that, at the time of filing, he had no *prima facie* case of handicap discrimination, and had no reasonable prospect of establishing a *prima facie case* through the discovery process.

In awarding fees, the court will be parsimonious. The court recognizes the burden that fee awards are likely to place upon a working individual who could afford to become a plaintiff only by virtue of a contingent fee arrangement with his lawyer. It is unlikely that fees incurred by virtue of venue fights or overlapping motions will be awarded. Nevertheless, if Defendant still wishes to pursue an award of fees, it

may submit a motion for fees within fifteen (15) days of the date of this order,
pursuant to Local Rule 54.2.

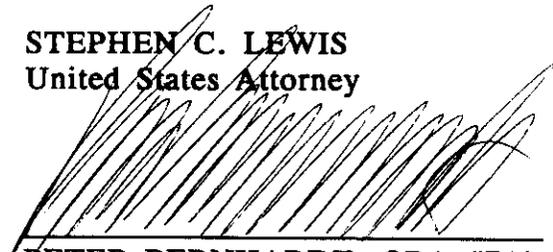
Dated this 21st day of January, 1997.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:orders\Richard3

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 W. Fourth St., Suite 3460
Tulsa, OK 74103-3809

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

FILED

JUNE KRUG,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,¹

Defendant.

JAN 21 1997 *SAC*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No: 96-C-99-W ✓

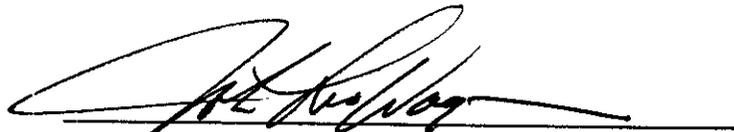
ENTERED ON DOCKET

DATE 1/21/97

JUDGMENT

Judgment is entered in favor of the plaintiff, June Krug, in accordance with this court's Order filed January 21, 1997.

Dated this 21st 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.

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

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

Case No. 94-CV-135-H

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

ENTERED ON DOCKET

DATE JAN 21 1997

ORDER

This matter comes before the Court on the Report and Recommendation filed by Magistrate Judge Frank H. McCarthy (Docket # 31).

In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), objections to a Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of the Report. Failure to file objections within the time allotted waives the right to appeal from a judgment of the District Court based upon the findings and recommendations of the United States Magistrate Judge. Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991).

In the instant case, Magistrate Judge McCarthy's Report and Recommendation was filed July 16, 1996. No objections to the report have been filed. Thus, the right to object to the findings and recommendations has been waived.

The Court hereby adopts Magistrate Judge McCarthy's Report and Recommendation (Docket # 31) granting Defendants' Motion to Dismiss or for Summary Judgment (Docket # 27, 29), dismissing the instant action without prejudice.

IT IS SO ORDERED.

This 17TH day of January, 1997.


Sven Erik Holmes
United States District Judge

33

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

FILED

JAN 1 1997

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

SCT PARTNERS, LTD.,

Plaintiff,

v.

FOUNDATION TO SAVE OUR
CHILDREN'S ENVIRONMENT

Defendant.

Case No. 96-CV-515-H ✓

ENTERED ON DOCKET

DATE JAN 21 1997

ORDER OF DISMISSAL UPON SETTLEMENT

The parties to the action, by their counsel, have advised the court that they have agreed to a settlement.

IT IS HEREBY ORDERED that this matter is DISMISSED WITH PREJUDICE.

However, if any party hereto certifies to this Court, with proof of service of a copy thereon on opposing counsel, within ninety days from the date hereof, that settlement has not in fact occurred, the foregoing order shall be vacated and this cause shall forthwith be restored to the calendar for further proceedings.

IT IS SO ORDERED.

This 17TH day of JANUARY, 1997.



Sven Erik Holmes
United States District Judge

121

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

FILED
JAN 1 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOSEPH ANGELO DiCESARE,)
)
Plaintiff,)
)
v.)
)
J.D. BALDRIDGE, et al.,)
)
Defendants.)

Case No. 93-CV-507-H

ENTERED ON DOCKET
DATE JAN 21 1997

ORDER

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge (Docket # 61) and Plaintiff's Objection to the Report and Recommendation (Docket # 63).

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

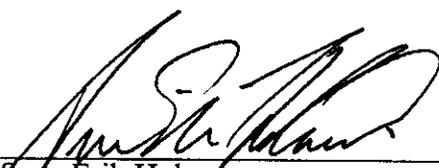
[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject,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

Fed. R. Civ. P. 72(b).

Based on a review of the Report and Recommendation and the Plaintiff's Objection, the Court hereby adopts and affirms the Report and Recommendation (Docket # 61). Accordingly, Defendants' motions for summary judgment (Docket # 51, 53) are granted.

IT IS SO ORDERED.

This 17th day of January, 1997.


Sven Erik Holmes
United States District Judge

6

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 A TRACT OF LAND CONTAINING)
 3.71 ACRES IN SECTION 24,)
 TOWNSHIP 16 SOUTH, RANGE 10)
 EAST, GILA AND SALT RIVER)
 BASE AND MERIDIAN, PIMA)
 COUNTY, ARIZONA, WITH ALL)
 BUILDINGS, APPURTENANCES,)
 AND IMPROVEMENTS THEREON,)
)
 Defendant.)

CIVIL ACTION NO. 95-C-249-H ✓

FILED

RECEIVED DISTRICT COURT JAN 17 1997

DATE JAN 21 1997 Phil Lombardi, Clerk
S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORFEITURE

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

The verified Complaint for Forfeiture In Rem was filed in this action on the 17th day of March 1995, alleging that the defendant property, to-wit:

The East 518.68 feet of the West 775.78 feet of the North Half (N/2) of Parcel 24-12 of that certain Map of Survey filed in Book 2 of Surveys, Page 5, being a part of Section 24, Township 16 South, Range 10 East, Gila and Salt River Base and Meridian, Pima County, Arizona, including all buildings, appurtenances, and improvements thereon.

EXCEPT the following-described parcel:

BEGINNING at the Northwest corner of said parcel described above; thence N89° 15' 00"E along the North line of said parcel, a distance of 490.40 feet to the

Northwest corner of that certain Well Site recorded in Docket 6273 at Page 380;

Thence S00° 15' 45"E, a distance of 125.00 feet to the Southwest corner of said Well Site;

Thence N89° 15' 00"E along the South line of said Well Site, a distance of 28.28 feet to a point:

Thence S00° 15' 45"E, a distance of 106.51 feet to a point; thence S67° 24' 05"W, a distance of 560.75 feet to a point; thence N 00° 15' 45"W, a distance of 440.20 feet to the point of beginning.

Said parcel contains 3.71 acres, more or less.

SUBJECT to an easement over the South 15 feet of said parcel.

Together with a 25 foot wide ingress-egress easement over the following-described parcel. Beginning at the Northwest corner of said East 518.68 feet of the West 775.78 feet of the N/2 of Parcel 24-12; thence N 89° 15' 00"E along the North line of said Parcel 24-12, a distance of 199.56 feet to the TRUE POINT OF BEGINNING:

Thence continuing N89° 15' 00"E, a distance of 25.00 feet to a point; thence S00° 15' 45"E, a distance of 349.85 feet to a point; thence S67° 24' 05"W, a distance of 27.03 feet to a point; thence N00° 15' 45"W, a distance of 359.19 feet to the point of beginning,

is subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7), because there is probable cause to believe it was used, or was intended for

use, to commit, or to facilitate the commission of, or became proceeds, in violation of the drug prevention and control laws of Title 21 United States Code.

Warrant of Arrest and Notice In Rem as to the defendant real property was issued by The Honorable Sven Erik Holmes, Judge of the United States District Court for the Northern District of Oklahoma, on March 22, 1995, providing that the United States Marshal for the District of Arizona arrest, seize, and detain the defendant real property in his possession until the further order of this Court, and further providing that the United States Marshal for the District of Arizona publish Notice of Arrest and Seizure once a week for three consecutive weeks in The Territorial, a newspaper of general circulation in the District of Arizona, the district in which the defendant real property is located.

Warrant of Arrest and Notice In Rem was issued by the Honorable Sven Erik Holmes, United States Judge for the Northern District of Oklahoma, on the 22nd day of March, 1995, providing that the United States Marshal for the Northern District of Oklahoma publish Notice of Arrest and Seizure once a week for three consecutive weeks in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in the district in which this action is pending.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrants of

Arrest and Notices In Rem on the defendant real property, as follows:

A tract of land containing
3.71 acres, more or less,
in Section 24, Township 16
South, Range 10 East, Gila
and Salt River Base and
Meridian, Pima County,
Arizona.

Served:
May 5, 1995

The United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrants of Arrest and Notices In Rem on all known individuals or entities with standing to file a claim against the defendant real property, as follows:

James H. Van Over

Served:
January 10, 1996

Betty Van Over

Served:
January 11, 1996

Pima County Treasurer
Pima County Courthouse
Tucson, Arizona

Served:
September 16, 1996

USMS 285s reflecting the service upon the defendant real property, and all buildings, appurtenances, and improvements thereon, and James H. Van Over and Betty Van Over, the only individuals or entities known to have standing to file a claim to the defendant real property, are on file herein.

The government acknowledges the validity of the claim of the Treasurer of Pima County, Arizona, as filed herein on October 2, 1996, and agrees that it will pay the sum of \$1,440.50 for taxes, interest, and fees due and owing through September 1996, plus additional taxes, interest, and fees, accruing until date of forfeiture to the United States of America.

That James William McPeek, Roselyn McPeek, Bobby Joe McPeek, and Johnna McPeek previously executed Stipulations for Forfeiture of the defendant real property and Quit-Claim Deeds, conveying to the United States of America, all of their right, title, and interest in and to the defendant real property, as set forth below:

- 1) James William McPeek, a potential claimant with standing to file a claim in this action, executed a Stipulation for Forfeiture of the defendant real property on January 30, 1995, and which was filed in this action on March 17, 1995.
- 2) Roselyn McPeek, wife of James William McPeek, a potential claimant with standing to file a claim in this action, executed a Stipulation for Forfeiture of the defendant real property on January 30, 1995, and which was filed in this action on March 17, 1995.
- 3) Bobby Joe McPeek, a potential claimant with standing to file a claim in this action, executed a Stipulation for Forfeiture of the defendant real property on January 30, 1995, and which was filed in this action on March 17, 1995.

- 4) Johnna McPeek, wife of Bobby Joe McPeek, a potential claimant with standing to file a claim in this action, executed a Stipulation for Forfeiture of the defendant real property on January 30, 1995, and which was filed in this action on March 17, 1995.
- 5) James William McPeek and Roselyn McPeek, Husband and Wife, executed a Quit-Claim Deed, conveying all of their right, title, and interest in and to the defendant real property to the United States of America on January 19, 1995. This Quit-Claim Deed was recorded in Docket No. 10132 at Page 431 in the land records of Pima County, Arizona, on September 20, 1995.
- 6) Bobby Joe McPeek and Johnna McPeek, Husband and Wife, executed a Quit-Claim Deed, conveying all of their right, title, and interest in and to the defendant real property to the United States of America on January 4, 1995. This Quit-Claim Deed was recorded in Docket No. 10132 at Page 427 in the land records of Pima County, Arizona, on September 20, 1995.

All persons or entities interested in the defendant real property were required to file their claims herein within ten (10) days after service upon them of the Warrants of Arrest and Notices In Rem, publication of the Notices of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

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

Publication of Notice of Arrest and Seizure occurred in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, the district in which this action is filed, on June 1, 8, and 15, 1995, and in The Territorial, a newspaper of general circulation in Pima County, Arizona, the county in which the defendant real property is located, on May 15, 22, and 30, 1995.

No claims in respect to the defendant real property have been filed with the Clerk of the Court, and no persons or entities have plead or otherwise defended in this suit as to the defendant real property, except the Pima County Treasurer, Pima County, Arizona, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant real property, and all persons and/or entities interested therein, except, James William McPeek, Roselyn McPeek, Bobby Joe McPeek, Johnna McPeek, James H. Van Over, and Betty Van Over, who have either consented to the forfeiture of the defendant real property by virtue of duly executed and filed Stipulations for Forfeiture or Quit-Claim Deeds, whereby all right, title, and interest of the potential claimants was conveyed to the United States of America.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that judgment of forfeiture be entered against the following-described defendant real property:

The East 518.68 feet of the West 775.78 feet of the North Half (N/2) of Parcel 24-12 of that certain Map of Survey filed in Book 2 of Surveys, Page 5, being a part of Section 24, Township 16 South, Range 10 East, Gila and Salt River Base and Meridian, Pima County, Arizona, including all buildings, appurtenances, and improvements thereon.

EXCEPT the following-described parcel:

BEGINNING at the Northwest corner of said parcel described above; thence N89° 15' 00"E along the North line of said parcel, a distance of 490.40 feet to the

Northwest corner of that certain Well Site recorded in Docket 6273 at Page 380;

Thence S00° 15' 45"E, a distance of 125.00 feet to the Southwest corner of said Well Site;

Thence N89° 15' 00"E along the South line of said Well Site, a distance of 28.28 feet to a point:

Thence S00° 15' 45"E, a distance of 106.51 feet to a point; thence S67° 24' 05"W, a distance of 560.75 feet to a point; thence N 00° 15' 45"W, a distance of 440.20 feet to the point of beginning.

Said parcel contains 3.71 acres, more or less.

SUBJECT to an easement over the South 15 feet of said parcel.

Together with a 25 foot wide ingress-egress easement over the following-described parcel. Beginning at the Northwest corner of said East

518.68 feet of the West 775.78 feet of the N/2 of Parcel 24-12; thence N 89° 15' 00"E along the North line of said Parcel 24-12, a distance of 199.56 feet to the TRUE POINT OF BEGINNING:

Thence continuing N89° 15' 00"E, a distance of 25.00 feet to a point; thence S00° 15' 45"E, a distance of 349.85 feet to a point; thence S67° 24' 05"W, a distance of 27.03 feet to a point; thence N00° 15' 45"W, a distance of 359.19 feet to the point of beginning,

and that the defendant real property above described be, and it hereby is, forfeited to the United States of America for disposition according to law, in the following priority:

- a) First, from the sale proceeds of the real property, payment to the United States of America for all expenses of forfeiture of the defendant real property, including, but not limited to, expenses of seizure, maintenance and custody, advertising, and sale.
- b) Second, to the County Treasurer of Pima County, Arizona, the sum of \$1440.50, as and for ad valorem taxes due and owing against the defendant real property for the through September 1996; plus additional taxes, interest, and fees accruing until date of forfeiture to the United States of America.
- c) Third, to the Arizona Department of Environmental Quality, 130 West Congress Street, Tucson, Arizona 85701-1317, the total sum of \$3,873.84, representing cost of hazardous waste cleanup performed by the Arizona Department of Environmental Quality in the amount of \$3,720.80, plus \$153.04 as and

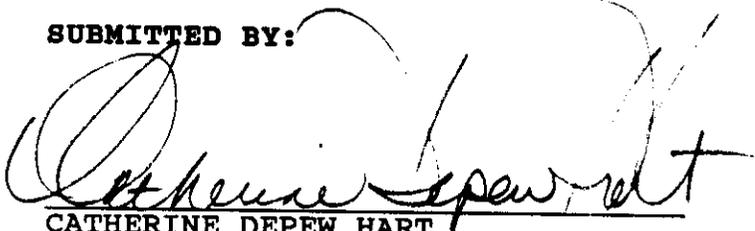
for labor for such cleanup, for a total of \$3,873.04.

- d) Fourth, the remaining proceeds of the sale of the defendant real property, with all buildings, appurtenances, and improvements thereon, shall be retained by the United States Marshals Service for disposition according to law.



SVEN ERIK HOLMES, Judge of the United States District Court for the Northern District of Oklahoma

SUBMITTED BY:



CATHERINE DEPEW HART
Assistant United States Attorney

N: \UDD\CHOOK\FC\VANOV10\05308

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

FILED
JAN 17 1997 *LC*

LIPE, GREEN, PASCHAL & TRUMP, P.C.)
)
 Plaintiffs,)
)
 v.)
)
 IMPACT SOFTWARE PRODUCTIONS, INC.,)
 BROOK BOEHMLER, and WILLIAM BICE,)
)
 Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CIV915-C ✓

ENTERED ON DOCKET
DATE JAN 21 1997

ADMINISTRATIVE CLOSING ORDER

NOW, on this 17th day of January, 1997, there comes on for hearing before me, the Joint Motion of the parties, pursuant to Rule 41 of the local rules of the United States District Court for the Northern District of Oklahoma, for administrative closure of this action.

The parties having entered into a settlement agreement, 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 the purpose of enforcing rights under the terms of the parties' Settlement Agreement.

IF, by February 28, 1998, 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 17th day of January, 1997.

W. Salebrook
Judge of the District Court

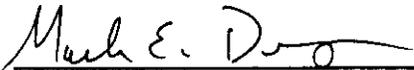
(5)

APPROVED AS TO FORM:



William R. Grimm, #3628
Robert B. Sartin, #12848
610 South Main, Suite 300
Tulsa, OK 74119-1226
(918) 584-1600

ATTORNEYS FOR DEFENDANTS



Larry B. Lipe, #5451
Mark E. Dreyer, #14998
Lipe, Green, Paschal & Trump, P.C.
3700 First Place Tower
15 East 5th Street, Suite 3700
Tulsa, OK 74103-4344
(918) 599-9400

ATTORNEYS FOR PLAINTIFF

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 17 1997

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 THE SUM OF EIGHT HUNDRED)
 SEVENTY-SEVEN AND NO/100)
 DOLLARS (\$877.00) IN)
 GENUINE UNITED STATES)
 CURRENCY,)
)
 Defendant.)

CIVIL ACTION NO. 96-C-823-B

ENTERED ON DOCKET
DATE JAN 21 1997

JUDGMENT OF FORFEITURE

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

The verified Complaint for Forfeiture In Rem was filed in this action on the 10th day of September 1996, alleging that the defendant currency, to-wit:

The Sum of Eight Hundred
Seventy-seven and no/100
Dollars (\$877.00) in
Genuine United States
Currency,

is subject to forfeiture pursuant to 18 U.S.C. § 472 because it was used, fitted, or intended to be used in the making of counterfeit currency, articles, devices, or things found in the possession of

any person without authority from the Secretary of Treasury or other proper officer, all in violation of 18 U.S.C., § 472.

Warrant of Arrest and Seizure was issued by the Clerk of this Court on the 13th day of September, 1996, providing that the United States Secret Service arrest and seize the defendant currency and retain the same in its possession until the further order of this Court.

The United States Secret Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on the defendant currency and all known potential individuals or entities with standing to file a claim to the defendant currency, as follows:

The Sum of Eight Hundred Seventy-seven and no/100 Dollars (\$877.00) In Genuine United States Currency	Served: September 23, 1996
CAROLE TRIPLETT	Served: September 23, 1996
MARTY EUGENE SANDERS	Served: September 23, 1996
JAMES RUSSELL RIDGEWAY	Served: September 23, 1996

United States Secret Service Process Receipt and Return Forms reflecting the service upon the defendant currency and on Carole Triplett, the individual from whom the defendant currency was personally seized, and on Marty Eugene Sanders and James Russell Ridgeway, the only other individuals or entities known to

have standing to file a claim to the defendant currency, are on file herein.

All persons or entities interested in the defendant currency were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No persons or entities upon whom service was effected more than thirty (30) days ago have filed a claim, answer, or other response or defense herein, except Carole Triplett, who filed a Claim and Answer on October 17, 1996, and executed a Stipulation for Forfeiture on January 5, 1997, agreeing that the defendant currency is subject to forfeiture for the reasons stated in the Complaint for Forfeiture and pursuant to 18 U.S.C. § 492, since it was used, fitted, or intended to be used in the making of counterfeit currency, articles, devices, or things found in the possession of any person without authority from the Secretary of Treasury or other proper officer, all in violation of 18 U.S.C. 472.

At a case management conference on December 16, 1996, the Court noted that Carole Triplett, entered a plea of guilty to counterfeiting on December 15, 1996, in criminal case No. 96-CR-126-K in the United States District Court for the Northern District of Oklahoma, pursuant to a plea agreement in which defendant Carole

Triplett agreed that the defendant currency in this civil forfeiture action should be forfeited. The Court ordered the plaintiff to prepare and submit judgment of forfeiture on or before January 31, 1997.

No other claims in respect to the defendant currency have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to the defendant currency, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant currency, and all persons and/or entities interested therein, except Carole Triplett, who agreed to the forfeiture of the defendant currency in a plea agreement in criminal case No. 96-CR-126-K, and in a Stipulation for Forfeiture filed herein.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that judgment of forfeiture be entered against the following-described defendant currency:

**The Sum of Eight Hundred
Seventy-seven and no/100
Dollars (\$877.00) in
Genuine United States
Currency,**

and that the defendant currency above described be, and it hereby is, forfeited to the United States of America for disposition according to law.

for James Brett
THOMAS R. BRETT, Senior Judge
United States District Court for the
Northern District of Oklahoma

SUBMITTED BY:

Catherine Depew Hart
CATHERINE DEPEW HART
Assistant United States Attorney

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