

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

**F I L E D**

MAR 28 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

REUBEN THOMAS,

Petitioner,

vs.

RON CHAMPION,

Respondent.

Case No. 96-CV-565-B

ENTERED ON DOCKET  
MAR 31 1997

**ORDER**

Before the Court for consideration is Respondent's motion to dismiss Thomas' petition for a writ of habeas corpus. (Docket # 16). After careful review of the record and applicable legal authorities, the Court concludes Respondent's motion is well-taken and should be GRANTED.

**I. BACKGROUND**

On May 13, 1986, Thomas pled *nolo contendere* to two (2) Counts of robbery with a firearm, after former conviction of two or more felonies, in Tulsa County District Court, one Count in Case No. CRF-86-393 and one Count in Case No. CRF-86-420. Thomas received an enhanced sentence of twenty-five (25) years on each Count to run concurrently. The former convictions used by the State to enhance Thomas' sentences were Case Nos. CRF 81-2176, CRF 81-2175, CRF 70-1292, and CRF 75-3553. As the litany of state court applications for post-conviction relief filed by Thomas are not relevant here, the Court will forego such a recitation.

On June 8, 1995, Thomas filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the Eastern District of Oklahoma. That case was transferred to the Northern District of Oklahoma and assigned Case No. 96-CV-204-K. On August 8, 1996, the Honorable Terry C. Kern

denied Thomas' petition for a writ of habeas corpus on the merits.<sup>1</sup> In addition, Judge Kern denied Thomas' motions for appointment of counsel and a hearing.

On June 24, 1996, Thomas filed a petition for a writ of habeas corpus pursuant to U.S.C. § 2254 ("second petition") in the above styled case. Respondent seeks dismissal of Thomas' second petition contending Thomas has failed to comply with 28 U.S.C. § 2244(b)(3)(A), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, tit. I (1996) ("Act"). Thomas responds by urging the new amendments to the Act should not apply to the second petition, as the claims raised therein rely on a new rule of constitutional law made retroactive to cases on collateral review by Pension v. Ohio, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988) that was previously unavailable.

## II. ANALYSIS

28 U.S.C. § 2244(b)(3)(A) states:

Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Initially, the Court finds the amended provisions of 28 U.S.C. § 2244(b)(3)(A) apply as Thomas' second petition was filed after the April 24, 1996 effective date of the Act. The undersigned notes the record is devoid of an Order from the Tenth Circuit Court of Appeals authorizing this Court to consider Thomas' second petition. Thus, Thomas' legal arguments as to why this Court should consider his second petition are premature.

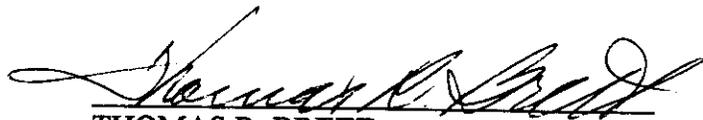
---

<sup>1</sup>On August 22, 1996, Judge Kern denied Thomas' incorrectly labeled motion for a certificate of probable cause. On January 30, 1997, the Tenth Circuit Court of Appeals denied Thomas' motion for a certificate of appealability and dismissed his appeal.

### III. CONCLUSION

As the record is devoid of an Order from the Tenth Circuit Court of Appeals authorizing this Court to consider Thomas' second petition pursuant to 28 U.S.C. § 2244(b)(3)(A), Respondent's motion to dismiss is **GRANTED**.

SO ORDERED THIS 27 day of Mar., 1997.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

DSF/tsr

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

**F I L E D**

MAR 28 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

OHIO CASUALTY INSURANCE )  
COMPANY, a Foreign Insurance )  
Corporation, )

Plaintiff, )

vs. )

LEROY OLIVER, d/b/a OLIVER )  
ROOFING COMPANY, )

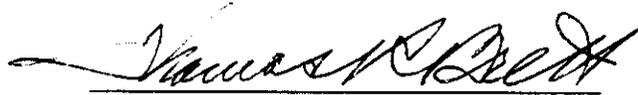
Defendant. )

Case No. 96-CV-518B

ENTERED ON THE CLERK'S  
MAR 31 1997

**ORDER OF DISMISSAL**

NOW on this 27 day of Mar., Plaintiff's Application for Dismissal With Prejudice comes on for consideration before the undersigned Judge of the District Court. The Court hereby enters its Order dismissing this case with prejudice to future refiling.

  
UNITED STATES DISTRICT JUDGE

s:\wpdocs\amstates\96014\p\ORDDIS.DSF

9

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**MAR 27 1997**

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

JUDY A. BAKER,  
SS# 540-52-0451

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of  
Social Security Administration,

Defendant.

No. 96-C-387-J

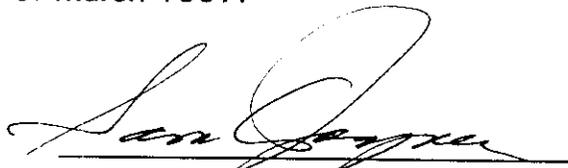
ENTERED ON DOCKET

DATE 3/28/97

**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 27 day of March 1997.



Sam A. Joyner  
United States Magistrate Judge

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

MAR 27 1997

JUDY A. BAKER,  
SS# 540-52-0451

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of  
Social Security Administration,

Defendant.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 96-C-387-J

ENTERED ON DOCKET

DATE

3/28/97

**ORDER**<sup>1/</sup>

Plaintiff, Judy A. Baker, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.<sup>2/</sup> Plaintiff asserts that the ALJ because (1) Plaintiff lacks the ability to perform the physical demands of medium work, (2) the ALJ's credibility analysis is not supported by the record, and (3) the vocational testimony does not adequately support the ALJ's conclusion. For the reasons discussed below, the Court **reverses and remands** the Commissioner's decision.

---

<sup>1/</sup> 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.

<sup>2/</sup> Plaintiff filed an application for disability and supplemental security insurance benefits on November 16, 1992. [R. at 64]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Richard Kallsnick (hereafter, "ALJ") was held May 19, 1994. [R. at 25]. By order dated December 7, 1994, the ALJ determined that Plaintiff was not disabled. [R. at 11]. Plaintiff appealed the ALJ's decision to the Appeals Council. On September 22, 1995, the Appeals Council denied Plaintiff's request for review. [R. at 3].

## I. PLAINTIFF'S BACKGROUND

Plaintiff was born on March 22, 1944, and was 50 years old at the time of her hearing in May 1994. [R. at 33]. Plaintiff testified that she lived with three individuals, and received "room and board" in exchange for assisting with the care of one of the individuals in the house who suffered from multiple sclerosis. [R. at 33].

Plaintiff testified that she was unable to work, that she had hepatitis C, degenerative bone disease, and arthritis. Plaintiff additionally stated that she was unable to lift over 20 pounds (on instruction from a doctor), was sometimes dizzy, and took ibuprofen for pain. [R. at 38-39].

Plaintiff stated that she did not drive because of a previous DUI citation. [R. at 35]. Plaintiff is able to ride a bike for exercise, cook for herself, perform some cleaning and does some embroidery and crochet work. [R. at 41-47]. On an application form completed in November 1992, Plaintiff noted that she mows the grass. [R. at 63].

Plaintiff completed the seventh grade, and in an interview stated that due to GED tests she had the equivalent of a tenth grade education. [R. at 119].

## II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

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

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

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

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

---

<sup>3/</sup> 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).

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<sup>4/</sup> 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.

---

<sup>4/</sup> 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."

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 none of Plaintiff's doctors had placed any physical restrictions on Plaintiff, and that Plaintiff had the ability to lift 25 pounds frequently, 50 pounds occasionally, and could perform medium work. [R. at 14].

The ALJ discounted Plaintiff's credibility, noting that although Plaintiff stated that one of her physicians limited her to no lifting over 20 pounds, no such restriction appeared in the record. [R. at 15]. Similarly, the ALJ noted that although Plaintiff complained of memory loss, the ALJ found no mention of such a complaint being made to any of Plaintiff's doctors. [R. at 15].

### **IV. REVIEW**

#### **Plaintiff's Ability to Perform "Medium" Work**

Plaintiff initially asserts that the ALJ erred in concluding, based on the record, that Plaintiff had the ability to perform medium work. The Court agrees.

Initially, the Court notes that the record contains no physical "residual functional capacity assessment" that provides Plaintiff's lifting limitations/capabilities. Plaintiff

was examined by Steven Y.M. Lee, M.D., on February 10, 1993. [R. at 125]. He noted that Plaintiff did not have a good understanding of the level and severity of the pain she experienced, and used mineral ice and Ben-Gay to relieve back pain. [R. at 125]. Dr. Lee also noted that Plaintiff could not give good examples or details of her claim of memory loss. [R. at 126]. After an examination of Plaintiff, the doctor concluded that Plaintiff did have osteoarthritis of the lumbar spine, but that her asserted memory loss was not readily apparent. [R. at 127]. Dr. Lee additionally observed that Plaintiff walked without limping, that straight leg raising was negative, that she was able to bend 90 degrees on her back without difficulty and that the only tenderness on her back was the S1 joint in the lumbar spine. [R. at 127]. Dr. Lee completed range of motion evaluations, and noted that Plaintiff had the ability to manipulate small objects. [R. at 131]. However, Dr. Lee provided no information as to Plaintiff's ability to lift.

Plaintiff testified that one of her doctors had restricted her to no lifting over twenty pounds. The ALJ noted, "[a]lthough the claimant stated that a doctor told her not to lift over 20 pounds, there is no mention of this in the record." [R. at 15]. The ALJ additionally wrote, "[n]one of the claimant's treating physicians have placed any restriction on her ability to sit, stand, walk, bend, lift, or carry." [R. at 14]. However, Plaintiff's treating physician in 1986<sup>5/</sup> indicated that Plaintiff was limited to lifting no

---

<sup>5/</sup> The Court notes that this lifting limitation is by a treating physician in July of 1986. Defendant asserts that this is "outside the claim period" and therefore should not be considered. Defendant has the burden of proof at Step Five to establish that Plaintiff has the ability to perform the demands required of medium work. Although the medical record may be prior to the date Plaintiff claims she was disabled,  
(continued...)

more than twenty pounds. [R. at 169]. The ALJ's failure to address this limitation poses several problems.

Although the ALJ concludes that Plaintiff can perform the lifting requirements for medium work, nothing in the record supports the ALJ's finding. Nothing in the record affirmatively indicates the amount of weight that Plaintiff is able to lift. The ALJ notes that no physical limitations have ever been placed on Plaintiff by any of her treating physicians. However, obviously this is not the case as one of Plaintiff's treating physicians, in 1986, indicated that Plaintiff should not lift over twenty pounds. In addition, the ALJ discounted Plaintiff's credibility, in part, due to Plaintiff's testimony that one of her physicians had told her not to lift over twenty pounds, but that no doctor had actually placed such a restriction on Plaintiff.

At Step Five, the burden of proof to establish that an individual is able to work is on the Commissioner. In Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993), the Tenth Circuit reversed the finding of the ALJ, at Step Five, because the record contained insufficient evidence to support the decision of the ALJ. The Thompson court noted that "in making his finding that Ms. Thompson could do the full range of sedentary work, the ALJ relied on the absence of contraindication in the medical records." Id. at 1490. Similarly, in this case, the ALJ seemingly relied on the lack of

---

<sup>5/</sup> (...continued)

Defendant has the burden to establish that Plaintiff's condition improved. The record does not indicate that Plaintiff has ever had the ability to lift 25 pounds frequently or 50 pounds occasionally. Furthermore, nothing in the record indicates that the ALJ considered these 1986 records in his determination that Plaintiff was not disabled.

"contraindication in the medical records."<sup>6/</sup> In addition, the ALJ did not address the limitation placed on Plaintiff in 1986 of not lifting over 20 pounds. In accordance with Thompson, at Step Five the Commissioner bears the burden of proof. Under the circumstances of this case, the ALJ's conclusion that Plaintiff could perform the physical requirements for medium work is not supported by the record. On remand, the ALJ should obtain a consultative examination which includes Plaintiff's physical limitations and residual functional capacity.

### **Credibility Analysis**

Plaintiff asserts that the ALJ's credibility analysis was undermined based on the ALJ's erroneous conclusion that Plaintiff had never had a lifting restriction placed on her by a treating physician, and had never reported her memory loss to a physician.

In his credibility determination, the ALJ writes, in part,

The Administrative Law Judge has considered the testimony at the hearing and finds that this testimony is inconsistent with the record as a whole. Although the claimant stated that a doctor told her not to lift over 20 pounds, there is no mention of this in the record. Based on her own statement, she has worked while having mild pain for the last 10 years and alleged memory loss for the last 7 years. There is no record that the claimant has ever mentioned memory loss to any of her treating physicians. The claimant takes prescription ibuprofen for pain and indicated at the hearing that this helped her. . . . [T]he Administrative Law Judge finds that the claimant's allegation of inability to work due to back and leg pain are credible to the extent that she can perform medium work activity, as evidenced by the fact

---

<sup>6/</sup> The ALJ's opinion notes that, "[n]one of the claimant's treating physicians have placed any restriction on her ability to sit, stand, walk, bend, lift, or carry." [R. at 14].

that her daily activities are unrestricted and she also takes care of a woman with multiple sclerosis.

[R. at 15].

As outlined above, the ALJ did not consider the 1986 medical records which indicate that Plaintiff was told to lift no more than 20 pounds. In addition, the records indicate that Plaintiff did, on at least one occasion, inform her doctor of her difficulty with memory loss. [R. at 170]. The ALJ's credibility evaluation was based, in part, on an inaccurate review of Plaintiff's medical records. On remand, Plaintiff's credibility should be reevaluated with appropriate consideration given to the 1986 medical records noted above.

#### **The Vocational Testimony Was Flawed**

Plaintiff additionally asserts that the vocational testimony given by the expert was flawed. The Court declines to address each of the specific arguments raised in Plaintiff's brief. Generally, as noted above, because nothing in the record establishes the specific lifting capabilities of Plaintiff, testimony from the vocational expert based on hypotheticals which included any such lifting requirements cannot constitute substantial evidence for the ALJ's conclusion that Plaintiff is not disabled.

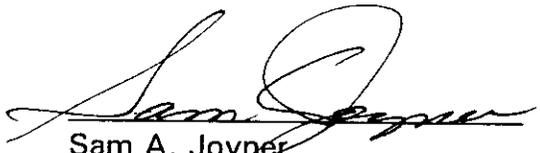
The ALJ additionally asked the vocational expert to consider whether an individual who was 50 years old, with a tenth grade education, a limited ability to read and write, and assuming that the testimony as given by the Plaintiff was true, would be able to work. The vocational expert identified two sedentary unskilled positions which the expert testified Plaintiff would be capable of performing. [R. at 55-56].

Assuming that the hypothetical question and answer as presented would otherwise constitute substantial evidence to support the ALJ's decision, the testimony would still not support a conclusion that Plaintiff was not disabled. According to the requirements given by the ALJ, an individual 50 years of age ("closely approaching advanced age"), and lacking a high school education is presumptively considered disabled (in accordance with the Grids) if that individual can otherwise do only "unskilled sedentary" work.<sup>71</sup> The presumption of disability under the Grids would preclude the further reliance by the ALJ on testimony from a vocational expert. See, e.g., 20 C.F.R. Pt. 404, Subpt. P, App. 2, 200.00(e)(2).

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

IT IS SO ORDERED.

Dated this 27 day of March 1997.

  
Sam A. Joyner  
United States Magistrate Judge

---

<sup>71</sup> The Court in no way means to suggest that Plaintiff is disabled pursuant to the Grids. As noted above, the record does not sufficiently substantiate Plaintiff's physical capabilities. The Court notes only that if Plaintiff is capable of performing only unskilled sedentary work, lacks a high school education, and is "closely approaching advanced age," that Plaintiff is presumed disabled under the regulations of the Commissioner.

**FILED**  
MAR 26 1997

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

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

LOUIS NEAL JAMES,

Petitioner,

vs.

Case No.96-CV-1089-E ✓

MIKE ADDISON, JAMES SAFFLE,  
DREW EDMONDSON,

Respondents.

ENTERED ON DOCKET

DATE MAR 28 1997

**REPORT AND RECOMMENDATION**

Respondents have filed a Motion to Dismiss for Failure to Exhaust State Remedies [Dkt. 7]. In response, Petitioner filed a motion seeking voluntary dismissal of his petition for failure to exhaust state remedies. [Dkt. 13].

Since the parties are in agreement that the petition should be dismissed, the undersigned United States Magistrate Judge RECOMMENDS that the petition for habeas corpus relief be DISMISSED, without prejudice, for failure to exhaust state remedies.

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

DATED this 26<sup>th</sup> day of March, 1997.

Frank H. McCarthy  
Frank H. McCarthy  
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 28<sup>th</sup> Day of March, 1997.

C. Portillo, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

CAROLYN J. NORTON,  
(SSN: 062-56-9504)

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner  
of Social Security Administration,

Defendant.

**F I L E D**

MAR 27 1997 *SAE*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 96-C-156-J

ENTERED ON DOCKET

DATE 3/28/97

**JUDGMENT**

This action has come before the Court for consideration. 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 27 day of March 1997.

  
\_\_\_\_\_  
Sam A. Joyner  
United States Magistrate Judge

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

CAROLYN J. NORTON, )  
(SSN: 062-56-9504) )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
SHIRLEY S. CHATER, Commissioner )  
of Social Security Administration, )  
 )  
Defendant. )

MAR 27 1997 *SA*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 96-C-156-J ✓

ENTERED ON DOCKET  
DATE 3/28/97

ORDER<sup>1/</sup>

Now before the Court is Plaintiff's appeal of the Commissioner's decision denying Plaintiff Disability Insurance and Supplemental Security Insurance Benefits under the Social Security Act. The Administrative Law Judge ("ALJ"), Glen E. Michael, found that Plaintiff was not disabled because Plaintiff retained the Residual Functional Capacity ("RFC") to perform a limited range of light work and a significant number of jobs existed in the national economy which Plaintiff could perform.

Plaintiff argues that the ALJ erred by failing (1) to properly evaluate Plaintiff's subjective complaints of pain, (2) to give controlling weight to an opinion of one of Plaintiff's treating doctors, and (4) to present a proper hypothetical question to the Vocational Expert. After reviewing the record as a whole, the Court finds that the Vocational Expert's testimony does not provide substantial evidence to support the

---

<sup>1/</sup> This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge, filed April 16, 1996.

ALJ's conclusion. Consequently, the Commissioner's denial of benefits is **REVERSED** and this case is **REMANDED** for further proceedings.

### **I. STANDARD OF REVIEW**

A disability under the Social Security Act is defined as the

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

42 U.S.C. § 423(d)(1)(A). A claimant will be found disabled

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). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.<sup>2/</sup>

The standard of review to be applied by this Court to the Commissioner's disability determination is set forth in 42 U.S.C. § 405(g), which provides that "the

---

<sup>2/</sup> Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 416.910 and 416.972. Step two requires the claimant to 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. § 416.921. 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"). See 20 C.F.R. § 416.925. 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 combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at 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, 20 C.F.R. § 416.920; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

finding of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ALJ's ultimate 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.

To determine whether the Commissioner's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will 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).

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to 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.

## **II. SUMMARY OF THE EVIDENCE**

At the time of the hearing below, Plaintiff was a 35 year old female with a 10th grade education. *R. at 33.* Plaintiff testified that from 1979 to 1992 (i.e., approximately 13 years) she worked in a nursing home as a nurse's aide, medication assistant, cook and dishwasher. *R. at 36-37.* Plaintiff alleges that she became unable to work as of November 1992 when she injured her back. Plaintiff testified that she was washing dishes and picked up a pile of food trays and was trying to make a turn when she experienced a sudden onset of pain in her low back. *R. at 171.* Plaintiff alleges that headaches, pain in her back, and numbness in her right leg completely prevent her from performing any sustained work activity.

The Court has reviewed the entire record and the ALJ's decision. The Court finds that the ALJ's summary of the medical evidence is accurate and well balanced. The Court will, therefore, not summarize the medical evidence. The Court adopts and approves the ALJ's summary of the medical evidence.

#### **IV. DISCUSSION**

The ALJ determined that Plaintiff retained the RFC to perform a limited range of light work. Because Plaintiff's past relevant work was at the medium to heavy exertional level, the ALJ concluded that Plaintiff could not perform her past relevant work. The ALJ then moved to step five of the sequential evaluation process.

At step five, the ALJ found that based on Plaintiff's exertional limitations only, the Grids would direct a finding of not disabled.<sup>3/</sup> The ALJ recognized, however, that Plaintiff's subjective complaints of pain created some non-exertional limitations which prevented her from being able to perform a full range of light work. Consequently, the ALJ consulted a Vocational Expert ("VE"). The ALJ presented the VE with a hypothetical question which allegedly identified Plaintiff's exertional and non-exertional limitations. Based on the ALJ's hypothetical question, the VE identified various jobs which Plaintiff could perform at the light and sedentary exertional levels.

Plaintiff attacks the ALJ's analysis on two fronts. First, Plaintiff argues that the ALJ's RFC determination is not supported by the evidence. Second, Plaintiff argues that the VE's testimony cannot provide substantial evidence for the ALJ's step five determination because the ALJ did not present the VE with an adequate hypothetical.

##### **A. The ALJ's RFC Determination**

Plaintiff argues that the ALJ's determination that she could perform a limited range of light work is contrary to the evidence. Plaintiff argues that the ALJ failed to

---

<sup>3/</sup> See The Medical-Vocational Guidelines, commonly referred to as the "Grids," 20 C.F.R. Pt. 404, Supbt. P, App. 2, Table 2, Rule 202.17.

give proper weight to her treating doctors and failed to adequately consider her subjective complaints of pain. The Court disagrees. After a thorough review of the record, the Court finds that there were conflicting statements from Plaintiff's treating doctors and it is the ALJ's job, not this Court's, to resolve those conflicts.<sup>4/</sup> Plaintiff also alleges that the ALJ failed to properly evaluate her subjective complaints of pain. Again, the Court does not agree. The ALJ considered Plaintiff's subjective complaints and then found them not to be wholly credible. The ALJ gave specific reasons for his determination which were supported by the record. The ALJ was required to do no more.<sup>5/</sup>

---

<sup>4/</sup> It is the ALJ's function, and not this Court's, to resolve any conflicts between the opinions of Plaintiff's treating physicians. 20 C.F.R. § 404.1527; Tillery v. Schweiker, 713 F.2d 601, 603 (10th Cir. 1983). The opinion of each of Plaintiff's treating doctors may be weighed with and balanced against other evidence of record. Castellano v. HHS, 26 F.3d 1027, 1029 (10th Cir. 1994). The ALJ must, however, give specific reasons for rejecting a particular treating doctor's opinion. Byron, 742 F.2d at 1235. The ALJ did so in this case.

<sup>5/</sup> The familiar nexus test in Luna was developed as a guide to explain when an ALJ must consider subjective complaints of pain. If the nexus between pain-producing impairment and alleged pain can be established, Luna requires that an ALJ consider the claimant's subjective complaints of pain. Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). When the ALJ considers subjective complaints of pain, he is still entitled to judge the credibility of the claimant in light of all other evidence. Luna, 834 F.2d at 161-63.

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

The ALJ reached the last step of the Luna analysis, because he considered Plaintiff's subjective complaints of pain. The ALJ concluded, however, that Plaintiff's allegations of disabling pain were not credible. In Kepler v. Chater, 68 F.3d 387, (10th Cir. 1995), the Tenth Circuit held that an ALJ must provide the reasoning which supports his credibility determination, as opposed to mere conclusions. The ALJ did so in this case.

## **B. The VE's Testimony**

The ALJ presented the following hypothetical question to the VE:

The hypothetical is a female who is 35 years of age, has a tenth grade education with reasonable ability to read and write and use numbers. She's got primarily back pain for which she's taking medication, and she can do sedentary and light work, and says that she has problems lifting and she has some problem with movement.

*R. at 48-49.* This hypothetical question does not adequately describe Plaintiff's non-exertional limitations.

The ALJ specifically determined that Plaintiff's ability to perform the full range of light work was compromised by her non-exertional limitations. The ALJ made no similar findings with respect to Plaintiff's ability to perform the full range of sedentary work. It must be presumed, however, that the ALJ is relying on the testimony of a VE because the ALJ believes that Plaintiff's ability to perform the full range of both light and sedentary work is compromised by her non-exertional limitations. If the ALJ believed that Plaintiff had the ability to perform the full range of sedentary work, then he would have relied on the Grids and there would have been no reason to rely on the VE's testimony.

The ALJ's hypothetical presented a person to the VE who could perform light and sedentary work, but could not perform some of the "lifting" or "movement" requirements of light and sedentary work. The Court has no way to evaluate these vague limitations to determine if they do or do not match Plaintiff's limitations. There is no Residual Functional Capacity assessment form completed by any doctor. There

is no evidence other than Plaintiff's testimony of what Plaintiff could lift, push or pull and how long Plaintiff could sit, stand, or walk. In short, the ALJ never quantifies what he means by some lifting problems and some movement problems.

The only quantitative evidence in the record regarding Plaintiff's "lifting" and "movement" limitations is Plaintiff's own testimony. The VE admitted that if the severity of Plaintiff's "lifting" and "movement" limitations is as severe as testified to by Plaintiff, there are no jobs Plaintiff can perform. So, the fact that the VE identified jobs in response to the ALJ's hypothetical establishes that the VE found the severity of Plaintiff's "lifting" and "movement" limitations to be less than testified to by Plaintiff. How much less the Court has no way of determining. Because the Court cannot determine what degree of limitation the VE assigned to Plaintiff's limitations and because the ALJ never quantified the degree of limitation in his hypothetical to the VE, the Court has no way to determine whether the degree of limitation used by the VE is or is not supported by the record. This case must be remanded so that the ALJ may pose a proper hypothetical question to the VE.

IT IS SO ORDERED.

Dated this 27 day of March 1997.



Sam A. Joyner  
United States Magistrate Judge

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

M.A. MORTENSON COMPANY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ARKANSAS ELECTRIC COOPERATIVE )  
 CORPORATION and THE BENHAM )  
 GROUP, INC., )  
 )  
 Defendants. )

MAR 2 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 95-C-966-BU ✓

ENTERED ON DOCKET  
DATE MAR 28 1997

ADMINISTRATIVE CLOSING ORDER

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

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

Entered this 27<sup>th</sup> day of March, 1997.

Michael Burrage  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

**FILED**

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

MAR 20 1997

*uf*

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

MUSKOGEE ENVIRONMENTAL	)	
CONSERVATION COMPANY, INC.,	)	Bankruptcy
an Oklahoma corporation,	)	Case No. 96-04292-C
	)	
MUSKOGEE ENVIRONMENTAL	)	
CONSERVATION COMPANY, a	)	Bankruptcy
partnership, and	)	Case No. 96-04293-C
	)	
WILLIAM F. SCRIMINGER,	)	Bankruptcy
	)	Case No. 96-04522-C
	)	
	)	(Jointly Administered
	)	Chapter 11)
Debtors.	)	
	)	District Court
	)	Case No. <u>97-C-145-BU</u>

ENTERED ON DOCKET  
MAR 27 1997

DATE \_\_\_\_\_

**ORDER**

This matter came before the Court for hearing on February 25, 1997, on the Alternative Motion for Abstention, Withdrawal of Reference, and Jury Trial and the Motion to Stay Proceedings filed by First Maintenance & Support Trust ("Trust") and MKP Rocky, Ltd. ("Rocky"). Having reviewed the parties' submissions and having heard the oral arguments of counsel, the Court finds no cause, as required by 28 U.S.C.A. 157(d), to withdraw the reference of this matter to the Bankruptcy Court for the Northern District of Oklahoma ("Bankruptcy Court"). The Trust and Rocky have principally argued that the reference to the Bankruptcy Court should be withdrawn in order to preserve their Seventh Amendment right to a jury trial. This Court, however, concludes that the Trust and Rocky have no Seventh Amendment right to a jury trial for adjudication of the Debtors' objections to the Trust and Rocky's claims. By filing claims against the bankruptcy estate, the Trust

and Rocky have brought themselves within the equitable jurisdiction of the Bankruptcy Court. Langenkamp v. Culp, 498 U.S. 42, 44 (1990) (quoting, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 58-59 (1989)) (creditor filing claim against bankruptcy estate triggers the process of "allowance and disallowance of claims" and subjects the creditor to the bankruptcy court's equitable power); In re Republic Trust & Sav. Co., 924 F.2d 997, 998 (10th Cir. 1991) (creditor filing claim precludes entitlement to jury trial).

The Trust and Rocky have also argued that the reference should be withdrawn because issues of state law are more commonly and regularly considered by district judges and because an Article III judge, rather than a referee, is more appropriate to hear and decide state law claims and disputes of fact in this matter. This Court finds such arguments without merit or support.

In the alternative, the Trust and Rocky have moved this Court to abstain from addressing the state court questions. The Court concludes that the instant motion should be decided by the Bankruptcy Court as this Court has declined to withdraw the reference. The Court notes that the Bankruptcy Court in the Order Striking Trial and Staying Proceedings (In Part, As Specified) dated February 27, 1997, has stayed a decision on the motion pending appeal in the Oklahoma Supreme Court. The Court therefore declares moot the Motion for Abstention, which has been filed and docketed in this case.

As to the Motion to Stay Proceedings, the Court finds the motion is moot in light of the Bankruptcy Court's Order Striking

Trial and Staying Proceedings (In Part, As Specified) filed on February 27, 1997 and this Court's denial of the Trust and Rocky's request to withdraw the reference.

Accordingly, the Motion to Withdraw Reference and Jury Trial (Docket Entry #1) is **DENIED**; the Motion for Abstention (Docket Entry #1) is **DECLARED MOOT**; and the Motion to Stay Proceedings (Docket Entry #2) is **DECLARED MOOT**.

ENTERED this 25<sup>th</sup> day of March, 1997.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

MAR 25 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GREG BENNETT, )  
)  
Petitioner, )  
)  
v. )  
)  
RON WARD and THE )  
ATTORNEY GENERAL OF THE )  
STATE OF OKLAHOMA, )  
)  
Respondents. )

Case No: 96-C-425-B

ENTERED ON DOCKET  
MAR 27 1997  
DATE \_\_\_\_\_

**REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE**

This report and recommendation pertains to the petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Docket #1), the Response to Petition for Writ of Habeas Corpus (Docket #10), and Petitioner's Response to Attorney General's Response to Writ of Habeas Corpus (Docket #14). Petitioner was convicted in Tulsa County District Court, Case No. CRF-94-4528, of sexually abusing a minor child and first degree rape and sentenced to 35 years and 15 years imprisonment. The conviction was not appealed to the Oklahoma Court of Criminal Appeals.

Petitioner filed an application for relief under the Oklahoma Post-Conviction Procedure Act, 22 O.S. § 1080 et seq. This was denied on March 18, 1996, and the denial was affirmed by the Oklahoma Court of Criminal Appeals in Case No. PC-96-440.

Petitioner now seeks federal habeas relief on the alleged grounds that: 1) no plea agreement was signed, (2) he was sentenced to two charges which were part

15

of the same transaction, and (3) he received ineffective assistance of counsel, because his attorney did not object to "the violations of sentence" or assert his "rights to appeal, trial, etc."

In their Response to the Petition for Writ of Habeas Corpus (Docket #10), respondents contend that petitioner's petition must be denied under the recently enacted law amending habeas corpus procedure, the "Antiterrorism and Effective Death Penalty Act of 1996," 110 Stat. § 1217 (1996) ("the Act"), which was enacted prior to the date this case was filed. Under § 2254(d) of the Act, there are only two bases which permit the granting of federal habeas relief:

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.

This court can only grant relief to the petitioner if the State court's decision, which denied relief because petitioner failed to follow proper state procedure, resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law or an unreasonable determination of the facts in light of the evidence presented.

All three of petitioner's grounds were adjudicated on the merits during post-

conviction relief proceedings before the Oklahoma Court of Criminal Appeals, which applied a procedural bar. The state court held that petitioner had failed to follow proper state procedure and request a withdrawal of his plea and then appeal that denial, so his claims should not be heard by way of post-conviction relief (See Exhibit "C" to the Response (Docket #10)). A determination that a claim will not be reviewed based on petitioner's failure to follow proper state procedure is a determination on the merits of the case, to which § 2254(d) applies. Hawkins v. Evans, 64 F.3d 543, 547 (10th Cir. 1995).

In the order affirming the denial of petitioner's application for post-conviction relief, the Oklahoma Court of Criminal Appeals said: "[p]etitioner did not offer the District Court, and has not offered this Court, any sufficient reason for his failure to file a direct appeal. Therefore, each of the issues raised by Petitioner that could have been raised on direct appeal were properly rejected by the trial court in denying post-conviction relief." (See Exhibit "C" to the Response (Docket #10)).

The application of a state procedural bar was upheld by the Supreme Court in Coleman v. Thompson, 501 U.S. 722, 750 (1991), so the decision of the state court in this case was not contrary to clearly established federal law. Oklahoma's application of a procedural bar is based on Coleman and later cases discussing it, such as McCleskey v. Zant, 499 U.S. 467 (1991). In Johnson v. State, 823 P.2d 370, 372-373 (Okla. Crim. App. 1991), cert. denied, 504 U.S. 926 (1992), the Oklahoma court stated:

Although the McCleskey case is specifically applicable to claims brought

under federal habeas corpus statutes, we find its message to be equally applicable to explain the processes involved when we are called upon to consider various subsequent attempts to invoke our jurisdiction in the same underlying case. As is the case in the federal courts, we will not review new claims brought in successive petitions or applications that could have or should have been brought at some previous point in time without proof of adequate grounds to excuse the delay.

In addition, petitioner cannot show that the decision involved an unreasonable application of clearly established federal law as determined by the Supreme Court. The Court in Coleman stated that a petitioner who raises an issue that was not asserted in the state court must show cause and prejudice for the default in federal court when the state court refuses to review the merits of the issue on the basis of its procedural rules. The Court stated that it would not review a question of federal law decided by a state court, if the decision of that court rested on a state law ground that was independent of the federal question and adequate to support the judgment. 501 U.S. at 729.

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750.

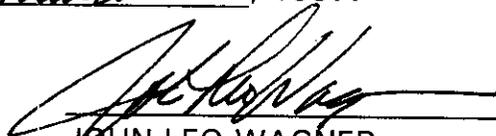
Petitioner's reason for failing to effect a direct appeal is "that he was totally unaware of the legal facets of his case until he came to the Penitentiary . . . ." (Petitioner's Response, Docket #14). However, the state court found that he was advised of his right to appeal and was represented by retained counsel (See Exhibit

"A" to Response (Docket #10)). This factual finding is entitled to a presumption of correctness by this court, as petitioner has not refuted it by clear and convincing evidence under 2254(e)(1) of the Act. The holding of the Oklahoma Court of Criminal Appeals which barred a review of his claims was not unreasonable in light of his failure to appeal, particularly in light of the fact that he was informed of this right. The holding of the Court of Criminal Appeals did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence. The second basis on which this court could grant federal habeas corpus relief does not exist in this case.

Petitioner's petition for a writ of habeas corpus should be denied on the basis that he is procedurally barred as to his three grounds for relief.

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to these findings and recommendations. Failure to object within that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

Dated this 25<sup>th</sup> day of March, 1997.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

S:\orders\Bennett

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

FILED ON DOCKET  
DATE MAR 26 1997

ROBERT MICHAEL GAFFNEY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 STATE OF OKLAHOMA DEPARTMENT )  
 OF CORRECTIONS; )  
 CORRECTIONAL MEDICAL SYSTEMS, )  
 a tradename for Correctional )  
 Medical Services, Inc., a )  
 Missouri corporation; )  
 STATE OF TEXAS DEPARTMENT OF )  
 CRIMINAL JUSTICE; and )  
 WAYNE SCOTT, in his official )  
 capacity as Executive Director )  
 of the State of Texas )  
 Department of Criminal Justice, )  
 )  
 Defendants. )

Case No: 96 CV 1110 B

FILED  
MAR 25 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

AGREED NOTICE OF DISMISSAL

COMES NOW Plaintiff, Robert Michael Gaffney, and hereby dismisses, without prejudice, Defendant Correctional Medical Sytems, a tradename for Correctional Medical Services, Inc., a Missouri corporation, from the above-styled and captioned matter because Plaintiff has learned that said Defendant was not the medical provider responsible and culpatory in this cause of action.

Respectfully submitted,

D.C. PHILLIPS & ASSOCIATES, P.C.

*David C. Phillips III*  
David C. Phillips, III  
OBA #13551  
115 W. 3rd St., Ste. 525  
Tulsa, OK 74103  
(918) 584-5062

APPROVED BY:



Michael T. Maloan, OBA # 15097  
Foliart, Huff, Ottaway & Caldwell  
20th Floor  
First National Center  
120 N. Robinson  
Oklahoma City, OK 73102

APPROVED BY:



Jennifer A. Childress, TBN # 00789220  
Asst. Attorney General  
State of Texas  
P.O. Box 12548, Capitol Station  
Austin, TX 78711

CERTIFICATE OF MAILING

This is to certify that this 25 day of March, 1997, a true and correct copy of the above Notice was placed in the U.S. mail, first class postage prepaid, to:

Michael T. Maloan  
Foliart, Huff, Ottaway & Caldwell  
20th Floor  
First National Center  
120 N. Robinson  
Oklahoma City, OK 73102  
Attorney for Correctional  
Medical Services, Inc.

Wellon B. Poe  
Asst. Attorney General  
State of Oklahoma  
4545 N. Lincoln, Ste. 260  
Oklahoma City, OK 73105

and

Jennifer A. Childress  
Asst. Attorney General  
State of Texas  
P.O. Box 12548, Capitol Station  
Austin, TX 78711  
Attorneys for Defendant Wayne Scott

David C. Phillips, III

ENTERED ON DOCKET  
3-26-97

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

IN RE: DECKER, AMOS )  
ANDREW and DECKER, )  
MARY GRACE, )  
Debtors, )  
KAIMACHA KENNELS, INC., )  
ET AL, )  
Appellants, )  
vs. )  
KENNETH L. STAINER, )  
TRUSTEE, )  
Appellee. )

**FILED**

MAR 25 1997 *PL*

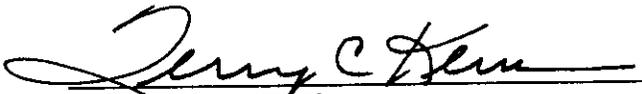
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE No. 96-C-761-K ✓

ORDER

There being no objection, the Court adopts the Magistrate's Report and Recommendation filed February 24, 1997. [Dkt. 8]. **THE COURT ORDERS THAT THIS CASE BE DISMISSED** as outlined in the Magistrate Judge's Report and Recommendation.

Dated this 24 day of March, 1997.

  
TERRY C. KERN  
U.S. DISTRICT COURT CHIEF JUDGE

9

3-26-97

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

IN RE: DECKER, AMOS )  
 ANDREW and DECKER, )  
 MARY GRACE, )  
 Debtors, )  
 KAIMACHA KENNELS, INC., )  
 ET AL, )  
 Appellants, )  
 vs. )  
 KENNETH L. STAINER, )  
 TRUSTEE, )  
 Appellee. )

**FILED**

MAR 25 1997

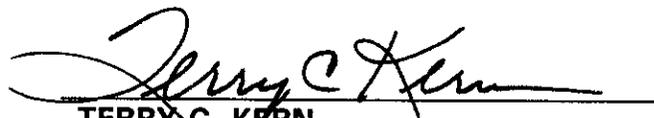
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE No. 96-C-761-K ✓

JUDGMENT

This Court entered an Order on the 24 day of March, 1997, adopting the Report and Recommendation of the United States Magistrate Judge to to dismiss the captioned appeal for failure to prosecute.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Appellee and against Appellant on this 24 day of March, 1997.

  
 TERRY C. KERN  
 U.S. DISTRICT COURT CHIEF JUDGE

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

**FILED**

MAR 25 1997

CHARLES A. FIELDS, )  
 )  
 ) Petitioner, )  
 )  
 v. )  
 )  
 ) RON CHAMPION, )  
 )  
 ) Respondent. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 96-C-125-C

ENTERED ON DOCKET

DATE MAR 26 1997

**REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE**

This report and recommendation pertains to petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1) and Respondent's Motion to Dismiss for Filing Successive Petition (Docket #4). The petitioner has objected to the motion.

On April 18, 1988, petitioner pled guilty in Case Nos. CRF-87-4637, CRF-87-4639, and CRF-88-306. At the sentencing hearing on June 10, 1988, the defense counsel argued that his two prior convictions should be considered as one felony conviction for enhancement purposes, but the court rejected the argument and sentenced petitioner to a mandatory minimum sentence of twenty years in CRF-88-306 and CRF-87-4639 and ten years in CRF-87-4637, to be run concurrently.

Petitioner filed a petition for a writ of habeas corpus in this district in Case No. 94-C-440-K. He requested an appeal out of time, claiming his waiver of appeal was not knowing, intelligent, and voluntary and his counsel failed to advise him of his appeal rights. He also argued that his sentences were improperly enhanced on the basis of two prior felony convictions which arose from the same criminal transaction,

14

in violation of Okla. Stat. tit. 21, § 51(B). On July 18, 1995, the district court denied habeas relief, finding that petitioner had not been denied effective assistance of counsel and could not show sufficient cause and prejudice to excuse the procedural default of his enhancement claim. The Tenth Circuit Court of Appeals affirmed.

In his petition, petitioner again alleges that he was denied the effective assistance counsel during the ten-day period to appeal his guilty plea conviction and that the State improperly relied upon two prior felony convictions arising from the same criminal episode for enhancement purposes under Okla. Stat. tit. 21, § 51(B). Respondent has moved to dismiss this second petition as successive, since the claims were raised in the previous habeas petition and dismissed on the merits.

Rule 9(b) of the Rules Governing Section § 2254 Cases states:

**Successive petitions.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

The court noted in its order of October 22, 1996 (Docket #7) that petitioner bears the burden of showing that "although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground." Parks v. Reynolds, 958 F.2d 989, 994 (10th Cir.) cert. denied, 503 U.S. 928 (1992) (quoting Sanders v. United States, 373 U.S. 1 (1963)).

Also, in Herrera v. Collins, 506 U.S. 390, 404 (1993), the Supreme Court stated that "a petitioner otherwise subject to defenses of abusive or successive use

of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." Id.

"In a habitual offender case, the petitioner is actually innocent of the sentence if he can show he is innocent of the fact -- i.e., the prior conviction -- necessary to sentence him as an habitual offender." Selsor v. Kaiser, 22 F.3d 1029, 1036 (10th Cir. 1994) (citing Mills v. Jordan, 979 F.2d 1273, 1279 (7th Cir. 1992)).

Under Okla. Stat. tit. 21, § 51(B), a person who has been twice convicted of felony offenses and "commits a third, or thereafter, felony offense within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of not less than twenty (20) years. Felony offenses relied upon shall not have arisen out of the same transaction or occurrence or series of events closely related in time and location." (Emphasis added).

In its October 22, 1996 order, the court found that petitioner had made a colorable showing of actual innocence of the sentence which would justify reaching the merits of the successive claim raised in the present petition and ordered respondent to brief whether the crimes of burglary of an automobile in Case No. CRF-88-37, which the State relied on to enhance his sentence, were a "series of events closely related in time and location" and that only one could be used for

enhancement. The two burglaries occurred shortly before midnight on July 7, 1984 on East 6th Street in Tulsa and shortly after midnight on July 8, 1984 in the 4800 block of South Braden in Tulsa.

The court has reviewed the cases presented by the parties. In Hammer v. State, 671 P.2d 677, 678 (Okla. Crim. App. 1983), the defendant was convicted of pointing a weapon at a person and of kidnapping as the result of an incident in an Oklahoma City hospital. The court found that the two convictions, "because of their relation to each other in time and location," arose out of the same criminal transaction, and thus the State improperly found them to be multiple prior felony convictions for enhancement purposes under Section 51(B).

In Cardenas v. State, 695 P.2d 876, 878 (Okla. Crim. App. 1985), the defendant was convicted of two offenses that occurred on the same day and at the same location. The court found that the conclusion was inescapable that the offenses were "a series of events closely related in time and location," and that only one could be used for enhancement under 51(B). Id.

In Glass v. State, 701 P.2d 765, 768 (Okla. Crim. App. 1985), the court discussed joinder of defendants in one information, which is only permitted if they are alleged to have participated in the "same act or transaction" or in the "same series of acts or transactions." The court defined the phrase "series of criminal acts or transactions" as "a number of things, events, etc., ranged or occurring in spatial, temporal, or other succession; a sequence." The court concluded that joinder of offenses is proper where the counts refer to the same type of offenses occurring over

a relatively short period of time and in approximately the same location, and proof as to each transaction overlaps so as to evidence a common scheme or plan. Id.

The court in Plunkett v. State, 719 P.2d 834, 838 (Okla. Crim. App.), cert. denied, 479 U.S. 1019 (1986), also discussed the meaning of "transaction" in the context of a motion to sever four charges joined for trial. The crimes occurred in the same general neighborhood on the same evening. The court found that "transaction" could mean a series of many occurrences, depending not so much on the immediateness of their connection as on their logical relationship. Id. Because all the incidents occurred within one hour, all charges involved breaking into a residence, and all the incidents occurred within a few blocks of each other, there was a series of transactions and joinder was proper. Id.

In Smith v. State, 736 P.2d 531, 535 (Okla. Crim. App. 1987), the court found that the plaintiff was erroneously sentenced under Okla. Stat. tit. 21, § 51(B), because the two prior felony convictions used to enhance his sentence arose out of the same series of events. The plaintiff had been fleeing from the site of the armed robbery of one individual and pointed his pistol at another individual attempting to restrain his flight, and was convicted of armed robbery and pointing a weapon. Id. The court found that these constituted one incident.

Finally, in Wilson v. State, 730 P.2d 527, 529 (Okla. Crim. App. 1986), the court found that three separate incidents of passing bogus checks over a two day period were not one transaction or series of events, but rather three separate

convictions and could be used for enhancement purposes under § 51(B).<sup>1</sup>

There is no merit to claimant's contention that his two convictions were only one transaction. The burglaries involved different property targets in different geographic locations so different victims were involved, and there was a time lapse between them. They were clearly separate incidents involving separate intents to commit a wrong.

Respondent's Motion to Dismiss for Filing Successive Petition (Docket #4) should be granted. The Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1) should be denied.

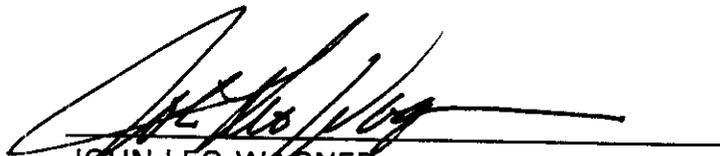
Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to these findings and

---

<sup>1</sup> While Oklahoma law applies to this case, the court has reviewed federal cases dealing with enhancement of punishment under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), as implemented through the United States Sentencing Commission Guidelines, to seek additional guidance as to how courts have determined whether several convictions are to be considered single or multiple offenses. In United States v. Tisdale, 921 F.2d 1095, 1099 (10th Cir. 1990), cert. denied, 502 U.S. 986 (1991), the court found that the burglaries of two businesses on the same night were separate criminal transactions. In United States v. Potter, 895 F.2d 1231, 1235-37 (9th Cir.), cert. denied, 497 U.S. 1008 (1990), the court held that two robberies at two different locations involving two separate victims on the same night equaled two distinct criminal transactions. The courts in United States v. Ressler, 54 F.3d 257, 259-60 (5th Cir. 1995), United States v. Hudspeth, 42 F.3d 1015, 1020-22 (7th Cir. 1994), cert. denied, \_\_\_ U.S. \_\_\_, 115 S.Ct. 2252, 132 L.Ed.2d 260 (1995), and United States v. Rideout, 3 F.3d 32, 34 (2nd Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 114 S.Ct. 569, 126 L.Ed.2d 469 (1993) all determined that crimes committed the same night were separate transactions because they were committed at different times, against different victims, and at different locations. These courts have all considered whether there are different victims or property targets, whether there are time lapses between the criminal activities, and whether there are substantial geographical disparities.

recommendations. Failure to object within that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

Dated this 24<sup>th</sup> day of March, 1997.

A handwritten signature in black ink, appearing to read "John Leo Wagner", is written over a horizontal line.

JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

T:fields.rr

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

ABED DAMAJ, )  
)  
Plaintiff, )  
)  
v. )  
)  
FARMERS INSURANCE COMPANY, )  
INC., d/b/a FARMERS INSURANCE )  
GROUP OF COMPANIES, )  
)  
Defendant. )

NO. 94-C-531-M

**FILED**

MAR 25 1997

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

ENTERED ON DOCKET

DATE

3/26/97

**ORDER**

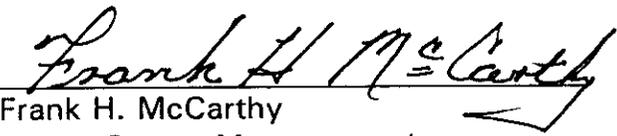
Plaintiff's Motion for Assessment of Attorney's Fees [Dkt. 71] is before the Court.

Plaintiff sought monetary damages for breach of an insurance contract and for bad faith refusal to pay a claim. On February 16, 1996, Judge Sven Erik Holmes granted summary judgment in Defendants' favor, eliminating Plaintiff's claim for bad faith and punitive damages. [Dkt. 52]. Thereafter the parties consented to trial before a magistrate judge and submitted their case to the undersigned by way of joint stipulations of fact and submission of affidavits. The Court found Defendant had breached the contract of insurance and awarded Plaintiff damages of \$2,305.00. [Dkt. 70]. Plaintiff seeks an award of attorney fees in accordance with 36 Okla. Stat § 3629, which provides "[u]pon a judgment rendered to either party, costs and attorney fees shall be allowable to the prevailing party."

Plaintiff has appealed the partial summary judgment decision to the Tenth Circuit Court of Appeals. Since the disposition of the appeal may substantially affect

any award of attorney fees, the Court will defer decision on the fee issue, pending the outcome of the appeal. Therefore, Plaintiff's Motion for Assessment of Attorney's Fees [Dkt. 71] is DENIED without prejudice to being reurged by motion filed and served no later than 14 days after the Tenth Circuit issues a decision on the pending appeal.

SO ORDERED this 25<sup>th</sup> day of March, 1997.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

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

**F I L E D**

MAR 25 1997 *SAR*

WILLIAM J. BROCK, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 BLUE CIRCLE CEMENT, INC., )  
 )  
 Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No: 93-C-874-W ✓

ENTERED ON DOCKET  
DATE 3/26/97

**ORDER OF DISMISSAL WITH PREJUDICE**

In accordance with the Joint Stipulation of Dismissal filed March 17, 1997, the parties agree that this action has been settled, and further that plaintiff and defendant are each to bear its own attorney's fees and costs incurred in this action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-entitled cause of action is dismissed with prejudice.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

*32X*

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

**FILED**

MAR 24 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RANDY D. PRUITT, )  
)  
Plaintiff, )

v. )

SHIRLEY S. CHATER, )  
COMMISSIONER OF SOCIAL )  
SECURITY,<sup>1</sup> )

Defendant. )

Case No. 94-C-915-W /

ENTERED ON DOCKET

DATE MAR 25 1997

**ORDER AND JUDGMENT**

This case is remanded to the Secretary for further proceedings in accordance with the Tenth Circuit Court of Appeals' Order and Judgment, attached hereto.

Dated this 21<sup>st</sup> day of March, 1997.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

S:\orders\judg.rem2

<sup>1</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. 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.

17

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

MAR 24 1997

MYRA PATRICK,

Plaintiff,

v.

SHIRLEY S. CHATER,  
Commissioner of Social Security,<sup>1</sup>

Defendant.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No: 96-C-563-W

ENTERED ON DOCKET

DATE MAR 25 1997

**JUDGMENT**

Judgment is entered in favor of the Plaintiff, Myra Patrick, in accordance with this court's Order filed March 24, 1997.

Dated this 24<sup>th</sup> day of March, 1997.



JOHN LEO WAGNER  
UNITE STATES MAGISTRATE JUDGE

<sup>1</sup>Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. 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.

102

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

MAR 24 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MYRA PATRICK,

Plaintiff,

v.

JOHN CALLAHAN,  
Commissioner of the Social  
Security Administration,

Defendant.

Case No. 96-C-563-W ✓

ENTERED ON DOCKET  
DATE MAR 25 1997

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further development of the record pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

DATED this 21<sup>st</sup> day of March, 1997.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS  
United States Attorney

A handwritten signature in cursive script, appearing to read "Phil Pinnell".

PHIL PINNELL, OBA #7169  
Assistant United States Attorney  
333 W. Fourth St., Suite 3460  
Tulsa, OK 74103-3809

3-25-97

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

**F I L E D**

MAR 24 1997 *RP*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BERTHA BUTLER,	)
	)
Plaintiff,	)
	)
vs.	)
	)
UNITED STATES OF AMERICA,	)
	)
Defendant.	)

No. 96-C-117-C ✓

**JUDGMENT**

This matter came before the Court for non-jury trial on plaintiff's claims brought pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., alleging medical negligence. The issues having been duly considered and a decision having been rendered in accordance with the Findings of Fact and Conclusions of Law filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for defendant, United States of America, and against plaintiff, Bertha Butler.

IT IS SO ORDERED this 21<sup>st</sup> day of March, 1997.



H. DALE COOK  
United States District Judge

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

**F I L E D**

MAR 24 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BERTHA BUTLER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Defendant. )

No. 96-C-117-C ✓

FILED ON DOCKET  
3-25-97

**FINDINGS OF FACT**  
**AND**  
**CONCLUSIONS OF LAW**

In March of 1993, plaintiff underwent a right thyroid lobectomy operation at the Claremore Indian Hospital, located in Claremore, Oklahoma. At some point following the operation, plaintiff experienced right vocal cord paralysis, which resulted in permanent injury. Plaintiff claims that Dr. Virginia Kopelman, an employee of the Claremore Indian Hospital, negligently performed the thyroid operation, and such negligence resulted in her vocal cord paralysis. Defendant owns and operates the Claremore Indian Hospital through the Indian Health Service of the Public Health Service of the U.S. Department of Health and Human Services.

Plaintiff brings this action pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, alleging that defendant negligently performed a right thyroid lobectomy which resulted in permanent vocal cord injury. Plaintiff seeks damages in the amount of \$2,000,000 plus interest and costs.

In response, defendant admits that plaintiff was a patient at the Claremore Indian Hospital in March of 1993 and that plaintiff underwent a right thyroid lobectomy while a patient at that facility. Defendant admits that the relevant Federal agency, through its administrative process, failed to make

a final disposition of the present claim and that the claim is therefore deemed denied. However, defendant denies that any employee of the Hospital was negligent in performing the lobectomy. Defendant argues that plaintiff failed to demonstrate that the medical attention provided to plaintiff while a patient at the Hospital fell below the acceptable medical standard of care. Further, defendant asserts that plaintiff's vocal cord paralysis could be the result of a variety of different causes, such as a viral illness, rather than her thyroid operation. Defendant contends that since plaintiff failed to establish by a preponderance of the evidence that her vocal cord condition was caused by the lobectomy, or that defendant's employees negligently performed the lobectomy, plaintiff's claims must be dismissed.

After considering the pleadings, the testimony and exhibits admitted at trial, the briefs and arguments presented by counsel for the plaintiff and defendant, and being fully advised on the premises, the Court enters the following findings of fact and conclusions of law.

### **FINDINGS OF FACT**

#### **A. Jurisdiction and Venue**

1. Plaintiff brings this action pursuant to the Federal Tort Claims Act, invoking federal question jurisdiction.

2. The alleged acts or omissions giving rise to this action occurred within this Court's judicial district.

#### **B. Background**

3. Plaintiff is an American Indian and is a resident of Claremore, Oklahoma, which is within this Court's judicial district.

4. The alleged acts or omissions giving rise to this action occurred at the Claremore Indian Hospital, which is owned and operated by defendant through the U.S. Department of Health and Human Services.

5. In October of 1992, plaintiff underwent a pre-employment physical examination, at which time a nodule was discovered in her neck. Plaintiff was advised to seek further medical attention with respect to the nodule.

6. In November of 1992, plaintiff went to the Claremore Indian Medical Clinic in order to have the nodule examined. Plaintiff was referred to the surgery clinic for further evaluation.

7. In January of 1993, plaintiff went to the Claremore Indian Surgery Clinic and diagnostic tests were recommended and performed. A Technetium Thyroid Scan revealed the presence of a "cold nodule" at the inferior pole of the right lobe of plaintiff's thyroid.

8. On February 5, 1993, plaintiff returned to the Claremore Indian Surgery Clinic, at which time Dr. Virginia Kopelman examined plaintiff. Dr. Kopelman is a general surgeon employed by the Claremore Indian Hospital. Dr. Kopelman received her M.D. degree in 1970 from the University of Michigan. Dr. Kopelman has acted as chief of surgery at Claremore Indian Hospital since April of 1995, and she supervises two other general surgeons. Between September of 1989 and March of 1995, Dr. Kopelman was a staff surgeon at the Claremore Indian Hospital.

9. During plaintiff's visit with Dr. Kopelman, plaintiff complained of a lump in her neck which had been growing for a period of three months. Plaintiff also complained of fatigue, loss of appetite, altered sleep patterns, and expressed her fear of cancer. Dr. Kopelman and plaintiff discussed various methods of treating the cold nodule, including medication and surgery. Dr. Kopelman advised plaintiff that, in certain cases, medication could reduce the thyroid. However,

plaintiff chose the surgical route because she understood that medication worked as an overactive thyroid, and it would make it difficult for her to swallow. Surgery was also attractive to plaintiff since the nodule had been growing and it felt as if the nodule was pushing on plaintiff's wind pipe, thereby interfering with the flow of air into her lungs. Further, plaintiff was worried that the nodule could signify cancer, which the medication would not treat. Dr. Kopelman thus scheduled plaintiff for a right thyroid lobectomy to be performed on March 9, 1993, with a pre-operative visit scheduled for March 5, 1993.

10. On March 5 plaintiff arrived at the surgery clinic at the Claremore Indian Hospital for her scheduled pre-operative visit. Dr. Kopelman performed a physical examination of plaintiff and counseled plaintiff with respect to the thyroid lobectomy. Dr. Kopelman noted that plaintiff smokes less than a pack of cigarettes per day.

11. On March 9 plaintiff returned to the Claremore Indian Hospital and underwent a right thyroid lobectomy. Dr. Kopelman performed the procedure as the primary surgeon. Dr. Roger Youmans assisted in the procedure. The removal of the right lobe of the thyroid was accomplished via a transverse midline neck incision. Plaintiff was under general anesthesia during the operation. The pathology report revealed that the right lobe of the thyroid contained adenomatous goiter, a benign process.

12. When plaintiff awoke from the operation, she experienced throat pain and a raspy voice. Plaintiff was not alarmed because she considered such a condition normal after undergoing such an operation. However, there is no mention in the hospital record of post-operative hoarseness. Dr. Youmans noted on March 10 that plaintiff's voice was strong. No other notations regarding

plaintiff's voice appear in the record with respect to her hospital stay. Plaintiff experienced mild nausea following the operation. Plaintiff was discharged from the hospital on March 11.

13. On March 14 plaintiff returned to the outpatient clinic at the Claremore Indian Hospital, complaining of nausea, hoarse voice, and flu-like symptoms. This was the first documented complaint of hoarseness. Plaintiff was treated and instructed to return as needed or on March 15. The diagnosis on the medical record reveals bronchitis and gastroenteritis. Plaintiff was sent home, but returned to the clinic that same day, complaining of vomiting, loss of appetite, chills, and headache. Plaintiff was again treated and released. For this second visit, the medical record indicates a diagnosis of dehydration.

14. On March 15 plaintiff went to the surgery clinic at the Claremore Indian Hospital for a follow-up visit. Plaintiff complained of nausea, vomiting, weakness, loss of appetite, flu-like symptoms and cough. Plaintiff was treated by Dr. Kopelman, hospitalized for an overnight stay, and released on March 16. The final diagnosis indicated dehydration. The condition on discharge indicated that plaintiff was in good health, and a follow-up visit to the surgery clinic was scheduled for mid-April.

15. On April 12 plaintiff returned to the surgery clinic at the Claremore Indian Hospital and was seen by Dr. Kopelman. Plaintiff complained of trouble with her voice and with swallowing. The medical record indicates that plaintiff's voice sounded hoarse, and that plaintiff seemed to lose control of pitch and volume if she talked much. Possible nerve injury was noted, and plaintiff was referred to Dr. Wes McFarland, an otolaryngologist in Claremore. A visit with Dr. McFarland was scheduled for April 28.

16. On April 28 plaintiff was examined by Dr. McFarland. The record indicates that plaintiff was in the office for examination of her throat, and that plaintiff was referred by Dr. Kopelman. Dr. McFarland examined plaintiff and diagnosed her condition as partial paralysis of left vocal cord. Dr. McFarland noted the treatment as being indirect laryngoscopy. Dr. McFarland performs similar exams on other patients about twice per day. The medical record further reveals that Dr. McFarland told plaintiff that there was probable nerve irritation of the left nerve, but that the condition would probably resolve itself in thirty to forty days. Dr. McFarland made no conclusions as to what caused the partial paralysis.

17. During her visit, plaintiff asked Dr. McFarland why she was experiencing a problem with her left vocal cord when her surgery was performed on the right. Dr. McFarland replied that plaintiff raised a good question and that he would get in touch with the Claremore Indian Hospital.

18. On January 19, 1994, plaintiff visited the walk-in clinic at the Claremore Indian Hospital, in order to have her thyroid examined. The medical record reveals that plaintiff was not referred to Dr. McFarland for a return visit. Plaintiff reported problems with her voice.

19. On January 24 plaintiff visited the medical clinic at the Claremore Indian Hospital to receive the results of her thyroid test. Dr. Richard Chubb of the Claremore Indian Hospital examined plaintiff. Plaintiff reported that her hoarseness was unchanged since her surgery, which was performed approximately ten months prior to the January 24 visit.

20. On January 28 plaintiff returned to the medical clinic at the Claremore Indian Hospital to receive a referral regarding left vocal cord paralysis. Plaintiff was referred by Dr. Chubb to Dr. Rollie Rhodes, an otolaryngologist in Tulsa.

21. On February 11 plaintiff visited Dr. Rhodes. Dr. Rhodes noted that plaintiff developed a very weak voice coincident and subsequent to the thyroidectomy operation, which had been performed approximately eleven months prior. Dr. Rhodes performed a fiberoptic nasopharyngeal exam on plaintiff which revealed a paralyzed right vocal cord. Dr. Rhodes noted that the tumor on the thyroidectomy was on the right side, and that there is good mobility on the left. Dr. Rhodes advised plaintiff that improvement could only be achieved surgically, and he recommended a right laryngeal thyroplasty. Such an operation would allow the right cord to meet the left cord in the midline, which would dramatically improve plaintiff's speech and projection. On February 17 plaintiff was scheduled for surgery to be performed on April 7 by Dr. Rhodes.

22. In giving his expert opinion as to the cause of plaintiff's right vocal cord paralysis, Dr. Rhodes testified that, given plaintiff's history, the paralysis most likely occurred from the thyroid lobectomy, which was performed in March of 1993. Dr. Rhodes opined that at the time of plaintiff's thyroid lobectomy, some permanent injury occurred to the recurrent laryngeal nerve, resulting in paralysis to plaintiff's vocal cord. Dr. Rhodes believes that it is very unlikely that a viral illness caused plaintiff's vocal cord paralysis. In Dr. Rhodes' opinion, the quality of plaintiff's voice will never be as good as it was originally.

23. Although Dr. Rhodes has never seen Dr. McFarland's records relating to plaintiff, Dr. Rhodes is aware that Dr. McFarland diagnosed plaintiff as having a *left* vocal cord partial paralysis in April of 1993, following plaintiff's thyroid lobectomy. Dr. Rhodes speculated that Dr. McFarland was probably incorrect in diagnosing *left* vocal cord paralysis rather than *right* vocal cord paralysis. Dr. Rhodes indicated that such an error is conceivable since examining the throat reveals a reversed image, and consequently, the right cord could mistakenly be identified as the left cord. Dr. Rhodes

therefore believes that Dr. McFarland simply erred in noting left vocal cord paralysis. However, Dr. Rhodes concedes that what Dr. McFarland saw could have resolved itself prior to plaintiff's visit with Dr. Rhodes.

24. On March 29, 1994, Dr. Rhodes prepared an outpatient surgery and history report regarding the laryngeal thyroplasty operation, which plaintiff was scheduled to undergo on April 7, 1994. The report indicates that plaintiff experienced a weak voice ever since her March 1993 thyroid surgery. Dr. Rhodes noted in the report that plaintiff suffered from a paralyzed right vocal cord. Dr. Rhodes mentioned to plaintiff that a second operation may be required.

25. On April 7 Dr. Rhodes performed a right laryngeal thyroplasty with silastic implant on plaintiff at St. Francis Hospital in Tulsa. Following the operation, plaintiff continued to complain of neck and throat pain and hoarseness of voice.

26. On July 21 plaintiff returned to Dr. Rhodes, complaining of hoarseness and neck pain which radiated to the left ear. Dr. Rhodes noted in the medical record that plaintiff has had intermittent pain since her April 7 operation. Dr. Rhodes recommended a second surgery and scheduled it for July 28.

27. On July 28 Dr. Rhodes performed a right thyroplasty revision, removing the silastic implants and replacing them with irradiated cartilage. Dr. Rhodes noted in his operative report that the cartilage was placed to help obliterate some of the void but probably will not improve the voice.

28. On August 24 Dr. Rhodes noted that plaintiff's voice is a little stronger and clearer, and he advised plaintiff that he saw no need for further post-operative visits. Plaintiff's last visit with Dr. Rhodes was in 1994.

29. Upon examining the April, 1993, report of Dr. McFarland diagnosing plaintiff as suffering from a left vocal cord paralysis, Dr. Kopelman immediately contacted Dr. McFarland and asked if he might have made a mistake when reporting left vocal cord paralysis. Dr. Kopelman advised Dr. McFarland that she would have either expected to find nothing wrong with plaintiff or an injury to the right vocal cord. Dr. McFarland responded that he was aware of the right thyroid lobectomy, but he nonetheless found paralysis on plaintiff's left cord. Dr. McFarland's hand-written notes, written during his examination of plaintiff on April 28, 1993, state that plaintiff had a right lobe thyroidectomy on 3/9/93. Thus, the Court finds that Dr. McFarland was aware, at the time of examining plaintiff and rendering his diagnosis of left vocal cord partial paralysis, that plaintiff had undergone an operation on her thyroid and that this operation involved the right side.

30. Since plaintiff became ill with what appeared to be a viral infection immediately following her operation in March of 1993, Dr. Kopelman assumes that the viral illness caused injury to the left vocal cord. As noted, Dr. McFarland did not reach any conclusion as to the cause of the injury.

31. Dr. Kopelman cannot explain the contradictory findings revealed in the reports of Dr. McFarland, who diagnosed left vocal cord paralysis, and Dr. Rhodes, who diagnosed right vocal cord paralysis. However, it is significant that such contrary findings were made approximately ten months apart.

32. Dr. Samuel Esterkyn, a general surgeon situated in California, was retained by plaintiff to render opinions in the present action. Dr. Esterkyn speculated that plaintiff's laryngeal nerve was injured during the March 9, 1993, thyroid lobectomy performed by Dr. Kopelman. Dr. Esterkyn further theorized that plaintiff's right vocal cord paralysis was most probably caused by such nerve

damage. Dr. Esterkyn is of the opinion that in a thyroid lobectomy, an attempt to identify the recurrent laryngeal nerve should always be made before beginning to remove the thyroid in order to prevent injury to the nerve and the resulting vocal cord paralysis. Since Dr. Kopelman did not actively attempt to locate the nerve during the procedure, Dr. Esterkyn suggests that the nerve was likely injured during the operation, and this injury resulted in plaintiff's present vocal cord paralysis.

33. Dr. Kopelman believes that plaintiff's right vocal cord paralysis was not a result of her March 1993 operation. Plaintiff did not complain to Dr. Kopelman about her voice during the first few days following her operation, and Dr. McFarland's examination in April 1993 revealed nothing abnormal with respect to plaintiff's right vocal cord.

34. At the request of defendant, Dr. John Mowry, a specialist in otorhinolaryngology, examined plaintiff on August 28, 1996. Dr. Mowry's examination revealed the vocal cords to have immobility of the right vocal cord with relevant good compensation by the left side, which is consistent with the findings of Dr. Rhodes. Based on the plaintiff's medical history and his own examination, Dr. Mowry formed an opinion as to the cause of the vocal cord paralysis. Dr. Mowry noted that Dr. McFarland found that plaintiff's left vocal cord was not moving six weeks after her thyroid operation, and a viral illness had occurred shortly after surgery. Dr. Mowry opined that it appears that a viral illness is the most probable cause of the right vocal cord paralysis, and the paralysis was not the result of plaintiff's thyroid surgery. Viral illnesses can cause nerves to stop functioning. However, Dr. Mowry could not identify any particular viral illness which caused plaintiff's current affliction. Dr. Mowry speculated that shortly after her thyroid operation, a viral illness may have caused the partial paralysis of plaintiff's left vocal cord, which resolved itself, and, subsequently, another illness could have caused the vocal cord paralysis on the right. Plaintiff's

medical history subsequent to her thyroid operation does signify the presence of a potential viral illness. For example, as noted above, on March 14, 1993, only days following her operation, plaintiff visited the Claremore Indian Hospital, complaining of nausea, hoarse voice, and flu-like symptoms. The diagnosis revealed bronchitis, gastroenteritis and dehydration. Bronchitis can certainly be caused by a viral infection. These infections, immediately following plaintiff's operation, could have resulted in her transient partial left vocal cord paralysis. Additionally, on October 28, 1993, plaintiff was seen at the Claremore Indian Hospital for sinus drainage and sore throat. On November 17, 1993, plaintiff was again seen for sinus drainage and sore throat, among other symptoms. In Dr. Mowry's opinion, these symptoms are very consistent with the presence of a viral illness, which could be a possible cause of plaintiff's vocal cord paralysis. Dr. McFarland's report stating that plaintiff's left vocal cord partial paralysis should resolve itself is consistent with the findings of Dr. Rhodes and Dr. Mowry.

35. The Court finds that plaintiff suffered from a partial paralysis of her *left* vocal cord at the time of Dr. McFarland's examination. As noted, Dr. McFarland specifically diagnosed left vocal cord paralysis in April of 1993. Plaintiff admits that she made inquiry with Dr. McFarland as to why her left cord was injured when her operation had focused on the right side. Plaintiff testified that Dr. McFarland responded that he, too, was perplexed as to why she would suffer a left vocal cord injury in light of the thyroid operation. Further, Dr. Kopelman testified that she spoke with Dr. McFarland immediately upon learning of his diagnosis of left vocal cord paralysis, thereby further drawing Dr. McFarland's attention to this apparent anomaly. It is also undisputed that Dr. Rhodes examined plaintiff approximately eleven months after her thyroid lobectomy, while Dr. McFarland examined plaintiff the month immediately following the operation. The Court accepts Dr. Rhodes' diagnosis that plaintiff now suffers from a paralyzed right vocal cord, but the Court rejects Dr. Rhodes'

conclusion that Dr. McFarland simply made a mistake as to which vocal cord was paralyzed in April of 1993. Dr. McFarland was alerted by plaintiff as well as Dr. Kopelman that it was strange that plaintiff would suffer from a left vocal cord paralysis following her thyroid operation. Nonetheless, Dr. McFarland maintained his diagnosis of left vocal cord paralysis. Hence, the Court does not accept the conclusion that Dr. McFarland made a mistake as to which vocal cord suffered paralysis in April of 1993. Such a conclusion would have certainly been more conceivable had Dr. McFarland not been alerted to the fact that plaintiff had undergone an operation involving the right side. However, given the facts that Dr. McFarland was aware of plaintiff's operation at the time he examined plaintiff, understood that it was unusual for the left side to be injured following such an operation, was specifically asked whether his diagnosis might be in error by plaintiff and Dr. Kopelman, and regularly performs similar exams in the scope of his practice, the Court finds that Dr. McFarland did not erroneously diagnose left vocal cord injury. The Court further finds that the left vocal cord paralysis diagnosed by Dr. McFarland resolved itself after a certain period of time, which would explain why Dr. Rhodes did not find paralysis of the left vocal cord approximately ten months after Dr. McFarland's diagnosis. Such is also consistent with Dr. McFarland's prognosis, which stated that plaintiff's condition should resolve within thirty to forty days following her visit to Dr. McFarland. Dr. Rhodes concedes that the condition which Dr. McFarland found may have resolved itself following his examination.

36. The Court finds that plaintiff failed to show by a preponderance of the evidence that her March 1993 operation caused her right vocal cord paralysis. The Court is unable to determine what may have caused such paralysis from the evidence presented. The evidence certainly leaves much room for speculation as to the actual cause of plaintiff's right vocal cord paralysis. The fact

that plaintiff was diagnosed with right vocal cord paralysis approximately eleven months following her operation surely leaves the door open to a host of potential causes with respect to her present condition. Further, the Court is not at all convinced that plaintiff's partial paralysis of her left vocal cord, as diagnosed by Dr. McFarland, was caused by the March 1993 operation. It is certainly conceivable that the condition may have resulted from some other cause, such as a viral infection. As noted, following her operation in March 1993, plaintiff was treated on more than one occasion for other conditions and afflictions. The evidence indicates that it is possible that one of these conditions caused injury to plaintiff's left vocal cord, which then resolved itself. Even if plaintiff were able to demonstrate that the partial paralysis of her left vocal cord was caused by her operation, such a showing would not necessarily lead to the conclusion that the transient left vocal cord partial paralysis subsequently resulted in the total paralysis of the right vocal cord. As noted, the record demonstrates that plaintiff suffered from other afflictions during the interim between being examined by Dr. McFarland and Dr. Rhodes. These afflictions may be responsible for plaintiff's current condition. Hence, even if Dr. Kopelman's performance fell below the medical standard of care, which it did not, the Court is not convinced by the appropriate standard of proof that the thyroid operation caused the paralysis of plaintiff's right vocal cord.

37. With respect to the proper standard of care, Dr. Esterkyn opined that in a thyroid lobectomy, an attempt to identify the recurrent laryngeal nerve should always be made before beginning to remove the thyroid. Otherwise, Dr. Esterkyn suggests that the nerve could be injured and damage to the vocal cords may result.

38. Dr. Esterkyn noted that, according to Dr. Kopelman's operative notes, there is no mention of the recurrent laryngeal nerve under any circumstances. That is, Dr. Kopelman does not

indicate in her operative notes that she did not identify the nerve, and she does not indicate that she tried to identify it. It is Dr. Esterkyn's custom and practice to always attempt to identify the laryngeal nerve during a thyroid lobectomy. Dr. Esterkyn suggests that most surgeons in the country who perform such an operation likewise attempt to identify the nerve, and a patient's chart should always reveal what attempt was made to identify the nerve. Upon reviewing Dr. Kopelman's deposition, Dr. Esterkyn observed that she does not attempt to locate the nerve. Dr. Esterkyn does not know why Dr. Kopelman would not attempt to identify the nerve.

39. In Dr. Esterkyn's opinion, it is below the standard of care not to attempt to identify the recurrent laryngeal nerve before removing the thyroid, and the failure to make a note of such in the patient's chart also falls below the standard of care.

40. Dr. Kopelman is of the opinion that it is not the duty of the surgeon to first locate the laryngeal nerve in every operative procedure. However, the surgeon must always be aware of it. Dr. Kopelman acknowledges that a surgeon does have a duty to avoid injury to the nerve, and if such an attempt is not made, the surgeon's performance would fall below the proper standard of care. Dr. Kopelman further recognizes that the surgeon must be aware of where the laryngeal nerve may be, and the surgeon must constantly be alert of its presence while working around the thyroid. That is, Dr. Kopelman agrees that anyone operating on the thyroid must have the laryngeal nerve uppermost in their mind throughout the procedure. Dr. Kopelman offered the opinion that when dissecting the thyroid gland, there is about a 25 percent chance that the nerve will be found, if the surgeon is not following a technique where the nerve is intentionally located first. Dr. Kopelman did not mention the laryngeal nerve in her operation report because it was not visible.

41. Dr. Kopelman disagrees with the opinion of Dr. Esterkyn regarding the attempt to identify the laryngeal nerve in every thyroid operation. Dr. Kopelman asserts that Dr. Esterkyn's technique is not the only acceptable operative method, and that other appropriate and acceptable procedures are practiced.

42. In performing thyroid surgery, Dr. Kopelman is a student of and follows the technique articulated by Dr. Norman Thompson, an internationally recognized physician in the area of thyroid surgery. The "Thompson technique" involves staying on the surface of the thyroid gland in dividing the blood vessels where they branch. Dr. Kopelman believes that this is the preferable technique because an attempt to identify the laryngeal nerve early in the surgery poses a greater risk to this nerve. All authorities agree, however, that the avoidance of injury to the laryngeal nerve is of primary importance. Notwithstanding the care and attention paid to the nerve, however, potential injury to the laryngeal nerve is a recognized risk involved in every thyroid surgery, regardless of which procedure is employed.

43. Although Dr. Kopelman adheres to the "Thompson technique" rather than to Dr. Esterkyn's method of attempting to identify the laryngeal nerve during every thyroid lobectomy, Dr. Kopelman does look for the laryngeal nerve continuously while dissecting around the thyroid gland. It is Dr. Kopelman's opinion that her method of adhering to the Thompson technique in performing the surgery poses the least amount of risk to the laryngeal nerve.

44. Dr. Jimmy Giddens, a general surgeon who has performed numerous thyroid lobectomies, stated that Dr. Kopelman's performance with respect to the March 9, 1993, operation on plaintiff was performed within the medical standard of care. Dr. Giddens submits that there is a wide variation of what physicians put in their operative notes or how much detail is included. The

fact that a physician does not list every step is not below the standard of care. In operating on the thyroid, there are two recognized and accepted methods of handling the laryngeal nerve. One method is to find the nerve immediately upon entering the neck, and the other is to stay on the capsule of the thyroid, rolling the thyroid medially, and then looking for the nerve. The nerve will not always be found in every operation. Dr. Kopelman's notes reveal that she chose the second method, thereby hugging the thyroid rather than attempting to locate the nerve immediately. Dr. Giddens also cites the method espoused by Dr. Norman Thompson, which states that it is dangerous to begin the operation by trying to locate the nerve. A deliberate search for the nerve can actually result in its injury. As long as a physician is aware of the nerve and is extremely careful in trying to avoid the nerve, the standard of care is met. However, injury to the nerve is a recognized risk of thyroid lobectomies. Transient paralysis occurs in five to six percent of the cases and permanent paralysis occurs in two to three percent of the cases, regardless of the procedure employed.

45. The Court finds that at least two acceptable methods of handling the laryngeal nerve in thyroid operations exist, each of which is detailed above. The Court finds that Dr. Kopelman's practice of not identifying the nerve in the initial stage of the operation, but having the nerve foremost in mind throughout the operation, falls within one of these acceptable medical operative methods and is therefore within the acceptable standard of medical care. Thus, the Court finds that Dr. Kopelman did not fall below the standard of care either with respect to her manner of preparing her operative notes or with respect to her method of avoiding injury to the laryngeal nerve. That is, the Court is not convinced by a preponderance of the evidence that the procedure performed was below the appropriate standard of care or that it was the proximate cause of plaintiff's right vocal cord paralysis.

## CONCLUSIONS OF LAW

### **A. Jurisdiction and Venue**

1. Plaintiff brings this action pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq, alleging medical negligence.

2. Jurisdiction is conferred upon this Court by virtue of 28 U.S.C. § 1346(b)(1), which grants jurisdiction to this Court over actions brought pursuant to the Federal Tort Claims Act (“FTCA”).

3. The relevant Federal agency failed to make a final disposition of plaintiff’s claim within six months after it was filed, and the claim was therefore deemed denied. 28 U.S.C. § 2675(a). Thus, the Court is authorized to entertain plaintiff’s claim.

4. Venue properly lies within this Court’s judicial district pursuant to 28 U.S.C. 1402(b). The plaintiff in this action resides within this Court’s judicial district. The alleged violations giving rise to this action occurred within this Court’s judicial district.

### **B. Medical Negligence**

5. In an FTCA action, the Court applies the law of the place in which the alleged negligence occurred. 28 U.S.C. § 1346(b)(1); Flynn v. U.S., 902 F.2d 1524, 1527 (10th Cir.1990).

6. In Oklahoma three elements are essential to establish a medical negligence claim. These are “(1) a duty owed by the defendant to protect the plaintiff from injury, (2) a failure to properly exercise or perform that duty and (3) the plaintiff’s injuries are proximately caused by the defendant’s failure to exercise his duty of care.” McKellips v. Saint Francis Hosp. Inc., 741 P.2d 467, 470 (Okla.1987).

## 1. Cause

7. Plaintiff bears the burden of producing evidence tending to establish a causal link between the alleged negligence and the injury, and plaintiff also bears the burden of persuading the trier of fact by a preponderance of the evidence that her injury was in fact caused by the alleged negligence. Id. at 471. A preponderance of the evidence simply means more probably true than not true or more likely so than not so.

8. “In Oklahoma, the general principles of proof of causation in a medical malpractice action are the same as an ordinary negligence case. The reasonable probability standard for sufficiency of proof of causation is applied . . .” Id. That is, “[w]hen such lay and expert testimony is considered together, it must warrant the conclusion that a preponderance of the evidence discloses facts and circumstances establishing a reasonable probability that defendant’s negligence was the proximate cause of the injury.” Robertson v. LaCroix, 534 P.2d 17, 21 (Okla.App.1975). “Absolute certainty is not required, however, mere possibility or speculation is insufficient.” McKellips at 471. Where the probabilities are evenly balanced or less, plaintiff has failed to carry her burden. Id. “It is fundamental that a plaintiff, in order to impose liability upon a defendant, is required to establish, by a preponderance of the evidence, that the defendant was guilty of negligence which probably, not merely possibly, caused plaintiff’s injury.” Downs v. Longfellow Corp., 351 P.2d 999, 1004 (Okla.1960). “If the proof is as consistent with the theory that the injury was due to a cause not actionable as with the theory that it was due to an actionable cause, the case fails . . .” Id. (quoting, 66 A.L.R. 1517).

9. Proximate cause consists of cause in fact and legal causation. The latter concerns a determination as to whether legal liability should be imposed as a matter of law where cause in fact is established. Cause in fact deals with the “but for” consequences of an act. McKellips at 470.

10. As more fully set forth in the Findings of Fact, the Court concludes that plaintiff failed to carry her burden of establishing that her right vocal cord paralysis was caused by the right thyroid lobectomy performed on March 9, 1993. From the evidence presented, the Court is left to speculate as to what may have caused plaintiff’s injury. The Court concludes that this is a case in which the proof submitted equally supports two different theories as to the cause of plaintiff’s injury. That is, the evidence demonstrates that the injury could have been caused either by the thyroid operation or by some other cause separate from the operation, such as a viral illness. Plaintiff therefore failed to prove that the thyroid operation more likely than not caused her injury. As such, the Court concludes that plaintiff did not carry her burden of proof with respect to causation.

## **2. Standard of Care**

11. In Oklahoma, the “standard of care required of those engaging in the practice of the healing arts . . . shall be measured by national standards.” 76 O.S. § 20.1.

12. “It cannot be disputed that hospitals and physicians owe a duty of care to their patients.” Grayson v. Oklahoma, 838 P.2d 546, 550 (Okla.App. 1992). The “standard of care generally applied to physicians requires that the physician exercise the care, skill, and learning ordinarily exercised by other physicians under similar circumstances.” Sisson v. Elkins, 801 P.2d 722, 727 (Okla.1990). Expert testimony is necessary in order to establish a proper standard of care which the physician should have followed. “The [trier of fact] may consider all evidence in determining

whether the treating physician failed to meet the requisite standard of care.” Boxberger v. Martin, 552 P.2d 370, 373-374 (Okla.1976).

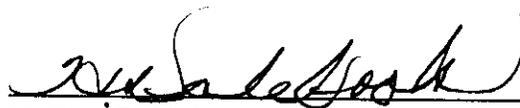
13. In the present case, the Court concludes that plaintiff failed to prove that Dr. Kopelman’s performance fell below the accepted standard of medical care. As noted in the Findings of Fact, in performing thyroid lobectomies, Dr. Kopelman adheres to a procedure accepted by other physicians who perform like operations. The evidence reveals that there are at least two acceptable methods of handling the laryngeal nerve during a thyroid operation. One method is to make a conscious effort to locate the nerve at the beginning of the operation. The other method is to forego such an attempt, but to make every attempt to avoid injury to the nerve during the operation. Both methods place utmost importance on the safety of the nerve. Dr. Kopelman chooses to perform thyroid operations in accordance with the second method, because Dr. Kopelman believes that an initial attempt to locate the nerve poses greater danger to the patient. Dr. Kopelman’s method is accepted and espoused by others in the medical community. There is no showing that locating the nerve always prevents injury whereas not locating the nerve increasing the risk of injury. Other than showing that Dr. Kopelman does not intentionally explore for the nerve during thyroid operations, plaintiff presented no competent evidence tending to demonstrate that Dr. Kopelman was in any other way negligent during plaintiff’s thyroid operation. As such, plaintiff failed to present sufficient evidence to meet her burden of proof that Dr. Kopelman was in any manner negligent during plaintiff’s thyroid operation.

### CONCLUSION

From the evidence submitted to the Court, by the parties, exhibits, pleadings and briefs, the Court finds that plaintiff failed to establish that Dr. Kopelman was negligent in the performance of

plaintiff's thyroid lobectomy or that such operation caused plaintiff's right vocal cord paralysis. Thus, the Court finds in favor of defendant and against plaintiff.

IT IS SO ORDERED this 21<sup>st</sup> day of March, 1997.



H. DALE COOK  
United States District Judge

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

ENTERED ON DOCKET

DATE MAR 25 1997

LARRY D. ADAMS, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 PRINCIPAL MUTUAL LIFE )  
 INSURANCE COMPANY, )  
 a foreign company, )  
 )  
 Defendant. )

No. 97 CV 0219B

**FILED**

MAR 24 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

The Plaintiff and Defendant, pursuant to Rule 41(a)(1) F.R.C.P., stipulate to the dismissal of the above-styled and numbered cause of action without prejudice, each party to bear their own costs.

THE HUMPHREYS LAW FIRM

By Tanya D. Humphreys  
Tanya D. Humphreys, OBA #15021  
David Humphreys, OBA #12346  
1602 South Main Street, Suite A  
Tulsa, Oklahoma 74119-4455  
Telephone: (918) 584-2244  
Facsimile: (918) 584-2245

ATTORNEYS FOR PLAINTIFF

FELDMAN, HALL, FRANDEN,  
WOODARD & FARRIS

By John R. Woodard, III  
John R. Woodard, III, OBA #9853  
Jody R. Nathan, #11685  
525 South Main, Suite 1400  
Tulsa, OK 74103-4523  
918/583-7129  
FAX 918/584-3814

ATTORNEYS FOR DEFENDANT

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

**FILED**

MAR 21 1997

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

LOUIS K. ROOKS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JOHN J. CALLAHAN,<sup>1</sup> )  
 Commissioner of Social )  
 Security, )  
 )  
 Defendant. )

Case No. 96-C-249-BU

ENTERED ON DOCKET  
DATE MAR 24 1997

**JUDGMENT**

Pursuant to the Court's Order of this same date, judgment is hereby entered in favor of Plaintiff, Louis K. Rooks, against Defendant, John J. Callahan, Commissioner of Social Security, and this action is remanded to Defendant for further administrative proceedings.

ENTERED this 21<sup>st</sup> day of March, 1997.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

<sup>1</sup> Effective March 1, 1997, John J. Callahan was appointed to serve as Acting Commissioner of Social Security, to succeed Shirley S. Chater. Pursuant to Rule 25(d)(1), Fed.R.Civ.P., John J. Callahan is hereby substituted for Shirley S. Chater, as defendant in this action.

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

**FILED**

MAR 21 1997

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

LOUIS K. ROOKS,  
SSN: 443-70-8754

Plaintiff,

vs.

JOHN J. CALLAHAN,<sup>1</sup>  
Commissioner of Social  
Security,

Defendant.

Case No. 96-C-249-BU

CLERK'S OFFICE

MAR 24 1997

**ORDER**

On February 28, 1997, United States Magistrate Judge Frank H. McCarthy issued a Report and Recommendation, wherein he recommended that this case be remanded to the Commissioner for the purpose of making express findings in accordance with Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987), and Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995), concerning Plaintiff's claim of disabling pain in light of Dr. Kache's records and for a credibility determination in accordance with correct legal standards. In the Report and Recommendation, Magistrate Judge McCarthy advised the parties that any objections to the Report and Recommendation must be filed with

---

<sup>1</sup> Effective March 1, 1997, John J. Callahan was appointed to serve as Acting Commissioner of Social Security, to succeed Shirley S. Chater. Pursuant to Rule 25(d)(1), Fed.R.Civ.P., John Callahan is hereby substituted for Shirley S. Chater, as defendant in this action.

the Clerk of the Court within ten (10) days of service of the Report and Recommendation.

On March 15, 1997, Defendant, John J. Callahan, Commissioner of Social Security, timely responded to the Report and Recommendation and advised the Court that he had no objection to the Report and Recommendation. To date, Plaintiff has not objected or otherwise responded to the Report and Recommendation.

With no objection being lodged by either party, the Court, pursuant to 28 U.S.C. 636(b)(1), adopts the Report and Recommendation in its entirety.

Accordingly, Magistrate Judge McCarthy's Report and Recommendation (Docket Entry #9) is **AFFIRMED**. This matter is hereby remanded to the Commissioner for the purpose of making express findings in accordance with Magistrate Judge McCarthy's Report and Recommendation.

ENTERED this 21<sup>st</sup> day of March, 1997.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

DATE

ENTERED ON DOCKET

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
DENNIS REEDY aka DENNIS R. )  
REEDY; DONNA ANN REEDY aka )  
DONNA A. REEDY; STATE OF )  
OKLAHOMA ex rel OKLAHOMA TAX )  
COMMISSION; CITY OF OWASSO, )  
Oklahoma; COUNTY TREASURER, )  
Tulsa County, Oklahoma; BOARD OF )  
COUNTY COMMISSIONERS, Tulsa )  
County, Oklahoma, )  
)  
Defendants. )

FILED  
IN OPEN COURT

MAR 19 1997

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

ENTERED ON DOCKET

DATE MAR 21 1997

Civil Case No. 96-C 73H

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 19 day of March, 1997, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 21, 1997, pursuant to an Order of Sale dated August 27, 1996, of the following described property located in Tulsa County, Oklahoma:

LOT FOURTEEN (14), BLOCK TWO (2), NICHOLS HEIGHTS, AN ADDITION TO OWASSO, COUNTY OF TULSA, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Dennis Reedy, Donna Ann Reedy, State of Oklahoma, ex rel. Oklahoma Tax Commission, City of Owasso, Oklahoma, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County,

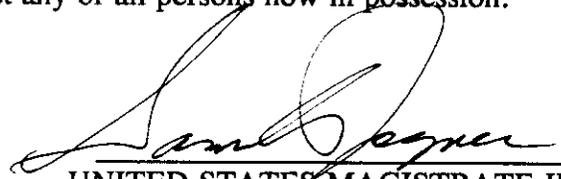
18

Oklahoma and to the purchasers, Ernest D. Potter and Ruby L. Potter, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Owasso Reporter, a newspaper published and of general circulation in Owasso, Oklahoma, and that on the day fixed in the notice the property was sold to Ernest D. Potter and Ruby L. Potter, their being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

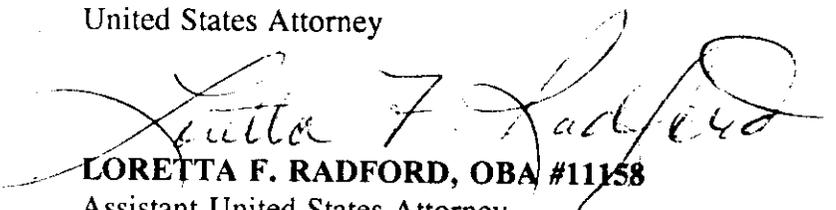
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchasers, Ernest D. Potter and Ruby L. Potter, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**

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

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 96-C 73H

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  
21st Day of March, 1997.

C. Partida, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE MAR 21 1997

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DENNIS DERAL REED aka DENNIS D. )  
 REED; LINDA REED aka DELINDA )  
 REED; COUNTY TREASURER, Tulsa )  
 County, Oklahoma; BOARD OF COUNTY )  
 COMMISSIONERS, Tulsa County, )  
 Oklahoma, )  
 )  
 Defendants. )

**FILED**  
IN OPEN COURT

MAR 19 1997 *[Signature]*

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

Civil Case No. 95-C 1068H *[Signature]*

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 19 day of March, 1997, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 22, 1997, pursuant to an Order of Sale dated October 2, 1996, of the following described property located in Tulsa County, Oklahoma:

Lot Thirty-four (34), Block Eight (8), KENSINGTON II AMENDED, BLOCKS 3 THRU 8, an Addition in Tulsa County, City of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Linda Reed, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma and to the purchaser Jarry M. Jones, by mail and to the Defendant, Dennis Deral Reed by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

*20*

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Jarry M. Jones, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

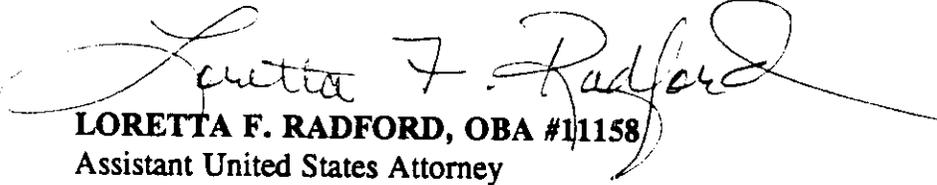
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Jarry M. Jones, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 1068H

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  
21st Day of March, 1997.

C. Costello, Deputy Clerk

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

**FILED**

Patricia A. Cassel,

Plaintiff,

vs.

Webco Industries, Inc.,

Defendant.

MAR 19 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 96CV 582H ✓

**ENTERED ON DOCKET**

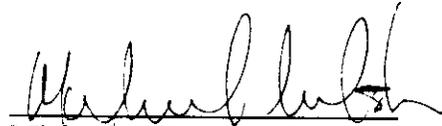
**DATE MAR 21 1997**

**JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE**

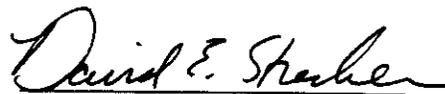
The Plaintiff, Patricia A. Cassel and the Defendant, Webco Industries, Inc., jointly stipulate and agree that this case be dismissed with prejudice, each party to bear her or its own costs, expenses and attorneys' fees.

Attorneys for Plaintiff

  
Will K. Wright, OBA #16349  
P.O. Box 423  
Claremore, OK 74018-0423

  
Michael T. Welsh, OBA #16748  
2209 E. Seattle Street  
Broken Arrow, OK 74012

Attorneys for Defendants

  
David E. Strecker, OBA #8687  
Robert C. Fries, OBA #16958  
Strecker & Associates, P.C.  
Petroleum Club Building  
601 South Boulder - Suite 412  
Tulsa, Oklahoma 74119  
(918) 582-1760

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

UARINUE A. WINFORD,

Plaintiff,

vs.

DOLLAR RENT-A-CAR  
SYSTEMS, INC.,

Defendant.

ENTERED ON DOCKET  
DATE MAR 21 1997

Case No. 96-CV-657-H

FILED

MAR 19 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Uarinue A. Winford, and Defendant, Dollar Rent A Car Systems, Inc., by and through their respective attorneys, jointly stipulate that all of Plaintiff's claims herein should be dismissed with prejudice with each side to bear its own costs and attorneys' fees.

Respectfully submitted,

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

By: Kelly S. Kibbie  
Claire V. Eagan, OBA #554  
Kelly S. Kibbie, OBA #16333  
320 South Boston Avenue, Suite 400  
Tulsa, Oklahoma 74103-3708  
(918) 594-0400

ATTORNEYS FOR DEFENDANT  
DOLLAR RENT A CAR SYSTEMS, INC.

-and-

AMSTRONG, NIX & LOWE

By: Jeff Nix  
Jeff Nix, OBA #6688  
1401 S. Cheyenne  
Tulsa, Oklahoma 74119

ATTORNEY FOR PLAINTIFF  
UARINUE A. WINFORD



512  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 20 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ODETTE TERROLLE,

Plaintiff,

vs.

ATLANTA CASUALTY COMPANY,

Defendant.

No. 97 CIV 58 H

ENTERED ON DOCKET

DATE MAR 21 1997

STIPULATION OF DISMISSAL

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

JOHN B. NICKS

  
Attorney for Plaintiff

MARK A. WARMAN

  
Attorney for Defendant

7  
C/S

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

FILED

MAR 20 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DEBBIE J. BUIRREA,  
SSN: 440-62-5807,

Plaintiff,

v.

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

Defendant.

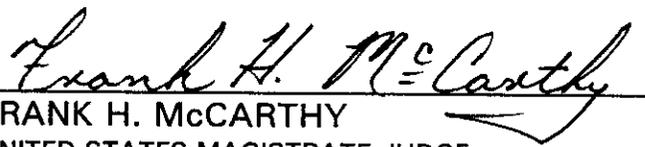
CASE NO. 96-cv-186-M ✓

ENTERED ON DOCKET

DATE 3/21/97

**JUDGMENT**

Judgment is hereby entered for Defendant and against Plaintiff. Dated  
this 20<sup>th</sup> day of March, 1997.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

FILED

DEBBIE J. BUIRREA

440-62-5807

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner  
Social Security Administration,

Defendant,

Case No. 96-C-186-M

MAR 20 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE 3/21/97

ORDER

Plaintiff, Debbie J. Buirrea, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>1</sup> In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might

---

<sup>1</sup> Plaintiff's September 13, 1993 application for disability benefits was denied December 14, 1993 and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held January 12, 1995. By decision dated February 28, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 15, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991).

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

Plaintiff was 39 years old at the time of the hearing. She has an 11th grade education. She claims to be unable to work as a result of the existence of deep vein thrombosis in her left leg and venous stasis ulcers on her lower left leg. The ALJ determined that Plaintiff is impaired by the condition of her left lower leg and found that although Plaintiff is unable to perform her past relevant work, she is capable of performing unskilled sedentary work, limited by the need to elevate her left leg. A vocational expert testified such work exists in the national and regional economies and therefore the ALJ concluded Plaintiff is not disabled as that term is used in the Social Security Act. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that: (1) she meets Listing 4.11; (2) her inability to walk or stand for up to 1/3 of an 8 hour work-day precludes the performance of sedentary work; (3) the ALJ improperly considered whether an employer would accommodate Plaintiff's need to elevate her leg; and (4) based on the vocational expert's testimony, the ALJ's finding that she had no transferable skills is inconsistent with the finding that she is not disabled.

**LISTING 4.11**

Plaintiff alleges the ALJ erred by failing to find that her impairment met or equaled the Listings of Impairments found in 20 C.F.R. Pt. 404, Subpt. P., App.1. The Listing of Impairments describe, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity. Plaintiff argues that she meets the criteria for Listing 4.11 for chronic venous insufficiency of a lower extremity, the text of which follows:

4.11 *Chronic venous insufficiency* of a lower extremity. With incompetency or obstruction of the deep venous system **and** one of the following:

A. Extensive brawny edema;

OR

B. Superficial varicosities, stasis dermatitis, **and** recurrent or persistent ulceration which has not healed following at least 3 months of prescribed medical or surgical therapy.

20 C.F.R. Pt. 404, Subpt. P., App.1. [italics in original, bold emphasis added].

It is well-settled that a claimant is required to meet all the specified medical criteria for a listing to apply. See *Sullivan v. Zebley*, 493 U.S. 521, 530, 110 S.Ct. 885, 891, 107 L.Ed.2d 967 (1990).

Plaintiff does not meet all the requirements of Listing 4.11 as there is no medical evidence of brawny edema or superficial varicosities. The medical evidence reflects the existence of chronic venous insufficiency of Plaintiff's lower left leg. However, Dr. Richard Cooper, a consultative examining physician, specifically noted the absence of gross superficial varicosities in his October 9, 1990 examination. [R. 179]. On November 17, 1993, Dr. Angelo Dalessandro noted Plaintiff had "no varicosities or brawny edema." [R. 298].

Plaintiff has had stasis ulcers on her left leg, however, those have not failed to heal following treatment as required to meet Listing 4.11. The office notes of Dr. Mathers reflect that Plaintiff was referred to him on December 17, 1991 for treatment of a "6 x 6 cm venous stasis ulcer" that had been present for numerous years but had recently become larger, painful, and that conservative care had failed to improve. At the outset of his treatment of Plaintiff, Dr. Mathers predicted that she would "probably need vigorous outpatient whirlpools followed by surgical debridement and possible skin grafting." [R. 189]. However, by January 6, 1992, her left ankle was "healing extremely well and much better than [Dr. Mathers] anticipated." *Id.* The notes continue to report improvement until February 11, 1992 when Dr. Mathers reported, "[h]er ankle is completely healed in now." [R. 188]. The ulcer healed without surgical debridement or skin grafting. In November of 1993, Dr. Dalessandro

noted the existence of several *healed* ulcerations on Plaintiff's lower left leg. [R. 298].

The foregoing medical evidence supports the ALJ's conclusion that Plaintiff does not meet Listing 4.11.

### **SEDENTARY WORK REQUIREMENTS**

Plaintiff argues that because she is unable to walk or stand for 1/3 of an 8-hour day and is required to elevate her leg, a finding that she retains the residual functional capacity ("RFC") for sedentary work is precluded. In support of this argument Plaintiff points to the definition of sedentary work:

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

20 C.F.R. §§ 404.1567(a) and 416.967(a). The Dictionary of Occupational Titles ("DOT") defines "occasionally" as an activity existing *up to* 1/3 of the time. Because Plaintiff testified she can only walk a half a block and stand for 15 to 20 minutes, Plaintiff claims she is precluded from performing sedentary work. This argument is without merit.

The ALJ did not find that Plaintiff was capable of performing the full range of sedentary work. Such a finding is not necessary to a step-five denial of benefits. Unless the ALJ is applying the grids at step-five to make a determination that work

exists, there is no requirement that a claimant be required to perform all, most, or even a majority of occupations within a given exertional category. *Evans v. Chater*, 55 F.3d 530, 532-33 (10th Cir. 1995).

The ALJ found that Plaintiff had a residual functional capacity for the performance of sedentary work but that she was further limited by the inability to use her left foot and leg and by the need to elevate her leg. [R. 21, 23, 24]. The ALJ received the testimony of a vocational expert who testified that Plaintiff's limitations reduce the number of jobs available but that sedentary jobs exist in the national and regional economies that could be performed by someone having Plaintiff's limitations. [R. 63-66]. The Court finds the ALJ's analysis was performed in accordance with social security regulations and relevant case law.

Support for this conclusion is found in a recent Social Security Ruling. The Social Security Administration recently (July 2, 1996) issued Social Security Ruling 96-9p "[t]o explain the Social Security Administration's policies regarding the impact of a residual functional capacity (RFC) assessment for less than a full range of sedentary work on an individual's ability to do other work." The policies SSR 96-9p explains are not new. Ruling 96-9p emphasizes that "a finding that an individual has the ability to do less than a full range of sedentary work does not necessarily equate with a decision of 'disabled.'" The ruling also reiterates that the term "occasionally" means "occurring from very little up to one-third of the time, and would generally total no more than about 2 hours of an 8-hour workday." *Id.* Social security rulings are entitled to deference because "they constitute Social Security Administration

interpretations of its own regulations and the statute which it administers." *Walker v. Secretary of Health & Human Servs.*, 943 F.2d 1257, 1259-60 (10th Cir. 1991). The Court defers to social security rulings unless "they are plainly erroneous or inconsistent with the [Social Security] Act." *Andrade v. Secretary of Health & Human Servs.*, 985 F.2d 1045, 1051 (10th Cir. 1993) (quoting *Walker*, 943 F.2d at 1060). Plaintiff's argument that a person incapable of performing the full range of sedentary work is disabled finds no support in the social security regulations.

### ACCOMMODATION OF PLAINTIFF'S LIMITATIONS

Plaintiff argues that the ALJ "improperly considered that an employer would accommodate Buirrea's need to elevate her left leg." [Dkt. 4, p. 2]. Plaintiff cited a "Memorandum of Associate Commissioner Daniel L. Skoler, issued on June 2, 1993, reprinted in *NOSSCR, Social Security Forum*, Volume 15, No. 7, July 1993, page 8-9" as the basis for her argument. According to Plaintiff, the Memorandum notes:

[a] finding of ability to do past relevant work is only appropriate if the claimant retains the capacity to perform either the actual functional demands and job duties of the particular past relevant job he or she performed or the functional demands and job duties of the occupation as generally required by employers throughout the national economy. . . . Consequently, hypothetical inquiries about whether an employer would or could make accommodations that would allow return to a prior job **would not** be appropriate. [as quoted by Plaintiff, emphasis added by Plaintiff].

[Dkt. 5, p. 2-3]. The Court has conducted a computer search of the Federal Register, the Code of Federal Regulations, Social Security Rulings and Tenth Circuit case law and did not find anything addressing the issue of employer accommodations in the

context of Social Security disability determinations.<sup>2</sup> However, the Court agrees that a hypothetical questioning about employer accommodations would not be appropriate. Such inappropriate questioning did not occur in this case.

The record reflects the ALJ did not ask the vocational expert whether employers would accommodate Plaintiff's need to elevate her foot. Rather, the ALJ asked whether, considering her need to elevate her foot, "are there any jobs of a sedentary or light work that she could perform?" [R. 64]. The correct inquiry at step-five is: whether, considering age, education, past work experience and RFC, a person whose impairment precludes performance of past work can perform other work in the national economy. 20 C.F.R. § 416.920(f); *Reyes v. Bowen*, 845 F.2d 242, 243 (10th Cir. 1988). The Court finds that the ALJ made the correct step-five inquiry and appropriately analyzed the record.

Following the vocational expert's answer that there were such jobs, Plaintiff's counsel interjected the issue of employer accommodation, as follows:

Q. [by Plaintiff's attorney] Okay. Let's assume -- I'll see if I can -- if I understand your testimony. Let's assume that the employer is not required -- let's assume no accommodation. And based on the additional space it would require, or additional facilities that are required to accommodate somebody from sitting would rule all that out. Would she be able to do these jobs?

---

<sup>2</sup> The term "accommodation" does not have a specialized meaning in the context of Social Security disability law. However, "reasonable accommodation" is a term of art used in the context of the Americans with Disabilities Act ("ADA") and encompasses the requirement that employers make existing facilities used by employees readily accessible to and useable by individuals with disabilities, and further refers to job restructuring, modification, reassignment or acquisition of equipment, devices, training or other features adopted to accommodate or facilitate individuals with disabilities in the work force. See 42 U.S.C. § 12111, *et. seq.*

A. If there was no --

Q. No accommodations.

A. She would not -- very few of the jobs would she be able to do, maybe ten, 20 percent of the jobs.

[R. 65-66]. The Court notes that even employer accommodation may not be considered, the record reflects the existence of a significant number of jobs in the economy that Plaintiff could perform with her impairments, even without any employer accommodation.

### VOCATIONAL SKILLS

The jobs identified by the vocational expert in response to the ALJ's hypothetical question which included Plaintiff's RFC were: sedentary cashier, sedentary order clerk and assembly work. The cashier and the order clerk were identified as semiskilled, the assembly work as unskilled. [R. 64]. The ALJ found that Plaintiff "does not have any acquired work skills which are transferable to the skilled or semiskilled work functions of other work." [R. 24]. However, in his decision the ALJ cited both the semi-skilled and unskilled work as examples of jobs that Plaintiff could perform. Plaintiff argues that the decision should be reversed because of the inconsistency.

It is the Court's task to determine whether the Commissioner's decision is "supported by substantial evidence in the record **viewed as a whole.**" *Castellano v. Secretary of Health and Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994) [emphasis supplied]. Regardless of the erroneous inclusion of semi-skilled jobs in the

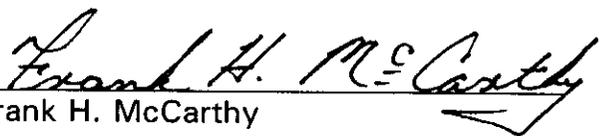
ALJ's decision, the record supports the ALJ's conclusion that Plaintiff is not disabled. The vocational expert identified unskilled sedentary assembly jobs as being available in the economy; these jobs fit the Plaintiff's RFC. Viewing the record as a whole, the Court finds that the ALJ's conclusion is supported by substantial evidence.

Plaintiff also states that the Dictionary of Occupational Titles ("DOT") does not identify any jobs as "assembly work" and points out that the occupations of small products assembler I and II are both classified in the DOT as light jobs. The Court notes that the assembler I and II are not the only assembly jobs identified in the DOT. The DOT identifies numerous assembly jobs at all skill and exertional levels. The fact that Plaintiff was able to find two assembly job classifications in the DOT that fall within the light exertional category is of no factual or legal consequence in regard to this case.

### **CONCLUSION**

The Court concludes that the decision denying Plaintiff disability benefits is supported by substantial evidence and is therefore AFFIRMED.

SO ORDERED this 20<sup>th</sup> day of March, 1997.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE