

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

FILED

MAY - 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES HOUSTON, DYE, JUNIOR,)
)
Plaintiff,)
)
v.)
)
DALE BAUSTERT, et al.,)
)
Defendants.)

Case No. 96-C-965-H

ENTERED ON DOCKET

DATE MAY 09 1997

ORDER

This matter comes before the Court on Plaintiff's motion to dismiss (Docket # 11).
Accordingly, pursuant to Fed. R. Civ. P. 41(a)(1), this case is hereby dismissed.

Plaintiff's motion for a temporary restraining order (Docket # 2) is dismissed as moot.

IT IS SO ORDERED.

This 7TH day of May, 1997.



Sven Erik Holmes
United States District Judge

(12)

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

FILED
MAY - 8 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ERNESTINE HARRISON,)
)
Plaintiff,)
)
v.)
BRISTOW HOUSING AUTHORITY, et al.,)
)
Defendants.)

Case No. 93-C-638-H

ENTERED ON DOCKET
DATE MAY 09 1997

ORDER

This matter comes before the Court on the parties' responses to this Court's Order of February 12, 1997 (Docket # 32, Docket # 33).

On February 15, 1996, Defendants filed a response to Plaintiff's statement of facts, in which Defendants requested that this Court dismiss Plaintiff's case (Docket # 29). Because Defendants' pleading contained affidavits and other supporting evidence, the Court construed Defendants' motion to dismiss to be a motion for summary judgment, pursuant to Fed. R. Civ. P. 12(c). The Court directed Plaintiff to file a response to Defendants' summary judgment motion, and allowed Defendants time within which to reply. The parties timely filed their pleadings.

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

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

34

477 U.S. at 322.

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

Summary judgment is only appropriate where "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. As the Supreme Court held, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."

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

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

After reviewing the pleadings, the Court concludes that Defendants are entitled to summary judgment. In her previous pleadings, Plaintiff has not produced any evidence that Defendants treated her differently based on her race, and none of the evidence proffered by Plaintiff in her response to Defendants' motion demonstrates race discrimination. Accordingly, Defendants' motion for summary judgment (Docket # 29) is granted.

IT IS SO ORDERED.

This 2TH day of May, 1997.



Sven Erik Holmes
United States District Judge

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

FILED

MAY - 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICK ROMANS, an individual,)
)
 Plaintiff,)

v.)

Case No. 96-CV-891-H

PRUDENTIAL INSURANCE COMPANY)
 OF AMERICA, INC., and TULSA PAIN)
 CONSULTANTS, P.C.,)

Defendants.)

ENTERED ON DOCKET

DATE MAY 09 1997

ORDER OF DISMISSAL UPON SETTLEMENT

The parties to the action, by their counsel, have advised the court that they have agreed to a settlement.

IT IS HEREBY ORDERED that this matter is DISMISSED WITH PREJUDICE. However, if any party hereto certifies to this Court, with proof of service of a copy thereon on opposing counsel, within ninety days from the date hereof, that settlement has not in fact occurred, the foregoing order shall be vacated and this cause shall forthwith be restored to the calendar for further proceedings.

IT IS SO ORDERED.

This 7th day of MAY, 1997.



Sven Erik Holmes
United States District Judge

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

FILED

MAY - 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT



FEDERAL DEPOSIT INSURANCE
CORPORATION, in its corporate capacity
Plaintiff and
Counter-Defendant

§
§
§
§
§
§
§
§
§
§

vs.

CASE NO. 94-C-728-H

PAUL D. HINCH, Individually, et. al.

Defendants,

ENTERED ON DOCKET

DATE MAY 09 1997

EMERSON CHECKRITE FEDERAL
RECOVERIES, L.P., a Delaware
limited partnership,
Plaintiff,

§
§
§
§
§
§
§
§
§
§

vs.

CASE NO. 95-C-1249-H

PAUL D. HINCH, Individually; et al.,
Defendants.

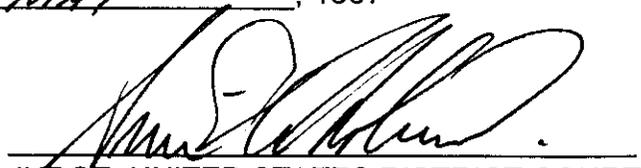
**AGREED ORDER DISMISSING ACTION
WITH PREJUDICE**

Before this Court on the below date, came on for consideration the Stipulation of Dismissal filed herein. This Court being fully advised in the premise, finds that,

IT IS THEREFORE, ORDERED that the captioned case is hereby dismissed with prejudice to it being refiled,

IT IS FURTHER ORDERED that all documents held by the Court or any magistrate for *in camera* review shall be returned to the party that tendered same to the Court.

SIGNED THIS 7th day of May, 1997

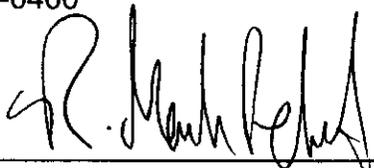


JUDGE, UNITED STATES DISTRICT COURT

246

AGREED:

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
320 South Boston, Suite 400
Tulsa, Oklahoma 74103
(918) 594-0400

By: 
James M. Reed, OBA #7466
Thomas A. Creekmore, OBA #0211
R. Mark Petrich, OBA #11956
Pamela H. Goldberg, OBA #12310

ATTORNEYS FOR THE FEDERAL DEPOSIT
INSURANCE CORPORATION

THOMAS, SHEEHAN, CULP, L.L.P.
2300 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201-4756
(214) 953-0000

By: _____
TOM THOMAS
State Bar No. 19870000

ATTORNEYS FOR TULSA DEFENDANTS

AGREED:

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
320 South Boston, Suite 400
Tulsa, Oklahoma 74103
(918) 594-0400

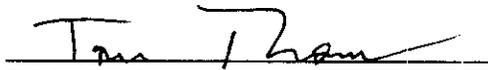
By:

James M. Reed, OBA #7466
Thomas A. Creekmore, OBA #0211
R. Mark Petrich, OBA #11956
Pamela H. Goldberg, OBA #12310

ATTORNEYS FOR THE FEDERAL DEPOSIT
INSURANCE CORPORATION

THOMAS, SHEEHAN, CULP, L.L.P.
2300 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201-4756
(214) 953-0000

By:



TOM THOMAS
State Bar No. 19870000

ATTORNEYS FOR TULSA DEFENDANTS

CONNER & WINTERS
a Professional Corporation
2400 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103
(918) 586-5711

David R. Cordell

By: *By Andrew R. Turner*
ANDREW R. TURNER, OBA #9125
DAVID R. CORDELL, OBA #11272

ATTORNEYS FOR BONNET RESOURCES, INC.

DUNN, SWAN & CUNNINGHAM
2800 Oklahoma Tower
210 Park Avenue
Oklahoma City, Oklahoma 73103
(918) 235-8318

By: _____
Clell I. Cunningham III, OBA #2093

ATTORNEYS FOR EMERSON CHECKRITE
FEDERAL RECOVERIES, L.P. and
GOVERNMENT FINANCIAL SERVICES
ONE, L.P.

CONNER & WINTERS
a Professional Corporation
2400 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103
(918) 586-5711

By: _____
ANDREW R. TURNER, OBA #9125
DAVID R. CORDELL, OBA #11272

ATTORNEYS FOR BONNET RESOURCES, INC.

DUNN, SWAN & CUNNINGHAM
2800 Oklahoma Tower
210 Park Avenue
Oklahoma City, Oklahoma 73103
(918) 235-8318

By: 
Clell I. Cunningham III, OBA #2093

ATTORNEYS FOR EMERSON CHECKRITE
FEDERAL RECOVERIES, L.P. and
GOVERNMENT FINANCIAL SERVICES
ONE, L.P.

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

F I L E D

MAY - 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CYNTHIA A. JENNINGS,
an individual,

Plaintiff,

v.

CLEVELAND HOSPITAL TRUST, a public trust,
Operator of Cleveland Area Hospital;
CLEVELAND AREA HOSPITAL,

Defendants.

Case No. 96-CV-973-H

ENTERED ON DOCKET

DATE MAY 09 1997

ORDER

This matter comes before the Court on a stipulation of dismissal with prejudice filed by both parties in this action on May 5, 1997 (Docket # 8). The parties have settled the case, and Plaintiff has agreed to dismiss her claims with prejudice. Accordingly, this case is dismissed with prejudice.

IT IS SO ORDERED.

This 7th day of May, 1997.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAY - 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 ONE HEWLETT PACKARD)
 COLOR COPIER/PRINTER,)
 MODEL NO. C3817A,)
 SERIAL NO. SG65PA204V,)
)
 Defendant.)

CIVIL ACTION NO. 96-CV-794-H

ENTERED ON DOCKET

DATE MAY 09 1997

JUDGMENT OF FORFEITURE

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

The verified Complaint for Forfeiture In Rem was filed in this action on the 29th day of August 1996, alleging that the defendant personal property, to-wit:

ONE HEWLETT PACKARD
COLOR COPIER/PRINTER,
MODEL NO. C3817A,
SERIAL NO. SG65PA204V,

is subject to forfeiture pursuant to 18 U.S.C. § 472, because it was used, fitted, or intended to be used in the making of counterfeit currency, articles, devices, or things found in the possession of any person without authority from the Secretary of

7

Treasury or other proper officer, all in violation of 18 U.S.C. § 472.

Warrant or Arrest and Seizure was issued by the Clerk of this Court on the 19th day of September, 1996, pursuant to Order of the Honorable Sven Erik Holmes, United States Judge for the Northern District of Oklahoma, for such Warrant to issue. The Warrant of Arrest and Seizure provided that the United States Department of the Treasury publish Notice of Arrest and Seizure once a week for three consecutive weeks in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant property is located.

The United States Secret Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notices In Rem on the defendant personal property and all known potential individuals or entities with standing to file a claim to the defendant personal property, as follows:

**One Hewlett Packard
Color Copier/Printer
Model No. C3817A,
Serial No. SG65PA204V**

**Served:
September 24, 1996**

Carole Triplett

**Served:
September 24, 1996**

Marty Eugene Sanders

**Served:
September 24, 1996**

Process Receipt and Return forms reflecting the service upon the defendant personal property and on Carole Triplett and Marty Eugene Sanders, the only individuals or entities known to have standing to file a claim to the defendant personal property, are on file herein.

All persons or entities interested in the defendant personal property were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

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

Carole Triplett entered into a Plea Agreement in Criminal Case No. 96-CR-126-K in this District, agreeing that the Hewlett Packard Color Copier/Printer, Model No. C3817A, Serial No. SG65PA204V, the defendant herein, would be forfeited in this civil forfeiture proceeding, because it was used, or intended to be used, in the making of counterfeit currency.

Publication of Notice of Arrest and Seizure occurred in the Tulsa Daily Commerce & Legal News, 8545 East 41st Street, Tulsa, Oklahoma, the district in which this action is filed and in

which the defendant personal property is located, on March 5, 12, and 19, 1997.

No claims in respect to the defendant personal property have been filed with the Clerk of the Court, and no persons or entities have plead or otherwise defended in this suit as to the defendant personal property, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant personal property, and all persons and/or entities interested therein.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that judgment of forfeiture be entered against the following-described defendant personal property:

**ONE HEWLETT PACKARD
COLOR COPIER/PRINTER,
MODEL NO. C3817A,
SERIAL NO. SG65PA204V,**

and that the defendant personal property above described be, and it hereby is, forfeited to the United States of America for disposition according to law.


SVEN ERIK HOLMES, Judge of the
United States District Court for the
Northern District of Oklahoma

SUBMITTED BY:

A handwritten signature in cursive script, appearing to read "Catherine Depew Hart". The signature is written in black ink and is positioned above a horizontal line.

CATHERINE DEPEW HART
Assistant United States Attorney

N: \UDD\CHOOK\FC\TRIPLETT\05809

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

JEANETTE P. TIGER,)
)
 Plaintiff,)
)
 v.)
)
 JOHN J. CALLAHAN,)
 COMMISSIONER OF SOCIAL)
 SECURITY,¹)
)
 Defendant.)

Case No. 96-C-353-W

F I L E D
MAY 07 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE MAY 09 1997

ORDER

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

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

¹Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

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

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform work-related activities, except for work involving lifting over fifty pounds. He concluded that the claimant's past relevant work as a cashier/manager of a gasoline station, cook, and waitress did not require the performance of work

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

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

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

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

related activities precluded by the lifting limitation, so the claimant's impairment did not prevent her from performing her past relevant work. Having determined that claimant's impairment did not prevent her from performing her past relevant work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts that:

- (1) The ALJ's conclusion that claimant does not have a severe mental impairment is not supported by substantial evidence.
- (2) The ALJ did not support the conclusions he recorded on the Psychiatric Review Technique Form with evidence and did not relate the findings of the psychiatric examiner and the Commissioner's staff psychologists to his conclusions.
- (3) The ALJ erred in concluding that claimant could do her past work in the retail and restaurant business, as the agency psychologists found she could not deal with the public.
- (4) The ALJ failed to obtain information from the vocational expert on the vocational impact of her mental impairment and what activities cause her stress.

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

Claimant alleges that she became unable to work on September 16, 1991, due to asthma, nervous tension, urinary incontinence, ulcers, diabetes, low back pain, and two heart attacks (TR 81). However, at the hearing on May 16, 1994, she did not mention low back pain or heart problems. She stated that the main problem keeping her from working is "the pressures, everything going on" in her neighborhood, and the

pressure of raising a 15-year-old son and 11-year-old grandson (TR 239-240). She stated that if she is not watchful at night the neighborhood kids will invade her house, drinking and taking girls to bed, and the gangs meet across the street in a big crowd and once even committed a murder there (TR 239-240, 242). She is actively involved with the school regarding her son's problems, and stated that she goes to the school almost every other day (TR 249). In addition to the housework she performs, she picks up trash from the yard, cleaning up the messes made by the gangs (TR 249).

When her attorney questioned her, she said that she has shortness of breath with all the "pressures" and can clean house only for an hour and then is out of breath (TR 241). She said she has stomach problems when she eats (TR 242). She also has bladder problems and has to change clothes sometimes due to leakage, and she had gone to Parkside Clinic to get help dealing with her son, grandson, and neighbors (TR 244-245).

Claimant testified that she takes Amitriptyline each night to help her sleep about half the month, and at other times just once a week (TR 245-246). When her attorney described a bench assembly job to her, the claimant stated that it was similar to her gas station manager's job, and that she could not do it because she had "too many places . . . to go" and people to tend to, such as her son and grandson, and she "couldn't handle the pressures of all of it" from the customers and her boss (TR 250-251).

On April 14, 1993, Dr. David Dean saw claimant for a psychiatric consultative examination (TR 112-113). While she reported to the doctor that she had a history of anxiety extending throughout the past several years, nearing panic proportions on occasion, the doctor noted that her anxiety was unassociated with phobias or hysterical behavior, she had no hallucinations or delusional thinking at any time during her life, and she had never experienced a "nervous breakdown," been hospitalized in a psychiatric hospital, sought psychiatric care on an outpatient basis, or taken a psychoactive drug (TR 112).

Dr. Dean noted that claimant lived with her mother and son and was able to manage matters of self-care and personal hygiene, as well as matters of household responsibility (TR 112). The doctor found that she was well-grounded in current external reality and showed no unusual behavior or psychomotor hyperactivity or retardation (TR 113). She was not odd nor vague in the use of language and demonstrated no blocking or inhibition (TR 113). Her speech was under normal pressure, no neologism usage was noted, and there was no loosening of the associative thought process (TR 113). She reported no auditory or visual hallucinations or delusional thinking (TR 113). While she felt herself to be less than a worthwhile person, she had no insomnia, anorexia, or weight loss (TR 113). Her affect was of a wide range and entirely appropriate to the context of the exam, she was oriented to time, place and person, and her memory and judgment were good (TR 113). The doctor concluded that she had "[g]eneralized anxiety disorder, chronic,

mild to moderate in severity, [m]ajor depression, chronic, mild to moderate in severity, [and] [m]ixed personality disorder." (TR 113).

On April 15, 1993, Dr. Carolyn Goodrich completed a Psychiatric Review Technique Form concerning claimant, which was reviewed and affirmed on August 2, 1993 by Dr. R.E. Smallwood (TR 37-47). The doctors reviewed the medical records and concluded that claimant had an affective disorder, which included depression, feelings of guilt, worthlessness, and generalized persistent anxiety, and a mixed personality disorder (TR 37-47). They concluded that these resulted in slight restriction of activities of daily living and moderate difficulties in maintaining social functioning (TR 44). They concluded that she often had deficiencies of concentration, persistence, or pace resulting in failure to complete tasks in a timely manner and had once or twice suffered episodes of deterioration in work or work-like settings which caused her to withdraw from the situation (TR 44). The summary conclusions of the doctors were that she was markedly limited in her ability to understand and remember detailed instructions, carry out detailed instructions, and interact appropriately with the general public, but had no additional limitations (TR 45-46).

The evidence in claimant's medical records reveals only situationally-based episodes of anxiety or depression. On May 31, 1985, she told her doctor that she was a victim of domestic violence and had trouble sleeping because she was "scared." (TR 191). On October 21, 1985, her doctor reported that she was anxious following an allergic reaction to tetracycline (TR 188). On December 1, 1989, she reported

that she had been depressed following the death of her husband (TR 177). On April 22, 1994, she told her doctor she had been depressed because her son was in jail (TR 206). The interviewer at the Social Security office on February 24, 1993, who helped her complete her forms, reported that she talked fast "and nervous-like" and her hands shook (TR 88).

A vocational expert was questioned at the May 16, 1994 hearing by claimant's counsel. He stated that he had reviewed the vocational information in the case and heard the testimony (TR 252). He was asked if a person of claimant's age, education, and work experience with the following impairments, "major depression that's chronic, who states that they can't work because of pressure, job pressures, who has breathing problems after an hour of doing minor housework, who says that they can't think clear and keep things straight," would be able to engage in substantial gainful activity (TR 252). He responded: "not on a sustained basis," and gave his reasoning as:

[t]he jobs as they typically exist in the national economy require that the person be able to perform basically eight hours a day, five days a week and be able to remember and carry out the instructions of the job and be able to deal with work stresses, such as getting to work on a regular basis, on time, being able to do it, paying attention to what the person is doing, be productive.

(TR 252).

There is no merit to claimant's contentions. There is substantial competent evidence to support the ALJ's conclusions concerning claimant's mental impairment which he recorded on the Psychiatric Review Technique Form, as required by the

court in Cruse v. U.S. Dept. of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1995). As also required by the Cruse court, the ALJ discussed the evidence he considered in reaching the conclusions expressed on the form which supported the conclusions. Id. at 617-618. The ALJ was required to base his evaluation of claimant's mental impairments on "evidence from qualified mental health professionals." Bishop v. Sullivan, 900 F.2d 1259, 1263 (8th Cir. 1990). He reviewed Dr. Dean's report in detail (TR 17). He also discussed her visit at the Parkside Clinic, noting that she was not admitted there, but rather referred to Family and Children's Services (TR 17). The ALJ concluded:

[a]lthough the claimant testified that she "cannot think straight," she is able to keep vigilant watch over her house and neighborhood, and deal with the schools regarding her son. She can concentrate, understand, remember, and carry out instructions. She can use judgment, respond to supervision and co-workers, deal with usual work settings and routine changes. The Administrative Law Judge finds that the claimant's anxiety/depression is not severe

(TR 17).

The ALJ noted that, because the medical evidence did not contain clinical findings and laboratory tests to support the claimant's allegations of total disability, a determination of disability had to rest solely on her subjective complaints (TR 18). The ALJ considered the claimant's alleged limitations under the criteria set out in 20 C.F.R. § 416.929 and found that they were not fully credible (TR 18). The ALJ stated that the primary reasons that claimant's allegations were found not to be fully credible were the lack of objective findings by the claimant's treating physicians, the

lack of objective findings by examining physicians, the lack of mental health treatment, and the claimant's daily activities (TR 18). The ALJ said:

[t]hese activities are essentially normal, to include normal household chores, going to football games, going fishing, driving, and a hobby of gardening. She also maintains the area in front of her house by picking up trash left by large groups of young people. The claimant's credibility is further damaged by her testimony that she has not worked at all since September 16, 1991, but medical evidence shows that the claimant injured her back moving a freezer on August 17, 1993, and on September 10, 1993, December 23, 1993, and January 20, 1994, asked for a "work release" to stay off work. To the Administrative Law Judge this is proof that the claimant was not truthful when she testified that she had not worked since September 1991.

.....

The claimant is dealing with some serious problems -- in her neighborhood, with the school, and with her son, who was jailed in April 1994. Also, the claimant missed her first scheduled hearing because she was doing community service work to pay off traffic fines. The Administrative Law Judge realizes that these are all serious, distressing problems, but they are social problems, and certainly do not qualify an individual for disability payments.

(TR 18-19).

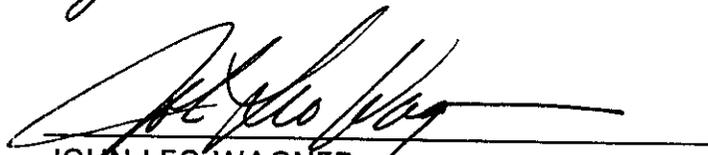
The ALJ did not discuss the conclusions of the two doctors who completed the Psychiatric Review Technique Form (TR 37-47), but he was not required to discuss them. Under 42 U.S.C. § 421(h), he was required to make every reasonable effort to ensure that a qualified psychiatrist or psychologist assessed the claimant's mental RFC, which he did. Dr. Dean assessed the claimant and submitted a full evaluation, which the ALJ discussed and relied on in concluding that claimant could return to her past employment. There was absolutely no evidence to support the conclusions of Drs. Goodrich and Smallwood, except claimant's self-serving statements on

applications. There is no explanation for their failure to reach conclusions similar to those of Dr. Dean, who actually examined her, or for their conclusion that she was markedly-limited in her ability to interact appropriately with the general public. She interacts regularly with adults at her son's school. It is clear that her claims on social security forms that she wants "to stay away from people" (TR 89, 93) are related to social problems in the neighborhood and not an inability to interact with the general public.

The ALJ was not required to consider the opinion of the vocational expert after he concluded claimant could perform her past work. Only after a determination that a claimant suffers from an impairment or combination of impairments severe enough to preclude her from returning to her prior work activity is the ALJ under an obligation to make an inquiry of a vocational expert to determine what other employment is available to her in the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990); Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

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

Dated this 6th day of May, 1997.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\ORDERS\TIGER.SS

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

FILED

MAY 07 1997

nil Lombardi, Clerk
U.S. DISTRICT COURT

JEANETTE P. TIGER,)
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN,)
Commissioner of Social Security,¹)
)
Defendant.)

Case No: 96-C-353-W ✓

ENTERED ON DOCKET

DATE MAY 09 1997

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed May 7, 1997.

Dated this 7th day of May, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan, is substituted for Shirley S. Chater, Commissioner of Social Security, as defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY - 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ELLEN GIBBS,
SS# 442-66-5083

Plaintiff,

v.

No. 96-C-299-J

JOHN J. CALLAHAN, Acting Commissioner
of Social Security Administration,^{1/}

Defendant.

ENTERED ON DOCKET

DATE MAY 09 1997

ORDER^{2/}

Plaintiff, Ellen Gibbs, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{3/} Plaintiff asserts that the Commissioner erred by finding that Plaintiff could perform her past relevant work as an electronics assembler because, (1) Plaintiff last worked as an electronics assembler more than fifteen years ago and that job is not vocationally relevant, and (2) Plaintiff does not have the residual functional capacity to perform

^{1/} Effective March 1, 1997, President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), John J. Callahan, Acting Commissioner of Social Security, is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action.

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

^{3/} Plaintiff filed an application for disability and supplemental security insurance benefits on September 1, 1992. [R. at 80]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Stephen C. Calvarese (hereafter, "ALJ") was held May 5, 1994. [R. at 536]. By order dated December 16, 1994, the ALJ determined that Plaintiff was not disabled. [R. at 23-35]. Plaintiff appealed the ALJ's decision to the Appeals Council. On February 26, 1996 the Appeals Council denied Plaintiff's request for review, and denied Plaintiff's request to reopen its prior decision denying review. [R. at 7].

13

work as an electronics assembler. Defendant asserts that Plaintiff failed to raise these issues to the Appeals Council, and is therefore precluded from raising these issues before this Court. For the reasons discussed below, the Court reverses the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born March 15, 1959. [R. at 43]. Plaintiff testified that she could stand for approximately five minutes before she would have to move, that she could sit for approximately fifteen to twenty minutes, and could walk approximately one and one-half blocks. [R. at 520-23]. Plaintiff previously worked as a nursing assistant, a cook at a fast food restaurant, and an electronics assembler. [R. at 113].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{4/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

^{4/} 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).

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

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

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff was not disabled at Step Four of the sequential evaluation. The ALJ concluded that Plaintiff retained the residual functional capacity ("RFC") to perform work-related activities involving lifting no more than ten pounds, standing/walking no more than two hours in an eight hour day, and alternating between sitting and standing at will. The ALJ found that Plaintiff's pain

^{5/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

and other symptoms did not interfere with her ability to perform work within these limitations. Based on the testimony of the Plaintiff, the ALJ determined that Plaintiff had the residual functional capacity to perform her past relevant work as an electronics assembler and was therefore not disabled.

IV. REVIEW

Prospective Application of James

Defendant initially argues that Plaintiff failed to preserve her right to a review of the issues which she currently raises in district court because Plaintiff failed to present the issues for administrative review. Plaintiff asserts that the decision relied on by Defendant, James v. Chater, 96 F.3d 1341 (10th Cir. 1996) is prospective and does not apply. Defendant addresses whether or not James is prospective in a footnote, and states only that James is not prospective because it “reiterates well established case law.”

In James, the Tenth Circuit Court of Appeals noted that “[o]rdinarily, issues omitted from an administrative appeal are deemed waived for purposes of subsequent judicial review.” James, 96 F.3d at 1343 (citations omitted). In addition, the Court observed that many circuits have applied this rule to social security opinions. The Court concluded that to effectively preserve issues and raise them at the district court, a claimant must first specifically present the issues to the Appeals Council. James, 96 F.3d at 1344. Consequently, James requires a claimant to first present issues to the Appeals Council before raising such issues to the district court.

The tenor of James is certainly prospective. The Tenth Circuit summarized its holding, noting that “we announce a prospective rule today that should have a significant salutary effect on the administrative prosecution of social security disability claims: As in other agency adjudications, issues not presented to the Secretary through the administrative appeal process may be deemed waived on subsequent judicial review.” James, 96 F.3d 1342. And, in the concluding sentence, the Court writes that “[h]enceforth, issues not brought to the attention of the Appeals Council on administrative review may, given sufficient notice to the claimant, be deemed waived on subsequent judicial review.” James, 96 F.3d at 1344 (emphasis added).

In addition, the James opinion states that it is deciding the case on the merits “[g]iven the due process concerns implicated by enforcement of a waiver rule about which the adversely affected party did not have adequate notice, through such means as direct admonition for *pro se* claimants, or published case law guidance for counsel. . . .” James, 96 F.3d 1344. This language seems to require some type of prior notice to the claimant or claimant’s counsel of the effect of a failure to present issues to the Appeals Council. In this case, the record does not indicate that Plaintiff was informed of the potential waiver, and obviously the James decision did not provide guidance within the Tenth Circuit to claimant’s counsel until after it was decided.

The James opinion certainly presents itself as prospective in nature. Defendant argues only that it is not prospective because it is only reiterating “well established case law.” To support this statement, Defendant relies on several cases which address the principle of “exhaustion of administrative remedies.” However, a claimant

may exhaust his administrative remedies (with respect to the appeal of the denial of benefits) but, because the claimant failed to present a specific issue within that appeal to the Appeals Council, the claimant (under James) may be precluded from raising a specific issue within that appeal to the district court. Consequently James, and the issues outlined by the courts in the decisions cited by Plaintiff, are not coextensive. Regardless, James certainly contemplates prospective application, and absent a more compelling argument from Defendant, the Court is reluctant to adopt an interpretation that is inconsistent with the plain language of the opinion.

Past Relevant Work: Fifteen Year Period

Plaintiff testified that she previously worked in an electronic assembly job in 1979 assembling "pc boards for computers." [R. at 528]. Plaintiff states that she last performed this work (for seven months) in 1979, more than 15 years before the ALJ's decision. Plaintiff asserts that because Plaintiff last performed the job more than 15 years before the ALJ's decision, the ALJ improperly relied upon the job as "past relevant work." [R. at 113].

The regulations provide a "general rule" that the Commissioner will not consider work experience that was obtained more than fifteen years prior to the Commissioner's decision on disability.

Work experience means skills and abilities you have acquired through work you have done which show the type of work you may be expected to do. Work you have already been able to do shows the kind of work that you may be expected to do. We consider that your work experience applies when it was done within the last 15 years, lasted long enough for you to learn to do it, and was

substantial gainful activity. We do not usually consider that work you did 15 years or more before the time we are deciding whether you are disabled (or when the disability insured status requirement was last met, if earlier) applies. A gradual change occurs in most jobs so that after fifteen years it is no longer realistic to expect that skills and abilities acquired in a job done then continue to apply. The 15-year guide is intended to insure that remote work experience is not currently applied. . . .

20 C.F.R. § 404.1565(a) (emphasis added). The plain language of the regulation provides that the Commissioner will not usually, but may consider work experience obtained more than fifteen years before the Commissioner's decision. See Pickner v. Sullivan, 985 F.2d 401, 403 (8th Cir. 1992); Smith v. Sec. of Health & Human Services, 893 F.2d 106, 108 (6th Cir. 1989). Consequently, contrary to the interpretation urged by Plaintiff, the language of the regulation does not mandate that the Commissioner ignore Plaintiff's previous work as an electronics assembler "as a matter of law."

However, the Tenth Circuit has been relatively clear that the decisions of the Commissioner must contain the reasons supporting the decision. See Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995) ("[I]t is well settled that administrative agencies must give reasons for their decisions."), citing Reyes v. Bowen, 845 F.2d 242, 244 (10th Cir. 1988). The "general rule" of the Commissioner is that work prior to fifteen years before the Commissioner's decision will not be considered. In this case the ALJ departed from the "general rule" by considering Plaintiff's work as an electronics assembler, but provided no reason for his departure. As in Kepler, "the ALJ gave his conclusion but not the reasons for his conclusion." Kepler, 68 F.3d at 390. See, e.g.,

Pickner, 985 F.2d at 403-04 ("In the present case, the Secretary properly considered appellant's 1974 secretarial/bookkeeper work experience as past relevant work because there was a continuity in job skills between that work and appellant's more recent work as a secretary/sales agent and an apartment manager.").

The regulations permit the Commissioner to consider work outside the fifteen year period. However, because the "general rule" is that such work should not be considered, the decision of the Commissioner should contain the Commissioner's reasons for departing from the general rule.

Past Relevant Work: Step Four Decision

Plaintiff additionally asserts that the ALJ erred in finding that Plaintiff could perform the work demands of an electronics assembler. The ALJ's conclusion that Plaintiff could return to her work as an electronics assembler is a decision at Step Four of the administrative process.

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

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

. . . .
[D]etailed information about strength, endurance, manipulative ability, mental demands and other job requirements must be obtained as appropriate. This information will be derived from a detailed description of the work obtained from the claimant, employer, or other informed source. Information concerning job titles, dates work was performed, rate of compensation, tools and machines used, knowledge required, the extent of

supervision and independent judgment required, and a description of tasks and responsibilities will permit a judgment as to the skill level and the current relevance of the individual's work experience.

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

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

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994); Henrie v. United States Dep't of Health & Human Services, 13 F.3d 359, 361 (10th Cir. 1993).

In this case, the ALJ concluded that Plaintiff "has the residual functional capacity to perform work-related activities except for work involving occasional lifting of more than 10 pounds, standing and walking, off and on, for more than 2 hours in an 8-hour workday, significant bending and stooping, and performing tasks not permitting the claimant to alternate sitting and standing at will." [R. at 31-32] (emphasis in original).

Under the regulations and case law, the record must contain substantial evidence to support the ALJ's finding that Plaintiff's past work as an electronics assembler does not require a physical or mental RFC in excess of Plaintiff's abilities.

In this case, a short discussion of Plaintiff's past relevant work is contained in the hearing transcript.

Q: What kind of job was it?

A: It was a assembling pc boards for computers, the electronic type machines.

Q: Is it primarily a sit down position -- sit down job then or a stand up job?

A: Well it was a stand up, but you had small bins with little parts in it.

Q: You were on your feet pretty much eight hours a day then?

A: Yes, sir.

Q: And was there a lot of bending to get things from these bins? Were the bins located pretty much waste [sic] level?

A: Yes, they were on a table at waste [sic] level.

Q: Okay, so there's not to [sic] much bending then, --

A: No.

Q: -- just mainly standing then?

A: Right.

Q: Okay. If you could get that job back again, do you think you could perform that job?

* * * *

A: Could I physically do it?

Q: Yes. Would you have any problems standing for eight hours, or doing that work for eight hours piecing pc boards together?

A: At the time that I did that type of work, they had little stools for us to sit on if it got to be to [sic] much.

Q: Okay, how about now in your present condition, do you think you could do that? Could you stand up or use the stool, whatever you need to do to get the job done? What's your opinion?

A: In my opinion, I could use the stool, but I don't believe I could stand for eight hours.

Q: If you're allowed to use the stool would you be able to put in an eight hour day -- 40 hour week, in electronic assembly?

* * * *

A: I don't know.

Q: You don't know. What might give you problems?

* * * *

A: Just the required standing for however long.

[R. at 529-30].

In a vocational report dated December 15, 1990, Plaintiff noted that her job as an electronics assembler required walking for eight hours each day, standing for eight hours each day, sitting one hour each day, bending occasionally, and lifting and carrying boards and components approximately 150 feet. [R. at 116]. In a separate vocational report, Plaintiff noted that the electronics assembler job required walking for eight hours, standing for eight hours, sitting for zero hours, and frequent bending.

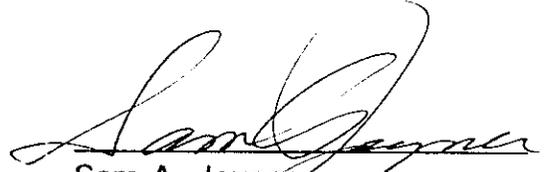
The ALJ does not, in his assessment of Plaintiff's RFC, indicate Plaintiff's standing capabilities, except to note that Plaintiff should not stand or walk for more than two hours in a day. Plaintiff's description of her position as an electronics assembler, which is the only evidence in the record with respect to the requirements of that job, suggest that the job, as she performed it, required significantly more standing than the ALJ found within Plaintiff's capability. In addition, although the ALJ found that Plaintiff's physical RFC required that Plaintiff be able to sit and stand at will, the record is not clear that the job of an electronics assembler would permit Plaintiff to sit and stand at will.

On remand, the ALJ should include, in the decision, the reasons for relying on a job that is outside the "fifteen year period." In addition, the ALJ should make certain that the job requirements clearly match Plaintiff's abilities in accordance with Henrie and the regulations. If Plaintiff is unable to perform her past relevant work, the ALJ should proceed to Step Five.^{6/}

^{6/} The Court notes that it in no way intends to suggest that Plaintiff is or is not disabled. With respect to Plaintiff's ability to work, the record suggests that Plaintiff's own doctors recommend that she consider

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

Dated this 7 day of May 1997.


Sam A. Joyner
United States Magistrate Judge

"some other line of work." [R. at 231].

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

ELLEN GIBBS,
SS# 442-66-5083

Plaintiff,

v.

JOHN J. CALLAHAN, Acting Commissioner
of Social Security Administration,^{1/}

Defendant.

MAY - 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-299-J

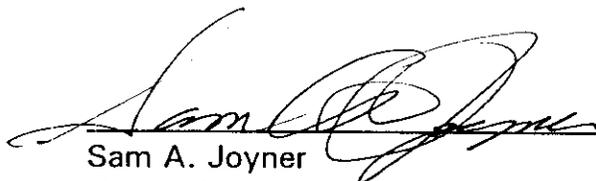
ENTERED ON DOCKET

DATE MAY 09 1997

JUDGMENT

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

It is so ordered this 7 day of May 1997.



Sam A. Joyner
United States Magistrate Judge

^{1/} Effective March 1, 1997, President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), John J. Callahan, Acting Commissioner of Social Security, is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action.

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

FILED

MAY - 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STATE BANK & TRUST, N.A.,
a national banking association,

Plaintiff,

vs.

JOHN CHRIST; CREW RESOURCES, a
trust; DENNIS DAZEY, individually and
as trustee of CREW RESOURCES, a
trust; MARCUS CRAIG OSWALT; and
JIM LAMBERT,

Defendants.

Case No. 96-C-414H

ENTERED ON DOCKET
MAY 03 1997
DATE

ORDER DIRECTING ENTRY OF JUDGMENT

ON this 17th day of April, 1997, the Pre-Trial Conference was held in this Court in the above-styled action. The Plaintiff, State Bank & Trust, N.A. ("State Bank") appeared by and through its attorneys of record, Bruce W. Freeman and David H. Herrold; the sole, remaining Defendant, Marcus Craig Oswald ("Oswald"), *pro se*, did not appear after being given proper notice of the Pre-Trial Conference by the Court and an additional thirty (30) minutes from the time the Pre-Trial Conference was scheduled to begin to appear.

Based upon Oswald's failure to respond to the Motion for Summary Judgment filed by State Bank on February 7, 1997, Oswald's failure to respond to State Bank's Request for Admissions earlier entered in the case, and Oswald's failure to appear at the Pre-Trial Conference herein to state his case or defense, the Court FINDS that judgment should be rendered against him in the amount at issue, *i.e.*, \$54,604.08.

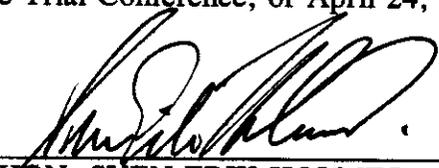
The Court FURTHER FINDS that due to the nature of State Bank's claims involved herein, *i.e.*, under the RICO Act, 18 U.S.C. §§ 1961 *et seq.*, and by virtue of the trebling

provision therein, 18 U.S.C. § 1964(c), the judgment entered against Oswald should be trebled to total \$163,812.24, which judgment is expressly determined to be "final" pursuant to Fed.R.Civ.P. 54(b) as Oswald is the remaining defendant in this case and there is no reason to delay enforcement of the judgment against him.

The Court FURTHER FINDS that because the judgment entered today against Oswald is final for purposes of Fed.R.Civ.P. 54(b), the default judgment earlier entered against Crew Resources, a trust ("Crew"), on July 11, 1996 in the amount of \$163,812.24 is also expressly determined to be "final" for purposes of Fed.R.Civ.P. 54(b) and there is no reason to delay enforcement of said judgment against Crew at this time. Each of Crew's objections to enforcement of the judgment against it are hereby *mooted* and all collection efforts of State Bank to satisfy its judgment against Crew may proceed forthwith.

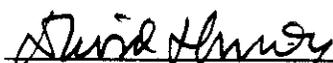
IT IS THEREFORE ORDERED that State Bank shall prepare a final Judgment in this action which incorporates the findings of this Order, submitted for the approval of counsel for Crew, and will present the Judgment for this Court's approval and entry on or before the expiration of ten (10) days from the date of the Pre-Trial Conference, or April 24, 1997.

Dated: ^{MAY} April 7, 1997.



HON. SVEN ERIK HOLMES
United States District Judge

Submitted by:



Andrew R. Turner (OBA No. 9125)
Bruce W. Freeman (OBA No. 10812)
David H. Herrold (OBA No. 17053)

of
CONNER & WINTERS,
A Professional Corporation
15 East Fifth Street, Ste. 2400
Tulsa, Oklahoma 74103
(918) 586-5711
Attorneys for Plaintiff STATE BANK & TRUST, N.A.

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

FILED

MAY - 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

G. BRYANT BOYD,)
)
Plaintiff,)
)
vs.)
)
JOHN HANCOCK MUTUAL LIFE)
INSURANCE COMPANY, a foreign)
insurance company,)
)
Defendant.)

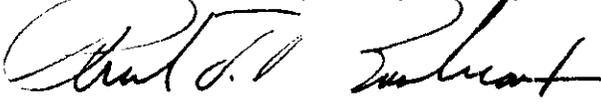
Case No. 96-CV-542-B

DATE MAY 8 1997

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, Plaintiff, G. Bryant Boyd, and Defendant, John Hancock Mutual Life Insurance Company, hereby stipulate that this action shall be and hereby is dismissed with prejudice to the refileing thereof.

DATED this 7th day of May, 1997.


Paul T. Boudreaux, OBA #990
ATKINSON, HASKINS, NELLIS,
BOUDREAUX, HOLEMAN, PHIPPS
& BRITTINGHAM
525 South Main, Suite 1500
Tulsa, Oklahoma 74103-4524
(918) 582-8877

ATTORNEY FOR PLAINTIFF


Patricia Ledvina Himes, OBA #5331
GABLE GOTWALS MOCK SCHWABE
KIHLE GABERINO
2000 Boatmen's Center
15 West Sixth Street
Tulsa, Oklahoma 74119-5447
(918) 582-9201

ATTORNEYS FOR DEFENDANT

CJT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JEAN PROCTOR, as)
Administrator of the Estate of)
Ronald Proctor and as Mother)
and Next Friend of Randy Lee)
Proctor, Robert Wayne Proctor,)
and Camilia D. Johnson, as)
Mother and Next Friend of)
Marsha Leann Proctor and)
Melissa Kay Proctor,)

Plaintiffs,)

v.)

UNITED STATES OF AMERICA,)

Defendant.)

Case No. 95-C-1017-E /

FILED
MAY - 8 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE MAY 09 1997

STIPULATION OF DISMISSAL

The plaintiffs, Jean Proctor, as Administrator of the Estate of Ronald Proctor and as Mother and Next Friend of Randy Lee Proctor, Robert Wayne Proctor, and Camilia D. Johnson, as Mother and Next Friend of Marsha Leann Proctor and Melissa Kay Proctor, by their attorney of record, Stephen Grayless, and the defendant, United States of America, acting on behalf of the United States Department of Health and Human Services, Public Health Services, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, having fully settled all claims asserted by the plaintiff in this litigation, hereby stipulate to, and request entry by the Court of, the order submitted herewith dismissing all such claims with prejudice.

Dated this 8th day of ~~March~~ ^{May}, 1997.

Phil Pinnell

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

Stephen Grayless

STEPHEN GRAYLESS
Attorney for Plaintiffs
1718 S. Cheyenne Ave.
Tulsa, OK 74119
(918) 587-3366

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

ANNETTE A. BLANKE, as mother)
and guardian of JESSE BLANKE,)
a minor,)
)
Plaintiffs,)
)
v.)
)
BILLY E. ALEXANDER,)
individually, BUILDERS)
TRANSPORT, INC., a foreign)
corporation, and PLANET)
INSURANCE COMPANY a/k/a)
RELIANCE NATIONAL INDEMNITY)
COMPANY, a foreign corporation,)
)
Defendants.)

ENTERED ON DOCKET

DATE MAY 0 8 1997

No. 96-CV-740B ✓

FILED
IN OPEN COURT

MAY - 7 1997 *MW*

PHIL LOMBARDI, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

COURT ORDER APPROVING SETTLEMENT AGREEMENT WITH MINOR

NOW on this the 7 day of MAY, 1997, this matter coming on before me the undersigned Judge of the United States District Court for the Northern District of Oklahoma, and having heard testimony of witnesses sworn and statement of counsel and being fully advised in the premises herein finds as follows:

That on the 7th day of December, 1994, the parties hereto were involved in an automobile accident. That as a result of the automobile accident, the minor child, Jesse C. Blanke, was allegedly injured, and a claim has arisen that is disputed both as to the liability and damages. The parties have reached a compromise agreement and have requested that the Court approve the settlement.

The Court finds that Annette A. Blanke is the proper party to act on behalf of the minor child, and that she is competent and is hereby appointed guardian ad litem.

*cc/ hand deliver to counsel
now*

21

The Court finds that a compromise agreement has been reached, wherein Billy E. Alexander, Builders Transport, Inc., and Planet Insurance Company, a/k/a Reliance National Indemnity Company (hereinafter "Defendants"), have agreed to settle all claims of Annette A. Blanke and Jesse C. Blanke for such claims as are derivative of injuries sustained by Jesse C. Blanke, for the amount of \$70,000.00 (Seventy Thousand and 00/100ths Dollars) to be paid in two installments, the first payment due on May 7, 1997, and the second thirty days thereafter.

Defendants have offered to pay to Annette A. Blanke, individually, the sum of \$12,071.00 (Twelve Thousand, Seventy One and 00/100ths Dollars), representing her claim for all necessary and incidental expenses, past and future, incurred or to be incurred because of the alleged injuries to the minor Plaintiff, and for loss of love, services and affection of the minor child due to said alleged injuries.

Further, Defendants have offered to pay to Jesse C. Blanke (the minor Plaintiff), by and through his parents and next friends, the sum of \$57,929.00 (Fifty-Seven Thousand, Nine Hundred and Twenty Nine and 00/100th Dollars), representing full payment for pain and suffering, both past and future, permanent disability, disfigurement and any other claim the minor child may have now, or which may arise in the future, known or unknown, resulting from the said accident.

The Court finds that the Plaintiff has reached an informed decision to waive the right to trial by jury. That Annette A. Blanke is fully aware of the consequences of settlement of this

matter and is aware that once the Court approves this settlement, and the settlement proceeds have been paid, that both the parents and the minor, even after reaching the age of majority, shall be forever barred from making any additional claims as a result of the subject accident, even if the medical condition of the minor child does not progress as presently anticipated or shall unexpectedly change for the worse after this settlement.

The Court finds that the parties have agreed, and the Court so orders that the parent, Annette A. Blanke, individually, and as parent and guardian, shall pay any and all outstanding medical bills, liens, attorneys' fees, and all other claims made against the settlement proceeds, and shall indemnify the Defendants from any further loss, as set out in the Application herein.

The Court has heard testimony as to the medical condition and prognosis of the minor Plaintiff, and as to the other elements of damage and liability in the case, and finds that the settlement agreement is fair, equitable, and in the best interest of the minor child. That it was entered into free from fraud, coercion, and duress by the parties, their agents, insurers, or attorneys. Said agreement is hereby approved by the Court.

The Court finds that Mark Thetford, as attorney for the injured minor and the mother and guardian, is entitled to receive an attorney's fee and cost reimbursement in the combined sum of \$24,500.00 (Twenty-Four Thousand, Five Hundred and 00/100ths Dollars) to be taken out of the settlement received by the parent individually. The Court finds that said fee is reasonable and is hereby approved.

The Court finds that the Defendants, by settling this case, are not admitting negligence, liability or fault, and have not waived any defenses available to them in cases that may result from this accident in the future, cases currently pending in other courts, or Annette A. Blanke v. Billy Alexander, No. 96-5200, currently on appeal in the Tenth Circuit Court of Appeals, nor is Annette Blanke waiving any claims, arising from her own personal injuries or injuries which may have been sustained by her minor daughter Krista Blanke, in the case of Annette A. Blanke v. Billy Alexander, No. 96-5200.

The Court finds and hereby orders that the proposed settlement, as set forth above in the Application, should be and is hereby approved, and upon payment of the settlement proceeds, the Defendants shall be deemed to be released from any and all further liability to the other parties as a result of the automobile accident described herein.


MAGISTRATE JUDGE SAM A. JOYNER
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

APPROVED AS TO FORM AND CONTENT:

ANNETTE A. BLANKE, individually and as
parent and guardian of JESSE C. BLANKE,
a minor


MARK THETFORD, OBA #12893
Attorney for the Plaintiff


DANIEL E. HOLEMAN, OBA #11865
JOHN W. TURNER, OBA #17155
Attorney for the Defendants

351\19\friendly.tcm\jwt

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

ANNETTE A. BLANKE, as mother)
and guardian of JESSE BLANKE,)
a minor,)
)
Plaintiffs,)
)
v.)
)
BILLY E. ALEXANDER,)
individually, BUILDERS)
TRANSPORT, INC., a foreign)
corporation, and PLANET)
INSURANCE COMPANY a/k/a)
RELIANCE NATIONAL INDEMNITY)
COMPANY, a foreign corporation,)
)
Defendants.)

ENTERED ON DOCKET
MAY 09 1997
DATE _____

No. 96-CV-740B ✓

FILED
IN OPEN COURT

MAY - 7 1997

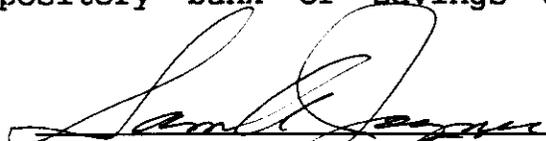
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

SUPPLEMENTAL ORDER

NOW on this 7th day of May, 1997, the sum of Seventy Thousand and 00/100ths Dollars, (\$70,000.00), payable in two installments, and to be recovered by the parent and guardian for and on behalf of Jesse C. Blanke, a minor, after deducting the amount of \$36,571.00 (Thirty-Six Thousand, Five Hundred, Seventy One and 00/100ths Dollars), said sum being sufficient to pay the costs and expenses, including medical bills and attorneys' fees, the Court orders in accordance with 12 O.S. Supp. § 83 that the remaining sum of \$33,429.00 (Thirty Three Thousand, Four Hundred and Twenty-Nine and 00/100ths Dollars), be deposited with or having been deposited with First Bank of Okmulgee, a banking or savings and loan institution, hereby approved by this Court to receive such deposit, in a savings account to be held at interest for the benefit of such minor and to be withdrawn or after Jesse C. Blanke's eighteenth (18th) birthday on May 26, 2002, or by the

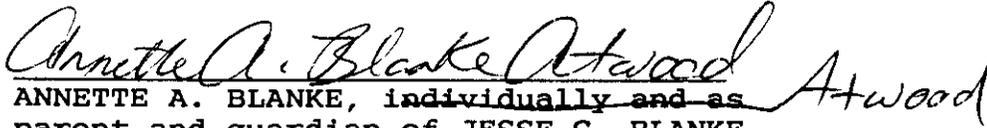
22
cc of hand delivered
to counsel
for

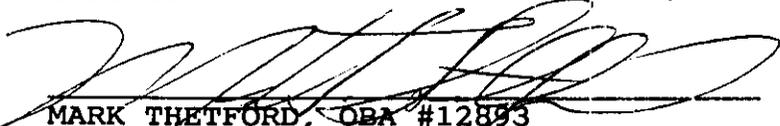
express Order of this Court executed and issued only by a Judge of this Court. Such withdrawal before May 26, 2002, will be authorized by the presentation of a certified copy of such Order which expressly directs the appropriate disposition of the funds, including the amount to be withdrawn and to whom it shall be paid. Such said account shall be styled and administered in accordance with the rules of the depository bank or savings and loan institution.

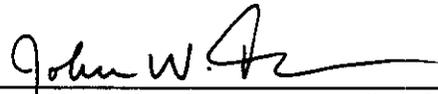

MAGISTRATE JUDGE SAM A. JOYNER
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

351\19\friendly.tcm\jwt

APPROVED AS TO FORM AND CONTENT:


ANNETTE A. BLANKE, ~~individually and as~~ Atwood
parent and guardian of JESSE C. BLANKE,
a minor


MARK THETFORD, OBA #12893
Attorney for the Plaintiff


DANIEL E. HOLEMAN, OBA #11865
JOHN W. TURNER, OBA #17155
Attorney for the Defendants

351\19\friendly.tcm\jw

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

ANNETTE A. BLANKE, as mother)
and guardian of JESSE BLANKE,)
a minor,)
)
Plaintiffs,)

ENTERED ON DOCKET

DATE MAY 09 1997

v.)

No. 96-CV-740B ✓

BILLY E. ALEXANDER,)
individually, BUILDERS)
TRANSPORT, INC., a foreign)
corporation, and PLANET)
INSURANCE COMPANY a/k/a)
RELIANCE NATIONAL INDEMNITY)
COMPANY, a foreign corporation,)
)
Defendants.)

FILED
IN OPEN COURT

MAY - 7 1997 *W*

Public Defender
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL

NOW on this 7 day of MAY, 1997, this matter coming on before me the undersigned Magistrate Judge for the United States District Court for the Northern District of Oklahoma, and the Court having previously approved the settlement agreement between the parties hereto and having received the Stipulation of Dismissal, finds as follows:

That each of the parties to this matter have entered into a settlement agreement which has been fully satisfied and is binding upon each of the parties to this action. Pursuant to the terms of said settlement agreement, that this action is now herein dismissed with prejudice and that the Plaintiff shall be forever barred from pursuing this matter further against the Defendants.

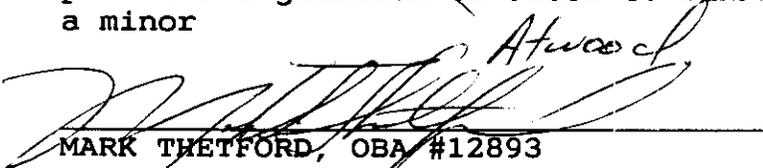
[Signature]
MAGISTRATE JUDGE SAM A. JOYNER
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

24

cc) hand delivered to court

APPROVED AS TO FORM AND CONTENT:


ANNETTE A. BLANKE, ~~individually and as~~ *Atwood*
parent and guardian of JESSE C. BLANKE,
a minor


MARK THETFORD, OBA #12893
Attorney for the Plaintiff


DANIEL E. HOLEMAN, OBA #11865
JOHN W. TURNER, OBA #17155
Attorney for the Defendants

351\19\friendly.tcm\jwt

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

ANNETTE A. BLANKE, as mother)
and guardian of JESSE BLANKE,)
a minor,)
)
Plaintiffs,)
)
v.)
)
BILLY E. ALEXANDER,)
individually, BUILDERS)
TRANSPORT, INC., a foreign)
corporation, and PLANET)
INSURANCE COMPANY a/k/a)
RELIANCE NATIONAL INDEMNITY)
COMPANY, a foreign corporation,)
)
Defendants.)

ENTERED ON DOCKET

DATE MAY 09 1997

No. 96-CV-740B ✓

FILED
IN OPEN COURT

MAY - 7 1997

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

ACKNOWLEDGEMENT OF RECEIPT OF FUNDS

COME NOW the Plaintiff, and herein acknowledges receipt of all funds to be paid pursuant to the settlement agreement entered into between the parties and approved by the Court on the 7 day of May, 1997, resulting from bodily injuries sustained by Jesse C. Blanke, a minor, in an accident that occurred on or about the 7th day of December, 1994. I understand and agree that said payment releases and discharges the Defendants from all liability to the Plaintiff for all claims that have resulted or may result, either known or unknown, from said accident.

Dated this 7 day of May, 1997.

Annette A. Blanke
ANNETTE A. BLANKE, as parent and guardian of JESSE C. BLANKE, a minor

Mark Thetford
MARK THETFORD, OBA #12893
Attorney for the Plaintiff

Copy hand delivered to court

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

ANNETTE A. BLANKE, as mother)
and guardian of JESSE BLANKE,)
a minor,)

Plaintiffs,)

v.)

BILLY E. ALEXANDER,)
individually, BUILDERS)
TRANSPORT, INC., a foreign)
corporation, and PLANET)
INSURANCE COMPANY a/k/a)
RELIANCE NATIONAL INDEMNITY)
COMPANY, a foreign corporation,)

Defendants.)

ENTERED ON DOCKET
DATE MAY 09 1997

No. 96-CV-740B

FILED
IN OPEN COURT

MAY - 7 1997 *PL*

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

STIPULATION OF DISMISSAL

COME NOW the parties to this action, the Court having previously heard statement of counsel and testimony of witnesses sworn and having approved the settlement agreement, and pursuant to the terms of said settlement agreement, do hereby stipulate that the settlement has been satisfied and that this matter should be dismissed with prejudice to its refiling.

WHEREFORE, the parties pray that this Honorable Court enter its Order dismissing this matter with prejudice as to refiling.

Annette A. Blanke Atwood
ANNETTE A. BLANKE, ~~individually~~ *Atwood*
and as mother and guardian of
JESSE C. BLANKE *Atwood*

Mark Thetford
MARK THETFORD, OBA #12893
Attorney for Plaintiff

*copy sent
delivered to
counsel
7/11/97*

20

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

F I L E D
MAY 7 1997 *PLW*

ALLSTATE INSURANCE COMPANY,)
an Illinois corporation,)
)
Plaintiff,)
)
vs.)
)
MICHAEL PARSONS, an individual, and)
CHRISTINA STILLION, an individual,)
)
Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-587-B ✓

ENTERED ON DOCKET
DATE MAY 08 1997

ORDER

Before the Court is the motion for summary judgment filed by plaintiff Allstate Insurance Company ("Allstate") (Docket No. 15) and the motion to strike the affidavit of Karon Holmes filed by defendant Michael Parsons ("Parsons") (Docket No. 22). At the hearing before the Court on May 2, 1997, the Court denied Parsons' motion to strike Ms. Holmes' affidavit and took under consideration Allstate's motion for summary judgment. Also at that time the Court consolidated this case with the lawsuit brought by Parsons in the Eastern District of Oklahoma, Michael Parsons v. Allstate Insurance Company, Case No. 97-C-322-B.¹ In the Eastern District action, the district court found that Parsons' breach of contract and bad faith claims were compulsory counterclaims to this declaratory judgment action, and thus transfer to this Court was appropriate. *Order of March 31, 1997, Case No. CIV-96-465-B.*

At the May 2, 1997 hearing, the parties agreed that the issue of the amount of uninsured motorist ("UM") coverage under Policy # 010498172 is a matter of law and appropriate for summary

¹All future filings are to be in the lower numbered case, 96-C-587-B.

judgment, as the material facts are undisputed. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). Accordingly, although Parsons has not formally moved for summary judgment, the Court considers the issue presented by cross-motions for partial summary judgment.² For the reasons set forth below, the Court grants partial summary judgment to Parsons and against Allstate on Allstate's claim for declaratory judgment.

A. FACTUAL SUMMARY

Allstate insured Parsons and his former wife, Michaelyn Parsons, under an automobile insurance policy, Policy No. 010498172 (the "policy"). On April 7, 1993, Ms. Parsons signed an Uninsured Motorist ("UM") Coverage selection form rejecting UM coverage. The Parsons subsequently divorced and Ms. Parsons was removed from the policy, leaving Parsons as the single named insured under the policy. When there is a change in the named insured under an automobile insurance policy, Oklahoma's Uninsured Motorist Statute requires the insurer to make a new offer of UM coverage. Okla. Stat. tit. 36, §3636(G). Allstate failed to secure a new UM selection form from Parsons.

On August 12, 1995, Parsons was involved in an automobile accident in Tulsa County. As a result of the accident, Parsons made a claim to recover UM coverage under the policy. When Allstate informed Parsons that his policy did not provide UM coverage, Parsons took the position that Allstate was required to impute UM coverage to his policy in the amount equal to his liability coverage, \$100,000/\$300,000. In response, Allstate secured a legal opinion from its

² Due to the consolidation of the Eastern District case with this case, the motion for summary judgment is now a partial motion for summary judgment.

counsel concerning the legal effect of its failure to secure a new UM selection form from Parsons. The opinion notes that since the UM statute was amended in 1990, "the Oklahoma Supreme Court has not addressed the issue of the effect of an insurer's failure to comply with the statute." *Ex. C., Appendix to Plaintiff's Brief in Support of Motion for Summary Judgment*. However, the legal opinion continues, the Oklahoma Court of Appeals in *Perkins v. Hartford Ins. Co.*, 889 P.2d 1262 (Okla. App. 1994), "has held that the effect is that the insured will be granted UM coverage equal to his liability limits." *Id.* Noting that *Perkins* is "merely persuasive authority, and is not precedent," the opinion concludes:

In our opinion, Allstate has two options in this case. Allstate can simply grant Mr. Parsons UM coverage equal to his liability limits, or pursue a declaratory judgment action asking the court to certify to the Oklahoma Supreme Court the question of the effect of an insurer's failure to obtain the statutorily mandated UM rejection form as required by the amended statute.

Id.

It is undisputed that Allstate elected to amend the policy to grant Parsons UM coverage equal to his liability limits of \$100,000/\$300,000, that it amended the policy, and that it advised Parsons of the amendment on November 30, 1995. *Exs. B, C, and D to Response and Objection to Plaintiff's Motion for Summary Judgment*. However, in a letter dated June 21, 1996, Allstate informed Parsons' counsel that Allstate had changed its position on the amount of UM coverage in the policy based on the recent Oklahoma Supreme Court decision, *May v. National Union Fire Ins. Co.*, 918 P.2d 43 (Okla. 1996), in which the Court held that an insurer who fails to secure a UM selection form is required to impute to the policy only the minimum coverage required by Oklahoma law, *i.e.*, \$10,000. *Ex. G, Appendix to Plaintiff's Brief in Support of Motion for Summary Judgment*. This declaratory judgment action followed four days later on June 25, 1996

seeking a ruling that the maximum limits of UM coverage under the policy is \$10,000.³

B. ANALYSIS

Allstate concedes that the policy was amended to provide UM coverage with limits of \$100,000/\$300,000. However, Allstate argues that this amendment was “by operation of law based primarily upon the *Perkins* decision,” and when the law changed with the *May* decision, the UM coverage “imputed” to the policy changed “by operation of law” to \$10,000/\$20,000.

The Court disagrees. The term “operation of law” “expresses the manner in which rights, and sometimes liabilities, devolve upon a person by the mere application to the particular transaction of the established rules of law, *without the act or cooperation of the party himself.*” Black’s Law Dictionary, 985 (rev. 5th ed. 1979) (emphasis added); see *Turgeon v. Schneider*, 531 A.2d 1200 (Vt. 1987); *McQuillen v. National Cash Register Co.*, 22 F.Supp. 867, 872 (D.Md. 1938). Allstate admits that at the time it amended the policy to provide for UM coverage of \$100,000/\$300,000, there were no “established rules of law” as to the effect of the insurer’s failure to comply with Okla. Stat. tit. 36, §3636(G). The June 21, 1996 letter from Allstate to Parsons’ counsel acknowledges that “[a]t the time in which UM coverage was imputed onto Mr. Parsons’ policy, the law was uncertain concerning the amount of UM coverage which was required to be added to the policy.” *Ex. C, Appendix to Plaintiff’s Brief in Support of Motion for Summary Judgment*. The legal opinion relied upon by Allstate expressly states that *Perkins* was “merely persuasive” and not precedential authority. *Ex. C, Appendix to Plaintiff’s Brief in*

³ Allstate stipulates that since the policy insured two vehicles, the maximum limits of UM coverage available to Parsons is \$20,000 based on “stacking” which is permitted under Oklahoma law.

Support of Motion for Summary Judgment. Based on the lack of “established law,” the legal opinion advised that Allstate could either elect to grant Parsons UM coverage equal to his liability coverage of \$100,000/\$300,000, as he demanded, or file a declaratory judgment action certifying the question to the Oklahoma Supreme Court. *Id.* Allstate chose the former course and amended the policy, rather than litigate the issue. Thus by Allstate’s “act” and “cooperation,” the policy was amended to reflect UM coverage of \$100,000/\$300,000. The fact that the *May* decision later established the amount of UM coverage statutorily imputed to an insurance policy due to the insurer’s failure to secure a UM Selection Form does not permit a unilateral change of rights previously agreed to and established by the parties.

Based on the above, the Court denies Allstate’s motion for summary judgment (Docket No. 15) and grants partial summary judgment to Parsons on the amount of UM coverage under the policy, *i.e.*, \$100,000/\$300,000 as amended and acknowledged by the insurer, Allstate Insurance Company.

ORDERED this ^{7th}~~7~~ day of May, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT COURT

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

MAY 7 1997 *PLW*

MARILYN MOORE,

Plaintiff,

Phil Lombardi, Clerk
U.S. DISTRICT COURT

v.

No. 96-CV-815-B ✓

OKLAHOMA CENTRAL CREDIT UNION,
a State Chartered Financial
Institution,

ENTERED ON DOCKET

DATE MAY 08 1997

Defendant.

ORDER GRANTING JOINT MOTION FOR DISMISSAL WITH PREJUDICE

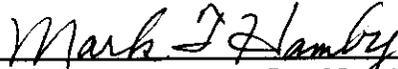
THIS MATTER having come before the Court on the joint motion of all parties for dismissal, with prejudice, of all claims in this action pursuant to a settlement and compromise, it is therefore

ORDERED, ADJUDGED, AND DECREED that this action is dismissed in its entirety with prejudice against refiling or further prosecution of such claims. The Court retains jurisdiction over this matter for the limited purpose of entertaining and ruling on an application for a finding of contempt for a violation by either of the parties of the confidentiality undertaking in the settlement agreement, and for the purpose of imposing sanctions for any such violation, if appropriate.

SIGNED this 7th day of May, 1997.

Howard R. Gentry
UNITED STATES DISTRICT JUDGE

APPROVED FOR ENTRY:



W. Allen Vaughn, Okla. Bar No. 14434
Mark T. Hamby, Okla. Bar No. 16942
HOWARD & WIDDOWS, P.C.
2021 S. Lewis Avenue, Suite 470
Tulsa, Oklahoma 74104-5714
Telephone: (918) 744-7440
Telecopier: (918) 744-9358

ATTORNEYS FOR PLAINTIFF, MARILYN MOORE



David P. Page, Okla. Bar No. 6852
Stephen R. Ward, Okla. Bar No. 13610
GARDERE & WYNNE, L.L.P.
100 W. Fifth Street, Suite 200
Tulsa, Oklahoma 74103-4240
Telephone: (918) 699-2900
Telecopier: (918) 699-2929

ATTORNEYS FOR DEFENDANT,
OKLAHOMA CENTRAL CREDIT UNION

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

FILED

MAY 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Robert Neilson)
Plaintiff,)
v.)
John Lennerts, Don Campbell,)
Metropolitan Resources Corp)
Defendant.)

95-C-1213-C

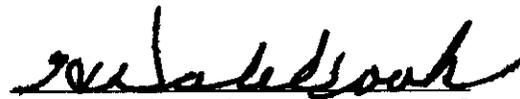
ENTERED ON DOCKET
DATE MAY 08 1997

Upon the Court's review of the above styled case and the fact that the complaint was filed on December 12, 1995 by an attorney who had not been given prior permission to file pleadings in this action, the Court finds that this case should be dismissed.

Further, this Court entered an order on April 30, 1997 denying the plaintiff counsel's application of April 16, 1997 to appear pro hac vice.

IT IS THEREFORE ORDERED that this case is hereby dismissed.

Dated this *7th* day of May, 1997.


U. S. District Court Judge
H. Dale Cook

5

ENTERED ON DOCKET

DATE 5-8-97

FILED

MAY 07 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

WILLIAM H. ROBISON, JR.,)
)
Plaintiff,)
)
vs.)
)
ARBOR J. WILLIS, JR., et al.,)
)
Defendants.)

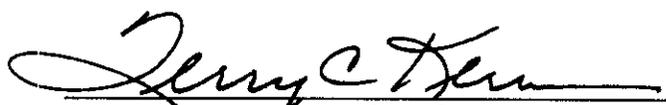
No. 96-C-690-K

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 6 day of May, 1997.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 5-8-97

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

FILED

MAY 07 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MANNY BORGES FERREIRA, et al.,)
)
Plaintiffs,)
)
vs.)
)
TMG LIFE INSURANCE COMPANY,)
)
Defendants.)

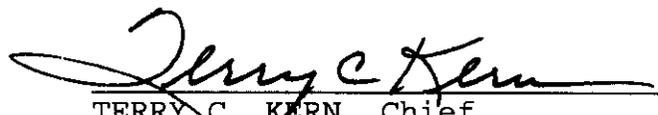
No. 96-C-805-K

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 6th day of May, 1997.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

FILED ON DOCKET
DATE 5-8-97

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

JOHN P. DRING, JR.,)
)
 Plaintiff,)
)
 vs.)
)
 THE WILLIAMS COMPANIES, INC.,)
 et al,)
)
 Defendants.)

No. 96-C-730-K ✓

FILED

MAY 07 1997 *M*

ADMINISTRATIVE CLOSING ORDER

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

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

ORDERED this 6 day of ^{May}~~April~~, 1997.

Terry C. Kern
TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

25

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

MAY 06 1997 SAC

RAY A. WHITNEY,)
)
 Plaintiff,)
)
 v.)
)
 JOHN J. CALLAHAN,)
 Commissioner of Social Security,¹)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

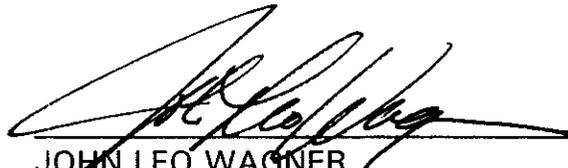
Case No: 96-C-86-W ✓

ENTERED ON DOCKET
DATE 5/8/97

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed May 6, 1997.

Dated this 6th day of May, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan, is substituted for Shirley S. Chater, Commissioner of Social Security, as defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

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

F I L E D

MAY 06 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RAY A. WHITNEY,)
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN,)
COMMISSIONER OF SOCIAL)
SECURITY, ¹)
)
Defendant.)

Case No. 96-C-86-W ✓

ENTERED ON DOCKET

DATE 5/8/97

ORDER

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

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

¹Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

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

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform a full range of sedentary work of an unskilled or semi-skilled nature, subject to alternating standing and sitting at his discretion. The ALJ concluded that claimant's impairments and residual functional capacity precluded him from

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

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

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

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

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

Claimant now appeals this ruling and asserts that there is not substantial evidence to support the ALJ's conclusion that there are a significant number of jobs that claimant can do. He alleges:

- (1) The vocational expert erred in concluding that claimant could do the semi-skilled job of service dispatcher.
- (2) The ALJ did not give his reasons for rejecting claimant's testimony concerning his educational limitations.
- (3) The number of unskilled jobs which the vocational expert found that claimant could do was not significant.

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

Claimant alleges that he has been unable to work since March 27, 1993, because of injuries to his lower back that he received in a motor vehicle accident (TR 102). On that date, he was diagnosed as having contusions, a laceration of his right hand, and back strain (TR 118-120). X-rays taken at the time were negative (TR

121). Almost a year later on February 10, 1994 he complained of back pain, and the doctor concluded that he had "[p]robable L.S. strain, chronic." (TR 125). His gait was satisfactory, but the range of motion of his lumbar spine was severely limited (TR 125).

On August 17, 1994 and December 20, 1994, claimant had pain and spasms in the lower back, but x-rays, an MRI, and EMG were normal (TR 155, 163). In January 1995, he was found to be unchanged and to have experienced maximum medical improvement (TR 153). The doctor concluded that he should receive suitable training/education to do sedentary work that would allow him "the freedom of ad lib movement." (TR 154). The doctor stated that he should have the freedom to stand, to walk, or to sit according to the requirements of his job and the needs of his back care. (TR 154).

At a hearing on August 9, 1995, the claimant testified that he has continuous pain in his lower back which is relieved by lying flat on his back (TR 40). On a zero to ten pain intensity scale, with zero being no pain and ten being the worst pain, he stated that his pain intensity was eight during the hearing and seven at other times (TR 40). He said that his neck hurts all the time and the pain intensity was five during the hearing and four at other times (TR 41). He stated that his right leg hurts with exertion and sitting (TR 41-42).

The claimant also testified that he is going to college fulltime, and when he is not in school he spends his time in bed (TR 42). He said that he can lift a bag of groceries and a gallon of milk in each hand, and stand thirty minutes, walk twenty

minutes, and sit thirty-five to forty minutes, although the ALJ noted that he sat comfortably for 45 minutes during the hearing (TR 12, 44-45). He claimed that active writing on a repetitive basis increases his neck and back pain, so he cannot write for long (TR 49).

Claimant testified that, when he was a truck driver, the only paperwork he did was keeping track of mileage and the number of items on bills of lading, and he "had trouble" with that paperwork (TR 48). His wife testified that he has trouble interacting with other people because his pain makes him "grumpy," and he has trouble with his schoolwork because his "reading and spelling are real low for college-level work, and a lot of the way the books are worded are too high a level for [him] to understand." (TR 55). She stated that his pain pills make him sleepy, so he can't do his schoolwork (TR 56).

A letter from Northeastern Oklahoma A&M College, written by the coordinator of testing and assessment, stated that claimant had to go through extensive testing to receive financial aid from the school (TR 189). It stated that claimant took the Algebra/Arithmetic test once, the Reading test twice, and the English test three times before he passed, and he had to work extremely hard just to be able to attend college (TR 189). It went on to say that he was taking Introduction to Psychology and had to drop the course, because his reading comprehension skills were too low, that he had to drop Physical Science because his math skills were insufficient, and that he had to drop Fundamentals of English and Math because he had difficulty keeping up (TR 189). The author of the letter concluded that claimant needed to take some non-

college credit classes to make the adjustment to college work and that he had the work ethic to succeed in school if given the opportunity (TR 189).

The vocational expert testified that claimant could do certain sedentary jobs that allowed him to alternate sitting and standing:

There is one that I call a scale man and it would be called a weight recorder in the DOT. It is sedentary strength demand. It's a skill level of two, which is unskilled but the reasoning level is three which would make it entry level semiskilled [I]t would be like a place where people weigh the truck empty and you just write it down and they go out and get rock and they come back and you weigh it again and give them a ticket

And I believe that this hypothetical person with the past relevant work should be able to work as a service dispatcher. It would be a sedentary strength demand. The skill level is four, which is semiskilled I think that there would be unskilled that would be a sedentary strength demand It would be a surveillance system monitor.

(TR 59-60). The vocational expert stated that there were approximately 70 weight recorder jobs, 2,126 service dispatcher jobs, and 175 surveillance system monitor jobs in Oklahoma (TR 60).

There is no merit to claimant's contention that there is not substantial evidence to support the ALJ's conclusion that there are a significant number of jobs that claimant can do. In Trimiar v. Sullivan, 966 F.2d 1326, 1330 (10th Cir. 1992), the court stated: "[t]his Circuit has never drawn a bright line establishing the number of jobs necessary to constitute a "significant number" and rejects the opportunity to do so here. Our reluctance stems from our belief that each case should be evaluated on its individual merits." The court, while refusing to draw any bright line, found 850-1,000 potential jobs were a significant number of jobs. Id. at 1330-32.

In Lee v. Sullivan, 988 F.2d 789, 794 (7th Cir. 1993), the court found that 1400 jobs constituted a significant number. In Barker v. Secretary of Health & Human Servs., 882 F.2d 1474, 1479 (9th Cir. 1989), the Ninth Circuit found that 1,266 positions were significant. In Hall v. Bowen, 837 F.2d 272, 275 (6th Cir. 1988), the Sixth Circuit found 1,350 positions were a significant number of jobs. In Jenkins v. Bowen, 861 F.2d 1083, 1087 (8th Cir. 1988), 500 jobs were found to be a significant number. In Allen v. Bowen, 816 F.2d 600, 602 (11th Cir. 1987), 174 positions were seen as significant.

The court finds that the ALJ gave proper consideration to claimant's allegations of back, neck, and leg pain under the criteria set out in 20 C.F.R. 404.1529⁴ and

⁴ The criteria in 20 C.F.R. 404.1529 are as follows:

In determining whether you are disabled, we consider all your symptoms, including pain, and the extent to which your symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence. By objective medical evidence, we mean medical signs and laboratory findings By other evidence, we mean the kinds of evidence . . . includ[ing] statements or reports from you, your treating or examining physician or psychologist, and others about your medical history, diagnosis, prescribed treatment, daily activities, efforts to work, and any other evidence showing how your impairment(s) and any related symptoms affect your ability to work. We will consider all of your statements about your symptoms, such as pain, and any description you, your physician, your psychologist, or other persons may provide about how the symptoms affect your activities of daily living and your ability to work. However, statements about your pain or other symptoms will not alone establish that you are disabled; there must be medical signs and laboratory findings which show that you have a medical impairment(s) which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all of the other evidence (including statements about the intensity and persistence of your pain or other symptoms which may

416.929 and concluded that his subjective complaints were not fully credible, based primarily on the lack of objective findings by treating doctors, the lack of medication for severe pain, the frequency of treatments by doctors, and the lack of discomfort shown by claimant at the hearing (TR 13).

The ALJ discussed this conclusion more specifically. He noted that the medical evidence did not support allegations of neck pain, since a sore left shoulder was only mentioned once (TR 13). He also noted that the claimant's left leg had not been affected specifically because the straight-leg-raising was negative (TR 14). He noted that the claimant's back showed no objective findings of a herniated disk or other pathology, as x-rays, an MRI, and an EMG were negative (TR 14). He discussed the treating physician's finding of chronic sprain of the lumbosacral area, and the limitations placed on him to do only sedentary work which allowed standing and sitting at will (TR 14).

The ALJ concluded that "[t]he claimant's credibility is substantially diminished because his treating physician does not find an objective basis for all of his complaints nor are his medications sufficient for more than mild to moderate pain" (TR 14). There was thus substantial evidence to support his conclusion that claimant had the residual functional capacity to perform a full range of sedentary work, subject to alternating standing and sitting at his discretion (TR 14).

reasonably be accepted as consistent with the medical signs and laboratory findings), would lead to a conclusion that you are disabled.

The claimant's attorney questioned the vocational expert about the writing requirements of the three jobs she found claimant could perform and she responded: "[t]he weight recorder would have -- of the two semi-skilled -- would have the least amount of writing to do. The service dispatcher would depend upon if he were at a truck terminal how often calls would come in and just puts the order down on the ticket and hand it out. Or if he were working at some place where somebody came in and said, repair my car, that would take more writing than even, you know, for the truck terminal." (TR 61). The claimant's attorney asked whether claimant could do any of the jobs if he had "zero tolerance to write," and she said no. (TR 63).

There is substantial evidence that claimant is only moderately impaired by back pain, and his contention that his neck pain precludes him from writing at work is not supported by objective medical evidence. The jobs listed by the vocational expert do not involve complex reading or writing skills. The evidence does not show that claimant is so educationally handicapped that he cannot perform the jobs of service dispatcher. His admission to college fulltime is evidence that he can do basic reading and writing. There is no reason to conclude that claimant does not have a verbal aptitude in the highest 1/3 of the population or the general learning ability and numerical aptitude in the middle 1/3, as required for the service dispatcher job.

The ALJ specifically found that claimant's allegations of pain "and other limitations" were not fully credible (TR 13). There was substantial evidence to support a conclusion that claimant's allegations of "educational limitations" were not credible. It has been recognized that "some claimants exaggerate symptoms for

purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Frey v. Bowen, 816 F.2d 508, 517 (10th Cir. 1987). Credibility determinations are generally binding upon review. Gossett v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988).

Because the vocational expert did not err in concluding that claimant could perform the work of a service dispatcher, there were a total of 2,371 jobs in Oklahoma in the three categories which she found he could perform, which is a significant number.

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

Dated this 6th day of May, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\ORDERS\WHITNEY.WPD

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

FILED

WILLIAM D. CARPENTER,)
)
Plaintiff,)
)
vs.)
)
)
STANLEY GLANZ, et al.,)
)
)
Defendants.)

MAY -7 1997

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

No. 97-CV-65-BU.

ENTERED ON DOCKET

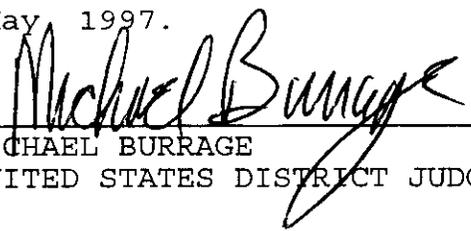
DATE MAY 08 1997

ORDER

This matter comes before the Court upon the motion of Plaintiff, William D. Carpenter, to dismiss the above-captioned case pursuant to Rule 41(a), Fed.R.Civ.P. Plaintiff seeks dismissal of the above-captioned case on the basis that he has refiled the claims along with the claims previously filed in 97-CV-66-K in 97-CV-152-BU. Upon due consideration, the Court finds that Plaintiff's motion should be granted.

Accordingly, Plaintiff's Motion to Dismiss Pursuant to Rule 41 Fed.R.Civ.Proc. filed on May 5, 1997 is **GRANTED**. The above-captioned case is **DISMISSED WITHOUT PREJUDICE**.

ENTERED THIS 7th day of May, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAY 6 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TROY ZICKEFOOSE,

Plaintiff,

vs.

No. 96-C-501-B

AMERICAN FIDELITY INSURANCE
COMPANY d/b/a CIMARRON
INSURANCE, a Kansas corporation,
and AMERICAN FIDELITY CREDIT
CORPORATION, a Kansas corporation,

Defendants.

ENTERED ON DOCKET

DATE MAY 07 1997

ORDER

Before the Court is Defendant Cimarron Insurance Company's ("Cimarron") Motion to Reconsider Remand or Alternatively Motion to Dismiss American Fidelity Credit Corporation (Docket No. 38). Having reviewed Cimarron's brief and plaintiff's response, the Court concludes there is no merit to Cimarron's motion for reconsideration. The case was properly remanded for lack of diversity jurisdiction as set forth in this Court's Order of April 9, 1997.

ORDERED this 6th day of May, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE ~~ENTERED ON DOCKET~~
NORTHERN DISTRICT OF OKLAHOMA

DATE 5-7-97

UNITED STATES OF AMERICA,

Plaintiff

v.

WANDA R. NICHOLS,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

Civil Action No. 97CV0090K ✓

FILED

MAY 06 1997 *M*

DEFAULT JUDGMENT

Phil Lombardi, Clerk
U.S. DISTRICT COURT

This matter comes on for consideration this 5 day of May, 1997, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Wanda R. Nichols, appearing not.

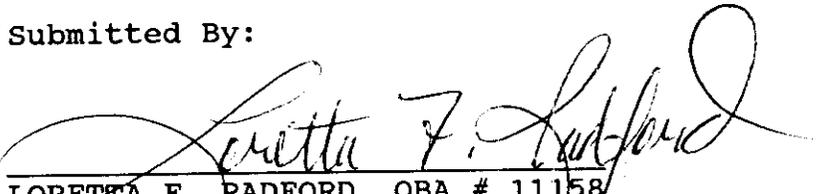
The Court being fully advised and having examined the court file finds that Defendant, Wanda R. Nichols, was served with Summons and Complaint on March 17, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Wanda R. Nichols, for the principal amount of \$761.00, plus accrued interest of \$559.92, plus interest thereafter at the rate of 8 percent per annum until judgment, a surcharge of 10% of the

amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 6.06 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

SAC

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 30 1997

LOWELL POWELL,)
)
 Plaintiff,)
)
 vs.)
)
 BURLINGTON NORTHERN RAILROAD)
 COMPANY,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 4:96-CV-00266-K

2-7-97

SATISFACTION OF JUDGMENT

WHEREAS judgment was entered for Plaintiff, Lowell Powell, and against Defendant, Burlington Northern Railroad Company, on February 6, 1997, for the sum of \$90,000.00 with post-judgment interest thereon at a rate of 5.64% as provided by law.

WHEREAS said judgment has been fully satisfied and now, therefore, the undersigned hereby acknowledge full satisfaction of same and hereby releases said judgment.

Dated this 28 day of April, 1997.

Lowell D. Powell
Lowell Powell, Plaintiff

[Signature]
Drew C. Baebler, His Attorney

FILED

MAY 06 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

Pursuant to the above and foregoing Satisfaction of Judgment, IT IS HEREBY ORDERED that the above-entitled cause be and the same is hereby dismissed.

ORDERED this 5th day of May, 1997.

ENTER. [Signature]
TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

100

Phil Lombardi

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

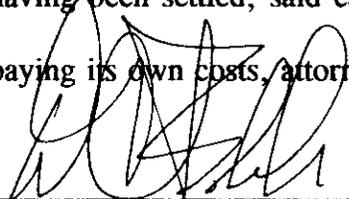
No. 4:96-CV-00266-K

ENTERED ON DOCKET
DATE 5-7-97

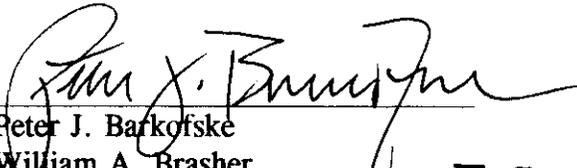
LOWELL POWELL,)
)
Plaintiff,)
)
vs.)
)
BURLINGTON NORTHERN RAILROAD)
COMPANY,)
)
Defendant.)

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

COMES NOW Plaintiff, Lowell Powell, and Defendant, Burlington Northern Railroad Company, by and through their attorneys of record and stipulate that all matters in controversy having been settled, said cause may be dismissed with prejudice to plaintiff, with each party paying its own costs, attorney's fees and expenses.



Drew C. Baebler
Michael L. Nepple
BAUER & BAEBLER
900 Walnut Street, Suite 520
St. Louis, MO 63102
(314) 241-7700
ATTORNEYS FOR PLAINTIFF



Peter J. Barkofske
William A. Brasher
BRASHER LAW FIRM, L.P.
211 North Broadway, Suite 2300
St. Louis, MO 63102
(314) 621-7700
ATTORNEYS FOR DEFENDANT

FILED

MAY 06 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

Pursuant to the above and foregoing Joint Stipulation for Dismissal with Prejudice, IT IS HEREBY ORDERED that the above-entitled cause be and the same is hereby dismissed with prejudice, with each party paying its own costs, attorney's fees and expenses.

ORDERED this 5 day of May, 1997.

ENTER: _____

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

REGISTERED ON DOCKET
5-7-97

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

JEAN MARIE AKIN,)
)
Plaintiff,)
)
v.)
)
BROWN J. AKIN, III; LAURIE E.)
AKIN; DONALD B. ATKINS;)
BRADFORD GRIFFITH; LAWRENCE)
A. G. JOHNSON; J. PETER)
MESSLER; DAN MURDOCK; TODD)
W. SINGER; and T. BRETT SWAB,)
)
Defendants.)

97 CV 408-KLJ ✓
Case No. ~~97-MC-7H~~

F I L E D

MAY 06 1997

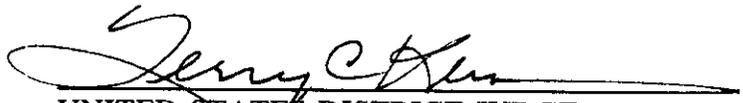
Phil Lombardi, Clerk
U.S. DISTRICT COURT

**ORDER GRANTING DISMISSAL OF DEFENDANT
MURDOCK WITH PREJUDICE**

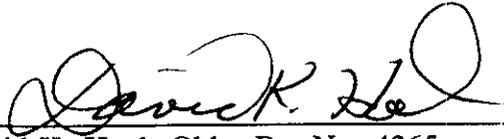
THIS MATTER having come before the Court on the agreed motion of Plaintiff Jean Marie Akin ("Akin") and Defendant Dan Murdock ("Murdock"), for dismissal, with prejudice, of all claims in this action only against Murdock, the motion is hereby GRANTED. It is therefore

ORDERED, ADJUDGED, AND DECREED that Murdock is hereby dismissed from this action, and that all claims in this action against Murdock are hereby dismissed with prejudice to any refiling.

DONE this 5 day of May, 1997.

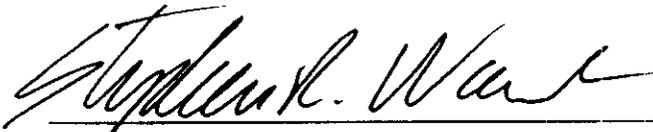

UNITED STATES DISTRICT JUDGE

APPROVED FOR ENTRY:



David K. Hoel, Okla. Bar No. 4265
P.O. Box 2796
Tulsa, Oklahoma 74101-2796
Telephone: (918) 592-2275
Telecopier: (918) 592-0155

ATTORNEY FOR PLAINTIFF, JEAN MARIE AKIN



Stephen J. Adams, Okla. Bar No. 142
Stephen R. Ward, Okla. Bar No. 013610
GARDERE & WYNNE, L.L.P.
100 W. Fifth Street, Suite 200
Tulsa, Oklahoma 74103-4240
Telephone: (918) 699-2900
Telecopier: (918) 699-2929

ATTORNEYS FOR DEFENDANT, DAN MURDOCK

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

F I L E D

MAY 05 1997 *SLR*

RONALD L. STEPHENS,

Plaintiff,

v.

JOHN J. CALLAHAN,
Commissioner of Social Security,¹

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No: 96-C-133-W ✓

ENTERED ON DOCKET

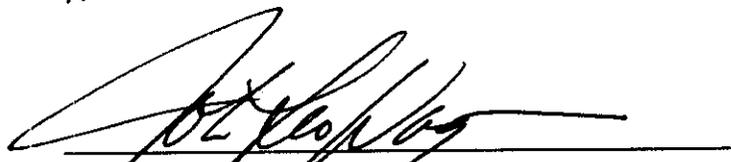
DATE

5/7/97

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed May 5, 1997.

Dated this 5th day of May, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan, is substituted for Shirley S. Chater, Commissioner of Social Security, as defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

F I L E D

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

MAY 05 1997 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RONALD L. STEPHENS,)
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN,)
COMMISSIONER OF SOCIAL)
SECURITY, ¹)
)
Defendant.)

Case No. 96-C-133-W ✓

ENTERED ON DOCKET

DATE 5/7/97

ORDER

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

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

¹Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

15

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

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertional requirements of work, except for lifting over 20 pounds, subject to only occasionally. He concluded that the claimant was unable to perform his past relevant work as a pipefitter. He found that the claimant was 51

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

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

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

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

years old, which is defined as closely approaching advanced age, had a tenth grade education and pipefitters and welding training, and did not have any acquired work skills which were transferable to the skilled or semiskilled work activities of other work. Although claimant's exertional limitations did not allow him to perform the full range of light work, the ALJ concluded that there were a significant number of jobs in the national economy which he could perform, as discussed by the vocational expert. Having determined that there were a substantial number of jobs in the national economy that claimant could perform, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ failed to follow the "treating physician" rule.
- (2) The ALJ failed to consider the combined testimony of the medical and vocational experts.

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

Claimant contends that he has been unable to work since September 13, 1990, because of back and neck pain and numbness in his legs (TR 100). On that date, he sustained an injury while lifting a heavy pipe (TR 133). His doctor prescribed traction, hot packs, and medication (TR 134). He went through a work hardening program in November of 1990 and improved "from light-medium to medium." (TR 122-124).

On January 10, 1991, x-rays and a myelogram of his lumbar spine showed a bulging disc at the L4-5 level on the left (TR 140-141). On February 5, 1991, he had an L4-5 laminectomy (TR 144-158). He went through physical therapy in March of 1991 (TR 163-173).

On May 20, 1991, his doctor, Dr. Terrill Simmons, stated:

It looks like he will have to be on Class 2-3 sedentary work on a permanent basis doing primarily office work, light lifting. It looks to me that we will need to plan on him having a vocation that involves less than 50 lbs. of lifting, carrying, and probably less of bending, stooping. He will have minimal weather changes sensitivity. Of course, exercises will help about 10% and there is probably 10% more rehabilitation in the long run. We'll see him back in 3 wks. We can begin vocational counseling.

(TR 327).

Claimant had physical therapy every day from May 1, 1991 to June 5, 1991 and was discharged at a medium physical demand level (TR 193). The therapist stated: "[p]atient is independent in his home program and should continue to progress well. Work hardening activities are discontinued at this time unless otherwise indicated by his physician." (TR 193). Claimant's doctor released him on June 10, 1991. The doctor reported:

Pt can be released from medical care. 2) He has a permanent lifting restriction of 25 lbs. He should not climb, not bend repetitively, or lift repetitively from the floor. I would recommend he not carry objects. I feel his vocational status is Class II, Light Sedentary Work; for example working on small engines, boat motors, etc., but no heavy lifting. In discussion with the patient, he may well require retraining and appears not to be able to return to his previous vocation.

(TR 327).

The ALJ correctly found that this period when the claimant could not work from August 1990 to June 1991 did not meet the durational requirement for disability under the Social Security Act. In order to be found "disabled" under the Act, a claimant must be unable to do any substantial gainful activity due to a medically-determinable physical or mental impairment which lasts twelve continuous months (20 C.F.R. § 404.1505(a)).

Claimant did not see the doctor again until April 14, 1992, when he once more complained of back and leg pain and reported that he had not returned to work (TR 324). On April 22, 1992, a CT scan of his lumbar spine showed:

A very slight asymmetric disk bulge is present on the left at L5-S1 . . . the appearance of findings here would not strongly predict clinical significance.

At L4-5, a slightly more prominent leftward asymmetric disk bulge is present on the outer corner at the lateral recess at the foraminal floor but there is no nerve root sleeve displacement or significant dural indentation and likewise this focus of findings would not strongly predict clinical significance The L4-5 findings are significantly decreased in appearance compared to the previous exam of January 1990. There is mild intervertebral disk space narrowing at L4-5.

(TR 283).

A CT scan of his cervical spine on the same date showed: [m]ild spondylosis changes are seen at multiple levels comprising mild uncal spurring. This appears largest at C4-5 on the right but the foramina are widely patent here and there does not appear to be significant dural indentation and no evidence of disk herniation. Mild, symmetric uncal spurs at C5-6 and C6-7 likewise with patent foramina and no evidence of disk herniation.

(TR 283).

On May 7, 1992, an EMG was performed on claimant's back and the study showed: "[i]nsertional activity was normal. No fibrillations or fasciculations were seen. The maximum contraction pattern was well preserved." (TR 294). Facet injections were given on May 15, 1992, giving significant improvement (TR 323). A CT scan of the lumbar spine on July 2, 1992 showed: "[m]ild disc space narrowing at L4-5 with loss of water signal within the central disc substance. These findings are unchanged since exam of April 1991. Post-surgical changes are again noted at L4-5, likewise unchanged. There is no significant canal or foraminal stenosis and no good evidence of disc herniation." (TR 300) (emphasis added). His doctor gave him a facet joint injection, and reported that the last injection had brought "significant pain relief for several weeks." (TR 320).

On May 13, 1993, another EMG revealed: "[n]ormal nerve conduction velocities with normal motor distal and proximal latencies. The only abnormality seen was slight decrease in the amplitude of the sensory latency of the ulnar nerve. The appearance of the nerve potential was slightly neuropathic." (TR 309) (emphasis added). However, his doctor reported at that time that he was spending 80% of his time in bed (TR 320). On May 24, 1993, his doctor noted that his "marked symptoms" were more severe than what would be expected from objective findings (TR 320).

Dr. Michael Farrar examined claimant on July 6, 1993, and concluded that claimant's condition was getting worse (TR 313). The doctor recommended referral to a neurological surgeon, Dr. Boxell, for consideration of the extradural defects

throughout the cervical spine area and evaluation by an orthopedic spinal surgeon of the lumbar spine. The doctor concluded:

I am of the opinion in all probability he is suffering from segmental instability of the lumbar spine. I believe that he could be benefited if he underwent diskography of the lumbar spine to prove and/or disprove the symptomatic disk lesions throughout the lumbar area. Potentially additional operative intervention may be necessary, including that of fusion. It is premature at this time to otherwise state for that would be speculative. He, therefore, at this point in time in my opinion does show an objective change in condition for the worse, subsequent to the Court's adjudication, in consideration of the cervical and lumbar spine, and is temporarily totally disabled... [but] it is premature considering him for permanent impairment.

(TR 313-314).

On August 6, 1993, Dr. Chris Boxell wrote that claimant had mild tenderness in his neck, but no distinct trigger points, his shoulders had normal range of motion, he had limited range of flexion in his back, and he had "excellent motor strength throughout the lower extremities and the upper extremities. His reflexes are present and symmetrical throughout." (TR 334). On August 10, 1993, he had a lumbar discography and was found to have normal disks, except at L4-5, where there was a degenerated pattern (TR 333). Surgery was scheduled for September 29, 1993 (TR 333). However, there is no record that the surgery was done.

On November 15, 1993, Dr. Boxell reported that claimant was having pain and tests suggested "the presence of disk disease," but he had normal range of motion (TR 352). Some of his reflexes were diminished, but he did not show any weakness in his upper extremities and he had excellent motor strength in his lower extremities (TR 352). The doctor stated that he had not had surgery as claimant was awaiting

a court decision regarding his lower back (TR 352). On November 17, 1993, the doctor reported that a myelogram and CT scan were "extremely benign" and showed "minor annular bulges, but no nerve root compression at any levels."

In spite of the studies, a lumbar fusion was done on January 24, 1994, and Dr. Boxell wrote on June 24, 1994 that claimant was "totally disabled for at least one year" from that date (TR 348). The doctor stated that the pain from the surgery "impair[ed] his ability to work." (TR 348). The doctor concluded that claimant was 25% impaired and could not return to his former work (TR 348). The doctor found that he could lift 20 pounds occasionally and 5 pounds frequently, but only stand and sit two hours in an eight-hour day and walk 2-4 hours in an eight day (TR 347).

Because of the inconsistencies between the objective medical evidence in this claim, and the claimant's allegations of total inability to work, the Administrative Law Judge requested the testimony of a medical expert witness, Michael Karathanos, M.D., a neurologist (TR 14, 33-38). Dr. Karathanos reviewed the medical evidence and stated that during the period August 1990 to June 1991, the claimant would not have been able to work at all (TR 33-34). Dr. Karathanos stated further that beginning June 1991, the claimant could lift 30 pounds maximum with no repetitive bending or lifting (TR 33-34). From April of 1992 until August of 1993 Dr. Karathanos concluded that claimant could do light sedentary work with frequent breaks and lift 10-20 pounds occasionally (TR 36). The doctor agreed that the claimant takes some medications which could cause drowsiness, to which most

people adjust, but not severe side effects, and that he should avoid working around dangerous machinery (TR 37).

There is no merit to claimant's first contention that the ALJ did not follow the "treating physician" rule. He contends that the ALJ should have followed Dr. Boxell's June 7, 1994, opinion that claimant could only stand and sit two hours per day and would be totally disabled for at least one year from the date of his surgery (Jan. 24, 1994)(TR 347-340). The medical expert did not review Dr. Boxell's report, as it was admitted at the hearing (TR 14, 68).

"A treating physician's opinion must be given substantial weight unless good cause is how to disregard it." Goatcher v. U.S. Dept. of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995); Reyes v. Bowen, 845 F.2d 242, 244-45 (10th Cir. 1988). Good cause to disregard a treating physician's opinion may be shown if such an opinion is inconsistent with substantial evidence in the record. Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). The ALJ correctly found good cause to disregard the opinion of Dr. Boxell since it was based on claimant's subjective complaints, not objective findings, and was not supported by other evidence in the record. The doctor did not find claimant unable to work until June 7, 1994, but on that date he projected that claimant would be unable to work until January of 1995. The ALJ stated his reasons for disregarding the opinion:

The ALJ notes that Dr. Boxell stated on June 7, 1994, that the claimant was totally disabled beginning August 6, 1993, and would be until January 24, 1995. This statement of total disability was not made

until the doctor learned that the claimant had applied for Social Security disability benefits. Dr. Boxell's report on August 6, 1993, however, while showing marked limitation of lumbar flexion, also showed negative straight leg raising bilaterally. Neurological examination showed excellent motor strength throughout the upper and low extremities and reflexes were present and symmetrical throughout. While every consideration is given to the opinion expressed by a physician that a claimant is disabled, such an opinion of total disability is beyond the purview of a physician's medical expertise. Under the Social Security Act a person is found to be "disabled" if he is physically or mentally unable to engage in any form of substantial gainful activity, considering his age, education, and past work history, and the Administrative Law Judge must consider all these factors to make a determination of whether a person is "disabled". Dr. Boxell's treatment notes are inconsistent with "total disability", and his statement of "total disability" is inconsistent with a Physical Capacities Evaluation he submitted dated June 7, 1994, which shows the claimant capable of performing light and sedentary work. The Administrative Law Judge, by letter dated July 8, 1994, asked Dr. Boxell to explain how he arrived at the Physical Capacities Evaluation, but this request was never honored. The Administrative Law Judge, therefore, gives no weight to the Physical Capacities Evaluation.

(TR 14-15).

Dr. Boxell's retrospective opinion that claimant would be disabled until January of 1995 was not supported by evidence in the record, as required by the court in Potter v. Secretary of Health & Human Servs., 905 F.2d 1346, 1349 (10th Cir. 1990). While claimant contends that Dr. Farrar made the same objective finding as Dr. Boxell on July 6, 1993, this is not true, as Dr. Farrar only found on that date "an objective change in condition " resulting in temporary total disability, but added that it was "premature" to consider him permanently impaired (TR 313-314).

There is also no merit to claimant's second contention that the ALJ failed to consider the combined testimony of medical and vocational experts. It is true that

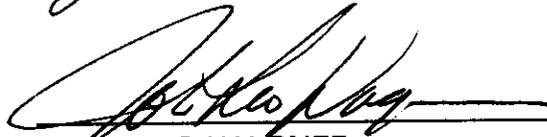
the medical expert testified that claimant could only do light sedentary work with frequent breaks to get up and move around (TR 36). The vocational expert testified that this "sitting/standing" requirement would preclude claimant from doing sedentary assembly work (TR 68), but did not find it would preclude the other jobs she had found claimant could perform earlier in her testimony, such as light machine operating jobs and light delivery driver (TR 65-68). She noted that these jobs she mentioned were representative of the types of jobs claimant could perform and not an exhaustive listing (TR 65).

It is also true that the vocational expert testified that claimant would be unable to do light assembly work if his testimony that he had no grip strength and numbness in his hands was true (TR 54-55, 68). However, Dr. Boxell did not "verify" claimant's claim on November 15, 1993; rather he found reduced grip strength (TR 352). The doctor said that "motor testing does not show any specific weakness in the upper extremities" and he could not detect any weakness in the left triceps muscle and left wrist extensor muscle group (TR 352). Grip strength on the left was half that on the right (TR 352).

While claimant stated at the hearing that he has "numbness in both hands and left arm" and "can't open a jar" or "lift a gallon of milk out of the icebox" (TR 54), there is no objective medical evidence to support these self-serving statements. It has been recognized that "some claimants exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Frey v. Bowen, 816 F.2d 508, 517 (10th Cir. 1987).

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

Dated this 2nd day of May, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\orders\ss\stephens.aff

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

FILED
MAY 1 1997

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

RAYMOND L. WOFFORD and)
MILDRED E. WOFFORD,)
)
Plaintiffs,)
)
v.)
)
AMERICAN RED CROSS and THE AMERICAN)
NATIONAL RED CROSS; FRANK FORE, M.D.,)
and ST. JOHN MEDICAL CENTER,)
)
Defendants.)

Case No. 96-CV-468-H

ENTERED ON DOCKET
DATE MAY - 6 1997

ORDER

This matter comes before the Court on a motion for summary judgment by Defendant St. John Medical Center (Docket #8). This motion does not affect Defendants American Red Cross, The American National Red Cross, and Frank Fore, M.D.

I.

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

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The

440

mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

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

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

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

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

II.

For purposes of this motion, the Court accepts as true the following facts identified by St. John:

1. Plaintiff Raymond Wofford was admitted as a patient to St. John on August 6, 1990.

2. Dr. Frank Fore performed a surgical consult on the Plaintiff and subsequently performed a three-vessel coronary artery bypass graft on August 10, 1990.

3. On August 10, 1990, two units of fresh frozen plasma and one unit of platelet concentrate were transfused to the Plaintiff.

4. American Red Cross supplied the blood and blood components for patients at St. John and performed the testing for transmissible viruses of the blood and blood components.

5. Mr. Wofford signed a hospital consent form as to his heart surgery.

The Court further accepts as true for purposes of this motion, the following facts identified by Plaintiffs:

1. The defendant hospital's policy and procedures required its employees to warn its patients, such as Mr. Wofford, of the risks of contracting hepatitis from anonymous blood transfusions.

2. The defendant hospital's policies and procedures required its employees to inform its patients of the safer alternatives to anonymous blood transfusions.

III.

In support of its motion, St. John argues that under Oklahoma law it had no duty to obtain the informed consent of Plaintiff Raymond Wofford prior to his blood transfusion. In applicable part, Goss v. Oklahoma Blood Inst., 856 P.2d 998 (Okla. App. 1990), cert. denied, (1993), provides as follows:

[W]e find no Oklahoma authority imposing a like duty on hospitals to inform patients of potential risks and/or available alternatives to a particular procedure or treatment. Our review of the authority cited by the parties hereto from other jurisdictions reveals a consistent rejection of imposition of the duty to inform on hospitals

Like these jurisdictions, we now refuse to impose upon hospitals the duty to inform patients of the material risks of a procedure prescribed by the patient's physician. To impose upon a hospital the duty to inform would be to require a hospital to intervene into the physician/patient relationship, "more disruptive than beneficial to [the] patient." In short, we believe it to be the duty of the physician ordering blood transfusions, rather than the hospital filling the physician's orders,

“to inform patients of the risks, general and specific, involved in the surgical procedures.”

Id. at 1007 (citations omitted). Based on this authority, the Court concludes that as a matter of law, the duty to inform the patient of possible complications resulting from a procedure resides with the physician, and therefore the physician, not the hospital, is responsible for obtaining the patient’s informed consent. Accord Trousdale v. City of Faith Hosp., Inc., 892 P.2d 678, 680 (Okl. App. 1995).

Plaintiffs do not claim that Oklahoma law imposed a duty on St. John to obtain Mr. Wofford’s informed consent. Instead, Plaintiffs argue that St. John voluntarily assumed such a duty by its adoption of policies and procedures requiring its employees to warn patients in advance of the risks of contracting hepatitis from anonymous blood transfusions. In support of this proposition, Plaintiffs cite Fry Land & Cattle Co. v. Colorado Interstate Gas Co., 805 P.2d 695 (Okl. App. 1991), and Restatement (Second) of Torts § 324A (1965). In applicable part, Fry Land & Cattle states as follows: “[e]ven when a person has no duty to act with regard to a matter, if he volunteers to assume that duty, either expressly or by his conduct, he must exercise ordinary care and is liable for injury resulting from his failure to do so.” Id. at 696. Similarly, Section 324A of the Restatement (Second) of Torts provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or,
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Under the authorities cited by Plaintiffs, the mere adoption of the policies and procedures referenced above does not create a duty to warn. Moreover, the facts do not support a cause of

action against St. John. There is no evidence that St. John advised Mr. Wofford of its policies and procedures or that St. John communicated with Mr. Wofford's physician or otherwise acted so as to deprive him of the assistance of others. Such actions are required to find a voluntary assumption of duty. As explained in one authoritative treatise:

If there is no duty to go to the assistance of a person in difficulty or peril, there is at least a duty to avoid any affirmative acts which make his situation worse.

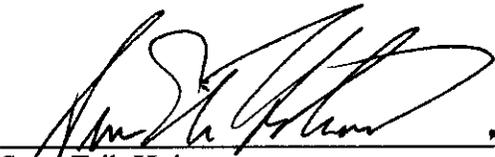
In most of the cases finding liability, the defendant has made the situation worse, either by increasing the danger, by misleading the plaintiff into the belief that it has been removed, or by depriving him of the possibility of help from other sources.

W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 56, at 378 & 381 (5th Ed. 1984). Thus, the Court holds that St. John did not assume an independent duty to warn Mr. Wofford of the risks attending his blood transfusion.

In the instant case, Mr. Wofford's physician was under a legal duty to inform him of the risks associated with his impending medical procedure. The action of St. John in adopting policies and procedures regarding informed consent did not relieve the physician of his duty, displace such duty with one of its own, or interfere with the physician's ability to discharge his duty. The record simply does not support any addition to the general principles of law articulated in Goss, or a modification of how those principles are to be applied. Therefore, this case should be decided in accordance with Goss. See 856 P.2d at 1007. Defendant St. John's Motion for Summary Judgment (Docket #8) is hereby granted.

IT IS SO ORDERED.

This 1st day of May, 1997.


Sven Erik Holmes
United States District Judge

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

FILED
MAY 5 1997 *lw*
Phil Lombardi, Clerk
U.S. DISTRICT COURT

BERNARD OLCOTT,)
)
Plaintiff,)
)
vs.)
)
DELAWARE FLOOD COMPANY, a limited)
partnership under the laws of)
Oklahoma; LAYTON OIL COMPANY, a)
Kansas corporation; WILLIAM DOUGLAS)
LAYTON, individually and as general)
partner of DELAWARE FLOOD COMPANY)
1976 DH; DELAWARE FLOOD COMPANY)
1977 EH; DELAWARE FLOOD COMPANY)
1978 FH; and DELAWARE FLOOD COMPANY)
1979 LTD., limited partnerships)
under the laws of OKLAHOMA; and M.)
MICHAEL GALES,)
)
Defendants.)

No. 83-C-179-E

ENTERED ON DOCKET
DATE MAY 06 1997

ORDER

Now before the Court is the Motion To Compel Lumbermens Mutual Casualty Company, As Surety, To Release and Make Payment on Bond Number 3s 739-134-00, Posted on Behalf of Defendants, To Plaintiff Bernard Olcott, As Well as For Payment of all "Costs, Interest and Damages for Delay", as Provided for In Said Bond, Pursuant to Tenth Circuit Court of Appeals' Affirmance of This Court's Award of Sanctions (Docket #889) of the Plaintiff Bernard Olcott; the Motion for Summary Judgment as To Plaintiff's Complaint Relating To His Investment in the Delaware Flood Company 1979 LTD Partnership (Docket #894) of the Defendants Delaware Flood Company, Delaware Flood Company 1976 DH, Delaware Flood Company 1977 EH, Delaware Flood Company 1978 FH, Delaware Flood Company 1979 LTD, and William

903

Galesi (collectively, "Delaware Flood") and Defendants William Douglas Layton and Layton Oil Company (collectively, "Layton"); and the Motion for Partial Summary Judgment (As to the Equities Mandating That This Court Retain Supplemental Jurisdiction Over Pendent State Claims in the Event of a Dismissal of the Federal Cause of Action Relating to the D.F.C. 1979 Limited Partnership Investments) (Docket #896) of the plaintiff, Bernard Olcott.

Bernard Olcott brought these securities fraud and common law claims against defendants asserting that he was defrauded by defendants in conjunction with his investments (over a four year period) in four limited partnerships. After a lengthy pretrial and discovery process, this court dismissed the federal securities claims concluding that the claims were time-barred, and also dismissed the pendent state claims, concluding that it did not have jurisdiction once the federal claims were dismissed. This Court also sanctioned defendants in the amount of \$402,527.98 for their failure to comply with orders concerning an accounting of the financial affairs of the four limited partnerships. Mr. Olcott appealed the dismissal of his claims, and, in cross-appeals, all defendants appealed the propriety of this Court's sanctions.

The Court of Appeals affirmed the award of sanctions, affirmed the dismissal of the federal securities claims for three of the investments (1976, 1977, and 1978) and reversed and remanded the dismissal of the claim for the 1979 investment and the pendent state claims. Upon remand, Olcott filed a motion for payment on the bond for the award of sanctions and a motion for partial summary judgment on the retention of jurisdiction over the pendent

state claims. The defendants filed a motion for summary judgment on the statute of limitations issue with respect to the 1979 limited partnership investment. Because the motion for summary judgment regarding pendent jurisdiction is moot if the motion for summary judgment on the 1979 limited partnership investment is denied, the Court will consider first the motion with respect to payment on the bond, then the 1979 investment, then the pendent state claims.

I. Payment on the Bond

In light of the Court of Appeals' affirmance of the sanction, plaintiff requests payment on the bond in the amount of \$402,527.98. Defendants object to the relief requested, arguing that the sanction order is neither factually nor legally a final judgment. Defendants' arguments are without merit. The substantive proceedings which remain on remand do not render the sanction order not "final." The Court of appeals noted that "[T]he district court imposed a sanction against the defendants because their failure to submit a complete, meaningful accounting directly resulted in significant costs to the court and Mr. Olcott." This fact does not change regardless of the outcome of the issues remanded for further consideration. Regardless of what is ultimately done with the remaining claims, or the concept of a default judgment, this Court has been affirmed in assessing a sanction "which equaled the total of Mr. Olcott's expenditures and the court's expert's fee."

In addition, despite the fact that a sanction order is generally non-appealable as not final, the question before this

court does not address the appealability of the sanction. The Order has been appealed and has been affirmed. There is no question as to its finality. Defendants motion to make payment on the bond (Docket #889) in the amount of \$402,527.98 is granted.

II. Summary Judgment on the 1979 Investment

The Court of Appeals affirmed the dismissal of the claims on the 1976, 1977, and 1978 investments as time-barred. The Court, remanded, however, for a determination of whether Mr. Olcott brought his federal securities claim on his 1979 investment within the one year statute of limitations period. The Court of Appeals held:

On remand, the district court must determine when Mr. Olcott had notice of the underlying 'facts constituting the violation.' [citations omitted] Inquiry notice of the underlying facts giving rise to a potential Rule 10b-5 cause of action is sufficient. [citations omitted] The statute of limitations period accrued when Mr. Olcott knew or should have known of the Rule 10b-5 violation. [citations omitted]

Defendants assert in their motion for summary judgment that the uncontradicted facts "show that at least by the end of 1980, but under no conceivable circumstances beyond March 20, 1981, plaintiff had 'discovered' facts which caused him to believe that he had been defrauded by the defendants in the purchase of his limited partnership interest in all of the partnerships, including the 1979 investment."¹

Plaintiff's own deposition testimony reveals that he believed he was being cheated by defendants more than one year prior to

¹ Plaintiff's Complaint was filed on July 9, 1982, so the issue is whether plaintiff had sufficient notice prior to July 9, 1981.

filing his complaint. He further admits that he knew he "made a bad investment" in 1980, and that he knew he was "being given excuses" for the poor performance. The bottom line is that he wanted out of his investment in 1980 because he was not realizing the return that he had been promised. The court finds that this knowledge was sufficient knowledge, in that Mr. Olcott "knew or should have known" of the facts underlying the fraud by that time.

Defendants' motion for summary judgment on the securities claim regarding the 1979 investment is granted.

III. Summary Judgment on the Pendent State Claims

Because the Court is dismissing the federal securities claim on the 1979 investment, and there are no remaining federal claims, the next question is whether the court should retain jurisdiction over the pendent state claims. In determining whether to exercise pendent jurisdiction, a district court must weigh "considerations of judicial economy, convenience and fairness to litigants." United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). In In Re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 737 (3rd Cir 1994) the district court's decision to retain jurisdiction after the federal claims had been dismissed was upheld. In that case, retention of jurisdiction was based primarily on judicial economy:

Considerations of judicial economy clearly weighed in favor of the district court retaining jurisdiction. Although considerations of judicial economy alone are generally insufficient to justify a district court's decision to retain jurisdiction, [citations omitted], we have held such concerns sufficient when they are especially strong. In Lentino v. Fringe Employee Plans, Inc., 611 F.2d 474, 480 (3rd Cir. 1979), we upheld a district court's decision to retain jurisdiction over a state law claim when plaintiffs dropped their federal

claims on the morning of trial after there had already been a year of pretrial proceedings.

In re Paoli, 35 F.3rd, at 737. In this case judicial economy also dictates that the court retain jurisdiction. Years of extensive pretrial proceedings have taken place, and, in fact, this matter was pretried In 1986, when the trial date was stricken after the defendants agreed to provide an accounting. With the pretrial proceedings essentially complete in this court, judicial economy is best served by the exercise of supplemental jurisdiction.

Fairness to the litigants also dictates that this court retain jurisdiction. While plaintiff did not demonstrate, in light of the "savings statutes" of Oklahoma and New Jersey, that he would not have any other forum in which to pursue his claims, the inordinate delay caused by the defendants in attempting to avoid providing an accounting dictates that, in fairness to plaintiff, the case should continue in the forum in which substantial work has already been done. Plaintiff's motion for partial summary judgment is granted.

The motion for payment on the bond (docket #889) is granted, defendants' motion for partial summary judgment (docket #894) is granted, and plaintiff's motion for partial summary judgment (docket #896) is granted. This matter is set for scheduling conference on June 24, 1997 at 1:30 p.m.

So ORDERED this 5th day of May, 1997.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

MAY 5 1997 *PLW*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Hassib Darweesh)
)
 Plaintiff(s),)
)
 vs.)
)
 Denny's Inc.)
)

Case #95-C-1250-E ✓

ENTERED ON DOCKET

DATE MAY 6 1997

Defendnts(s). ADMINISTRATIVE CLOSING ORDER

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

If, by July 1, 1997, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismisses with prejudice.

IT IS SO ORDERED this 5th day of May, 1997.

James L. ...

UNITED STATES DISTRICT JUDGE

18

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

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

REAL PROPERTY DESCRIBED AS FOLLOWS:)

ALL OF THAT PART OF LOT 3 OF THE)
SOUTHWEST QUARTER (SW/4) LYING)
NORTH OF THE FRISCO RAILROAD RIGHT OF)
WAY IN SECTION 9, TOWNSHIP 27 NORTH,)
RANGE 25 EAST OF THE INDIAN MERIDIAN,)
OTTAWA COUNTY, OKLAHOMA, LESS A)
TRACT DESCRIBED AS FOLLOWS:)

BEGINNING AT A POINT 653.0 FEET EAST OF)
THE NORTHWEST CORNER OF SAID LOT 3;)
THENCE S 0° 16' E 158.20 FEET; THENCE N)
58° 47' E ALONG THE FRISCO RAILROAD)
RIGHT OF WAY 305.23 FEET; THENCE WEST)
261.78 FEET TO THE BEGINNING,)

Defendant.)

ENTERED ON DOCKET.

DATE 5/6/97

Case No. 96-CV-652-J ✓

F I L E D

MAY - 5 1997 *gr*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court is Plaintiff's "Motion to Strike Claim of Dorothy O'Brien."
[Doc. No. 19]. Claimant, Dorothy O'Brien, has not filed a response to Plaintiff's
motion. The Court contacted Ms. O'Brien's counsel, Charles Whitman, by telephone
on May 5, 1995. Mr. Whitman informed the Court that he wished to confess the
motion as Ms. O'Brien no longer has an interest in the Defendant property. Ms.
O'Brien's interest in the defendant property was terminated by a January 17, 1997

divorce decree filed in the Circuit Court of McDonald County, Missouri. See Exhibit to Plaintiff's Motion to Dismiss Claim, Doc. No. 19.

For the foregoing reasons, Plaintiff's "Motion to Strike Claim of Dorothy O'Brien" is **GRANTED**. Ms. O'Brien's claim, filed October 3, 1996, is hereby stricken. See Doc. No. 3.

IT IS SO ORDERED.

Dated this 5 day of May 1997.



Sam A. Joyner
United States Magistrate Judge

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

SOUTHWESTERN WIRE CLOTH, INC.,
SOUTHWESTERN WIRE CLOTH
OILFIELD SCREENS, INC.,

Plaintiffs/Counter-Defendants,

vs.

DERRICK MANUFACTURING CORP.,

Defendant/Counter-Plaintiff,

vs.

ROBERT E. NORMAN,

Cross-Defendant.

ENTERED ON DOCKET
DATE 5-6-97

No. 95-C-1184-K ✓

FILED

MAY 05 1997

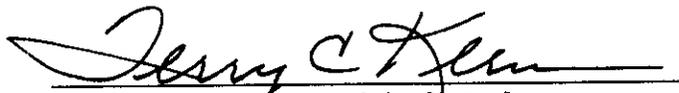
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

IN ACCORDANCE with the Order filed April 9, 1997, granting the motion for summary judgment of cross-defendant Robert E. Norman,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for cross-defendant Robert E. Norman and against cross-plaintiff Derrick Manufacturing Corporation.

ORDERED THIS 30 DAY OF APRIL, 1997


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

MAY 5 1997

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

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FILED
MAY 06 1997

Plaintiffs,)

v.)

No. 89-C-843-E

DELOITTE HASKINS & SELLS;)
W.R. HAGSTROM; and)
EDWARD L. JACOBY,)

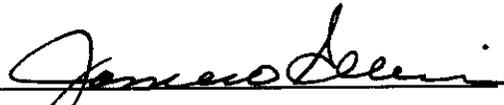
Defendants.)

ORDER DISMISSING DEFENDANTS
HAGSTROM AND JACOBY

At the pretrial conference held April 25, 1997, Plaintiffs announced their willingness to dismiss without prejudice defendants Hagstrom and Jacoby with all parties to bear their own costs and attorney fees in the action. Defendant Jacoby consented to such dismissal and defendant Hagstrom was not present.

IT IS THEREFORE ORDERED that defendants Edward Jacoby and W.R. Hagstrom are dismissed from this case, without prejudice, each party to bear his own costs and attorneys fees in the case.

Ordered this 5th day of May, 1997.


Hon. James O. Ellison
United States District Judge

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

AMERICAN AIRLINES, INC.,)
)
Plaintiff,)
)
vs.)
)
WRIGHT-LINE, INC.,)
)
Defendant.)

ENTERED ON DOCKET
MAY - 6 1997
DATE _____
Case No. 96-CV-504-Holmes

FILED
MAY 02 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DATE _____
ENTERED ON DOCKET

STIPULATION OF DISMISSAL

The parties, by and through their undersigned counsel, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure stipulate to the dismissal of this matter, with prejudice, each party to bear their respective costs and attorneys' fees.

DAVID R. CORDELL, OBA #11272

By: David R. Cordell

David R. Cordell
2400 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103-4391
(918) 586-5711
(918) 586-8547 (FAX)

Attorneys for Plaintiff,
AMERICAN AIRLINES, INC.

OF COUNSEL:

CONNER & WINTERS
2400 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103-4391

DENNIS CAMERON, OBA #12236

By: Dennis Cameron

Dennis Cameron
GABLE & GOTWALS, INC.
2000 Bank IV Center
15 West 6th Street
Tulsa, Oklahoma 74119-5447
(918) 582-9201

Attorneys for Defendant,
WRIGHT-LINE, INC.

13

CT

3. The Clerk shall mail a copy of Plaintiff's motion to dismiss (Docket #50) to Defendants' counsel of record along with this Order.

SO ORDERED THIS 30 day of April, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 5-2-97

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

SOUTHWESTERN WIRE CLOTH, INC.,)
SOUTHWESTERN WIRE CLOTH)
OILFIELD SCREENS, INC.,)
)
Plaintiffs/Counter-Defendants,)
)
vs.)
)
DERRICK MANUFACTURING CORP.,)
)
Defendant/Counter-Plaintiff,)
)
vs.)
)
ROBERT E. NORMAN,)
)
Cross-Defendant.)

No. 95-C-1184-K ✓

F I L E D

APR 30 1997 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

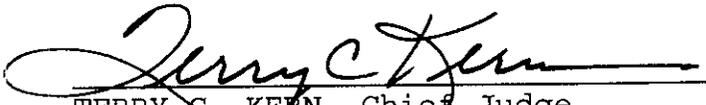
JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that on plaintiffs' claim for declaratory judgment, judgment is hereby entered in favor of defendant and against plaintiffs.

On defendant's counterclaim, judgment is hereby entered in favor of defendant and against plaintiffs in the sum of \$431,875.00, with post-judgment interest thereon at the rate of 6.06% as provided by law.

ORDERED THIS 30 DAY OF APRIL, 1997


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

135

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

FILED

MAY 01 1997

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

PATRICIA M. HILES-BARNES,)
)
Plaintiff,)
)
vs.)
)
CAMPBELL MOTEL PROPERTIES,)
INC., a California corporation, d/b/a)
TRAVELERS INN,)
)
Defendant.)

No. 96-C-998-B

ENTERED ON DOCKET

DATE MAY 02 1997

ORDER

Before the Court is the Partial Motion to Dismiss filed by defendant Campbell Motel Properties, Inc. d/b/a Travelers Inn ("Travelers Inn") (Docket No. 5). In her complaint, plaintiff Patricia M. Hiles-Barnes ("Hiles-Barnes"), a white female, alleges that while she was working for Travelers Inn as a night auditor, she was sexually harassed by the District Manager, Rich Bianco ("Bianco"). When she filed a complaint against him, Travelers Inn took no action against Bianco and instead retaliated against plaintiff making her work conditions so intolerable she was forced to resign.

Hiles-Barnes alleges that these actions give rise to a claim of employment discrimination based on sexual harassment in violation of the Civil Rights Act of 1964 as amended ("Title VII"), 42 U.S.C. §2000e-2, *et seq.*, and a claim under 42 U.S.C. §1983 against defendant Travelers Inn.

On March 25, 1997, defendant Travelers Inn moved to dismiss plaintiff's §1983 claim because Travelers Inn is a private employer and plaintiff failed to allege sufficient facts to establish that Travelers Inn was acting under color of state law. Although the time period for a response has passed, plaintiff has to date filed no response to defendant's partial motion to dismiss.

(6)

As there is no state action alleged in plaintiff's complaint and plaintiff has failed to respond to defendant's partial motion to dismiss, the Court grants defendant's motion (Docket No. 5). Accordingly, plaintiff's claim under 42 U.S.C. §1983¹ is dismissed pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim.

ORDERED this 31 day of May, 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

¹Although Plaintiff intermittently refers to 42 U.S.C. §1981 in her complaint, it does not appear that she intended to allege a §1981 claim. However, if that were Plaintiff's intention, the Court finds that Plaintiff has also failed to state a claim under 42 U.S.C. §1981.

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

FILED

MAY 01 1997 *SP*

RITA McPEAK,)
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-883-W ✓

ENTERED ON DOCKET

DATE 5/2/97

ORDER

This order pertains to Defendant's Motion to Reconsider Decision of U.S. Magistrate Judge (Docket #12) and Plaintiff's Reply to Defendant's Motion to Reconsider Decision of U.S. Magistrate Judge (Docket #13). On April 9, 1997, this case was remanded for additional development of the record concerning depression and for additional testimony by a vocational expert as to whether jobs exist in the national economy which claimant could perform, after considering Dr. Harris' 1995 evaluation and the impact of her headaches on the jobs available, as well as any additional evidence that is developed concerning depression.

Plaintiff argues that the motion should be denied because it is untimely and does not raise new law or facts for consideration.

¹Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

Defendant contends that the court held the ALJ to an unreasonably strict standard which was contrary to law in its order. The defendant notes that the court emphasized that the ALJ found plaintiff's physician's opinion conclusory, because "no functional limitations are expressed in arriving at the disability opinion." Defendant agrees that the statement was conclusory because it was unsupported by medical evidence or foundation. The defendant agrees with the court that plaintiff's doctor's opinion was inconsistent with his diagnostic findings, which suggested claimant had no active cardiopulmonary disease, had an asthmatic condition which responded well to medication, had no diagnostic findings of arthritis or back and hip problems, and had adequate grip strength.

However, defendant then contends that the court ignored "the ALJ's clearly legally sufficient analysis" which cited the correct standard of law and evaluated the ALJ's decision based on the single erroneous statement made by the ALJ. Defendant claims that the court concluded "that the post-decision RFC statement by plaintiff's treating physician, which is itself conclusory, somehow acts to repair the conclusory nature of the treating physician's earlier opinion of disability Conclusory plus conclusory does not equal non-conclusory. The equation . . . defies the law and common sense." Defendant claims that the deficiency in the ALJ's opinion-writing technique should not be a reason to set aside his finding of non-disability. Such a minimal error should not effect the case outcome.

Defendant argues that the court's decision is unfair because Dr. Harris' conclusions are not binding on the ALJ, and the doctor's diagnostic findings and

other substantial evidence show that plaintiff has no impairment which would prevent the sitting and standing requirements of light work. Thus, defendant contends that the ALJ's decision comports with relevant legal standards, is clearly supported by substantial evidence, and must be upheld by the court.

The defendant also claims that the court erred when it found that this case should be remanded for further development regarding alleged impairments due to headaches and depression. Defendant argues that claimant did not raise the issue of depression in her brief and there was no evidence of functional loss caused by depression, and a CAT scan showed no medical cause for the headaches and they were controlled by medication. Thus, these had no impact on claimant's ability to work, and the court's conclusion was contrary to established law and facts.

Defendant's Motion to Reconsider Decision of U.S. Magistrate Judge (Docket #12) is dismissed as untimely filed. In addition, the defendant has placed inordinate emphasis on the court's discussion of the conclusory nature of Dr. Harris' finding that claimant cannot work. This case was remanded for several reasons, only one of which was to allow a vocational expert to consider Dr. Harris' October 27, 1994 residual functional capacity evaluation, which showed significant limitations in sitting and standing. There is no merit to defendant's claim that claimant did not raise the issue of depression in her brief - she noted in her first statement of specific errors that the ALJ found that she met Part A of two mental disorder listings, 12.04 which pertains to affective disorders and 12.06 which pertains to anxiety related disorders. The ALJ said: "the medical record reveals that claimant was noted to have an anxiety

disorder in August 1992 . . . [s]he also takes medication for depression." (TR 20). She went on to argue that she met Part B of the Listings also (page 2 of plaintiff's brief (Docket #6)).

This court noted that in Carter v. Chater, 73 F.3d 1019, 1022 (10th Cir. 1996), the court held that when a diagnosis of "depression" comes to the attention of the ALJ during a hearing, he has a duty to "develop the record" concerning depression, and the Circuit had since relied on Carter in a series of unreported decisions which remanded for the purpose of further development of the record concerning depression. Based on this case law, the court remanded this case for such development.

Finally, the court remanded this case for an examination of the medical evidence in the record regarding the severity of her headaches. There are disparities in the record concerning whether medication has been totally effective in controlling the pain. (TR 125, 127, 152-153, 208-209, 217-218, 245-246, 274, 284-292). A vocational expert should be questioned concerning the impact of headaches on claimant's ability to work, especially since Dr. Harris, the physician who treated her headaches, found that she was disabled from gainful employment.

Dated this 1st day of May, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\ORDERS\MCPK.2

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

FILED

APR 30 1997

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

IN RE: COOPER MANUFACTURING)
CORP., and its Affiliates;)
CHALLENGER RIG & MANUFACTURING,)
INC.; COOPER OFFSHORE SYSTEMS,)
INC.; and COOPER SALES CORP.,)

Case No. 84-01061-W
(Chapter 11)

Debtors,)

Adversary No. 93-0340-W

JON A. BARTON,)
Liquidating Trustee,)

ENTERED ON DOCKET

MAY 01 1997

Plaintiff,)

DATE

vs.)

Case No. 96-C-1188-BU

THE HOME INDEMNITY COMPANY;)
THE CONTINENTAL INSURANCE)
COMPANY; HARBOR INSURANCE)
COMPANY; and GREENWICH)
INSURANCE COMPANY,)

Defendants.)

ORDER

Based upon the filing of the Stipulation of Dismissal With Prejudice and the representations of counsel for Defendant, The Home Insurance Company, as successor in interest to Defendant, The Home Indemnity Company, the Court

(1) **DECLARES MOOT** the Motion for Withdrawal of the Reference by the Home Insurance Company (Docket Entry #1);

(2) **DECLARES MOOT** the Trustee's Motion to Consolidate the Captioned Case with Case No. 94-C-901-BU for Purposes of Ruling Upon Pending Motion to Withdraw the Reference (Docket Entry #3);
and

(3) **ORDERS** the above-captioned case **DISMISSED WITH PREJUDICE**

8

pursuant to the Stipulation of Dismissal With Prejudice.

ENTERED this 30th day of April, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

APR 30 1997

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

CHILMARK FINANCIAL COMPANY,
L.L.C., a Limited Liability
Company,

Plaintiff,

vs.

Case No. 96-C-1152-BU

AMERIWEST BANCORP, INC., an
Oklahoma Corporation; GREGORY
D. LORSON, an individual,

Defendants.

ENTERED ON DOCKET

DATE MAY 01 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 30th day of April, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE