

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

MAY 19 1997 *La*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BLAINE A. ADAMS)
SS# 444-64-9671)

Plaintiff,)

v.)

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

Defendant.)

No. 96-395-J ✓

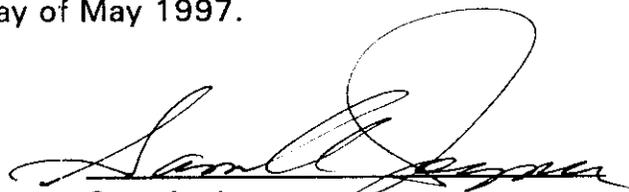
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DATE MAY 20 1997

JUDGMENT

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

It is so ordered this 19 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.

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UNITED STATES DISTRICT COURT FOR THE
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BLAINE A. ADAMS,
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Plaintiff,

v.

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

Defendant.

No. 96-C-395-J

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DATE MAY 20 1997

ORDER^{2/}

Plaintiff, Blaine A. Adams, 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 ALJ erred by (1) failing to properly consider all of Plaintiff's impairments, (2) not properly evaluating Plaintiff's complaints of pain, and (3) not including in the hypothetical question all of Plaintiff's limitations. For the reasons discussed below, the Court **affirms** the Commissioner's decision.

^{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 August 16, 1993. [R. at 79-82]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Glen E. Michael (hereafter, "ALJ") was held September 23, 1994. [R. at 31]. By order dated February 28, 1995, the ALJ determined that Plaintiff was not disabled. [R. at 11-24]. Plaintiff appealed the ALJ's decision to the Appeals Council. On April 2, 1996, the Appeals Council denied Plaintiff's request for review, and denied Plaintiff's request to reopen its prior decision denying review. [R. at 2].

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I. PLAINTIFF'S BACKGROUND

Plaintiff was born on January 24, 1959. [R. at 59-62]. Plaintiff completed high school and two years of college courses. [R. at 37].

Plaintiff testified that he worked at Paragan Pipes for approximately nine months. [R. at 38]. According to Plaintiff, while he was working, the glove on his left hand became caught in a coupling at the end of a pipe and the pipe rolled onto his hand. [R. at 38]. Plaintiff testified that the accident injured his hand and he was required to have surgery. [R. at 38-39]. Plaintiff noted that he had no "range of motion" in his left wrist. [R. at 41]. Plaintiff has been diagnosed with Kienbock's disease.^{4/}

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

Disability under the Social Security Act is defined as the

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

^{4/} Taber's Cyclopedic Medical Dictionary 1055 (17th ed. 1993), defines Kienbock's disease as "slow degeneration of the lunate bone of the wrist. Usually due to trauma. (sic)"

42 U.S.C. § 423(d)(1)(A). The Commissioner has established a five-step process for the evaluation of social security claims.^{5/} See 20 C.F.R. § 404.1520. 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

^{5/} 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).

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^{6/} 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.

^{6/} 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."

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff was not disabled at Step Five of the sequential evaluation process. The ALJ found that Plaintiff was restricted to the performance of light work with the limitation that Plaintiff had no range of motion in his left wrist. The ALJ considered Plaintiff's complaints of pain but concluded that although Plaintiff may experience some pain, Plaintiff was not further restricted by such pain. The ALJ, based on a hypothetical question presented to a vocational expert, concluded that Plaintiff was not disabled.

IV. REVIEW

Plaintiff's RFC

Plaintiff notes that the ALJ's finding that Plaintiff could not manipulate his left wrist was correct. However, Plaintiff contends that the ALJ failed to accept additional limitations placed on Plaintiff by various physicians with respect to Plaintiff's weakness in his arm and grip, inability to repetitively use his left arm and wrist, and pain.

Plaintiff injured his left wrist while working. Plaintiff was admitted on October 18, 1991, to St. John Medical Center, for surgery (fusion) of his left wrist. [R. at 141]. In March of 1992, Plaintiff's doctor noted that Plaintiff could return to work but should not lift anything over 20 pounds, and should do no repetitive lifting over ten pounds. In addition, Plaintiff was not to climb ladders. [R. at 159]. By April of 1992, Plaintiff was released to return to work with the restriction of no lifting over 60 pounds and no repetitive lifting over 40 pounds. [R. at 156]. On July 1, 1992, Plaintiff's doctor released Plaintiff to return to work with no work restrictions. [R. at 153]. By

letter dated March 23, 1992, Plaintiff's doctor noted that "On his last visit on March 19, 1992, Mr. Adams mentioned that the pain in the wrist continues to improve and at that time, he had no pain or discomfort in the wrist. He was complaining of weakness, however in the wrist and did not feel it was as strong as his other hand." [R. at 157]. Plaintiff's doctor noted that he had previously released Plaintiff to return to "light duty type of work." [R. at 157].

On February 2, 1993, Plaintiff's doctor noted that

Blaine returns today for follow up of his left wrist. He appears fairly upset and I asked him what was bothering him and he said he is very upset about the length of time that it is taking for his wrist to heal and he is concerned that he is still having some difficulties with his wrist and states that Dr. Bell told him that he would never be able to return to heavy labor and this concerns him. He has been through vocational rehab and he is concerned that it is going to be a long time as he was going to have to spend 2 years in school in order to be able to do what he would like to do.

[R. at 185]. Plaintiff's doctor concludes that "I agree with Dr. Bell that Mr. Adams [Plaintiff] will not be able to return to heavy labor and I have encourage him to pursue the rehabilitation aspect through vocational rehab." [R. at 185].

Plaintiff was evaluated by William R. Gillock, M.D., on June 3, 1993. Dr. Gillock noted that Plaintiff had no range of motion of his left wrist. Dr. Gillock concluded that Plaintiff had a 33% permanent partial impairment to his hand, based on his left wrist, but had "sustained no additional permanent impairment to his left arm." [R. at 190].

Plaintiff was evaluated by Garrett Watts, M.D., in June of 1993. Dr. Watts noted that Plaintiff's fusion should be extended, but declined to recommend surgery due to Plaintiff's frustration from the results of his previous surgery. [R. at 194]. The doctor concluded that Plaintiff had been temporarily totally disabled, and that "[i]n lue [sic] of further surgery, I would recommend that he seek vocational rehabilitation and retraining for lighter work." [R. at 195].

A Residual Physical Functional Capacity Assessment, completed in on February 19, 1992, indicates that Plaintiff can lift 20 pounds occasionally, ten pounds frequently, stand or walk approximately six hours in an eight hour day, sit for approximately six hours in an eight hour day, and push or pull an unlimited amount. [R. at 65]. Plaintiff's ability to manipulate and grip with his left hand is noted as "limited." [R. at 67]. A second Residual Physical Functional Capacity Assessment, completed in February of 1994, noted similar findings. [R. at 92].

The ALJ's specific finding in his written opinion is perhaps not as thorough as Plaintiff would like. However, the ALJ's conclusions will be upheld on appeal if supported by substantial evidence. In this case, the ALJ presented a hypothetical to the vocational expert which included restrictions on the use of the left wrist, left arm, ability to grip,⁷¹ and climbing. [R. at 50]. Consequently, the ALJ presented a hypothetical to the vocational expert which included each of the limitations which

⁷¹ Plaintiff argues that the ALJ neglected to include his limited ability to use his thumb. As noted in the Residual Physical Functional Assessments, Plaintiff's limitation effects his ability to grip, which was included in the hypothetical to the vocational expert.

Plaintiff has asserted. The ALJ also posed limitations to the vocational expert which Plaintiff's doctors had no longer placed on Plaintiff.^{8/} In addition, the ALJ's conclusion that Plaintiff can work is supported by Plaintiff's own doctors, who maintain that Plaintiff should seek some form of vocational training and return to work.

Pain Analysis

Plaintiff asserts that the ALJ failed to properly consider his complaints of pain and did not follow the appropriate legal standards in evaluating his subjective complaints. Plaintiff notes that he testified that if he uses his left hand and wrist he experiences pain, and that the ALJ was required to consider his subjective complaints of pain.

The familiar nexus test in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987) was developed as a guide to explain when an ALJ must consider subjective complaints of pain. If a nexus between the pain-producing impairment and alleged pain can be established, Luna requires that an ALJ consider the claimant's subjective complaints of pain. However, when the ALJ reaches the last step of Luna and considers the claimant's subjective complaints of pain, the ALJ is still entitled to judge the credibility of the claimant. Luna, 834 F.2d at 161-63. The ALJ's credibility determinations are entitled to great deference by this Court. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

^{8/} For example, the ALJ placed a limitation on the ability to climb. However, this limitation, which was placed on Plaintiff in his doctor's March 1992 evaluation, was not included by Plaintiff's doctor in his April 1992 evaluation.

In assessing the credibility of a claimant's complaints of pain, the following factors may be considered.

[T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.").

In addition, even if the ALJ finds the claimant to be credible, the mere existence of pain is insufficient to support a finding of disability. Claimant's pain must be "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988). "Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment." Id.

The ALJ reached the last step of the Luna analysis, because he considered Plaintiff's subjective complaints of pain. The ALJ concluded, however, that Plaintiff's allegations of disabling pain were not fully credible. This conclusion shall be affirmed on appeal if it is supported by substantial evidence. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). In Kepler, the Tenth Circuit made it clear that an ALJ's credibility determination cannot be conclusory (i.e., "I find the claimant's testimony not credible."). An ALJ must give detailed reasons, with reference to specific evidence in the record, for his credibility determinations. Kepler, 68 F.3d at 390-92. In particular, findings as to credibility should be closely and affirmatively linked to substantial evidence and not just a conclusion in the guise of findings. Id.

The ALJ noted that nothing in the file indicated that Plaintiff complained of knee or hip pain to his treating sources, and that the medical evidence indicated that Plaintiff had a full range of motion of his lower limbs. [R. at 21]. Plaintiff also noted that he took no medications. Plaintiff's treating physicians support the ALJ's conclusion that Plaintiff is not experiencing "disabling pain."

Hypothetical Question & DOT

Plaintiff additionally asserts that the hypothetical question posed to the vocational expert was flawed because it did not include limitations for pain,^{9/} hand manipulation (because of Plaintiff's thumb), or the need to avoid repetitive use of the

^{9/} The Court notes that pain is not *per se* a limitation. If an individual's ability to function (*i.e.* to lift, carry, climb, etc.) is limited by pain, than that limitation should be presented to the vocational expert. Merely telling a vocational expert that a claimant experiences pain does not provide any guidance to the vocational expert with respect to the abilities of the individual. The Court additionally notes that the September 1993 RFC indicated that Plaintiff's pain did not further limit his RFC. [R. at 92].

left hand or arm. As noted above, the hypothetical question accurately included the limitations which the ALJ concluded Plaintiff had. The hypothetical question included gripping (of the left hand) and use of the left hand and arm. After a thorough review of the record, the Court concludes that the conclusions of the ALJ are based on substantial evidence.

Plaintiff additionally suggests that the ALJ erred because the testimony of the vocational expert conflicted with the Dictionary of Occupational Titles ("DOT"). Plaintiff does not elaborate on his argument.

Although a few Circuits have decided the issue which is vaguely referenced by Plaintiff in his brief, the Tenth Circuit has not yet specifically addressed it.^{10/} The Eighth Circuit has determined that in an express contradiction between the DOT and the testimony of the vocational expert, the DOT controls;^{11/} the Ninth Circuit permits the DOT to act as a rebuttable presumption which can be rebutted by the testimony of a vocational expert;^{12/} the Sixth Circuit concluded that the DOT was not controlling

^{10/} Two unpublished decisions in the Tenth Circuit have recognized this issue, but have not addressed it on the merits. See Queen v. Chater, 1995 WL 747683 (10th Cir. Dec. 18, 1995); Turner v. Chater, 1996 WL 718125 (10th Cir. Dec. 13, 1996). One unpublished decision concluded that the DOT "controls." Sanders v. Chater, 1995 WL 749686 (10th Cir. Dec. 19, 1995). This decision is based in part on Campbell v. Bowen, 822 F.2d 1518 (10th Cir. 1987). In that case, the Tenth Circuit noted that the jobs which the vocational expert had identified as "light work" were, under the DOT, "medium" or "heavy." The Campbell Court, however, did not decide the issue of whether the DOT classifications "trump" the testimony of the expert. Id. at 1523 n.3. See also Simmons v. Chater, 950 F. Supp. 1501 (N.D. Okla. 1997).

^{11/} Smith v. Shalala, 46 F.3d 45 (8th Cir. 1995).

^{12/} Johnson v. Shalala, 60 F.3d 1428 (9th Cir. 1995).

and an ALJ may rely on the testimony of a vocational expert.^{13/} This Court is persuaded by the conclusion reached by the Sixth Circuit, and finds that the DOT is not controlling authority.

The social security regulations provide that the administration takes "administrative notice" of "reliable job information available from various governmental and other publications . . . [including] the Dictionary of Occupational Titles." 20 C.F.R. § 404.1566(d). The regulation does not, by its plain language, require that the DOT must be controlling authority; the regulations provide only that the administration will take administrative notice of various "reliable job information" sources, which can include the DOT.^{14/} The regulations also provide that a vocational expert can be consulted. 20 C.F.R. § 404.1566(e). In addition, the DOT notes that differences in jobs between localities do exist. The vocational expert in this case was presented with the facts that the Plaintiff was limited in the use of his left hand and arm, his grip strength, and was unable to climb. Consequently, the jobs which the vocational expert testified that Plaintiff can perform were tailored to these qualifications. But see Smith v. Shalala, 46 F.3d 45 (8th Cir. 1995), and Johnson v. Shalala, 60 F.3d 1428 (9th Cir. 1995).

^{13/} Conn v. Sec. of Health & Human Serv., 51 F.3d 607 (6th Cir. 1995).

^{14/} The wording of this regulation is additionally troublesome. It provides that "[w]hen we determine that unskilled, sedentary, light, and medium jobs exist in the national economy (in significant numbers . . .), we will take administrative notice of reliable job information available. . . ." 20 C.F.R. § 404.1566(d). The regulations therefore appear to place two qualifiers on the use of such information. The Commissioner must first make a finding that significant numbers of jobs exist, and second, the information must be reliable.

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

Dated this 17 day of May 1997.

A handwritten signature in black ink, appearing to read "Sam A. Joyner", written over a horizontal line.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 19 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHNNY L. GOREE,
SS# 441-50-2392

Plaintiff,

v.

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

Defendant.

No. 96-439-J

ENTERED ON DOCKET

DATE MAY 20 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 19 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.

UNITED STATES DISTRICT COURT FOR THE
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JOHNNY L. GOREE,
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Plaintiff,

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Defendant.

MAY 19 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-439-J

ENTERED ON DOCKET

DATE MAY 20 1997

ORDER^{2/}

Plaintiff, Johnny L. Goree, 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 ALJ erred because (1) he neglected to properly evaluate Plaintiff's mental impairment, (2) he improperly relied on post-hearing reports although Plaintiff had requested the opportunity to cross-examine the individuals who submitted the reports, and (3) because he improperly evaluated Plaintiff's physical impairments. For

^{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 December 4, 1992. [R. at 104]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge James D. Jordan (hereafter, "ALJ") was held February 14, 1994, and December 12, 1994. [R. at 30, 69]. By order dated May 15, 1995, the ALJ determined that Plaintiff was not disabled. [R. at 13]. Plaintiff appealed the ALJ's decision to the Appeals Council, and the Appeals Council denied Plaintiff's request for review. On April 26, 1996, the Appeals Council extended Plaintiff's time for appeal. [R. at 13].

the reasons discussed below, the Court reverses and remands the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff testifies that he suffered from rheumatoid arthritis and was unable to work due to pain in his right hand, lower back, and right foot. [R. at 39]. Plaintiff takes Motrin for swelling. [R. at 91].

Plaintiff was born on May 20, 1947. [R. at 72]. Plaintiff has a sixth grade education and is unable to read or write. [R. at 72. 88]. Plaintiff's previous work experience includes working as a stone mason, a front end loader, and a backhoe operator. [R. at 72].

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

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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 found that Plaintiff had the Residual Functional Capacity ("RFC") to lift no more than 50 pounds occasionally and 25 pounds frequently with only occasional stooping. [R. at 21]. The ALJ additionally noted that Plaintiff was able to understand and perform simple but not detailed instructions. [R.

^{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."

at 21]. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff retained the RFC to perform his past relevant work. [R. at 22].

IV. REVIEW

Due Process

Plaintiff initially asserts that the ALJ erred by relying on a post-hearing report from a doctor who never examined Plaintiff. Plaintiff notes that after being supplied with a copy of the report, Plaintiff requested a supplemental hearing and the opportunity to cross-examine the doctor. According to Plaintiff the ALJ ignored his request and issued his opinion without providing Plaintiff with any opportunity to examine the doctor. Defendant notes, in his brief, that Plaintiff has raised this issue. However, Defendant does not address the issue and makes no argument with respect to the due process concerns raised by Plaintiff.

Plaintiff's first hearing before the ALJ was on February 14, 1994. [R. at 69]. A second hearing was held December 12, 1994. The ALJ noted in that hearing, that one reason the second hearing was necessary was to provide Plaintiff with an opportunity to cross-examine doctor Paul April. [R. at 34, 47].

After the December hearing, the ALJ determined that additional information was necessary, and sent interrogatories to Thomas A. Goodman, M.D. [R. at 236]. The Interrogatories addressed whether Plaintiff met a listing, Plaintiff's physical limitations, whether Plaintiff's pain interfered with his ability to work, and whether Plaintiff had sought appropriate medical treatment. [R. at 237]. The doctor replied, by letter dated January 27, 1995, noting that Plaintiff did not meet a Listing, that nothing in the

record indicated that Plaintiff would be impaired in his ability to work due to his I.Q. or other "psychiatric" problems, and that Plaintiff had no psychiatric limitations. [R. at 240].

The ALJ sent a letter to Plaintiff, dated February 14, 1995, informing him of the information obtained from Dr. Goodman and noting that Plaintiff could submit written comments, submit additional interrogatories, or request the right to cross-examine the doctor. [R. at 243]. By letter dated February 22, 1995, Plaintiff noted that "as per your letter of February 14, 1995," he requested a supplemental hearing with Dr. Goodman. Plaintiff asked that he be advised of the earliest possible opportunity for the hearing. [R. at 244]. The record does not indicate any further communication between the ALJ and Plaintiff, or any additional hearings, prior to the ALJ's denial of benefits on June 15, 1995. Noting in the record suggests that Plaintiff was ever provided with the opportunity to cross-examine Dr. Goodman, or to submit interrogatories to Dr. Goodman. In his decision denying benefits, the ALJ referenced the report he received from Dr. Goodman which stated that Plaintiff had no psychiatric limitations.

In Allison v. Heckler, 711 F.2d 145 (10th Cir. 1983), the Tenth Circuit Court of Appeals addressed the ALJ's reliance on a post-hearing report in denying benefits. The Court noted that no evidence at the hearing established that the claimant was disabled, and that after the hearing the ALJ sent the hearing record to a doctor for review. The ALJ relied on the conclusions in that doctor's report in finding that the claimant was not disabled and in denying benefits. The claimant contended that the

ALJ's reliance on the post-hearing report denied her due process. The Court concluded that "[a]n ALJ's use of a post-hearing medical report constitutes a denial of due process because the applicant is not given the opportunity to cross-examine the physician or to rebut the report." Id. at 147. The Court reversed the case, concluding that "[s]hould the Secretary wish to reopen the hearing and properly admit Dr. Harvey's report, Allison must be provided the opportunity to subpoena and cross-examine Dr. Harvey, and to offer evidence in rebuttal." Id.

In this case after the close of the second hearing, the ALJ, requested additional information from a consulting doctor. After receiving the doctor's report, the ALJ informed Plaintiff of his right to submit interrogatories to the doctor, or to request the opportunity to cross-examine the doctor. However, although the Plaintiff requested that he be given the opportunity to cross-examine the doctor, the ALJ seemingly ignored this request. The ALJ rendered his decision without any additional information from the Plaintiff with respect to the post-hearing report from Dr. Goodman.

Defendant ignores this argument on appeal and provides no reason for the ALJ's failure to permit Plaintiff the opportunity to counter the evidence supplied by Dr. Goodman. Pursuant to Allison, such a failure constitutes a denial to Plaintiff of his due process rights. As with Allison, on remand, if the Commissioner chooses to rely on the post-hearing report, Plaintiff must be provided with the opportunity to supply additional information and cross-examine Dr. Goodman.

Prospective Application of James

Defendant additionally argues that Plaintiff failed to preserve his right to a review of the issues which he currently raises in district court because Plaintiff failed to present the issues for administrative review. Defendant relies on James v. Chater, 96 F.3d 1341 (10th Cir. 1996). Defendant addresses whether or not James is prospective in a three-line sentence, noting only that James is not prospective because it "is but a reiteration of 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).

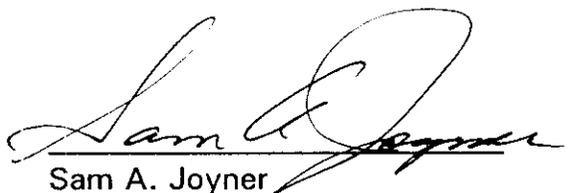
In addition, the James opinion states that it is deciding the case on the merits “[g]iven the due process concerns implicated by enforcement of a waiver rule about which the adversely affected party did not have adequate notice, through such means as direct admonition for *pro se* claimants, or published 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 Tenth Circuit opinion.

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

Dated this 19 day of May 1997.

A handwritten signature in cursive script, appearing to read "Sam A. Joyner", written over a horizontal line.

Sam A. Joyner
United States Magistrate Judge

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

FILED

MAY 16 1997

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

WILBURN A. HITT,
SSN: 442-32-5667,

Plaintiff,

v.

JOHN J. CALLAHAN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 96-cv-62-M

ENTERED ON DOCKET
DATE MAY 20 1997

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 16th day of MAY, 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

MAY 16 1997

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

CHARLES FITZGERALD GOUDEAU,)
)
Petitioner,)
)
vs.)
)
STATE OF OKLAHOMA and)
TULSA COUNTY,)
)
Respondents.)

No. 97-CV-135-H

ENTERED ON DOCKET
DATE MAY 20 1997

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge filed on April 16, 1997, in this habeas corpus action pursuant to 28 U.S.C. § 2254. The Magistrate Judge recommends that the petition for a writ of habeas corpus be dismissed without prejudice pursuant to petitioner's indication that he had "decided not to file that writ of habeas corpus," a statement contained in a letter received by the Magistrate Judge. That letter was construed to be petitioner's motion to dismiss the petition without prejudice. As no objection has been filed by petitioner, the Court concludes that the Report should be adopted and affirmed.

IT IS HEREBY ORDERED:

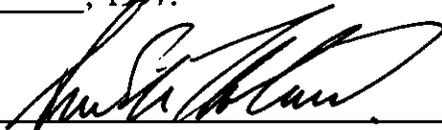
- (1) That the Report and Recommendation of the Magistrate Judge (Docket #6) is **adopted and affirmed;**

1

(2) That Petitioner's motion to dismiss without prejudice the petition for a writ of habeas corpus (Docket #4) is **granted**. The petition is dismissed without prejudice pursuant to Petitioner's voluntary request.

IT IS SO ORDERED.

This 15TH 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 16 1997

Phil Lombardi, Clerk
U.S. District Court
Northern District of Oklahoma

ROBERTA CROWLEY,

Plaintiff,

v.

MARRIOTT INTERNATIONAL
CORPORATION, INC.,

Defendant.

Case No. 97-CV-469-H

ENTERED ON DOCKET

DATE MAY 20 1997

ORDER

This matter comes before the Court on Defendant's notice of removal.¹

Plaintiff originally brought this action in the District Court of Tulsa County. Plaintiff's petition alleges three causes of action and claims damages "in excess of \$10,000.00, including compensatory damages, punitive damages, interest, attorney's fees and costs and for such other and further relief as the Court may deem just and proper."² Defendants filed a notice of removal

¹ In pertinent part, the statute governing "procedure for removal" states that:

[t]he United States district court in which [the notice for removal] is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require.

28 U.S.C. § 1446; see also 28 U.S.C. § 1447(c) (procedure after removal) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

² In Oklahoma, the general rules of pleading require that:

[e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000.00) shall, without demanding any specific amount of money, set forth only that the amount sought as damages is in excess of Ten Thousand Dollars (\$10,000.00), except in actions sounding in contract.

stating that removal is proper on the basis of diversity jurisdiction. It appears that complete diversity of citizenship exists between the parties. Thus, the question before the Court is whether the jurisdictional amount requirement has been satisfied under 28 U.S.C. § 1332(a).

I.

Initially, the Court notes that federal courts are courts of limited jurisdiction. Further,

[d]efendant's right to remove and plaintiff's right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand.

Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed \$75,000. 28 U.S.C. § 1332(a). The Court notes that Defendant's notice of removal states that "this is an action between citizens of different states and the amount in controversy exceeds the sum or value of \$50,000, exclusive of interests or costs," indicating the former jurisdictional amount. As of January 17, 1997, however, the jurisdictional amount for diversity jurisdiction was changed to \$75,000. 28 U.S.C. § 1332(a). Thus, Defendant's notice of removal is facially deficient and fails to establish that this Court has subject matter jurisdiction in this matter. Even ignoring this mistake, the notice of removal still fails under the analysis below.

The Tenth Circuit has clarified the analysis which a district court should undertake in determining whether an amount in controversy is greater than \$75,000. The Tenth Circuit stated:

[t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. The burden is on the party requesting removal to set forth, in the notice of removal itself, the "underlying facts supporting [the] assertion that the amount in controversy exceeds [the jurisdictional amount]." Moreover, there is a presumption against removal jurisdiction.

Okla. Stat. Ann. tit. 12, § 2008(2) (West 1993).

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir.) (citations omitted), cert. denied, 116 S. Ct. 174 (1995); see Maxon v. Texaco Ref. & Mktg. Inc., 905 F. Supp. 976 (N.D. Okla. 1995) (following Laughlin and remanding); see also Martin v. Missouri Pac. R.R. Co., 1996 WL 435614 (N.D. Okla. 1996) (same); Hughes v. E-Z Serve Petroleum Mktg. Co., 1996 WL 434528 (N.D. Okla. 1996) (same).

In Laughlin, the plaintiff originally brought his action in state court. Defendant removed to federal court based on diversity jurisdiction. The court granted summary judgment to defendant, and plaintiff appealed. On appeal, the Tenth Circuit raised the issue of subject matter jurisdiction and remanded the case to state court. Neither the petition nor the notice of removal had established the requisite jurisdictional amount. The petition alleged that the amount in controversy was "in excess of \$10,000" for each of two claims. The notice of removal did not refer to an amount in controversy, but did contain a reference to the removal statute, 28 U.S.C. § 1441. In its brief on the issue of jurisdiction, Kmart set forth facts alleging that, at the time of removal, the amount in controversy was well above the jurisdictional minimum of \$50,000, as required at the time. However, Kmart failed to include those facts in its notice of removal.

The Tenth Circuit held that:

Kmart's economic analysis of Laughlin's claims for damages, prepared after the motion for removal and purporting to demonstrate the jurisdictional minimum, does not establish the existence of jurisdiction at the time the motion was made. Both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice.

Laughlin, 50 F.3d at 873.

In Laughlin, Kmart attempted to rely on Shaw v. Dow Brands, Inc., 994 F.2d 364 (7th Cir. 1993). The Shaw court held that "the plaintiff had conceded jurisdiction because he failed to contest removal when the motion was originally made, and because he stated in his opening appellate brief that the amount in controversy exceeded [jurisdictional amount]." The Tenth Circuit distinguished Shaw, stating:

[w]e do not agree, however, that jurisdiction can be "conceded." Rather, we agree with the dissenting opinion that "subject matter jurisdiction is not a matter of equity or of conscience or of efficiency," but is a matter of the "lack of judicial power to decide a controversy."

Laughlin, 50 F.3d at 874 (citation omitted).

II.

The Tenth Circuit's interpretation of 28 U.S.C. § 1441, the statute governing a party's removal of a lawsuit to federal court predicated on diversity jurisdiction, is in accord with the views of other federal courts. In a comprehensive, well-reasoned opinion, the Sixth Circuit held that, where the amount of damages in the lawsuit is not specified, the removing party bears the burden of proving by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional amount. Gafford v. General Elec. Co., 997 F.2d 150, 157-60 (6th Cir. 1993); accord Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995) (where the complaint does not allege a specific amount of damages, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional amount); Shaw, 994 F.2d at 366 (adopting preponderance of the evidence standard; removing defendant must produce proof to a reasonable probability that jurisdiction exists); McCorkindale v. American Home Assurance Co./A.I.C., 909 F. Supp. 646, 653 (N.D. Iowa 1995) (same); cf. Burns, 31 F.3d at 1097 (where plaintiff alleges a specific claim for damages in an amount less than the jurisdictional amount, to establish removal jurisdiction, defendant must prove to a legal certainty that, if plaintiff were to prevail, she would not recover less than the jurisdictional amount).

In Gafford, a witness on behalf of the removing defendant, the Senior Counsel for Labor and Employment at the GE facility where Plaintiff was employed, testified at the pretrial hearing on jurisdiction that, if the Plaintiff were to prevail on her claims, she would be entitled to damages in an amount greater than the jurisdictional amount. Plaintiff did not present any evidence

contradicting that testimony. Id. at 160-61. On that basis, the Sixth Circuit upheld the district court's finding of removal jurisdiction. Id. at 161.

The Gafford court noted that its holding (that the appropriate burden of proof born by the removing party is the preponderance of the evidence) comports with the views expressed by the United States Supreme Court in McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). Quoting McNutt, the Gafford court stated:

[t]he authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in an appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of the evidence.

997 F.2d at 160.

To the extent that both Laughlin and Gafford represent the requirement that underlying facts be utilized by the removing party to satisfy its burden of proof, the Fifth Circuit is in accord. See Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia (Anpac) v. Dow Quimica de Colombia S.A., 988 F.2d 559, 566 (5th Cir. 1993), cert. denied, 114 S. Ct. 685 (1994). In Anpac, a group of Colombian fishermen sued a chemical manufacturer and its Colombian subsidiary in Texas state court for personal injuries such as "skin rashes" allegedly arising out of a pesticide spill. The complaint did not specify an amount of damages. Defendant Dow filed a notice of removal which stated simply that "the matter in controversy exceeds \$50,000 [as required at the time] exclusive of interest and costs." Id. at 565. This conclusory statement did not establish that removal jurisdiction was proper. Id. The Fifth Circuit articulated its analysis in Allen, stating:

[f]irst, a court can determine that removal was proper if it is facially apparent that the claims are likely above [the jurisdictional minimum]. If not, a removing attorney may support federal jurisdiction by setting forth the facts in controversy -- preferably in the removal petition, but sometimes by affidavit -- that support a finding of the requisite amount.

Removal, however, cannot be based simply upon conclusory allegations. Finally, under any manner of proof, the jurisdictional facts that support removal must be judged at the time of the removal, and any post-petition affidavits are allowable only if relevant to that period of time.

63 F.3d at 1335 (citations omitted); see also Lupo v. Human Affairs Int'l. Inc., 28 F.3d 269, 273-74 (2d Cir. 1994) ("We hold that if the jurisdictional amount is not clearly alleged in the plaintiff's complaint, and the defendant's notice of removal fails to allege facts adequate to establish that the amount in controversy exceeds the jurisdictional amount, federal courts lack diversity jurisdiction as a basis for removing the plaintiff's action from state court.") (emphasis added); Reid v. Delta Gas, Inc., 837 F. Supp. 751, 752 (M.D. La. 1993) (denying motion to remand where removing party introduced deposition testimony of plaintiff and letter from neurosurgeon to establish federal jurisdiction).

These views of other federal courts are consistent with the central holding of Laughlin, as expressed by the Tenth Circuit's statement that "[t]he burden is on the party requesting removal to set forth, in the notice of removal itself, the underlying facts supporting [the] assertion that the amount in controversy exceeds [the jurisdictional amount]." 50 F.3d at 873.

III.

In the instant case, neither the allegations in the petition nor the allegations in the removal documents establish the requisite jurisdictional amount. The petition asserts three claims. Plaintiff seeks total damages "in excess of \$10,000" for these claims. Thus, on its face, the petition does not establish that the amount in controversy is greater than \$75,000.

Furthermore, in its removal documents, Defendant has failed to satisfy the requirements set forth in Laughlin and the other authorities described above. The petition for removal does not allege any underlying facts whatsoever with respect to Plaintiff's claims for damages. Instead, Defendant offers only the conclusory statement that "the amount in controversy exceeds the sum or value of \$50,000" Notice of Removal at ¶ 4. The Court concludes that any such

assertion, standing alone, does not affirmatively establish that the amount in controversy satisfies the jurisdictional amount required for diversity jurisdiction.

IV.

Where the face of the complaint does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the removal documents, not only the defendant's good faith belief that the amount in controversy exceeds \$75,000, but also facts underlying defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than \$75,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction. Laughlin, 50 F.3d at 873. And the Tenth Circuit has clearly stated what is required to satisfy that burden.

Based upon a review of the record, the Court concludes that Defendant has not met its burden, as defined by the court in Laughlin. Thus, the Court is without subject matter jurisdiction and lacks the power to hear this matter. As a result, the Court must remand this action to the District Court of Tulsa County. The Court hereby orders the Court Clerk to remand the case to the District Court in and for Tulsa County.

IT IS SO ORDERED.

This 15TH 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 1 1997

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

JERRY McNEIL, ET AL.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,
ET AL.,

Defendants.

Case No. 96-CV-624-H

ENTERED ON DOCKET

DATE MAY 20 1997

ORDER

This matter comes before the Court on Defendant United States' Motion to Dismiss or in the Alternative Motion for Summary Judgment (Docket #7), and Plaintiffs' Motion for Summary Judgment (Docket #9).

I.

This lawsuit was filed by Jerry and Marian McNeil for a tax refund of \$1,205.32, plus interest. This Court has jurisdiction under 26 U.S.C. § 7422 and 28 U.S.C. § 1346(a)(1).¹ The facts of the case are not in dispute. Plaintiffs filed their married, filing jointly federal income tax return for 1994 on April 15, 1995. Plaintiffs subsequently filed amended, separate returns on May 9, 1995. Plaintiffs' stated purpose for amending their 1994 tax return was to include on their return(s) dividend income and interest in the amount of \$372.46, which amounts were not reflected on the initial return. Plaintiffs also claimed a refund of \$945.00 resulting from the change in their filing status from joint to separate. The Internal Revenue Service ("IRS") assessed an estimated tax penalty against Plaintiffs on July 10, 1995. By letter dated August 28, 1995, the IRS also disallowed Plaintiffs' claim for refund because Plaintiffs had changed their filing status from joint to separate after April 15, 1995, the due date of the return.

¹Plaintiffs argue that their complaint is incorrectly characterized as a tax refund action, but rather claim that they seek money damages for "return of property seized under regulation of an executive department . . . and for exemplary damages pursuant to Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 91 S. Ct. 1999 (1971)" As discussed below, such an action is not available in this case.

5

In addition to naming the United States of America as a defendant, Plaintiffs have brought this action against the Secretary of the Treasury and the Commissioner of Internal Revenue. While the United States is a proper defendant under section 7422, section 7422(f)(1) prohibits any officer or employee of the United States from being named as a defendant in any 26 U.S.C. § 7422 action. Consequently, the Secretary of the Treasury and the Commissioner of Internal Revenue are improperly named as Defendants in this action.

Under certain circumstances, an action may be maintained against federal officers or agents in their individual capacities for violations of constitutional rights. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). However, a Bivens action is not available where alternate remedies already exist: “[w]hen the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration [the courts] have not created additional Bivens remedies.” Schweiker v. Chilicky, 487 U.S. 412, 423 (1988). Other remedies provided to taxpayers preclude the availability of a Bivens remedy in the instant case. Moreover, Bivens damage claims against government employees for actions taken while collecting tax liabilities have been held not to exist in most instances. See, e.g., Wages v. Internal Revenue Service, 915 F.2d 1230, 1235 (9th Cir. 1990) (no Bivens action against IRS employees collecting taxes); National Commodity & Barter Ass’n v. Gibbs, 886 F.2d 1240, 1247-49 (10th Cir. 1989).²

²The Court notes that in Gibbs the Tenth Circuit left open the possibility of a Bivens action against IRS employees for violations of the first and fourth amendments. Gibbs, 886 F.2d at 1248-49. The fourth amendment guarantees the right to be free from “unreasonable . . . seizures.” In the present case, however, it is undisputed that only potential “seizures” at issue are the assessment of an estimated tax penalty and the disallowance of a claimed refund. The IRS’ actions in this regard were conducted under established income tax laws and regulations that clearly have withstood constitutional scrutiny. While the Court recognizes that “certain values, such as those protected by the . . . fourth amendment[], may be superior to the need to protect the integrity of the internal revenue system,” id. at 1248, these values are not called into question in the present case. Therefore, there is no need to depart from the general rule that a Bivens action will not lie against IRS employees for actions taken while collecting tax liabilities.

Thus, the Court hereby grants the motion to dismiss of Defendants Secretary of the Treasury and Commissioner of Internal Revenue. The Secretary of the Treasury and the Commissioner of Internal Revenue are hereby dismissed with prejudice from this lawsuit.

The remainder of the issues raised in the United States' Motion to Dismiss or in the Alternative Motion for Summary Judgment will be treated as a motion for summary judgment under Fed. R. Civ. P. 56(c).

II.

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

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

477 U.S. at 322.

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

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

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

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

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

III.

As stated above, the facts in this case are not in dispute. Thus, the only questions for the Court are (1) whether the IRS properly disallowed Plaintiffs' claim for refund and (2) whether the IRS properly assessed an estimated tax penalty against Plaintiffs.

Plaintiffs filed amended, separate returns on May 9, 1995, and stated that the purpose for the amended filings was to include \$372.46 in omitted interest and dividend income and to claim a refund of \$945.00 resulting from changing their filing status from joint to separate. Plaintiffs apparently assert that the original return filed on April 15, 1995 is not a valid return due to the erroneous omission of income. Plaintiffs further assert in their Complaint that they may change their filing status after the return due date in this case because the IRS should not have accepted their erroneous return in the first place.

It is well settled law that a income tax return is valid "if it purports to be a return, is sworn to as such and evinces an honest and genuine endeavor to satisfy the law. This is so even though at the time of filing the omission or inaccuracies are such to make amendment necessary." Zellerbach Paper Co. v. Helvering, 293 U.S. 172, 180 (1934); see Rev. Rul. 74-203, 1974-1 C.B. 330 ("a document . . . may constitute a return if it discloses the data from which the tax can be computed, is executed by the taxpayer, and is lodged with the [IRS]").

In the instant case, Plaintiffs filed their joint tax return on April 15, 1995, on IRS Form 1040; Plaintiffs provided the information required by Form 1040; and Plaintiffs signed and verified their joint return. The omission of \$372.46 of income does not render the return invalid under Zellerbach.³ Such a minor omission is insufficient to render Plaintiffs' return invalid. See Zellerbach, 293 U.S. at 180. Thus, the Court holds that Plaintiffs' joint return filed April 15, 1995 is a valid income tax return.

Once Plaintiffs make the choice to file a joint return, they cannot undo this choice by filing separate returns after the original time for filing has expired. Pursuant to 25 U.S.C. § 7805, the Secretary of the Treasury promulgated Treas. Reg. § 1.6013-1(a), stating in pertinent part: "[f]or any taxable year with respect to which a joint return has been filed, separate returns shall not be made by the spouses after the time for filing the return for either has expired."⁴

³The Court notes that if this sum represented all or substantially all of Plaintiffs income then their argument would be stronger. However, the omitted figure comprised only .48 percent of Plaintiffs total 1994 adjusted gross income of \$77,489.38.

⁴Plaintiffs challenge this rule, citing, inter alia, Little et al. v. Barreme et al., 6 U.S. 170 (1804), presumably for the proposition that the Secretary of the Treasury is answerable in damages because Treas. Reg. § 1.6013-1 is not strictly warranted by law. In Little, the Supreme Court held that a commander of a ship of war of the United States, in obeying his instructions from the president, acts at his peril; and, if those instructions are not strictly warranted by law, he is answerable in damages to any person injured by their execution. Id. at 177-79. Plaintiffs have identified no authority whatsoever for the proposition that Treas. Reg. § 1.6013-1 is not strictly warranted by 26 U.S.C. § 7805. This regulation has been cited consistently since its promulgation and the Court finds no support for Plaintiffs assertion. See, e.g., United States v. Guy, 978 F.2d 934, 937 (6th Cir. 1992) (citing § 1.6013-1 as precluding defendant from filing a separate return after the filing deadline had passed subsequent to filing a joint return).

Plaintiffs elected to file a joint return on April 15, 1995, in accordance with 26 U.S.C. § 6013. On May 8, 1995, after the return due date had passed, Plaintiffs attempted to change their election from that of a joint return to separate returns by filing a separate return for each of them. Plaintiffs may not alter their filing status after the return due date has passed, Treas Reg. § 1.6013-1(a), and therefore Plaintiffs are not entitled to their claimed refund of \$945.00. Thus, the Court hereby grants Defendant's motion for summary judgment with regard to Plaintiffs' claim for a refund of \$945.00.

The second issue on Defendants' motion for summary judgment is whether Plaintiffs were properly assessed interest based on their failure to pay estimated tax during 1994. Plaintiffs were assessed an addition to their 1994 tax liability under 26 U.S.C. § 6654 because of their failure to pay estimated tax. Section 6654(d) requires that during the course of a year a taxpayer shall make tax payments equal to the lesser of (1) 90 percent of the tax shown on the return for that tax year, or (2) 100 percent of the tax shown on last year's tax return. Plaintiffs had \$5,142.00 withheld for payment of federal income taxes during 1994. Their 1994 tax liability as shown on their 1994 income tax return was \$13,393.00. Their 1993 tax liability as shown on their 1993 income tax return was \$9,630.00. Based on the requirements of section 6654(d), Plaintiffs should have paid at least \$9,630.00 during the course of 1994 to avoid an addition to tax under section 6654. Plaintiffs paid only \$5,162.00; the IRS assessed interest on \$4,468.00, the amount by which their tax was underpaid for that portion of the year the tax was underpaid, in the amount of \$260.32.

Plaintiffs respond to this assertion as follows:

Plaintiffs have not argued that no penalty is due the United States under the terms of 26 U.S.C. sec. 6654, but that penalty and interest assessments should not have been calculated using the original returns, which included amounts not due the United States pursuant to enacted tax rates.

Pl. Mot. for Summ. J. at 10. As stated above, the Court has held Plaintiffs failed in their attempt to change their filing status because their amended returns were filed after the due date for their

original return. Thus, the interest assessed under section 6654(d) was properly calculated by the IRS. The Court hereby grants Defendant's motion for summary judgment with regard to the assessed interest under section 6654(d).

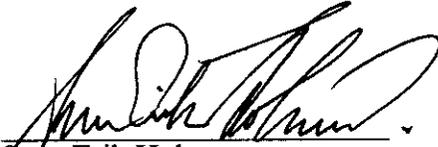
IV.

There is no genuine issue of material fact in this matter. For the reasons stated above, Plaintiffs' cross motion for summary judgment is hereby denied.

In summary, the Court (1) grants the United States' motion to dismiss the Secretary of the Treasury and Commissioner of Internal Revenue, (2) grants the United States' motion for summary judgment and (3) denies Plaintiffs' motion for summary judgment.

IT IS SO ORDERED.

This 15TH day of May, 1997.


Sven Erik Holmes
United States District Judge

FILED

MAY 16 1997

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

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

JERRY McNEIL, ET AL.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,
ET AL.,

Defendants.

Case No. 96-CV-624-H ✓

ENTERED ON DOCKET

DATE MAY 20 1997

JUDGMENT

This matter came before the Court on a Motion for Summary Judgment by Defendant United States of America and a Motion for Summary Judgment by Plaintiffs. The Court duly considered the issues and rendered a decision in accordance with the order filed on May 15, 1997.

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

IT IS SO ORDERED.

This 15TH day of May, 1997.


Sven Erik Holmes
United States District Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 16 1997

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

UNITED STATES OF AMERICA,)
)
PLAINTIFF,)
)
vs.)
)
RICHARD M. LABAT aka RICHARD)
LABAT aka RICHARD MALCOLM)
LABAT; REBECCA J. LABAT aka)
REBECCA JO LABAT (LaBat) fka)
REBECCA J. LORELLO; HOUSEHOLD)
FINANCE CORPORATION III; LEADER)
FEDERAL BANK FOR SAVINGS)
formerly LEADER FEDERAL SAVINGS)
& LOAN ASSOCIATION; CITY OF)
BROKEN ARROW, OKLAHOMA;)
COUNTY TREASURER, TULSA)
COUNTY, OKLAHOMA; BOARD OF)
COUNTY COMMISSIONERS, TULSA)
COUNTY, OKLAHOMA,)
)
DEFENDANTS.)

CASE No. 96-cv-240-H

ENTERED ON DOCKET

DATE MAY 20 1997

REPORT AND RECOMMENDATION

Defendants, Richard M. LaBat and Rebecca J. LaBat (LaBat), have filed an Answer and in the Alternative a Motion For Summary Judgment in this case. [Dkt. 6]. Plaintiff, United States of America (USA), filed its Response to LaBats' Motion For Summary Judgment and an Alternative Motion For Summary Judgment. [Dkt. 8]. Both have been referred to the undersigned Magistrate Judge for Report and Recommendation.

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Background

This is a foreclosure action brought by the USA on behalf of the Secretary of Housing and Urban Development (HUD) against the LaBats. [Dkt. 1]. USA's complaint was filed in this court on March 27, 1996 with attachments consisting of:

1. A copy of a mortgage note in the amount of \$80,850.00 to Firstier Mortgage Co. of Omaha, Nebraska, executed by James M. Murphy and Bonnie L. Murphy dated January 24, 1986, [Dkt. 1, Exhibit "A"];
2. A copy of a mortgage to Firstier Mortgage Co, Nebraska, executed by James M. Murphy and Bonnie L. Murphy, husband and wife, January 24, 1986, upon real property described as:
Lot Three (3), Block One (1), SOUTHBROOK III, an addition in the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded plat thereof.
[Dkt. 1, Exhibit "B"];
3. Copies of Bankruptcy Forms Schedule A and D: In re: Richard Malcolm LaBat and Rebecca Jo LaBat, listing a \$75,000.00 debtors' interest in a homestead at 1100 N. Cypress Ave., Broken Arrow, OK with HUD listed as the secured creditor, [Dkt. 1, Exhibit "C"].

In the complaint, Household Finance Corporation III, the City of Broken Arrow and the Board of County Commissioners, Tulsa County, Oklahoma, were named as defendants as tax lien holders. [Dkt. 1, p. 6]. They were properly served with summons but have not claimed interest in the subject property. The City of Tulsa and the Board of County Commissioners have answered and denied any claim in the real property. [Dkt. 2 and 3]. Leader Federal Bank For Savings was named as a defendant in the lawsuit for the purpose of clearing title. [Dkt. 1, p. 5]. Robert B. Adams, Vice-President of Leader Federal Bank, signed a waiver of service of summons in the case

on April 1, 1996, filed on April 12, 1996. Leader has not asserted an interest in the subject real property.

On July 10, 1996, a motion was timely filed by the LaBats requesting an extension of time to file their answer to the complaint. [Dkt. 4]. The request was granted [Dkt. 5], and on July 30, 1996, the LaBats filed a document titled: "Defendants Answers And In The Alternative Defendants Motion For Summary Judgment." [Dkt. 6]. The document was not accompanied with any affidavits, exhibits or supporting documents of any kind. On November 5, 1996, the USA filed a Motion For Enlargement of Time to respond to Defendants' Answer/Motion For Summary Judgment [Dkt. 7], which was granted. On November 22, 1996, the USA filed Plaintiff's Response to Defendant's Motion For Summary Judgment and Plaintiff's Alternative Motion For Summary Judgment. [Dkt. 8]. The USA attached to its motion copies of the same documents attached to the original complaint as described above, and:

1. A copy of an Assignment of Mortgage/Deed of Trust from Firstier Mortgage Co. to Leader Federal Savings & Loan Association of the mortgage held by James M. Murphy and Bonnie L. Murphy on October 30, 1986, [Dkt. 8, Exhibit "C"];
2. A copy of a General Warranty Deed dated March 31, 1988 conveying title of the above described property from James M. Murphy and Bonnie Murphy, husband and wife to Richard LaBat and Rebecca J. Lorello, [Dkt. 8, Exhibit "E"];
3. A copy of an Assignment of Mortgage/Deed of Trust from Leader Federal Bank For Savings to HUD of the mortgage held by Richard LaBat on March 14, 1990, [Dkt. 8, Exhibit "D"];
4. Copies of Payment Plans for Mortgagor Richard LaBat, signed by

Richard M. LaBat, Rebecca LaBat and Art Ramage, Chief, Loan Management Branch for HUD, on February 18, 1990, February 28, 1991 and September 24, 1992, [Dkt. 8, Exhibit "F"];

5. Affidavit of Cindy Jumper, Housing Specialist for HUD, attesting that the LaBats have defaulted on the mortgage note with an unpaid balance of \$122,518.34, signed on October 22, 1997.

No response to Plaintiff's Motion For Summary Judgment has been filed by the LaBats.

Summary Judgment Standard

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the pleadings, affidavits and exhibits show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden may be discharged by "showing", that is, pointing out to the court that there is an absence of evidence to support the nonmoving party's case. *Celotex*, p. 325. To survive a motion for summary judgment, the non-moving party "must establish that there is a genuine issue of material fact . . ." and "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, 106 S.Ct. 1348, 1455-56 (1986). The language of Rule 56(c) mandates the entry of summary judgment against a party who fails to

make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex*, p. 322-23.

Rule 56 provides that a party may move, with or without supporting affidavits, for summary judgment and that judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(e) further provides that when a motion for summary judgment is made and supported as provided above, an adverse party may not rest upon mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial.

Defendants' Motion

Defendants, LaBats, are "pro se" in this case. An individual may appear in federal courts only pro se or through legal counsel. 28 U.S.C. § 1654. The pleadings of pro se litigants should be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. See *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996); *Haines v. Kerner*, 404 U.S. 519 (1972). However, when a party elects to exercise his right to represent himself, the court owes no duty to help him make his case. Instead, a court must remain impartial and treat both sides of a controversy the same.

The LaBats have not asserted or identified any material facts as to which they contend no genuine issue exists and which entitles them to judgment as a matter of law. Nor have they "shown" that there is an absence of evidence to support Plaintiff's case. Their Motion For Summary Judgment, therefore, should be denied.

Plaintiff's Motion

Plaintiff has presented admissible evidence to prove the following material facts to which there exists no genuine dispute:

1. The action is for foreclosure of a mortgage upon the subject real property described above;
2. On January 24, 1986, a mortgage note was executed by James M. Murphy and Bonnie L. Murphy to Firstier Mortgage Company with the subject real property as security;
3. On October 30, 1986, Firstier Mortgage Co. assigned the subject mortgage to Leader Federal Savings & Loan Association;
4. On March 31, 1988, James M. Murphy and Bonnie L. Murphy conveyed the subject real property to Richard M. LaBat and Rebecca J. LaBat (formerly Lorello), with the agreement that the LaBats would assume the subject mortgage;
5. On March 14, 1990, Leader Federal Bank for Savings, formerly Leader Federal Savings & Loan Association, assigned the subject mortgage to HUD;
6. Defendants signed agreements with HUD for lowered monthly payments on the mortgage note three times, each time acknowledging the mortgage debt and HUD's right to foreclose if the payments were not made; and,

7. Defendants have defaulted on the mortgage note.

This Court finds that Plaintiff's Motion For Summary Judgment is properly supported by admissible evidence and that the evidence establishes Plaintiff's right to judgment as a matter of law against Defendants LaBats. Defendants have failed to controvert any of Plaintiff's undisputed material facts.

Conclusion

The undersigned Magistrate Judge recommends that Defendants' Motion For Summary Judgment [Dkt. 6] be **DENIED** and that Plaintiff's Motion For Summary Judgment [Dkt. 8] be **GRANTED**.

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

DATED this 16th day of MAY, 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

MAY 16 1997

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

CHARLES WILSON and PATRICIA)
WILSON, as parents and next friends of)
Brian Wilson, a minor, and Charles and)
Patricia Wilson, individually,)

Plaintiffs,)

v.)

MERRELL DOW PHARMACEUTICALS)
INC., et al.,)

Defendant.)

CASE NO. 82-C-710-H

ENTERED ON DOCKET

DATE MAY 20 1997

JUDGMENT

Pursuant to the stipulation of parties, this Court's order filed on May 28, 1996, granting summary judgment shall include defendants Merrell National Laboratories, Inc. and Richardson-Merrell, Inc.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is

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hereby entered on behalf of all defendants and against the plaintiffs.

IT IS SO ORDERED.

This 15TH day of ~~April~~ ^{MAY}, 1997.



Sven Erik Holmes
UNITED STATES DISTRICT JUDGE

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

LUKE ROBINSON,)
)
Petitioner,)
)
vs.)
)
RONALD J. CHAMPION, Warden,)
)
Respondent.)

No. 97-CV-352-H

ENTERED ON DOCKET

DATE MAY 19 1997

FILED
MAY 16 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Petitioner, a state prisoner represented by counsel, has submitted a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has neither paid the \$5.00 filing fee nor submitted his motion for leave to proceed in forma pauperis. However, it appears from the face of the petition that Petitioner has failed to exhaust his available state remedies for each of his claims. In Rose v. Lundy, 455 U.S. 509 (1982), the United States Supreme Court held that a federal district court must dismiss a habeas corpus petition containing exhausted and unexhausted grounds for relief. The Court stated:

In this case we consider whether the exhaustion rule in 28 U.S.C. § 2254(b), (c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statutes, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

Id. at 510 (emphasis added). Therefore, pursuant to Rose v. Lundy, a petition for a writ of habeas corpus which contains both exhausted and unexhausted claims must be dismissed without prejudice to afford the state the opportunity to remedy the alleged errors.

In addition, Rule 4, Rules Governing Section 2254 Cases in the United States District Courts, provides that "[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified." Because it plainly appears from the face of the petition that Petitioner has not exhausted his state court remedies for all of his claims, the Court finds that the petition for a writ of habeas corpus must be summarily dismissed without prejudice to refile after the exhaustion requirement is satisfied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for writ of habeas corpus is dismissed without prejudice for failure to exhaust state remedies.

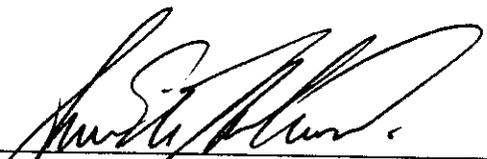
IT IS SO ORDERED.

This 15th day of MAY, 1997.



Sven Erik Holmes
United States District Judge

ORDERED that the above-captioned action be and it is hereby **DISMISSED**
WITH PREJUDICE, each party to pay their own costs and attorneys' fees.



SVEN ERIK HOLMES,
United States District Court Judge

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

FILED

MAY 16 1997 *rw*

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

BRENDA RICHARDS,

Plaintiff,

vs.

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

Defendants.

No. 96-C-67-B (M) ✓

ENTERED ON DOCKET

DATE MAY 19 1997

ORDER

Before the Court is the Motion for Summary Judgment filed by defendant James W. Small ("Small"). (Docket No. 66). Plaintiff Brenda Richards ("Richards") filed this action bringing Title VII hostile work environment and intentional infliction of emotional distress claims against Small and St. John Medical Center ("St. John"), and a battery claim against Small. On February 27, 1997, the Court granted St. John summary judgment on Richards' intentional infliction of emotional distress claim and denied summary judgment on Richards' Title VII hostile work environment claim. *February 27, 1997 Order, Docket No 65.* In that Order the Court also noted that any Title VII claim against Small lies in his official capacity, not in his individual capacity. Consequently, the remaining claims in this case are (1) a Title VII hostile work environment claim against St. John and Small in his official capacity, (2) an intentional infliction of emotional distress against Small, and (3) a battery claim against Small. Small now moves for summary judgment on the intentional infliction of emotional distress and battery claims against him individually. The Court thus confines its summary

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judgment review to the allegations pertaining to Small's battery of Richards and his extreme and outrageous conduct.

A. Summary Judgment Standard

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

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

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

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must

prevail as a matter of law.” *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

B. Analysis

Small asserts that he is entitled to summary judgment on the battery claim because it is barred by the statute of limitations. Small states the following undisputed fact pertaining to the battery claim against him:

Plaintiff’s claim for “sexual battery” against Defendant Small is based upon two alleged occurrences. Plaintiff alleges that Defendant Small tried to kiss her in August, 1991. Plaintiff describes the second alleged incident as follows:

A. Once he was -- I don’t remember what the circumstances were. He grabbed my butt, and I shoved him away from me.

Q. When did that occur, do you know?

* * * *

A. I don’t -- it was either ‘93 or ‘94.

Plaintiff’s deposition, at pp. 135, 230-31, attached as Exhibit A.

Undisputed Fact No. 23, Defendant Small’s Motion for Summary Judgment (Small’s Summary Judgment Motion)). The only response offered by Richards is “Deny.” *Response to Undisputed Fact No. 23, Plaintiff Brenda Richard’s Response and Objection to Defendant Dr. James Small’s Motion for Summary Judgment (“Response”)*. Neither does Richards submit additional evidence of sexual battery in her statement of disputed facts.

Plaintiff’s sexual battery claim is governed by the one year statute of limitations set forth in Okla. Stat. tit.12, §95(4). Viewing the evidence and inferences in a light most favorable to Richards, the latest any sexual battery could have taken place was December 31, 1994. As the lawsuit was filed on January 9, 1996, more than two years later, Richard’s sexual battery claim is barred.

Small also moves for summary judgment on Richard's intentional infliction of emotional distress claim, contending that (1) any acts giving rise to her intentional infliction of emotional distress claim which occurred before January 9, 1994 are barred by the two year statute of limitations; and (2) Small's conduct does not rise to the level necessary to support a claim of intentional infliction of emotional distress under Oklahoma law.

Small's statute of limitations defense is premised on the assumption that Richards "may not rely on the continuing violation doctrine to argue that she should be compensated for letters received before 1994, as her claims against Defendant Small are based on tort theories, not Title VII." *Small's Summary Judgment Motion*, p. 16 n.5. Although the continuing violation doctrine is specifically applicable to Title VII claims, Small offers no legal authority for the proposition that intentional infliction of emotional distress cannot be a continuing tort under Oklahoma law.¹ The Court, however, need not reach this issue because the Court concludes that Small's conduct when viewed *in toto* is not sufficiently extreme and outrageous to meet the "narrow standards" of §46 Restatement of Torts (Second). *Eddy v. Brown*, 715 P.2d 74, 76-77 (Okla. 1986); *Breden*

¹ Although not yet addressed by the Oklahoma Supreme Court, the continuing tort doctrine has been applied to intentional infliction of emotional distress claims in other jurisdictions to toll the applicable statute of limitations. See, e.g. *Bryant v. Thalheimer Brothers, Inc.*, 437 S.E.2d 519, 525-26 (N.C.Ct.App. 1993)(as "the tort [of intentional infliction of emotional distress] does not come into existence until the continued conduct of the defendant causes extreme emotional distress," . . . "to parse out the intentional or reckless acts of a defendant due to the statute of limitations, when those acts have not yet caused the damage required to complete the tort, would allow persons to continually harass potential plaintiffs until such time as the emotional damage became severe enough to cause the extreme result, then exclude much of their conduct giving rise to the damage."); *Curtis v. Firth*, 123 Idaho 598, 850 P.2d 749, 754-55 (1993); *Bustamento v. J.D. Tucker*, 607 So.2d 532, 537-541 (La. 1992); *Continental Casualty Insurance Co. v. McDonald*, 567 So.2d 1208, 1215-1217 (Ala. 1990); *Drury v. Tucker*, 210 A.D.2d 891, 892, 621 N.Y.S. 2d 822, 823 (N.Y.App.Div. 1994); *Twyman v. Twyman*, 790 S.W. 2d 819, 820-21 (Tex.Ct.App. 1990); *Eisenberg v. Ins. Co. of No. America*, 815 F.2d 1285, 1292 (9th Cir. 1987)(applying California law); *Curcio v. Chinn Enterprises, Inc.*, 887 F.Supp. 190, 195 (N.D. Ill. 1995)(applying Illinois law). But see *Foley v. Mobil Chemical Co.*, 626 N.Y.S.2d 906, 907 (N.Y.App.Div. 1995); *Marshall v. Nelson Electric*, 766 F.Supp. 1018, 1029-1032 (N.D. Okla. 1991), *aff'd*, 999 F.2d 547 (1993)(interpreting Oklahoma law and declining to apply the continuing tort doctrine to intentional infliction of emotional distress because "[a]ny other result would subject defendants to never-ending liability for such claims, which could at any time be triggered by non-extreme, non-outrageous, and non-tortious acts."); *Smith v. Tandy Corp.*, 738 F.Supp. 521, 522-523 (S.D. Ga. 1990).

v. *League Services Corp.*, 575 P.2d 1374, 1376 (Okla. 1978).

The Court views the following undisputed and disputed facts in support of Richards' intentional infliction of emotional distress claim against Small in a light most favorable to Richards.

Richards was employed by St. John as an administrative secretary in St. John's WorkMed Occupational Health Network department ("WorkMed") from August 16, 1988 until she submitted her resignation on January 27, 1995. WorkMed is a wholly owned subsidiary of St. John. From October 1, 1991 until the present, Small has been the Medical Director of WorkMed, and from October 1, 1991 until January 27, 1995, Small was Richards' supervisor.

It is undisputed that from 1991 through mid 1993, Small wrote several sexually explicit letters to Richards. Richards claims that Small also sent her the first letter in 1989 or 1990 and the last letter in early to mid 1994. Richards made copies of most of the letters and gave them to her friend, Debra Battey, because she was afraid of being fired. Richards testified that these letters were unwelcome and extremely offensive; for over four years she had advised Small that his behavior was unacceptable; and although so informed, Small continued to write the letters and make inappropriate comments to Richards.

In support of her intentional infliction of emotional distress claim, Richards also cites the following excerpts from Small's letters to her:

"I may have a strong sexual desire that may peak at times that I may need to relieve myself."
Ex. E-1, Plaintiff's Response.

"It is hard for me to handle this relationship with you. Just a few minutes here and there that I always initiate." "May I ask you why you never call or write?" "Yes, seeing you in a short tight dress that curves around your hips with your up thrusting breasts pushing your blouse out is arousing. Yes, I am getting an erection just writing about it. God I want you."
Ex. E-2, Plaintiff's Response.

"I want you, I fantasize about you, yet this is inappropriate." "I am nervous about giving this to you as I feel you may keep it [the letter], copy it to use against me later or show it to someone because you are probably sick of my saying these things to you." "Brenda, I will stop. Please bear with me, I am trying desperately."

Ex. E-3, Plaintiff's Response.

"I know my comments could be taken as inappropriate and that you could report me. I am trying and will stop. I know I've said that before, but I will. I know you value your job and marriage greatly." "I also (believe me) value my job and marriage greatly. I will stop talking to you. Please have patience." "I wish I knew what you thought. Do you think of me as a disturbed person? Love-sick? a dirty old man? an unfaithful husband? a wimp? Can we be friends? This is crazy isn't it? I really want to be with you. I really love you."

Ex. E-4, Plaintiff's Response.

"My hormones were taking over at the end. As it was I was so hot when you left I ended up fantasizing about you and masturbating four times til this morning." "I want to say if we had made love I would have been very gentle and done anything to please you and bring satisfaction to you. I would have pushed myself to exhaustion and physically hurt myself if it was needed to please you." "You are so sweet. If you ever need help with anything let me know. If you need help at work, advice about Mike, medical questions, friendship questions, money, anything let me know."

Ex. E-5, Plaintiff's Response.

"At work I will do whatever I can to help you to come to your aid as long as it doesn't look so obvious that people will think I'm playing definite favorites and then suspect something. I think that would hurt both of us." "If you find you have to mention me and my feelings towards you to someone, please only do so with a true confidential friend perhaps Debra?" "Do you mind if I write you letters? Please Please guard them and don't let anyone see them. It would absolutely destroy me."

Ex. E-6, Plaintiff's Response.

"But to put something in writing that so easily could put me in trouble is scary." "Do you think I'm totally crazy carrying on like this with you? If we weren't both married would you go out with me? Would you ever consider even remotely of marrying me?" "Perhaps the work situation does not allow it what with your desk being out in the open, the walls being so thin and my office located where it is. I think it could work if we both wanted it to." "Why can't we be friends? Why don't you try to talk with me? At least tell me I bother you or you don't want any relationship other than a work relationship." "Sometimes when I'm talking with you and your wearing some tight fitting clothes I have to walk away as I am getting sexually aroused myself. I do fantasize about you. I think if we were to make love it could be done discreetly without affecting our work situation." "You do not work directly for me and we would need to act as though nothing had happened. As long as each of us did not make work expectations, as a result of our friendship it could go well." "Am I falling in love. I need to stop - I am married and you are married." "I won't keep pushing myself, my thoughts and desires for a friendship on you."

“Clearly your feelings are not the same as mine neither regarding friendship nor intimacy, and why should they be?”

Ex. E-7, Plaintiff's Response.

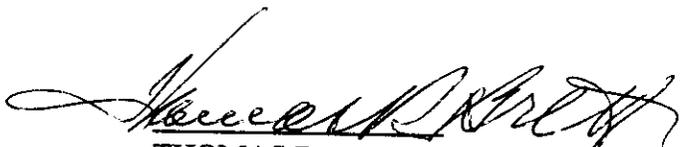
“It is the trial court’s responsibility initially to determine whether the defendant’s conduct may reasonably be regarded as sufficiently extreme and outrageous to meet the §46 standards.” *Eddy v. Brown*, 715 P.2d 74, 76 (Okla. 1986). Summary judgment is appropriate if the Court finds that reasonable persons would not “differ in an assessment of this critical issue.” *Id.* The Court concludes that Small’s conduct, although actionable under Title VII, is insufficient to establish an “extraordinary transgression of the bounds of socially tolerable conduct” to support an intentional infliction of emotion distress claim. *Williams v. Lee Way Motor Freight, Inc.*, 688 P.2d 1294, 1297 (Okla. 1984). In so concluding, the Court is aware that extreme and outrageous conduct “may arise from an abuse of a position or a relationship which gives the actor actual or apparent authority over another or the power to affect another’s interest,” *Breeden*, 575 P.2d at 1377, and that Small’s position as Richards’ supervisor provided the opportunity for such abuse. However, measured by the standards set forth in Restatement §46, the transgressions themselves, though reprehensible, may not reasonably be regarded as so extreme and outrageous as to defeat summary judgment on Richards’ intentional infliction of emotional distress claim. *Eddy*, 715 P.2d at 77.

Based on the above and consistent with this Court’s Order of February 27, 1997, the Court grants Small’s motion for summary judgment (Docket No. 66).

The Court sets the following trial schedule on Richards' remaining Title VII sexual harassment claim against St. John Medical Center and Dr. James W. Small, in his official capacity:

Agreed Pre-trial Order and exchange all prenumbered exhibits	June 2, 1997;
Suggested voir dire, proposed jury instructions and trial briefs	June 9, 1997;
Trial date	June 18, 1997 at 9:30 a.m.

ORDERED this ^{the} ~~16~~ day of May, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT COURT

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

MAY 16 1997 *flw*

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

GEORGE ELIAS, JR.,)

Plaintiff,)

vs.)

UNITED STATES OF AMERICA,)

Defendant.)

No. 97-C-153-B (W) ✓

ENTERED ON DOCKET

ORDER

DATE MAY 19 1997

Before the Court are the Motion to Dismiss Plaintiff's Claims for Lack of Jurisdiction (Docket No. 6), Motion to Strike Plaintiff's Demand for Jury Trial (Docket No. 7), and Motion to Strike Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss (Docket No. 10)¹ filed by the United States of America on behalf of defendant Mike Wysocki. Plaintiff George Elias, Jr. ("Elias") brought this action originally in Tulsa County District Court against defendant Mike Wysocki ("Wysocki") seeking actual and punitive damages for slander and violation of his constitutional rights of privacy and due process pursuant to 42 U.S.C. §1983. In his petition Elias alleges that defendant Wysocki, an F.B.I. agent, exceeded the bounds of his official duties when he made false and slanderous statements to Elias' business and social acquaintances that Elias had defrauded oil investors, been involved with money laundering, was a drug dealer and had stolen an 87 year-old woman's mineral interests. Pursuant to 28 U.S.C. §§ 1441, 1442 and 1446, the United States on behalf of Wysocki removed the case to this Court. On February 19, 1997, the United States filed a

¹ The government moves to strike Elias' response as untimely. The Court denies the motion. (Docket No. 10).

notice of substitution pursuant to 28 U.S.C. §2679(d)(1), substituting the United States as defendant based on the Assistant U.S. Attorney Thomas Scott Woodward's certification that Wysocki was acting within the scope of his employment as an employee of the United States at the time of the alleged misconduct. (Docket Nos. 2 and 13).

The United States moves to dismiss based on the following: (1) this Court lacks subject matter jurisdiction over Elias' common law slander claim and (2) Elias cannot state a claim under 42 U.S.C. §1983 because Wysocki was acting under color of federal law, not state law.

In response, Elias concedes that the government's motion is valid as to his tort and §1983 claims. However, Elias argues that the petition properly alleges Wysocki's violation of his constitutional rights of privacy and due process; and thus, he has stated a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and dismissal is improper.

Elias' petition sounds in tort; the allegations are of defamation and the relief sought is money damages. As Wysocki has been certified as a government employee acting within the scope of his employment at the time of his alleged defamatory conduct, Elias' remedy against the United States is under the Federal Tort Claims Act, "exclusive of any other civil action or proceeding for money damages . . . against the employee." 28 U.S.C. §2679(b)(1) (emphasis added); *Salmon v. Schwarz*, 948 F.2d 1131, 1141-42 (10th Cir. 1991) (§2679(b)(1) "'codifies the doctrine of absolute immunity and forces persons injured by common law torts committed by federal employees within the scope of their employment to seek redress against the United States under the Federal Tort Claims Act'"); *Aviles v. Lutz*, 887 F.2d 1046, 1049-50 (10th Cir. 1989). Section 2680(h), however, expressly excepts from the government's waiver of immunity "[a]ny claim arising out of assault, battery, false

imprisonment, false arrest, malicious prosecution, abuse of process, libel, **slander**, misrepresentation, deceit, or interference with contract rights.” (emphasis added). Given that sovereign immunity is not waived as to Elias’ slander claim, the Court lacks subject matter jurisdiction under the FTCA to hear the common law tort claim. *Aviles*, 887 F.2d at 1048-49 (10th Cir. 1989).

Although Elias concedes that he wrongly identified his constitutional tort claim as a §1983 claim in the petition, he argues that the allegations support a *Bivens* action against Wysocki. Section 2679(2)(A) does provide that the FTCA is not the exclusive remedy for torts committed by Government employees in the scope of their employment when an injured plaintiff brings a *Bivens* action. *U.S. v. Smith*, 499 U.S. 160, 166-67 (1991). Therefore, the pertinent inquiry before the Court on the government’s Fed.R.Civ.P. 12(b)(6) motion is whether the allegations in the petition, if accepted as true, state a claim for violation of any constitutional right. The Court concludes that they do not.

“Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation.” *Siegert v. Gilley*, 500 U.S. 226, 233 (1991). In *Paul v. Davis*, 424 U.S. 693, 708-09, 713 (1976), the Supreme Court held that the local police chief’s wrongful inclusion of plaintiff’s photograph in a flyer of “active shoplifters” and the alleged injury to plaintiff’s reputation did not rise to the level of a constitutional violation of plaintiff’s right to privacy or liberty. Similarly in *Siegert*, the Supreme Court rejected plaintiff’s *Bivens* claim, holding that the plaintiff failed to state a claim of infringement of plaintiff’s “liberty interests” in violation of the Due Process Clause of the Fifth Amendment based on plaintiff’s former supervisor’s malicious and bad faith publication of a defamatory per se statement. *Siegert*, 500 U.S. at 229. The facts alleged in *Siegert* were that plaintiff’s former supervisor stated in a letter to plaintiff’s new employer, an Army hospital, that

plaintiff was inept, unethical, and untrustworthy, and as a result of the letter, plaintiff was denied credentials to work at the hospital and his federal service was terminated. *Id.* at 228-29. Here, Elias simply alleges that Wysocki's statements to Elias' acquaintances and business associates were "slanderous per se" and therefore violated his rights under the Constitution. In light of *Paul v. Davis* and *Siegert*, such is insufficient to state a claim of constitutional violation to support a *Bivens* claim. Thus, even if Elias had properly identified his constitutional tort claim as a *Bivens* action rather than a §1983 claim in his petition, his claim could not withstand the government's 12(b)(6) motion.²

As this Court has no jurisdiction over Elias' common law defamation claim and Elias has failed to state a constitutional tort claim under 42 U.S.C. §1983 or under *Bivens*, the Court grants defendant's motion to dismiss (Docket No. 6). Defendant's Motion to Strike Plaintiff's Demand for Jury Trial (Docket No. 7) is moot.

ORDERED this ^{16th}~~12~~ day of May, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT COURT

²The Court notes that §§2679(b)(1) and 2680(h) of the FTCA effectively preclude any means of recovery for a government employee's defamatory statements if the employee is acting within the scope of his/her employment, unless the statements implicate constitutional rights. The Supreme Court, however, has held that such limitation on the waiver of sovereign immunity was the congressional intent in enacting the Federal Employees Liability Reform and Tort Compensation Act which amended the FTCA. *Siegert*, 499 U.S. at 1189-90; *Aviles*, 887 F.2d at 1049-50 (quoting H.R.Rep. No. 700, 100th Cong., 2d Sess. 6: "The 'exclusive remedy' provision of section 5 [§2679] is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the scope of employment. Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery. Thus, any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U. S.C. also is precluded against an employee . . .").

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

FILED

MAY 16 1997 *rw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE ESTATE OF DON DOUGLAS IWANSKI,)
deceased, GINGER MATHEWS, on behalf of)
LINDSAY DAWN BARRETT, a minor child,)
JUDY GAIL POINDEXTER IWANSKI,)

Plaintiffs,)

vs.)

Case No. 97-CV-103-B (M) ✓

LARRY FIELDS, Director of Department)
of Corrections, in his official and individual)
capacities, JOHN MIDDLETON, Warden,)
Northeastern Oklahoma Correctional Center,)
in his official and individual capacities, JOHN)
and JANE DOES I-XX, in their official and)
individual capacities, Jailers, Counselors, and)
Administrators, Oklahoma Correctional Center,)

Defendants.)

ENTERED ON DOCKET

DATE MAY 19 1997

ORDER

Before the Court for consideration is Defendants Larry Fields ("Fields") and John Middleton's ("Middleton") Motion to Dismiss Amended Complaint (Docket # 7). After careful consideration of the record and applicable legal authorities, the Court hereby **GRANTS in part and DENIES in part** Defendants' Motion to Dismiss Amended Complaint.

FACTUAL SUMMARY

On February 4, 1995, inmate Don Iwanski was allegedly murdered by inmate Kevin White. Plaintiffs bring this suit pursuant to 42 U.S.C. § 1983 seeking monetary damages from the numerous defendants. Plaintiffs allege that shortly before his death Don Iwanski notified Defendants of his

belief he was in danger of being murdered by another inmate. Plaintiff does not allege he told Defendants he was in fear of being murdered by inmate White.

On February 3, 1997, Plaintiffs filed the instant suit. After allowing Plaintiffs leave to amend to add the Estate of Don Iwanski as a party plaintiff in accordance with Berry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1990), Plaintiff's counsel so amended. However, counsel again named Ginger Matthews and Judy Gail Poindexter Iwanski, the natural mother of Don Iwanski's child and mother of Don Iwanski, respectively, as plaintiffs.

As they did with Plaintiffs' Complaint, Defendants have moved to dismiss Plaintiffs' Amended Complaint, pursuant to Fed.R.Civ.P. 12(b)(6), contending the Amended Complaint is barred by the statute of limitations, Plaintiffs Lindsay Dawn Barrett, her guardian Ginger Mathews, and Judy Gail Poindexter Iwanski, individually, lack standing to bring this action, Defendants Fields and Middleton are entitled to Eleventh Amendment immunity, Plaintiffs' Amended Complaint fails to state a claim against Defendants Fields and Middleton in their individual capacities, and Defendants Fields and Middleton are entitled to qualified immunity.

STANDARD FOR RULE 12(b)6 MOTION TO DISMISS

To dismiss a complaint and action for failure to state a claim upon which relief can be granted it must appear beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). Motions to dismiss under Fed.R.Civ.P. 12(b) admit all well-pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), cert denied, 397 U.S. 991 (1970). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969), cert denied, 397 U.S. 1074 (1970).

STATUTE OF LIMITATIONS

Don Iwanski, deceased, was murdered on February 4, 1995. Plaintiffs filed their original Complaint on February 3, 1997. As of that date, legal proceedings had not been initiated to appoint an executor/executrix of the Estate of Don Iwanski, deceased. On April 3, 1997, Judy Gail Poindexter Iwanski was appointed executrix of the Estate of Don Iwanski. After securing leave of Court to do so, Plaintiffs filed an Amended Complaint on April 11, 1997, which added the Estate as a party plaintiff. Defendants contend the Amended Complaint should be dismissed as it is barred by the statute of limitations. The Court disagrees.

In Oklahoma, a survival action pursuant to 42 U.S.C. § 1983 must be filed within two (2) years of the date of decedent's death. See EEOC v. Gaddis, 733 F.2d 1373 (10th Cir. 1984) (en banc); see also OKLA.ST.ANN. tit. 12, § 95 (West 1997). The survival claim must be brought by the estate of the deceased. See Berry, 900 F.2d at 1506. Here, the original Complaint was timely filed. However, the action was brought by the deceased's relatives, as opposed to the deceased's estate, and only after the statute of limitations had expired was an executrix appointed and the Estate of Don Iwanski added as a party. This does not prove fatal to Plaintiff's claim.

An amendment substituting a new plaintiff relates back to the date of filing of the original complaint if the added plaintiff is the real party in interest. See Fed.R.Civ.P. 15 (c); see also Metropolitan Paving Co. v. International Union of Operating Engineers, 439 F.2d 300 (10th Cir. 1971), cert. denied, 92 S.Ct. 68, 404 U.S. 829, 30 L.Ed.2d 58. Here, the Estate of Don Iwanski is the real party in interest. Therefore, the amendment relates back to February 3, 1997, one day prior to the expiration of the statute of limitations. Thus, the Court **DENIES** Defendants' Motion to Dismiss Amended Complaint on the issue of statute of limitations.

STANDING

Defendants maintain Plaintiffs Lindsay Dawn Barrett, her guardian Ginger Mathews, and Judy Gail Poindexter Iwanski, individually, do not have standing to bring the instant claims. The Court agrees. The rights of Lindsay Dawn Barrett, her guardian Ginger Mathews, and Judy Gail Poindexter Iwanski, individually, if any, are through the Estate. See Berry, 900 F.2d at 1506-07. Defendants' Motion to Dismiss Lindsay Dawn Barrett, her guardian Ginger Mathews, and Judy Gail Poindexter Iwanski, individually, is **GRANTED**. As Count Two of the Amended Complaint is plead solely for the benefit of the dismissed individuals, it is hereby **DISMISSED**.

DEFENDANTS FIELDS AND MIDDLETON - PERSONAL CAPACITY

The Court is of the opinion Plaintiff's allegations, taken as true for purposes of this Motion, prevent the Court from concluding Plaintiff can prove no set of facts showing Defendants Fields and Middleton, in their personal capacity, acting under color of state law, caused the deprivation of a federal right. See Hafer v. Melo, 112 S.Ct. 358, 362 (1991).

Defendants' contention they are entitled to qualified immunity must fail at this point in the proceedings. While the Court is not convinced Plaintiff has identified specific conduct which is a violation of a clearly established statutory or constitutional right of which a reasonable person would have known, Plaintiff allegations, taken as true, do contend the conduct of Defendants Fields and Middleton violated Plaintiff's rights under the Eighth and Fourteenth Amendments. See Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982). Defendants' Motion to Dismiss Plaintiff's personal capacity claim based on qualified immunity is **DENIED**.

DEFENDANTS FIELDS AND MIDDLETON - OFFICIAL CAPACITY

An official capacity suit against a state officer "is not a suit against the official but rather is

a suit against the official's office. As such it is no different from a suit against the State itself.” Hafer, 112 S.Ct. at 362 (quoting Will v. Michigan Dept. of State Police, 109 S.Ct. 2304 (1989)). The only immunities available to a defendant in an official capacity suit are those that the governmental entity possesses. See Hafer, 112 S.Ct. at 362. Thus, Defendants Fields and Middleton, in their official capacities, are entitled to Eleventh Amendment immunity only if the State of Oklahoma is entitled to Eleventh Amendment immunity.

A governmental entity sued pursuant to 42 U.S.C. § 1983 is not entitled to Eleventh Amendment immunity if its policy or custom played a part in the violation of federal law. Id. Here, Plaintiff's Amended Complaint alleges the policies and procedures, and/or failure to enact and enforce such, of Defendants Fields and Middleton resulted in the violation of Plaintiff's federal rights. Said allegations, taken as true for purposes of this Motion, preclude the granting of Defendants' Motion to Dismiss based on Eleventh Amendment immunity. Therefore, Defendants' Motion to Dismiss based on Eleventh Amendment immunity is **DENIED**.

CONCLUSION

Defendants' Fields and Middleton Motion to Dismiss based on the statute of limitations is **DENIED**.

Defendants' Fields and Middleton Motion to Dismiss Ginger Mathews, Lindsay Dawn Barrett, and Judy Gail Poindexter Iwanski, individually, based on lack of standing is **GRANTED**.

Defendants' Fields and Middleton Motion to Dismiss the claim brought against them in their official capacity based on Eleventh Amendment immunity is **DENIED**.

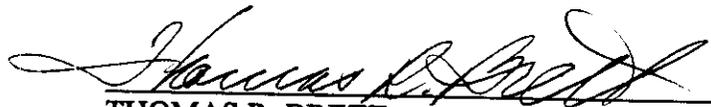
Defendants' Fields and Middleton Motion to Dismiss the claim brought against them in their official capacity for failure to state a claim is **DENIED**.

Defendants' Fields and Middleton Motion to Dismiss the claim brought against them in their personal capacity is **DENIED**.

Count Two of the Amended Complaint is **DISMISSED**.

The dispositive motion schedule as provided in this Court's Scheduling Order remains in effect.

IT IS SO ORDERED this 16th day of May, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

MAY 19 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL FRANK BRIGAN,)

Plaintiff,)

vs.)

No. 97-CV-390-E (M)

POLICEMAN BRYAN BAKER,)

et al.,)

Defendants.)

ENTERED ON DOCKET

DATE MAY 19 1997

ORDER

BEFORE this Court is the motion for leave to proceed *in forma pauperis* (Docket #2) and the civil rights complaint (Docket #1) of the plaintiff, Michael Frank Brigán.

Plaintiff filed the instant § 1983 complaint on April 23, 1997, alleging that his federally protected rights were violated when Claremore Police Officer Bryan Baker, along with other unknown defendant police officers, arrested and severely beat him on or about February 10, 1995. Plaintiff attaches to his complaint a "letter to the Court" in which he states the attorney "handling this claim" had been barred from practice in the State of Oklahoma, and as proof, attaches another letter in which the previously retained counsel (Earl W. Wolfe) advised Plaintiff that he (Mr. Wolfe) was unable to represent him. This letter from Mr. Wolfe is dated August 4, 1996, and specifically advises Plaintiff "the statute of limitations would bar the filing [of this claim] unless it is filed by February 10, 1997."

Because there is no federal statute of limitations for a civil rights action, the time in which such action must be filed is determined by the applicable state statute of limitations for personal injury actions. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). The applicable statute of limitations under Oklahoma law is the two-year limitations period for "an action for injury to the

3

rights of another." Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988). In such cases the cause of action accrues at the time the injury occurred. Id. Thus, a plaintiff must bring an action within two years of the date of that occurrence. The statute of limitations may be excused or tolled where the complaining party was not aware that the facts could not have been discovered at an earlier date through the exercise of reasonable diligence. Id.

Plaintiff's contention that he thought Mr. Wolfe was handling his claim only to find out that the attorney had been disbarred lacks merit. The allegations in his complaint reveal that the Plaintiff had knowledge of the alleged excessive force claim as early as February 10, 1995, the date Plaintiff was arrested. The August 1996 letter from Earl W. Wolfe simply stated that he could no longer represent Plaintiff on his case against the Claremore Police Department and its officers, that it would be necessary for Plaintiff to secure other counsel, and specifically, that the filing of the case must be by February 10, 1997. Thus, the allegations in the complaint establish that the two-year statute of limitations has expired and that Plaintiff knew the facts upon which his current claim is based within the limitations period.

Furthermore, Plaintiff's inmate status is insufficient justification for tolling the statute of limitations. Oklahoma has no tolling provision for civil lawsuits filed by prisoners. See Hardin v. Straub, 490 U.S. 536, 540 n.8 (1989).

The Prison Litigation Reform Act of 1996, added a new section to the in forma pauperis statute, entitled Screening. See 28 U.S.C. § 1915A. That section requires the Court to review prisoner complaints before docketing, or as soon as practicable after docketing, and dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted. Id. A suit is frivolous if "it lacks an arguable

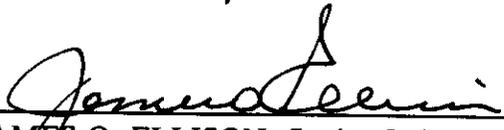
basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A suit is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After liberally construing Plaintiff's pro se pleading, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action lacks an arguable basis in law as it is clear from the face of the complaint that Plaintiff's claim against Defendants is barred by the two-year statute of limitations. See Fratus v. Deland, 49 F.3d 673, 674-75 (10th Cir. 1995) (district court may consider affirmative defense sua sponte when the defense is "obvious from the face of the complaint" and "[n]o further factual record [is] required to be developed"). Under the provisions of 28 U.S.C. § 1915A, the Court, upon review, shall dismiss the complaint, or any portion of the complaint, if the complaint -- (1) ... is frivolous, malicious or fails to state a claim upon which relief may be granted Therefore, the Court finds that Plaintiff's excessive force claim against the Claremore Police Department and its officers should be dismissed.

The Court declines to exercise pendent jurisdiction over any state claims Plaintiff may have. See 28 U.S.C. § 1367(c)(3); see also United Mine Workers v. Gibbs, 383 U.S. 715, 725-26 (1966).

ACCORDINGLY, IT IS HEREBY ORDERED that the above captioned case is hereby **dismissed as frivolous pursuant to 28 § 1915A(b)(1)**. Plaintiff's motion for leave to proceed *in forma pauperis* (Docket #2) is **denied**. Furthermore, the clerk of the Court is directed to "flag" this dismissal.

SO ORDERED THIS 16th 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

F I L E D

MAY 16 1997

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

BRENDA RICHARDS,)
)
Plaintiff,)

vs.)

No. 96-C-67-B (m)

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

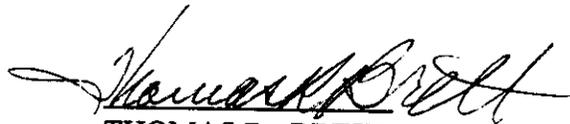
Defendants.)

EOD 5/19/97

ORDER

Before the Court is defendant St. John Medical Center's ("St. John") Motion to Reconsider the Court's February 27, 1997 Order sustaining in part and denying in part St. John's Motion for Summary Judgment. (Docket No. 67). The Court finds no merit to St. John's objection to the Court's ruling regarding St. John's potential liability under Title VII for the acts of its agent/supervisor, Dr. James Small. The Court's ruling is consistent with the Tenth Circuit Court of Appeals' interpretation of *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) and 42 U.S.C. §2000e(b). Accordingly, the Court denies defendant's motion.

ORDERED this 16th day of May, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT COURT

79

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

F I L E D

MAY 16 1997

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

BRENDA RICHARDS,)
)
 Plaintiff,)
)
 vs.)
)
 DR. JAMES SMALL, and SAINT JOHN)
 MEDICAL CENTER, ex rel., WORKMED)
 OCCUPATIONAL HEALTH NETWORK,)
)
 Defendants.)

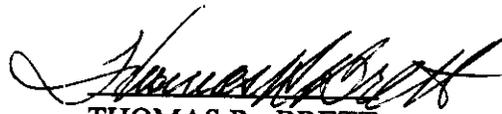
No. 96-C-67-B (M) ✓

EOD 5/19/97

ORDER

Before the Court is plaintiff Brenda Richards' ("Richards") Motion to Reconsider the Court's February 27, 1997 Order sustaining in part and denying in part St. John's Motion for Summary Judgment. (Docket No. 67). The Court finds no merit to Richard's objection to the Court's grant of summary judgment to defendant St. John Medical Center ("St. John") on Richards' intentional infliction of emotional distress claim. Accordingly, the Court denies plaintiff's motion to reconsider.

ORDERED this 16th day of May, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT COURT

80

FILED

MAY 15 1997

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

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

CHILMARK FINANCIAL CO.,
L.L.C., a Delaware Limited
Liability Company,

Plaintiff,

v.

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

Defendants.

Case No. 96-CV-1152-BU ✓

ENTERED ON DOCKET

DATE MAY 19 1997

STIPULATED ORDER OF DISMISSAL

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, plaintiff, Chilmark Financial Co. and the defendants, Ameriwest Bancorp, Inc. and Gregory D. Lorson, jointly stipulate and agree that this action, including all claims asserted therein, should be and is hereby dismissed with prejudice, in accordance with that certain Settlement Agreement executed by the parties on the 30th day of April, 1997. Plaintiff and defendants shall each bear their or his own costs, attorneys' fees, and expenses.

Pursuant to the express order of this Court, as recognized in paragraph 4 of the Settlement Agreement referred to and incorporated herein, this Court shall retain jurisdiction over the parties hereto and the matters which are the subject of the Settlement Agreement for the sole purpose of enforcing the terms of the Settlement Agreement.

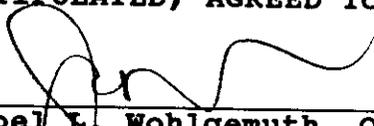
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C/J

DATED this 15th day of May, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

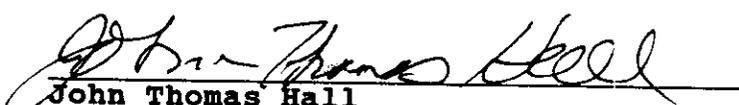
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GREGORY D. LORSON

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F I L E D

MAY 18 1997

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

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

WILBURN A. HITT

442-32-5667

Plaintiff,

vs.

JOHN J. CALLAHAN¹,
Acting Commissioner Social Security
Administration,

Defendant,

Case No. 96-CV-62-M ✓

ENTERED ON DOCKET
DATE MAY 19 1997

ORDER

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

I. STANDARD OF REVIEW

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

¹ President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security, effective March 1, 1997, to succeed Shirley S. Chater. Pursuant to Fed.R.Civ.P. 25(d)(1) John J. Callahan is substituted as the defendant in this suit.

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

II. BACKGROUND

This case has a long history beginning with Plaintiff's application for benefits in February 1988 which was denied initially, on reconsideration, and after hearing by the ALJ who found that Plaintiff could return to his past relevant work. On remand by the Appeals Council for further development of the record concerning Plaintiff's past relevant work, the ALJ determined that Plaintiff could not perform his past relevant work but could perform other work in the economy, therefore disability benefits were denied at step-5. [Decision dated 1/25/91; R. 11-45]. On September 1, 1993, the district court affirmed the ALJ's finding that Plaintiff "was not disabled prior to his 55th birthday on April 4, 1989," but remanded the case for further evaluation for the time subsequent to his 55th birthday. [R. 417].

Upon remand the ALJ issued a decision dated 3/25/94 finding Plaintiff was limited to light and sedentary work, and unable to perform his past relevant work. [R. 444]. Based on his RFC, his education, and the absence of transferable skills, the regulations directed that Plaintiff be found disabled as of his 55th birthday, April 4, 1989, but not prior thereto. [R. 448]. Plaintiff appealed the denial portion of the

district court's 9/1/93 decision to the Tenth Circuit. Despite the unique procedural posture of such an appeal, the Tenth Circuit concluded it had jurisdiction and addressed the merits. [R. 452-53].

The Tenth Circuit affirmed the Secretary's² analysis of Plaintiff's claim of disabling pain and the analysis of the medical record. [R. 455-56]. However, the Circuit agreed that the questioning of the vocational expert was improper and remanded the case "to the Secretary for the sole purpose of eliciting vocational testimony with a properly phrased hypothetical question." [R. 457].

On remand from the Tenth Circuit the ALJ determined that during the relevant time frame, July, 1985 to April, 1989, Plaintiff had the residual functional capacity for light work which required only occasional bending. Based on the testimony of the vocational expert, the ALJ concluded that there were light and sedentary jobs that Plaintiff could perform given his age, education, and lack of transferable skills. Therefore benefits were denied. [366-67].

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues: (1) there is no support for the ALJ's conclusion that Plaintiff could perform the prolonged standing required of light work; (2) the ALJ improperly evaluated Plaintiff's credibility; (3) the ALJ erroneously relied on the grids; and (4) the ALJ relied upon improper hypothetical questioning.

² Although the Commissioner of Social Security is the appropriate defendant in this action, the Court continues to refer to the Secretary of Health and Human Services throughout the text of this opinion because the Secretary was the appropriate party at the time of the underlying decision. Further, much of the relevant case law refers to the Secretary.

III. DISCUSSION

Plaintiff claims to be unable to work since July 1985 due to arthritis and residuals from 1978 and 1983 on the job back injuries. [Dkt. 7, p.1]. The only medical evidence pertaining to these complaints during the July 1985 to April 1989 time frame are the 1988 and 1989 records from Dr. Krug [R. 289-95] and Dr. Williams [R. 305-06], neither of whom were treating physicians.

Dr. Krug performed a consultative examination in April 1989. He reported that Plaintiff had a ventral hernia and tenderness in the lumbosacral area. He found crepitation, unusual laxity, and tenderness in both knees. He found symptoms of arthritis in the wrist and hands. On physical examination Plaintiff had fairly normal range of motion of the shoulders, cervical spine, and lumbar spine, although there was some mild pain, spasm, and tenderness in these areas. Krug stated: "I think prolonged standing and walking would probably bother him. His low back problem would give him difficulty with persistent bending and stooping, even prolonged sitting. . . . [The hernia] would give him difficulty and restrict him in heavy lifting." [R. 291].

Dr. Williams examined Plaintiff in January, 1989 at the request of his attorney. Based on a 1978 lumbar myelogram Dr. Williams noted spinal stenosis at L1-2. On examination Dr. Williams found lumbosacral tenderness, tightness of the paraspinous muscles, positive straight leg raising, and limitation in the range of motion of the spine. Dr. Williams concluded that Plaintiff could not lift more than five pounds, bend or rotate the lumbar spine, squat, stand for more than 30 minutes, or perform

prolonged walking or sitting. [R. 305-06]. The ALJ found that although the physical findings by Dr. Williams were fairly consistent with those noted by other physicians, the physical limitations were not. Further, the ALJ noted the limitations described by Dr. Williams "are inconsistent with the claimant's own description of physical activities." [R. 364]. At the January 18, 1989 hearing Plaintiff testified that the distance he could walk was a quarter of a mile, a half mile; he could sit for an hour; and stand an hour or an hour and a half. [R. 99]. On a pain questionnaire completed March 6, 1988, Plaintiff related that his activities consist of occasional fishing, walking, and cutting wood for home use. [R. 231]. As to what brings on pain, he answered, "Anything I do physically, changed a tire, cut wood." *Id.* These activities are inconsistent with the level of disability Dr. Williams found to exist.

The ALJ found that "claimant's residual functional capacity is limited to no more than light work which requires only occasional bending." [R. 364]. Plaintiff contends that the evidence of record for the period prior to April 1989 provides no support for the ALJ's conclusion that he could perform the prolonged standing required of light work. Both Dr. Krug and Dr. Williams specifically identified prolonged sitting, standing and walking as areas that would bother Plaintiff. [R. 291, 306]. Doctors Krug and Williams were uncontradicted in their opinion that Plaintiff could not perform the standing and walking required of light work. Thus, Plaintiff is correct, the medical evidence does not support the ALJ's finding that Plaintiff could perform light work provided he was limited to occasional bending. However, the

evidence does support the second hypothetical which was based, primarily, on Plaintiff's own description of his physical activities.

In 1994 Plaintiff testified he could lift "about 10, 20 pounds." [R. 485]. In the 1989 hearing he testified he could walk a half mile, could stand an hour or an hour and a half, and could sit for an hour. [R. 99]. The following hypothetical question asked of the vocational expert was supported by the record:

Let's say somebody couldn't do the full range of light. They might be able to occasionally lift 15 to 20 pounds. They might not be able to stand the full six out of eight hours in the definition of a full range of light work, but they could stand maybe three or four hours out of an eight-hour day, an hour at a time. And then, the other parts of the day, they'd have to have a situation where they could sit down, and have limited ability to bend. They could occasionally do it, but we wouldn't expect them to do it frequently. Any unskilled jobs that would meet that kind of a profile that you could try to place someone in?

[R. 404-05]. The vocational expert responded with a number of jobs that were all in the sedentary range. Because the grids dictate a conclusion of disabled for a person like Plaintiff who is over 50 with limited or less education and no transferable skills,³ Plaintiff argues that it was error for the ALJ to rely on these sedentary jobs to find that Plaintiff was not disabled. The Court agrees.

At step five of the sequential analysis, the Secretary bears the burden of establishing that, given the claimant's residual functional capacity, age, education, and work experience, a significant number of jobs exist in the national economy that

³ See Rule 201.09, 20 C.F.R. Pt. 404, Subpt. P., App. 2.

the claimant can perform. *Ragland v. Shalala*, 992 F.2d 1056, 1057 (10th Cir.1993). During the period at issue, Plaintiff was a person closely approaching advanced age. See 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 201.00(g)(age 50-54). Plaintiff had an eighth grade education and, according to the vocational expert, he had no transferrable skills. Given plaintiff's age, education, and work experience, the grids would dictate a finding of disabled if plaintiff were limited to sedentary work, *id.* at Table 1, Rule 201.09, but not if he could perform a full range of light work, *id.* at Table 2, Rule 202.10.

Although the ALJ iterated that Plaintiff could do more than sedentary work, when presented with the set of limitation supported by the record, the vocational expert responded with only sedentary jobs. [R. 405]. However, Plaintiff's ability to perform sedentary jobs is "immaterial given his age, education, and work experience," *DeFrancesco v. Bowen*, 867 F.2d 1040, 1045 (7th Cir. 1989). Therefore, the vocational expert's testimony about available *sedentary* jobs does not support a finding that Plaintiff is not disabled. See *Distasio v. Shalala*, 47 F.3d 348, 350 (9th Cir. 1995)(concluding that "[b]ecause the Secretary failed to produce evidence that any job categorized as light work was available to [the claimant], but only produced evidence of sedentary work available to him," substantial evidence did not support the Secretary's finding that the claimant, who was closely approaching advanced age and capable of performing only a limited range of light work, was not disabled).

Absent evidence of the existence of a significant number of *light* jobs that plaintiff can perform despite the impairments supported by the record, substantial

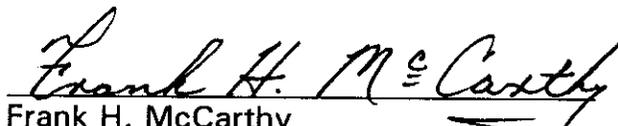
evidence does not support the ALJ's determination at step five that plaintiff is not disabled. Therefore, the denial of benefits must be reversed. This result eliminates the necessity of addressing Plaintiff's other points of error.

IV. CONCLUSION

When a decision of the Secretary is reversed on appeal, it is within the court's discretion to remand either for further administrative proceedings or for an immediate award of benefits. 42 U.S.C. § 405(g). *Ragland*, 992 F.2d at 1060. "[O]utright reversal and remand for immediate award of benefits is appropriate when additional fact finding would serve no useful purpose." *Dollar v. Bowen*, 821 F.2d 530, 534 (10th Cir. 1987). The Court finds that additional fact finding would not be useful.

Accordingly, the court exercises its discretion pursuant to 42 U.S.C. § 405(g) and REVERSES and REMANDS the case for an immediate award of disability benefits.

SO ORDERED THIS 16th day of MAY, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

ROBERT B. GWYN, an individual,
and JOHN A. MOLENAAR, an
individual,

Plaintiffs,

vs.

TERRA INDUSTRIES INC.,
a Maryland corporation, and
AGRICULTURAL MINERALS AND
CHEMICALS, INC. DEFERRED
COMPENSATION PLAN,

Defendants.

FILED

MAY 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-1177-BU

ENTERED ON DOCKET

DATE MAY 19 1997

JOINT STIPULATION OF DISMISSAL

Plaintiffs, Robert B. Gwyn and John A. Molenaar, and defendants, Terra Industries, Inc., Agricultural Minerals and Chemicals, Inc. Deferred Compensation Plan, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby stipulate to the dismissal of this proceeding with prejudice to the refiling of same.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS, ROBERT B.
GWYN AND JOHN A. MOLENAAR

(3)

clt



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**ATTORNEYS FOR DEFENDANTS, TERRA
INDUSTRIES, INC. and AGRICULTURAL
MINERALS AND CHEMICALS, INC. DEFERRED
COMPENSATION PLAN**

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ENTERED ON DOCKET
MAY 5-19-97

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

FILED

MAY 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

P. M. M. ENTERPRISES, INC., d/b/a)
Hampshire Inn, et al.,)
)
Plaintiffs,)
)
vs.)
)
STRATFORD HOUSE INNS, INC.,)
an Oklahoma corporation, et al)
)
Defendants.)

CIVIL ACTION NO. 95-C-1125 K

AGREED JOURNAL ENTRY OF JUDGMENT

Now on this 16 day of May, 1997, comes on for consideration the joint application of certain Plaintiffs and Defendants for this Court to vacate the Order of Dismissal of March 14, 1997, and to enter judgment herein consistent with a compromise and settlement which they have negotiated by and between themselves. Plaintiff Shaner Hotel Group Limited Partnership does not seek to participate herein and the Order of Dismissal of March 14, 1997 shall stand as to this Plaintiff in relation to these Defendants.

This Court, being duly advised in the premises, finds that the Order of Dismissal of March 14, 1997, should be vacated as to certain Plaintiffs, that the compromise and settlement of the parties should be approved and made the order of the Court and judgment rendered according, all as separately hereafter described.

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IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, as follows:

1. That the Order of Dismissal of March 14, 1997, should be and is hereby vacated as to the Parties to this Settlement as further defined in paragraph 2 hereafter.
2. The parties to this settlement consist of the following Plaintiffs: P.M.M. Enterprises, Inc, d/b/a Hampshire Inn; Pal and Pal, Inc., d/b/a Stratford House Inn; U&M, Inc., d/b/a Stratford House Inn; Broken Arrow Motel Investment, Inc. f/d/b/a Inn of Broken Arrow; Stratford House Enterprises, Inc., d/b/a Stratford House Inn; Savitaben R. Patel, d/b/a Stratford House Inn; K&A Motel, Inc., d/b/a Stratford House Inn; Lal & Lal Enterprises, Inc., d/b/a Stratford House Inn; RamRaj Enterprises, Inc., d/b/a Super 8 Motel; Hotel Properties f/d/b/a Stratford House Inn at two locations and Stratford Towers Hotel and later as Towers Hotel and Suites (all in Tulsa County, Oklahoma); Stratford Nacogdoches, Inc., d/b/a Stratford House Inns; and, Dharendra S. Patel and Kusumben D. Patel, d/b/a Stratford House Inn ("Plaintiff Group" hereafter), and the Defendants. The Plaintiff Group does not include Shaner Hotel Group Limited Partnership, f/d/b/a Shaner Haus Lodge and Shaner Hotel Group Limited Partnership is not a party to this settlement. The Plaintiff Group should be and are hereby denied any and all relief as prayed for in their Second Amended Complaint.
3. That Defendant George A. Shipman, individually, has disclaimed and does hereby disclaim any right, title or interest in or claim to the trademarks including 'Stratford House Inns' or 'Stratford House Inns Luxury Accommodations' or the logo 'SHI' and damages described in the counter-claim of Defendant Stratford House Inns, Inc. ("Stratford" hereafter) and accordingly it is adjudicated that George A. Shipman has no right, title or interest in or claim to such trademarks or damage claims based thereupon. Therefore, Defendant George A. Shipman, individually, should be and is hereby permanently restrained and enjoined from asserting any claim against Plaintiff Group for any alleged wrongful use of the trade names or marks 'Stratford House Inns' or 'Stratford House Inns Luxury

Accommodations' or the logo 'SHI' for any claim or counterclaim made or that could have been made in conjunction with the claims to the trademarks and damages set forth in the Answer or Counterclaim of Defendant Stratford House Inns, Inc., and George Shipman in any forum at any time hereafter.

4. That Stratford House Inns, Inc. shall be paid the agreed sum of \$23,324.00 by the Plaintiff Group. This payment is in lieu of other damages for their use of the name 'Stratford House Inns' or 'Stratford House Inns Luxury Accommodations' or the logo 'SHI' from any prior time through the expiration of the terms of paragraph 6 herein. The Plaintiff Group shall be held jointly and severally liable for payment of said settlement amount. Said agreed settlement terms and sum are the negotiated and agreed terms fixed by the parties themselves in order to reach a settlement and do not represent any finding of fact made by the Court as to what, if any, actual damages were suffered by any Party. Based upon the judgment for \$23,324.00 as aforesaid and the agreement of the parties with respect to the settlement of their claims one against another, this Court finds and it is further ordered that all of the claims of the Plaintiff Group and Defendants, including each Parties's employees and agents and assigns, are hereby released and discharged from any accounts, claims, demands or causes of action whatsoever, known or unknown, arising out of the matters, things and events described in the Second Amended Complaint and in the Answer and Counter Claim, and the parties are restrained from suing one another with respect thereto; provided, however, that this shall not prohibit these parties from enforcing the terms and conditions of the within Agreed Journal Entry of Judgment.

5. As between Defendants and the Plaintiff Group, above defined do jointly and severally agree, that Stratford House Inns, Inc., has the exclusive ownership of the mark 'Stratford House Inns', of 'Stratford House Inns Luxury Accommodations' and the logo 'SHI' and that said Defendant

Stratford House Inns, Inc., has not abandoned the ownership or use of the 'Stratford' name and mark and that Plaintiffs have no interest therein.

6. That Plaintiff Group has agreed and accordingly should be and are hereby permanently restrained and enjoined from using the name 'Stratford' or the mark 'Stratford House Inns' or 'Stratford House Inns Luxury Accommodations' or the logo 'SHI' on or after March 26, 1998, whether by signage, stationary, supplies, accessories, telephone listing, advertising or otherwise; *provided, however*, that until March 26, 1998, each Plaintiff in the said Plaintiff Group shall have the right to continue the use of the Stratford name and Stratford marks (hereinabove described) at its respective present motel premises in the same manner as presently used and at those other locations being presently used to advertise its respective present motel premises but not at any other location and not in those instances where any one or more of the Plaintiffs in the said Plaintiff Group has abandoned the actual use of the Stratford name and mark prior to this date. Further, provided, that any telephone directory listings or advertisements made for a one (1) year term in 1997 by any one or more of the Plaintiffs in the said Plaintiff Group which extended to the anniversary date thereof in 1998, shall not be deemed to be a violation of this permanent injunction. The Plaintiffs in the Plaintiff Group, their assigns and successors, shall also be bound by this permanent injunction in the nature of a covenant running with the land. Additionally, that the Plaintiffs in the said Plaintiff Group shall not hereafter adopt and use on their said respective motel properties a name which is deceptively similar to Stratford House Inns and they are each permanently restrained and enjoined from doing so. The Plaintiffs in said Plaintiff Group hereby represent that any one or more Plaintiffs may in the future use the name 'Sanford Inn' and such name and mark 'SI' is deemed by the Defendants to not be deceptively similar to 'Stratford House Inns' and Plaintiffs shall not be enjoined from using such in the future. Further, Plaintiff K & A Motel, Inc., currently doing business as Strafford House Inn

may continue to use said name at K & A Motel, Inc.'s current premises and said name shall not be deemed to be deceptively similar when used by said Plaintiff nor shall Defendants enjoin said Plaintiff for so using the name 'Strafford House Inn' at such location in the future. The Plaintiffs in the said Plaintiff Group shall not oppose the application of Stratford House Inn, Inc., for registration of its said trademarks with the United States Patent and Trademark Office, the State of Oklahoma and/or the State of Texas, and they are permanently restrained and enjoined from doing so.

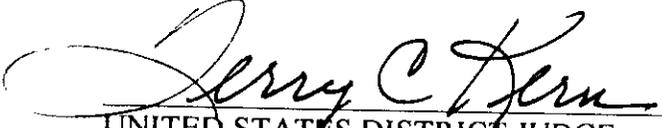
7. Additionally, if any one or more of the Plaintiffs in the said Plaintiff Group shall hereafter buy a motel property not covered in this litigation which is then using the name 'Stratford House Inn', then such Plaintiff may continue the use of the Stratford name or mark for six (6) months thereafter; provided, however, that said usage shall in no instance extend beyond March 26, 1998.

8. The foregoing restrained and prohibition is not intended to nor shall prohibit the Plaintiff Group from using indefinitely hereafter the design or traddress referenced in the Second Amended Complaint and in the counter claim of Defendants as to any motel now owned or operated by the said Plaintiffs Group or any member of the Plaintiffs Group may hereafter acquire. That Defendants, their successors and assigns are denied any other relief on their counter-claims and are hereby bond by the terms hereof.

9. That Plaintiffs and Defendants and Counter-Claimants shall each be responsible for and pay their own respective costs and fees.

10. Notwithstanding anything above to the contrary, that Plaintiff Shaner Hotel Group Limited Partnership, f/d/b/a Shaner Haus Lodge is not participating in this negotiated and agreed settlement, is not obligated for the payment of all or any part of the agreed money judgment and is not intended, nor shall be benefitted or burdened by the terms of this Settlement Agreement.

11. That the within and foregoing Journal Entry of Judgment is a final order and judgment.


UNITED STATES DISTRICT JUDGE

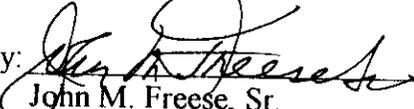
Approved as to form and substance:

DORMAN & GILBERT, P.A.

By: 
William S. Dorman

ATTORNEY FOR PLAINTIFFS

FREESE MARCH & GRAVES

By: 
John M. Freese, Sr.

ATTORNEY FOR DEFENDANTS

By: 
George A. Shipman, Individually

STRATFORD HOUSE INNS, INC.

By: 
George A. Shipman, President

That Defendant Odessa Industries, Inc. is a corporate Defendant, and therefore not an infant or incompetent person, and is not in the military service of the United States; and

That the Court has also been fully advised as to the legal costs incurred by Plaintiff, including attorney fees authorized by statute, which the Court finds reasonable and necessary.

The Court having heard the argument of counsel and being fully advised, finds that judgment should be and is hereby entered against Defendant Odessa Industries, Inc. and in favor of Plaintiff, Amercool Manufacturing, Inc.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff, Amercool Industries, Inc. recover from Defendant Odessa Industries, Inc. in the sum of \$87,920.00 (U.S.), together with pre-judgment interest as allowed by law, all costs, and a reasonable attorneys fee for all of which let execution issue.

Judgment rendered this 16 day of May, 1997.


UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

APPROVED AS TO CONTENT AND FORM:


James R. Polan
Counsel for Plaintiff

ENTERED ON DOCKET
DATE 5-19-97

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

WANDA RUBLE,

Plaintiff,

v.

THE FEDERAL DEPOSIT INSURANCE CORPORATION,
a Corporation Organized Under the Laws of the United
States of America,

Defendant.

MAY 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-c-617-K

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 16 day of May, 1997.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

HOWARD W. IDDINGS, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 BENEFUND, INC., et. al.,)
)
 Defendants.)

Case No. 94-C-1056-H

FILED
MAY 15 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

MAY 16 1997

JUDGMENT

I. Judgment for Defendants on Jury Verdict.

In accordance with the jury verdict rendered on February 27, 1997, judgment is hereby entered in favor of the Defendants, BeneFund, Inc., Vernon R. Twyman, Jr., and John C. Edwards and against Plaintiffs, Howard W. Iddings, Trustee of the Howard Iddings and Audrey Iddings Revocable Living Trust, George C. Loeber, Nathan E. Hodges, Jr., Patrick M. Hodges, Kevin A. Guttman and J. Herbert Peddicord.

II. Judgment for Defendants Against Plaintiffs Who Failed to Appear and Prosecute Claims.

The following Plaintiffs did not appear at trial and prosecute their claims: Doris J. Loeber, Dr. Alex L. Grad, as Trustee of the Dr. Alex L. Grad RLT U/A, Pamela Lee Grad, as Trustee of the Pamela Lee Grad RLT U/A, Sabrena L. Guttman, Mona M. Gourley, Robert M. Ray, Jr., Diana J. Ray, Richard D. Woodall, Donis C. Woodall, R. Corinaldi, CFP and Dr. A. Mercer, Trustees of the R. Corinaldi and A. Mercer RLT U/A, and Robert F. Ziegenfuss.

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Accordingly, the Court enters judgment against these Plaintiffs and in favor of Defendants BeneFund, Inc., Vernon R. Twyman, Jr. and John C. Edwards, in accordance with its prior Order granting pursuant to Defendants' motions during trial presented pursuant to Rule 50 of the Federal Rules of Civil Procedure.

III. Judgment for Defendants Against Plaintiff Russell C. Gourley, III

Plaintiff Russell C. Gourley, III, appeared at trial and presented evidence. The claims of Russell C. Gourley, III were dismissed pursuant to Rule 50 of the Federal Rules of Civil Procedure, and were not presented to the jury. Accordingly, the Court enters judgment against Plaintiff Russell C. Gourley, III, and in favor of Defendants BeneFund, Inc., Vernon R. Twyman, Jr. and John C. Edwards.

IV. Judgment for Plaintiffs Against Defendant Inland Commercial Investments, Inc.

Default judgment is entered against Defendant Inland Commercial Investments, Inc. and in favor of Plaintiff Howard W. Iddings, Trustee of the Howard Iddings and Audrey Iddings Revocable Living Trust, in the amount of \$400,000, together with prejudgment interest at the rate of 6.99 %, from February 23, 1994, until the date of this judgment, and post judgment interest at the rate of 6.06 % per annum.

Default judgment is entered against Defendant Inland Commercial Investments, Inc. and in favor of Plaintiff George C. Loeber, in the amount of \$100,000, together with prejudgment interest at the rate of 6.99%, from January 1, 1994, until the date of this judgment, and post judgment interest at the rate of 6.06 % per annum.

Default judgment is entered against Defendant Inland Commercial Investments, Inc. and in favor of Plaintiff Nathan E. Hodges, Jr. in the amount of \$75,000 ,together with

prejudgment interest at the rate of 6.99 %, from January 1, 1994, until the date of this judgment and post judgment interest at the rate of 6.06 % per annum.

Default judgment is entered against Defendant Inland Commercial Investments, Inc. and in favor of Plaintiff Patrick M. Hodges in the amount of \$48,500, together with prejudgment interest at the rate of 6.99 %, from January 1, 1994, until the date of this judgment and post judgment interest at the rate of 6.06 % per annum.

Default judgment is entered against Defendant Inland Commercial Investments, Inc. and in favor of Plaintiff Kevin A. Guttman in the amount of \$ 15,000, together with prejudgment interest at the rate of 6.99% , from January 21, 1994, until the date of this judgment, and post judgment interest at the rate of 6.06 % per annum.

Default judgment is entered against Defendant Inland Commercial Investments, Inc. and in favor of Plaintiff J. Herbert Peddicord in the amount of \$68,795.69, together with prejudgment interest at the rate of 6.99%, from February 25, 1994, until the date of this judgment, and post judgment interest at the rate of 6.06 % per annum.

Default judgment is entered against Defendant Inland Commercial Investments, Inc. and in favor of Plaintiff Russell C. Gourley, III in the amount of \$11,250, together with prejudgment interest at the rate of 6.99%, January 1,1994, until the date of this judgment, and post judgment interest at the rate of 6.06 % per annum.

V. **Judgment in favor of Third Party Defendant Mark Loeber and Against Third Party Plaintiffs BeneFund, Inc., Vernon R. Twyman, Jr. and John C. Edwards**

The claims asserted by Third Party Plaintiffs BeneFund, Inc., Vernon R. Twyman, Jr. and John C. Edwards were dismissed with prejudice by means of the Order Granting Third-

Party Defendant's Motion For Summary Judgment filed January 6, 1997. Judgment is entered in favor of Third Party Defendant Mark Loeber and against Third Party Plaintiffs BeneFund, Inc., Vernon R. Twyman, Jr. and John C. Edwards.

VI. Dismissal with Prejudice of Plaintiffs' Claims Against Peter G. Futro and Futro & Associates, P.C.

The Plaintiffs' claims against Defendants Peter G. Futro and Futro & Associates, P.C. were dismissed with prejudice by means of stipulation filed October 23, 1996. Each party is to bear its own costs.

VII. Dismissal with Prejudice of Plaintiffs' Claims against Defendants Pat Guest and Guest & Company

The Plaintiffs' claims against Defendants Pat Guest & Guest & Company were dismissed with prejudice by means of a stipulation filed August 31, 1995. Each party is to bear its own costs.

VIII. Severance of Plaintiffs' Claims Against Defendants Ronald Whittier and William Cardie

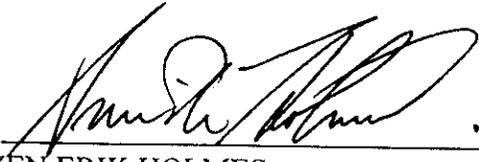
The Plaintiffs' claims against Defendants Ronald P. Whittier and William J. Cardie are severed. Those claims are presently pending in adversary proceedings in the United States Bankruptcy Court for the Central District of California.

IX. Substitution of Plaintiff Howard W. Iddings, Trustee of the Howard Iddings and Audrey Iddings Revocable Living Trust, for Plaintiff Howard W. Iddings

Pursuant to Rule 17(a) of the Federal Rules of Civil Procedure, Howard W.

Iddings, Trustee of the Howard Iddings and Audrey Iddings Revocable Living Trust, was substituted for Plaintiff Howard W. Iddings. Howard W. Iddings agreed to be bound by the result in this case.

ORDERED this 14TH day of May, 1997.

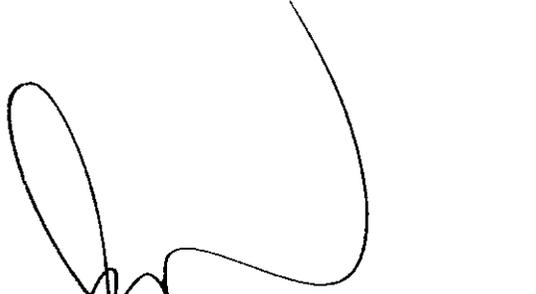

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

Agreed as to form:



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O.B.A. #492
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BALMAN & WALLER
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ATTORNEYS FOR PLAINTIFFS

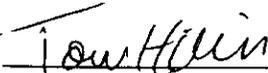


Joe L. Wohlgenuth, Esquire
O.B.A. #9811
NORMAN & WOHLGEMUTH
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(918) 583-7571

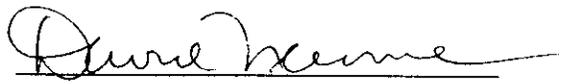
ATTORNEYS FOR DEFENDANT
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CRAIGE & HICKS, INC.
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VERNON R. TWYMAN


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ATTORNEYS FOR THIRD-PARTY
DEFENDANT

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

FILED

MAY 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HUGH GENE McELROY,)
)
Plaintiff,)

vs.)

Case No. 96-C-795B ✓

INDEPENDENT SCHOOL DISTRICT)
#9 OF TULSA COUNTY also known)
as UNION PUBLIC SCHOOLS;)
UNION PUBLIC SCHOOLS BOARD OF)
EDUCATION; JOHN DOE NOS. 1-20)
as unknown members of UNION)
SCHOOL BOARD; THE SERVICEMASTER)
COMPANY LIMITED PARTNERSHIP,)
a Delaware limited partnership;)
SERVICEMASTER MANAGEMENT)
CORPORATION, a Delaware)
corporation; MID-AMERICA MANAGEMENT)
SERVICES, a Delaware corporation;)
JOHN DOE COMPANY NOS.)
1-20 AND INDIVIDUAL JOHN DOE NOS.)
21-40 as unknown partners in THE)
SERVICEMASTER COMPANY LIMITED)
PARTNERSHIP,)

Defendants.)

ENTERED ON DOCKET

DATE MAY 16 1997

**JOINT STIPULATION OF
DISMISSAL WITHOUT PREJUDICE**

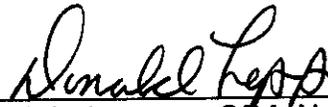
The plaintiff, Hugh Gene McElroy, and the defendants, The ServiceMaster Company Limited Partnership, a Delaware limited partnership, ServiceMaster Management Corporation, a Delaware corporation, Mid-America Management Services, a Delaware corporation, and Individual John Doe Nos. 21-40 as unknown partners in The ServiceMaster Company Limited Partnership, pursuant to Rule 41(a)(1)(ii), Fed.R.Civ.P., jointly stipulate that the plaintiff's action against the

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Handwritten initials/signature

defendants, The ServiceMaster Company Limited Partnership, a Delaware limited partnership, ServiceMaster Management Corporation, a Delaware corporation, Mid-America Management Services, a Delaware corporation, and Individual John Doe Nos. 21-40 as unknown partners in The ServiceMaster Company Limited Partnership, and each of them, be dismissed **WITHOUT PREJUDICE**, with the parties to bear their own respective costs, including all attorney's fees and expenses of this litigation.

Dated this 13th day of May, 1997.



Donald A. Lepp, OBA No. 16260
Frances E. Patton, OBA No. 10924
Kevin Gassaway, OBA No. 03281
PIERCE COUCH HENDRICKSON
BAYSINGER & GREEN
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Attorneys for Plaintiff



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& GERALDSON
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Gary C. Pierson, Esq.
LYTLE SOULE & CURLEE
1200 Robinson Renaissance
Oklahoma City, Oklahoma 73102
Attorneys for ServiceMaster Defendants

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

CALLIE COCHRAN,

Plaintiff,

v.

COASTAL MART, INC., a Delaware
corporation,

Defendant.

No. 96-C-132-K ✓

FILED

MAY 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the Plaintiff's Motion for Attorney Fees. The Plaintiff brought a variety of claims against the Defendant including hostile environment sexual harassment and constructive discharge under Title VII of the Civil Rights Act of 1991, 42 U.S.C. 2000e *et seq.*, violation of the Equal Pay Act, assault and battery, negligent hiring and retention, and wrongful discharge in violation of Oklahoma public policy. Defendant was granted summary judgment as to the Plaintiff's wrongful discharge claim, and the remaining state law claims were dismissed by the Court prior to submission of the case to the jury. The jury returned a verdict in favor of the Plaintiff as to her hostile environment claim, and in favor of the Defendant as to the Equal Pay Act and constructive discharge claims. The jury also awarded damages in the amount of \$500 to the Plaintiff.

The Plaintiff now seeks \$22,312.50 in attorney fees based upon expenditure of approximately 178.5 hours at a rate of \$125.00 per hour.¹ The Defendant opposes this amount as excessive and unreasonable in light of the fact that the Plaintiff failed on five of six claims, and was awarded only

¹ The Court notes that the Plaintiff's attorney submitted a recalculation of hours excluding time spent on the Equal Pay Act and state law claims. The recalculation resulted in a total claim of \$20,875.00 based upon 167 hours at a rate of \$125.00 per hour.

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

FILED

MAY 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JEANNIE JAMES,

Plaintiff,

vs.

GRAND LAKE MENTAL HEALTH CENTER;
PAULA VELLA; SIOUS GRENINGER;
RONNIE BATT; TRENT HUMPHREY; CITY OF
PRYOR, OKLAHOMA; AND
DR. CHRISTOPHER DELONG,

Defendants.

Case No. 96-CV-631-C

ENTERED ON DOCKET
DATE MAY 15 1997

ORDER

Before the Court is the motion for summary judgment filed by defendant Christopher DeLong, D.O. For the reasons set forth below the Court finds that the defendant's motion should be granted.

On July 11, 1995, Christopher DeLong was employed as a staff emergency room physician by a private hospital, Mayes County Medical Center which is owned and operated by Baptist Healthcare Corporation. On that date, the plaintiff Jeannie James was brought to the emergency room by an officer with the City of Pryor police department for an emergency mental health evaluation on a referral from the Grand Lake Mental Health Center. The referral stated that the plaintiff could not remember to take medication appropriately, had been severely depressed, could not remember simple things, was confused, had racing thoughts, was not eating and could not take care of her basic needs. The referral also stated that plaintiff's estranged husband was severely abusive and had threatened to kill her but that she "refused to go to a SAFE house or consider leaving her home."

During her stay at the hospital emergency room, Dr. DeLong executed a "Licensed Mental Health Professional's Statement" certifying that plaintiff was in need of an emergency psychiatric

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evaluation at a state mental health hospital. Based on his evaluation, Dr. DeLong directed the police officer to transport plaintiff to Eastern State Hospital. Plaintiff was transported involuntarily. Plaintiff contends that Dr. DeLong made this determination without personally examining her. She also contends that Dr. DeLong improperly delegated his professional obligation to a non-physician, by allowing a portion of the "Licensed Mental Health Professional's Statement" to be completed by plaintiff's clinician, Paula Vella, at the Grand Lake Mental Health Center.

Dr. DeLong admits that he cannot recall whether he personally examined the plaintiff, however he contends that he customarily bases emergency mental health evaluations on his personal observation of the patient, interviewing and talking to the patient, reviewing the patient's medical records, history and reviewing the case with the clinician who referred the patient from the Grand Lake Mental Health Clinic. Dr. DeLong also contends that he does not personally know the clinician Paula Vella.

Plaintiff brings this action under 42 U.S.C. § 1983, claiming that her constitutional rights were violated by Dr. DeLong's conduct which contributed to her involuntary detention at Eastern State Hospital pursuant to the Oklahoma Emergency Detention and Protective Custody Act. As against defendant DeLong plaintiff alleges, in addition to improperly relinquishing his duties to Paula Vella, that he failed to immediately file a Petition for Protective Custody and Treatment in the District Court of Mayes County seeking authorization for her involuntary emergency detention.

In Pino v. Higgs, 75 F.3d 1461 (10th Cir.1996), the court stated private physicians performing official duties pursuant to a state mental health emergency detention statute were not state actors within the meaning of 42 U.S.C. § 1983. It is undisputed that Dr. DeLong was provided with the referral from Grand Lake Mental Health Center which contained comments by Paula Vella, the clinician assigned to plaintiff at that facility, that the referral indicated that plaintiff was severely depressed,

despondent, not eating, and unconcerned for her personal safety. Additionally it is undisputed that Dr. DeLong spoke to the police officer who transported plaintiff to the emergency room. It was Dr. DeLong's recommendation, that plaintiff was in an emergency situation and needed further evaluation at a mental health hospital. Dr. DeLong neither admitted or treated the plaintiff at Mayes County Medical Center. She was at the hospital for less than one hour. As a private physician, Dr. DeLong merely authorized that plaintiff be transported for an evaluation by a qualified mental health expert at Eastern State Hospital to determine whether plaintiff required treatment. In such a capacity, Dr. DeLong was not obligated to file with the district court a Petition for Protective Custody and Treatment because Plaintiff was never involuntarily admitted to that hospital nor did she receive treatment from Dr. DeLong. It is uncontested that Dr. DeLong personally signed the Referral to Eastern State Hospital, and included his professional opinion that plaintiff was depressed, unable to care for herself, was confused and crying.

To state a claim under § 1983, a plaintiff must initially establish that a defendant acted "under color of any statute, ordinance, regulation, custom, or usage, of any State" to deprive the plaintiff of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. Dr. DeLong was the emergency room physician on call when plaintiff was brought to the private hospital by the police officer. As stated in Pino v. Higgs, a state has no authority and cannot require a private physician to examine a "proposed client" anymore than it could require the examination of any other person who appeared at the emergency room. Id. 75 F.3d at 1466. Thus, Dr. DeLong's actions of referring plaintiff to Eastern State hospital for a mental evaluation were those of a private physician not "state action". In Pino the Tenth Circuit held that a private physician who certifies a person for an involuntary mental health evaluation is not subject to § 1983 liability simply

because a police officer responds by transporting or detaining that person. *Id.* "A state is not responsible for decisions that ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Id.* citing *Blum v. Yaretsky*, 457 U.S. 991, 1008 (1982). Accordingly, Dr. DeLong's certification for transport of the plaintiff to Eastern State Hospital for evaluation did not constitute state action under § 1983.

It is therefore the Order of the Court that the motion for summary judgment filed by defendant Christopher DeLong, D.O. is hereby granted.

IT IS SO ORDERED the 17th day of May, 1997.



H. DALE COOK
Senior U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAY 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 ONE 30.0 ACRE TRACT OF)
 LAND IN SECTION 24,)
 TOWNSHIP 27 NORTH,)
 RANGE 16 EAST,)
 NOWATA COUNTY, OKLAHOMA,)
 AND ALL BUILDINGS,)
 APPURTENANCES, AND)
 IMPROVEMENTS THEREON,)
)
 Defendant.)

CIVIL ACTION NO. 95-C-777-C

ENTERED ON DOCKET
MAY 15 1997
DATE

JUDGMENT OF FORFEITURE

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

The verified Complaint for Forfeiture In Rem was filed in this action on the 14th day of August 1995, alleging that the defendant currency, to-wit:

The North Half of the Southeast Quarter of the Southwest Quarter (N/2 SE/4 SW/4) and the South Half of the Northeast Quarter of the Southwest Quarter (S/2 NE/4 SW/4) of Section 34, Township 27 North, Range 16 East, Nowata, County, Oklahoma, less a tract described as follows:

Beginning at the Southeast Corner of said N/2 SE/4 SW/4; thence West on the South line of the N/2 SE/4 SW/4 1322 feet to the Center of the S/2 SW/4 of Section 34; thence North on the West line of the N/2 SE/4 SW/4 and the S/2 NE/4 SW/4, 1314 feet to the Center of the N/2 SW/4 of Section 34; thence East on the North line of the S/2 NE/4 SW/4 316.2 feet; thence South and parallel to the Second Course described, 1294.18 feet; thence East and parallel to the First Course described 1005.8 feet, thence South 20 feet to the place and point of beginning,

is subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7), because it was used, or intended to be used, to commit, or to facilitate the commission of, a violation of the drug prevention and control laws of the United States.

Warrant of Arrest and Seizure was issued by the Honorable H. Dale Cook, Senior Judge of the United States District Court for the Northern District of Oklahoma, on the 15th day of August, 1995, providing that the United States Marshal for the Northern District of Oklahoma publish Notice of Arrest and Seizure once a week for three consecutive weeks in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in the district in which this action is pending and for three consecutive weeks in the Nowata Star, a newspaper of general circulation in the county in which the defendant real property is located.

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

Defendant real property

**Served:
August 23, 1995**

**CHARLOTTE ANN BAILEY,
a/k/a C.A. Bailey,
C. Ann Bailey, Ann
Bailey, and (Dr.)
Margaret Ledbetter**

**Served:
August 18, 1995**

**STEPHEN WILSON,
a/k/a STEPHEN W. BAILEY**

**Served:
August 18, 1995**

**COUNTY TREASURER OF
NOWATA COUNTY, OKLAHOMA**

**Served:
August 18, 1995**

USMS 285s reflecting the service upon the defendant real property and on Charlotte Ann Bailey, Stephen Wilson, and the County Treasurer of Nowata County, Oklahoma, the only individuals or entities known to have standing to file a claim to the defendant real property, are on file herein.

All persons or entities interested in the defendant real property were required to file their claims herein within ten (10) days after service upon them of the Warrants of Arrest and Notices In Rem, publication of the 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, except Charlotte Ann Bailey and Stephen W. Wilson, who have entered into a Stipulation for Forfeiture with the plaintiff, for forfeiture of the defendant real property to the plaintiff, and have executed a Quit-Claim Deed, conveying to the United States of America all of their right, title, and interest in and to the defendant real property.

Publication of Notice of Arrest and Seizure occurred in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, the district in which this action is filed on February 22, 29, and March 7, 1996, and in the NOWATA STAR, Nowata, Nowata County, Oklahoma, the county in which the defendant currency is located, on May 10, 17, and 24, 1996. Proof of Publication was filed on March 29, 1996.

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

Stephen Wilson, who have entered into a Stipulation for Forfeiture of the property and who have executed a Quit-Claim Deed, conveying to the United States of America all of their right, title, and interest in and to the defendant real property.

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

The North Half of the Southeast Quarter of the Southwest Quarter (N/2 SE/4 SW/4) and the South Half of the Northeast Quarter of the Southwest Quarter (S/2 NE/4 SW/4) of Section 34, Township 27 North, Range 16 East, Nowata, County, Oklahoma, less a tract described as follows:

Beginning at the Southeast Corner of said N/2 SE/4 SW/4; thence West on the South line of the N/2 SE/4 SW/4 1322 feet to the Center of the S/2 SW/4 of Section 34; thence North on the West line of the N/2 SE/4 SW/4 and the S/2 NE/4 SW/4, 1314 feet to the Center of the N/2 SW/4 of Section 34; thence East on the North line of the S/2 NE/4 SW/4 316.2 feet; thence South and parallel to the Second Course described, 1294.18 feet; thence East and parallel to the First Course described 1005.8 feet, thence South 20 feet to the place and point of beginning,

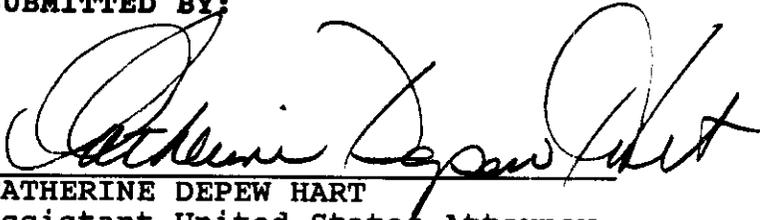
and that the defendant real property above described be, and it hereby is, forfeited to the United States of America for disposition according to law, in the following priority:

- a) First, from the sale proceeds of the real and personal property, payment to the United States of America for all expenses of forfeiture of the defendant real and personal property, including, but not limited to, expenses of seizure, maintenance, and custody, advertising, and sale.
- b) Second, to the County Treasurer of Nowata County, Oklahoma, any ad valorem taxes for which the plaintiff is responsible.
- c) Third, the remaining proceeds of the sale of the defendant real property, with all buildings, appurtenances, and improvements thereon, shall be retained by the United States Marshals Service for disposition according to law, and pursuant to the further Order of this Court.



H. DALE COOK, Senior 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\BAILEY1\05975

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

WILLIE & MARILYN GILBERT,)
as parents and next friend of their)
minor daughter, TANYA GILBERT;)
et al.,)

Plaintiffs,)

v.)

INDEPENDENT SCHOOL DISTRICT)
NO. 5 OF ROGERS COUNTY, a/k/a)
INOLA PUBLIC SCHOOLS;)
et al.,)

Defendants.)

ENTERED ON DOCKET

DATE MAY 15 1997

Case No. 97-CV-20H

FILED

MAY 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL OF INDIVIDUAL DEFENDANT

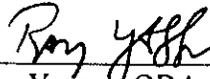
Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiffs, Willie and Marilyn Gilbert, Boyd and Debra Louderback, and Douglas R. and Susan G. Jacobsen, hereby stipulate with the Defendants, Independent School District No. 5 of Rogers County, and Perry Adams (individually and in his official capacity), that this action shall be dismissed with prejudice as to Defendant Adams in his individual capacity.

Respectfully submitted,



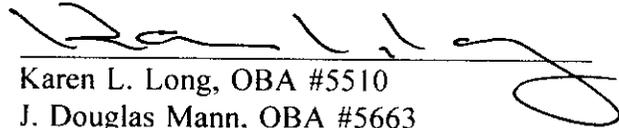
Samuel J. Schiller, OBA #016067
SCHILLER LAW FIRM
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Haskell, OK 74436





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(918) 585-9211

*Attorneys for all Defendants Except
Does 1 through 50*

DATE 5-14-97

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

OKLAHOMA PLAZA INVESTORS, LTD.)

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant.

No. 96-C-877-K ✓

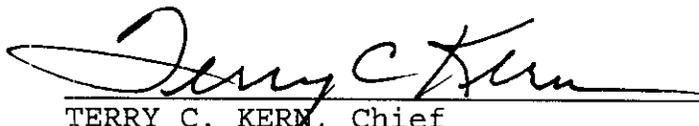
FILED
MAY 13 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

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

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

ORDERED THIS DAY OF 12 MAY, 1997


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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found. However, the minimum fixed rent continued to be paid by, first, Wal-Mart, and then the assignee. Neither the assignee nor any of the sublessees had sufficient gross sales to require the payment of any percentage rent.

OPI filed an action in the United States District Court for the Western District of Oklahoma on September 29, 1989. OPI represents in this Court that it sought to compel arbitration pursuant to an arbitration clause in the lease, that Wal-Mart opposed arbitration, and the parties "argued" the arbitration issue for five years. Finally, on May 26, 1994, OPI states that it withdrew its attempt to compel arbitration and filed a motion to transfer venue due to a companion case pending in the United States Bankruptcy Court for the Northern District of Oklahoma. The motion to transfer venue was granted by the Western District and the case was transferred to this Court, which in turn transferred the action to the Bankruptcy Court.¹

On September 16, 1996, Wal-Mart filed a motion to withdraw reference from the Bankruptcy Court, based upon Wal-Mart's refusal to consent to a jury trial in that court. This Court granted the motion by order filed October 4, 1996. OPI brings two causes of action: (1) Wal-Mart breached the lease provision dealing with desertion or vacation of the premises or an implied covenant to

¹The record from the Western District of Oklahoma is not before this Court. The Court has recited procedural history as related in the case management plan filed in this Court December 13, 1996. In that document, and in the proposed Pretrial Order, the parties stipulate that venue is appropriate in this district. Shawnee, Oklahoma is located in the Western District of Oklahoma.

remain on the premises; (2) Wal-Mart breached the obligation of good faith and fair dealing present in any contract.

Four paragraphs of the lease form the core of this dispute.

Paragraph 7, Use of Premises, provided:

It is understood and agreed that the premises being leased will be used by the Lessee in the operation of a discount store, but Lessor agrees the store may be used for any lawful purpose other than the operation of a supermarket (however Lessee shall be permitted to sell or offer for sale items which are customarily sold or offered for sale in supermarkets provided that the area for said items shall not exceed 1,500 square feet).

Paragraph 16, Default Clause, provided in part:

If the demised premises shall be deserted or vacated, or if Lessee shall be adjudicated bankrupt, or if a trustee or receiver of Lessee's property be appointed, or if Lessee shall make an assignment for the benefit of creditors, or if default shall at any time be made by Lessee in the payment of the rent herein, or any installment thereof for more than ten (10) days after written notice of such default by Lessor, or if there shall be a default in the performance of any other covenant, agreement, condition, rule or regulation herein contained or hereafter established on the part of the Lessee for twenty (20) days after written notice of such default by the Lessor, this lease, if the Lessor so elects, shall thereupon become null and void, and the Lessor shall have the right to reenter or repossess the leased property. .

. .

Paragraph 17, Assignment and Subletting Clause, provided in part:

Lessee shall have the right at any time to sublet the leased premises, or any part thereof, or to assign this lease; provided, however that no such subletting or assignment shall be for the purpose of operating a supermarket in the leased premises; provided further that no such subletting or assignment shall relieve the Lessee of any of its

obligations hereunder. . .

Paragraph 21, Lessee's Fixtures, Equipment and Goods, provided in part:

Any and all fixtures, equipment and goods installed by Lessee shall be and remain the property of Lessee, and Lessee may, at any time, remove any and all fixtures, goods and equipment installed by it in or on the premises. . . .

Apparently, similar leases and similar acts by Wal-Mart have led to lawsuits in various forums. This has produced authority, primarily from district courts, which is virtually uniform in ruling that no breach of the lease took place. For example in United Associates, Inc. v. Wal-Mart Stores, Inc., CIV-93-1287-A, Judge Alley of the Western District of Oklahoma found the lease (apparently identical to this one) unambiguous, and ruled that "a construction is untenable to the effect that there's anything in the lease unambiguously that obliges Wal-Mart to continue to conduct a discount store operation for the entire period of the lease." (Exhibit B-1 to Wal-Mart's April 23, 1997 Reply Brief at 3-4). Judge Alley based his view upon the fact that the lease contained provisions that permitted Wal-Mart to assign the lease without the landlord's consent, and which permitted Wal-Mart to remove its fixtures, equipment and goods without the landlord's consent.

Similarly, in Jacksonville Investors, Ltd. v. Wal-Mart Stores, Inc., No. 6:95 CV 617, Judge Hannah of the United States District Court for the Eastern District of Texas also rejected an argument similar to that made by the present plaintiff. Judge Hannah ruled

that the Default Clause, which commences with the word "if", constituted a condition subsequent rather than an affirmative covenant. In other words, the lease acknowledges that if Wal-Mart vacates, the landlord has the right to repossess (which OPI admittedly did not do). The Default Clause does not represent an "affirmative covenant to continuously occupy the premises. . . ." (Exhibit B-2 to Wal-Mart's Reply Brief at 7).

In Senatobia Plaza Investors, Ltd. v. Wal-Mart Stores, Inc., No. 2:94CV140-B-A, Judge Biggers of the Northern District of Mississippi also ruled in Wal-Mart's favor on such a lease, holding that "[t]he clause stating that the defendant shall operate a discount store grants the defendant permission to use the premises as such, but does not require the defendant to continuously do so." (Exhibit B-3 to Wal-Mart's Reply Brief at 6).

In separate litigation between the same parties, including the same attorneys, regarding a lease in a Catoosa, Oklahoma shopping center, Judge Ellison of this Court found the lease language ambiguous and directed the Bankruptcy Court to take evidence on the parties' intent. See In re Oklahoma Plaza Investors, Ltd., 203 B.R. 479 (N.D.Okla.1994).² The parties agree the lease is unambiguous. See Defendant's motion for summary judgment at 11 and Plaintiff's motion for summary judgment at 14. This Court likewise finds the lease to be unambiguous. However, in the alternative, the Court has considered the affidavit of F. Barry Tapp, attached

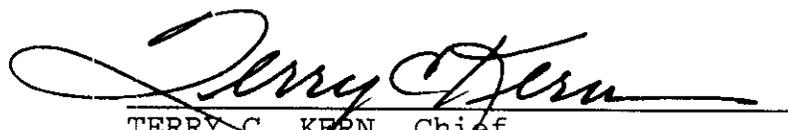
²After the taking of evidence, the Bankruptcy Court ruled in Wal-Mart's favor on the same issues before this Court. See In re Oklahoma Plaza Investors, Ltd., 203 B.R. 478 (Bankr.N.D.Okla.1996).

as Exhibit E to Wal-Mart's January 13, 1997 motion for summary judgment. Tapp is the original landlord who entered into the lease between Wal-Mart as Lessee and Tapp and I-240 Industrial Park Development Corporation as Lessor. In the affidavit, Tapp relates his understanding and intent at the time the lease was executed that Wal-Mart was not bound to remain in the premises for the full term of the lease. OPI did not enter into the lease with Wal-Mart upon original execution, and therefore evidence as to OPI's intent is irrelevant.

In sum, the Court concludes that Wal-Mart's actions did not constitute a violation of the lease and therefore OPI's claim for breach of contract will not lie. OPI also raises a claim for tortious breach of the covenant of good faith. Even assuming that Oklahoma law recognizes this cause of action outside the insurance context, a dubious proposition, the Court further finds that OPI has failed to establish that Wal-Mart acted in "bad faith" such that any liability exists under the second cause of action.

The motion of the defendant for summary judgment (#12) is hereby granted. The motion of the plaintiff for summary judgment (#33) is hereby denied. All other motions are declared moot.

ORDERED this 12 day of May, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

FEDERAL DEPOSIT
INSURANCE CORPORATION,

Plaintiff,

vs.

JOSEPH A. FRATES, *et al.*,

Defendants.

ENTERED ON DOCKET

DATE MAY 14 1997

Case No. 93-CV-123-H

FILED
MAY 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

Pursuant to Judge Sven Erik Holmes' January 23, 1997 Order, this Report and Recommendation discusses the effect of Atherton v. FDIC, --- U.S. ---, 117 S. Ct. 666 (1997) on the March 4, 1996 Report and Recommendation filed in this case by Magistrate Judge Sam A. Joyner.

"Defendants' Joint Motion for Partial Summary Judgment" was referred to the undersigned for a report and recommendation. [Doc. No. 137]. On March 4, 1996, the undersigned filed a Report and Recommendation, recommending that Defendants' joint motion for summary judgment be denied.^{1/} [Doc. No. 159]. Defendants filed objections to the Report and Recommendation, and Plaintiff responded to those objections. [Doc. Nos. 161-64, and 167].

After Defendants filed their objections to the March 4th Report and Recommendation, the United States Supreme Court granted certiorari in Atherton v.

^{1/} Following is a list of the docket numbers/pleadings considered by the undersigned at the time the March 4th Report and Recommendation was drafted: 137, and 143-45. The following docket numbers/pleadings, containing supplemental authority on the standard of care issue, were submitted after the March 4th Report and Recommendation had been filed: 206, and 211.

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FDIC, No. 95-928 (U.S.). Because the issues to be addressed by the Supreme Court in Atherton were substantially similar to the issues addressed in the March 4th Report and Recommendation, the Court determined that it would not rule on the objections to the March 4th Report and Recommendation until after the Supreme Court rendered its decision in Atherton. All pre-trial and trial deadlines were then struck. [Doc. No. 207 and 1/6/97 minute order].

The Supreme Court rendered its decision in Atherton on January 14, 1997. See Atherton v. FDIC, --- U.S. ---, 117 S. Ct. 666 (1997).^{2/} On January 23, 1997, Judge Holmes reviewed the March 4th Report and Recommendation and, pursuant to Fed. R. Civ. P. 72(b), he recommitted the Defendants' Joint Motion for Summary Judgment to the undersigned Magistrate Judge to determine the effect, if any, of the Supreme Court's decision in Atherton on the March 4th Report and Recommendation. [Doc. No. 235]. On February 3, 1997, the undersigned ordered the parties to file either a stipulation or a brief regarding the effect of Atherton on the March 4th Report and Recommendation. [Doc. No. 239]. In response to the undersigned's Order, the parties filed a stipulation and the Defendants filed a brief regarding the effect of Atherton. [Doc. Nos. 241-42]. The stipulation will be discussed below.

^{2/} See Doc. Nos. 233 and 238. These are the suggestions of authority filed by the parties indicating that Atherton had been decided.

I. The March 4, 1996 Report and Recommendation

Following is an outline of the issues addressed in the March 4th Report and Recommendation:

- A. By what standard of care are the actions of officers and directors of State Federal Savings and Loan Association ("State Federal"), a federally chartered and federally insured depository institution to be judged -- ordinary or gross negligence?
1. What law supplies the standard of care -- federal or state?
 - a. Has the state versus federal law issue already been decided in this case?
 - i. By the Tenth Circuit in the interlocutory appeal taken in this case and reported at RTC v. Frates, 52 F.3d 295 (10th Cir. 1995).
 - ii. As a result of the inconsistent positions taken by the FDIC during the course of this litigation.
 2. If Oklahoma law supplies the standard of care, does the gross negligence standard in 6 Okla. Stat. § 712(C) apply to actions brought by the FDIC?

In the March 4th Report and Recommendation, the undersigned found that the state versus federal law issue had not already been decided and that state law, not federal law, supplied the standard of care for officers and directors of a federally chartered and federally insured depository institution. The undersigned recognized, however, that federal law (i.e., 12 U.S.C. § 1821(k)) sets gross negligence as the minimum standard of care in those states holding an officer or director liable only for conduct more egregious than gross negligence (i.e., intentional conduct). The undersigned then determined that the gross negligence standard in 6 Okla. Stat. §

712(C) could not be applied in this case. The undersigned found that § 712(C) is preempted by 12 U.S.C. § 1821(d)(2)(A)(i) and that § 712(C) violates the Oklahoma Constitution. [Doc. No. 159].

II. The Supreme Court's Decision in *Atherton*

The Supreme Court framed the issue in *Atherton* as follows:

The Resolution Trust Corporation (RTC) sued several officers and directors of City Federal Savings Bank, claiming that they had violated the legal standard of care they owed that federally chartered, federally insured institution. The case here focuses upon the legal standard for determining whether or not their behavior was improper. It asks where courts should look to find the standard of care to measure the legal propriety of the defendants' conduct -- to state law, to federal common law, or to a special federal statute (103 Stat. 243, 12 U.S.C. § 1821(k)) that speaks of 'gross negligence'?

Atherton, 117 S. Ct. at 669. The Supreme Court answered this question as follows:

We conclude that state law sets the standard of conduct as long as the state standard (such as simple negligence) is stricter than that of the federal statute. The federal statute nonetheless sets a 'gross negligence' floor, which applies as a substitute for state standards that are more relaxed.

Id.

The Supreme Court's decision in *Atherton* affirms the recommendation in the March 4th Report and Recommendation that Oklahoma law be applied to determine the applicable standard of care to be applied to Defendants' actions in this case. The parties stipulate that this is true with the following language: "In *Atherton*, the Supreme Court concluded that state law sets the standard of conduct required of

officers and directors of failed, federally insured financial institutions.” [Doc. No. 242, pp. 1-2].

The Atherton opinion only answers question A(1) on the outline discussed above. That is, Atherton only answers the question of what law, state or federal, supplies the standard of care for officers and directors of a federally chartered, federally insured depository institution. This issue was addressed in Parts II-IV (i.e., pages 3-22) of the March 4th Report and Recommendation. The Supreme Court’s opinion in Atherton should be substituted for the analysis at Parts II-IV of the March 4th Report and Recommendation. The Atherton opinion does not directly impact the undersigned’s recommendations relating to the applicability of 6 Okla. Stat. § 712(C).

That portion of the March 4th Report and Recommendation not affected by Atherton has been objected to by Defendants. [Doc. Nos. 161-164]. These objections are still pending after Atherton and they are ripe for *de novo* review by Judge Holmes under Fed. R. Civ. P. 72(b).

III. The Standard of Care in Oklahoma

As discussed above, the Supreme Court has held that state law will be applied to defendants such as the Defendants in this case. Oklahoma law will, therefore, supply the standard of care in this case. This leaves the issue of what is the standard of care for officers and directors of depository institutions under Oklahoma law.

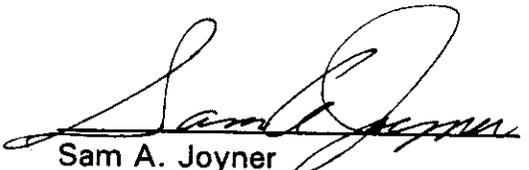
Defendants argued that the standard of care in Oklahoma is gross negligence under 6 Okla. Stat. § 712(C). As discussed above, the undersigned recommended in the March 4th Report and Recommendation that the Court find § 712(C) to be

preempted by federal law and/or that it be found to violate the Oklahoma Constitution. If Judge Holmes rejects that recommendation, then § 712(C) will apply and the Oklahoma standard of care will be gross negligence under § 712(C). If Judge Holmes adopts the undersigned's recommendation, then Oklahoma's common law will supply the standard of care. The state of Oklahoma's common law, including the applicability of the business judgment rule in Oklahoma, has not been addressed by the parties or presented to the Court for resolution. Thus, if Judge Holmes adopts the undersigned's recommendation in connection with § 712(C), the issue of what standard of care is imposed by Oklahoma's common law will have to be addressed.

CONCLUSION

The United States Supreme Court has held that state law sets the standard of care for officers and directors of federally chartered, federally insured depository institutions like State Federal Savings and Loan Association. Atherton v. FDIC, --- U.S. ---, 117 S. Ct. 666 (1997). Federal law will set the standard at gross negligence only when the applicable state standard is more relaxed than gross negligence. Id.; and 12 U.S.C. § 1821(k). This holding affirms the conclusion reached by the undersigned in his March 4, 1996 Report and Recommendation, and it is recommended that the analysis in the Supreme Court's Atherton opinion be substituted for the analysis at Parts II-IV of the March 4th Report and Recommendation. The remainder of the March 4th Report and Recommendation is not directly affected by the Supreme Court's opinion in Atherton. Objections are pending and ripe for decision by Judge Holmes with respect to the unaffected portions of the March 4th Report and Recommendation.

Dated this 19 day of May 1997.


Sam A. Joyner
United States Magistrate Judge

Group I Defendants filed objections to the Report and Recommendation, and Plaintiff responded to those objections. [Doc. Nos. 289, and 297-99]. After filing their objections to the March 4th Report and Recommendation, the Group I Defendants asked the Court to continue all pretrial and trial deadlines in light of the fact that the United States Supreme Court had agreed to hear an appeal in Atherton v. FDIC, No. 95-928 (U.S.). The Court granted the Group I Defendants' request for a continuance and stayed this case pending a decision by the Supreme Court in Atherton. [Doc. No. 310].

The Supreme Court rendered its decision in Atherton on January 14, 1997. See Atherton v. FDIC, --- U.S. ---, 117 S. Ct. 666 (1997). On January 23, 1997, Judge Holmes reviewed the March 4th Report and Recommendation and, pursuant to Fed. R. Civ. P. 72(b), he recommitted the Hawes-Malone-Riss motion to the undersigned Magistrate Judge to determine the effect, if any, of the Supreme Court's decision in Atherton on the March 4th Report and Recommendation. [Doc. No. 317]. On February 3, 1997, the undersigned ordered the parties to file either a stipulation or a brief regarding the effect of Atherton on the March 4th Report and Recommendation. [Doc. No. 318]. In response to the undersigned's Order, the parties filed stipulations regarding the effect of Atherton. [Doc. Nos. 319 and 320]. These stipulations will be discussed below.

I. The March 4, 1996 Report and Recommendation

Following is an outline of the issues addressed in the March 4th Report and Recommendation:

- A. By what standard of care are the actions of officers and directors of Sooner Federal Savings and Loan Association ("Sooner Federal"), a federally chartered and federally insured depository institution to be judged -- ordinary or gross negligence?
1. What law supplies the standard of care -- federal or state?
 - a. Has the state versus federal law issue already been decided in this case?
 - i. By Judge Lee West, while he was sitting by designation.
 - ii. By the Tenth Circuit in the interlocutory appeal taken in this case and reported at RTC v. Frates, 52 F.3d 295 (10th Cir. 1995).
 - iii. As a result of the inconsistent positions taken by the FDIC during the course of this litigation.
 2. If Oklahoma law supplies the standard of care, does the gross negligence standard in 6 Okla. Stat. § 712(C) apply to actions brought by the FDIC?
- B. Are there genuine issues of material fact precluding the entry of summary judgment under the applicable standard of care?
1. Could a reasonable jury conclude that Defendants' actions caused the harm alleged by Plaintiff?

In the March 4th Report and Recommendation, the undersigned found that the state versus federal law issue had not already been decided and that state law, not federal law, supplied the standard of care for officers and directors of a federally chartered and federally insured depository institution. The undersigned recognized, however, that federal law (i.e., 12 U.S.C. § 1821(k)) sets gross negligence as the minimum standard of care in those states holding an officer or director liable only for conduct more egregious than gross negligence (i.e., intentional conduct). The

undersigned then determined that the gross negligence standard in 6 Okla. Stat. § 712(C) could not be applied in this case. The undersigned found that § 712(C) is preempted by 12 U.S.C. § 1821(d)(2)(A)(i) and that § 712(C) violates the Oklahoma Constitution. [Doc. No. 281]. The undersigned then determined that there were genuine issues of material fact as to whether Defendants' breach of the applicable standard of care caused the damage to Sooner Federal alleged by Plaintiff. [Doc. No. 281].

II. The Supreme Court's Decision in *Atherton*

The Supreme Court framed the issue in *Atherton* as follows:

The Resolution Trust Corporation (RTC) sued several officers and directors of City Federal Savings Bank, claiming that they had violated the legal standard of care they owed that federally chartered, federally insured institution. The case here focuses upon the legal standard for determining whether or not their behavior was improper. It asks where courts should look to find the standard of care to measure the legal propriety of the defendants' conduct -- to state law, to federal common law, or to a special federal statute (103 Stat. 243, 12 U.S.C. § 1821(k)) that speaks of 'gross negligence'?

Atherton, 117 S. Ct. at 669. The Supreme Court answered this question as follows:

We conclude that state law sets the standard of conduct as long as the state standard (such as simple negligence) is stricter than that of the federal statute. The federal statute nonetheless sets a 'gross negligence' floor, which applies as a substitute for state standards that are more relaxed.

Id.

The Supreme Court's decision in Atherton affirms the recommendation in the March 4th Report and Recommendation that Oklahoma law be applied to determine the applicable standard of care to be applied to Defendants' actions in this case. The parties stipulate that this is true with the following language: "In Atherton, the Supreme Court concluded that state law sets the standard of conduct required of officers and directors of failed, federally insured financial institutions." [Doc. Nos. 319, p. 2 & 320].

The Atherton opinion only answers question A(1) on the outline discussed above. That is, Atherton only answers the question of what law, state or federal, supplies the standard of care for officers and directors of a federally chartered, federally insured depository institution. This issue was addressed in Parts II-IV (i.e., pages 3-23) of the March 4th Report and Recommendation. The Supreme Court's opinion in Atherton should be substituted for the analysis in Parts II-IV of the March 4th Report and Recommendation. The Atherton opinion does not directly impact any of the other issues addressed in the March 4th Report and Recommendation. For example, the Atherton opinion does not directly impact the undersigned's recommendations relating to the applicability of 6 Okla. Stat. § 712(C) or the recommendations relating to whether or not there are genuine issues of material fact precluding summary judgment.

That portion of the March 4th Report and Recommendation not affected by Atherton has been objected to by Defendants. [Doc. Nos. 289, 297-99]. These

objections are still pending after Atherton and they are ripe for *de novo* review by Judge Holmes under Fed. R. Civ. P. 72(b).

III. The Standard of Care in Oklahoma

As discussed above, the Supreme Court has held that state law will be applied to defendants such as the Defendants in this case. Oklahoma law will, therefore, supply the standard of care in this case. This leaves the issue of what is the standard of care for officers and directors of depository institutions under Oklahoma law.

Defendants argued that the standard of care in Oklahoma is gross negligence under 6 Okla. Stat. § 712(C). As discussed above, the undersigned recommended in the March 4th Report and Recommendation that the Court find § 712(C) to be preempted by federal law and/or that it be found to violate the Oklahoma Constitution. If Judge Holmes rejects that recommendation, then § 712(C) will apply and the Oklahoma standard of care will be gross negligence under § 712(C). If Judge Holmes adopts the undersigned's recommendation, then Oklahoma's common law will supply the standard of care. The state of Oklahoma's common law, including the applicability of the business judgment rule in Oklahoma, has not been addressed by the parties or presented to the Court for resolution. Thus, if Judge Holmes adopts the undersigned's recommendation in connection with § 712(C), the issue of what standard of care is imposed by Oklahoma's common law will have to be addressed.

CONCLUSION

The United States Supreme Court has held that state law sets the standard of care for officers and directors of federally chartered, federally insured depository institutions like Sooner Federal Savings and Loan Association. Atherton v. FDIC, --- U.S. ---, 117 S. Ct. 666 (1997). Federal law will set the standard at gross negligence only when the applicable state standard is more relaxed than gross negligence. Id.; and 12 U.S.C. § 1821(k). This holding affirms the conclusion reached by the undersigned in his March 4, 1996 Report and Recommendation, and it is recommended that the analysis in the Supreme Court's Atherton opinion be substituted for the analysis at Parts II-IV of the March 4th Report and Recommendation. The remainder of the March 4th Report and Recommendation is not directly affected by the Supreme Court's opinion in Atherton. Objections are pending and ripe for decision by Judge Holmes with respect to the unaffected portions of the March 4th Report and Recommendation.

Dated this 13 day of May 1997.



Sam A. Joyner
United States Magistrate Judge

Mw.
4-30

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

FILED

MAY 13 1997

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

ROBERT G. TILTON, an individual,)
)
 Plaintiff,)
)
 vs.)
)
 CAPITAL CITIES/ABC INC., a New York)
 corporation, et al.,)
)
 Defendants.)

Case No. 92-C-1032-BU

ENTERED ON DOCKET
DATE MAY 14 1997

**JOINT STIPULATION
APPROVING AMOUNT OF TREASURY BILLS**

On April 22, 1996, this Court entered an Amended Agreed Order granting Plaintiff leave to post a Treasury Bill with the Court and staying execution of judgment upon receipt of notification of Treasury Bill Purchase and authorized the Clerk of this Court to accept from Bank IV Oklahoma, N.A., satisfactory evidence that Plaintiff has purchased a United States Treasury Bill in the principal amount of \$145,000 payable to the United States District Court Clerk which matures one year from the date of its purchase.

On April 12, 1996, Bank IV purchased a Treasury Bill paid for by Plaintiff in which the principal amount was not exactly \$145,000, but \$144,798.58 because of the manner in which Treasury Bills are sold. On June 10, 1996, this Court approved the parties' joint stipulation that the amount of the Treasury Bill on April 12, 1996, provides sufficient financial protection to Defendants to satisfy the requirements of the Amended Agreed Order and to allow the Court Clerk to issue his receipt for said Treasury Bill upon this Court's approval of that stipulation.

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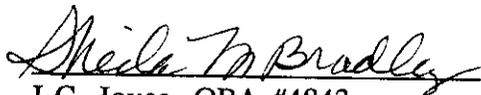
1/1/97

On March 6, 1997, the Treasury Bill in this case matured for a par value amount of \$152,000.00. Pursuant to this Court's Order of April 22, 1996, said proceeds were to be used to renew the Treasury Bill. However Boatmen's National Bank of Oklahoma, successor in interest to Bank IV ("Bank") did not invest all the proceeds but simply purchased a Treasury Bill with the same par value of \$152,000. On March 13, 1997, the parties filed a Joint Stipulation Approving Treasury Bill Transaction approved by this Court in which they agreed that the maximum amount of the \$152,000.00 was to be reinvested in a Treasury Bill per the terms of the Amended Agreed Order and that an associated savings account be opened and the sum remaining after purchasing the Treasury Bill should be placed in that associated savings account. The parties subsequently learned that, because the Bank was not able to reverse the original transaction (purchasing a Treasury Bill with a par value of \$152,000), on March 14, 1997, the Bank purchased a second Treasury Bill with a par value of \$8,000 at the same price and yield as the first, and placed the remaining sum in account No. 415200 492 553 styled United States District Court, Northern District of Oklahoma, Case No. 92-C-1032-BU. The balance in that savings account as of April 21, 1997 was \$479.83.

The parties acknowledge that the re-investment of the proceeds from the Treasury Bill that matured March 6, 1997, varies from that set out in the Joint Stipulation Approving Treasury Bill Transaction filed on March 13, 1997, but they agree and hereby stipulate that the Treasury Bills purchased on March 7, 1997 and March 14, 1997, together with savings account No. 415200 492 553, provide sufficient financial protection to Defendants to satisfy the requirements of the Amended Agreed Order and to substantially conform to the Joint Stipulation Approving Treasury Bill Transaction filed March 13, 1997. The parties further agree and stipulate that the

terms of the Amended Agreed Order and the Joint Stipulation Approving Treasury Bill Transaction filed March 13, 1997, otherwise continue in effect, until further order of the Court.

Respectfully submitted,



J.C. Joyce, OBA #4843
Sheila M. Bradley, OBA #13449
JOYCE AND POLLARD
515 South Main St., Suite 300
Tulsa, Oklahoma 74103-4489
(918) 585-2751

ATTORNEYS FOR PLAINTIFF



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Floyd Abrams, Esq.
Susan Buckley, Esq.
CAHILL, GORDON & REINDEL
80 Pine Street
New York, NY 10005
(212) 701-3000

ATTORNEYS FOR DEFENDANTS

APPROVED this 13th day of May, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

G:\HIC\WOF.LIT\ABC\APPEAL.CST\STIP-TB4.97

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

CHARLES FITZGERALD GOUDEAU,)
)
Petitioner,)
)
vs.)
)
STATE OF OKLAHOMA and)
TULSA COUNTY,)
)
Respondents.)

No. 97-CV-086-BU

FILED

MAY 11 1997

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

ENTERED ON DOCKET

DATE MAY 14 1997

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge filed on April 16, 1997, in this habeas corpus action pursuant to 28 U.S.C. § 2254. The Magistrate Judge recommends that the petition for a writ of habeas corpus be dismissed without prejudice pursuant to petitioner's indication that he had "decided not to file that writ of habeas corpus," a statement contained in a letter received by the Magistrate Judge. That letter was construed to be petitioner's motion to dismiss the petition without prejudice. As no objection has been filed by petitioner, the Court concludes that the Report should be adopted and affirmed.

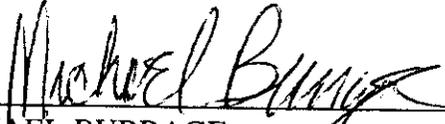
IT IS HEREBY ORDERED:

- (1) That the Report and Recommendation of the Magistrate Judge (doc. #7) is **adopted and affirmed;**

⑧

(2) That Petitioner's motion to dismiss without prejudice the petition for a writ of habeas corpus is **granted**. The petition is dismissed without prejudice pursuant to Petitioner's voluntary request.

SO ORDERED THIS 13th day of May, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

M.A. Mortenson Company,)
)
) Plaintiff,)
)
) Arkansas Electric Cooperative)
) Corporation and The Benham Group, Inc.,)
)
) Defendants.)

ENTERED ON DOCKET

DATE MAY 14 1997

Case No. 95-CV-966-BU

FILED

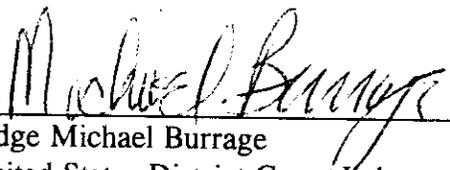
MAY 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Pursuant to the parties' Stipulation of Dismissal, it is hereby ordered that a judgment of dismissal with prejudice and on the merits without costs or attorneys' fees to any party be and it is hereby entered in this case.

Dated: ~~April~~ ^{May} 13, 1997



Judge Michael Burrage
United States District Court Judge

M2:20078060.01

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ENTERED ON DOCKET
5-14-97

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

DEWAYNE STARR,)
)
 Petitioner,)
)
 vs.)
)
 RON WARD, et al.,)
)
 Respondents.)

No. 96-CV-245-K ✓

F I L E D

MAY 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge filed on April 8, 1997, in this habeas corpus action brought pursuant to 28 U.S.C. § 2254. The Magistrate Judge recommended that the petition for a writ of habeas corpus be dismissed based on the fact that Petitioner was not in custody as a result of the conviction under attack (CRF-88-14, for which Petitioner was certified to stand trial as an adult in JF-88-1) when he filed his petition. Furthermore, Petitioner failed to show that his current sentence, resulting from his conviction in CRF-89-150, was enhanced by the prior conviction. None of the parties has filed an objection to the Report.

Having reviewed the Report and the facts of this case, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed.

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IT IS THEREFORE ORDERED that the Report and Recommendation of the Magistrate Judge (docket #17) is **adopted and affirmed**. The petition for a writ of habeas corpus is dismissed with prejudice.

SO ORDERED THIS 12 day of May, 1997.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 5-14-97

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

FILED

MAY 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOE O. SAVILLE, JR.,)
an individual,)
)
Plaintiff,)
)
vs.)
)
MORTON COMPREHENSIVE HEALTH)
SERVICES, INC., an Oklahoma corporation,)
MOZELLE S. LEWIS, an individual, and)
ERIC MIKEL, an individual,)
)
Defendants.)

No. 96-C-355K ✓

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 12 day of May, 1997.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

AS

ENTERED ON DOCKET
5-14-97

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 ONE 1989 FORD F250 PICKUP,)
 VIN 1FTHX25MXKKA89024,)
)
 and)
)
 THE SUM OF TWO THOUSAND)
 TWO HUNDRED THIRTY-FIVE)
 DOLLARS (\$2,235.00),)
 IN UNITED STATES CURRENCY,)
)
 and)
)
 THE SUM OF ELEVEN THOUSAND)
 TWO HUNDRED SEVENTY-EIGHT)
 DOLLARS (\$11,278.00) IN)
 UNITED STATES CURRENCY;)
)
 FOR A TOTAL OF THIRTEEN)
 THOUSAND FIVE HUNDRED)
 THIRTEEN DOLLARS)
 (\$13,513.00) IN UNITED)
 STATES CURRENCY,)
)
 Defendants.)

CIVIL ACTION NO. 94-C-446-K ✓

FILED

MAY 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT OF FORFEITURE
OF 1989 FORD 250 XLT LARIAT PICKUP
AND RETURN OF CELLULAR PHONE IN SAID VEHICLE
AND OF PORTION OF SEIZED
CURRENCY TO CLAIMANT RICHARDSON

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture by Default as to the defendant 1989 Ford F250 XLT Lariat Pickup, VIN 1FTHX25MXKKA89024, as to all entities and/or persons interested in the defendant vehicle, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 2nd day of May 1994, alleging that the defendant vehicle was subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6), because it was furnished or intended to be furnished in exchange for a controlled substance, or is proceeds traceable to such an exchange, and subject to seizure and forfeiture to the United States.

Warrant of Arrest and Notice In Rem was issued on the 3rd day of June 1994, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant vehicle and currency and for publication of notice of arrest and seizure once a week for three consecutive weeks in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, 8545 East 41st Street, Tulsa, Oklahoma, a newspaper of general circulation in the district in which this action is pending and in which the defendant vehicle and currency was located, and further providing that the United States Marshals Service personally serve the defendant vehicle and currency and all known potential owners thereof with a copy of the Complaint for Forfeiture In Rem and Warrant of Arrest and Notice In Rem, and that immediately upon the arrest and seizure of the defendant vehicle and currency the United States Marshals Service take custody of the defendant vehicle and currency and retain the same in its possession until the further order of this Court.

On the 8th day of June 1994, the United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and the Order on the defendant vehicle and currency.

Bobby Gene Richardson was determined to be the only potential claimant in this action with possible standing to file a claim to the defendant vehicle and currency. The United States Marshals Service served Bobby Gene Richardson with a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and the Order on the defendant vehicle on June 23, 1994. Bobby Gene Richardson filed an answer and counterclaim as to the defendant \$2,235.00 of the defendant currency, only, on June 28, 1994. No claim was filed by Bobby Gene Richardson as to the defendant \$11,278.00 in United States currency, and judgment of forfeiture as to the defendant \$11,278.00 in United States currency was entered on the 8th day of September, 1994.

USMS 285 reflecting the service upon the defendant vehicle and all known potential claimants is on file herein.

All persons or entities interested in the defendant vehicle were required to file their claims herein within ten (10) days after service upon them of the 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 other persons or entities upon whom service was effected more than thirty (30) days ago have filed a Claim, Answer, or other response or defense herein.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant vehicle was located, on July 14, 21, and 28, 1994. Proof of Publication was filed August 16, 1994.

No other claims in respect to the \$2,235.00 in defendant currency have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant currency, and the time for presenting claims and answers, or other pleadings, has expired. Plaintiff asserts that investigation has determined the \$2,235.00 in U. S. Currency to have been legitimate income, and that this currency should be returned to Claimant Richardson, by check made payable to Richardson, and mailed, delivered, or otherwise released to Stuart Southerland, his attorney.

That the plaintiff, the United States of America, and the claimant, Bobby Gene Richardson, entered into a Stipulation for Forfeiture of the defendant vehicle, and for the return of the cellular phone inside the defendant vehicle and the \$2,235.00

in United States Currency to the Claimant. The Stipulation was filed April 17, 1997.

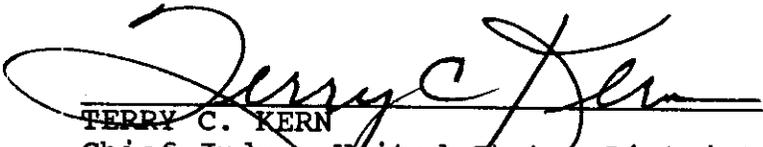
IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant vehicle:

ONE 1989 FORD F250 XLT
LARIAT PICKUP,
VIN 1FTHX25MXKKA89024,

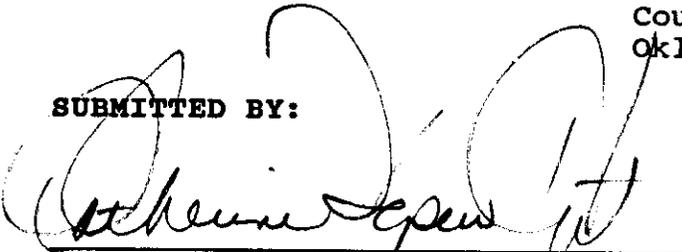
be, and it hereby is, forfeited to the United States of America for disposition according to law.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the cellular phone in the defendant vehicle and the \$2,235.00 in United States Currency shall be returned to Claimant Richardson by mailing, delivering, or otherwise releasing to his attorney, Stuart W. Southerland, P. O. Box 4441, Tulsa, Oklahoma 74159-0441.

Entered this 12 day of May 1997.


TERRY C. KERN
Chief Judge, United States District
Court for the Northern District of
Oklahoma

SUBMITTED BY:


CATHERINE DEPEW HART
Assistant United States Attorney
N:\UDD\CHOOK\FC\RICHARD.SON\05997

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

ENTERED ON DOCKET
5-14-97

EMPLOYERS INSURANCE OF)
WAUSAU, a Mutual Company,)

Plaintiff,)

vs.)

FREEMAN COMMERCIAL)
CONCRETE, INC., an Oklahoma)
Corporation,)

Defendant.)

Case No. 96-C-336-K

F I L E D

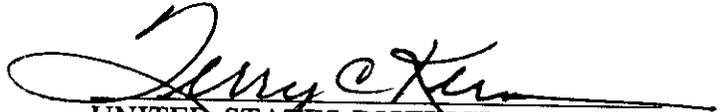
MAY 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AMENDED JUDGMENT

The Judgment previously entered by this Court on April 1, 1997 against the Defendant Freeman Commercial Concrete, Inc., and in favor of the Plaintiff, Employers Insurance of Wausau, in the amount of \$152,100 is hereby amended to include out-of-pocket medical expenses paid by the Plaintiff in the amount of \$49,232.44, for a total of \$201,332.44. Plaintiff is entitled to recover its costs and attorneys' fees incurred in this action.

SO ORDERED this 12 day of May, 1997.


UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
5-14-97

BOBBY EARL JONES,)
)
Petitioner,)
)
vs.)
)
KEN KLINGLER,)
)
Respondent.)

No. 96-CV-981-K ✓

F I L E D

MAY 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court are Petitioner's "motion for leave to withdraw petition for writ of habeas corpus in case number 96-CV-981-K without prejudice" (Docket # 10), Petitioner's motion to dismiss without prejudice for failure to exhaust state court remedies (Docket #13) and Petitioner's "motion for order directing that the clerk provide petitioner copy of traverse without cost due to indigent status and forma pauperis status being granted" (Docket # 11). Respondent has not objected to these motions.

On May 6, 1997, the Clerk's office received a letter from Petitioner requesting copies of Exhibits A, D, E and F attached to his Traverse filed in this Court on January 30, 1997. The Clerk's office mailed the requested exhibits to Petitioner on May 7, 1997. In light of these events, the Court finds that Petitioner's motion for order directing that the clerk provide petitioner copy of traverse without cost due to indigent status and forma pauperis status being granted (Docket #11) is moot.

The Court liberally construes Petitioner's "motion for leave to withdraw petition for writ of habeas corpus in case number 96-CV-981-K without prejudice" as a motion to dismiss

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the petition without prejudice. See Haines v. Kerner, 404 U.S. 519, 520 (1972) (pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally). Petitioner filed second motion to dismiss without prejudice (Docket #13) on April 16, 1997. In that second motion, Petitioner identifies his unexhausted claim as a denial of his right to "reasonably effective assistance of counsel." Petitioner also states that he only "recently realized" that he needs to satisfy the exhaustion requirements of Rose v. Lundy, 455 U.S. 509 (1982).

When considering a motion to dismiss without prejudice, the court should consider the potential for legal prejudice to the opposing party. Clark v. Tansy, 13 F.3d 1407, 1411 (10th Cir. 1993). Factors affecting an evaluation of the legal prejudice to the opposing party include "the [opposing party's] effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the [movant] in prosecuting the action, [and] insufficient explanation for the need to take a dismissal." Id. (quoting United States v. Outboard, 789 F.2d 497, 502 (7th Cir. 1986)). Applying these factors to this case, the Court finds that Respondent will not be prejudiced by the dismissal of Petitioner's petition for a writ of habeas corpus. The Court finds, therefore, that Petitioner's motions to dismiss should be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's motion for order directing that the clerk provide petitioner copy of traverse without cost due to indigent status and forma pauperis status being granted (Docket #11) is **DENIED** as moot.
2. Petitioner's motions for leave to withdraw petition for writ of habeas corpus without prejudice and to dismiss without prejudice (Docket #s 10 and 13) are

GRANTED. The petition for a writ of habeas corpus is dismissed without prejudice for failure to exhaust state court remedies pursuant to Rose v. Lundy, 455 U.S. 509 (1982).

SO ORDERED THIS 12 day of May, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

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.

ENTERED ON DOCKET

DATE MAY 13 1997

Case No. 96-C-414H

FILED

MAY 12 1997

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

JUDGMENT

Judgment is hereby entered in favor of the Plaintiff and against Defendant Marcus Craig Oswald in the amount of \$163,812.24. For purposes of Fed.R.Civ.P. 54(b), the judgment against Oswald is expressly determined to be final as there is no just reason to delay its enforcement.

IT IS FURTHER ORDERED that the judgment earlier rendered in favor of the Plaintiff and against the Defendant, Crew Resources, a trust, on July 11, 1997 in the amount of \$163,812.24, together with costs assessed of \$11,026.00, be and it is hereby expressly determined to be "final" for purposes of Fed.R.Civ.P. 54(b) and that no just reason exists to delay enforcement of said judgment.

IT IS FURTHER ORDERED that because the judgment earlier rendered against Crew Resources is now "final" for purposes of Fed.R.Civ.P. 54(b), each of Crew Resources' objections to and/or motions seeking relief from Plaintiff's enforcement of the judgment are

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

FILED
MAY 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VENOIA T. WRIGHT,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)

Case No. 96-C-482-E ✓

FILED ON DOCKET
DATE MAY 13 1997

ORDER

Now before the Court is the Motion to Dismiss Without Prejudice (Docket #3) of the Plaintiff Venoia Wright.

There being no objection, the Motion to Dismiss Without Prejudice (Docket #3) of the plaintiff, Venoia Wright is granted.

IT IS SO ORDERED THIS 9th DAY OF MAY, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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 ✓

ENTERED ON DOCKET

DATE MAY 3 1997

ORDER

This matter comes on before the court upon the stipulation of all parties and the court, being fully advised in the premises, orders, adjudges and decrees that all claims asserted herein by plaintiffs against the United States of America are hereby dismissed with prejudice.

Dated this 9th day of May, 1997.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

F I L E D

MAY 12 1997 *PLW*

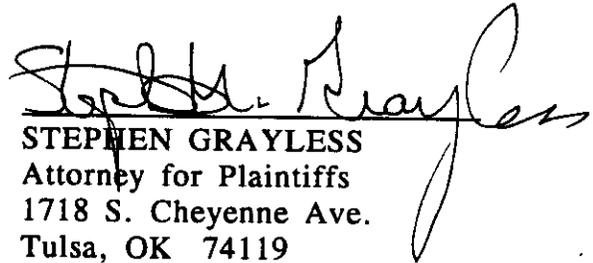
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Proctor v. USA
Order of Dismissal

APPROVED AS TO CONTENT AND FORM:



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
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

FILED

MAY 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TULSA LITHO COMPANY,)
)
Plaintiff,)
)
vs.)
)
TILE & DECORATIVE SURFACES MAGAZINE)
PUBLISHING, INC.; DIMENSIONAL STONE)
INSTITUTE, INC.; CONTEMPORARY)
DIALYSIS INCORPORATED; and JERRY)
FISHER,)
)
Defendants.)

Case No. 93-C-470-E

ENTERED ON DOCKET

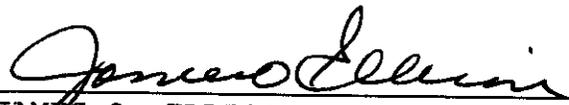
DATE MAY 13 1997

ADMINISTRATIVE CLOSING ORDER

The Plaintiff, Tulsa Litho Company, having filed a petition in bankruptcy and these proceedings being stayed thereby, 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, within thirty (30) days of a final adjudication of the bankruptcy proceedings the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

ORDERED this 9th day of May, 1997.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

MAY 12 1997

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

B. WILLIS, C.P.A., INC.,)
)
Plaintiff,)
)
vs.)
)
PUBLIC SERVICE COMPANY OF OKLAHOMA,)
an Oklahoma Corporation, and)
BURLINGTON NORTHERN RAILROAD COMPANY)
a foreign corporation,)
)
Defendants.)

Case No. 96-C-59-E
(Consolidated with
Case No. 96-C-172-E)

ENTERED ON DOCKET

DATE MAY 13 1997

ORDER

Now before the Court is the Motion of Defendant The Burlington Northern and Santa Fe Railway Company to Amend Judgment (Docket #68) and Defendant Public Service Company of Oklahoma's Motion to Clarify April 7, 1997 Order and to Enter Judgment (Docket #69).

Both Defendants are concerned that the Order of April 7th, 1997 is not sufficiently clear that it was intended to dispose of all claims against all defendants, since the order, in fact, addressed only one of the motions for summary judgment. The Defendants therefore want the court to amend its Order and enter Judgment reflecting that it granted BN's motion for summary judgment. Plaintiff objects to this relief. The Defendants are correct in that the Order of April 7 did, and was intended to, dispose of all claims against all Defendants. The Court however, did not consider the Motion for Summary Judgment of Burlington Northern, because it became moot when the other motion was granted.

The Motions to Amend Judgment and to Clarify are granted in part and denied in part.

IT IS SO ORDERED THIS 9th DAY OF MAY, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

MAY 12 1997

B. WILLIS, C.P.A., INC.,)
)
 Plaintiff,)
)
 vs.)
)
 PUBLIC SERVICE COMPANY OF OKLAHOMA,)
 an Oklahoma Corporation, and)
 BURLINGTON NORTHERN RAILROAD COMPANY)
 a foreign corporation,)
)
 Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-59-E
(Consolidated with
Case No. 96-C-172-E)

ENTERED ON DOCKET
DATE MAY 13 1997

JUDGMENT

In accordance with the Order filed April 7, 1997, the Court grants Defendant Public Service Company of Oklahoma's Motion to Dismiss (Docket #9 in Case No. 96-C-172-E), which Motion was converted to a Motion for Summary Judgment pursuant to Rule 12(c), Fed.R.Civ.P.; denies¹ Defendant Burlington Northern Railroad Company's Motion for Summary Judgment (Docket #20 in Case No. 96-C-59-E); denies Plaintiff's Motion for Partial Summary Judgment on the Issue of Liability of Burlington Northern Railroad Company to B. Willis, C.P.A., Inc. (Docket #11 in Case No 96-C-59-E); denies Plaintiff's Motion for Partial Summary Judgment on Issue of Liability on First Cause of Action for Violation of Constitutional Rights Under 42 U.S.C. §1983 (Docket #15 in Case N. 96-C-59-E); and Denies Defendant PSO's Motion for Sanctions (Docket No. 31 in Case

¹ In light of the ruling on the Motion to Dismiss, which disposes of all claims against all parties, the Court did not specifically consider the arguments in Burlington Northern's Motion for Summary Judgment. The Motion is therefore denied as moot.

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No. 96-C-59-E). As a result of the adjudication of PSO's Motion to Dismiss, the Court enters judgment on the merits in favor of Defendants on all claims asserted against Defendants by Plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Defendants Public Service Company of Oklahoma and Burlington Northern Railroad Company on all claims asserted against Defendants by Plaintiff, and that Public Service Company of Oklahoma's Motion for Sanctions against Plaintiff be denied .

IT IS SO ORDERED THIS 9th 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

F I L E D

MAY 09 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ELDON E. ROSE,)

Plaintiff,)

v.)

JOHN J. CALLAHAN,)

COMMISSIONER OF SOCIAL)

SECURITY,¹)

Defendant.)

Case No. 96-C-138-B ✓

ENTERED ON DOCKET

DATE MAY 13 1997

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Commissioner of Health and Human Services ("Commissioner") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended. Plaintiff has moved for judgment on the pleadings (Docket #4).

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

¹Effective March 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).

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The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the 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 the degree of functional limitation claimant alleged due to pain and other subjective complaints was not credible. He concluded that the claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for limitations on lifting/carrying over 25

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).

pounds occasionally or 10 pounds frequently and bending, stooping, and climbing. He found that claimant was unable to perform his past relevant work as a supervisor, farm operator, backhoe operator, and railroad maintenance worker. He concluded that the claimant's residual functional capacity for the full range of sedentary to light work was reduced by his nonexertional limitations.

The ALJ found that the claimant was 47 years old, which is defined as a "younger person," had a high school education, and did not have any acquired work skills which were transferable to the skilled or semiskilled work functions of other work. He concluded that, although the claimant's additional nonexertional limitations did not allow him to perform the full range of sedentary to light work, there were a significant number of jobs in the national economy which he could perform, such as hand packager, assembler, cashier, and scale man. Having determined that there were a significant number of jobs in the national economy that claimant could perform, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ's decision that claimant can do sedentary and light work is not supported by substantial evidence, because an attached Exhibit "A" indicated that claimant could not afford prescribed treatment for pain.
- (2) The ALJ failed to follow the Medical Vocational Guidelines to determine that claimant was disabled.

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 November 13, 1993, because of a back injury involving broken vertebrae (TR 67). He fell off a ladder and suffered a 20% compression fracture of L2 and grade I spondylolisthesis of L5 and S1 with spondylolysis of L5 (TR 84). On November 22, 1993, he underwent a L2 decompression, L1-2 fusion, and rod placement at T10 through L4 (TR 84-98). On discharge, he was neurologically intact and ambulating well in a brace (TR 84). By January 27, 1994, he was walking slowly but normally and was off all pain medication (TR 99).

On April 8, 1994, claimant reported only intermittent pain, and his doctor said he was ready to change from the rigid brace to a corset for two months, and then would "be able to start physical therapy and resume his usual activities." (TR 109). On June 13, 1994, claimant reported no leg pain and back pain only after being out of the brace longer than thirty minutes, so his doctor asked him to wean himself out of the brace and reported that he had "resumed mowing and some of his other activities." (TR 109).

At a hearing on November 3, 1994, Dr. Harold Goldman testified as a medical expert after reviewing the medical records. Dr. Goldman stated that six months recovery would be reasonable and routine following a Harrington rod procedure (TR 117). The doctor pointed out that the medical records showed no notation of severe

radicular pain, sensory loss, motor loss, or demonstrated muscle atrophy or muscular weakness (TR 117-118). The doctor concluded that claimant did not meet a social security listing, and that he would have no residual functional capacity restrictions twelve months after the actual fall (TR 119). The doctor said that claimant would have some pain on lifting and so could frequently lift only 25 pounds and occasionally lift 35 to 50 pounds (TR 120). The doctor found that claimant could sit, stand and walk for a total of eight hours in an eight-hour day, do these without interruption for four hours, would have some restrictions on bending because of the Harrington rod and thus could only bend infrequently, and could stoop, climb, and be exposed to dangerous machinery and unprotected heights (TR 120).

At the hearing, claimant testified that if he stood "for any time at all," he lost the use of his legs (TR 124). He said if he walked five or six blocks, he loses complete use of his left leg for thirty minutes to an hour (TR 124). He claimed he can't work fulltime because he loses "all strength and mobility." (TR 124). He stated that he cannot lift an automobile battery weighing thirty pounds (TR 126). He testified that during a typical day he does some walking and works at the counter in the convenience store owned by his wife and himself (TR 128). He admitted that the only restriction his doctor has placed on his activities is a restriction of weight lifting to twenty-five pounds (TR 128). He admitted that there are no restrictions on his standing or walking, but claimed the most he can walk is four to six blocks (TR 133). He said he does not do any work around the house because his wife has "always done it," but does use a push mower to mow their yard twice a month (TR 135).

At the hearing, a vocational expert testified that she had reviewed claimant's medical records and heard the testimony (TR 142). She stated that if he could do sedentary and light strength demand work for four hours at a time, he could be a hand packer, sedentary assembler, cashier, or scale man (TR 143). She said that, if she assumed that all of claimant's testimony was fully credible, he could work as a sedentary assembler or cashier (TR 145).

Based on this evidence, the ALJ concluded that the claimant retained the residual functional capacity to perform the work activities of the sedentary to light exertional level. (TR 14). According to 20 C.F.R. § 404.1567(a) and § 416.967(a), sedentary work involves lifting no more than ten pounds at a time, occasionally lifting or carrying articles like docket files, ledgers, and small tools, and a certain amount of walking and standing. According to 20 C.F.R. § 404.1567(b) and § 416.967(b), light work involves lifting no more than twenty pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds and requires a good deal of standing and walking or sitting with some pushing and pulling of arm or leg controls.

Claimant attempts to submit additional records to the court from Dr. M. Ellen Nichols (See Attachment "A" to Plaintiff's Memorandum of Law (Docket #5)). Those records show that on November 16, 1994, claimant told the doctor he was experiencing back pain which limited his ability to work to a half an hour at a time. The doctor found his gait slow, but normal, and reported that he performed heel and toe walking well. The doctor ordered x-rays and physical therapy using heat or ice, massage, and an exercise program for work hardening three times a week for four

weeks with a home program. She prescribed Elavil and said she would see him back in three months to determine if he had made improvement in his work tolerance so the rods could be removed.

Attachment "A" also shows that on December 5, 1994, Dr. Nichols was told by claimant that, due to the cost of physical therapy, a different treatment should be prescribed. The amount of physical therapy was cut to one time a week for four weeks.

The records in Exhibit "A" were not submitted to the ALJ or Appeals Council, so this court must decide whether to remand this case for their consideration. Section 405(g) of Title 42 of the United States Code provides that this court "shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding for a rehearing The court . . . may, at any time, on good cause shown, order additional evidence to be taken before the Secretary" Under that section, a claimant may submit new evidence regarding a disability, but several requirements must be met before the court remands the case for reconsideration of those records. The evidence must be new and not merely additional and cumulative of what is already in the record, because a plaintiff may not relitigate the same issues. Bradley v. Califano, 573 F.2d 28, 30-31 (10th Cir. 1978). The evidence must also be material, that is, relevant and probative.

There must also be a reasonable possibility that the new evidence would have changed the Secretary's decision had it been before him. Cagle v. Califano, 638 F.2d

219, 221 (10th Cir. 1981), cert. denied, 451 U.S. 993 (1982). Implicit in the materiality requirement is the idea that new evidence should relate to the time period for which benefits were denied, and that it not concern evidence of a later-acquired disability or of the subsequent deterioration of the previously non-disabling condition. Haywood v. Sullivan, 888 F.2d 1463, 1471-72 (5th Cir. 1989) (citing Johnson v. Heckler, 767 F.2d 180, 183 (5th Cir. 1985)). The final requirement is that plaintiff must demonstrate good cause for not having incorporated the new evidence into the administrative record. Id.

The court finds that Exhibit "A" does not contain new evidence, but merely additional and cumulative evidence of what is already in the record, and it is not material and would not have changed the ALJ's decision. The claimant has not shown any reason for not having incorporated the evidence into the administrative record when he raised his appeal to the Appeals Council on March 6, 1995.

There is no merit to claimant's contentions. There is substantial evidence to support the ALJ's decision that claimant can do sedentary and light work, except for certain lifting limitations. As the ALJ noted, there are "troubling inconsistencies in claimant's testimony and statements when compared to the medical evidence of record and other required factors of evaluation. Subjective testimony that the claimant suffers pain, by itself, cannot support a finding of disability." (TR 15).

There is no objective evidence to support allegations that he walks stiffly, leans on a wall to straighten after bending, and watches TV all day and is not much help in the convenience store. (TR 130-132, 139-140). His wife admitted that there has

been improvement since March 1994 and that he is more agile and can stay up longer (TR 140-141). As the ALJ stated, the wife's belief that he could not work eight hours is not determinative, "since there is the factor of secondary gain to be considered in assessing her testimony. Both she and any children would also receive benefits if he were determined disabled." (TR 16).

There is substantial evidence to support the ALJ's conclusion. As he stated:

[claimant] has long returned to quite strenuous work activities, including mowing the yard with a push mower. This activity involves pushing/pulling, walking, standing, and even bending (to clear the blades). He also goes fishing, from boat and dock, which would involve standing/sitting for long periods, and in the boat, some balancing. He visits with friends and has no problems driving to shop, visit, or do errands. He walks for exercise and was doing 6-7 blocks in March 1994; it is unlikely that he is doing less now. He sits for long periods watching TV or reading and had no difficulty at the hearing. Consequently, his allegation that he can only sit 15-30 minutes without extreme discomfort is not convincing. The fact that he does no household chores is not pertinent, because he says his wife has always done them.

Furthermore, his claim that he is disabled due to back and leg pain, leg weakness, and even shoulder pain is inconsistent with the medical record in which he told his doctors that the pain had been relieved by the surgery and that there was no weakness. He had some shoulder pain during the time he was on a walker or crutches, but that should have resolved. Moreover, he was taking no pain relievers, not even over-the-counter products, as early as 2 months after the surgery, even though his doctor recommended that he take something. The failure to take pain medication of any kind is inconsistent with a disabling level of pain. Even now, he takes only Advil, an over-the-counter product for mild symptoms.

Other than walking and napping, there is no evidence that he does anything on his own to alleviate symptoms. Physical therapy was prescribed, but the record does not show that he took it. He admitted to his doctors that his symptoms were better after surgery and that the pain had resolved except after strenuous activity. Nevertheless, he

continues to perform those activities while alleging inability to work at any level. The undersigned finds that the evidence does not support the claimant's allegations, and the record of mild medication (or none), no side effects, reports to treating physicians, objective observations by others, daily activities, and return to pre-injury activities, is more persuasive than his claims of disabling pain of the back, legs, and shoulder, leg weakness, and decreased strength.

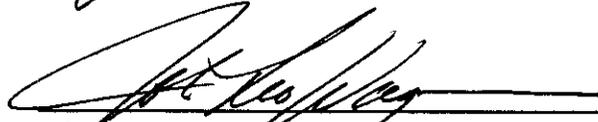
(TR 16).

Claimant contends that, under the Medical-Vocational Guidelines in Appendix 2 of Subpart P of Part 404 of the Social Security Requirements § 201.00(h), claimant should be found disabled because the full range of sedentary work cannot be performed. There is no merit to this contention. Under this section, an individual is disabled if he is (1) restricted to sedentary work, (2) is unskilled or has no transferable skills, (3) has no relevant past work or can no longer perform vocationally relevant past work, and (4) is either illiterate or unable to communicate in the English language. Plaintiff does not meet these requirements, since he has the residual functional capacity to perform sedentary and light work and a high school education (TR 19, 71). The ALJ properly referred to Appendix 2 to determine that there were a significant number of jobs remaining in the national economy that the claimant can perform. He took notice of jobs which presumptively represent a significant number at each exertional level. He said: "Section 404.1569, section 416.969, and Appendix 2 to Subpart P of the Regulations No. 4 provide a basis for determining the claimant's capacity for other work In this case, considering the claimant's age, education, and skilled and semi-skilled work background with some transferable supervisory skills, Appendix 2 . . . direct[s] a conclusion of 'not disabled.'"

(TR 17).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision should be affirmed. Plaintiff's Motion for Judgment on the Pleadings (Docket #4) should be denied.

Dated this 2nd day of May, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\Orders\ss\rose.aff

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

FILED ON DOCKET
DATE 5-13-97

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 ONE 1989 FORD F250 PICKUP,)
 VIN 1FTHX25MXKKA89024,)
)
 and)
)
 THE SUM OF TWO THOUSAND)
 TWO HUNDRED THIRTY-FIVE)
 DOLLARS (\$2,235.00),)
 IN UNITED STATES CURRENCY,)
)
 and)
)
 THE SUM OF ELEVEN THOUSAND)
 TWO HUNDRED SEVENTY-EIGHT)
 DOLLARS (\$11,278.00) IN)
 UNITED STATES CURRENCY;)
)
 FOR A TOTAL OF THIRTEEN)
 THOUSAND FIVE HUNDRED)
 THIRTEEN DOLLARS)
 (\$13,513.00) IN UNITED)
 STATES CURRENCY,)
)
 Defendants.)

CIVIL ACTION NO. 94-C-446-K

FILED

MAY 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CLERK'S ENTRY OF DEFAULT
AS TO 1989 FORD F250 XLT LARIAT PICKUP

It appearing from the files and records of this Court as
of May 12, 1997, and the Declaration of Assistant United
States Attorney Catherine Depew Hart, that all parties in interest,
if any, to the following-described defendant vehicle, to-wit:

ONE 1989 FORD F250
PICKUP,
VIN 1FTHX25MXKKA89024,

against which judgment for affirmative relief is sought in this action, have failed to plead or otherwise defend as to the defendant vehicle, as provided by the Federal Rules of Civil Procedure, except Bobby Gene Richardson who filed a Notice of Claim on June 28, 1994, and an Answer and Counterclaim on July 13, 1994.

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter default as to the defendant vehicle, as to all persons and entities by virtue of the failure to file Claims to said defendant vehicle within the prescribed time, except Bobby Gene Richardson, who filed a Notice of Claim and an Answer and Counterclaim, and whose stipulation for the forfeiture of this vehicle and the return to him of the cellular phone inside the vehicle was filed on April 17, 1997.

DATED at Tulsa, Oklahoma, this 12 day of May 1997.

PHIL LOMBARDI

Clerk, U. S. District Court

By: A. Schuelke, Deputy

N:\UDD\CHOOK\FC\RICHARD.SON\05994

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

FILED

MAY 12 1997

Phil Lombardi Clerk
U.S. DISTRICT COURT

M.A. Mortenson Company,)
)
Plaintiff,)
)
Arkansas Electric Cooperative)
Corporation and The Benham Group, Inc.,)
)
Defendants.)

Case No. 95-CV-966-BU

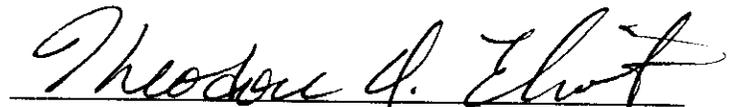
ENTERED ON DOCKET

DATE 5/13/97

STIPULATION OF DISMISSAL

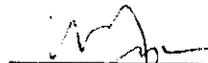
It is stipulated and agreed by the parties and by their respective undersigned attorneys that the above-entitled action may be and it is hereby dismissed with prejudice and on the merits without costs or attorneys' fees to any party and that a Judgment of Dismissal With Prejudice and on the Merits may be entered pursuant hereto without further notice.

Dated: May 12, 1997



Sidney G. Dunagan, OBA No. 2524
Theodore Q. Eliot, OBA No. 2669
Kari S. McKee, OBA No. 14284
Gable, Gotwals, Mock & Schwabe
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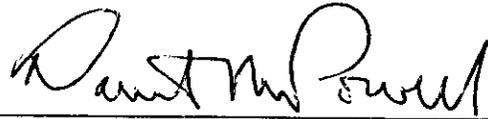
Dated: April 10, 1997



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ATTORNEYS FOR PLAINTIFF
M.A. MORTENSON COMPANY

Dated: April 21, 1997



David M. Powell #69062
Gregory T. Jones #83097
Wright, Lindsey & Jennings
200 West Capitol Avenue #2200
Little Rock, Arkansas 72201-3699
501/371-0808

**ATTORNEYS FOR DEFENDANT ARKANSAS
ELECTRIC COOPERATIVE CORPORATION**

Dated: April 30, 1997



J. Michael Grier KS #12047
Lori H. Hill, KS #14396
Blackwell, Sanders, Matheny,
Weary & Lombardi L.C.
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9401 Indian Creek Parkway
Overland Park, Kansas 66210
913/345-8400

**ATTORNEYS FOR DEFENDANT
THE BENHAM GROUP, INC.**

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

FILED

MAY 09 1997

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

G. BRYANT BOYD, individually)
and as surviving spouse,)
personal representative)
and administrator of the)
Estate of Catherine Ann Boyd,)
deceased)

Plaintiff,)

vs.)

Case No. 96-CV-542-B /

JOHN HANCOCK MUTUAL LIFE)
INSURANCE COMPANY, a foreign)
insurance company,)

Defendant.)

ENTERED ON DOCKET
DATE MAY 12 1997

ORDER OF DISMISSAL WITH PREJUDICE

The parties having stipulated to the dismissal of this action with prejudice pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the court finds that this action shall be and hereby is dismissed with prejudice to the refileing thereof.

DATED this 9TH day of May, 1997.

for James Deen
Honorable Thomas R. Brett
United States District Judge

47

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

MAY - 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HOMER H. KIRKWOOD,
SS# 443-36-0941

Plaintiff,

v.

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

Defendant.

No. 96-C-137-BU ✓

ENTERED ON DOCKET

DATE MAY 12 1997

REPORT & RECOMMENDATION^{2/}

Plaintiff, Homer H. Kirkwood, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{3/} Plaintiff asserts error because (1) the record does not support the Commissioner's conclusion that Plaintiff can perform work at the medium exertional level, (2) the record does not support the Commissioner's conclusion that Plaintiff can perform his past relevant

^{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/} By minute order dated February 26, 1996, this case was referred to the United States Magistrate Judge for all further proceedings in accordance with his jurisdiction.

^{3/} Plaintiff filed an application for disability and supplemental security insurance benefits on May 20, 1992. [R. at 108]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Richard J. Kallsnick (hereafter, "ALJ") was held November 14, 1994. [R. at 75]. By order dated April 11, 1995, the ALJ determined that Plaintiff was not disabled. [R. at 61]. Plaintiff appealed the ALJ's decision to the Appeals Council. The Appeals Council initially denied Plaintiff's appeal on December 29, 1995. Plaintiff's appeal was again denied on April 1, 1996, after Plaintiff submitted additional evidence. [R. at 4].

(12)

work, and (3) Plaintiff can work only at the light level, and the Grids ^{4/} direct a finding of disability. For the reasons discussed below, the Magistrate Judge recommends that the Court **reverse and remand** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on August 31, 1935, and was fifty-nine years old at the time of the hearing before the ALJ. [R. at 81]. Plaintiff attended high school and completed the tenth grade.

Plaintiff's past relevant work involved raising and selling chickens. Plaintiff testified that he had a heart attack in May of 1992, and a second heart attack in April of 1993. [R. at 87-89]. Plaintiff stated that he still experiences chest pain, fatigue, shortness of breath, and is unable to lift as much weight as he previously did. [R. at 90-95]. According to Plaintiff, due to his current physical limitations, he is no longer able to perform the work necessary to raise and sell chickens. Plaintiff testified that he does still do a limited amount of work on his chicken farm, and is able to work approximately four hours each day. [R. at 96-99]. Before his heart attack, Plaintiff was able to work at least six to eight hours each day. [R. at 99].

^{4/} The Medical-Vocational Guidelines, commonly referred to as the "Grids," are located at 20 C.F.R. Pt. 404, Subpt. P, App. 2.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{5/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

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

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

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by

^{5/} Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

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

"The finding of the Secretary^{6/} 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.

^{6/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

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

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff was not disabled at Step Four of the sequential evaluation. The ALJ, based on the record and the testimony of Plaintiff, found that Plaintiff had the residual functional capacity to perform work at the medium work level. The ALJ concluded that Plaintiff could return to his past relevant work as a chicken farmer.

IV. REVIEW

Medium Work Level

Plaintiff initially asserts that the ALJ's conclusion that Plaintiff is capable of performing work at the medium level is not supported by the record. Plaintiff states that nothing in the record supports this conclusion.

Plaintiff did testify that he is limited in his ability to walk, lift, and bend. On May 18, 1992, Plaintiff's doctor restricted him from engaging in "heavy exertion." [R. at 347]. By June 15, 1992, Plaintiff was informed that he "can be active." [R. at 347]. Plaintiff's doctor does not elaborate on any restrictions placed on Plaintiff. On April 5, 1993, Robert C. Haas, M.D. noted that, based on his findings he

recommended to Plaintiff that he "resume activities." Again, no elaboration on any restrictions with respect to the "activities" permitted is provided.

A Residual Physical Functional Capacity Assessment ("RFC Assessment"), dated May 3, 1992, indicated that Plaintiff could lift 50 pounds occasionally, 25 pounds frequently, sit or walk for six hours in an eight hour day, sit for six hours in an eight hour day, and push or pull an unlimited amount. [R. at 147-157]. A second RFC Assessment, from August 1992, reports similar findings. [R. at 113-120].

Consequently, contrary to the representation of Plaintiff, the record does contain some evidence that Plaintiff is capable of performing work at the medium exertional level.

Past Relevant Work

The ALJ found that Plaintiff could perform his past relevant work as a chicken farmer. Plaintiff disagrees, contending that he is unable to perform such work. Upon review, the Magistrate Judge concludes that the ALJ provided insufficient analysis, and the record contains insufficient information with respect to whether or not Plaintiff has the capability of performing his past relevant work. The Magistrate Judge recommends that the District Court reverse on this basis.

A decision at Step Four of the sequential evaluation process that an individual can return to his or her past relevant work, requires that an ALJ make certain specific factual findings. 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).

The ALJ found that:

[T]he claimant does retain the residual functional capacity to perform the duties required by his past relevant work. Past relevant work is that which has been performed within the past 15 years at a level constituting substantial gainful activity. The claimant's past work as farmer was described

by the claimant as being of the heavy exertional level. This is consistent with the description of general farmer in the Dictionary of Occupational Titles (DOT), section 421. Thus, the claimant does not retain the residual functional capacity to perform his past relevant work as a farmer as he and the DOT describe it. However, the claimant admits that he has altered his activities so that he no longer performs heavy duties, but is still able to maintain his farming operation. Therefore, as he describes it now, it may not be at the heavy level. Moreover, the DOT, section 411, describes the chicken farming operations and various occupations therein at no exertional requirement more than medium. The claimant described his operation in such a way that it seems he performs duties variously described in several of the different DOT categories, not limited to one, but including some of the more strenuous activities. The undersigned, therefore, has determined that the work as the claimant performed it was medium. Thus, the claimant does retain the residual functional capacity to perform the activities of poultry farming as ordinarily performed in the national economy.

[R. at 68]. The ALJ's conclusions are confusing.

Initially, the ALJ notes that Plaintiff can perform work at the medium exertional level, but that his past relevant work, as described by Plaintiff (and the DOT description for general farmer) is at the heavy exertional level. Consequently, the ALJ notes that "the claimant does not retain the residual functional capacity to perform his past relevant work as a farmer as he and the DOT describe it." [R. at 68] (emphasis added). Later, and within that same paragraph, the ALJ states that, based upon Plaintiff's description of his altered work activities and based on various DOT descriptions of Plaintiff's job, that "claimant does retain the residual functional capacity to perform the activities of poultry farming as ordinarily performed in the

national economy." These statements seem to be contradictory, and at the very least are confusing.⁷¹

After initially concluding that Plaintiff cannot perform his "past relevant work" as he performed it, the ALJ notes that Plaintiff can do some of his former activities, that he is no longer performing "heavy" duties, and that Plaintiff is able to maintain his farming operation. The problem with the analysis by the ALJ is that it goes beyond what is permitted at Step Four. Step Four concentrates on whether or not a claimant can perform his previous past relevant work. If a claimant can return to his past relevant work and do the work activities as he previously did them, or as they are generally performed in the national economy, the individual is not disabled. However, in this case, the ALJ seems to be modifying Plaintiff's past relevant work to be his "job" as he is currently attempting to perform it. Plaintiff testified, and the ALJ acknowledges, that the manner in which Plaintiff is currently performing his job is different from the job which Plaintiff performed prior to the alleged onset date of his disability. The ALJ cannot modify the job requirements of Plaintiff's past relevant

⁷¹ One possible explanation for the apparent contradiction is that, in the first statement, the ALJ is referring to Plaintiff's past relevant work as Plaintiff performed it, and in the second statement, the ALJ is referring to Plaintiff's past relevant work as it is performed in the national economy. However, the paragraph is still confusing. The ALJ refers to the DOT in both statements, but initially concludes that Plaintiff cannot perform the work (based on one part of the DOT) and later concludes Plaintiff can perform the work (based on other sections of the DOT). The ALJ does not reference the specific DOT sections upon which he is relying. In addition, in the sentences preceding the conclusion by the ALJ that Plaintiff can perform his job as "performed in the national economy," the ALJ notes that Plaintiff is performing his job differently from the way in which he performed it prior to his heart attack.

work to attempt to fit the "work" as Plaintiff is currently performing it, and based upon that conclude that Plaintiff can perform his past relevant work.^{8/}

At the very least, the ALJ's decision with respect to Plaintiff's ability to perform his past relevant work is confusing. Regardless, a decision at Step Four must contain specific details of the claimant's past relevant work and the claimant's current RFC. Even if the confusing portions of the ALJ's decision are ignored, the decision lacks an adequate description of Plaintiff's past relevant work (as either Plaintiff performed it or as it was performed in the national economy). Therefore, the United States Magistrate Judge recommends that this case be reversed and remanded for further proceedings. Initially, the ALJ should specifically outline the requirements of Plaintiff's past relevant work.^{9/} If the ALJ concludes, on remand, that Plaintiff is unable to perform his past relevant work, he should proceed to Step Five.

"Light" RFC & the Grids

Plaintiff additionally asserts that his RFC is limited to work in the "light" category. Because of his age, work experience and education, if Plaintiff is limited to performing work in the "light" category, the Grids dictate a finding of disability.

^{8/} Of course, if a claimant is currently working, and is engaged in substantial gainful activity, the claimant is not disabled. Therefore, if the job, as Plaintiff is currently performing it constitutes substantial gainful activity, Plaintiff is not disabled at Step Two. The ALJ found that claimant had not engaged in "any substantial gainful activity since the alleged onset date." [R. at 65]. Therefore, the job, as Plaintiff is currently performing it, is insufficient to constitute substantial gainful activity. The possible result of the ALJ's decision could be perplexing. It would permit an individual who was no longer able to do his past relevant work as he did it, but was able to do some of those job requirements (but not enough to constitute substantial gainful activity), to be found not disabled based on his ability to perform some but not all of his previous job requirements.

^{9/} The work requirements should be detailed and may include a description by Plaintiff or a vocational expert. At the very least, the ALJ should reference the portions of the DOT which the ALJ relied upon.

Plaintiff therefore asserts that the ALJ erred in finding that he was not disabled, and the Court should direct a finding of disability.

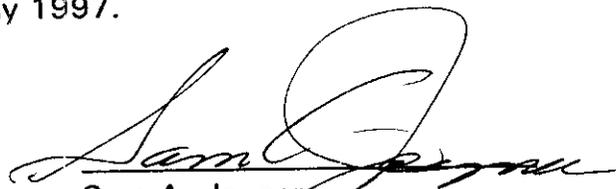
As noted above, the record contains some evidence to support the ALJ's finding that Plaintiff is able to perform work at the "medium" level. Such determinations are within the initial province of the ALJ. See, e.g., Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995) ("Credibility determinations are peculiarly within the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence."); Musgrave v. Sullivan, 966 F.2d 1371, 1374 (10th Cir. 1992). In addition, as noted above, 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). Based on the record, the court is unwilling to totally disregard the findings of the ALJ that Plaintiff can do medium work.

RECOMMENDATION

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

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

Dated this 9 day of May 1997.

A handwritten signature in black ink, appearing to read "Sam A. Joyner". The signature is stylized with a large, looped initial "S" and a long, sweeping underline.

Sam A. Joyner
United States Magistrate Judge