

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

F I L E D

JUL 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES FREDERICK,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

No. 97-CV-599-B (W)

FILED ON DOCKET

DATE ~~JUL 10 1997~~

ORDER

Petitioner, a state prisoner appearing *pro se*, has filed a "habeas corpus petition" pursuant to 28 U.S.C. § 2254 and a motion for leave to proceed *in forma pauperis*. Petitioner challenges an Order issued by the Supreme Court of the State of Oklahoma dismissing as untimely the appeal of the termination of his parental rights.

In reliance upon the representations set forth in the motion, the Court concludes that Petitioner should be granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. 1915(a), as amended.

Pursuant to 28 U.S.C. § 2254(a), an application for a writ of habeas corpus on "behalf of a person in custody pursuant to the judgment of a State court" may be brought "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." The Supreme Court has made it clear ". . . that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). In addition, a § 2254 case does not "confer federal-court jurisdiction" in all cases of custody. Extending the federal writ

to challenges to state child-custody decisions -- challenges based on alleged constitutional defects collateral to the actual custody decision -- would be an unprecedented expansion of the jurisdiction of the lower federal courts. *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 511-12, 516, 102 S.Ct. 3231, 3237-38, 3240 (1982); *see also Roman-Nose v. New Mexico Dep't of Human Servs.*, 967 F.2d 435 (10th Cir. 1992).

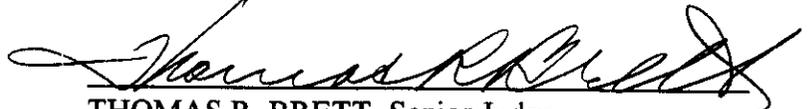
After liberally construing Plaintiff's *pro se* pleading, *see Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that it lacks subject matter jurisdiction over Plaintiff's action which challenges the termination of his parental rights and the dismissal of his appeal by the Oklahoma Supreme Court as untimely. Federal courts have traditionally abstained from hearing suits involving divorces, alimony or child custody even though the prerequisites of diversity jurisdiction exist. *See Ingram v. Hayes*, 866 F.2d 368, 370-72 (11th Cir. 1988); *Oltremari v. Kansas Soc. & Rehabilitative Serv.*, 871 F.Supp. 1331, 1339-1340 (D.Kan. 1994). Furthermore, to the extent Petitioner is seeking simply an appellate review of a state court judgment, "it is well settled that federal district courts are without authority to review state court judgments where the relief sought is in the nature of appellate review." *Anderson v. Colorado*, 793 F.2d 262, 263 (10th Cir. 1986); *Van Sickle v. Holloway*, 791 F.2d 1431, 1436 (10th Cir. 1986) (stating that "a federal district court does not have the authority to review final judgments of a state court in judicial proceedings; such review may only be had in the United States Supreme Court").

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Petitioner's motion for leave to proceed *in forma pauperis* is **granted**;
- (2) Petitioner's "habeas corpus petition" is **dismissed** for lack of subject matter jurisdiction; and

(3) The Clerk of the Court is directed to **return** all copies of the "habeas corpus petition" to Petitioner.

SO ORDERED this 9th day of July, 1997.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

RIVER OAKS DEVELOPMENT CORPORATION, an Oklahoma corporation,

Plaintiff,

v.

MNA, INC., a Colorado corporation; NAIM G. NASSAR, an individual; and MACE L. PEMBERTON, an individual,

Defendants.

MNA, INC., a Colorado corporation,

Third-Party Plaintiff,

v.

LORICE WALLACE,

Third Party Defendant.

Case No. 97-CV-68H ✓

F I L E D

JUL 9 1997

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

ENTERED ON CLERK

DATE JUL 10 1997

**ORDER OF DISMISSAL
OF THIRD PARTY DEFENDANT WITHOUT PREJUDICE**

This matter came on for hearing on June 27, 1997. The plaintiff, River Oaks Development Corporation ("River Oaks"), is represented by Joseph Hull, III. The defendants, MNA, Inc., Naim G. Nassar and Mace L. Pemberton (collectively "MNA"), are represented by Harry Crowe and James Rusher. The third party defendant, Lorice Wallace ("Wallace"), is represented by Frederick J. Hegenbart. After hearing the statements and representations of counsel, reviewing the court file and being fully apprised and FOR GOOD CAUSE SHOWN THE COURT FINDS:

1. Wallace, in her individual capacity should not be a party to this litigation.
2. Wallace should be dismissed from this action without prejudice.

(15)

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Lorice Wallace, individually, is dismissed from this action without prejudice.


Sven Erik Holmes
United States District Judge

Approved:

Joseph L. Hull III, OBA No.
Council Oaks Center
1717 S. Cheyenne Ave.
Tulsa, OK 74119
Attorney for Plaintiff

Harry Crowe, Jr., OBA No.
406 S. Boulder, Suite 422
Tulsa, OK 74103

James W. Rusher, OBA No.
Albright & Rusher
15 W. 6th St., Suite 2600
Tulsa, OK 74119-5434
Attorneys for Defendants



Frederick J. Hegenbart, OBA No. 10846
525 South Main, Suite 700
Tulsa, OK 74103
(918) 585-9211
Attorneys for Third Party Defendant

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that
Lorice Wallace, individually, is dismissed from this action without prejudice.

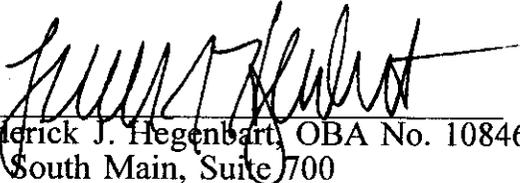
Sven Erik Holmes
United States District Judge

Approved:

Joseph L. Hull III, OBA No.
Council Oaks Center
1717 S. Cheyenne Ave.
Tulsa, OK 74119
Attorney for Plaintiff

Harry Crowe, Jr., OBA No.
406 S. Boulder, Suite 422
Tulsa, OK 74103

James W. Rusher, OBA No.
Albright & Rusher
15 W. 6th St., Suite 2600
Tulsa, OK 74119-5434
Attorneys for Defendants

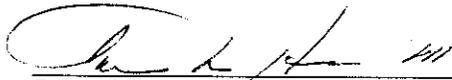


Frederick J. Hegenbart, OBA No. 10846
525 South Main, Suite 700
Tulsa, OK 74103
(918) 585-9211
Attorneys for Third Party Defendant

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that
Lorice Wallace, individually, is dismissed from this action without prejudice.

Sven Erik Holmes
United States District Judge

Approved:



Joseph L. Hull III, OBA No.
Council Oaks Center
1717 S. Cheyenne Ave.
Tulsa, OK 74119
Attorney for Plaintiff

Harry Crowe, Jr., OBA No.
406 S. Boulder, Suite 422
Tulsa, OK 74103

James W. Rusher, OBA No.
Albright & Rusher
15 W. 6th St., Suite 2600
Tulsa, OK 74119-5434
Attorneys for Defendants



Frederick J. Hegenbart, OBA No. 10846
525 South Main, Suite 700
Tulsa, OK 74103
(918) 585-9211
Attorneys for Third Party Defendant

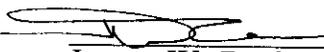
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that
Lorice Wallace, individually, is dismissed from this action without prejudice.

Sven Erik Holmes
United States District Judge

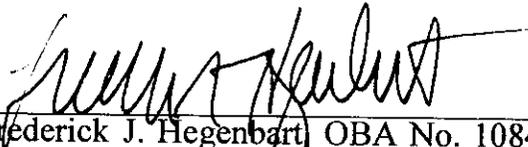
Approved:

Joseph L. Hull III, OBA No.
Council Oaks Center
1717 S. Cheyenne Ave.
Tulsa, OK 74119
Attorney for Plaintiff

Harry Crowe, Jr., OBA No.
406 S. Boulder, Suite 422
Tulsa, OK 74103



James W. Rusher, OBA No.
Albright & Rusher
15 W. 6th St., Suite 2600
Tulsa, OK 74119-5434
Attorneys for Defendants



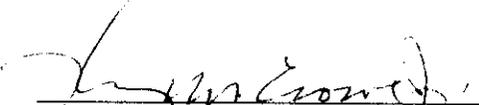
Frederick J. Hegenbart, OBA No. 10846
525 South Main, Suite 700
Tulsa, OK 74103
(918) 585-9211
Attorneys for Third Party Defendant

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that
Lorice Wallace, individually, is dismissed from this action without prejudice.

Sven Erik Holmes
United States District Judge

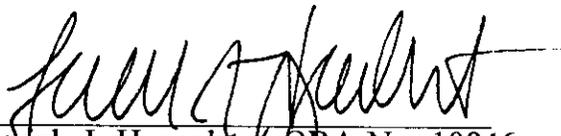
Approved:

Joseph L. Hull III, OBA No.
Council Oaks Center
1717 S. Cheyenne Ave.
Tulsa, OK 74119
Attorney for Plaintiff



Harry Crowe, Jr., OBA No. 20247
406 S. Boulder, Suite 422
Tulsa, OK 74103

James W. Rusher, OBA No.
Albright & Rusher
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Tulsa, OK 74119-5434
Attorneys for Defendants



Frederick J. Hegenbart, OBA No. 10846
525 South Main, Suite 700
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(918) 585-9211
Attorneys for Third Party Defendant

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

FILED

JUL 9 1997

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

TRUGREEN LIMITED PARTNERSHIP,)
)
 Plaintiff,)
)
 vs.)
)
 TIM LOVELAND, EVELYN SUE)
 LOVELAND, and DARREN NIXON,)
)
 Defendants.)

Case No. 97CV 474H (W)

ENTERED ON DOCKET
DATE JUL 10 1997

ORDER OF DISMISSAL WITHOUT PREJUDICE

NOW on this 9th day of July, 1997, the Plaintiff, TruGreen Limited Partnership has filed
it's Motion to Dismiss without Prejudice. The Court finds it's Motion should be granted.

IT IS THEREFORE ORDERED that this cause of action is hereby dismissed without
prejudice.

DATED in Tulsa, Oklahoma, this 9th day of July, 1997.



JUDGE OF THE DISTRICT COURT

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ENTERED ON DOCKET
7-10-97

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

TAMMY LYNN SHOEMAKER,)
)
 Plaintiff,)
)
 v.)
)
 APEX WASTE MANAGEMENT, INC. and)
 ADS, INC.; AMERICAN DISPOSAL,)
 SERVICES OF MISSOURI, INC. d/b/a)
 APEX WASTE MANAGEMENT; and THOMAS)
 NEWTON KING,)
)
 Defendants.)

Case No.: 96-CV-583K

F I L E D
JUL 09 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

This matter comes on for hearing on the joint stipulation of the Plaintiff, Tammy Lynn Shoemaker, individually, and the Defendants, ADS, Inc., American Disposal Services of Missouri, Inc., and Thomas Newton King, individually, for a dismissal with prejudice of the above-captioned cause. The Court, being fully advised and having reviewed the Stipulation, finds that the parties herein have entered into a compromise covering all claims involved in this action, which this Court hereby approves, and that the above-entitled cause should be dismissed with prejudice to the filing of a future action pursuant to said Stipulation.

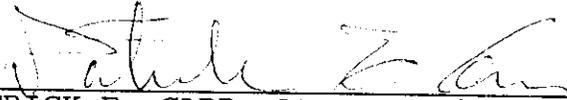
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above-entitled cause be and is hereby dismissed with prejudice to the filing of a future action, the parties to bear their own respective costs.

Dated this 8 day of July, 1997.

Jerry C. Kern
UNITED STATES DISTRICT JUDGE

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APPROVED AS TO FORM AND CONTENT:



PATRICK E. CARR, Attorney for Plaintiff
Carr & Carr Attorneys
P.O. Box 35647
Tulsa, OK 74153
(918) 747-1000



ROBERT P. REDEMANN, Attorney for Defendant
Rhodes, Hieronymus, Jones, Tucker & Gable
Suite 400, 100 West 5th Street
Tulsa, OK 74103
(918) 582-1173

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

ENTERED ON DOCKET
DATE 7-10-97

DEBBIE S. HAMILTON,)
)
Plaintiff,)
)
vs.)
)
J.C. PENNEY LIFE INSURANCE)
COMPANY, a foreign insurance)
company, FIRST USA BANK, a)
foreign banking corporation,)
SOMAR TELECOMMUNICATIONS, INC.,)
a foreign corporation, and)
APAC TELESERVICES, INC., a)
foreign corporation,)
)
Defendants.)

Case No. 96 C 850 K ✓

FILED

JUL 09 1997 27

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER GRANTING
PLAINTIFF'S MOTION FOR DISMISSAL WITHOUT PREJUDICE
AS TO HER CLAIMS AGAINST APAC TELESERVICES, INC.

The motion of the Plaintiff for an order of dismissal without prejudice as to her claims against APAC Teleservices, Inc. came on for decision on this 8 day of July, 1997;

And it appearing that APAC Teleservices, Inc., in its Answer, makes no counter-claim against Plaintiff and will not be substantially prejudiced by a dismissal; therefore,

IT IS ORDERED that the Plaintiff's claims against APAC Teleservices, Inc., as set out in the above-entitled action, be, and are hereby dismissed without prejudice.

Jerry C Kern

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ENTERED ON DOCKET
DATE 7-10-97

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

WILLIAM M. WARD, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 TIMOTHY A. SHINER, et al.,)
)
 Defendants.)

No. 96-C-925-K ✓

FILED

JUL 09 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 8 day of July, 1997.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 7-10-97

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

FILED
JUL 09 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICKY D. WILKERSON,
Plaintiff,
vs.
CHRYSLER CORPORATION,
Defendant.

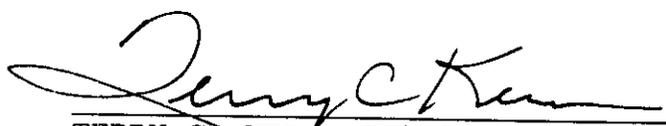
No. 96-C-1054-K

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 8 day of July, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

FILED

JUL -9 1997

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

KELA MARIE GREGORY,)
)
)
 Plaintiff,)

v.)

Case No. 96-CV-1171-E

KARIN GARLAND, individually and)
in her official capacity as Court)
Clerk of Mayes County, Oklahoma;)
REGINA HARRIS, individually and in)
her official capacity as Deputy)
Court Clerk of Mayes County,)
Oklahoma; HAROLD BERRY,)
individually and in his official)
capacity as Sheriff of Mayes)
County, Oklahoma; CARL SLOAN,)
individually and in his official)
capacity as Jail Administrator of)
Mayes County, Oklahoma; and BOARD)
OF COUNTY COMMISSIONERS OF MAYES)
COUNTY, OKLAHOMA,)

Defendants.)

ENTERED ON DOCKET

JUL 10 1997

STIPULATION OF DISMISSAL WITH PREJUDICE

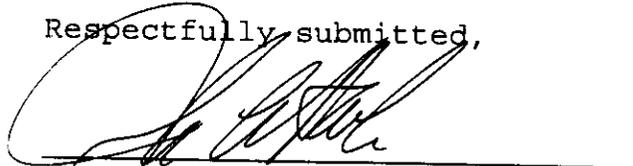
The Plaintiff, Kela Gregory, by and through her attorney of record, John Harlan, and the Defendants Karin Garland, individually and in her official capacity, Regina Conn, individually and in her official capacity, Harold Berry, individually and in his official capacity, Carl Sloan, individually and in his official capacity and the Board of County Commissioners of Mayes County, Oklahoma, by and through their attorney of record, Gayla Jones, agree to dismiss this action with prejudice as to Defendant Carl Sloan only, in his

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individual and official capacity as Jail Administrator of Mayes County, Oklahoma, and the action shall continue as to the remaining Defendants.

Date: July 8, 1997

Respectfully submitted,



John Harlan, OBA #3861
Harlan & Associates, P.C.
404 East Dewey, Suite 106
P.O. Box 1326
Sapulpa, OK 74067

ATTORNEY FOR PLAINTIFF



Gayla I. Jones, OBA #14900
Collins, Zorn, Jones & Wagner, P.C.
429 N.E. 50th Street, Second Floor
Oklahoma City, OK 73105-1815

ATTORNEY FOR DEFENDANTS

COLLINS, ZORN, JONES & WAGNER, P.C.

ATTORNEYS AT LAW

429 N.E. 50TH, SECOND FLOOR
OKLAHOMA CITY, OKLAHOMA 73105-1815

CHRISTOPHER J. COLLINS
DANIEL K. ZORN
GAYLA I. JONES
JASON C. WAGNER

TELEPHONE (405) 524-2070
1-800-916-0676
TELEFAX (405) 524-2078

JAMES L. GIBBS, II
DONNA L. COMPTON
LAURIE A. FONG

July 8, 1997

RECEIVED

JUL - 9 1997

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

Phil Lombardi
Northern District Court Clerk
4411 U.S. Courthouse
333 W. 4th Street
Tulsa, OK 74103

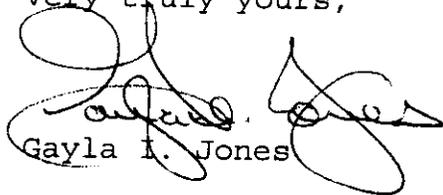
RE: Gregory v. Mayes County Jail, et al., Case No. 96-CV-
1171-E, Northern District of Oklahoma

Dear Mr. Lombardi:

Enclosed is the original and one copy of the Stipulation of Dismissal With Prejudice in connection with the above-referenced case. Please file the original and return the file-stamped copy to me in the enclosed, self-addressed stamped envelope.

Thank you for your assistance. If you should have any questions, please do not hesitate to contact me.

Very truly yours,


Gayla I. Jones

GIJ:arm

Enclosures

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff

v.

STEVEN D. ZAFERIS,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

Civil Action No. 97CV 244B

FILED ON DOCKET

JUL 10 1997

AMENDED DEFAULT JUDGMENT

This matter comes on for consideration this 9th day of July, 1997, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Steven D. Zaferis, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Steven D. Zaferis, was served with Summons and Complaint on April 26, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

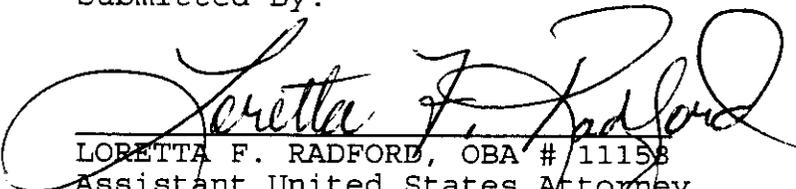
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Steven D. Zaferis, for the principal amount of \$2,797.48 and \$1,342.32, plus accrued interest of \$1,652.54 and \$558.80, plus interest thereafter at the rate of 8 percent per annum and 12 percent per

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annum until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.65 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

LFR/jmo

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

FILED
JUL 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARCOUS FRIDAY,)
)
Plaintiff,)
)
vs.)
)
PENNWELL PUBLISHING CO.,)
)
Defendant.)

Case No. 97-CV-397-B

ENTERED ON DOCKET
DATE JUL 10 1997

ORDER

Before the Court for consideration is Defendant Pennwell Publishing Company's Motion to Dismiss pursuant to Fed.R.Civ.P. 12 (b)(6) and 9 (c). Pennwell asserts Plaintiff Marcous Friday, an employee of Defendant's, filed this 42 U.S.C. § 1983 action without having obtained a right to sue letter from the Equal Employment Opportunities Commission.

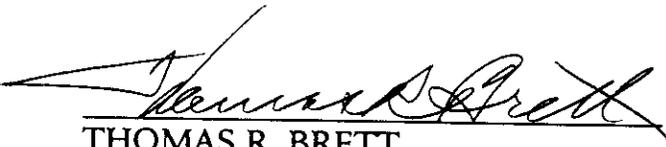
Pennwell filed its Motion to Dismiss May 16, 1997. Under this Court's Local Rules, Friday's response was due within fifteen (15) days. See ND L.R. 7.1(C). On June 17, 1997, roughly seventeen (17) days after the response due date, counsel for Friday, Jeff Nix, filed a Motion to change the time to respond to Pennwell's Motion to Dismiss. On June 18, 1997, this Court entered an Order granting Friday's requested relief and established June 30, 1997, as the due date for any response. As of July 8, 1997, no response brief had been filed on Friday's behalf.

Based on Friday's failure to respond, the Court hereby exercises its discretion and deems the matter raised by Pennwell's Motion confessed. Id. Pennwell's Motion to

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Dismiss is GRANTED and the instant action is hereby DISMISSED WITHOUT PREJUDICE for failure of Friday to fulfill the statutory prerequisite of obtaining a right to sue letter. See 42 U.S.C. § 2000e-5(f)(1). The Court finds said condition precedent has not been waived by Pennwell, and Pennwell is not estopped from asserting the issue. See Hladki v. Jeffrey's Consolidated, Ltd., 652 F.Supp. 388 (E.D.N.Y. 1987); see also Townsend v. State of Oklahoma, 760 F.Supp. 884 (W.D.Okla. 1991) (right to sue letter required in suit against State).

IT IS SO ORDERED this 9th day of July, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

ABRAHAM CALAMEASE, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 CASH AMERICA, INC. OF)
 OKLAHOMA, et al.,)
)
 Defendants.)

F I L E D

JUL - 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-295-K

ENTERED ON DOCKET

JUL 10 1997

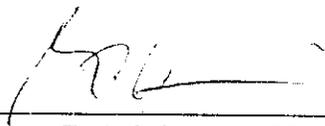
STIPULATION OF PARTIAL DISMISSAL

COME NOW the parties hereto and stipulate to the dismissal of the claim of
Plaintiff Chris R. Olson against Defendants in the above styled and numbered cause.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN

By:



Steven R. Hickman, OBA#4172
1700 Southwest Blvd.
P.O. Box 799
Tulsa, OK 74101-0799
918/584-4724
Attorneys for Plaintiffs

DOERNER, SAUNDERS, DANIEL & ANDERSON

By:

A handwritten signature in cursive script, appearing to read "Rebecca M. Fowler", written over a horizontal line.

Rebecca M. Fowler, OBA#13682

320 S. Boston, Suite 500

Tulsa, OK 74103

918/582-1211

Attorneys for Defendants

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

BOARD OF TRUSTEES OF)
RESILIENT FLOOR COVERERS)
LOCAL #1533 PENSION PLAN)
and MARLIN HEIM, Plan)
Administrator,)

Plaintiffs,)

vs.)

HOWARD CAVANESS; THOMAS ODLE;)
EDDIE L. BRIMMER; MARLIN L. HEIM;)
WILLIAM ODLE; ORVAL COTHRAN;)
FERLIEGH JONES; CLARENCE ROSE; TRAVIS)
SANFORD; PAUL M. JONES; LEON ROSE;)
LOUIS SPRINGSTUBE; WALLACE JONES; L. V.)
SEWELL; JOSEPH GARBER; JAMES KORNE;)
NATHAN WILSON; SUE EMLER; JACK KROLL;)
JOE DANIEL HURD; JUDY ANN GRAGG; W.)
C. MAHANES, JR.; LUTHER ROGERS; LEOLA)
HENDERSON; LUTHER MCALISTER;)
SYLVESTER SMITH; BILLIE JONES; EDWARD)
R. NEVEL; JIMMY SHAW; JUANITA MOORE;)
GAYNOLD TACKETT; PAULINE WHITE; JANE)
WILLIS; LOVITA YOCOM; BEVERLY OWENS;)
BOB BURNHAM; CLARK BISHOP; DANNY)
BOWMAN; WELDON BREWER; DOUGLAS)
DRULLINGER; BILLY FISHER; GENE H.)
GRAYSON; WILLIAM HAMPTON; GARY D.)
HUCKABY; NORMAN HUGHES; CURTIS D.)
JONES; ROBERT G. JONES; HOWARD O.)
LUPER; PAUL EDDIE MILLS; MARK NOLEN;)
WILLIAM R. RAMSEY; EDWIN WILKINSON;)
DAVID J. YELTON; TERRY DEWEESE;)
DONALD FELTZ; LYNN JONES; LARRY)
MUSHRUSH; LARRY PIFER; EDDIE J.)
BRIMMER; ROGER SYVERSON; GARY)
BOWMAN; TERRY BOWMAN; MARK EMLER;)
LESTER PRIEST; JERRY BURKE, The)
Participants of the Resilient Floor)

FILED

JUL - 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97CV-338 C ✓

ENTERED ON DOCKET
JUL 09 1997

C/S.

Coverers Local #1533 Pension Trust Plan;)
 JOHN DOE and JANE DOE, unknown)
 Participants in the Resilient Floor)
 Coverers Local #1533 Pension Trust Plan;)
 LIBERTY BANK AND TRUST COMPANY OF)
 TULSA, N.A., JOHN SEAL, Acting Executive)
 Director, Pension Benefit Guaranty)
 Corporation; CYNTHIA METZLER, Acting)
 Secretary of Labor, Department of Labor of)
 the United States; ROBERT E. RUBIN,)
 Secretary of Treasury, Department of)
 Internal Revenue Service of the United)
 States,)
)
)
)
 Defendants.)

**DISMISSAL WITHOUT PREJUDICE
AS TO DEFENDANT JOHN SEAL ONLY**

COME NOW the Plaintiffs, Board of Trustees of Resilient Floor Coverers Local #1533 Pension Plan and Marlin Heim, and hereby dismiss the above-captioned action without prejudice as against the Defendant, John Seal, Acting Executive Director, Pension Benefit Guaranty Corporation, only.

Respectfully submitted,

By 
 THOMAS F. BIRMINGHAM OBA #811
 Birmingham, Morley, Weatherford &
 Priore
 1141 East 37th Street
 Tulsa, Oklahoma 74105-3162
 (918) 743-8355
 Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 8 day of July, 1997, I mailed a true and correct copy of the above and foregoing Dismissal Without Prejudice to: Mr. Thomas Kim, Office of General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street N.W., Washington, D.C., 20005; Ms. Kenni B. Merritt, CROWE & DUNLEVY, 1800 Mid-America Tower, 20 North Broadway, Oklahoma City, Oklahoma, 73102 and Mr. Phil Pinnell, Assistant United States Attorney, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma, 74103-3809 in the U.S. mail, postage prepaid.


THOMAS F. BIRMINGHAM

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL - 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JACK R. MAY,
SS# 511-60-9250

Plaintiff,

v.

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

Defendant.

No. 96-C-571-C(J)

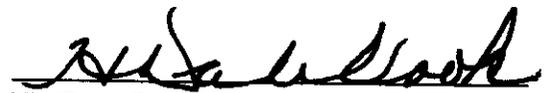
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JUL 09 1997

ORDER

A Report and Recommendation of the Magistrate was filed June 10, 1997. No objections have been filed by the parties, and the time period for filing any such objections has clearly expired. F.R.C.P. 72. Pursuant to Rule 72 and after careful consideration of the record and the issues, the Court hereby adopts the Magistrate's Report and Recommendation and **GRANTS** Defendant's Motion to Dismiss the Plaintiff's action for lack of jurisdiction.

IT IS SO ORDERED this 8th day of July, 1997.



H. Dale Cook
U.S. District Judge

12

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JON SHAFFER,
SS# 445-42-1926

Plaintiff,

v.

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

Defendant.

JUL 03 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

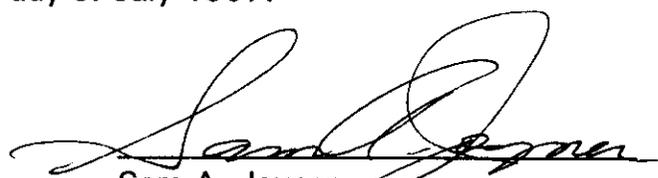
No. 96-C-586-J

ENTERED ON DOCKET
DATE JUL 08 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 3 day of July 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
NORTHERN DISTRICT OF OKLAHOMA

FILED

JON SHAFFER,
SS# 445-42-1926

Plaintiff,

v.

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

Defendant.

JUL 03 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-586-J

ENTERED ON DOCKET
DATE JUL 03 1997

ORDER^{2/}

Plaintiff, Jon Shaffer, 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) improperly evaluating Plaintiff's credibility, (2) applying an incorrect "legal standard" at Step Five, and (3) improperly concluding that

^{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 January 4, 1993. [R. at 35]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Richard J. Kallsnick (hereafter, "ALJ") was held September 7, 1994. [R. at 272]. By order dated February 7, 1995, the ALJ determined that Plaintiff was not disabled. [R. at 12]. Plaintiff appealed the ALJ's decision to the Appeals Council. On May 13, 1996, the Appeals Council denied Plaintiff's request for review, and denied Plaintiff's request to reopen its prior decision denying review. [R. at 4].

Plaintiff could perform the standing requirements of "light work." For the reasons discussed below, the Court affirms the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on May 2, 1943, and was 51 years old at the time of the hearing before the ALJ. [R. at 12, 272]. Plaintiff has a Bachelor of Science degree in Education. [R. at 278].

Plaintiff noted in his disability report that he was disabled due to "multiple joint deterioration and osteoarthritis." [R. at 63]. Plaintiff testified that he worked as a bill collector for nine years, and was a division collection manager. [R. at 294]. Plaintiff also worked for a steel company as a "rack punch operator," and a burner. [R. at 296-97]. Plaintiff testified that he stopped working because of the physical requirements of the job, because his knees were swollen, and because his right arm gave him difficulty. [R. at 279].

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

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 has established a five-step process for the evaluation of social security claims.^{4/} See 20 C.F.R. § 404.1520.

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

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

^{4/} 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 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 Five of the sequential evaluation. The ALJ concluded that although Plaintiff could not perform his past relevant work, he could perform light work or sedentary work requiring sitting, standing or walking for up to six hours out of an eight hour day, but was prohibited from work environments which involved extreme temperatures of cold or humidity.

^{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."

[R. at 20-21]. Based on the testimony of a vocational expert, the ALJ found that Plaintiff could work as a teacher's aide, a grading clerk, a cashier, or a counter salesperson. [R. at 24].

IV. REVIEW

Credibility Analysis

Plaintiff initially asserts that the ALJ failed to properly evaluate Plaintiff's credibility. Plaintiff contends that the ALJ found Plaintiff credible only to the extent that Plaintiff could perform light work, but that the ALJ's analysis was not properly "linked to specific evidence," and was merely "boiler-plate." Plaintiff refers to Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995).

An ALJ's determination of credibility is given great deference by the reviewing court. See Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). On appeal, the court's role is to verify whether substantial evidence in the record supports the ALJ's decision, and not to substitute the court's judgment for that of the ALJ. In Kepler v. Chater, 68 F.3d 387, (10th Cir. 1995), the Tenth Circuit determined that an ALJ must discuss a Plaintiff's complaints of pain, in accordance with Luna, and provide the reasoning which supports the decision as opposed to mere conclusions. Id. at 390-91.

Though the ALJ listed some of these [Luna] factors, he did not explain why the specific evidence relevant to each factor led him to conclude claimant's subjective complaints were not credible.

Id. at 391.

In this case, the ALJ adequately supported his determinations with respect to Plaintiff's credibility. In general, the ALJ based his conclusions on Plaintiff's own testimony. The ALJ noted that Plaintiff testified that he can lift three bottles of two liter pop in one sack, that he can walk for approximately 30 minutes, that he climbs stairs, and that he occasionally uses a cane. In addition, Plaintiff's daily activities consist of mowing the lawn, cooking, cleaning, gardening, playing guitar and running necessary errands. The ALJ analyzed the medications taken by Plaintiff, Plaintiff's activities, the treatment which Plaintiff has sought, and Plaintiff's testimony, and concluded that although Plaintiff did have some pain he did not have a "totally disabling pain syndrome." The ALJ's findings are supported by the record.

Step Five Analysis & Light Work

Plaintiff additionally asserts that the ALJ erred in his Step Five analysis. Plaintiff notes that he was 50 years old with no transferable job skills, and therefore he was "precluded" from performing sedentary work.^{6/} Plaintiff therefore concludes that whether or not he is "disabled" is dependent upon whether he can perform the physical and mental requirements of "light work." Plaintiff argues that nothing in the record supports the ALJ's conclusion that Plaintiff can perform the standing

^{6/} 20 C.F.R. § 201.00(g) provides that "individuals approaching advanced age may be significantly limited in vocational adaptability if they are restricted to sedentary work. When such individuals have no past work experience or can no longer perform vocationally relevant past work and have no transferable skills, a finding of disabled ordinarily obtains. However, recently completed education which provides for direct entry into sedentary work will preclude such a finding. For this age group, even a high school education or more (ordinarily completed in the remote past) would have little impact for effecting a vocational adjustment unless relevant work experience reflects use of such education." The Court makes no finding with respect to whether Plaintiff's argument that Plaintiff is presumptively disabled if Plaintiff is limited to "sedentary work" because the Court finds that substantial evidence exists to support the ALJ's conclusion that Plaintiff can perform "light work."

requirements for light work, that the burden (at Step Five) is on the Commissioner, and therefore the Commissioner erred in concluding that Plaintiff could perform light work.

Plaintiff is correct that at Step Five, the "burden" is on the Commissioner to establish that a significant number of jobs exist which a claimant can perform. However, the Commissioner met this burden.

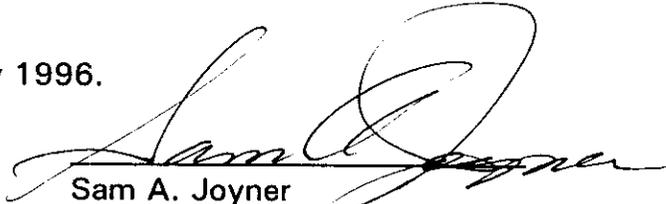
A Residual Functional Capacity Assessment completed by Thurma Fiegel, M.D., on September 2, 1993, indicates that Plaintiff can occasionally lift 20 pounds, frequently lift 10 pounds, stand or walk for approximately six hours out of an eight hour day, sit for approximately six hours out of an eight hour day, and push/pull an unlimited amount. Plaintiff was examined by Paul J. Krautter, M.D., on March 22, 1993. Dr. Krautter noted that Plaintiff told him he was able to work in his garden for approximately one hour before his back pain required him to discontinue his work. The doctor observed that Plaintiff's gait was normal, that he had normal dexterity of gross and fine manipulation, that he was easily able to get on and off the examination table and required no assistive devices. [R. at 162]. Plaintiff's range of motion was reported as "all normal." [R. at 166-67]. Sufficient evidence in the record supports the ALJ's finding that Plaintiff could physically perform the standing requirements necessary for light work.^{7/} Furthermore, the opinions and records from Plaintiff's

^{7/} "Light work" requires "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. . . ." 20 C.F.R. § 404.1567

treating physicians do not dictate a contrary result.^{8/} Plaintiff additionally testified that one of his doctors advised him to walk.^{9/} [R. at 303].

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

Dated this 3 day of July 1996.



Sam A. Joyner
United States Magistrate Judge

^{8/} Plaintiff suggests that Dr. Mauerman "stated Mr. Shaffer could only stand 30-45 minutes." Plaintiff's Brief at 4. However, the record citations relied upon by Plaintiff do not support Plaintiff's statements. On March 23, 1992, three weeks after a "shaving of a lateral tibial plateau chondral lesion fracture" Dr. Mauerman did note that Plaintiff had 'discomfort' when he was on his leg for more than a half hour or 45 minutes at one time. There is nothing in there that would cause any locking . . . It has been mostly been the discomfort. He is to return here in five weeks at which time he should be close to reaching maximum benefit from his orthopedic care. It will not make him normal, but will hopefully improve him." [R. at 159]. On April 28, 1992, Dr. Mauerman stated "he is only minimally better than when we started. He has been told that he will probably have to lose down to 200 pounds, although Dr. Costner said 250, that he should not go back to heavy manual labor, that with multiple joint complaints, back fusion, etc., that he would not hold up."

^{9/} Plaintiff did state that he could walk only about 30 minutes before his knees and ankles would begin swelling.

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

ABRAHAM CALAMEASE, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 CASH AMERICA, INC. OF)
 OKLAHOMA, et al.,)
)
 Defendants.)

Case No. 96-C-295-K

FILED
JUL - 7 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

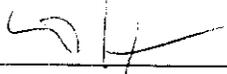
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STIPULATION OF PARTIAL DISMISSAL

COME NOW the parties hereto and stipulate to the dismissal of the claim of Plaintiff Adrian L. Cuter against Defendants in the above styled and numbered cause.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN

By: 

Steven R. Hickman, OBA#4172
1700 Southwest Blvd.
P.O. Box 799
Tulsa, OK 74101-0799
918/584-4724
Attorneys for Plaintiffs

DOERNER, SAUNDERS, DANIEL & ANDERSON

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320 S. Boston, Suite 500

Tulsa, OK 74103

918/582-1211

Attorneys for Defendants

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 02 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANN FARLEY, DONNA L. RAMBO, and
CYNTHIA LEE SHANKLIN,

Plaintiffs,

vs.

Case No.: 96-CV-863-CO

THE UNITED STATES,

Defendant.

ENTERED ON DOCKET

DATE JUL 0 8 1997

ORDER

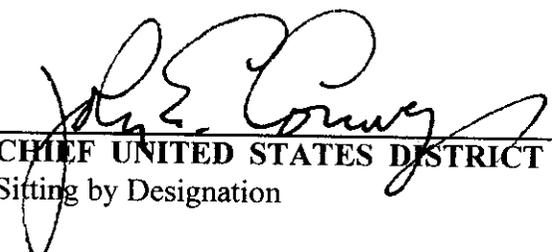
THIS MATTER came on for consideration of Defendant's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim, filed February 14, 1997. A memorandum opinion was entered this date. Wherefore,

IT IS HEREBY ORDERED that Plaintiffs' Motion to File a First Amended Complaint (Docket No. 15) is hereby granted.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File First Amended Complaint **and** the filed First Amended Complaint shall be placed under seal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim (Docket No. 4) is granted, and this action is hereby dismissed in its entirety.

DATED June 30, 1997.



CHIEF UNITED STATES DISTRICT JUDGE
Sitting by Designation

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 02 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANN FARLEY, DONNA L. RAMBO, and
CYNTHIA LEE SHANKLIN,

Plaintiffs,

vs.

Case No.: 96-CV-863-CO

THE UNITED STATES,

Defendant.

EOD 7/8/97

MEMORANDUM OPINION

THIS MATTER came on for consideration of Defendant's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim, filed February 14, 1997. As an initial matter, Plaintiffs have requested leave to file a First Amended Complaint and have it placed under seal. The proposed amended complaint sets forth in far more detail the factual allegations as to the conduct of Chief Baker but does not add any new claims for relief. There being no prejudice to the defendant, the Court will permit filing of the First Amended Complaint and order that it be placed under seal given the potentially embarrassing nature and character of the pleading's allegations. Having fully reviewed the defendant's motion to dismiss and the memoranda submitted by the parties, the Court finds that the motion is well taken and will be granted.

I. ALLEGATIONS OF THE FIRST AMENDED COMPLAINT

In essence, Plaintiffs, former employees of the United States Probation Office for the Northern District of Oklahoma, allege that they were subjected to sexual harassment and retaliation by their supervisor, Chief of Probation Rob Baker. They contend that as Baker's employer, the

20

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United States is liable under the principles of *respondeat superior* for Baker's actions pursuant to the FTCA. They further contend that the United States can be held directly liable because it "negligently or recklessly permitted a pervasive and long-standing environment of sexual discrimination, harassment and retaliation to exist" and "failed to respond to or remediate the plaintiffs' complaints" relating to this work environment. For purposes of the present motion, I will assume these factual allegations are true.

II. STANDARD OF REVIEW

Plaintiffs assert that the United States' submission of many exhibits has transformed the motion to dismiss into one for summary judgment. However, "[a] court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." Holt v. United States, 46 F.3d 1000, 1003 (10th Cir. 1995). Even so, I have found it unnecessary to rely on the exhibits in ruling on this motion to dismiss. My findings are based solely on the allegations of the First Amended Complaint.

III. LIABILITY UNDER THE FTCA

Congress has not extended the protections of Title VII to federal employees who, like Plaintiffs, are not in competitive civil service. 42 U.S.C. § 2000e-16; 18 U.S.C. § 3654 (appointment and removal of probation officers rests exclusively with the district courts of the United States); Bryant v. O'Connor, 671 F. Supp. 1279 (D. Kan. 1986), aff'd 848 F.2d 1024 (10th Cir. 1988) (Title VII does not apply to district court probation officer since position was not specifically included in competitive service by statute). Because Plaintiffs lack a cause of action under Title VII for claims of employment-based harassment, discrimination and retaliation, they now

seek relief based on three common law tort theories asserted under Oklahoma law: the tort of outrage, tortious breach of contract and sexual discrimination.

Plaintiffs have chosen to proceed against the United States. The United States, however, is entitled to sovereign immunity unless it has consented to be sued. United States v. Sherwood, 312 U.S. 584, 590-91 (1941). By enacting the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 2671, et seq., Congress waived the sovereign immunity of the United States for tort claims (subject to certain exceptions outlined in 28 U.S.C. § 2680), but restricted the United States’ liability as follows:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674. Thus, unless a private employer would be liable under Oklahoma law for the alleged injuries to Plaintiffs, the United States retains its sovereign immunity from their tort claims.

A. An employer’s vicarious liability for torts of its employees

“The doctrine of *respondeat superior* provides a vehicle by which the employer can be held liable for its employee’s intentional torts.”¹ Jordan v. Cates, 935 P.2d 289, 292 (Okla. 1997). To impose liability on the employer under this doctrine in Oklahoma, the injured party must demonstrate “that (1) the relationship of master and servant must exist and (2) the tortious act must have been committed while the employee was acting within the scope of employment.” Id. With regard to the “scope of his employment” requirement, an employer cannot be held vicariously liable unless the employee’s act is found to have been “‘incidental to and in furtherance of’ its business.”

¹ Given the factual allegations of the First Amended Complaint, Chief Baker’s alleged actions could only be characterized as intentional, as opposed to negligent, conduct.

Brown v. Ford, 905 P.2d 223, 230 (Okla. 1995) (citing Rodebush v. Oklahoma Nursing Homes, Ltd., 867 P.2d 1241, 1245 (Okla. 1993)).

As its first ground for dismissal of the complaint, the United States contends that Chief Baker's alleged actions are outside the scope of his employment and thereby preclude a common law claim based upon *respondeat superior*. As the Tenth Circuit and several other courts have noted, "[s]exual harassment simply is not within the job description of any supervisor or other worker in any reputable business." Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572, 576 (10th Cir. 1990), quoting Hicks v. Gates Rubber Co., 833 F.2d 1406, 1417-18 (10th Cir. 1987).

Nevertheless, Plaintiffs argue that the proper inquiry for the scope-of-employment finding must ask solely "whether the service itself in which the tortious act was done was within the ordinary course of such business or within the scope of such authority." Response Brief at 14. Yet, this "test" for scope of employment would ignore Oklahoma's requirement that the *tortious act* must have been "incidental to and in furtherance of" the employer's business. Such a broad interpretation of Oklahoma law would in essence extend an employer's vicarious liability to one of strict liability for an employee's torts at the workplace which were strictly personally motivated. See Note, *RODEBUSH: Finding the Road to Strict Liability for the Intentional Torts of Employees*, 30 TULSA L.J. 375 (1994).

A more careful reading of the case upon which Plaintiffs rely, Rodebush v. Oklahoma Nursing Homes, Ltd., 867 P.2d 1241, 1245 (Okla. 1993), reveals that an employer's vicarious liability attaches only when

the act is one which is 'fairly and naturally incident to the business,' and is done 'while the servant was engaged upon the master's business and be done, although mistakenly or ill advisedly, with a view to further the master's interest, or from some

impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business.' [citations omitted]

Rodebush, 867 P.2d at 1245. Indeed, a major aspect of such liability requires that the employee's conduct "did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account." Russell-Locke Super-Service Inc. v. Vaughn, 170 Okla. 377, 40 P.2d 1090, 1094 (1935).

The Court finds that the allegations of sexual harassment, discrimination and retaliation charged here against Chief Baker could in no way be for the purpose of advancing his employer's business. Rather, a sexually harassing supervisor steps outside the scope of his employment on a mission to seek personal gratification without concern for furthering his employer's interests. Thus, the United States cannot be held liable for Chief Baker's actions under the agency principle set forth in RESTATEMENT (SECOND) OF AGENCY § 219(1) and adopted by Oklahoma for imposing *respondent superior* liability.

Plaintiffs nevertheless contend that under a different agency principle, found in the first clause of RESTATEMENT (SECOND) OF AGENCY § 219(2)(d), the United States can be liable for a supervisor's harassment of his subordinates *even if* the conduct is deemed to fall outside the scope of employment. Indeed, in a recent pronouncement by the Tenth Circuit Court of Appeals, the court held that

an employer in this circuit can be held liable under Title VII for hostile work environment sexual harassment committed by one of its supervisors if any of the following conditions are met:

1) The supervisor committed the harassment while acting in the scope of his employment. See RESTATEMENT (SECOND) OF AGENCY § 219(1). (As previously indicated, this will rarely be a basis for employer liability.)

2) The employer knew about, or should have known about, the harassment and failed to respond in a reasonable manner. See RESTATEMENT (SECOND) OF AGENCY § 219(2)(b).

3) If the employer manifested in the supervisor the authority to act on its behalf, such manifestation resulted in harm to the plaintiff, and the plaintiff acted or relied on the apparent authority in some way. See RESTATEMENT (SECOND) OF AGENCY § 219(2)(d), clause 1.

4) If the employer delegated the authority to the supervisor to control the plaintiff's work environment and the supervisor abused that delegated authority by using that authority to aid or facilitate his perpetration of the harassment. See RESTATEMENT (SECOND) OF AGENCY § 219(2)(d), clause 2.

Harrison v. Eddy Potash, Inc., 112 F.3d 1437, ___ (10th Cir. 1997) [emphasis added]. Yet, this holding is limited to a cause of action brought pursuant to Title VII.

To extend the Harrison ruling to a common law tort claim brought pursuant to the FTCA would, in essence, provide a mechanism offering Plaintiffs Title VII relief where Congress has mandated otherwise. Oklahoma courts do not appear to have adopted the above-emphasized theory of employer liability for torts committed by a supervisor, and “Oklahoma does not recognize a common law claim for wrongful constructive discharge in violation of public policy where the claim is predicated upon the employee’s status rather than [the employee’s] conduct.” Marshall v. OK Rental & Leasing, Inc., 1997 WL 120535 (Okla. March 18, 1997) (citing to List v. Anchor Paint Mfg. Co., 910 P.2d 1011 (Okla.1996)). Therefore, the Court finds that Plaintiffs fail to state an FTCA action based upon either *respondeat superior* or the agency principles set forth in the second clause of §219(d)(2) of RESTATEMENT (SECOND) OF AGENCY.

B. An employer’s direct liability for the torts of its employees

Even if the sexually-harassing conduct fell outside the scope of Chief Baker’s employment, Plaintiffs argue that the federal judges of the district had reason to know of Chief Baker’s wrongful

activities and failed to remedy the situation. Oklahoma recognizes a form of “direct liability” on an employer for negligent hiring, supervising and retaining an employee who tortiously injures another. Pursell v. Pizza Inn Inc., 786 P.2d 716 (Okla. Ct. App. 1990); Jordan v. Cates, 935 P.2d 289 (Okla. 1977). I agree with the United States, however, that Plaintiffs have not proceeded on causes of action for negligent hiring, supervision or retention. Instead, Plaintiffs seek damages for three distinctly different torts--intentional infliction of emotional distress, sexual harassment and tortious breach of contract.

Moreover, if Plaintiffs had brought a negligent supervision claim, the “discretionary function” exception of the Tort Claims Act could stand as a barrier to maintaining suit. See 28 U.S.C. § 2680(a). Similarly, should the injuries suffered by Plaintiffs be best characterized as arising from an “assault and battery” by a federal employee, the exclusion of liability for such intentional torts may bar the action.² See 28 U.S.C. § 2680(h). When the government’s duty to prevent the harm is contingent on the perpetrator’s federal employment status, Courts must reject any attempt by a plaintiff to recast the excluded intentional tort claim into a “new” cause of action for negligent failure to prevent the tort. Franklin v. United States, 992 F.2d 1492, 1498-99 (10th Cir. 1993) (citing Shearer v. United States, 473 U.S. 52 (1985) and distinguishing Sheridan v. United States, 487 U.S. 392 (1988)). In the present case, the United States would have no potential liability under the FTCA but for its employment of the alleged intentional tortfeasor, Chief Baker.

² Such a conclusion is likely given the more detailed factual allegations set forth in the First Amended Complaint. These allegations assert that their emotional distress arose, at least in part, from a fear of continuing unwelcomed physical contact by Chief Baker. Similar allegations have been considered by the Oklahoma Supreme Court to be actionable as a common law tort of assault and battery. See Brown v. Ford, 905 P.2d 223, 225 (Okla. 1995).

IV. THE AVAILABILITY OF OTHER REMEDIES

A. Federal Employees Compensation Act

Plaintiffs assert that absent the viability of an FTCA claim, they have no remedies available for injuries resulting from sexual discrimination, harassment and retaliation since Congress has excluded them from Title VII protection. Yet even if Plaintiffs had successfully stated a claim against the United States under the FTCA, the present action could have been preempted by the exclusivity provisions of the Federal Employees Compensation Act (“FECA”).

Any liability imposed on the United States involving the injury or death of an employee is to be determined exclusively under FECA. See 5 U.S.C. § 8173. However, FECA only applies to injuries incurred by an employee ‘while in the performance of his duty.’ 5 U.S.C. § 8102(a). To have occurred ‘in the performance of duty,’ the injury or death must have ‘aris[en] out of and in the course of employment.’

Tarver v. United States, 25 F.3d 900, 902 (10th Cir. 1994), quoting Chin v. United States, 890 F.2d 1143, 1145 (Fed. Cir. 1989). Specifically, Plaintiffs allege their injuries arose during the performance of their duties as probation officers from Chief Baker’s intentional infliction of emotional distress.

Several courts have held that FECA covers claims brought by a federal employee who has sustained emotional distress while in the performance of his duty. See Swafford v. United States, 998 F.2d 837 (10th Cir. 1993). Therefore, where “a plaintiff brings an action in federal court, but a question exists as to whether FECA might cover the claim, the court must stay its proceedings pending the final decision of the Secretary of Labor regarding FECA coverage.” Id., citing to McDaniel v. United States, 970 F.2d 194, 198 (6th Cir. 1992). If the Secretary determined that FECA applies to their claims against the United States as employer, its “remedies are exclusive and

no other claims can be entertained by the court.” Jones v. Tennessee Valley Auth., 948 F.2d 258, 265 (6th Cir. 1991). This is true even if no compensation were actually awarded by the Secretary. Thus, the present FTCA action is barred in the absence of a determination by the Secretary of Labor that FECA does not apply to Plaintiffs’ injuries. See Tarver, 25 F.3d at 904.

B. A federal employee’s personal liability

The Court has found that the pleadings have failed to set forth either *respondeat superior* or direct employer liability claims under the FTCA for redressing injuries resulting from Chief Baker’s alleged conduct. Yet, it should be noted that the present lawsuit was not brought against Chief Baker. The United States has provided that it alone shall be liable for torts committed by its employees *only* when those torts result from a wrongful act or omission “while acting within the scope of his office or employment.” 28 U.S.C. § 2679(b)(1).

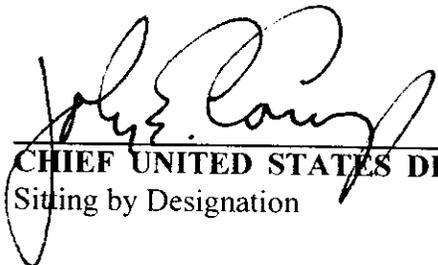
The above provision, known as the Westfall Act, was intended to protect federal employees from liability by providing the employee with immunity for wrongful acts done “within the scope of employment.” Because Chief Baker’s alleged conduct fell outside the scope of his employment, he is not entitled to the “Westfall Act” grant of absolute immunity and could potentially be held personally liable for injuries caused by that conduct. See Wood v. United States, 995 F.2d 1122, 1124-28 (1st Cir. 1993).

CONCLUSION

Plaintiffs have failed to allege a viable claim under the FTCA against the United States, and, therefore, this Court lacks subject matter jurisdiction over this action. Moreover, had the First Amended Complaint presented such a claim, it could not have been brought prior to seeking a

determination by the Secretary of Labor that their injuries are not covered by FECA. Lacking jurisdiction over this matter, the First Amended Complaint seeking damages from the United States shall be dismissed in its entirety.

An order in accordance with this opinion shall be entered.


CHIEF UNITED STATES DISTRICT JUDGE
Sitting by Designation

Counsel for Plaintiff:

Louis W. Bullock, Patricia W. Bullock
and Michele T. Gehres
Bullock & Bullock
Tulsa, Oklahoma

Counsel for Defendant:

Stephen C. Lewis, United States Attorney
Cathryn McClanahan, Assistant United States Attorney
Tulsa, Oklahoma

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

FILED

JUL 03 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JEANNIE JAMES,

Plaintiff,

vs.

GRAND LAKE MENTAL HEALTH CENTER,
INC.; PAULA VELLA; SIOUS GRENINGER;
TRENT HUMPHREY; JOE FERMO, M.D.; AND
CITY OF PRYOR, OKLAHOMA,

Defendants.

Case No. 96-CV-631-C

ENTERED ON DOCKET

DATE JUL 07 1997

JUDGMENT

This matter came before the court for consideration of the motion for summary judgment filed by defendants Grand Lake Mental Health Center Inc. and Paula Vella on plaintiff's cause of action brought pursuant to 42 U.S.C. § 1983. The issues having been duly considered and a decision having been rendered in accordance with the order filed simultaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment is entered for the defendants Grand Lake Mental Health Center and Paula Vella, and against the plaintiff Jeannie James.

IT IS SO ORDERED this 3rd day of July, 1997.


H. DALE COOK
Senior U.S. District Judge

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

FILED

JUL 03 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JEANNIE JAMES,

Plaintiff,

vs.

GRAND LAKE MENTAL HEALTH CENTER,
INC.; PAULA VELLA; SIOUS GRENINGER;
TRENT HUMPHREY; JOE FERMO, M.D.; AND
CITY OF PRYOR, OKLAHOMA,

Defendants.

Case No. 96-CV-631-C

ENTERED ON DOCKET

DATE JUL 07 1997

ORDER

Before the Court is a motion filed by defendants Grand Lake Mental Health Center, Inc. and Paula Vella to dismiss for lack of subject matter jurisdiction, or in the alternative, for summary judgment. Based on the following analysis and legal authority, the Court finds that defendants' motions should be granted.

In her complaint, plaintiff seeks recovery against defendants Grand Lake Mental Health Center and Paula Vella pursuant to 42 U.S.C. § 1983 asserting violations of a right to liberty and due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

During the time May 2, 1995 through July 11, 1995, plaintiff was an out-patient at Grand Lake Mental Health Center (GLMHC). GLMHC is a private mental health clinic for the treatment of persons suffering from mental and emotional disorders. Plaintiff was referred to GLMHC by her primary care physician Dr. Serratt. Defendant Paula Vella, in her capacity as an employee of GLMHC, was the mental health counselor for plaintiff. Plaintiff was suffering from severe depression and feelings of hopelessness associated with

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battered woman's syndrome. She was receiving counseling at GLMHC in an effort to remove herself from her home environment in which her husband was physically and mentally abusive toward her. Plaintiff admits that her husband was abusive and had "knocked [her] out."

On July 11, 1995, defendants GLMHC and Vella referred plaintiff to the Mayes County Medical Center to determine whether plaintiff was in need of temporary involuntary confinement and treatment at a state mental health hospital. Defendant Vella contacted police officers with the City of Pryor to transport plaintiff to the Mayes County Medical Center.

In her complaint, plaintiff asserts that defendant Vella wrongfully caused her to be referred under the "guise of instigating commitment proceedings against plaintiff ostensibly pursuant the Emergency Detention and Protective Custody Act."¹ Plaintiff asserts that defendant Vella made the referral without proper documentation and evidence required under the act to support involuntary detention. Plaintiff contends that the referral was made by defendants GLMHC and Vella "in order to satisfy their own sadistic desires and to make an example to others being treated at Grand Lake Mental Health Center, Inc. 'to toe the line' and to do *exactly* what was demanded by Vella and other Grand Lake Mental employees." (emphasis in text).

In her pleadings plaintiff contends that at the time defendants GLMHC and Vella referred plaintiff to the Mayes County Medical Center, her emotional and mental health condition was improving. Plaintiff seeks to hold defendants GLMHC and Vella liable for

¹ Title 43, Okla.Stat., Section 5-206 et.seq.

the unjustified referral which she contends ultimately led to her involuntary detention for seven days at Eastern State Hospital in Vinita, Oklahoma.

Plaintiff asserts that defendants GLMHC and Vella are "state actors" as defined under § 1983 because defendant Vella notified the City of Pryor Police Department to transport plaintiff to the Mayes County Hospital. Both GLMHC and Mayes County Hospital are private entities. Defendants seek dismissal upon plaintiff's failure to show the requisite "state action" to state a claim under § 1983.

To bring an action under § 1983, the plaintiff must establish that the defendant acted "under color of any statute, ordinance, regulation, custom, or usage, of any State" to deprive the plaintiff of any rights secured by the Constitution and the laws of the United States. 42 U.S.C. § 1983. The actions of the defendant must be "state action" or the actions must be "under color of state law." See, Pino v. Higgs, 75 F.3d 1461, 1464 (10th Cir.1996). The "under color of state law" and "state action" components of a § 1983 claim are separate inquiries. Id. "Although state action necessarily constitutes action under color of state law, the converse is not always true." Id. These requirements are met only if: First the deprivation was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." Id., citing Wyatt v. Cole, 504 U.S. 158, 162 (1992). Second, "the private party must have acted together with or obtained significant aid from state officials or engaged in conduct otherwise chargeable to the State." Id.

The actions on which plaintiff bases her claim against GLMHC are that GLMHC (1) failed in hiring and supervising it's employees, including Paula Vella, and (2) was

deliberately indifferent to the constitutional rights of its patients, such as plaintiff.

The actions on which plaintiff bases her claim against the mental health counselor, Paula Vella, are that Vella (1) notified the police officers to transport plaintiff to Mayes County Hospital, (2) referred plaintiff to Mayes County Hospital without proper documentation and evidence that emergency detention was needed, and (3) participated in completing the mental health evaluation form which was reviewed and signed by the physician on call in the emergency room of Mayes County Hospital. Viewing these facts in a light most favorable to the plaintiff, these allegations do not constitute "state action" or "action under the color of state law" sufficient to satisfy the requirements of § 1983.

Under a similar factual circumstance in Pino, the court found that a therapist working for a private corporation did not become a "state actor" through her act of notifying the police to involuntarily detain and transport a former patient from the patient's home to a hospital for psychiatric evaluation. The Pino court relied on Blum v. Yaretsky, 457 U.S. 991, 991, 1004 (1982), which held that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." In Pino the court held that the therapist's conduct did not rise to the level of state action simply because the police officers responded to her call and heeded her advice to transport the former patient to the hospital. Pino, 75 F.3d at 1464. Moreover, by defendant Vella furnishing information to the emergency room physician in his completion of the mental health evaluation forms, such actions at Mayes County Hospital, which is also a private entity, is not conduct which can be "fairly attributed to

the State" as required under § 1983. As stated in Pino, 75 F.3d at 1466, the position of a mental health counselor with a non-public organization, "while lending credibility to her opinion, carries with it no special state generated authority that would make her conduct attributed to the state."

Accordingly, it is the order of the Court that motions filed by defendants Grand Lake Mental Health Center and Paula Vella to dismiss or alternatively for summary judgment are hereby granted.

IT IS SO ORDERED this 3rd day of July, 1997.



H. DALE COOK
Senior U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL - 8 1997

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

WILMA I. McGUIRK,)

Plaintiff,)

v.)

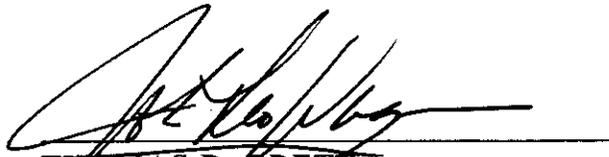
JOHN J. CALLAHAN, Acting)
Commissioner of the Social Security)
Administration,)

Defendant.)

CASE NO. 94-C-1002-B

ORDER

Upon the motion of the defendant, Acting Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, to which there is no objection, it is hereby **ORDERED** that the defendant have to and including July 21, 1997, within which to file his response to plaintiff's brief.



~~THOMAS R. BRETT
SENIOR UNITED STATES DISTRICT JUDGE~~

Mas.

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 W. Fourth St., Suite 3460
Tulsa, Oklahoma 74103

NOTE: THIS DOCUMENT IS FILED
ELECTRONICALLY AND IS NOT
FOR REVIEW AND IS IMMEDIATELY
UPON REVIEW.

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

F I L E D

JUL 03 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GARY LOWEN,)
)
Plaintiff,)
)
v.)
)
UNIT RIG, INC.,)
)
Defendant.)

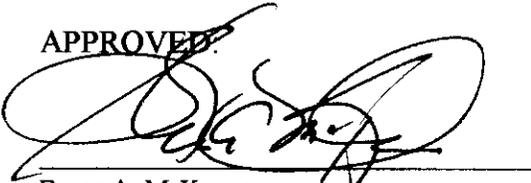
Case No. 96-C-0231-K
Honorable Judge Kern

ENTERED ON DOCKET
JUL 07 1997
DATE _____

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The plaintiff, through his counsel of record, Casey, Jones & McKenna, P.C. by Bruce A. McKenna and the defendant through its counsel of record, Hall Estill, Hardwick Gable, Golden & Nelson by Steven A. Broussard, execute this joint stipulation of dismissal of this action with prejudice to the refiling thereof.

APPROVED:



Bruce A. McKenna
Winston Square Building, Suite 2
3140 South Winston Avenue
Tulsa, Oklahoma 74135-2069
(918) 747-9654

J/Patrick Cremin
Steven A. Broussard
320 S. Boston Ave., Suite 400
Tulsa, OK 74103-3708
(918) 594-0400

IT IS SO ORDERED.


TERRY C. KERN, UNITED STATES DISTRICT JUDGE

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FILED

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

JUL 03 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

OCAW LOCAL 5-959,)
)
Plaintiff,)
)
v.)
)
BW/IP INTERNATIONAL,)
INC.,)
)
Defendants.)

Case No. 97-CV-506-B (M)

ENTERED ON DOCKET

DATE JUL 03 1997

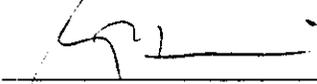
STIPULATION OF DISMISSAL

COME NOW Plaintiff and Defendant and stipulate to the dismissal of the above styled and numbered cause.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN

By:



Steven R. Hickman, OBA#4172
P.O. Box 799
1700 Southwest Blvd.
Tulsa, OK 74101-0799
918/584-4724
Attorney for Plaintiff

STEPHEN L. ANDREW & ASSOCIATES

By:

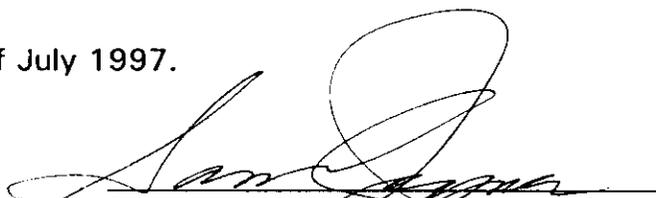


Stephen L. Andrew, OBA#294
125 W. 3rd Street
Tulsa, OK 74103
918/583-1111
Attorney for Defendant

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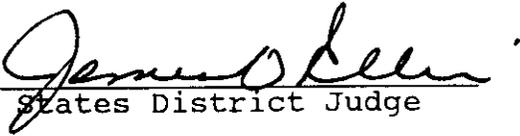
Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See, e.g., Talley v. Hesse, 91 F.3d 1411, 1412 (10th Cir. 1996), Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 1 day of July 1997.



Sam A. Joyner
United States Magistrate Judge

of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.65 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

5/12

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

PAUL E. MILLEN,)
)
Plaintiff,)
)
vs.)
)
COMMERCIAL FINANCIAL SERVICES,)
INC., an Oklahoma corporation,)
)
Defendant.)

F I L E D
JUL 01 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-444H (W)

ENTERED ON DOCKET
DATE JUL 02 1997

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Paul E. Millen, and Defendant, Commercial Financial Services, Inc., hereby stipulate, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure as follows:

1. The Complaint filed herein by Plaintiff is hereby dismissed with prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure; and
2. The Counterclaim filed herein by Defendant is hereby dismissed with prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure; and
3. Each party herein is to bear his or its own costs.

So stipulated this 30th day of June, 1997.

Brian S. Gaskill

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Sneed Lang, P.C.
2300 Williams Center Tower II
Two West Second Street
Tulsa, Oklahoma 74103-3146
(918) 583-3145

Attorneys for Plaintiff

Cheryl L. Cooper

James L. Kincaid, OBA #5021
Cheryl L. Cooper, OBA #15745
Crowe & Dunlevy
320 South Boston, Suite 500
Tulsa, Oklahoma 74103
(918) 592-9800

Attorneys for Defendant

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

FILED

JUN 30 1997

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

ROY A. SMITH,

Plaintiff,

v.

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

Defendant.

CASE NO. 96-cv-481-M ✓

ENTERED ON DOCKET

DATE JUL 02 1997

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 30th day of JUNE, 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

JUN 30 1997

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

ROY A. SMITH

492-56-5318

Plaintiff,

vs.

Case No. 96-C-481-M

JOHN J. CALLAHAN¹,
Acting Commissioner Social Security
Administration,

Defendant,

ENTERED ON DOCKET

DATE JUL 02 1997

ORDER

Plaintiff, Roy A. Smith, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.² In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

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

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.

² Plaintiff's April 27, 1992 application for disability benefits was denied July 2, 1992 and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held November 14, 1994. By decision dated April 6, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 29, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 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).

Plaintiff was born January 8, 1953 and was 42 years old at the time of the hearing. He has a general equivalency diploma and has worked as a construction laborer. He claims to be unable to work since February 20, 1990 due to lower back injury which required surgery on July 3, 1990. The ALJ determined that Plaintiff is impaired by low back pain and found that, although Plaintiff was unable to perform his past relevant work, he was capable of performing a full range of sedentary work.

The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) incorrectly evaluated Plaintiff's residual functional capacity ("RFC"); and (2) improperly applied the medical vocational guidelines ("grids") at 20 C.F.R. Pt. 404, Subpt. P, App.2.

RFC ANALYSIS

The ALJ found that Plaintiff's complaints of debilitating pain are not consistent with the record as a whole and that he has the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for prolonged walking, standing, repetitive lifting, bending or stooping. His residual functional capacity for sedentary work is not reduced by significant pain. [R. 17]. Plaintiff argues that the record contains contrary findings by four physicians, in particular, the records of treating physician, John B. Vosburgh, M.D., reflect his opinion that Plaintiff was "temporarily disabled" through August 5, 1991.

Plaintiff injured his back in a work-related accident in February 1990. He was treated conservatively, but eventually required surgery which was performed by orthopedic surgeon, John B. Vosburgh, M.D. and neurosurgeon, James Rodgers, M.D. on July 3, 1990. The record contains a series of letters between the two doctors and to the workers compensation insurer. Letters authored by Dr. Rodgers contain the opinion that Plaintiff was "temporarily disabled" until he was released from neurosurgical care on February 6, 1991. [R. 97-111]. Dr. Vosburgh's letters and office notes reflect his opinion that Plaintiff was "temporarily disabled" until October 3, 1991 when he issued a "final report" recommending that Plaintiff seek out work which would permit him to sit 50% of the work day. [R. 117-122].

From the context of their correspondence, it is apparent that these doctors used the term temporary disability as it relates to the Oklahoma Workers' Compensation Act. Generally speaking, temporary disability refers to the healing

period or that period of time following an accidental injury when an employee is totally incapacitated for work. *See Bodine v. L.A. King Corp.*, 869 P.2d 320, 322 (Okla. 1994). The Court concludes that when these treating doctors specified that Plaintiff was "temporarily disabled" they were expressing their opinion that he could not work from February 19, 1990 through October 3, 1991.

The Court acknowledges that the Oklahoma Workers' Compensation scheme may apply standards that differ from Social Security standards and that the Commissioner is not bound by disability determinations made by other agencies. *Baca v. Dept. Heath and Human Servs.*, 5 F.3d 476, 480 (10th cir. 1993). However, since Drs. Vosburgh and Rodgers were Plaintiff's treating physicians their opinions are entitled to controlling weight under Social Security Regulations as those opinions are supported by clinical findings and are not inconsistent with other evidence in the case. 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). The ALJ rejected the opinions of two physicians who conducted one-time examinations and concluded that Plaintiff suffered total permanent disability. In so doing he stated that greater weight was being given to the "treating physicians' findings and opinions, due to the doctor/patient relationship and studies and findings." [R. 16]. Yet, the ALJ's decision completely fails to address the treating physician's opinions that Plaintiff was temporarily disabled. The Court finds, therefore, that the ALJ's decision denying benefits from February 20, 1990 to October 3, 1991 is not supported by substantial evidence. Further, the Court finds that the record discloses that Plaintiff met the

requirements of the Social Security Act and is entitled to a period of disability for that time frame.

However, the ALJ's RFC analysis for the time period following his release from Dr. Vosburgh's care is supported by substantial evidence. Dr. Vosburgh's final report recommends that Plaintiff seek work that "does not require frequent bending, stooping or lifting, no lifting over 25 pounds and he should have work that would permit him to sit approximately 50 percent of his work day." [R. 117-18]. The ALJ pointed out that since he was released from Dr. Vosburgh's care, Plaintiff has not sought medical treatment for the pain he claims to suffer, and his activities are consistent with the ability to perform sedentary work.

The ALJ is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The Court finds that for the period of time following October 3, 1991, the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Secretary and the courts.

GRID APPLICATION

Plaintiff argues that pain is a nonexertional impairment that precludes application of the grids. When a claimant's ability to work at a certain RFC level is limited by nonexertional impairments, such as pain, conclusive application of the grids

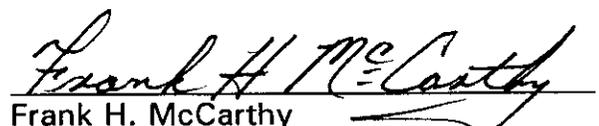
is not appropriate and the Commissioner must produce vocational testimony or other similar evidence. *Thompson v. Sullivan*, 987 F.2d 1482, 1488 (10th Cir. 1993); *Hargis v. Sullivan*, 945 F.2d 1482, 1490 (10th Cir. 1991). However, if there is substantial evidence for the ALJ to determine that a claimant's nonexertional impairments do not limit his ability to perform work, the grids may be applied conclusively. See e.g., *Glass v. Shalala*, 43 F.3d 1392, 1396 (10th Cir. 1994)(citing *Eggleston v. Bowen*, 851 F.2d 1244, 1247 (10th Cir. 1988)). Further, reliance on the grids is not error where, as here, the ALJ finds Plaintiff's testimony regarding his pain is not fully credible. *Castellano*, 26 F.3d 1027, 1030 (10th Cir. 1994).

The Court finds that the ALJ's application of the grids is supported by substantial evidence in the record.

CONCLUSION

"[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 exercises its discretion pursuant to 42 U.S.C. § 405(g) and REVERSES and REMANDS the case with directions to award disability benefits for a period of disability from February 20, 1990 to October 3, 1991. For the period after October 3, 1991, the Commissioner's decision that Plaintiff is not disabled is AFFIRMED.

SO ORDERED this 30th day of June, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

me

25-97

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

FILED

JUN 30 1997

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

TAMMY STORTS,)
)
Plaintiff,)
)
vs.)
)
HARDEE'S FOOD SYSTEMS, INC.,)
and IMASCO HOLDINGS, INC.,)
)
Defendants.)

Kansas District Court
Case No. 95-1036-MLB

Northern District of Oklahoma
Case No. 97-CV-499-BU(M)

ENTERED ON DOCKET

DATE JUL 02 1997

ORDER AUTHORIZING DISCLOSURE

Now on this 30th day of JUNE, 1997, pursuant to the confidentiality of Alcohol and Drug Abuse Patient Records legislation, 42 USC 290dd-3 and 42 USC 290ee-3, and pursuant to the legislation's regulations at 42 CFR Part 2, the Court, being fully advised in the premises makes the following findings and orders:

1. The Court finds that certain information or individuals set forth in the legal process attached hereto may be in the possession of Third Party St. John Medical Center;

2. The Court further finds that if Third Party St. John Medical Center was to reveal the identity of the individual and/or release records requested in the attached legal process, Third Party St. John Medical Center could be in violation of the above mentioned regulations and statutes;

3. Pursuant to the above mentioned regulations and statutes, the Court finds that the disclosure of the identity of the individual and/or release of the records requested in the attached legal process is essential and that such disclosure or release should be made; provided, however, such disclosure or release

should only be to those persons who need such information in order to effectuate the attached legal process and such disclosure or release should be limited to the set purpose effectuating the attached legal process.

4. The Court further finds that there is good cause for entering an Order Authorizing Disclosure as set forth herein.

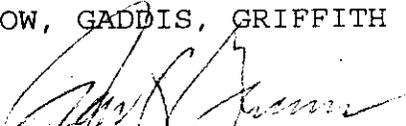
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Third Party St. John Medical Center comply with the request for information pertaining to an individual and/or request for the release of medical records set forth in the attached legal process.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that employees, agents or individuals of Third Party St. John Medical Center be authorized to effectuate the intent and requirements of this Order.

Frank H. McCarthy
MAB JUDGE OF THE NORTHERN DISTRICT
OF OKLAHOMA

APPROVED:

BARROW, GADDIS, GRIFFITH & GRIMM

By: 

William R. Grimm, Esq.
610 S. Main Street
Suite 300
Tulsa, OK 74119-1248
(918) 584-1600

DOERNER, SAUNDERS, DANIEL & ANDERSON

By: 

Elise Dunitz Brennan, Esq.
320 S. Boston Avenue
Suite 500
Tulsa, OK 74103
(918) 582-1211

AO 88 (Rev. 11/91) Subpoena in a Civil Case

United States District Court

NORTHERN

DISTRICT OF OKLAHOMA

TAMMY STORTS,
Plaintiff,

SUBPOENA IN A CIVIL CASE

HARDEE'S FOOD SYSTEMS, INC. and
IMASCO HOLDINGS, INC.,

CASE NUMBER 95-1036-MLB

Defendants.

TO: RECORDS CUSTODIAN
St. John's
1923 S. Utica
Tulsa, OK 74104

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION Office of Dauphine & Rogers, 401 South Boston, Suite 310, Tulsa, Oklahoma	DATE AND TIME Wednesday, May 21, 1997 at 3:30 p.m.
---	--

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

SEE ATTACHED EXHIBIT "A".

PLACE Office of Dauphine & Rogers, 401 South Boston, Suite 310, Tulsa, Oklahoma	DATE AND TIME Wednesday, May 21, 1997 at 3:30 p.m.
---	--

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME
----------	---------------

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) <i>Christopher S. McQuinn, Atty for Defendant</i>	DATE 5/13/97
--	-----------------

EXHIBIT "A" TO SUBPOENA
CASE NUMBER 95-1036-MLB

Documents and items to produce at time of deposition are as follows:

Complete and legible copies of any and all records in your possession concerning Tammy Storts (date of birth 04/01/59 and Social Security number 442-66-6656) of any type, including, but not limited to, hospital records, office notes, office charts, correspondence (regardless of the source), medical reports, ambulance records, emergency room notes, insurance communications, insurance claim forms, billing statements, psychological and/or psychiatric records, etc.

WIO-62296.1

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL -1 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GERALDINE PRINCE,)
SS# 444-38-8216)

Plaintiff,)

v.)

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

Defendant.)

No. 95-C-1136-E ✓

ENTERED ON DOCKET

DATE JUL 0 2 1997

ORDER

Plaintiff, Geraldine Prince, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{1/} Plaintiff asserts error because (1) the finding that Prince had transferrable skills is not supported by substantial evidence, (2) the finding that 400 alternative jobs for Prince constituted a significant number of jobs in not supported by substantial evidence, and (3) the ALJ failed to apply the presumption that Prince was disabled as of the date she turned 55. For the reasons discussed below, the Court **affirms** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

^{1/} Plaintiff filed an application for disability and supplemental security insurance benefits on June 10, 1993. [R. at 83]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge James D. Jordan (hereafter, "ALJ") was held August 24, 1994. [R. at 15]. By order dated January 6, 1995, the ALJ determined that Plaintiff was not disabled. [R. at 15]. Plaintiff appealed the ALJ's decision to the Appeals Council. On October 10, 1995 the Appeals Council denied Plaintiff's request for review. [R. at 3].

17

Prince was born August 29, 1940, and she completed the 11th grade. Her relevant work experience includes 10 years of janitorial work for the City of Tulsa and 5 years as a screener in airport security. She alleges she has been unable to work since November, 1992, due to back pain which left her unable to sit, stand, or walk for any period of time. She had back surgery in 1993, and now has problems with low back pain, hypertension, anxiety, depression, and difficulty breathing.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{2/} 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

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

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

42 U.S.C. § 423(d)(2)(A).

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

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

"The finding of the Secretary^{3/} 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

^{3/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

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

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

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff has not engaged in substantial gainful activity since November 20, 1992 and that she does not have an impairment or combination of impairments listed in the regulations. The ALJ further found that plaintiff's testimony regarding total inability to work, because of depression, pain, dizziness, and drowsiness is not credible. The ALJ found that, while plaintiff was not capable of performing her past relevant work, she has the residual functional capacity to perform the full range of sedentary work limited only by an inability to lift more than 10 pounds at a time, stand or walk more than 2 hours a day and perform any significant stooping. The ALJ concluded that, because of plaintiff's work skills, and her capability to perform sedentary work, she is "not disabled."

IV. REVIEW

Plaintiff argues that the ALJ erred in finding that she had transferrable skills. Plaintiff asserts that, while the vocational expert classified her previous job as "semi-skilled," the *Dictionary of Occupational Titles* classifies the job as "unskilled," and the ALJ was obligated to rely on the *Dictionary of Occupational Titles* when the two conflicted. Campbell v. Bowen, 822 F.2d 1518. Plaintiff argues that this error is compounded by the ALJ's treatment of her age as "approaching advanced age," rather than "advanced age."

Reliance on the testimony of the vocational expert, despite the description in the *Dictionary of Occupational Titles* was not error. Simmons v. Chater, 950 F.Supp. 1501 (N.D. Okla. 1997). The ALJ appropriately relied on the testimony of the vocational expert. The transferable skills of observing individuals, looking for certain objects, operating equipment, and preparing reports are supported by that testimony.

The Court also does not find any error with the classification of plaintiff's age. At the time the ALJ made his final decision, plaintiff was 54 years old. Thus, plaintiff was "approaching advanced age." Plaintiff asserts that she should receive benefits as of the time she reached age 55, but gives no authority for this assertion. Plaintiff also fails to provide any reason that she should be considered as "advanced age" prior to reaching age 55.

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

Dated this 15th day of ~~June~~ 1997.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

7-2-97

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

VALLEY FORGE INSURANCE)
COMPANY and LUTHERAN)
BENEVOLENT INSURANCE)
EXCHANGE,)

Plaintiffs,)

vs.)

No. 96-CV-1172 K

F I L E D

JUL - 1 1997

MORRIS DALE VANDERFORD;)
CATHOLIC DIOCESE OF TULSA;)
SAINT CECILIA CATHOLIC)
CHURCH; and GLENN)
ANDREW PRATER,)

Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTRY OF DEFAULT BY CLERK

The request to Enter Default, filed herein on ~~June~~ ^{July} 1, 1997, is hereby granted. The undersigned has searched the records of the United States District Court for the Northern District of Oklahoma, and has found that Defendant Morris Dale Vanderford has been duly served with the Complaint in this action as appears from the Acknowledgment of Receipt of Summons and Complaint and Complaint on April 2, 1997. The legal time for pleading or otherwise defending has expired and the Defendant Morris Dale Vanderford has failed to plead or otherwise defend. The default of Defendant Morris Dale Vanderford is therefore hereby entered this 1st day of July, 1997.

S. Schwelke
Phil Lombardi, Clerk ^{Deputy Clerk}
United States District Court
for the Northern District
of Oklahoma

UNITED STATES DISTRICT COURT
DISTRICT OF OKLAHOMA

FILED

JUL -1 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

FILED

JUL -1 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HOMeward BOUND, INC.
et al.,

Plaintiffs,

vs.

THE HISSOM MEMORIAL CENTER,
et al.,

Defendants.

Case No. 85-C-437-E

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on June 3, 1997, for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

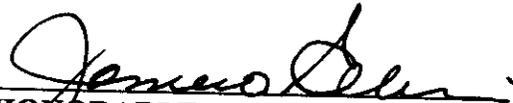
The Court has reviewed the application for fees and the Stipulation of the parties.

The Court hereby awards the firm Bullock & Bullock uncontested attorney fees and expenses in the amount of \$59,568.10.

IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority and the Department of Rehabilitation Services are each jointly and severally liable for the payment to plaintiffs' counsel, Bullock & Bullock, for attorney fees and expenses in the amount of \$59,568.10, and a judgment in the amount of \$59,568.10 is hereby granted on this day.

The contested time and expenses will be heard upon application of the parties.

ORDERED this 1st day of July, 1997.


HONORABLE JAMES O. ELLISON
United States District Court


Louis W. Bullock
Patricia W. Bullock
BULLOCK & BULLOCK
320 South Boston, Suite 718
Tulsa, Oklahoma 74103-3783
(918) 584-2001


Mark Lawton Jones
Assistant Attorney General
OFFICE OF THE ATTORNEY
GENERAL
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Oklahoma City, OK 73105-3498

- and -

Frank Laski
Judith Gran
PUBLIC INTEREST LAW CENTER
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125 South Ninth Street, Suite 700
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(215) 627-7100


Lynn S. Rambo-Jones
Deputy General Counsel
OKLAHOMA HEALTH CARE
AUTHORITY
4545 North Lincoln, Suite 124
Oklahoma City, OK 73105
(405) 530-3439

ATTORNEYS FOR PLAINTIFFS

ATTORNEYS FOR DEFENDANTS

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

F I L E D

JUN 30 1997

TIMOTHY ATKINS,)
)
 Plaintiff,)
)
 vs.)
)
 PUBLIC DEFENDERS OFFICE, and)
 DAMOND CANTRELL,)
)
 Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-85-H

ENTERED ON DOCKET

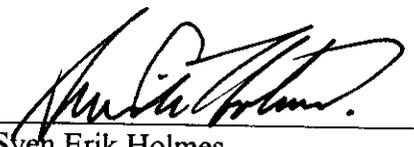
DATE JUL 1 1997

ORDER

A Report and Recommendation of the Magistrate was filed June 13, 1997. No objections have been filed by the parties. The Court adopts the Magistrate's Report and Recommendation and **DISMISSES** Plaintiff's cause of action **WITHOUT PREJUDICE**.

IT IS SO ORDERED.

This 30TH day of JUNE, 1997.


Sven Erik Holmes
United States District Judge

by Bengé, Acuna and Campbell on December 31, 1988.² The Option Agreement addresses two options. Under Option No. 1, Acuna grants Bengé and/or Campbell an irrevocable option to purchase four shares in each of the following companies: ABC Coating Company, Inc. (an Oklahoma corporation); ABC Coating Company, Inc. of Texas; ABC Coating Company, Inc. of Colorado; and ABC Coating Company, Inc. of Michigan (hereinafter, the "ABC companies"). Under Option No. 2, Acuna grants Bengé and/or Campbell an irrevocable option to purchase 298 shares, or all the shares, in each of the ABC companies after Acuna's death. *Defendant's Exhibit 7.*

On January 1, 1989, the day after the execution of the Option Agreement, Bengé and Campbell (and their spouses) entered into an Agreement (the "ABC Agreement") restricting the transfer of stock in the ABC companies and obligating the surviving shareholder to purchase the deceased shareholder's stock pursuant to the terms of the ABC Agreement. *Defendant's Exhibit 8.* The Option Agreement was incorporated by reference in the ABC Agreement.

Bengé exercised Option No. 1 when he caused a "Notice of Exercise of Option" dated August 28, 1995 to be delivered to Acuna, *Defendant's Exhibit 9*; Campbell assigned to Bengé his option to purchase four shares in each of the ABC companies, *Defendant's Exhibit 10*; and Acuna transferred eight shares of stock in each of the ABC companies to Bengé on October 5, 1995.

Campbell died on August 21, 1996. On August 27, 1996, Bengé gave written notice to Campbell's heirs of his intent to purchase Campbell's stock under the ABC Agreement. On October 17, 1996, Campbell's estate, by and through its court appointed independent executrix, Karen Keith McRae, filed a petition against Bengé, Acuna and others in the Probate Court of Bexar County,

² The Option Agreement is identical to an agreement executed by the same parties on April 23, 1985 except for the addition of the Michigan ABC company. *Defendant's Exhibit 6.*

Texas, seeking *inter alia* a determination of the enforceability of the ABC Agreement.

On February 6, 1997, Scott McEachin, counsel for Acuna, sent a letter to Michael Hartley, counsel for Benge, advising that "an Answer, Counterclaim and Cross Claim in [the Texas Probate Litigation] will be filed on behalf of Marcelo Acuna either late this week or early next week. We believe this is the proper time and forum to raise certain issues with respect to the agreements affecting the shareholders of the ABC Companies." *Defendant's Exhibit 12.*

On February 10, 1997, Benge filed the complaint in the instant action seeking declaratory judgment that the Option Agreement is enforceable.

On June 5, 1997, Acuna filed his Answer, Counterclaim and Cross-claim against Benge and Campbell's estate in the Texas Probate Litigation alleging in part the following:

3. In her amended petition, the plaintiff has alleged that on January 1, 1989, her decedent, Gerald Campbell, and the defendant Benge executed an agreement concerning their shares of stock in four corporations known as the ABC Companies. This Agreement was attached to the plaintiff's petition as Exhibit A. The agreement expressly incorporated by reference an Option Agreement executed the day before, December 31, 1988, by Benge, Campbell and this defendant Acuna, who also was and is now a shareholder in the ABC Companies. The Option Agreement concerned the parties' stock in the ABC Companies.

4. Under the terms of the Option Agreement of December 31, 1988, Acuna purported to give Benge and Campbell two separate and distinct options to purchase shares owned in the four ABC Companies. Option No.1 granted Benge and Campbell the option to purchase eight of the shares owned by Acuna in each of the corporations. No consideration was given to Acuna for this option.

5. Option No. 2 purported to give Benge and Campbell an option to purchase from Acuna all of his remaining stock in the ABC Companies that he owned at the time of his death. No consideration was given to Acuna for the granting of Option No.2 and it is, therefore, void and unenforceable.

6. Benge and the plaintiff, as Campbell's personal representative, are now the sole owners of the optionees' rights, if any, under Option No. 2. The defendant Acuna says that plaintiff and Benge have no enforceable rights under the option because there was no consideration passing to him therefor. The court should set aside Option No. 2 as being void and unenforceable for lack of consideration.

Plaintiff's Exhibit 1.

This Court “should not entertain a declaratory judgment action over which it has jurisdiction if the same fact-dependent issues are likely to be decided in another pending proceeding.” *St. Paul Fire and Marine Ins. Co. v. Runyon*, 53 F.3d 1167, 1170 (10th Cir. 1995)(quoting *Kunkel v. Continental Casualty Co.*, 866 F.2d 1269, 1276 (10th Cir. 1989). The state proceeding was commenced on October 17, 1996, four months before the declaratory action was filed in this Court on February 10, 1997. The filing of Acuna’s counterclaim and cross-claim places before the Texas state court in the pending Texas Probate Litigation the identical issue before this Court - the enforceability of the Option Agreement. Thus, the Texas state court will necessarily determine the rights and obligations of all the parties under the Option Agreement.

Benge argues that the enforceability of the Option Agreement was not made an issue in the Texas Probate Litigation until Acuna’s cross-claim was filed on June 7, 1997 and thus this declaratory judgment action was first to be filed, and Acuna’s late cross-claim is simply procedural fencing. The Court disagrees. The filing of the instant declaratory judgment action arguably is in response to Acuna’s attorney’s February 7, 1997 letter advising Benge’s counsel of Acuna’s intent to file the cross-claim in the Texas Probate Litigation. There is probably some procedural fencing on both sides. *St. Paul*, 53 F.3d at 1170 (“A district court may choose to avoid a declaratory judgment action because the plaintiff is using the action for procedural fencing.”). Furthermore, the Option Agreement was incorporated by reference in the ABC Agreement, and the enforceability of the ABC Agreement has been an issue in Texas Probate Litigation since its commencement. Thus, prior to the filing of this declaratory judgment action, the Texas state court had before it many of the same fact-dependent issues.

The pending Texas Probate Litigation includes all the necessary parties to the disputes involving the stock of the ABC companies and addresses all the legal relations in issue; therefore, "the claims of all parties in interest can satisfactorily be adjudicated in [the Texas state probate court] proceeding." *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 495 (1942). In addition, the Court's decision to defer to the Texas state court is influenced by the fact that the dispute does not involve a federal question, Bengé is a Texas resident, and the contract issues are to be interpreted under Texas law.³ There appears to be no dispute that the subject options were executed by the parties; the issue centers in their enforceability. The Court concludes that there is a "plain, adequate and speedy remedy afforded in the pending state court action, [so] that a declaratory judgment action will serve no useful purpose." *ARW Exploration Corp. v. Aguirre*, 947 F.2d 450, 454 (10th Cir.1991) (quoting *Franklin Life Ins. Co. v. Johnson*, 157 F.2d 653, 657 (10th Cir. 1946).

Based on the above, the Court grants Acuna's motion to dismiss on grounds of abstention and dismisses the declaratory judgment action.

ORDERED this th30 day of June, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT COURT

³ The Option Agreement provides that "all questions concerning the validity, interpretation, or performance of any of its terms or provisions, or any rights or obligations of the parties hereto, shall be governed by and resolved in accordance with the laws of [Texas]."

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

FILED

JUN 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
THE SUM OF ONE THOUSAND)
FOUR HUNDRED FORTY AND)
NO/100 DOLLARS (\$1,400.00))
IN UNITED STATES CURRENCY;)
)
1991 Plymouth Laser,)
VIN #4P3CS34T8ME085013;)
)
1992 Nissan Maxima,)
VIN #JN1HJ01F3NT012803;)
)
1970 Chevrolet Purple Camaro,)
VIN #12487L513987;)
)
1989 Buick Regal,)
VIN #2G4WB14W9K1436227;)
)
1985 Oldsmobile Cutlass,)
VIN #1G3AM1932FD397319;)
)
1976 GMC Red & White Pickup,)
VIN #TCL146S524232;)
)
1982 Oldsmobile Cutlass,)
VIN #1G3AX69Y7CM141401;)
)
1981 Ford Mustang,)
VIN #1FABP13B4BF202451;)
)
1986 Black Pontiac Firebird,)
VIN #1G2FW87H6GL202504;)
)
1994 Ford Thunderbird,)
VIN #1FALP6241RH220862;)
)
1995 Chevrolet Monte Carlo,)
VIN #2G1WW12M1S9126450;)
)

CIVIL ACTION NO. 96-CV-934-B ✓

ORDER OF PARTIAL DISMISSAL:
1995 CHEVROLET MONTE CARLO
VIN #2G1WW12M1S9126450

JUL 01 1997

1989 GMC 1-Ton Pickup,)
 VIN #2GTHC39N6K1529969;)
)
 1980 Chevrolet Impala,)
 VIN #1L47JAC127726;)
)
 Defendants.)

ORDER OF PARTIAL DISMISSAL

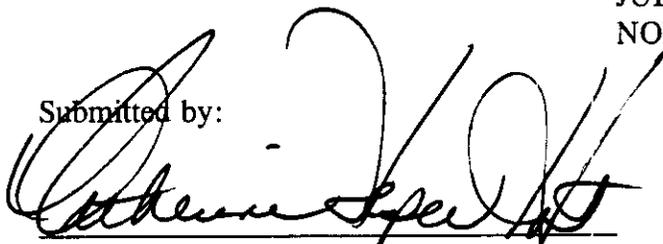
This matter, coming on before the undersigned Judge of the District Court of the Northern District of Oklahoma, this 30th day of June, 1997, upon the plaintiff's Motion for Partial Dismissal as to the 1995 Chevrolet Monte Carlo VIN #2G1WW12M1S9126450. The government intends to release custody of the vehicle to the registered lienholder, Olympic Financial Ltd., d/b/a Arcadia Financial Ltd. The only other party having filed any claim to the vehicle is Carmeka Harding.

IT IS, THEREFORE, ORDERED AND ADJUDGED by the Court that the 1995 Chevrolet Monte Carlo VIN #2G1WW12M1S9126450 is hereby dismissed, without prejudice and without any costs, except the cost of storage by the United States Marshals Service to be paid by Claimant Olympic Financial Ltd., d/b/a Arcadia Financial Ltd.



THOMAS R. BRETT,
 JUDGE OF THE DISTRICT COURT FOR THE
 NORTHERN DISTRICT OF OKLAHOMA

Submitted by:



CATHERINE DEPEW HART
 Assistant United States Attorney

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

ENTERED ON DOCKET
DATE 7-1-97

CHARLES FREDERICK,)
)
 Plaintiff,)
)
 vs.)
)
 TULSA COUNTY DISTRICT)
 COURT, JUVENILE DIVISION,)
)
 Defendant.)

No. 97-CV-150-K ✓

F I L E D

JUN 30 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 June 2, 1997, pertaining to Plaintiff's application to assume original jurisdiction over subject matter pursuant to 28 U.S.C. § 1361. The Magistrate Judge recommends that Plaintiff's application be dismissed based on lack of subject matter jurisdiction. As no objection has been filed by petitioner, the Court concludes that the Report should be adopted and affirmed.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) The Report and Recommendation of the Magistrate Judge (Docket #9) is **adopted and affirmed;**
- (2) Petitioner's application to assume original jurisdiction over subject matter pursuant to 28 U.S.C. § 1361 (Docket #1) is **dismissed** for lack of subject matter jurisdiction; and

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- (3) Those portions of the Order filed March 31, 1997 (Docket #7) requiring Plaintiff to pay the filing fee and stating that "the Court will enter an order directing the agency having custody of Plaintiff to collect and forward such monthly payments to the Clerk of Court until the filing fee is paid in full" are vacated.

SO ORDERED THIS 21 day of June, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

JUN 27 1997

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

ALFRED A. AVILLA,

Plaintiff,

v.

CASE NO. 96-CV-441-M

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

Defendant.

ENTERED ON DOCKET

DATE JUL 01 1997

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 27th day of JUNE, 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

JUN 27 1997

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

ALFRED A. AVILLA

448-40-5560

Plaintiff,

vs.

Case No. 96-CV-441-M ✓

JOHN J. CALLAHAN¹,
Acting Commissioner Social Security
Administration,

Defendant,

ENTERED ON DOCKET

JUL 01 1997

DATE _____

ORDER

Plaintiff, Alfred A. Avilla, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.² In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

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

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.

² Plaintiff's April 15, 1994 application for disability benefits was denied May 31, 1994 and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held January 20, 1995. By decision dated April 21, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on April 26, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 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).

Plaintiff was born June 8, 1942 and was 52 years old at the time of the hearing. He has an 11th grade education and claims to be unable to work as a result of bilateral knee replacements, back problems, elbow tendinitis, carpal tunnel syndrome, hearing impairment, and heart problems. The Administrative Law Judge ("ALJ") determined that although Plaintiff was unable to perform his past relevant work, he was capable of performing light work activities, limited by mild chronic pain for which he takes medication, a hearing loss, and a mild hand tremor. [R. 39]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) incorrectly found that Plaintiff did not meet Listing of Impairment 11.14; and (2) misinterpreted Plaintiff's testimony and the medical records in performing a residual functional capacity ("RFC") assessment.

The Listing of Impairments contained within the Social Security Regulations describe, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity. Listing 11.14 addresses peripheral neuropathies and requires: "disorganization of motor function as described in 11.04B, in spite of prescribed treatment." 20 C.F.R. Pt. 404, Subpt. P, App. 1, 11.14. Part 11.04B requires: "Significant and persistent disorganization of motor function in two extremities, resulting in sustained disturbance of gross and dexterous movements, or gait and station (see 11.00C)."

Section 11.00C requires:

Persistent disorganization of motor function in the form of paresis or paralysis, tremor or other involuntary movements, ataxia and sensory disturbances (any or all of which may be due to cerebral cerebellar, brain stem, spinal cord, or peripheral nerve dysfunction) which occur singly or in various combinations, frequently provides the sole or partial basis for decision in cases of neurological impairment. The assessment of impairment depends on the degree of interference with locomotion and/or interference with the use of fingers, hands and arms."

The question whether a claimant meets or equals a listed impairment is strictly a medical determination. *Ellison v. Sullivan*, 929 F.2d 534, 536 (10th Cir. 1990), 20 C.F.R. §§ 404.1526(b), 416.926(b). Plaintiff argues that he meets a Listing, but he does not cite any medical evidence to support his argument. Plaintiff's own testimony and claims will not establish that he meets a Listing. Further, although the record contains the treatment record of neurosurgeon, Frank S. Letcher, M.D., and neurologist, John D. Hastings, M.D., the record does not support a finding that the

requirements of Listing 11.14 have been met. The Court concludes that the ALJ's analysis of the Listings does not provide a basis for reversal.

The ALJ's assessment of Plaintiff's residual functional capacity is of concern to the Court. The ALJ found that Plaintiff can perform the range of light work reduced by mild chronic pain, a hearing loss, and a mild hand tremor. [R. 39]. Light work is work which involves:

lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities.

20 C.F.R. § 404.1567(b). A review of the medical record reveals the absence of evidence to support a finding that Plaintiff was able to meet the walking and standing requirements of light work throughout the time from the alleged date of onset, November 28, 1992, to the date of the administrative hearing, January 20, 1995.

The record reflects that Plaintiff became unemployed on his alleged date of onset, November 28, 1992, when his employer closed its Tulsa plant. [R. 54]. Plaintiff had been treated by orthopedic surgeon, John B. Vosburgh, M.D., since February 1981 for numerous complaints involving his knees, neck, and back, including a total of 9 knee surgeries.³ Focusing *only* on those notes by Dr. Vosburgh

³ March 1981 arthrotomy, chondroplasty patella, *both* knees [R. 417]; September 1983 arthroscopic chondroplasty of the patella, right knee [R. 415]; August 1985 arthroscopic evaluation of right knee, lateral joint capsule and retinaculum release performed [R. 413]; April 1987 arthroscopic evaluation

from November 1992 forward, it is apparent that Plaintiff was unable to perform light work for at least 12 months. On 3/2/93, arthroscopic surgery was performed, Dr. Vosburgh stated, "he is temporarily disabled." [R. 403]. 3/10/93, follow-up appointment, "temporarily disabled." [R. 404]. 4/7/93, Plaintiff was instructed to do "protective activity on it." *Id.* 5/19/93, Dr. Vosburgh notes hospital admission for acute myocardial infarction since last visit, "temporarily disabled." *Id.* 6/16/93, discussed knee replacement. 7/14/93, significant pain on ambulation noted. *Id.* 11/5/93, knee replacement performed. [R. 401]. 12/10/93, "temporarily disabled." *Id.* 1/12/94, "temporarily disabled" [R. 400]. 2/9/94, plan to release to work as of June 1, 1994. *Id.* Based on the foregoing, it is apparent that Plaintiff's treating physician was of the opinion that Plaintiff *could not* work from March 1993 through June 1994. Since Dr. Vosburgh was Plaintiff's treating physician and his opinion is related directly to Plaintiff's ability to walk and stand, that opinion is entitled to controlling weight under Social Security Regulations. 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). The Court finds, therefore, that Plaintiff is entitled to a period of disability for the period from March 2, 1993 to June 1, 1994.

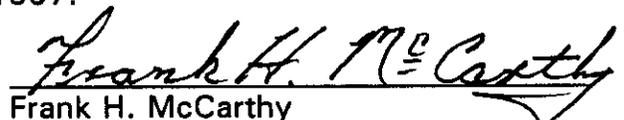
Despite the fact that the hearing was held on January 20, 1995, and the decision was not issued until April 21, 1995, the record does not contain any of Dr. Vosburgh's records after April, 1994. Therefore, the record does not disclose

of right knee, extensive chondroplasty of mediofemoral condyle, partial medial meniscectomy [R. 412]; April 1987 closing wedge osteotomy of proximal right tibia and fibula performed [R. 412]; November 1989 total knee arthroplasty (right knee replacement) [R. 409]; March 1993 arthroscopic examination of left knee, significant chondromalacia of weight bearing surface found [R. 405]; November 1993 total knee arthroplasty (replacement) of left knee [R. 401].

whether Plaintiff's treating physician was of the opinion that he was able to work after June 1, 1994. As the record stands, there is no evidence establishing Plaintiff's ability to perform the walking and standing requirements of light work. However, the materials already of record suggest that a treating physicians opinion concerning that ability may be contained in Dr. Vosburgh's later records. Such evidence is crucial to this case because if Plaintiff is limited to sedentary work, at his age, education and skill level, the grids direct a finding of disabled. 20 C.F.R. Pt. 404, Subpt. P, App.2, Rule 201.10. Therefore, the Court finds that the case must be remanded for further development of the record concerning Plaintiff's ability to work after June 1, 1994.

"[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 serve no purpose for the period from March 2, 1993 to June 1, 1994. Accordingly, the court exercises its discretion pursuant to 42 U.S.C. § 405(g) and REVERSES and REMANDS the case with directions to: (1) award disability benefits for a period of disability from March 2, 1993 to June 1, 1994; and (2) conduct such proceedings as are necessary to further develop the record concerning Plaintiff's ability to work after June 1, 1994.

SO ORDERED this 27th day of June, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

DANNY THOMAS,)
)
 Plaintiff,)
)
 v.)
)
 KOCH ENGINEERING COMPANY,)
 INC., and JOHN ZINK COMPANY,)
 a division of KOCH ENGINEERING)
 COMPANY, INC.,)
)
 Defendants.)

F I L E D

JUN 30 1997

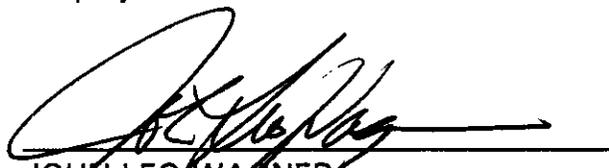
Case No: 96-C-556-W Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
JUL 01 1997
DATE _____

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to Fed. R. Civ. P. 41(a)(1)(ii), and in accordance with the joint Stipulation of Dismissal filed June 27, 1997, the parties stipulate to the dismissal of plaintiff's complaint against defendant with prejudice to refiling.

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


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

FILED

JUN 30 1997

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

LINDA L. HAYMAN,

Plaintiff,

v.

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

Defendant.

CASE NO. 96-CV-1239-M ✓

ENTERED ON DOCKET
DATE JUL 01 1997

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 30th day of June, 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

JUN 30 1997

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

LINDA L. HAYMAN,)
SSN: 569-11-8061,)
)
Plaintiff,)
)
v.)
)
JOHN CALLAHAN, Acting)
Commissioner of the Social)
Security Administration,¹)
)
Defendant.)

Case No. 95-CV-1239-M

ENTERED ON DOCKET
DATE JUL 01 1997

ORDER

Plaintiff, Linda L. Hayman, 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) the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this decision will be directly to the Circuit Court of Appeals.

Plaintiff was 37 years old at the time of the disability hearing before the ALJ. She has a high school diploma and one year of college and a past relevant work history as a forklift driver, clerk/office worker and most recently as a stock clerk. Plaintiff claims inability to work since July 12, 1988 due to back pain, leg pain and cytomegalovirus infection. Plaintiff's claim for benefits for the time period 7/12/88 through 10/25/92 has been previously adjudicated as discussed later in this Order.

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 Rule 25(d)(1) of the Federal Rules of Civil Procedure, John J. Callahan should be substituted, therefore, for Shirley S. Chater, as defendant in this suit. 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).

Plaintiff's claim for benefits for the time period after October 26, 1992 was considered by an Administrative Law Judge (ALJ), who found, in his December 16, 1994 decision, that Plaintiff has the residual functional capacity (RFC) to perform her past relevant work (PRW) as office worker. [R. 157-158]. His decision, therefore, was that Plaintiff is not disabled as defined by the Social Security Act. The Appeals Council affirmed the findings of the ALJ on October 27, 1995. [R. 141-142]. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Plaintiff presents several allegations of error on the part of the Commissioner. She contends the decision is not based upon substantial evidence because the ALJ improperly evaluated the medical evidence and Plaintiff's complaints of pain and that he posed an incorrect hypothetical to the vocational expert. Plaintiff further contends that the ALJ erred in applying the doctrine of *res judicata* to her previous application and that it should have been reopened.

The role of the Court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389,

401 (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 Secretary. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). The record of the proceedings has been meticulously reviewed by the Court.

Reopening of Prior Application

Plaintiff's initial application for Title II benefits, filed December 21, 1988, [R. 48-50], was denied January 24, 1989, [R. 51-52]. After a hearing on September 26, 1989, the ALJ entered a decision, dated October 25, 1989, denying benefits. [R. 10-20]. The Appeals Council denied review on September 90, 1990, thereby rendering final administrative action in that claim. [R. 3-4]. The decision was appealed to the United States District Court for the Northern District of Oklahoma which issued a final order on January 14, 1992, affirming the Commissioner's decision to deny benefits. [R. 164-168]. No further action was taken in that claim.

On December 2, 1992, Plaintiff filed a new application for disability insurance benefits under the Social Security Act. [R. 170-173]. That claim was also denied, [R. 174-186], as was her request for reconsideration, [R.197-199]. A hearing was held on the new claim on July 12, 1994, at which time Plaintiff's attorney requested that the prior administrative decision denying benefits be reopened. [R. 389]. On December 16, 1994, the ALJ entered the decision at issue in this case, finding that the decision of October 25, 1989 is binding under the doctrine of *res judicata* and denying Plaintiff's request to reopen the prior claim. [R. 151].

The Court finds that the ALJ properly concluded that no good cause had been demonstrated to reopen the final determination of the December 21, 1988 claim and that Plaintiff's claim for disability benefits for the time period covered in the first claim was barred on the basis of *res judicata*. This finding is not reviewable by this Court. *Califano v. Sanders*, 430 U.S. 99 (1977). *Nelson v. Secretary of Health and Human Services*, 927 F.2d 1109 (10th Cir. 1990) (holding that, absent a colorable constitutional claim, a district court does not have jurisdiction to review the Secretary's discretionary decision not to reopen an earlier adjudication). The Court finds no error on the part of the ALJ in deciding to not reopen the prior claim.

Medical Evidence

Plaintiff discontinued working as a stock clerk in July 1988, claiming an on-the-job injury to her low back from lifting and carrying stock. [R. 120-121]. She was treated by Henry H. Modrak, M.D., who diagnosed degenerative disc disease of the lumbar spine. An MRI, CT Scan and X-rays of the back confirmed his diagnosis. [R. 120, 122, 123]. Dr. Modrak prescribed Naprosyn, Flexeril and Lortab, fitted her for a lumbosacral back support/corset and referred her for physical therapy. [R. 95-100, 102, 118]. On October 3, 1988, Dr. Modrak released Plaintiff to "return to her work activities with the restriction of no lifting over 20 pounds and restriction of bending, lifting, and twisting activities as tolerated." [R. 115]. The following month, Plaintiff returned to Dr. Modrak with continuing complaints of back pain "similar to pain she has been having since her first visit." [R. 114]. However, Dr. Modrak repeated that she was released to return to work with restrictions, stated that she was dismissed

from active treatment and encouraged her to continue with neck and back exercises. *id.* Dr. Modrak saw Plaintiff again in January 1989, and noted continuing complaints of pain. [113]. He repeated his recommendation to exercise and wrote a prescription for a "treadmill" because he thought walking would be of benefit. *id.* In August 1989, Dr. Modrak ordered another MRI to compare with one taken the previous year. Although he noted that the scan showed significant disc degeneration he continued "full conservative measures." [R. 128]. In September 1989, Dr. Modrak discussed with Plaintiff, percutaneous discectomy as an alternative treatment. [R. 128].

The percutaneous discectomy was performed by Don L. Hawkins, M.D., in April 1990. On April 27, 1990, Dr. Hawkins signed a form for CIGNA, the carrier for Plaintiff's workers compensation benefits, and wrote that Plaintiff was "in too much pain to work at this time." [R. 286-287]. On January 10, 1991, Dr. Hawkins completed another CIGNA form noting that Plaintiff could now return to work on a part-time basis but wrote in "unknown" whether Plaintiff could return to her former job. [R. 284-285]. On June 11, 1991, Plaintiff asked Dr. Hawkins to refer her to Thomas Cate, a chiropractic doctor. [R. 229].

A third MRI performed on April 6, 1992 showed focal protrusion at the L2-3 level which was more noticeable since 1989, possible focal scar at L3-4 level, otherwise no definite change in the diffusely bulging discs, and bilateral neural foraminal narrowing at L4-5 and L5-S1 since August 11, 1989. On May 26, 1992, Dr. Hawkins reviewed the new MRI, examined Plaintiff, noted that she was being treated intermittently by Dr. Cate with improvement and reemphasized continuing

exercises. [R. 229].

Benjamin G. Benner, M.D. examined Plaintiff for a workers compensation evaluation on September 4, 1992. [R. 257 - 259]. He ordered yet another MRI which was performed on September 5, 1992. [R 260]. On September 10, 1992, Dr. Benner wrote Plaintiff a letter explaining that he believed her condition to be "probably affixed, that it is not amenable to surgery and is a condition that you will have to learn to live with. I do not think there is any reason why you should not go on to some useful position, although certainly your job description would have to be changed extensively where you do not have to do any lifting, twisting or any rotational movements of your back or prolonged sitting or squatting." [R. 254].

Plaintiff continued receiving chiropractic treatments from Dr. Cate after she was released from care by Dr. Hawkins. [R. 229, 252-253, 290]. On November 4, 1992, Dr. Cate completed a CIGNA form, estimating that Plaintiff could occasionally lift 10-20 pounds, occasionally carry up to 10 pounds, occasionally push/pull from a seated position, bend occasionally and sit for one hour, stand for 2 hours, walk for 2 hours and alternately sit/stand for 3 hours during an 8-hour work day. Dr. Cate, like Dr. Hawkins, indicated that Plaintiff could work 4 hours per day. [R. 284-285, 307]. His handwritten comment was: "This patient has a permanent impairment with her low back - she may anticipate pain for an indefinite period of time! unfortunately - " [sic]. [R. 306-307]. Dr. Cate checked "no" on the question of whether Plaintiff could work a different job other than her current work within the restrictions noted. [R. 285].

On May 13, 1993, Plaintiff was examined by Delbert O. Williams, M.D., for

chronicity of back pain and complaints of painful knees. [R. 280]. He referred her back to Dr. Hawkins for evaluation. *Id.* Plaintiff told Dr. Hawkins five days later that her back pain had "improved from a 10 to a 7." She complained of fever, chills, nausea and vomiting. Dr. Hawkins diagnosed "Viral syndrome with fever", prescribed Vicodin, Demerol and Phenergan and informed her that he anticipated her back pain would improve when the viral syndrome resolved. [R. 280]. On June 23, 1993, Dr. Hawkins examined Plaintiff's knees,² diagnosed Chondromalacia femur patella, prescribed Indocin, gave additional exercises for chronic pain in back and legs and told her to avoid squatting and stair climbing. [R. 279].

Plaintiff continued to receive chiropractic treatments from Thomas Cates, D.C. through July 7, 1994. [R. 288].

On April 6, 1994, Plaintiff was examined by E. Joseph Sutton, II, D.O., who stated that he saw no objective evidence of any type of discomfort. [R. 263]. At the hearing on July 12, 1994, Plaintiff's attorney objected to Dr. Sutton's report on various grounds and Plaintiff testified as to what she termed were her "disagreements" with Dr. Sutton's report. [R. 360-373]. The report was admitted into evidence at the hearing with the objections noted and is a part of the record before the Court. [R. 373]. However, the ALJ did not mention Dr. Sutton's findings in his decision and, apparently, did not rely upon them in reaching his conclusion that Plaintiff is not

² Dr. Hawkins wrote on that date: "Patient wanted to introduce the subject of her back. Her back was not examined...She also wanted to know if she could make an appointment to see me regarding her back, and I told her, since she has very good surgeons attending her and has had numerous examinations and has had surgery, I did not want to interject myself in this situation."

disabled.

Palmer R. Ramey, Jr., M.D. was seen by Plaintiff concerning removal of her breast implants on February 7, 1994 and April 25, 1994. [R. 336]. There is nothing in Dr. Ramey's record concerning Plaintiff's ability or inability to work.

Blood tests were done on June 23, 1994, [R. 322-324], and, on June 30, 1994, Dr. Williams reported that those tests suggest recent or past infection and that "rest is needed to alleviate the fatigue" caused by that infection. He stated that Plaintiff "should not push activity beyond the fatigue point." [R. 321].

Dr. Cate wrote a "To Whom It May Concern" letter on Plaintiff's behalf on January 4, 1995, stating that Plaintiff had been advised by himself and "the other physicians that she has seen that she is not a candidate for employment at this time." [R. 343-344]. This letter was presented after the hearing to the Appeals Council who concluded that this additional evidence did not provide a basis for changing the ALJ's decision. [R. 141].

Finally, Gerry D. Langston, D.C., reported on January 12, 1995 that Plaintiff suffers from a latent type of infection, chronic pain and severe malaise symptoms. [R. 345-346]. This report also was presented to the Appeals council. [R. 141].

The ALJ's Decision

In his December 16, 1994 decision, the ALJ concluded that the evidence establishes that Plaintiff has moderate degenerative disc disease but that she does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4. [R. 157]. He discredited Plaintiff's

complaints of debilitating pain as not consistent with the record as a whole and he determined that Plaintiff has the RFC to perform work related activities except for work involving lifting of greater than 10 pounds at a time, occasionally, or repetitive bending, stooping or squatting. [R. 157]. The ALJ determined that the medical evidence did not support Plaintiff's complaints of debilitating pain. He also found that Plaintiff's daily activities are inconsistent with inability to engage in gainful work and, he found her claim of debilitating fatigue not credible and contradicted by the objective findings of Dr. Williams. The ALJ found that Plaintiff can return to her past RFC as an office worker/office clerk. [R. 158].

The "Treating Physician Rule"

Plaintiff asserts that the Commissioner "is in violation of the treating physician rule." She contends that her treating physicians' reports support her claim that she is unable to perform any work in the national economy on a sustained reasonably regular basis. [Plf's Brief, p. 13-14].

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

Frey v. Bowen, 816 F.2d 508 (10th Cir. 1987); *Byron v. Heckler*, 742 F.2d 1232, (10th Cir. 1984) .

Dr. Cate, a chiropractor, stated that Plaintiff had been advised by himself and "the other physicians that she has seen" that she is not a candidate for employment. [R. 343-344]. However, Plaintiff's treating physicians, Dr. Modrak and Dr. Hawkins, had released her to return to work with restrictions. [R. 104-105, 114-115, 286-287]. Dr. Benner told Plaintiff that there was no reason why she should not go on to some useful position that did not require lifting, twisting, rotational movements of her back or prolonged sitting or squatting. [R. 254]. J.P. Skelly, M.D., an examining physician, also recommended "alternative placement". [R. 91]. Dr. Cate's letter is not entitled to the same weight as that given Plaintiff's treating medical doctors. See 20 C.F.R. § 404.1513. While a claimant may submit chiropractic evidence to help the Secretary understand her inability to work, chiropractors are not considered an acceptable medical source. Bunnell v. Sullivan, 912 F.2d 1149, 1152 (9th Cir. 1990) (citing 20 C.F.R. § 404.1513 (1989)). "[T]here is no requirement that the Secretary accept or specifically refute such evidence." Id. at 1152. At any rate, Dr. Cate, who stated that claimant was unemployable, actually assigned some restrictions that were less stringent than had been previously assessed by her treating physicians. And, his "no" on whether Plaintiff could work a different job within the restrictions noted, is inconsistent with the remainder of the same report in which he noted that Plaintiff could work 4 hours per day. [R. 306-307]. Even given "treating physician weight", his records do not conflict with the ALJ's conclusion that claimant could return to her

past work as an office worker.

Likewise, Dr. Williams's note that blood tests suggested recent or past infection and that rest is needed to alleviate fatigue is not substantial evidence of Plaintiff's inability to work. Nor does Dr. Langston's report that Plaintiff suffers from a latent type of infection support an inference from Plaintiff that she suffers from completely disabling pain and/or fatigue.

The ALJ's finding that Plaintiff is capable of performing work related activities except for work involving lifting of greater than 10 pounds at a time, occasionally, or repetitive bending, stooping or squatting, is consistent with the opinions of Plaintiff's treating physicians.

Credibility and Pain Analysis

Plaintiff asserts that the medical evidence supports her complaints of pain and inability to engage in work activities on a sustained basis. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10 Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 and appropriately applied the evidence to those guidelines.

Conclusion

Plaintiff's description of her work duties as office worker is found in the record at pages 66 and 209. The medical evidence discussed above is sufficient to support the ALJ's determination that Plaintiff retains the residual functional capacity to return to that work. The Court finds that, based upon the record before him, the ALJ evaluated Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Secretary and the courts.

As to Plaintiff's claim of error on the part of the ALJ in posing a hypothetical question to the vocational expert, the Court finds that the question given set forth all the impairments accepted as true by the ALJ, which is all that he is required to do. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). Furthermore, a case decided at step four of the determination process does not require the use of a vocational expert's testimony. *Glenn v. Shalala*, 21 F.3d 983 (10th Cir. 1994).

The Commissioner's determination that Plaintiff can perform her past relevant work as office worker is supported by substantial evidence. Accordingly the decision of the Commissioner is AFFIRMED.

SO ORDERED this 30th day of JUNE, 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

DELBERT E. NASH,)
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN, Acting)
Commissioner of the Social Security)
Administration,)
)
Defendant.)

CASE NO. 96-cv-223-M ✓

FILED

JUN 30 1997

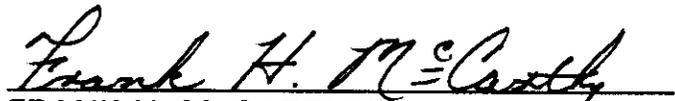
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE JUN 01 1997

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 30th day of June, 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 30 1997

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

DELBERT E. NASH,
SSN: 444-54-1405,

PLAINTIFF,

vs.

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

DEFENDANT.

CASE No. 96-CV-223-M

ENTERED ON DOCKET
DATE JUL 01 1997

ORDER

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

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92

¹ Plaintiff's January 22, 1993 application for disability benefits was denied May 28, 1993 and was affirmed on reconsideration. A hearing before an Administrative Law Judge (ALJ) was held May 5, 1994. By decision dated March 2, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ first on January 19, 1996. Then, on March 15, 1996, the Appeals Council vacated its prior action and entered a new Order, again affirming the ALJ's decision. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 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).

Plaintiff, born on May 15, 1952, claims to be unable to work as the result of headache, fatigue, shortness of breath and depression. [R. 37, 45, 69, 78, 103]. The ALJ determined that, although Plaintiff is unable to perform his past relevant work as refuse collector, sucker rod forger or tractor driver, he is functionally capable of performing the full range of sedentary work. [R. 21]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the Commissioner's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the Appeals Council failed to apply the "treating physician rule" in analyzing the medical evidence submitted after the decision of the ALJ and that, as a result of that error, the ALJ's assessment of Plaintiff's credibility was invalidated. Plaintiff further asserts that the ALJ improperly evaluated the medical evidence; failed to give the treating physician's opinion sufficient

consideration and weight; that his determination of Plaintiff's RFC was not supported in the record and that he was precluded from relying upon the Medical-Vocational Guidelines in determining that a significant number of jobs are available in the national economy which Plaintiff could perform. The record of the proceedings has been meticulously reviewed by the Court.

Action of the Appeals Council

The Court first addresses Plaintiff's contention that the Appeals Council's action on March 15, 1996 was improper. As noted above, the Appeals Council initially concluded that there had been no basis raised for changing the ALJ's decision on January 19, 1996 and denied Plaintiff's request for review. [R. 8-10]. On March 15, 1996, the Appeals Council vacated its prior action of January 19, 1996 and considered the contentions raised in a letter submitted by Christopher Carr, dated July 12, 1995, and a report with attachments written by Gary R. Davis, M.D., dated July 7, 1995. The Appeals Council concluded that "neither the contentions nor the additional evidence provides a basis for changing the Administrative Law Judge's decision" and again denied review. [R. 5-6].

20 C.F.R. § 404.970 provides the circumstances under which the Appeals Council may grant review of the decision of the ALJ:

(b) If new and material evidence is submitted, the Appeals Council shall consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision. The Appeals Council shall evaluate the entire evidence submitted if it relates to the period on or before the date of the administrative law judge hearing decision. It will then

review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

Plaintiff contends that the Appeals Council "reopen[ed] the record to consider new evidence" and that the Council "disregarded" the evidence without setting forth specific, legitimate reasons for doing so. [Plf's Brief, p. 3]. See 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987) (Secretary must give controlling weight to opinion of a treating physician if well supported by clinical and laboratory diagnostic techniques and if not inconsistent with other substantial evidence in the record); *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987), *Byron v. Heckler*, 742 F.2d 1232, (10th Cir. 1984) (good cause must be given for disregarding the treating physician's views and specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ). Plaintiff asserts that the Appeals Council was required to set forth in detail, an explanation as to the weight it accorded Dr. Davis's opinion in deciding whether or not to review the decision of the ALJ. He contends that the Appeals Council disregarded the new evidence. The Court finds, however, that the Appeals Council did not reject or disregard the newly submitted report of Dr. Davis but, rather, specifically vacated its previous action in order to consider and evaluate the newly submitted evidence and found that it did not warrant granting review of the ALJ's decision. [R. 5]. The Appeals Council is required to evaluate new evidence presented if it relates to the period on or before the date of the ALJ's hearing decision but it is not required to review the case unless it finds that the ALJ's decision is contradicted by the new evidence. See *O'Dell v. Shalala*, 44 F.3d

855, 859 (10th Cir. 1994). The Appeals Council was not required to assert more specifically than it did, its reasons for denying review of the ALJ's decision. The Court finds no error on the part of the Appeals Council.

The July 7, 1995 report of Dr. Davis did relate to Plaintiff's condition on or before the date of the ALJ's hearing decision, is a part of the administrative record before this Court and is, therefore, included in the evidence considered by this Court in determining whether the Commissioner's decision is supported by the record as a whole.

Medical Evidence

Although Plaintiff worked until November 15, 1991, medical records concerning his problems with high blood pressure commence in 1986. [R. 135-148]. Records from Morton Comprehensive Health Services, Inc. reveal that Plaintiff reported there regularly between April 10, 1986 and May 25, 1989 for blood pressure monitoring and refill of medication. [R. 113 - 148]. The records show that Plaintiff was working and "feeling fine" as long as he took the medication as prescribed by the doctors at Morton. [R. 113, 120, 123, 130, 132, 140]. On August 1, 1990, Plaintiff was treated at the Hillcrest Medical Center Emergency Room for "muscle cramps." [R. 190-192]. He was placed upon a cardiac monitor, given Valium and dismissed with instructions to see Dr. Davis. [R. 191]. In June, 1991, Plaintiff was referred by Dr. Davis to Kaiser Rehabilitation Center for physical therapy. [R. 195]. He did not return after his third visit. [R. 198]. Between July 1991 and September 5, 1991, Plaintiff's

blood pressure was checked and medication provided at Greenwood Centre. [R. 197, 199-203].

On September 6, 1991, Plaintiff was examined by Shashi Husain, M.D. [R. 206-207]. Dr. Husain recounted history given him by Plaintiff of muscles spasms since he was about 9 years old with more frequent occurrences "lately." He reported that the spasms occurred without provocation and that Flexaril helped him relax but did not alleviate the spasms. Dr. Husain's physical examination of Plaintiff was essentially normal except for some fibrillation induced by repeated tapping of the muscles. He scheduled Plaintiff for a cervical spine MRI, lab work and an EMG of all extremities. [R. 207]. The MRI and lab work results were negative. [R. 208-212]. The EMG was normal. [R. 205]. On September 30, 1991, Dr. Husain noted that Plaintiff's condition was stable and deferred doing a muscle biopsy. [R. 205].

The record contains notations and checklists dating from September 21, 1992 through June 17, 1993 of Gary R. Davis, M.D. The first such record, dated September 21, 1992, noted that Plaintiff denied any chest pain, shortness of breath or PND (paroxysmal nocturnal dyspnea) and that he had run out of his high blood pressure medication. The note indicated Plaintiff's blood pressure read 200/140. Plaintiff was given Isoptin, Cardura, Accupril, Lasix and K-Tabs. Dr. Davis rechecked Plaintiff's condition three days later and noted that Plaintiff's blood pressure was 150/100 and that he was doing much better. [R. 225]. Plaintiff's blood pressure was monitored by Dr. Davis regularly through the next eight months. [R. 214-226, 244-246].

On April 8, 1993, Plaintiff was examined by Carolyn J. Steele, D.O. for the State Disability Determination Unit. [R. 228-233]. Dr. Steele noted Plaintiff's long history of hypertension, and complaints of muscle cramps, fatigue and shortness of breath in the two years prior to the exam. She listed Plaintiff's medications of Cardura, Norvasc, Accupril, Isoptin, Lasix, K-Tab and Flexeril and noted that he receives them in samples from his doctor. Dr. Steele assessed severe hypertension with moderate control, severe fatigue unknown etiology, total body muscle cramping unknown etiology and stated that he needed a more thorough evaluation. She also assessed "migraine cephalgia." [R. 234].

Plaintiff underwent Pulmonary Function Studies on May 17, 1993 which were normal [R. 236-241] and a Chest X-ray on May 19, 1993 which revealed no abnormality and no enlargement of the heart. [R. 242].

On April 25, 1994, Dr. Davis wrote a "To Whom It May Concern" letter regarding the medical status of Delbert Nash. [R. 250]. Dr. Davis stated that he had been following Plaintiff in his office since May 1985 for severe hypertension, that was of such a degree that it produced severe incapacitating headaches, shortness of breath and cardiomegaly. He opined that Plaintiff is not employable in any type of work activity. *Id.*

The hearing before the ALJ was held on May 5, 1994. [R. 29-56]. During that hearing, Plaintiff testified that he suffers from headaches that never really go away, [R. 37], that every day he experiences "shooting pain-type headaches" that last a few seconds and require him to lay down, [R. 38], that he doesn't get up until the next day

or the headache wakes him up, [R. 39], that he has muscle cramps all over his body, [R. 40], and that he feels short of breath during conversation and while cleaning the house, using the vacuum cleaner and sweeping, [R. 46]. His breathing problems, he testified, had lessened after decrease in the prescribed dosage of Cardura and that he was taking potassium supplements to offset the Lasix which, he had been told, caused the muscle cramping. [R. 47]. Plaintiff testified that if he didn't have the headaches, shortness of breath and muscle cramping, he could go back to work. [R. 43]. Plaintiff testified that his daily activities consisted of sitting around the house, watching TV, sitting and laying down. [R. 40, 46].

At the conclusion of the hearing, the ALJ advised, and Plaintiff's attorney agreed, that a cardiac consultative evaluation with at least an EKG and chest x-ray would be necessary to resolve the question of cardiomegaly. [R. 55].

Dr. Davis's second "To Whom It May Concern" letter is dated June 24, 1994. [R. 251]. He stated that Plaintiff had a recent chest x-ray showing borderline normal heart size but that he has an obvious ventricular heave which is consistent with left heart enlargement. He again stated that Plaintiff is unemployable due to "the multiplicity of high blood pressure medications he is taking."

Plaintiff was examined by E. Joseph Sutton, II, D.O., on July 7, 1994. [R. 252-260]. An electrocardiogram conducted on that date was normal. His chest x-ray revealed normal heart and lungs and CT-ratio was 13/33. Dr. Sutton concluded from his physical examination of Plaintiff, that he is a well muscled individual with normal range of motion, good bilateral grip strength and good fine motor coordination. Dr.

Sutton evaluated Plaintiff's RFC as able to sit, stand and walk four hours at a time, eight hours during an entire work day, that he should be able to lift and carry 51 to 100 pounds continuously, that he had no limitations in pushing or pulling leg controls, no restrictions of his hands and that he should be able to bend, squat, crawl, climb or reach continuously. He noted that Plaintiff obviously has severe underlying hypertension, only fairly well controlled and stated:

While I would not underestimate the severity of his hypertension, I saw no evidence of any type of dysfunction on today's examination. The patient has multiple subjective complaints which are not borne out with any objective findings on physical examination. Certainly, the patient is at high risk for multiple vascular complications because of his uncontrolled blood pressure. If the patient's blood pressure can be controlled, then he should be able to perform essentially normal days activity.

[R. 255].

The ALJ rendered his decision that Plaintiff could perform the full range of sedentary work on March 2, 1995. [R. 21].

On July 7, 1995, Dr. Davis wrote a very detailed "To Whom It May Concern" letter essentially arguing against the decision of the ALJ. [R. 272-274]. He again listed the medications Plaintiff is required to take in order to keep his blood pressure in a normal range. He stated:

The pure fact that Mr. Nash requires this unusual amount of multiple drugs to keep his blood pressure in a normal range should be obvious that end organ damage such as cardiovascular side effects i.e. left ventricular hypertrophy, atherosclerotic cardiovascular disease, kidney damage, which could progress to kidney failure, headaches, with the potential to develop central nervous system complications

such as strokes, or subarachnoid hemorrhage caused by cerebral aneurysms.

Dr. Davis stated that Plaintiff is in an age group where the potential for most of the catastrophic side effects is very high. He acknowledged, however, that permanent end organ damage had not yet occurred, by way of explanation as to why Plaintiff denied shortness of breath, chest pain and PND in the medical records. He justified his diagnosis of cardiomegaly or congestive heart failure, on having found a ventricular heave, which had also not been recorded in earlier records, after examining Plaintiff "more carefully because of his prominent muscular status." [R. 273]. He stated that someone with such severe high blood pressure in Plaintiff's age group has a high likelihood of some catastrophic cerebrovascular or cardiovascular event before chronic end organ damage develops. Dr. Davis attached to this letter package inserts for the medications that Plaintiff is receiving. [R. 275-277].

The ALJ's Decision

The ALJ decided that Plaintiff cannot return to his previous employment as refuse collector, sucker rod forger or tractor driver because those jobs are "greater than sedentary work." [R. 19]. He determined that the medical record establishes that Plaintiff has severe hypertension for which he takes medication and that, when he is compliant with prescriptive orders, his blood pressure is within a normal range. [R. 18]. The ALJ found Plaintiff's claims of constant severe headaches of such an intensity that he is unable to work to be not credible. This decision was based upon inconsistencies between Plaintiff's testimony and the medical record, his

noncompliance with prescriptive orders, his failure to complain of constant debilitating headache to his treating physicians and his receipt of employment benefits which requires reporting an ability to work. The ALJ found that the other side effects, muscle cramping and fatigue, were relieved by adjustments in Plaintiff's medications by Plaintiff's physicians, again contingent upon Plaintiff's compliance with prescriptive orders. Based upon Plaintiff's current activities and the medical evidence, the ALJ determined that Plaintiff retains the residual functional capacity (RFC) to perform the full range of sedentary work.

Discussion

Plaintiff complains that the ALJ did not give sufficient weight to his treating physician's opinion that he is "unemployable." It is well established that the Secretary must give controlling weight to the opinion of a treating physician if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987). The medical record in this case establishes that Dr. Davis was one of Plaintiff's treating physicians. The controversy concerns the "To Whom It May Concern" letters written by Dr. Davis in support of Plaintiff's claim for social security benefits.

Dr. Davis's first "To Whom It May Concern" letter was written ten months after his last examination note. [R. 244, 250]. Dr. Davis states, in that letter, that Plaintiff's hypertension produced severe incapacitating headaches, shortness of breath and cardiomegaly and that the medication Plaintiff takes to control his blood pressure

causes fatigue and weakness. Only two of Dr. Davis's examination notes indicate that Plaintiff had complained of headache. [R. 214, 245]. On the other hand, Dr. Davis stated ten times that Plaintiff denied shortness of breath and chest pain. [R. 214-226, 244-246]. The second letter, dated June 24, 1994, mentions a recent chest x-ray that purportedly shows "borderline normal heart size." However, none of the x-ray reports in the record reveal such a showing. Conversely, the last x-ray report in the record, dated May 19, 1993, specifically states that the heart is not enlarged. [R. 242]. The third letter, dated July 7, 1995, obviously addressing the opinions stated by the ALJ in his March 2, 1995 decision, again stresses Dr. Davis's belief that Plaintiff is unemployable because of the "likelihood of some catastrophic cerebrovascular or cardiovascular event." [R. 273-274]. None of these letters are supported by objective medical findings or clinical and laboratory diagnostic tests and are inconsistent with the remainder of the medical evidence in the record, including Dr. Davis's own notes made during physical examinations of Plaintiff.

A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. *Castellano v. Secretary of Health and Human Services*, 26 F.3d 1027 (10th Cir. 1994). Furthermore, a treating physician's opinion that a claimant is totally disabled is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Secretary. *Id.* The ALJ's opinion indicates that he considered all of the medical reports in the record in making his determination that Plaintiff retains the capacity to do sedentary work. The ALJ's decision is supported by substantial evidence in the record. The third letter of Dr.

Davis does not contradict the ALJ's finding and did not require review by the Appeals Council. The record as a whole contains substantial evidence to support the determination of the Commissioner that Plaintiff is not disabled.

Credibility determination

To be accepted as credible, a social security claimant's complaints of disabling pain should be consistent with the degree of pain that could reasonably be expected from claimant's determinable medical abnormality. *Hargis v. Sullivan*, 945 F.2d 1482 (10th Cir. 1991). The Secretary is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10 Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 and appropriately applied the evidence to those guidelines. The Court finds that the ALJ evaluated the record and Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Secretary and the courts.

Use of the "Grids"

The ALJ found Plaintiff's claims of multiple symptoms resulting in complete inability to perform any activity not credible. The ALJ's reliance upon the grids was not improper. *Castellano*, p. 1030 (citing *Eggleston v. Bowen*, 851 F.2d 1244, 1247 (10th Cir. 1988))(presence of nonexertional impairment does not preclude use of grids

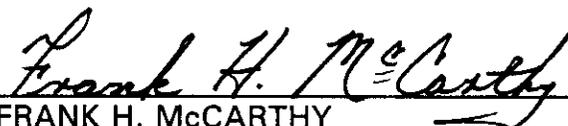
if nonexertional impairment does not further limit claimant's ability to perform work)).

The ALJ's determination is supported by substantial evidence in the record.

Conclusion

The Court finds that the decision of the Commissioner to deny benefits is supported by substantial evidence. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

SO ORDERED this 30th day of JUNE, 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

JUN 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY LUCY DAVIS,)
)
 Plaintiff,)
)
 vs.)
)
 ARROW SPECIALTY CO.,)
)
 Defendants.)

Case No. 97-CV-32-BU ✓

ENTERED ON DOCKET
DATE JUL 01 1997

ORDER

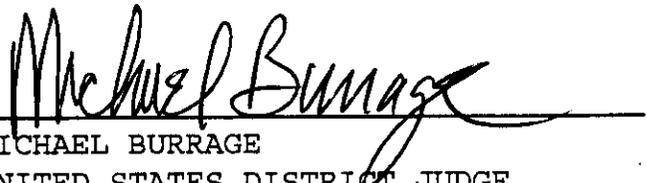
This matter comes before the Court upon Defendant's Motion to Compel Arbitration and to Dismiss and Defendant's Application for Expedited Hearing and/or Ruling on Plaintiff's Motion to Compel Arbitration and to Dismiss. It appears from a review of the record that Plaintiff has not responded to Defendant's motion and application within the time prescribed by Local Rule 7.1(C) and has not file an application for an extension of time to so respond. Pursuant to Local Rule 7.1(C), the Court deems the motion and application confessed.

Upon review of Defendant's motion, the Court finds that Plaintiff's claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., and the American With Disabilities Act, 42 U.S.C. § 12101, et seq., are subject to arbitration under the Corporate Dispute Resolution Policy and that dismissal of Plaintiff's Complaint is appropriate.

(15)

Accordingly, Defendant's Motion to Compel Arbitration and to Dismiss (Docket Entry #14) is **GRANTED**; Defendant's Application for Expedited Hearing and/or Ruling on Plaintiff's Motion to Compel Arbitration and to Dismiss (Docket Entry #13) is **GRANTED**; and Plaintiff's Complaint filed on January 10, 1997 (Docket Entry #1) is **DISMISSED**.

ENTERED this 30th day of June, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED
JUN 30 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

COLONIA INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
JULIE ANN SUMMERS, and)
SHIRLEY ANN HOLTER,)
CO-PERSONAL REPRESENTATIVE)
)of the ESTATE of KENNETH RAY)
SUMMERS, Deceased, for and)
on behalf of JULIE SUMMERS,)
SHIRLEY ANN HOLTER, and)
KRISTINA SUMMERS, CASEY)
SUMMERS and KENNETH)
SUMMERS, JR., minors.)
)
Defendants.)

Case No. 96-CV-1077-BU ✓

ENTERED ON DOCKET
DATE JUL 01 1997

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 5th day of June, 1997, the Joint Application of the parties comes on for Order of Dismissal With Prejudice of all claims that the Plaintiffs may have against the Defendants and that the Defendants may have against the Plaintiff on their Counter-Claim. The Court, after review of the Joint Application of the parties and pursuant to the Joint Application filed herein, finds the parties have stipulated that all questions and issues existing between said parties have been fully and completely disposed of by settlement and hereby dismiss the Plaintiff's declaratory judgment with prejudice and hereby dismisses all claims arising on the Counter-Claim of the Defendants with prejudice and have further requested the entrance of an Order of Dismissal with Prejudice.

IT IS SO ORDERED that the case should be and the same is hereby dismissed with prejudice and the matter is fully, finally and completely disposed of.

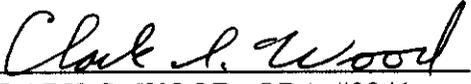


JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:



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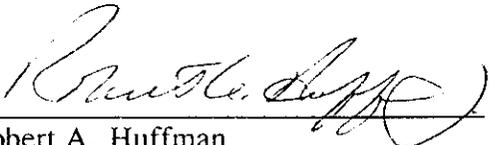


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Phone: (918) 775-9191
FAX: (918) 775-7549

CERTIFICATE OF SERVICE

This is to certify that on this 30 day of June 1997, I caused a true and correct copy of the foregoing document to be hand-delivered to:

Melinda J. Martin
MELINDA J. MARTIN, P.C.
15 W. Sixth Street, Suite 1610
Tulsa, Oklahoma 74119


Robert A. Huffman

ENTERED ON DOCKET
DATE 7-1-97

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

JUN 30 1997 *PL*

TOMMY DUGGER,)
)
Plaintiff,)
)
vs.)
)
BILL McKENZIE, et al.,)
)
Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 95-C-1173-K ✓

ORDER

In this pro se civil rights action, Plaintiff Tommy Dugger (Dugger), a state inmate, alleges that his due process rights were violated in a prison disciplinary proceeding which resulted in the loss of 120 earned credits, 30 days of disciplinary segregation, the assessment of 15 security points and transfer to maximum security prison. The Court liberally construes Plaintiff's complaint as a request to direct the Department of Corrections (DOC) to expunge his misconduct and to find that the DOC violated his due process rights.¹ Defendants have filed a motion to dismiss the civil rights complaint, or in the alternative, for summary judgment (#18). On May 2, 1997, Defendants filed a motion to amend their motion to dismiss (#23). For the reasons discussed below, the Court finds that Defendants' motions should be denied and Plaintiff's complaint dismissed without prejudice..

¹As stated in the complaint, Plaintiff requests "declaratory [sic] judgment that the defendants acts, policies and practices as described herein violates plaintiff's rights under the Constitution; a preliminary and permanent injunction which : (a) prohibits the defendants from continuing the praticies [sic] regarding confidential informants [sic] statement which there is no corroborated evidence to support the information; (c) [sic] award plaintiff monetary damages in the sum the court deems appropriate to deter future arbitrary acts by the defendants; (d) order plaintiff to be restored to his former status and a compensation for the loss of the personal property he has been forced to send home with no chance of receiving it again unless he pay for it out of his pocket which he cannot afford" (#1 at pg. 4-4A).

2/6

BACKGROUND

On May 10, 1995, Plaintiff received an Offense Report and was charged with "Group Disruption." The alleged disruption occurred on or about May 8, 1995, at approximately 9:30 a.m. According to the Offense Report, based exclusively on a confidential informant's statement, Plaintiff "conspired with other inmates to discover and physically harm an inmate to collect a reward." (Special Report (#17), Attachment B.) The Investigation Report, prepared by Lt. Lorene Kramer, concluded the charge was sufficiently supported by the employee's statement, the confidential informant statement, and the written statement of reliability. (Id.)

On May 12, 1995, Captain Maxwell conducted a disciplinary hearing. (Id.) He concluded the statements of the reporting employee, Bill McKenzie, and of the confidential informant were more believable than Plaintiff's claim ("it is a damn lie"). (#17 at Ex. B.) Plaintiff was found guilty of the charge of Group Disruption, DOC 01-3, which is defined as "participation with others in a course of disorderly conduct with purpose to commit or facilitate commission of a felony or misdemeanor." (#17, Affidavit of Dolores Ramsey, Disciplinary Procedures Review Officer.) Plaintiff exhausted his administrative remedies by appealing the disciplinary hearing decision to Warden Champion and to Officer Ramsey, both of whom affirmed the findings. Plaintiff was sentenced to 30 days in disciplinary segregation and the loss of 120 earned credits. Plaintiff was also assessed 15 security points and transferred to Oklahoma State Penitentiary, a maximum security facility (#17, p. 3).

ANALYSIS

As a preliminary matter, the Court notes that "a state prisoner's claim for damages is not cognizable under § 1983 if a judgment in favor of the prisoner would necessarily imply the invalidity

of his conviction or sentence, unless the prisoner can demonstrate that the conviction or sentence has previously been invalidated. Edwards v. Balisok, 117 S.Ct. 1584, 1588 (1997) (quoting Heck v. Humphrey, 114 S.Ct. 2364, 2372-2373 (1994)); see also Sheldon v. Hundley, 83 F.3d 231, 233 (8th Cir. 1996) (inmate could not bring § 1983 action until he had disciplinary action invalidated). In Edwards, the Supreme Court stated that in a prison disciplinary hearing where the claim alleged deceit and bias on the part of the hearing officer, a prisoner's claim necessarily implied invalidity of the deprivation of his good-time credits, and therefore, was not cognizable under § 1983.

Applying the Heck standard to this case, in order for Plaintiff Dugger to bring his § 1983 claim, which would necessarily "imply the invalidity of the punishment imposed," Dugger must first demonstrate that the disciplinary hearing decision has previously been invalidated. Heck, 114 S.Ct. at 2372. In other words, Dugger "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." Id Dugger has presented no evidence of such a determination to this Court.

As to the injunctive relief concerning the policies and practices of the state Department of Corrections, while "a prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983, ...[t]o prevail ... plaintiff must establish standing and meet the usual requirements." (citations omitted) Edwards, 117 S.Ct. at 1589. Dugger has failed to establish the basic requisites to issuance of equitable relief, that is, the likelihood of substantial and immediate irreparable injury and the inadequacy of legal remedies. O'Shea v. Littleton, 94 S.Ct. 669, 677-678 (1974). The Court finds that in this case, Dugger is unable to meet the requirements for injunctive relief.

Notwithstanding, in this action Plaintiff requests, among other things, that he be "restored to his former status" based upon "a denial of due process during a prison disciplinary hearing." (#2, p. 1). The Court liberally construes Plaintiff's request "to restore his former status" as a request for the Court to restore his lost earned credits and expunge the misconduct report/findings. Such request lies in habeas because it challenges the length or duration of his confinement. Preiser v. Rodriguez, 411 U.S. 475, 487-490 (1973); Smith v. Maschner, 899 F.2d 940 (10th Cir. 1990). Plaintiff's action is in essence a request for a writ of habeas corpus under 28 U.S.C. § 2254. Therefore, given Plaintiff's pro se status, the Court liberally construes Plaintiff's § 1983 complaint as a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972).

Section 2254(b)(1) requires a petitioner to exhaust state remedies before seeking habeas relief unless it would be futile to do so. The United States Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 501 U.S. 722, 731 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

Furthermore, the Oklahoma Court of Criminal Appeals has held that "an inmate has the writ of mandamus to force prison officials to insure due process within the Department of Corrections'

disciplinary system and to force prison officials to provide for procedural due process . . . before revoking credits after they have been previously earned." Canady v. Reynolds, 880 P.2d 391, 397 (Okla. Crim. App. 1994).

In this case, there is no evidence that Plaintiff would be entitled to immediate release should the Court restore his lost good-time credits, nor is there any indication that Plaintiff "has been denied relief in the state courts." Plaintiff has an available state court remedy, a petition for writ of mandamus. Id. The Court finds, therefore, that the Plaintiff's application for writ of habeas corpus should be dismissed without prejudice for failure to exhaust state remedies.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Plaintiff's action originally filed under 42 U.S.C. § 1983 is **treated** as a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.
- (2) Plaintiff's application for writ of habeas corpus is **dismissed without prejudice** for failure to exhaust state remedies.
- (3) Defendants' motion to dismiss Plaintiff's § 1983 complaint, and/or for summary judgment, and motion to amend same (Docket #18 and #23) are **denied** as moot.

IT IS SO ORDERED THIS 30 day of June, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 7-1-97

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

JOHNNY RAY LAMBERT,)
)
 Plaintiff,)
)
 vs.)
)
 BILL McKENZIE, et al.,)
)
 Defendants.)

No. 96-C-101-K ✓

F I L E D

JUN 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, a state prisoner appearing pro se, originally filed a § 1983 complaint, alleging that his due process rights were violated by prison officials in a disciplinary proceeding which, among other things, resulted in the loss of 120 earned credits. Although Plaintiff/Petitioner is not attacking his first degree murder conviction in Case No. CRF-79-120 in the District Court of Garfield County, Plaintiff's request¹ lies in habeas as it challenges the length or duration of his life sentence. *Preiser v. Rodriguez*, 411 U.S. 473, 487-490 (1973); *Smith v. Maschner*, 899 F.2d 940 (10th Cir. 1990). Accordingly, the Court has liberally construed Plaintiff's complaint as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). Relying on the unavailability of mandamus in cases concerning calculation of earned credits as stated in *Canady v. Reynolds*, 880 P.2d 391, 397 (Okla.Crim.App. 1994), the Court determined that requiring

¹Plaintiff's request for relief is as follows: (1) a declaratory judgment that the defendants' acts, policies and practices herein described and complained of violated plaintiff's rights under the United States Constitution; (2) a preliminary and permanent injunction which prohibits the defendants from continuing the practices they are with regards to confidential ... information; (a) order the plaintiff replaced to his prior status and any other relief the Court deems appropriate; (b) award plaintiff \$1.00 (one dollar) punitive damages from each defendant and cost to plaintiff for filing fee's [sic] of \$120.00 (one hundred twenty dollars) and any cost to the court; (c) order the director to reverse and expunge and restore plaintiff's loss earned credits. (#1, p. 5A)

Petitioner to exhaust his state remedies would be futile, and therefore, would consider the Petitioner's writ of habeas corpus.

The Court directed Defendants/Respondents to show cause why the writ should not be granted, and on May 20, 1997, they filed their objection (#17). Respondents argue that the Court erred in determining there are no state remedies to exhaust, that the writ of mandamus is the appropriate remedy, and therefore, the petition should be dismissed.

In his response and motion for clarification (#20, #18), Petitioner objects to the Court's order of May 6, 1997, converting his § 1983 complaint to a petition for writ of habeas corpus. Petitioner argues that calculated earned credits are not the issue, and therefore, *Canady v. Reynolds, supra.*, does not apply. Petitioner denies he should exhaust available state remedies and concludes the Court should grant the relief he originally sought, that is, a declaratory judgment that his constitutional rights were violated and a return to his prior status, or in the alternative, that Respondents' motion to dismiss for failure to exhaust state remedies be denied.

ANALYSIS

In *Wallace v. Cody*, 951 F.2d 1170, 1171 (10th Cir. 1991), the Tenth Circuit recognized that Oklahoma had created a liberty interest in earned credits and that an inmate is entitled to due process protection prior to the loss of those credits. *See also Ekstrand v State*, 791 P.2d 92, 95 (Okla.Crim.App. 1990); *Weaver v. Graham*, 101 S.Ct. 960-961 (1981); *Mitchell v. Meacham*, 770

P.2d 887 (Okla.S.Ct. 1989).

Although 57 O.S. Supp. § 138² requires due process to be followed it does not delineate what process is due in the forfeiture of earned credits. *Mitchell*, at 890. It was the United States Supreme Court in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963 (1974), that articulated the minimum requirements of procedural due process appropriate in prison disciplinary proceedings involving the revocation of a state created liberty interest in good-time credits. *Mitchell*, at 890. An inmate must be afforded (1) advance written notice of the claimed violation, (2) a written statement by the factfinder as to the evidence relied on and the reasons for the disciplinary action, and (3) the right to call witnesses and present documentary evidence in his defense when permitting him to do so would not be unduly hazardous to institutional safety or correctional goals. *Waldon v. Evans*, 861 P.2d 311, 312 (Okla.Crim.App. 1993) (quoting *Wolff v. McDonnell*, 94 S.Ct. at 2978-2980).

Further defining *Wolff*, the Supreme Court held in *Superintendent, Mass. Correctional Institution v. Hill*, 472 U.S. 445, 105 S.Ct. 2768 (1985), that "the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good-time credits. This standard is met if 'there was some evidence from which the conclusion of the

²57 O.S.Supp, section 138, provides, in part:

A. Except as otherwise provided by law, every inmate of a state correctional institution shall have their term of imprisonment reduced monthly, based upon the class level to which they are assigned. Earned credits may be subtracted from the total credits accumulated by an inmate, upon recommendation of the institution's disciplinary committee, **following due process, and** upon approval of the warden or superintendent. Each earned credit is equivalent to one (1) day of incarceration. Lost credits may be restored by the warden or superintendent upon approval of the classification committee. If a maximum and minimum term of imprisonment is imposed, the provisions of this subsection shall apply only to the maximum term. No deductions shall be credited to any inmate service a sentence of life imprisonment; however, a complete record of the inmate's participation in work, school, vocational training, or other approved program shall be maintained by the Department for consideration by the paroling authority. (emphasis added).

administrative tribunal could be deduced...." *Id.*, 105 S.Ct. at 2774 (citation omitted).

In the instant case, Plaintiff received advance written notice of the claimed violation, was afforded the right to call witnesses and present documentary evidence, and received a written statement by the factfinder as to the evidence relied on and the reasons for the disciplinary action. However, Plaintiff alleges that because the findings of the prison disciplinary board were based on unreliable information, the "some evidence" standard established in *Hill* was violated. Having reviewed the Special Report and the *in camera* documents, the Court agreed with Plaintiff and concluded that the evidence in the record failed to meet the "some evidence" requirement of *Hill*. See also *Taylor v. Reynolds*, 931 F.2d 698, 701 (10th Cir. 1991).

Although Plaintiff/Petitioner argues the Court should maintain his action as a § 1983 civil rights complaint for which there is no state exhaustion requirement, it is well-established that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been [overturned]." *Heck v. Humphrey*, 114 S.Ct. 2364, 2372-2373 (1994). Even assuming *arguendo* that the Court could order a new disciplinary hearing and restore the earned credits, Plaintiff's declaratory relief and money damages claim is not cognizable under section 1983 absent proof that his conviction or sentence has been "reversed, expunged, invalidated, or impugned." *Heck*, at 2373.

This *Heck* standard was re-emphasized in a recent Supreme Court decision, *Edwards v. Balisok*, ___ S.Ct. ___, 1997 WL 255341 (May 19, 1997). Balisok, a Washington state prisoner, was found guilty of prison rule infractions and sentenced to, *inter alia*, the loss of 30 days' good-time credit he had previously earned toward his release. Alleging that the procedures used in his

disciplinary proceeding violated his Fourteenth Amendment due process rights, he filed suit under 42 U.S.C. § 1983 for a declaration that those procedures were unconstitutional and sought compensatory and punitive damages for their use as well as an injunction to prevent future violations. Balisok alleged that the hearing officer concealed exculpatory witness statements and refused to ask specified questions of requested witnesses, which prevented the inmate from introducing extant exculpatory material and "intentionally denied" him the right to present evidence in his defense. The principal procedural defect complained of by Balisok,--- like the Plaintiff/Petitioner in the instant case ---, "would, if established, necessarily imply the invalidity of the deprivation of his good-time credits." *Edwards*, 1997 WL 255341, *4. Balisok's claim asserted that the cause of the exclusion of the exculpatory evidence was the deceit and bias of the hearing officer. (In the instant case, Petitioner alleges the hearing officer "conspired" with the other defendants "to deprive plaintiff of his due process rights" when the finding of the disciplinary proceeding was based on an uncorroborated confidential witness statement (#1, pp. 3-5)). While the due process requirements for a prison disciplinary hearing are in many respects less demanding than those for criminal prosecution, "they are not so lax as to let stand the decision of a biased hearing officer who dishonestly suppresses evidence of innocence." *Id.* (quoting *Wolff, supra*, 94 S.Ct. at 2981-2982). Citing the holdings of *Wolff, supra*, and *Hill, supra*, the Supreme Court concluded that Balisok's claim for declaratory relief and money damages, based on allegations of deceit and bias on the part of the decisionmaker that necessarily imply the invalidity of the punishment imposed, is not cognizable under § 1983." *Id.*, 1997 WL 255341, *5.

Finally, Petitioner is not entitled to the prospective relief which Plaintiff/Petitioner requests: "a preliminary and permanent injunction which prohibits the defendants from continuing the practices

they are with regards to confidential information" (#1, pp. 4-5). Ordinarily, a prayer for such prospective relief will not "necessarily imply" the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983. *Edwards*, 1997 WL 255341, *5. While it has been determined by the Court that the minimum requirements of procedural due process were violated because the findings of the disciplinary officer were not supported by "some evidence," Petitioner has not shown that he will suffer irreparable injury, nor that he does not have an adequate remedy at law. *O'Shea v. Littleton*, 94 S.Ct. 669, 678 (1974). Therefore, injunctive relief is not available as "the principles of equity, comity, and federalism" restrain a federal court from issuing an injunction "against state officers engaged in the administration of the State's criminal laws in the absence of a showing of irreparable injury which is 'both great and immediate.'" *Id.* (quoting *Younger v. Harris*, 91 S.Ct. 746, 751 (1971)).

CONCLUSION

After carefully reconsidering the authority as set forth in *Canady v. Reynolds*, 880 P.2d at 399, the complete record, including the Special Report and *in camera* review of the confidential statement, the Court finds merit in the State's argument and determines that under Oklahoma law the Petitioner "has the writ of mandamus to force prison officials to provide him with constitutional procedural due process." *Id.* at 399. Petitioner has an immediate state remedy, a writ of mandamus, to ensure due process is provided within the Department of Corrections' disciplinary system. *Id.* at

400.

IT IS HEREBY ORDERED that:

- (1) Petitioner's § 1983 declaratory and injunctive claim relative to the use of confidential informant statements is **dismissed without prejudice**, and,
- (2) the petition for writ of habeas is **dismissed without prejudice** for failure to exhaust state remedies.

SO ORDERED THIS 30 day of June, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 7-7-97

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

JUN 30 1997 *PL*

TIMOTHY ATKINS,)
)
 Plaintiff,)
)
 vs.)
)
 JOHNNY PRICE, and TULSA POLICE DEPT.,)
)
 Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-1117-K ✓

ORDER

A Report and Recommendation of the Magistrate was filed June 13, 1997. No objections have been filed by the parties. The Court adopts the Magistrate's Report and Recommendation and **DISMISSES** Plaintiff's cause of action **WITHOUT PREJUDICE**.

Dated this 30 day of June 1997.

Terry C. Kern
TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

DOUGLAS BOWEN,)	
)	
Plaintiff,)	
)	
vs.)	No. 96-C-603-K ✓
)	
INCOME PRODUCING MANAGEMENT)	
OF OKLAHOMA, INC.,)	
)	
Defendant.)	

FILED

JUN 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

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

IT IS THEREFORE ORDERED that the Plaintiff Douglas Bowen recover from the Defendant Income Producing Management of Oklahoma, Inc., the sum of \$372,230.00, with post-judgment interest thereon at the rate of 5.65 percent as provided by law.

ORDERED this 30 day of June, 1997.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

65

7-1-97

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

JACKIE L. MARTIN,)
)
 Plaintiff,)
)
 vs.)
)
 ROBIN FAGALA, STANLEY GLANZ,)
 and WEXFORD HEALTH SERVICES,)
)
 Defendant.)

No. 97-CV-39-K

FILED
JUN 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

A Report and Recommendation of the Magistrate was filed June 13, 1997.
No objections have been filed by the parties. The Court adopts the Magistrate's
Report and Recommendation and **DISMISSES** Plaintiff's cause of action **WITHOUT**
PREJUDICE.

Dated this 30 day of June 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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