

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

**F I L E D**

DEC 12 1997 *PLW*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

KEITH MURR, et al.,

Plaintiffs,

vs.

STEVEN KAISER, et al.,

Defendants.

Case No. 96-CV-961-B

ENTERED ON DOCKET

DATE DEC 15 1997

ORDER

Came on this day for hearing a pretrial conference in the above styled matter. Pursuant to the oral motion to dismiss of Defendant Joe Wanenmacher, and Plaintiffs' stipulation thereto, Defendant Joe Wanenmacher is hereby dismissed without prejudice.

IT IS SO ORDERED this 12th day of December, 1997.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

DEC 12 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ROBERT KARP, M.D.,

Plaintiff,

v.

UNIVERSITY OF OKLAHOMA, THE  
BOARD OF REGENTS THEREOF,

Defendant.

Case No. 97-CV-739-H

ENTERED ON DOCKET

DATE 12-15-97

**ORDER**

This matter comes before the Court on consideration of Plaintiff's failure to comply with both the local rules and the order of this Court and Plaintiff's "Motion for Transfer to State Court" (Docket # 10) filed on December 8, 1997.

Plaintiff brought this action seeking a preliminary injunction and a declaratory judgment that Defendant has breached its contract with Plaintiff (Docket # 1, # 3). A hearing was held in this matter on August 25, 1997. At that hearing, because the employment contract was evidence necessary to determine whether Defendant was in breach, Plaintiff was ordered to provide a copy of the alleged contract with the Court by 10 a.m. on August 26, 1997. Plaintiff failed to do so. His motion for preliminary injunction subsequently was denied by order of August 26, 1997 (Docket # 4).

Defendant then filed a motion to dismiss on September 11, 1997 (Docket # 8). Plaintiff failed to respond to Defendant's motion within the time allotted by the local rules. Despite Plaintiff's violation of the local rules, on November 25, 1997, the Court ordered Plaintiff to respond to Defendant's motion by December 5, 1997, set a hearing date for Defendant's motion, and expressly warned Plaintiff that his failure to comply with the Court's order to respond would result in dismissal of his action for failure to prosecute. Plaintiff nevertheless has failed to respond

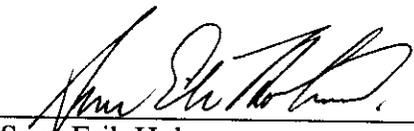
to Defendant's motion. Instead, Plaintiff filed a "Motion for Transfer to State Court" (Docket # 10) on December 8, 1997.

Plaintiff cites no authority, and the Court is not aware of any, pursuant to which the Court may transfer an action originally filed in federal court to state court. Accordingly, Plaintiff's motion to transfer is hereby denied. Further, Plaintiff's action is dismissed without prejudice. Plaintiff has failed to comply with Court's November 25, 1997 order requiring a response to Defendant's motion to dismiss by December 5, 1997.<sup>1</sup> In his motion to transfer, Plaintiff does not contest or otherwise respond in any way to Defendant's motion to dismiss. To the contrary, in requesting transfer to state court, Plaintiff appears to concede that the substance of Defendant's motion to dismiss has merit. Accordingly, even if the Court deemed Plaintiff's motion to be a response to Defendant's motion to dismiss, such response in effect concludes that this lawsuit is not properly in federal court. Since the law does not permit the requested "transfer" to state court, the appropriate action for the Court under these circumstances would be to dismiss the case.

For the reasons stated above, this action is hereby dismissed without prejudice. The hearing on Defendant's motion to dismiss scheduled for Friday, December 12, 1997 at 1:30 P.M. is stricken.

IT IS SO ORDERED.

This 12<sup>TH</sup> day of December, 1997.

  
Sven Erik Holmes  
United States District Judge

---

<sup>1</sup> Plaintiff dated his motion to transfer December 4, 1997, and certified that he "served" it on the Court Clerk on that date. In fact, the motion was filed the day it was received by the Clerk, December 8, 1997.

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

**FILED**  
DEC 12 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SHANNON R. LEAK, )  
)  
Plaintiff, )  
)  
vs. )  
)  
IMPERIAL CREDIT INDUSTRIES, INC. )  
d/b/a Auto Marketing Network, Inc., a )  
Florida Corporation; METROPOLITAN )  
LIFE INSURANCE COMPANY; and )  
AMERICAN FAMILY LIFE )  
ASSURANCE COMPANY OF COLUMBUS, )  
)  
Defendants. )

Case No. 97 CV 977 H (W)  
Judge: Holmes

ENTERED ON DOCKET  
DATE 12-15-97

**DISMISSAL WITHOUT PREJUDICE**

COMES NOW the Plaintiff, Shannon R. Leak, and dismisses, without prejudice, her claims against the Defendants, Imperial Credit Industries, Inc., d/b/a Auto Marketing Network, Inc., a Florida Corporation, United Health Care Insurance Company; and American Family Life Assurance Company of Columbus.

Respectfully submitted,

Mark T. Hamby  
Mark T. Hamby, OBA #16942  
**HOWARD, WIDDOWS, BUFOGLE  
& VAUGHN, P.C.**  
15 West 6th Street, Suite 1500  
Tulsa, OK 74119  
918/744-7440 Fax: 918/744-9358  
**ATTORNEYS FOR PLAINTIFF**

11

9

CB

**CERTIFICATE OF MAILING**

I, Mark T. Hamby, hereby certify that on the \_\_\_\_\_ day of December, 1997, a true and correct copy of the foregoing was mailed postage prepaid thereon to the following:

**IMPERIAL CREDIT INDUSTRIES, INC.**

Attn. David Hourigan  
23550 S HAWTHORNE BLVD STE 230  
TORRANCE CA 90505

Brent M. Johnson

**FELLERS, SNIDER, BLANKENSHIP,  
BAILEY & TIPPENS**

100 N BROADWAY STE 1700  
OKLAHOMA CITY OK 73102

David Benoit

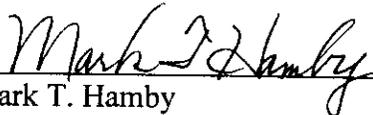
**ALSTON & BIRD**

ONE ATLANTIC CENTER  
1201 W PEACHTREE ST  
ATLANTA GA 30309-3424

Jackie Albright

**UNITED HEALTHCARE**

9900 BREN RD  
MINNITONKA MN 55343

  
Mark T. Hamby

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

**FILED**

DEC 18 1997

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

CARL C. HAMILTON  
SSN: 442-44-1733,

Plaintiff,

v.

KENNETH S. APFEL,  
Commissioner of the Social Security  
Administration,

Defendant.

CASE NO. 96-CV-666-M

FILED  
DEC 15 1997

**JUDGMENT**

Judgment is hereby entered for Plaintiff and against Defendant. Dated  
this 12<sup>th</sup> day of Dec., 1997.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

DEC 18 1997

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

CARL C. HAMILTON,  
SSN: 442-44-1733,  
  
PLAINTIFF,  
  
vs.  
  
KENNETH S. APFEL,  
Commissioner of the Social  
Security Administration,<sup>1</sup>  
  
DEFENDANT.

CASE No. 96-CV-666-M

ENTERED FOR THE COURT  
DATE 12/18/97

**ORDER**

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

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. § 405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine

---

<sup>1</sup> Kenneth S. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Kenneth S. Apfel should be substituted for John J. Callahan, Acting Commissioner, who was previously substituted 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).

<sup>2</sup> Plaintiff's August 18, 1992 application for disability benefits was denied on November 17, 1992 and affirmed on reconsideration. A hearing before an Administrative Law Judge (ALJ) was held August 8, 1994. By decision dated December 8, 1995 the ALJ entered the findings which are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on May 20, 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.

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, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born September 1, 1943 and was, at the time of the decision, a person approaching advanced age. He has an 11th grade education. His past relevant work (PRW) is route salesman, bus driver and sheet metal worker. He claims to be unable to work since December 21, 1991 due to low back and neck pain, fatigue, severe muscle spasms, high blood pressure, liver disease, collagen disease and hepatitis. The ALJ determined that Plaintiff has severe degenerative disc disease but that he has the residual functional capacity (RFC) to perform work related activities except for work involving lifting in excess of 50 pounds and frequent stooping. A vocational expert testified regarding the skill and exertional level of Plaintiff's PRW. The ALJ found Plaintiff is able to perform his past relevant work of

route salesman and bus driver. Therefore, the ALJ concluded Plaintiff is not disabled as that term is used in the Social Security Act. The case was thus decided at step four 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 the ALJ: failed to properly evaluate Plaintiff's allegations of disabling pain; improperly discredited Plaintiff's credibility; improperly dismissed a treating physician's report; failed to cite legitimate reasons for rejecting the opinions of two examining physicians; ignored other evaluations of the severity of Plaintiff's condition; and, minimized the significance and severity of the findings on two bone scans.

After careful review of the record and the ALJ's decision, the Court finds the Commissioner's determination to be flawed in several respects, requiring reversal of the decision and remand of the claim to the Commissioner for further consideration.

#### Pain and Credibility Analysis

When a "loose nexus" between the impairment and the allegations of pain associated with that impairment has been established, the ALJ is required to consider Plaintiff's assertions of severe pain and to "decide whether he believes them." *Thompson v. Sullivan*, 987 F.2d 1482, 1489 (10th Cir. 1993); *Luna v. Bowen*, 834 F.2d 161, 163 (10th Cir. 1987). To do this, he should consider factors such as "the levels of medication and their effectiveness, the extensiveness of the attempts

(medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence." *Id.*, quoting *Hargis*, 945 F.2d 1482, 1489 (10th Cir. 1991) (further quotation omitted).

In this case the nexus between Plaintiff's back injury and his complaints of back and neck pain has been established. The medical portion of the record documents the history of injury to Plaintiff's back while working and medical consultation, treatment and follow-up care for neck and back pain consistently from March 1991 through September 1993.<sup>3</sup> Although the ALJ did explain sufficiently his determination of Plaintiff's credibility regarding high blood pressure and liver disease, he did not explain why the specific evidence relevant to each factor led him to conclude Plaintiff's subjective complaints of back and neck pain were not credible.

The ALJ stated:

The claimant testified that his main complaint was neck pain. He described the pain as sharp and severe and spread all over his body. He said the pain was continuous and was relieved by bedrest or when he was in a recliner. He stated that medication or hot showers provided little relief. His wife, Judy Hamilton, testified and concurred with his testimony.

---

<sup>3</sup> In his decision, the ALJ summarized, in great detail, the body of the medical record. In light of the determination of this Court that the ALJ failed to link the credibility analysis with the objective evidence, another recitation of the content of the medical record would serve no purpose and is not done in this Order.

The Administrative Law Judge has considered the testimony at the hearing and finds that this testimony is inconsistent with the record as a whole. The claimant has greatly restricted his lifestyle but the record does not show any necessity to limit his activities to this degree. After considering all the evidence of record, the Administrative Law Judge finds that the claimant's allegations of inability to work due to pain and other symptomatology are not credible to the extent alleged and are not consistent with the medical evidence.

[R. 19]. This conclusory statement leaves the Court to speculate what specific evidence led the ALJ to find claimant's back and neck pain was not disabling. In light of statements by two of Plaintiff's treating physicians that they considered him "completely impaired" and "totally disabled" as to his former job, discussion of the ALJ's reasoning behind this finding was required. [R. 187, 195].

Credibility determinations are peculiarly the province of the finder of fact and the Court will not upset such determinations when supported by substantial evidence. *Diaz v. Secretary of Health & Human Servs.*, 898 F.2d 774, 777 (10th Cir.1990). However, "[f]indings as to credibility should be closely and affirmatively linked to substantial evidence and not just a conclusion in the guise of findings." *Huston v. Bowen*, 838 F.2d 1125, 1133 (footnote omitted); *see also Marbury v. Sullivan*, 957 F.2d 837, 839 (11th Cir.1992) (ALJ "must articulate specific reasons for questioning the claimant's credibility" where subjective pain testimony is critical); *Williams on Behalf of Williams v. Bowen*, 859 F.2d 255, 261 (2d Cir.1988) ("failure to make credibility findings regarding ... critical testimony fatally undermines the Secretary's argument that there is substantial evidence adequate to support his conclusion that

claimant is not under a disability"). Here, the link between the evidence and credibility determination is missing. The ALJ's conclusion is all that has been provided. See *Kepler v. Chater*, 68 F.3d 387 (10th Cir. 1995) (finding that the ALJ's opinion contained only conclusory findings concerning pain and credibility, remanding the case for the limited purpose of requiring the express findings in accordance with *Luna*).

The Court finds that the ALJ failed to indicate the credibility choices made and the basis for those choices in resolving the critical fact of the truthfulness of Plaintiff's subjective symptoms and complaints. *Kepler*, p. 391. Therefore, this case must be remanded to the Commissioner for the purpose of making express findings in accordance with *Luna* concerning Plaintiff's claim of disabling pain.

#### Treating Physician's Opinion and Bone Scans

Plaintiff further argues that the ALJ erred in evaluating the medical evidence of Plaintiff's limitations, in particular, the report of Dr. Hutton of September 10, 1992.

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. However, 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) .

Here, other than in the summarization of evidence in the decision, there is no reference to the notation of Dr. Lantz on October 21, 1992 that Plaintiff was totally disabled as to his former job. The assumption, based upon this omission, is that the ALJ disregarded it and, therefore, rejected it. An explanation for the rejection of this opinion was required in the decision. *Frey*, p. 514.

The ALJ concluded Dr. Hutton's September 1992 report was sympathetic and out of the realm of Dr. Hutton's expertise despite bone scans and office notes which would seem to support Dr. Hutton's opinion. [R. 143, 152-153, 162, 187-188]. Furthermore, as Plaintiff has pointed out to the Court, the ALJ misread a St. Francis Hospital Emergency Room report that Plaintiff "could walk", interpreting it as "could work." [R. 17, 157-158]. The ALJ also concluded that the final determination of the cause of Plaintiff's abnormal liver tests had been attributed to the medication he had taken. [R. 20]. Actually, the last report in the record regarding Plaintiff's liver condition called for another liver evaluation because the diagnosis was unclear. [R. 197].

The Court finds that the ALJ failed to articulate good cause for disregarding and rejecting the opinions of Plaintiff's treating physicians and the clinical findings that tend to support their conclusions as to Plaintiff's condition. *Frey v. Bowen*, 816 F.2d 508, 515 (10th Cir. 1987).

it is unclear whether the ALJ rejected these reports in favor of other medical evidence to establish Plaintiff's RFC. In light of the inadequate discussion of the weight the ALJ accorded the treating physician's records compared to the weight given the other evidence, including the report of Dr. Farrar, the Court finds the ALJ's conclusory statement of his reason for rejecting the opinion of the examining physicians is insufficient under the established precedent. *Frey*, p. 515.

Conclusion

The Court finds the ALJ's rejection of treating and examining physicians' records and reports without articulating good cause and his misapplication of the legal standard for the assessment of claims of disabling pain call into question more generally his conclusions regarding credibility. *Frey*, p. 517 (citing *Broadbent v. Harris*, 698 F.2d 407, 413-14 (10th Cir. 1983)). The Commissioner must apply the correct legal standards, and show that he has done so. *Winfrey*, p.1019. Therefore, this case is REMANDED FOR RECONSIDERATION.

In remanding this case, the Court does not dictate the result. Rather, remand is ordered to assure that a proper analysis is performed and the correct legal standards are invoked in reaching a decision based upon the facts of the case. *Kepler*, at 391.

SO ORDERED this 12<sup>th</sup> day of Dec., 1997.

  
FRANK H. MCCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

FILED

DEC 11 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

TERESA SUE FABES, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 GULF INSURANCE COMPANY, a foreign )  
 corporation, THE TRAVELERS )  
 INSURANCE COMPANY, a foreign )  
 corporation, and THE TRAVELERS )  
 INDEMNITY COMPANY, a foreign )  
 corporation, )  
 )  
 Defendants. )

Case No. 96-C-357B

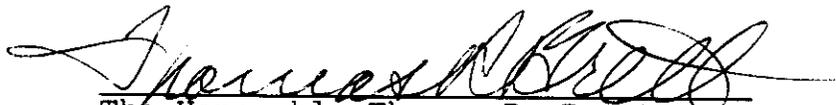
ENTERED ON DOCKET

DATE ~~DEC 15 1997~~

ORDER OF DISMISSAL WITH PREJUDICE

NOW, on this 11<sup>th</sup> day of December, 1997, came on for consideration the Stipulation of Dismissal With Prejudice filed by the parties to the above styled and numbered cause. The Court finds that said Stipulation is proper pursuant to Rule 41 of the Federal Rules of Civil Procedure and,

IT IS THEREFORE ORDERED that the above styled and numbered cause be, and is hereby, dismissed with prejudice to the refiling thereof.



The Honorable Thomas R. Brett  
United States District Judge

183

CLM/B

ENTERED ON DOCKET

DATE 12-15-97

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

**FILED**

RUFORD HENDERSON, *et al.*, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 AMR CORPORATION, AMERICAN )  
 AIRLINES, INC. and THE SABRE )  
 GROUP, INC., )  
 )  
 Defendants. )

DEC 12 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
Case No. 97-CV-457-K (W)

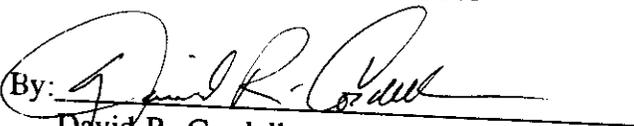
STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Elma Bellfield, and Defendants, AMR Corporation, American Airlines, Inc. and The SABRE Group, Inc., pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure stipulate to the dismissal of this action, with prejudice, each party to bear their respective attorneys' fees and costs.

ELMA BELLFIELD  
PLAINTIFF, *PRO SE*



DAVID R. CORDELL, OBA #11272  
JOHN A. BUGG, OBA #13665

By: 

OF COUNSEL:

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

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

Attorneys for Defendants  
AMR CORPORATION, AMERICAN AIRLINES,  
INC. and THE SABRE GROUP, INC.

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

ERNEST MIETTUNEN, individually,  
and, JAMES and LOUISE  
JOHNSON, as custodians of  
ETHAN MIETTUNEN,

Plaintiffs,

v.

PAUL CUSTER and FRANCIS CUSTER,  
FRANCIS RANGLES and CERTAIN  
UNDERWRITERS AT LLOYD'S  
LONDON, by and through their  
lead underwriter, PETER MALCOLM  
BROTHERTON,

Defendants.

ENTERED ON DOCKET

DATE 12-12-97

Case No. 97-CV-465-H

**FILED**

DEC 11 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

This matter comes before the Court to clarify actions that have occurred in this and a case related to it, Case No. 97-cv-897-H.

The instant action arose in 1995, when Ethan Miettunen, age four, was injured while riding on a go-kart driven by Justin Randles, age nine. Ernest Miettunen, individually, and, James and Louise Johnson, as custodians of Ethan Miettunen ("Meittunen Plaintiffs") brought Case No. 97-cv-465 in state court, alleging that Justin's parents, Paul and Francis Custer, were negligent in allowing Justin to operate the go-kart. The Meittunen Plaintiffs alleged that Mr. and Mrs. Custer's negligence resulted in Ethan's serious injuries. Judgment was entered in that case against the Custer's in the amount of \$489,963.87.

Defendant Lloyd's of London ("Lloyd's"), believing a garnishment proceeding against it had been filed in the state case, removed case No. 97-cv-465-H to this Court on May 13, 1997. A hearing was held in this matter on September 17, 1997. At that time, the Court advised the parties that a copy of the garnishment against Lloyd's had not been filed with the Court. The Court ordered the parties to file the garnishment papers with the Court. Lloyd's also notified the Court that it intended to remove to this Court a related state case, in which Mr. Custer alleged

Defendant Lloyd's wrongfully denied him coverage for Ethan's accident under his homeowner's policy. The Court directed Lloyd's to move to consolidate the two cases upon removal of Mr. Custer's action. On September 30, 1997, Lloyd's removed the related case, now Case No. 97-cv-897-H. However, Lloyd's did not move to consolidate the two related actions, because it soon became apparent that no garnishment action had ever been filed against Lloyd's in the first case. Accordingly, Defendant Lloyd's moved to dismiss the claims of the Meittunen Plaintiffs against it on October 31, 1997, since no garnishment had been issued against it (Docket # 8). The Meittunen Plaintiffs failed to respond within the time allotted by the local rule. Nevertheless, on December 1, 1997, the Court ordered Plaintiffs to respond to Lloyd's motion to dismiss or risk dismissal for failure to prosecute.

The Meittunen Plaintiffs responded on December 5, 1997, alleging that the new case, Case No. 97-cv-897, has been consolidated with the first case, Case No. 97-cv-465, and that Lloyd's motion to dismiss the first case is moot since all the parties and issues are properly before the Court in the consolidated cases. However, since Lloyd's never filed a motion to consolidate, the two cases were not consolidated. Further, the Meittunen Plaintiffs have filed all subsequent pleadings in the first case filed, rather in the proper case, despite the fact that the two cases were never consolidated.

It is clear to the Court that the first action, Case No. 97-cv-465 should be dismissed. Lloyd's, the party who removed the case, was never a party to that case as it originally was filed in the state court. Moreover, Lloyd's was not brought into the case through a postjudgment garnishment proceeding. Therefore, there is nothing left to be done in Case No. 97-cv-465.

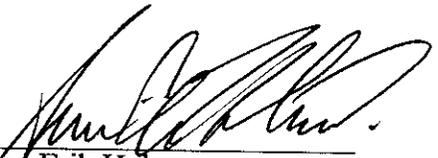
In order to clarify the procedural posture of each case, and to avoid the necessity of having the Meittunen Plaintiffs refile their pleadings in the proper action, the Court hereby orders the following:

1. The Court Clerk's Office is directed to file the original documents of Docket # 10 and # 11 in Case No. 97-cv-465 in Case No. 97-cv-897. Copies of Docket # 10 and # 11 shall remain in the file for Case No. 97-cv-465.
2. Defendant's motion to dismiss the Complaint in Case No. 97-cv-465 is granted. Case No. 97-cv-465 is hereby stricken from the docket.

The parties are directed that all future filings in this matter are to be filed under Case No. 97-cv-897. A similar order will be entered in Case No. 97-cv-897.

IT IS SO ORDERED.

This 10<sup>TH</sup> day of December, 1997.

  
Sven Erik Holmes  
United States District Judge

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

JOHN LLOYD SEXTON JR., individually )  
and on behalf of all other persons similarly )  
situated, )

Plaintiffs, )

EDWIN EDGAR JONES, individually )  
and on behalf of all other persons similarly )  
situated, )

Plaintiff Intevenor )

vs. )

RUSSELL P. HASS, sub. nom. RICHARD )  
R. CLARK, Special Judge, District )  
Court for the Fourteenth Judicial District, )  
Tulsa County, State of Oklahoma, )

Defendant. )

**FILED**

DEC 11 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 97-CV-753-B(M)

ENTERED ON DOCKET

DATE DEC 12 1997

**NOTICE OF VOLUNTARY DISMISSAL**

Plaintiff, John Lloyd Sexton, Jr., and Plaintiff Intervenor, Edwin  
Edgar Jones, hereby voluntarily dismiss this action and all claims against the  
defendant, pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure.



Steven A. Novick  
D. Gregory Bledsoe  
1717 S. Cheyenne Avenue  
Tulsa, OK 74119  
Telephone: 918-582-4441 or 599-8123  
Facsimile: 918-582-7830

*Attorneys for Plaintiff and  
Plaintiff Intervenor*

CERTIFICATE OF SERVICE

This is to certify that a true and complete copy of the foregoing Notice of Voluntary Dismissal was mailed, postage prepaid, this 11<sup>th</sup> day of December, 1997, to Mr. Charles K. Babb, Assistant Attorney General, 4545 N. Lincoln Blvd., Suite 260, Oklahoma City, OK 73105.

  
\_\_\_\_\_  
Steven A. Novick

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

FILED

DEC 11 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MCDONNELL DOUGLAS  
CORPORATION,

Plaintiff,

v.

Civil Action No. 97-339 B (J)

CHESTER ENGINEERS, INC.,  
LAIDLAW ENVIRONMENTAL SERVICES,  
INC., AND U.S. POLLUTION CONTROL,  
INC.,

Defendants.

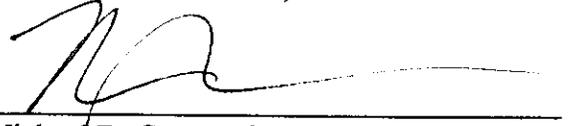
ENTERED ON DOCKET  
DATE DEC 12 1997

**STIPULATION FOR DISMISSAL WITHOUT PREJUDICE  
OF DEFENDANT LAIDLAW ENVIRONMENTAL SERVICES, INC.**

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, Plaintiff McDonnell Douglas Corporation, in the above styled and numbered action hereby dismisses without prejudice its claim which was asserted in this matter against Defendant Laidlaw Environmental Services, Inc.

Dated this 11<sup>th</sup> day of December, 1997.

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



Michael D. Graves, OBA #3539  
Claire V. Eagan, OBA #554  
320 South Boston Avenue, Suite 400  
Tulsa, Oklahoma 74103-3708  
(918) 594-0400  
ATTORNEYS FOR PLAINTIFF,  
MCDONNELL DOUGLAS CORPORATION

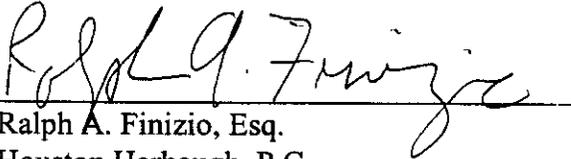
18

CT

APPROVED:



Mark Coldiron  
Robert L. Roark  
Patrick H. Kernan  
MCKINNEY, STRINGER & WEBSTER, P.C.  
101 North Broadway, Suite 800  
Oklahoma City, OK 73102  
**Attorneys for Defendants Laidlaw and USPCI**



Ralph A. Finizio, Esq.  
Houston Harbaugh, P.C.  
12th Floor, Two Chatham Center  
Pittsburgh, PA 15219  
**Attorney for Defendant, Chester Engineers**



Paul Kingstover, Esq.  
Stuart, Biolchini, Turner & Givray, P.C.  
15 East Fifth Street, Suite 3300  
Tulsa, OK 74103  
**Attorney for Defendant, Chester Engineers**

DATE 12-12-97

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

**F I L E D**

DEC 11 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

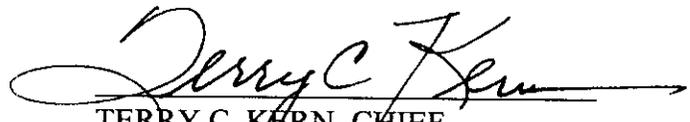
CHRISTIAN NJOKU, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 HOLIDAY INN, INC., a corporation in the )  
 state of Tennessee, and SAM FRIEDMAN, )  
 AKRUM BEN KHAYAL, AND BYRUM )  
 TEEKELL, d/b/a Tulsa Motels, Ltd., an )  
 Oklahoma limited partnership, )  
 )  
 Defendants. )

No. 97-C-120-K

**ORDER**

Before the Court are the Motions of Defendants Holiday Inn, Inc., Sam Friedman, and Akrum Ben Khayal to Dismiss. For good cause shown, the Court grants Defendants' Motions to Dismiss. Further, the Court dismisses this action, without prejudice, for the failure of Plaintiff's Counsel to attend the pre-trial conference and failure to submit a proposed pre-trial order. The Court further orders that this case should not be refiled until Plaintiff has made a more definite statement of the proper Defendants.

ORDERED THIS 10 DAY OF DECEMBER, 1997.

  
 TERRY C. KERN, CHIEF  
 UNITED STATES DISTRICT JUDGE

24

*gr*

ENTERED ON DOCKET

DATE 12-12-97

**FILED**

DEC 10 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

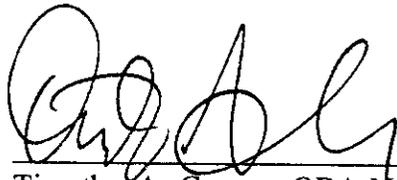
HARTFORD LIFE & ACCIDENT INSURANCE COMPANY,	)
	)
	)
Plaintiff,	)
	)
v.	)
	)
DANYELL STILLWEL and CONNIE RUTH SMITH,	)
	)
Defendants.	)

Case No. 97-CV-312H

**JOINT STIPULATION OF DISMISSAL**

COMES NOW the parties, Hartford Life & Accident Insurance Company, Connie Ruth Smith, and Danyell Stillwel, by and through their counsel of record, and hereby stipulate for the dismissal of this action with prejudice pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

The parties are to bear their own fees and costs associated with this action.



Timothy A. Carney, OBA No. 11784  
GABLE GOTWALS MOCK SCHWABE  
KIHLE GABERINO  
2000 Boatmen's Center  
15 West 6th Street  
Tulsa, Oklahoma 74119-5447  
(918) 582-9201

ATTORNEYS FOR PLAINTIFF,  
HARTFORD LIFE & ACCIDENT  
INSURANCE COMPANY

5

*gr* *CLJ*



John M. Freese, Sr.

Daniel B. Graves

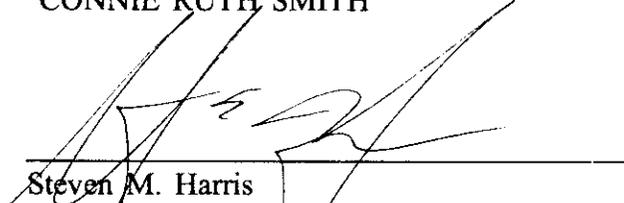
FREESE MARCH & GRAVES, P.A.

4510 East 31st Street

Tulsa, OK 74135

(918) 749-9331

ATTORNEYS FOR DEFENDANT,  
CONNIE RUTH SMITH



Steven M. Harris

DOYLE & HARRIS

2431 E. 61st Street

Suite 260

Tulsa, OK 74136

(918) 743-1276

ATTORNEYS FOR DEFENDANT,  
DANYELL STILLWEL



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

DEC 11 1997

**HOMEWARD BOUND, INC., et al.,** )  
)  
Plaintiffs, )  
)  
vs. )  
)  
**THE HISSOM MEMORIAL CENTER, et al.,** )  
)  
Defendants. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 85-C-437-E

ENTERED ON DOCKET  
DEC 11 1997

**ORDER AND JUDGMENT**

The Court has reviewed the stipulation of the parties concerning fees and expenses incurred on the SURS audit matters and the Defendants' Motion for Partial Reconsideration filed on September 15, 1997. The Court hereby approves the Stipulation of the parties.

The Court hereby awards the firm of Bullock & Bullock attorney fees and expenses for the SURS audit matters in the amount of \$10,154.05.

IT IS THEREFORE ORDERED that the Department of Human Services, the Department of Rehabilitation Services, and the Oklahoma Health Care Authority, are each jointly and severally liable for the payment of Plaintiffs' counsel, Bullock & Bullock, for attorney fees and expenses in the amount of \$10,154.05, and judgment in the amount of \$10,154.05 is hereby entered on this day.

ORDERED this 10<sup>th</sup> day of December, 1997.

  
\_\_\_\_\_  
JAMES O. ELLISON, Senior Judge  
United States District Court

745

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

**FILED**  
DEC 11 1997 *PLW*

**HOMEWARD BOUND, INC., et al.,** )  
 )  
 Plaintiffs, )  
 vs. )  
 )  
 **THE HISSOM MEMORIAL CENTER, et al.,** )  
 )  
 Defendants. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 85-C-437-E /

ENTERED ON DOCKET  
DEC 11 1997

**ORDER AND JUDGMENT**

Plaintiffs' counsel, Bullock & Bullock, filed Attorney Fee Applications on October 9, 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 Stipulation filed by the parties and approves the Stipulation of the parties.

The Court hereby awards the firm of Bullock & Bullock attorney fees and expenses in the amount of \$64,899.25.

IT IS THEREFORE ORDERED that the Department of Human Services, the Department of Rehabilitation Services, and the Oklahoma Health Care Authority, are each jointly and severally liable for the payment of Plaintiffs' counsel, Bullock & Bullock, for attorney fees and expenses in the amount of \$64,899.25 and judgment in the amount of \$64,899.25 is hereby entered on this day.

ORDERED this 10<sup>th</sup> day of December, 1997.

  
\_\_\_\_\_  
JAMES O. ELLISON, Senior Judge  
United States District Court

*796*

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

**FILED**

DEC 09 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

REMINGTON UNIVERSITY, INC.,

Plaintiff,

v.

RICHARD W. RILEY, SECRETARY  
OF THE UNITED STATES DEPARTMENT  
OF EDUCATION,

Defendant.

Case No. 96-CV-656-H

ENTERED ON DOCKET

DATE 12-11-97

**JUDGMENT**

This matter came before the Court on a Motion for Summary Judgment by Defendant. The Court duly considered the issues and rendered a decision in accordance with the order filed on November 6, 1997.

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

IT IS SO ORDERED.

This 9<sup>th</sup> day of December, 1997.



Sven Erik Holmes  
United States District Judge

90



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

**F I L E D**

DEC 10 1997 *llj*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DELISA ATCHLEY,

Plaintiff,

vs.

THE NORDAM GROUP, INC.,

Defendant.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

Case No. 96-C-344-C ✓

ENTERED ON DOCKET

DATE DEC 11 1997

JUDGMENT  
FOR  
DELISA ATCHLEY

This matter came before the Court for trial by jury on August 18, 1997. At the conclusion of a four day trial, the jury rendered a verdict on August 21, 1997 in favor of the plaintiff DELISA ATCHLEY and against the defendant THE NORDAM GROUP, INC. on plaintiff's claims brought pursuant to the Pregnancy Discrimination Act of Title VII, 42 U.S.C., Section 2000e and the Family and Medical Leave Act, Title 29 United States Code, Section 2601.

Based upon the jury awarding plaintiff \$ 9,000 in back wages on her claim under the Family and Medical Leave Act, the Court makes the additional finding that plaintiff DELISA ATCHLEY is entitled to an award of liquidated damages in an equivalent amount of \$ 9,000 in finding that defendant THE NORDAM GROUP, INC. failed to establish that it acted in good faith or that it had reasonable grounds for believing that its failure to reinstate plaintiff following her scheduled maternity leave was not a violation of 29 U.S.C § 2615.

ACCORDINGLY, Based upon the jury verdict and the findings of the Court:

43

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff DELISA ATCHLEY, have and recover judgment against the defendant, THE NORDAM GROUP, INC., as follows: \$ 9,000 in back pay; \$ 8,000 for emotional distress and other nonpecuniary losses, \$ 9,000 in liquidated damages under the Family and Medical Leave Act and \$ 65,000 in punitive damages under the Pregnancy Discrimination Act of Title VII; together with post-judgment interest at the rate of 5.468 percent per annum pursuant to 28 U.S.C. § 1961; and for her costs of this action.

IT IS SO ORDERED this 10<sup>th</sup> day of December, 1997.



H. DALE COOK  
Senior United States District Judge

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

**FILED**  
DEC 10 1997 *ml*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DELISA ATCHLEY, )  
 )  
 Plaintiff, )

vs. )

Case No. 96-C-344-C /

THE NORDAM GROUP, INC., )  
 )  
 Defendant and )  
 Third-Party Plaintiff, )

ENTERED ON DOCKET

vs. )

DATE DEC 11 1997

DESIGN SUPPORT SERVICES, INC. )  
 )  
 Third-Party Defendant. )

JUDGMENT  
FOR  
DESIGN SUPPORT SERVICES, INC.

This matter came before the Court for trial by jury on August 18, 1997. At the conclusion of plaintiff's case in chief, the Court entered a direct verdict in favor of DESIGN SUPPORT SERVICES, INC. (DSS) and against the plaintiff DELISA ATCHLEY pursuant to Rule 50 F.R.Cv.P. on plaintiff's claims brought pursuant to the Pregnancy Discrimination Act of Title VII, 42 U.S.C. Section 2000e and the Family and Medical Leave Act, Title 29 United States Code, Section 2601. Accordingly, judgment should be rendered in favor of DDS and against the plaintiff DELISA ATCHLEY.

In regard to the Third Party Complaint, the Court finds that a Contract Labor Agreement was executed on January 6, 1992, as between the third party plaintiff NORDAM and the third party defendant DSS. In the third party complaint, NORDAM, as "BUYER" seeks indemnification as against DSS, as "SELLER" based on the following provision contained within the subject Contract Labor Agreement:

It is understood that the personnel furnished will at all times be considered SELLER'S employees, and in accepting this agreement, SELLER agrees to defend, indemnify, and hold BUYER harmless from and against any and all damages, expenses, liabilities, and claims arising from sickness, injuries to, or death, of any person or damage to, or loss of any property caused (sic) any act or omission by SELLER's employees. Personnel furnished under this agreement are distinctly understood to be SELLER's responsibility, including payment of wages, compensation, hiring and firing, and in no instances or sense shall they be construed as BUYER's employees.

The Court finds that the above provision does not provide for indemnity against acts and omissions on the part of NORDAM. Indemnity would only apply if NORDAM were without fault. In order for a contractual right of indemnity to exist, "[t]he language employed must clearly and definitely show an intention to indemnify against the loss or liability involved." Allied Hotels Company v. H.&J. Construction Co., 376 F.2d 1, 2 (10th Cir. 1967). Courts may not read into an indemnity contract that which does not actually appear in it or which can not be reasonably interpreted from it. Id. Accordingly, judgment should be entered in favor of DSS, and against NORDAM on the Third Party Complaint for indemnification.

Based upon the findings and conclusions of the Court:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that DESIGN SUPPORT SERVICES, INC., have and recover judgment against the plaintiff DELISA ATCHLEY, on plaintiff's

claims for violation of the Pregnancy Discrimination Act of Title VII, and the Family and Medical Leave Act, together with costs of this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that DESIGN SUPPORT SERVICES, INC., have and recover judgment against THE NORDAM GROUP, INC. on its Third Party Complaint for indemnification, together with costs of this action.

IT IS SO ORDERED this 10<sup>th</sup> day of December, 1997.



H. DALE COOK  
Senior, United States District Judge

FILED

DEC 11 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

MARY W. COLLINS, et al., )  
 )  
 Plaintiffs, )  
 v. )  
 )  
 INTERNATIONAL BUSINESS MACHINES )  
 CORPORATION, et al., )  
 )  
 Defendants. )

CASE NO. 97-CV-856-K ✓

ENTERED ON DOCKET

DATE 12-11-97

PLAINTIFF'S  
STIPULATION OF DISMISSAL

Plaintiff, Mary W. Collins, by and through her counsel of record, hereby stipulates and agrees that all claims asserted by the Plaintiff against the Defendant, International Business Machines Corporation, only in the above styled and numbered cause may be dismissed with prejudice to the bringing of a further action thereon. Each party is to bear their own costs and attorney fees.

Respectfully submitted,

By: Steven R. Davis  
Larry A. Tawwater  
Steven R. Davis

Attorneys for Plaintiffs

OF COUNSEL:

McCAFFREY & TAWWATER  
211 North Robinson  
Suite 1950  
Oklahoma City, OK 73102  
Phone: (405) 235-2900  
Fax: (405) 231-2818

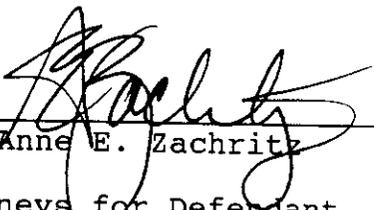
mail  
clerk  
envelope

4

and

Levy Phillips & Konigsberg  
Steven J. Phillips  
520 Madison Avenue, 4th Floor  
New York, New York 10022  
Phone: (212) 605-6200  
Fax: (212) 605-6290

By:

  
Anne E. Zachritz

Attorneys for Defendant  
International Business Machines  
Corporation

OF COUNSEL:

Niemeyer, Alexander, Austin  
& Phillips, P.C.  
Three Hundred North Walker  
Oklahoma City, OK 73102  
Phone: (405) 232-2725  
Fax: (405) 239-7185

and

Alfred E. Page, Jr.  
Cerussi & Spring  
One North Lexington Avenue  
White Plains, New York 10601-1700

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

**FILED**

DEC 11 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

NORMAN SIDNEY MILLER, )  
 )  
 )  
 Plaintiff, )  
 )  
 )  
 v. )  
 )  
 )  
 KENNETH S. APFEL, )  
 Commissioner of Social Security,<sup>1</sup> )  
 )  
 Defendant. )

Case No: 96-C-859-W ✓

ENTERED IN THE  
CLERK'S OFFICE  
DEC 11 1997

**JUDGMENT**

Judgment is entered in favor of the Defendant, Kenneth S. Apfel, Commissioner of Social Security, in accordance with this court's Order filed December 11, 1997.

Dated this 10<sup>th</sup> day of December, 1997.

  
\_\_\_\_\_  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

---

<sup>1</sup>Effective September 29, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), Kenneth S. Apfel, is substituted for John J. Callahan, Commissioner of Social Security, as defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

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

**F I L E D**

DEC 11 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

NORMAN SIDNEY MILLER, )

Plaintiff, )

v. )

KENNETH S. APFEL, )  
COMMISSIONER OF SOCIAL )  
SECURITY,<sup>1</sup> )

Defendant. )

Case No. 96-C-859-W

FILED  
DATE

**ORDER**

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

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

---

<sup>1</sup>Effective September 29, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

14

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

In the case at bar, the ALJ made his decision at the second step of the sequential evaluation process.<sup>3</sup> He found that claimant performed some work subsequent to the alleged onset date of October 15, 1983, but the evidence was insufficient to show whether he engaged or did not engage in substantial gainful activity. He concluded that claimant was not continuously precluded from the

---

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

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

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

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

performance of any substantial gainful activity from the time he last met the insured status requirements on March 31, 1984 to within fourteen months of the deemed filing date of his application on March 18, 1994. Having determined that claimant was not precluded from work during the relevant period, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts that the ALJ erred in failing to consider medical records from 1993-1995 which show that claimant was disabled when his insured status expired.

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

Claimant contends that he became unable to work because of a back injury and back pain on October 15, 1983 (TR 21). It is significant that he met the disability insured status requirements of the Social Security Act on that date, but only continued to meet them through March 31, 1984. He must show that his disability began before that date. Flint v. Sullivan, 951 F.2d 264, 267 (10th Cir. 1991).

The ALJ also noted that the Social Security Act, at 42 U.S.C. § 416(a)(2)(e), states that no application for disability benefits shall be accepted when filed more than twelve months after a period of disability ends (TR 10). Therefore, assuming claimant was disabled on or prior to March 31, 1984, he had to prove that his

disability continued uninterrupted until at least January, 1993, fourteen months prior to the date he filed his application for benefits on March 18, 1994 (TR 10).

The ALJ found that the evidence as a whole did not show that plaintiff was disabled at least through January 1993 (i.e. to within 14 months of the deemed filing date of his application on March 18, 1994). On October 19, 1983, he complained of "low back pain which had been present for years" and pain down both legs (TR 54). He said he had been injured on October 7, 1983 while operating heavy equipment (TR 54). He was placed on Feldene and improved (TR 54). X-rays showed "significant lower lumbar scoliosis with good correction," and his spine appeared straight (TR 54). He could walk well on his toes, but had trouble on his heels (TR 54). The doctor's impression was "probable L4-5 disc syndrome." (TR 54). Physical therapy and medication were recommended (TR 54). By October 31, 1983 he was "significantly improved," and he was told he could return to work (TR 53). He went to light work in January 1984 and continued to have some pain (TR 52).

A myelogram was done in January 1984 and showed S1 nerve root irritation and evidence of changes at the L4 level with some retrolisthesis and disc bulging (TR 51). On March 5, 1984, his doctor stated that he was working, but continuing to have pain in his back and left leg (TR 51). On March 12, 1984, a CT scan of the spine showed no significant abnormality, spinal stenosis, or nerve root impingement (TR 50). The scan revealed a "symmetric bulging of the L3-4 disc consistent with a herniated disc on the right posterior lateral margin" and "symmetric bulging at L4-5 and L5-1 levels" (TR 50). He was not working at that time (TR 50). He received

spinal injections on April 2, 1984 (TR 50). By May 10, 1984, therapy and medication resulted in improvement, and he said he felt he was "almost as good as before he had the back injury." (TR 49). He went back to work late in June of 1984 (TR 48). He reported some back pain the next few months when he drove heavy equipment for more than eight hours a day (TR 47).

On November 12, 1984, claimant's doctor recommended he take off work to do strengthening exercises (TR 47). He remained off work for an extended period. On July 17, 1985, x-rays showed some increase in osteophyte formation and some joint space narrowing and sclerosis of the end plate at the L4-5 and L3-4 levels (TR 46). He complained of difficulty sitting for long periods while driving heavy equipment at work on September 30, 1985 (TR 45). He saw his doctor periodically and received prescriptions for Motrin throughout 1987 (TR 43). On September 9, 1988, he told the doctor he continued to have intermittent back pain, but BUN and creatinine tests were normal (TR 42).

It is clear that claimant suffered a back injury in 1983, which predated March 31, 1984, the date he last met the earnings requirements. However, the evidence shows that he received conservative treatment for complaints of pain from 1983 through 1988. However, he was only seen by a doctor twice in 1985, twice in 1986, three times in 1987 and twice in 1988, primarily for medication refills (TR 42-46). He returned to work on several occasions, and continued working, at least intermittently, through September 30, 1985, which was approximately 18 months after he last met the disability insured status requirements. On that date, his

attending physician noted that he continued to have some difficulty maintaining a seated position when driving heavy equipment.

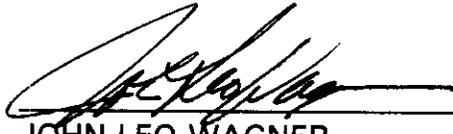
While subjective testimony can be used to diagnose a physical or mental condition, this type of evidence alone cannot justify an award of benefits. *Id.* In Potter v. Secretary of Health & Human Serv., 905 F.2d 1346 (10th Cir. 1990), the court addressed an application for disability benefits by a claimant suffering from multiple sclerosis which was diagnosed four years after her insured status expired. The Secretary's denial of benefits was affirmed, even though the claimant introduced numerous retrospective opinions diagnosing her disease. The court stated: "the relevant analysis is whether the claimant was actually disabled prior to the expiration of her insured status. A retrospective diagnosis without evidence of actual disability is insufficient." *Id.* at 1348-49 (emphasis added) (citations omitted). See also Talley v. Sullivan, 908 F.2d 585, 587 (10th Cir. 1990).

Claimant asks this court to remand the case for consideration of additional medical statements which are attached to his brief. A reviewing court may not consider evidence that is not in the record certified by the Commissioner. Carter v. Chater, 73 F.3d 1019, 1022 (10th Cir. 1996); Selman v. Califano, 619 F.2d 881, 884-85 (10th Cir. 1980). The Social Security Act, 42 U.S.C. § 405(g), states that the court will review the record made before the ALJ, and may not evaluate new evidence in determining whether a ALJ's decision is supported by substantial evidence.

Claimant has given no reason for not submitting the evidence previously. He was represented by counsel, who did in fact submit other medical evidence prior to the administrative hearing. Claimant testified during the May 8, 1995 hearing that he had not received any medical treatment since 1988 (TR 70). Thus, the ALJ had no notice of additional medical evidence and no obligation to obtain it. The two statements by Dr. Scott G. Stinnett contain no useful information concerning claimant's medical condition during the relevant period, October 15, 1983 through March 31, 1984. They are dated April 26 and May 1, 1995, eleven years after the date claimant was last insured.<sup>4</sup>

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

Dated this 10<sup>th</sup> day of December, 1997.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

S:\ss\ORDERS\miller.aff

---

<sup>4</sup> The court notes that these records actually support the ALJ's findings. Dr. Stinnett's first statement indicates only that he was treating claimant for chronic, low back pain in April 1995. (Docket #8, Exhibit A, p.1). The second statement dated May 1, 1995 indicates that Dr. Stinnett has seen claimant "infrequently over the last two years." The doctor reported that claimant was "neurologically intact," "requires virtually no medication for pain control," and "could well benefit from a rehabilitation program with job training." (Docket #8, Exhibit A, p.2).

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

**FILED**

DEC 10 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MICHAEL SHAWN BLEVENS, )  
)  
Petitioner, )  
)  
vs. )  
)  
TULSA COUNTY DISTRICT )  
COURT; STATE OF OKLAHOMA, )  
)  
Respondent. )

No. 97-CV-1013-BU (M)

ENTERED ON DOCKET  
DEC 11 1997  
DATE \_\_\_\_\_

**ORDER**

Before the Court is Petitioner's *pro se* application for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Simultaneous with the filing of the habeas petition, Petitioner submitted a motion for leave to proceed *informa pauperis* pursuant to 28 U.S.C. § 1915. However, on November 18, 1997, Petitioner paid in full the \$5.00 filing fee. Therefore, the motion for pauper status is denied as moot.

Pursuant to 28 U.S.C. § 2242, a petition attacking a state court judgment shall name as respondent "the state officer having custody of the applicant." The Court liberally construes Petitioner's application for a writ of habeas corpus pursuant to Haines v. Kerner, 92 S.Ct. 594 (1972), and substitutes the name of Leroy Young, Warden, as the Respondent.

For the reasons set out below, the Court finds that Petitioner's application for a writ of habeas corpus should be denied.

**BACKGROUND**

Petitioner is currently in custody of the Oklahoma Department of Corrections ("ODOC") at the John H. Lilley Correctional Center, Boley, Oklahoma. This habeas action stems from a

disciplinary hearing on March 2, 1995, in which Petitioner was convicted of Possession/Manufacture of Contraband, fined \$15.00 and forfeited 365 days earned credits. Petitioner subsequently pled guilty to the charge of Carrying Drugs in a Place where Prisoners are Kept through a plea agreement and received a two-year sentence in Case No. CF-95-1286 in the District Court of Tulsa County on May 1, 1995. Although Petitioner was represented by an attorney during the plea and sentencing phase and was advised of his right to appeal the conviction, Petitioner did not perfect a direct appeal.

On June 24, 1997, well after the ten-day period to withdraw a guilty plea, Petitioner filed a Motion for Order Nunc Pro Tunc, alleging that his criminal conviction and sentence constituted double jeopardy because the same evidence used at the disciplinary hearing was used at the trial to prove the crime committed. The trial court liberally construed this motion as an application for post-conviction relief, and denied the relief requested on August 27, 1997. Petitioner appealed the trial court's denial to the Oklahoma Court of Criminal Appeals.

On October 16, 1997, the Oklahoma Court of Criminal Appeals affirmed the trial court's denial of Petitioner's post-conviction relief application. Citing Okla. Stat. tit. 22, § 1086 (1991) and Webb v. State, 835 P.2d 115 (Okla. Crim. App. 1992), the state appeals court concluded Petitioner was procedurally barred from raising the double jeopardy claim because he had failed to make a direct appeal, and failed to raise the issue when he first had the opportunity. Therefore, the criminal appeals court held it would not reconsider in a post-conviction proceeding an issue that had been waived by failure to assert the issue on direct appeal and that had been upheld despite numerous requests to reconsider. See Caffey v. State, 739 P.2d 546, 547 (Okla. Crim. App. 1987) (prison disciplinary proceedings and the punishment resulting therefrom are not criminal prosecutions and do not implicate double jeopardy principles).

## *ANALYSIS*

As a preliminary matter, the Court finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record. See Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). The Court also finds Petitioner has met the exhaustion requirements of 28 U.S.C. § 2254(b). See Coleman v. Thompson, 111 S.Ct. 2546 (1991) (habeas petitioner who has defaulted his or her federal claims in state court meets technical requirements for exhaustion).

The alleged procedural default in this case results from Petitioner's failure to raise his claim by way of direct appeal and his subsequent failure to provide the state's highest court sufficient reason for his failure to perfect a direct appeal pursuant to Oklahoma's procedural rules.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

Applying these principles to the instant case, the Court concludes Petitioner's claims are

barred by the procedural default doctrine. The state court's procedural bar as applied to Petitioner's claims was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not raised on direct appeal but could have been. Okla. Stat. tit. 22, §§ 1080, et seq.; see also Mitchell v. State, 934 P.2d 346 (Okla. Crim. App. 1997), *cert. denied*, 117 S.Ct. 2489 (1997)..

Because of his procedural default, this Court may not consider Petitioner's claims unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

In the instant action, even if Petitioner were able to demonstrate "cause and prejudice" or a "fundamental miscarriage of justice" to overcome the procedural bar thereby allowing this Court to consider these claims, the Court finds that the petition would nonetheless be denied. Petitioner asserts he was punished twice for the "same act" when the ODOC imposed a fine after a disciplinary conviction and then he was convicted and sentenced in a criminal proceeding in state court for the same act. Relying upon the Fifth Amendment doctrine of double jeopardy, Petitioner argues once

he received punishment for the misconduct from ODOC, any punishment for the alleged offense in a separate action would be barred as "multiple punishment" in violation of the Double Jeopardy Clause (Doc. #1).

The Double Jeopardy Clause of the Fifth Amendment "protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969). However, despite Petitioner's reliance on the cases cited, there is one major flaw which he will not be able to overcome. It is well established in the Tenth Circuit that prison disciplinary hearings are not part of a criminal prosecution, and therefore, do not implicate double jeopardy concerns. Lucero v. Gunter, 17 F.3d 1347, 1351 (10th Cir. 1994) (quoting Wolff v. McDonnell, 94 S.Ct. 2963 (1974)). See Breed v. Jones, 95 S.Ct. 1779, 1785 (1975) (application of the double jeopardy clause is limited to proceedings which are "essentially criminal"); Ketcher v. State, 748 P.2d 536 (Okla.Crim.App. 1988)(imposition of disciplinary penalties and punishment for escape conviction did not violate prohibition against double jeopardy under the Fifth Amendment or under Oklahoma Stat. tit.21 § 443).<sup>1</sup> In Wolff, the Supreme Court stated that while due process considerations apply to disciplinary hearings within prison, the full panoply of rights in a criminal prosecution do not apply. 94 S.Ct. at 2975; see also United States v. Rising, 867 F.2d 1255, 1258 (1989) (holding that administrative punishment imposed by federal prison officials does not render a subsequent judicial proceeding, criminal in nature, violative of the double jeopardy clause).

---

<sup>1</sup>Other federal circuit courts have also concluded that prison disciplinary proceedings do not bar future criminal prosecutions. See, e.g., United States v. Brown, 59 F.3d 102, 10305 (9th Cir. 1995); United States v. Hernandez-Fundora, 58 F.3d 802, 806-07 (2nd Cir.), *cert. denied*, 115 S.Ct. 2288 (1995); Garrity v. Fiedler, 41 F.3d 1150, 1152-53 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1420 (1995); United States v. Newby, 11 F.3d 1143, 1144-46 (3rd Cir. 1993), *cert. denied*, 114 S.Ct. 1841 (1994), *cert. denied*, 115 S.Ct. 111 (1994).

In a federal habeas proceeding, this Court entertains a petition "only on the ground that [the state prisoner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254; see Pulley v. Harris, 465 U.S. 37, 41 (1984). Accordingly, the Court finds that Petitioner's prison disciplinary hearing/double jeopardy claim does not implicate a constitutional violation which would entitle Petitioner to immediate release, and therefore, his petition for a writ of habeas corpus should be denied.

Pursuant to Rule 4, *Rules Governing § 2254 Cases*, "if it plainly appears from the face of the petition and any exhibits attached thereto that the petitioner is not entitled to relief in the district court, the judge shall enter an order summarily dismissing the petition and cause the petitioner to be notified."

**IT IS THEREFORE ORDERED** that:

1. Petitioner's motion for leave to proceed *in forma pauperis* is **denied as moot**.
2. The petition for a writ of habeas corpus is **dismissed with prejudice**, and the Clerk of the Court is **directed** to mail a copy of this order to Petitioner.

SO ORDERED THIS 9<sup>th</sup> day of December, 1997.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 12-11-97

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

DEC 10 1997 *PL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ROY B. HAYS,	)
	)
Plaintiff,	)
	)
v.	)
	)
KENNETH S. APFEL,	)
Commissioner of Social Security, <sup>1</sup>	)
	)
Defendant.	)

Case No: 96-C-744-W

**JUDGMENT**

Judgment is entered in favor of the Defendant, Kenneth S. Apfel, Commissioner of Social Security, in accordance with this court's Order filed December 10, 1997.

Dated this 10<sup>th</sup> day of December, 1997.

  
 \_\_\_\_\_  
 JOHN LEO WAGNER  
 UNITED STATES MAGISTRATE JUDGE

---

<sup>1</sup>Effective September 29, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), Kenneth S. Apfel, is substituted for John J. Callahan, Commissioner of Social Security, as defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

15

F I L E D

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

DEC 10 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ROY B. HAYS, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 KENNETH S. APFEL, )  
 COMMISSIONER OF SOCIAL )  
 SECURITY,<sup>1</sup> )  
 )  
 Defendant. )

ENTERED ON DOCKET

DATE 12-11-97

Case No. 96-C-744-W ✓

**ORDER**

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

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

---

<sup>1</sup>Effective September 29, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

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

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.<sup>3</sup> He found that claimant had the residual functional capacity to perform work-related activities, except for work involving lifting/carrying over twenty pounds occasionally or ten pounds frequently. The ALJ concluded that the claimant's past relevant work as a clerk at a counseling center and a house

---

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

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

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

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

manager at a rehabilitation center did not require the performance of work-related activities precluded by the above limitations. Therefore the ALJ found that claimant's impairments did not prevent him from performing his past relevant work. Having determined that claimant could do his past relevant work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) Claimant was not effectively represented by his paralegal representative, and the ALJ failed in his duty to develop the record when she failed to do so.
- (2) The ALJ ignored claimant's testimony concerning his physical limitations and failed to grasp the significance of some of claimant's statements.

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

Claimant alleges that he has been unable to work since October, 1993 (this is an amended date - he initially alleged an onset date of May 1, 1986) because of pain caused by a hip replacement and curvature of the spine (TR 61, 114). The date he was last insured for the purposes of disability insurance benefits is December 31, 1993.

Claimant underwent a total left hip replacement in 1982, with good results from the surgery and an unremarkable recovery (TR 142-161). He worked as a house manager in a rehabilitation center after that until 1986 (TR 41). There is no evidence

that he has seen a doctor for his hip complaints since 1982. He also testified to knee pain and curvature of the spine, but there is no evidence that he has obtained medical care for these complaints.

Dr. James D. Harris examined claimant in January of 1990 and found mild obesity and symmetrical deep tendon reflexes, negative straight-leg-raising, and equal strength in the lower extremities (TR 129). X-rays showed the total hip replacement, with cemented acetabulum, no loosening of the hardware, and good alignment (TR 129). The doctor concluded that he had a limited ability to stand, climb, and squat, needed to lose weight, and should "get into a more sedentary type of activity." (TR 129). He continued to work in an alcohol and drug center and as a Goodwill Industries attendant through 1993 (TR 109).

Dr. James S. Stauffer saw claimant on June 21, 1994. The doctor noted that claimant claimed that he could not sit any longer than thirty minutes, stand any longer than ten to fifteen minutes, or walk more than ten minutes without severe pain, has trouble getting into and out of the bathtub, and has lower back pain that radiates into his left knee and hurts when he bends or stoops (TR 130). However, the doctor found that he moved his extremities well, except for the left hip which had a reduced range of motion (TR 131). The doctor found no cyanosis, no varicose veins, and no edema (TR 131). The doctor noted: "[t]here is kind of a little limp favoring the left hip. No muscle atrophy. Cranial nerves are intact. Deep tendon reflexes intact. No pathological reflex present." (TR 131).

This is all the medical evidence in the record. The ALJ found that claimant retained the residual functional capacity to perform work activities at the light exertional level, changing positions occasionally, which was "consistent with the assessments by the Disability Determination Service on two reviews of the evidence and not inconsistent with the assessment by Dr. Harris that there would be limitation of standing, climbing, and squatting" (TR 22-23, 67-77, 85-92, 129). The ALJ noted that, according to 20 C.F.R. § 404.1567(b) and § 416.967(b), light work involves lifting no more than twenty pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds (TR 23). He stated that a job is in this category when it requires a good deal of standing and walking or when it involves sitting most of the time with some pushing and pulling of arm or leg controls (TR 23).

The ALJ went on to consider claimant's allegations of disabling pain. At a hearing on March 10, 1995, claimant stated that he cannot work because, after he sits for awhile, his hip and back hurt (TR 48). He testified that he could lift twenty pounds without pain and sit forty-five minutes to an hour (TR 50, 59). He admitted that he had not seen a doctor since 1982 because of the cost (TR 52). The ALJ considered the nature, location, onset, duration, frequency, radiation and intensity of claimant's pain, precipitating and aggravating factors such as movement, activity or environmental conditions, the type, dosage, effectiveness, and adverse side effects of claimant's pain medication, treatment other than medication for relief of pain, claimant's functional restrictions, and claimant's daily activities, in accordance with the guidelines set out in Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987), 20

C.F.R. § 404.1529(c)(3) and § 416.929(c)(3), and Social Security Ruling 88-13 (TR 23).

The ALJ found that claimant's complaints of "excess pain" and other symptomatology were disproportionate to the objective findings and not credible beyond limiting claimant's ability to lift more than twenty pounds. The ALJ found troubling inconsistencies in claimant's testimony and statements when compared to the medical evidence and other factors of evaluation (TR 24). The ALJ noted:

[h]e has not even seen a doctor for his hip since 1982 and has had no medical attention except for medications for hypertension at the free clinic, which are effective. His medication report shows only Lotensin for hypertension and over-the-counter products for pain. Low level pain relievers are not consistent with a disabling level of pain.

The claimant lives with relatives and is not responsible for household chores, but he is still able to do light cooking, shopping, cleaning; he drives, reads, works crossword puzzles. He alleges difficulty getting out of the bathtub, but this particular maneuver would not greatly affect ordinary work activities.

Moreover, the claimant has gone to school in computers since his hip surgery. He had a substantial work history after the surgery. Even though doctors indicate that he may have to have more surgery in the future, they admit that he has received good wear from the apparatus. He does nothing on his own to alleviate his alleged symptoms. He has not even obtained medical attention or prescription pain relievers from the free clinic. He claims to have to lie down from pain several times a week, but his over-the-counter pain product consumption does not appreciably increase. The undersigned finds that these allegations are not credible.

(TR 24).

The ALJ concluded that claimant's past work as a clerk in a counseling center and house manager in a rehabilitation center were described by the vocational expert

as light exertional work, so claimant retained the residual functional capacity to perform this past relevant work (TR 24).

There is no merit to claimant's contentions. His first claim is that his paralegal representative was "somewhat less than effective" because she did not try to "explain" the absence of medical evidence, question him as to his ailments at an "early age," or make opening or closing statements, and therefore the ALJ had a duty to further develop the record. It is true that the ALJ has a basic duty of inquiry to fully and fairly develop the record as to material issues. Baca v. Department of Health & Human Servs., 5 F.3d 476, 479-80 (10th Cir. 1993). It is difficult to determine what is a "complete" record, as "one may always obtain another medical examination, seek the views of one more consultant, wait six months to see whether the claimant's condition changes, and so on." Kendrick v. Shalala, 998 F.2d 455, 456-57 (7th Cir. 1993). How much evidence to gather is a subject on which the court generally respects the Secretary's reasoned judgment. Id. at 458.

The Tenth Circuit has noted that it is difficult to decide what quantum of evidence a claimant must establish of a disabling impairment or combination of impairments before the ALJ will be required to look further. Hawkins v. Chater, 113 F.3d 1162, 1166 (10th Cir. 1997). The court stated:

As is usual in the law, the extreme cases are easy to decide; the cases that fit clearly within the framework of the regulations give us little pause. The difficult cases are those where there is some evidence in the record or some allegation by a claimant of a possibly disabling condition, but that evidence, by itself, is less than compelling. How much evidence must a claimant adduce in order to raise an issue requiring further investigation? Our review of the cases and the regulations leads

us to conclude that the starting place must be the presence of some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision requiring further investigation. Isolated and unsupported comments by the claimant are insufficient, by themselves, to raise the suspicion of the existence of a nonexertional impairment.

Id. at 1167 (citations omitted).

There is absolutely no objective evidence in the record to suggest a condition which could have a material impact on the disability decision in this case. The ALJ was not required to further develop the record.

Claimant's additional contentions are that "the ALJ's view of the evidence is flawed," he ignored evidence supporting claimant's claims, and he seemed not to "grasp the significance of some of the facts" and discounted them. The court finds no merit to these arguments, which challenge the ALJ's conclusion that claimant's complaints were not credible. Courts generally treat credibility determinations made by an ALJ as binding upon review. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence." Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990).

The ALJ did not err in concluding that the claimant's complaints of "excess pain" and other symptomatology were disproportionate to the objective findings and not credible beyond requiring certain lifting limitations. His failure to obtain medical attention and to take prescription pain medications is not consistent with his claim of

constant, disabling pain. He worked for several years after his back surgery. His allegations that he can only sit, stand, and walk for short periods and has trouble getting in and out of a bathtub are not supported by any medical evidence.

The Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. "To establish disabling pain without the explicit confirmation of treating physicians may be difficult." Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988). Unsubstantiated subjective evidence is not sufficient to prove disability. Diaz, 898 F.2d at 777. It has been recognized that "some claimants exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Frey, 816 F.2d at 517.

Claimant's questioning of the vocational expert was proper. In forming hypothetical questions to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

As to claimant's contention that he is a "poor man" who has no money for medical care or medication, Social Security Ruling 82-59 states that a claim will be allowed where free community resources are not available, but "[a]ll possible resources (e.g., clinics, charitable and public assistance agencies, etc.), must be

explored. Contacts with such resources and the claimant's financial circumstances must be documented." In Murphy v. Sullivan, 953 F.2d 383, 386-387 (8th Cir. 1992), the court found that there was a lack of evidence that plaintiff had been denied medical care because of his financial condition and denied benefits because the failure to seek treatment was not justified. This case was cited with approval by the Tenth Circuit in an unpublished opinion, Galdean v. Chater, 1996 WL 23199 (10th Cir. Jan. 23, 1996). There is a lack of evidence in the case at bar that claimant has been denied medical care because of his financial condition.

Finally, claimant claims that an "injury" related to the "onset date" was mentioned at the beginning of the hearing on March 10, 1995, and the ALJ deferred discussion of it and never returned to the issue. It is true that the May, 1986 onset date of claimant's disability was discussed early at the hearing (TR 42-43), but the claimant's representative raised the issue again at the end of the hearing and gave a corrected onset date of October, 1993 (TR 61). Therefore, contrary to what claimant contends, the issue was resolved.

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

Dated this 9<sup>th</sup> day of December, 1997.

  
\_\_\_\_\_  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

S:\ORDERS\hays.aff

ENTERED ON DOCKET

DATE 12-11-97

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

**F I L E D**

JUSTA GARZA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 KENNETH S. APFEL, )  
 Commissioner of Social Security,<sup>1</sup> )  
 )  
 Defendant. )

DEC 10 1997

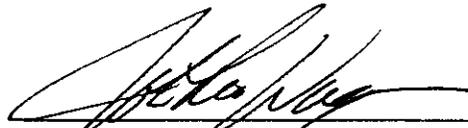
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No: 96-C-980-W ✓

**JUDGMENT**

Judgment is entered in favor of the Defendant, Kenneth S. Apfel, Commissioner of Social Security, in accordance with this court's Order filed December 10, 1997.

Dated this 10<sup>th</sup> day of December, 1997.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

<sup>1</sup>Effective September 29, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), Kenneth S. Apfel, is substituted for John J. Callahan, Commissioner of Social Security, as defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

DATE 12-11-97

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

DEC 10 1997 *PL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JUSTA GARZA,	)
	)
Plaintiff,	)
	)
v.	)
	)
KENNETH S. APFEL,	)
COMMISSIONER OF SOCIAL	)
SECURITY, <sup>1</sup>	)
	)
Defendant.	)

Case No. 96-C-980-W /

**ORDER**

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

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

\_\_\_\_\_

<sup>1</sup>Effective September 29, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

16

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

The November 23, 1993 decision of Administrative Law Judge John M. Slater in this case was vacated by the Social Security Appeals Council which remanded the case for a second hearing on August 17, 1994. The Appeals Council instructed the new ALJ to obtain additional evidence concerning the claimant's mental impairment to complete the record and testimony from a vocational expert to clarify the effect of any assessed limitations on claimant's occupational base (TR 280). The Appeals Council instructed the ALJ to ensure that hypothetical questions posed to the vocational expert reflected the specific capacity/limitations established by the record as a whole (TR 280).

ALJ Calvarese, on remand, made his decision at the fifth step of the sequential evaluation process.<sup>3</sup> He found that claimant had the residual functional capacity to

---

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

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

1. Is the claimant currently working?

perform light work, with a significant limitation of motion of the right shoulder. The ALJ concluded that her residual functional capacity precluded claimant from performing her past relevant work. The ALJ found that claimant's impairment, residual functional capacity, age, education, and work experience allowed her to do a significant number of jobs in the national economy. Having determined that there were jobs that claimant could perform, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts that the ALJ, on remand, did not effectuate the Appeal Council's order and rejected evidence regarding the mental and physical condition of claimant and the second vocational expert's testimony that there were no jobs plaintiff could perform, based on the limitations in the hypothetical question. The claimant contends that the ALJ wrongly relied on the testimony of the vocational expert at the first hearing, who indicated that there were jobs that claimant could perform.

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

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

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

Claimant contends that she has been unable to work since September 15, 1991, because of right shoulder and wrist problems (TR 44, 135). She injured her right shoulder in a work-related accident in 1988 (TR 43, 197). One year later she underwent surgery, but it failed to reduce her pain or restore her range of motion (TR 44-45, 197). That same year she underwent surgery to remove a cystic lesion on her right wrist, which caused pain and diminished grip and fine motor movement even after the surgery (TR 197). She returned to work and worked full time until September, 1991 (TR 44-45).

On December 7, 1992, Dr. David Dean performed a consultative physical examination of claimant. The doctor found limitation of range of motion, but no crepitus, erythema, swelling, or tenderness, over the right shoulder girdle (TR 198). He examined her right wrist and found no limitation of range of motion of the right wrist, but diminished grip in the right hand by 50% with slightly diminished fine motor movements (TR 199). He found that her right hand was usable for self-care and grooming and grasping small objects, and she was able to oppose the right thumb to each of the remaining four fingers (TR 199). In March and April of 1993, Dr. Darrell Mease treated her and found similar complaints (TR 204-206). On December 30, 1994, he found that she could do sedentary work (TR 282).

On August 27, 1993, Dr. Douglas Stevens conducted a "psychological and vocational" examination on claimant. The doctor did motor tests which showed reduced grip strength in her right hand and good finger coordination, with mildly impaired right hand function (TR 217). She did poorly on a small parts dexterity test (TR 217). The doctor noted that she claimed she had wrist and back pain, right hand weakness, and an ability to sit for only 30-60 minutes, stand for 30 minutes, and walk one block (TR 216-217).

Dr. Stevens administered a personality test and found "a very high elevation on the depression scale, followed by scales reflecting thought disorder and anxiety. The somatization scales were only mildly elevated. This suggests more of an emotional disorder than any type of somatiform condition. People with this profile avoid close interpersonal relationships and are afraid of emotional involvement" (TR 218). A second personality test showed: "a schizo-affective condition, reflecting both major depression and break down in reality contact. Also suggested was a generalized anxiety disorder and somatization. In the personality area there were borderline, schizoid and passive aggressive traits noted." (TR 218).

Dr. Stevens' final psychological diagnosis was "major depression, psychological factors affecting physical condition, [and] schizoid and avoidant personality traits." (TR 218). The doctor noted that she withdraws from social contacts, experiences deterioration when she tries to be productive, has frequent deficiencies of persistence and concentration, and has marked difficulty working with her dominant arm at a reasonable pace, and concluded that she was "presently vocationally disabled." (TR

218-219). However, he stated that, if she got psychotherapy, she had "the potential for marked emotional improvement" which would result in her ability to work again (TR 219).

In his November, 1993 opinion, ALJ Slater discounted Dr. Stevens' diagnosis of vocational disability because Dr. Stevens was not a treating physician or a vocational expert, and his analysis of claimant's mental status was based almost exclusively on claimant's subjective statements in response to various tests without any mental status examination (TR 235-236). The ALJ also commented that Dr. Stevens' report was prepared specifically for purposes of obtaining benefits (TR 236).

ALJ Slater noted that claimant was not taking psychotropic medication and had not sought psychiatric treatment (TR 236). While she had sought medical treatment for pain, she did not mention depression, anxiety, or thought disorders to her medical doctors, and there was no evidence that her mental condition was noticeable because no physician recorded it or advised her to seek help (TR 236).

ALJ Slater also noted that Dr. Dean, who evaluated her for the Social Security Administration, was a certified psychiatrist but did not feel it necessary to conduct a mental status examination at the time of the physical examination (TR 236). The ALJ found that the above evidence indicated that claimant's mental condition only slightly limited her daily activities (TR 236).

However, the Appeals Council instructed the ALJ, on remand, to further explore claimant's mental condition and to ensure that hypothetical questions to the

vocational expert reflected any specific capacity/limitations established by the record as a whole (TR 280).

ALJ Calvarese evaluated two additional reports of mental examinations of claimant. Dr. Minor Gordon performed a psychological evaluation on January 5, 1995. He found that claimant had no motor control problems, was in a depressed mood, and had an appropriate attitude (TR 288). Her social-adaptive behavior appeared to be within normal limits (TR 289). Her thought processes were spontaneous and the organization coherent (TR 289). She admitted to occasional thoughts of suicide, but no intent (TR 289). She admitted to being occasionally paranoid and having auditory hallucinations, but she was oriented as to time, person, and place (TR 289). Intelligence tests indicated her level of intelligence was in the low average range, and a disparity between verbal and performance I.Q. represented a possible disability (TR 289).

The doctor concluded: "[claimant] is functioning overall in the low average range. The spread of scores likely represents an individual with a learning disability. From the available data, it is the opinion of this examiner, Justa Garza is capable of performing some type of routine repetitive tasks on a regular basis." (TR 289).

Dr. Thomas Goodman also performed a psychiatric examination of claimant on January 5, 1995. He noted that she gave a vague, inconsistent, and sometimes rather bizarre history (TR 294). At first she said that she had no idea why she was being seen for a psychiatric evaluation, that she was unaware of any emotional problems or psychiatric illness that would interfere with her working, and that she had

never seen a psychiatrist for treatment, been hospitalized psychiatrically, or taken medications for a significant psychiatric problem (TR 294). Later in the interview she contradicted herself and said that she had been unable to work since 1989 because of problems with her wrist, shoulders, and back, and headaches (TR 294).

Dr. Goodman commented that a review of claimant's past medical records led to confused findings (TR 294). In the first place, the list of medications showed that she was taking two antidepressants, Paxil and Zoloft, simultaneously with Valium, in 1993 (TR 294). "These were being given by her family physician in a quite unusual dosage and manner. These medications are rarely, if ever, given together." (TR 294). The doctor noted that she seemed totally unaware of having taken those medicines, although she said she takes what her doctor gives her and never questions it (TR 294). She at first said she was only taking Darvocet, but later admitted taking other pills (TR 294).

Dr. Goodman noted that claimant's attorney sent her to Dr. Stevens, and Dr. Stevens' report was "about as confusing as the rest of the history. He eventually diagnosed her as suffering from a major depression, apparently based upon psychological testing. He reports no clinical evidence that would support a DSM-3R or 4 diagnosis of major depression." (TR 295). Dr. Goodman found no value to Dr. Stevens' report, which relied entirely on claimant's complaints (TR 296).

Dr. Goodman found no past history of a depressive disorder, and noted claimant's comments that she felt unhappy at times (TR 295). The doctor noted that she claimed to have hallucinations, but couldn't describe them, and could not give

examples of when she has difficulty concentrating (TR 295). He observed that she was able to concentrate during the interview and showed no signs of an anxiety disorder (TR 295). The doctor concluded that she embellished the severity of her symptoms (TR 296). He found she had no psychological disorder and could do the same type of work she had always done (TR 291).

After reviewing these reports, ALJ Calvarese gave more weight to the opinions of Dr. Goodman and Dr. Gordon and minimal weight to that of Dr. Stevens (TR 16). He found that plaintiff's mental condition did not impact her residual functional capacity (TR 17). He then presented the vocational expert with a hypothetical question which described a person with an I.Q. of 84, a moderate restriction of range of motion of the right shoulder, and a diminished grip in the right hand resulting in a slight decrease in fine motor movements in that hand, but still an ability to grasp small objects for self-grooming (TR 123-124). The vocational expert responded that such a person could perform light, but not sedentary, work (TR 125). The ALJ then added psychological restrictions: the ability to make occupational adjustments is seriously limited but not precluded, and relating to co-workers, dealing with the public, using judgment with the public, interacting with supervisors, and functioning independently is seriously limited (TR 124-125). The response was that there were no jobs such a person could perform (TR 127).

ALJ Calvarese was not bound by the vocational expert's second response. An ALJ may disregard a vocational expert's responses which contain assumptions that are unsupported by the record as a whole. Gay v. Sullivan, 986 F.2d 1336, 1341

(10th Cir. 1993). ALJ Calvarese ultimately determined that plaintiff suffered only minor mental restrictions which did not affect her residual functional capacity (TR 17).

In the end, ALJ Calvarese found absolutely no change in claimant's physical impairments since the first hearing. Therefore, he incorporated the hypothetical question and response from the first hearing (TR 17). The hypothetical included these limitations: the person can sit six out of eight hours a day and can lift fifty pounds occasionally and twenty-five pounds frequently (TR 65). The vocational expert responded that this person could perform claimant's past relevant work as a sewing machine operator (TR 65). The ALJ then added a significant limitation in the range of motion of the shoulder of the dominant arm to the extent that she could not regularly reach to the side, overhead, or down, while still being able to manipulate small objects for self care (TR 65). The vocational expert responded that such a person could not perform claimant's past relevant work, but could do other jobs in Oklahoma's economy, including light strength jobs, such as production checker/tester, shipping order clerk, mender, sedentary dispatcher, and receptionist (TR 66).

There is substantial evidence to support the ALJ's finding that claimant's mental condition did not affect her residual functional capacity. There is also substantial evidence in the records of Dr. Dean and Dr. Mease that the only physical impairments claimant has are reduced range of motion of her right shoulder and reduced grip in her right hand. There is no evidence to support claimant's allegations

of chronic disabling pain and other complaints, and the ALJ's findings regarding her credibility must be affirmed (TR 235).

Courts generally treat credibility determinations made by an ALJ as binding upon review. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1599 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence." Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990).

The ALJ met his burden of proving that there existed jobs in the national economy that claimant could perform. He complied with the order of the Appeals Council and obtained additional evidence concerning claimant's mental impairment. He secured the testimony of a vocational expert who had reviewed all the records (TR 122). He offered hypotheticals that included the specific limitations which he concluded were supported by the record as a whole (TR 123-127). Although the decision of the first hearing was vacated by the Appeals Council (TR 17), the testimony and medical facts of record were not vacated. ALJ Calvarese properly considered this evidence, as well as the new evidence, in reaching his opinion that claimant could work.

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

Dated this 9<sup>th</sup> day of December, 1997.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

s:\orders\ss\aff

ENTERED ON DOCKET

DATE 12-11-97

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

DEC 10 1997 *m*

LEON LENZY, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 KENNETH S. APFEL, )  
 Commissioner of Social Security,<sup>1</sup> )  
 )  
 Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No: 96-C-47-W ✓

**JUDGMENT**

Judgment is entered in favor of the Plaintiff, Leon Lenzy, in accordance with this court's Order filed December 10, 1997.

Dated this 10<sup>th</sup> day of December, 1997.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

---

<sup>1</sup>Effective September 29, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), Kenneth S. Apfel, is substituted for John J. Callahan, Commissioner of Social Security, as defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

ENTERED ON DOCKET

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

DATE 12-11-97

**F I L E D**

LEON LENZY,

Plaintiff,

v.

KENNETH S. APFEL,  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>1</sup>

Defendant.

DEC 10 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 96-C-47-W ✓

**ORDER**

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

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

---

<sup>1</sup>Effective September 29, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

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

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.<sup>3</sup> He found that claimant had the residual functional capacity to perform the physical exertional requirements of work, except for lifting over ten pounds frequently and twenty pounds occasionally, with only occasional bending, stooping, and twisting. The ALJ concluded that the claimant was unable to perform his past relevant work as a porter, laborer, auto detailer, sheetrock worker, electronic

---

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

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

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

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

scrubber, janitor, or furniture deliverer. The ALJ found that the claimant had the residual functional capacity to perform the full range of light work, was forty-three years old, which is defined as a younger individual, had a limited education, and, in view of his age and residual functional capacity, the issue of transferability of work skills was not material. Having determined that claimant could perform light work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ erred in failing to recognize and secure medical records to evaluate the severity of claimant's left extremity impairment shown by findings of decreased range of motion in claimant's shoulder, a sensory deficit in his left triceps and decreased triceps reflexes, and a diagnosis of thoracic outlet syndrome in his upper left extremity.
- (2) The ALJ erred in failing to recognize and secure medical records to evaluate the severity of claimant's cervical impairments shown by x-rays and decreased range of motion in his back.
- (3) The ALJ erred in finding that claimant's complaints were not credible because he rarely seeks medical treatment and fails to take medication, because he has no income to pay for such services.

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

Claimant alleges that he has been unable to work since July 18, 1992, due to pain in his chest and down his left arm into his back (TR 83). He told Dr. James Ritze on February 10, 1994 that he had suffered an accident on June 15, 1992 in which

he fell from a ladder onto a cement floor and after that he had neck, back, shoulder, and chest pain (TR 123). He claimed he had suffered muscle aches and chest pain prior to the accident, beginning on April 3, 1991 (TR 105). He was seen at the hospital on October 20, 1992 for chest pains and pressure the night before and an EKG showed "early replorization" and "no active process - borderline heart size" (TR 100-102). He told his doctor on August 12, 1993 that he had a "heavy feeling" in his chest following work or playing basketball, and the doctor prescribed nitroglycerin spray and referred him for a treadmill test (TR 104). The treadmill test on September 1, 1993, showed no chest pain, shortness of breath, or arrhythmias after seven minutes, and 100 percent of his maximum heart rate was achieved (TR 107-122). The doctor concluded the test was normal (TR 107).

Claimant did not see a doctor again until a consultative examination by Dr. Ritze was done on February 10, 1994, six months later (TR 123-124A). Claimant told the doctor he had stopped taking his medications three to four months earlier because of headaches, dizziness, and double vision (TR 123). He complained of chest pain radiating into his left arm upon exertion and numbness in his left hand (TR 124). He denied any muscle weakness or joint pain (TR 124). The doctor found normal heart rate and rhythm, and normal reflexes, sensory, motor, and vibratory functions (TR 124). His diagnosis was: "[c]hest pain, etiology undetermined, [l]eft neck, arm, and back pain, etiology undetermined, [r]ule out disk disease, [h]ypertension by history." (TR 124A). The doctor found restricted range of motion in claimant's back, left shoulder, hips, and elbows (TR 125-126). He also noted

muscle spasm in the left thoracic paraspinal muscle (TR 128). A medical consultant review form dated February 18, 1994 also showed decreased range of motion of the back, hips, shoulders, and elbows (TR 52).

Dr. Richard Felmlee reported on May 13, 1994, that claimant was suffering chest and back pain, which extended into his left arm and hand, causing numbness (TR 137). He stated that claimant had "complete loss of circulation of [left] upper extremity and brachial plexis on left," but good strength and bilateral flexion and extension of both upper extremities (TR 137). The doctor concluded that the loss of radial pulse and numbness and tingling of claimant's left hand and arm after holding them up for two minutes showed "thoracic outlet syndrome" and nerve entrapment (TR 137). Claimant was referred to a neurologist for a CT and MRI (TR 137). X-rays of his spine on that date showed: "calcifications of anterior longitudinal ligament at C5-C6, C6-C7," no osteophytic encroachment upon the intervertebral foramen, and "[d]egenerative changes at the levels of C5, 6 and 7." (TR 143).

Claimant was in jail after that for several months and did not see a neurologist (TR 170-171). There is one illegible undated medical record from the Oklahoma Department of Corrections showing that he was restricted to bed for some reason (TR 146). The ALJ left the record open for fifteen days following a hearing on September 15, 1994, to secure all medical records from the Department of Corrections (TR 151-152, 171, 192). There were additional medical records from Dr. Bowler at Moton Health Clinic mentioned at the hearing which were not produced (TR 84, 173).

On the basis of the evidence in the record, the ALJ concluded that claimant could do light work involving lifting less than twenty pounds frequently and carrying less than ten pounds (TR 32, 35). He based his conclusions on the fact that claimant told his doctor on February 10, 1994 that he had not taken his medications for several months and rarely sought medical treatment (TR 33). The ALJ noted that claimant never complained to Dr. Felmlee or Dr. Biddle of dizziness, and on his initial evaluation he only checked the box for back pain, not the one for dizzy spells (TR 33, 141). The ALJ noted that claimant's daily activities were restricted, but the restrictions were self-imposed since none of his treating physicians restricted his ability to sit, stand, walk, bend, lift, or carry (TR 34).

There is merit to claimant's first two contentions. Although a claimant has the burden of providing medical evidence proving disability, the ALJ has a basic duty of inquiry to fully and fairly develop the record as to material issues. Baca v. Department of Health & Human Servs., 5 F.3d 476, 479-80 (10th Cir. 1993).

The Social Security regulation found at 20 C.F.R. § 404.1512(d) provides that, before determining that a claimant is not disabled, the ALJ has the responsibility to develop the claimant's "complete medical history," defined as records of the claimant's medical sources covering at least the 12 months preceding the month in which the claimant's application is filed. The ALJ is to try to obtain additional evidence if the evidence before him is insufficient to determine whether a claimant is disabled or, if after weighing the conflicting evidence, he cannot reach a conclusion. 20 C.F.R. § 404.1527(c)(3). In that situation, the ALJ must either

request additional existing records, recontact claimant's treating sources or any other examining sources, or ask the claimant for more information or to undergo a consultative examination. Id.; 20 C.F.R. § 404.1512(e).

In this case, the last medical records reviewed by the ALJ were dated May 13, 1994. He was made aware of medical care received by claimant while he was incarcerated after that date, but did not secure those records when claimant's counsel failed to do so. The medical report on May 13, 1994 provided ample evidence that claimant was suffering a loss of circulation in his left arm which would impact his ability to work in some respect, and a MRI and CT scan were recommended (TR 137), but the ALJ failed to secure further medical evidence which he was aware existed or to request the claimant to undergo testing to determine that impact and did not include a restriction of the use of the arm in his hypothetical questions to the vocational expert.

It is difficult to determine what is a "complete" record, as "one may always obtain another medical examination, seek the views of one more consultant, wait six months to see whether the claimant's condition changes, and so on." Kendrick v. Shalala, 998 F.2d 455, 456-57 (7th Cir. 1993). How much evidence to gather is a subject on which the court generally respects the Secretary's reasoned judgment. Id. at 458. However, if a significant omission is noted, the ALJ will be found to have failed to develop the record adequately. Thompson v. Sullivan, 933 F.2d 581, 587 (7th Cir. 1991). "Failure to fulfill this special duty is good cause to remand for gathering of additional evidence." Id. at 585. This is especially true where, as here,

the ALJ has been informed of missing medical records. Vaile v. Chater, 916 F.Supp. 821, 830 (N.D. Ill. 1996).

The Tenth Circuit has noted that it is difficult to decide what quantum of evidence a claimant must establish of a disabling impairment or combination of impairments before the ALJ will be required to look further. Hawkins v. Chater, 113 F.3d 1162, 1166 (10th Cir. 1997). The court stated:

As is usual in the law, the extreme cases are easy to decide; the cases that fit clearly within the framework of the regulations give us little pause. The difficult cases are those where there is some evidence in the record or some allegation by a claimant of a possibly disabling condition, but that evidence, by itself, is less than compelling. How much evidence must a claimant adduce in order to raise an issue requiring further investigation? Our review of the cases and the regulations leads us to conclude that the starting place must be the presence of some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision requiring further investigation. Isolated and unsupported comments by the claimant are insufficient, by themselves, to raise the suspicion of the existence of a nonexertional impairment.

Id. at 1167 (citations omitted).

The court concluded that, where there is a direct conflict in the medical evidence requiring resolution or where the medical evidence in the record is inconclusive, a consultative examination is required for proper resolution of a disability claim. Also, where additional tests are required to explain a diagnosis already contained in the record, resort to a consultative examination may be necessary. Id. at 1166.

Here there is a significant omission of evidence to evaluate the loss of circulation in claimant's left arm. A CT and MRI were recommended (TR 137). "The

importance of clinical diagnostic reports in assessing disability is clear." Id. The ALJ erred in failing to secure the tests which would assist him in determining whether claimant is disabled in some way. The court does not suggest that claimant's condition makes him unable to work - rather that it may restrict the kind of light jobs he can perform.

There is also some evidence suggesting that the degenerative changes and calcifications of ligaments in claimant's back could be causing reduced range of motion which would impact his ability to do light work. The records which have not been reviewed may provide additional evidence concerning this claim also.

There is no merit to claimant's third contention. The ALJ did not err in considering the fact that claimant rarely seeks medical treatment and fails to take medication when he determined that claimant was not disabled. The court in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987), discussed the factors in addition to medical test results that agency decision makers should consider when judging the credibility of subjective claims of pain greater than that usually associated with a particular impairment.

[W]e have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems . . . [and] the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive.

Under Social Security Ruling 82-59, a claim will be allowed where free community resources are not available, but "[a]ll possible resources (e.g., clinics,

charitable and public assistance agencies, etc.), must be explored. Contacts with such resources and the claimant's financial circumstances must be documented." In Murphy v. Sullivan, 953 F.2d 383, 386-387 (8th Cir. 1992), the court found that there was a lack of evidence that plaintiff had been denied medical care because of his financial condition and denied benefits because the failure to seek treatment was not justified. This case was cited with approval by the Tenth Circuit in an unpublished opinion, Galdean v. Chater, 1996 WL 23199 (10th Cir. Jan. 23, 1996).

Claimant is represented by counsel, who has failed to show that claimant has been unable to obtain his medications and medical treatment because of his inability to pay for it. In fact, some of the medical records are from medical facilities which offer medical care to individuals who have no income or resources. There is no evidence that all community medical resources have been explored and he has been denied treatment at those established to serve the indigent. There is also no evidence of claimant's financial condition, such as income tax returns.

This case is remanded to secure the medical records from the Department of Corrections and Dr. Bowler at Moton Health Clinic and to secure a consultative examination by a neurologist and proper testing of claimant's thoracic outlet condition. Additional vocational expert testimony concerning the evidence should then be secured to determine if it impacts his ability to perform work that exists in the national economy.

Dated this 9<sup>th</sup> day of December, 1997.

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

JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

S:\ORDERS\lenzy.rev

ENTERED ON DOCKET

DATE 12-11-97

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

DEC 10 1997 *PL*

TONYA BROWN, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 KENNETH S. APFEL, )  
 Commissioner of Social Security,<sup>1</sup> )  
 )  
 Defendant. )

Phil Lombardi,  
U.S. DISTRICT COURT

Case No: 96-C-621-W ✓

**JUDGMENT**

Judgment is entered in favor of the Defendant, Kenneth S. Apfel, Commissioner of Social Security, in accordance with this court's Order filed December 10, 1997.

Dated this 10<sup>th</sup> day of December, 1997.

  
\_\_\_\_\_  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

<sup>1</sup>Effective September 29, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), Kenneth S. Apfel, is substituted for John J. Callahan, Commissioner of Social Security, as defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

17

ENTERED ON DOCKET

DATE 12-11-97

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

**F I L E D**

TONYA BROWN, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 KENNETH S. APFEL, )  
 COMMISSIONER OF SOCIAL )  
 SECURITY,<sup>1</sup> )  
 )  
 Defendant. )

DEC 10 1997 *PL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 96-C-621-W ✓

**ORDER**

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

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

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not

---

1/ Effective September 29, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

disabled within the meaning of the Social Security Act.<sup>2</sup>

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.<sup>3</sup> He found that claimant was impaired by Crohn's disease, which was severe enough to reduce her ability to work. He concluded that she had the residual functional capacity to perform a full range of sedentary work of an unskilled and semi-skilled nature. The ALJ found that claimant's impairment and residual functioning capacity did not preclude her from performing her past relevant work as a receptionist/secretary, accounting clerk, general clerk, and appointment clerk. Having determined that claimant's impairments did not prevent her from

---

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

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

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

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

performing her past relevant work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

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

- 1) The ALJ failed to consider all the relevant evidence.
- 2) The ALJ's decision is not supported by substantial evidence.

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

Claimant contends that she has been unable to work since December 4, 1992 due to Crohn's disease, an inflammatory bowel disease. The diagnosis was first made in 1984, with a resection of the terminal ileum and proximal colon shortly thereafter because of obstructive complications (TR 124). She required a second resection in March of 1989, with the disease primarily confined to the anastomotic area and most terminal segment of the ileum at that time (TR 124). She did well for a year, but intensification of symptoms prompted a third bowel-related hospitalization in 1990, at which time she had a colonoscopy which showed circumferential ulceration and stricturing at the anastomosis, but no critical obstruction (TR 124).

Claimant had another colonoscopy on December 8, 1992, which confirmed Crohn's disease, but the overall extent of inflammatory activity was less than two years before (TR 122). Balloon dilation was done (TR 122-136). She was discharged home under the care of her family, and the doctor said that she could return to work

as she felt able and was to pursue a relatively normal, but low residue, diet (TR 123). On January 18, 1993, her doctor found that she was "improved and stabilized." (TR 146). She was maintaining her weight and intake normally, not having nausea or vomiting, and free of nighttime symptoms (TR 146).

Dr. Ronald Passmore conducted a mental examination of claimant on October 18, 1993 and found that she was showing evidence of both depression and anxiety brought on by prednisone and her situation (TR 152). He recommended that she ask her doctor to prescribe an antidepressant (TR 152).

On April 22, 1994, claimant had another colonoscopy to treat an anastomotic stricture, which the doctor concluded would improve her symptomatology significantly, and perhaps allow her to get by with less medication (TR 159-160). Her prognosis was seen as fair in the short term (TR 161-162).

On July 12, 1994, claimant's doctor wrote that the obstruction of her bowel "requires frequent medical attention, care, and use of potent medications, which have potential deleterious side effects." (TR 166). During that month, she was treated for an ileocolic anastomotic leak in her bowel with a mechanical and antibiotic bowel preparation and antibiotics (TR 168-169). She recovered quickly and was discharged to a regular diet and told to avoid heavy lifting (TR 168-169).

The ALJ did not err in finding that the medical evidence in this case does not support claimant's claim that she is unable to perform any work due to her physical impairment. Although the record demonstrates that she has undergone several medical procedures related to her Crohn's disease, she improved immediately after

each procedure and did well for long periods varying from one to five years (TR 124, 127, 159, 168). Following each procedure, she was discharged in good condition, and the only restrictions placed on her were against heavy lifting or straining and a low residue diet (TR 123, 160, 162, 168).

There is no merit to claimant's contentions. The ALJ considered all the relevant evidence, and there is substantial evidence to support the ALJ's decision that claimant is not disabled. It is clear that claimant's impairment does not meet the duration requirement of lasting continuously for a period of at least twelve months, as required by 20 C.F.R. § 416.909. Claimant's condition resulted in periods of hospitalization and recuperation which lasted significantly less than 12 months and led to improvement.

There is no objective medical evidence that claimant's condition "possibly created some interference with her nutrition," as she contends. The only indication of malnutrition is her physician's remark on April 20, 1994 that she "looked fairly good, since I have seen her at times in the past when she has looked extremely wasted and emaciated" (TR 164). This statement alone is insufficient to demonstrate persistent malnourishment.

In February of 1992, claimant's doctor reported that she was "doing very well with her Crohn's disease, having discomfort and cramps only after certain diet indiscretion . . . ." (TR 148). The doctor noted that "[t]here has been no rectal bleeding, with a stool pattern of 3 or 4 mushy stools per day, and no nocturnal diarrhea or vomiting. No weight loss or anorexia. No fever or urinary tract

symptoms. No peripheral arthritis or skin sores." (TR 148). (emphasis added). The doctor found that her Crohn's disease was apparently stable on 15 mg. q.o.d. Prednisone (TR 147).

There is no merit to claimant's contention that she meets Listing § 5.07 of the impairments found in Appendix 1 of the Social Security Regulations. At a hearing on April 20, 1994, claimant testified that she weighed 165 pounds and that her normal weight was 135 pounds (TR 179-180). There is no medical evidence to establish a significant weight loss due to her digestional disorder which is required to meet the Listing of Impairment for "regional enteritis" under Listing 5.07 and 5.08; her weight would need to be 100 pounds or less to meet the Listings at her height of 5'6". 20 C.F.R. Pt. 4, Subpt P, App. 1, §5.08.

The ALJ properly determined that plaintiff retained the ability to perform her past relevant work along with a full range of sedentary work of an unskilled and semi-skilled nature (TR 18). Although she complained of severe pain, the ALJ determined that claimant's allegations are not fully credible (TR 16).

The ALJ applied the criteria set out in 20 C.F.R. § 404.1529 and § 416.929 and in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987) to find that claimant's allegations were not credible (TR 16). The court in Luna discussed the factors in addition to medical test results that agency decision makers should consider when judging the credibility of subjective claims of pain greater than that usually associated with a particular impairment. Id. at 165-66.

[W]e have noted a claimant's persistent attempts to find relief for his

pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems . . . [and] the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive.

Id. See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

The ALJ stated that the primary reasons he found claimant's allegations not to be fully credible were the lack of objective findings by claimant's treating physicians, the lack of objective findings by examining physicians, the lack of medication for severe pain, the lack of frequent treatments for pain, and the lack of discomfort shown by claimant at the hearing (TR 16). He noted specifically that claimant had been diagnosed with Crohn's disease, and had several flareups requiring hospitalization, but subsequent to each hospitalization, she was discharged in good and or stable condition. (TR 16). "There have been no restrictions placed on the claimant's ability to perform work-related activities, except to limit her lifting to no heavy lifting or straining." (TR 16). The ALJ also noted that the claimant told Dr. Golla that she had 3-5 bowel movements a day (TR 163) and testified that she was having 6-7 bowel movements a day (TR 186). The ALJ concluded that "[t]his inconsistency diminishes the claimant's credibility." (TR 16). The ALJ also stated that the doctor found claimant had abdominal tenderness, but did not find that it was "severe," as alleged by the claimant (TR 16, 181).

The decision of the ALJ reflects consideration of all the relevant evidence and is supported by substantial evidence. The decision of the ALJ is affirmed.

Dated this 9<sup>th</sup> day of December, 1997.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

S:\orders\ss\brown.aff