

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

JACK L. MEDICK,

Plaintiff,

vs.

BIOMET, INC., an Indiana
Corporation; CHARLES HESS,
and RONALD PAPA,

Defendants.

ENTERED ON DOCKET

DATE 2-20-98

Case No. 96-CV-584-H ✓

FILED

FEB 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

On January 16, 1998 the Court entered two Orders in this case: an Order denying the Defendants' objection to the Magistrate Judge's award of expenses (Docket #19), and an Order containing the Court's Findings of Fact and Conclusions of Law following the non-jury trial of this case in August, 1997. On January 30, 1998 the Plaintiff filed a Motion to Clarify, Reconsider, or Amend Findings of Fact and Conclusions of Law, to which Defendants responded on February 3, 1998. On February 4, 1998 the Court held a hearing on Plaintiff's motion and orally announced its ruling. The Court is now prepared to enter Judgment in this case.

The Court incorporates by reference herein its two Orders entered on January 16, 1998 and its comments made in open court on February 4, 1998. Based thereon, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Judgment is hereby entered in favor of the Plaintiff, Jack L. Medick, and against the Defendants, Biomet, Inc., Charles Hess, and Ronald Papa, in the amount of \$2,696.70, together

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with interest accruing from the date of this Judgment at the rate of 5.23 % per year, representing attorney fees and expenses awarded by the Magistrate Judge.

2. Judgment is hereby entered in favor of the Plaintiff, Jack L. Medick, and against the Defendant, Biomet, Inc., in the additional amount of \$33,541.28, together with interest accruing from the date of this Judgment at the rate of 5.23 % per year, representing long term commissions owed to Plaintiff from April 9, 1996 through January 31, 1998.

3. Judgment is hereby entered declaring that the Plaintiff, Jack L. Medick, is entitled to long term commissions pursuant to paragraph 9 of the Distributorship Agreement dated February 26, 1982, by and between Biomet, Inc., Jack Medick, Charles Hess, and Ronald Papa (the "Distributorship Agreement"), payable by Biomet, Inc. directly to Jack L. Medick (in accordance with Biomet's usual schedule for issuing commission payments) on "net sales" (as defined in the Distributorship Agreement) from the territories of Oklahoma, Arkansas, and West Texas, beginning with sales on February 1, 1998 and continuing for the life of Jack Medick. Provided, that if Jack Medick should die before April 9, 2006, then those long term commissions will be payable until April 9, 2006 as Jack Medick may appoint or as may otherwise be provided by law.

The amount of the long term commissions so payable shall be calculated as follows:

- (a) .22365 of one and one-quarter percent ($1\frac{1}{4}$ %) of the total "net sales" up to a maximum income of fifty thousand dollars (\$50,000) per year; and
- (b) .22365 of one-half ($\frac{1}{2}$) of one percent (1%) of "net sales" above the sales level from which the first fifty thousand dollars (\$50,000) in income was calculated, per year, with no maximum income level.

4. As the prevailing party, Plaintiff is entitled to an award of his costs pursuant to 28 U.S.C. § 1920.

IT IS SO ORDERED, ADJUDGED, AND DECREED on this 19TH day of February, 1998.


SVEN ERIK HOLMES,
United States District Judge

APPROVED AS TO FORM:


Attorney for Plaintiff,
Jack L. Medick


Attorney for Defendants,
Biomet, Inc., Charles Hess, and
Ronald Papa

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

FILED

FEB 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDSEY K. SPRINGER, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 96-CV-838-H

ENTERED ON DOCKET

DATE 2-20-98

ORDER

This matter come before the Court on consideration of the Report and Recommendation by Magistrate Frank H. McCarthy entered on October 16, 1997 (Docket # 78).

Plaintiffs filed their Objections to the Report and Recommendation on October 27, 1997 (Docket # 80).

When a party objects to the Report and Recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part:

[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

In the instant case, Magistrate Judge McCarthy recommended that Defendant's motion for summary judgment on its counterclaim under 28 U.S.C. § 6673(b)(1) be granted and that penalties be assessed because Plaintiff's lawsuit herein was groundless and frivolous within the meaning of the statute. In particular, it is recommended that Plaintiff Lindsay K. Springer be assess a penalty of \$4,000.00, with the remaining plaintiffs assessed penalties in the amount of either \$1,000.00 or \$500.00.

Plaintiffs object to the Report and Recommendation because no trial or hearing has been held as to Defendant's counterclaim. The Court finds Plaintiff's objection here to be without merit. Summary judgment is appropriate where "there is no genuine issue as to any material fact,"

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Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Widon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). The Court has conducted a de novo review of the record, briefs, and arguments of the parties on these issues. The Court finds that Plaintiffs' objections to be without merit. Further, Plaintiffs' objections do not provide any basis by which to reject the Report and Recommendation. The Court finds the penalties as listed in the Report and Recommendation as entirely appropriate in this case. Accordingly, the Court adopts the Report and Recommendation (Docket # 78) in full. Defendant's motion for summary judgment as to its counterclaim (Docket # 68) is hereby granted.

Plaintiffs also contend that there are outstanding issues in this case. This order is intended to dispose of all issues in this matter.

On December 18, 1997, the Court referred Plaintiffs' motion for the clerk to enter default (Docket # 6) and Plaintiffs' motion for default judgment (Docket # 5), along with others, to the magistrate judge for a report and recommendation. By order dated January 29, 1997 (Docket # 55), the magistrate denied Plaintiffs' motion for the clerk to enter default (Docket # 6) and Plaintiffs' motion for default judgment (Docket # 5). Plaintiffs has objected to the magistrate's order disposing of these issues, since the Court's minute order referred these matters for a report and recommendation. The Court finds Plaintiffs objections to be without merit. Under Fed. R. Civ. P. 72(a), the magistrate judge is permitted to enter orders regarding nondispositive pretrial matters. The magistrate's ruling on the issue of default was nondispositive. The Court observes that pursuant to Fed. R. Civ. P. 55, the clerk of the court may enter or decline to enter default or default judgment. Accordingly, the Court finds that the magistrate did not act outside his powers as Plaintiffs contend. However, the Court has reviewed the January 29, 1997 order as well as the

Plaintiffs objections.¹ This Court has conducted a de novo review of the record, the pleadings, and arguments by the parties under the standards of Rule 72(b). The Court concludes that Plaintiffs' motion for entry of default and for entry of default judgment should be denied. Because of the failure to effect proper service, the entry of default and the entry of default judgment were not appropriate. Accordingly, Plaintiffs' motion for the clerk to enter default (Docket # 6) and Plaintiffs' motion for default judgment (Docket # 5) are hereby denied.

Plaintiffs have also objected on February 11, 1997 (Docket # 58) to the Report and Recommendation by Judge McCarthy entered on January 31, 1997 (Docket # 56).

In that report, Judge McCarthy recommended that Defendant's motion for a preliminary injunction be denied and that Plaintiff's motion for hearing to expedite motion for preliminary injunction be denied.

The Court finds that Plaintiffs' objections are hereby moot in light of the Court's adoption of the magistrate's recommendation that Defendant's motion for summary judgment should be granted. However, pursuant to Rule 72(b), the Court has conducted a de novo review of the briefs, arguments of the parties, and the record on these issues. The Court finds no merit in Plaintiffs' objections. Further, the Court finds that Plaintiff's objections do not provide any basis by which to reject the Report and Recommendation. Accordingly, the Court adopts the Report and Recommendation (Docket # 56) in full. Accordingly, Plaintiffs' motion for preliminary injunction (Docket #3) and motion for hearing to expedite motion for preliminary injunction (Docket # 17) are hereby denied.

Plaintiffs' motion for permission to appeal dated May 9, 1997 (Docket # 73) is denied as moot. Plaintiffs' motion for certification of order dated June 9, 1997 (Docket # 75) is denied as moot.

¹ The Court finds that Plaintiffs have had an adequate opportunity to object to the magistrate's action and have indeed so objected in various pleadings

Plaintiffs' motion for summary judgment filed April 17, 1997 (Docket # 62) is denied as moot given the Court's adoption of the magistrate's March 14, 1997 and October 15, 1997 Report and Recommendations.

On June 9, 1997, Plaintiffs filed a motion for relief from the Court's minute order dated May 27, 1997 (Docket # 76), in which it disagreed with the Court's conclusion therein that the sole remaining issue was Defendant's counterclaim. The Court finds that all outstanding matters have been addressed at this time. Plaintiffs' Motion for relief from minute order (Docket # 76) is hereby denied.

IT IS SO ORDERED.

This 18TH day of February, 1998.


Sven Erik Holmes
United States District Judge

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

FILED
FEB 19 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDSEY K. SPRINGER, et al.,
Plaintiffs,
v.
UNITED STATES OF AMERICA,
Defendant.

Case No. 96-CV-838-H

ENTERED ON DOCKET
DATE 2-20-98

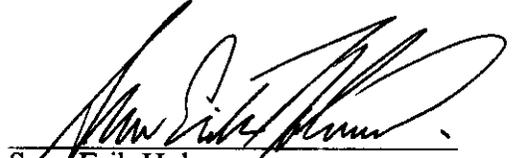
JUDGMENT

In an order entered February 18th, 1998, this Court adopted in its entirety the magistrate judge's Report and Recommendation (Docket # 78), recommending that Defendant's motion for summary judgment be granted.

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

IT IS SO ORDERED.

This 18th day of February, 1998.


Sver Erik Holmes
United States District Judge

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

FILED

FEB 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Plaintiffs,

vs.

HOWARD CAVANESS, et al.

Defendants.

Case No. 97-CV-338-E (M)

ENTERED ON DOCKET

DATE FEB 20 1998

**STIPULATION OF DISMISSAL
WITHOUT PREJUDICE AS
AGAINST DEFENDANT ROBERT E. RUBIN**

COME NOW the undersigned parties, and pursuant to Rule 41(a)(1)(ii), stipulate that the above-captioned action may be dismissed without prejudice as against Defendant Robert E. Rubin only.

Respectfully submitted,

By


THOMAS F. BIRMINGHAM OBA #811
Birmingham, Morley, Weatherford &
Priore
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02 21

By Robert E. Bacharach by Kenna B. Minitt

ROBERT E. BACHARACH/ OBA #11211

Crowe & Dunlevy

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(405) 235-7700

Attorney for Defendant, Bank One,
Oklahoma, N.A., formerly Liberty Bank
and Trust Company of Tulsa, N.A.

By Dennis M. Duffy

DENNIS M. DUFFY OBA #13030

Trial Attorney, Tax Division

U.S. Department of Justice

P.O. Box 7238

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STEPHEN C. LEWIS

United States Attorney

Attorney for Defendant, Robert E. Rubin,
Internal Revenue Service

2500-090

FILED

FEB 18 1993

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

PEGGY J. NEECE and BUEL H.
NEECE,

Plaintiffs,

vs.

INTERNAL REVENUE SERVICE OF
THE UNITED STATES OF AMERICA;
THE UNITED STATES OF AMERICA;
and FIRST NATIONAL BANK OF
TURLEY, N.A.,

Defendants.

ENTERED ON DOCKET

DATE FEB 20 1993

Case No. 88-CV-1320-E

AGREED FINAL JUDGMENT

The parties hereto do hereby stipulate, consent and agree to a Final Judgment in favor of the Plaintiffs, Peggy J. Neece and Buel H. Neece, against the United States of America in the sum of \$142,069.62, plus statutory interest thereon, and the First National Bank of Turley, N.A. in the sum of \$84,413.83, plus statutory interest thereon.

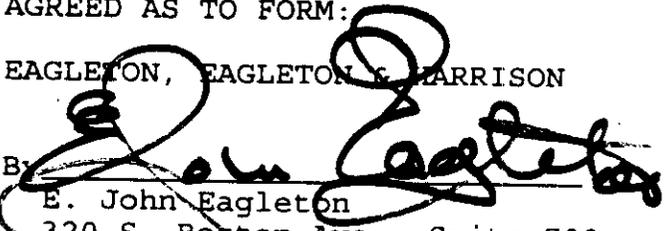
DATED this 26th day of January, 1998.


THE HONORABLE JAMES O. ELLISON
SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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AGREED AS TO FORM:

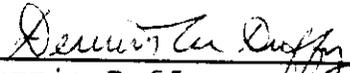
EAGLETON, EAGLETON & HARRISON

By 

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By 

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ATTORNEYS FOR FIRST BANK OF TURLEY

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

FEB 18 1998

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UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 TYRONE E. WILKERSON,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Action No. 97CV969 C /

ENTERED ON DOCKET

DEFAULT JUDGMENT

DATE ~~FEB 20 1998~~

This matter comes on for consideration this 18 day of Feb, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Tyrone E. Wilkerson, appearing not.

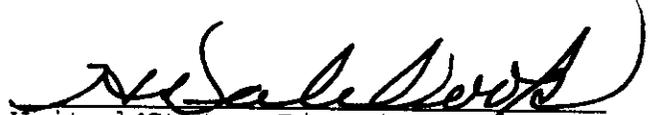
The Court being fully advised and having examined the court file finds that Defendant, Tyrone E. Wilkerson, was served with Summons and Complaint on December 4, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Tyrone E. Wilkerson, for the principal amount of \$800.00, plus accrued interest of \$496.80, plus administrative charges in the amount of \$87.00, plus interest thereafter at the rate of 3 percent per annum

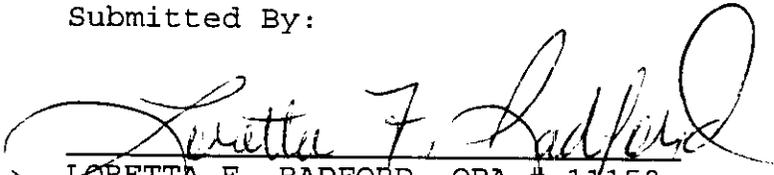
NOTE: THIS ORDER IS TO BE MAILED
BY MOVANT TO ALL COUNSEL AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

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until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.232 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:



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

LFR/jmo

DATE 2-20-98

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

F I L E D

FEB 19 1998 *p*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDA FAYE STEADMAN,)
 SSN: 447-46-1923,)
)
 Plaintiff,)
)
 v.)
)
 KENNETH S. APFEL,)
 Commissioner of the Social)
 Security Administration,¹)
)
 Defendant.)

Case No. 96-CV-0269-EA ✓

JUDGMENT

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

It is so ordered this 19th day of February, 1998.

Claire V Eagan

 CLAIRE V. EAGAN
 UNITED STATES MAGISTRATE JUDGE

¹Effective 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).

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F I L E D

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

FEB 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDA FAYE STEADMAN,)
 SSN: 447-46-1923,)
)
 Plaintiff,)
)
 v.)
)
 KENNETH S. APFEL,)
 Commissioner of the Social)
 Security Administration,¹)
)
 Defendant.)

ENTERED ON DOCKET
DATE 2-20-98

Case No. 96-CV-0269-EA /

ORDER

Plaintiff, Linda Faye Steadman, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying plaintiff's application for supplemental security income under the Social Security Act.² In accordance with 28 U.S.C. § 636(c)(1) and (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.

¹ On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Apfel is substituted for Shirley S. Chater, former Commissioner, as the defendant in this action.

² Plaintiff's September 9, 1992 application for disability benefits was denied initially (December 15, 1992) and on reconsideration (February 26, 1993). A hearing before an Administrative Law Judge (ALJ) was held September 21, 1993 in Tulsa, Oklahoma. A supplemental hearing was held January 4, 1994. By decision October 14, 1994, the ALJ entered the findings which are the subject of this appeal. The Appeals Council denied review of the ALJ's findings on February 7, 1996. The decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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Plaintiff asserts that the Commissioner erred where (1) the ALJ failed to properly assess claimant's credibility and her allegations of back and knee pain; (2) the ALJ failed to consider plaintiff's mental impairment; (3) the ALJ failed to properly develop the record by not obtaining medical evidence which was called to his attention; and (4) the ALJ, by not obtaining vocational expert testimony, failed to meet his Step Five burden to show that Plaintiff could do work in spite of her nonexertional impairments. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. Background

Plaintiff was born November 21, 1949 and resides in Mounds, Oklahoma. She has some high school level education, but did not graduate from high school or receive her G.E.D. (R. 48, 346). She worked as a nurse's aide for over ten years. Her last job was cleaning rooms in a motel, which she did for some time less than a year. (R. 347-49). Plaintiff has not worked since 1992. (R. 349).

II. Social Security Law and Standards of Review

Disability under the Social Security Act is defined as the "...inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment..." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy..." *Id.*, § 423(d)(2)(A). Social Security regulations

implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.³

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hargis v. Sullivan, 945 F.2d 1486 (10th Cir. 1991).

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Commissioner that plaintiff is not disabled within the meaning of the Social Security Act. The term substantial evidence has been interpreted by the U.S. Supreme Court to require "...more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126 (1938)). The search for adequate evidence does not allow the court to substitute its discretion for that of the agency. Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981). Nevertheless, the court must review the record as a whole, and "the substantiality of the evidence

³ Step One requires the claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510. Step Two requires that the claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with certain impairments listed in Appendix 1 of Subpart P, Part 404, 20 C.F.R.. Claimants suffering from a listed impairment or impairments "medically equivalent" to a listed impairment are determined to be disabled without further inquiry. If not, the evaluation proceeds to Step Four, where the claimant must establish that he does not retain the residual functional capacity ("RFC") to perform his past relative work. If the claimant's Step Four burden is met, the burden shifts to the Commissioner to establish at Step Five that work exists in significant numbers in the national economy which the claimant--taking into account his age, education, work experience, and RFC--can perform. See Diaz v. Sec. of H.H.S., 898 F.2d 774 (10th Cir. 1990). Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternate work.

must take into account whatever in the record fairly detracts from its weight.” Universal Camera Corp. V. NLRB, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951).

III. The Decision of the Administrative Law Judge

The ALJ determined at Step Five of the sequential evaluation process that plaintiff was not disabled within the meaning of the Social Security Act. (R. 29-30). The ALJ found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for an inability to lift more than ten pounds at a time, to lift/carry more than occasionally articles like docket files, ledgers, and small tools, to stand/walk more than two hours in an eight-hour day, and to do any significant stooping due to pain. The ALJ concluded that plaintiff was unable to perform her past relevant work as a nurse’s aide, but retained the residual functional capacity to perform a full range of sedentary work. (R. 29). The ALJ found that plaintiff was 44 years old, which is defined as a younger individual, had completed the tenth grade, and did not have any acquired work skills which were transferable to the skilled or semiskilled work functions of other work. Based on her exertional capacity for sedentary work, and age, education, and work experience, the ALJ concluded that plaintiff was not disabled under the Social Security Act at any time through the date of the decision. (R. 29-30).

IV. Medical History of Plaintiff

Plaintiff contends that she has been unable to work since February 29, 1992 because of chest pain, pain in her back, legs, and arms, head aches, and blurry eyes. (R. 79, 373). There is a great deal of medical evidence in the record of various ailments plaintiff had prior to 1992, including bladder infections and kidney pain, visual blurring, facial numbness, nausea and vomiting, migraines, lesions, obesity, and a hand injury. (R. 151-170, 175, 223-250, 251-261).

In November of 1991, plaintiff complained to her doctor of chest pain with exertion for the prior two months, but an EKG showed no significant changes, although the test was ended when her blood pressure dropped sharply. (R. 132-133). A thallium test was recommended if her pain continued, but she had been pain-free while taking Inderal so this medicine was continued. (R. 132). Plaintiff continued to have chest pain, so in December she was told to stop taking the Inderal and was scheduled for tests to rule out gallbladder disease. (R. 112, 119-120). On January 8, 1992, the gallbladder ultrasound showed no problems. (R. 118). Plaintiff was seen several times in March of 1992 for complaints of nausea, stomach pain, and vomiting, and a physician diagnosed her problem as epigastric/right upper quadrant abdominal pain of unknown etiology. (R. 111-115). A chest x-ray proved normal. (R. 109).

Plaintiff was seen on June 7, 1992 for complaints of headaches "for weeks," jaw and ear pain, and swelling of the left side of her face. (R. 108). By June 10, 1992, the headaches had resolved. (R. 107). Plaintiff was seen for left knee pain and swelling in October of 1992, arthritis and gastritis were diagnosed, and medications were prescribed. (R.104-105). Plaintiff told the doctor that she had suffered a similar problem in her right knee the year before and had periodic pain in other joints. (R. 104).

On December 21, 1992, plaintiff was seen for right knee pain and swelling and blurry eyes. (R. 194). She was treated symptomatically with pain medication and seen again on January 5, 1993. (R. 192, 194). The doctor's examination showed "musculoskeletal abnormalities." Plaintiff was treated with gentle osteopathic manipulation with good results. (R. 192). Medication was prescribed for pain, muscle relaxation and inflammation. (Id.).

Plaintiff was seen again on March 19, 1993, “for multiple somatic complaints.” (Id.). Plaintiff asked the doctor about disability and the source of her pains, but said she was unable to afford any sort of work-up. (Id.). Medications were prescribed, and she was counseled about weight loss, range of motion stretches, and some form of routine aerobic exercise. (Id.). X-rays taken on April 12, 1993 showed minimal arthritic processes and calcific density posterior to her knee joint and degenerative joint disease, including some spurring/slipping in the anterior surface at L3-L5, decreased disc space of the thoracic spine at T10-T11, and the L5 nearly fused with S1 posteriorly. (R. 191).

At a hearing on January 4, 1994, plaintiff stated that she could walk only twenty to thirty minutes, stand and sit twenty minutes, and lift one gallon of milk. (R. 355-356). X-rays taken on December 7, 1994, showed “moderate degenerative changes” in her left knee, “mild degenerative changes” in her right knee, no arthritic changes in her hips, and “mild degenerative changes” in her lower lumbar and lumbosacral spine. (R. 337).

V. Review

A. *The ALJ's Assessment of Plaintiff's Pain and Credibility*

Plaintiff initially asserts that the Commissioner erred because the ALJ failed to properly assess plaintiff's credibility regarding her allegations of back and knee pain. Plaintiff argues that the ALJ did not properly assess plaintiff's credibility regarding her pain, because the ALJ did not link his findings to specific evidence. This claim is without merit.

The framework for the proper analysis of evidence of allegedly disabling pain was set forth by the Tenth Circuit in Luna v. Bowen, 834 F.2d 161, 163-64 (10th Cir. 1987). That analysis requires the court to consider:

(1) whether Claimant established a pain-producing impairment by objective medical evidence; (2) if so, whether there is a “loose nexus” between the proven impairment and the Claimant’s subjective allegations of pain; and (3) if so, whether considering all the evidence, both objective and subjective, Claimant’s pain is in fact disabling.

Kepler v. Chater, 68 F.3d 387, 390 (10th Cir. 1995) (internal quotations omitted).

This court generally gives great deference to the credibility determinations made by an ALJ. 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). However, the ALJ’s credibility determinations must be closely and affirmatively linked and logically connected to substantial evidence. See Kepler, 68 F.3d at 391.

In the case at bar, the ALJ found that plaintiff’s subjective complaints of pain, blurred vision, depression, and nervousness were not of such intensity, frequency and duration as to affect her concentration or prevent her from performing sedentary work. (R. 29). The ALJ wrote: “[t]o the extent that the claimant’s testimony tends to show otherwise, such testimony, in light of all other evidence, including the medical exhibits, is deemed not sufficiently credible to support a finding of disability under current criteria.” (R. 29). This court finds that the determinations of the ALJ are supported by substantial evidence and specifically and logically connected to that evidence, as demonstrated below.

Dr. Richard Cooper conducted a consultative examination of Plaintiff on December 3, 1992. (R. 185-188). Plaintiff complained of leg pain, headaches, facial numbness, and blurry vision. (R. 185). At first plaintiff said she had no chest pain, and then she said she had such pain twice a month.

(R. 185). Dr. Cooper noted that plaintiff claimed that her right hand gets numb, but "she filled out the patient information sheet herself" and had legible writing. (R. 187). Dr. Cooper stated:

In the musculoskeletal exam, range of motion of the cervical spine, knees, shoulders, ankles, wrists, elbows, and fingers are all full range, except the right fifth proximal interphalangeal joint will only extend to -15 degrees. The left hip has full range. The right hip has full range of abduction, adduction, extension, flexion, and external rotation, but has reduced internal rotation.... In the thoracolumbar spine, right and left side-bending are full range. Flexion is to 80 degrees and extension to 15 degrees.... She was able to walk on her toes and walk on her heels without difficulty.

Fabere test negative. Straight leg raising test negative both seated and supine. Lasegue's negative. Fajersztajn's negative. In the knee structural exam, there was some crepitus in the right knee, primarily at the lateral joint line, and the left knee showed a ballottable patella, indicating some fluid. On the right knee, I suspect a small amount of fluid, but not truly obvious; the patella was not ballottable. The knees, nor any other joint, are red and no other joint has any suggestion of swelling. The gait is normal within the confines of the office.

In summary, this lady complains of pain in the legs, which may be centered in the two knees and possibly some in the right hip. There is a suggestion of some swelling in both knees and some crepitus of the right knee. She seems to have migraine headaches with a neurological component. On her complaint of chest pain, it is hard to specify, particularly since she reports a negative exercise treadmill test and some sort of scan being negative at the Tulsa Medical College about a year ago. In my opinion, she would be impaired in any activity that required prolonged standing, walking, bending, lifting.

(R. 187-188).

On December 14, 1992, a medical-vocational report was written which concluded "claimant alleges blurry vision, chest pain and multiple joint pain. Medical evidence shows that she has no severe impairments to prevent her from working. She can do all work." (R. 53).

Dr. S.Y. Andelman testified as a medical expert at a hearing on January 4, 1994, and also submitted written reports. (R. 214-216, 285, 359-363). On October 11, 1993, he reviewed claimant's records and reported no documentation of any acute or chronic inflammatory disease of the joints,

no physical problems affecting her posture and walk, no inflammatory reactions in her leg joints, mild degenerative joint disease in her back, no documentation of eye impairments, ulcers, kidney disease, neurological problems, or myocardial disease, and no signs of hypertension. (R. 214-216). Dr.

Andelman concluded that plaintiff did not meet any listing of impairments and commented:

Though the alleged onset date is 02/29/92 it is evident that the involvement of the multiple systems have been present long before that and have been recurrent and have been treated with relief, so that she was able to return to work each time. She states that she can never bend, reach, squat, crawl, climb stairs, or climb ladders. The examination by Dr. Cooper reveals that she stands erectly and is able to walk with good gait and she has no involvement of the joints except for crepitation of the right knee. She has had no difficulty in mental difficulties or environmental factors.... Claimant has had pain occasionally but at multiple examinations there is no mention of pain.... Claimant has usually been compliant with medical treatment. However she has canceled many appointments and there has been long periods between visits. She has not lost weight as recommended and she has not performed exercises.

(R. 216).

On January 27, 1994, Dr. Andelman again reviewed claimant's records and stated that his conclusion was the same as the one on October 11, 1993: "[s]he continues to have minimal arthritic changes in her knee and lumbar spine. However, these are not sufficient to cause her inability to perform any activities." (R. 285). At the hearing, the doctor stated that he still held that opinion. (R. 359).

After reviewing these and other records, the ALJ concluded:

Although the treatment notes do reflect complaints of chest pain and of numbness in the hands and face, blurred vision and headaches, such complaints are most consistent and prevalent in the treatment record prior to the date from which the claimant alleges disability in February 1992. Aside from only occasional references to headaches and/or blurred vision, from February 1992 onward symptoms addressed relate primarily to musculoskeletal and gastrointestinal complaints. The latter are reflected in the early treatment notes following the date from which the claimant alleges disability, but inferring from the absence of continued complaints, appear to have

resolved by March 1992. It is only in approximately October of 1992 that complaints with respect to her musculoskeletal system emerge with any significance....

Dr. Schooley's notes suggest that the claimant got good results from osteopathic manipulation and medication, the claimant, being advised further about weight loss, range of motion stretches, and aerobic exercises. At the supplemental hearing as at the original hearing, the claimant testified she weighed 240 pounds. The entry from March 1988, at Exhibit 20, indicated the claimant weighed 242 pounds and was being advised to lose weight. Thus, the record would suggest that the claimant had failed, at the very least, to follow this prescribed treatment.... Furthermore, the medical expert felt that the claimant had not performed her exercises as recommended. The claimant also complained of a history of boils.... Nonetheless, although the claimant did make this complaint to the consultative examiner and boils were observed by him, he drew no conclusions as to that condition with respect to the claimant's ability to perform work-like activity, leaving the Administrative Law Judge to conclude that although the claimant may be subject to the condition, it does not represent a source of significant limitation on her ability to perform work-like activity. The Administrative Law Judge concludes the residual functional capacity to perform work-like activity set out below is not contradicted by the treatment notes or the opinions of the medical expert or consultative examiner and is most consistent with the reading of the medical record as a whole.... Furthermore, the treatment notes only address significant musculoskeletal complaints following February 1992 between October 1992 and April 1993, when the treatment notes terminate, leaving a gap in treatment thereafter. Exhibit 23 represents an invitation to the claimant's representative to obtain and submit additional evidence which his client desired to be consider [sic] in processing her claim. Nonetheless, no additional treatment notes following April 1993 have been entered into the record. On more than one occasion, the claimant and/or her representative contended that the claimant is unable to afford a medical evaluation and/or treatment she feels she needs. Nonetheless, the record does not demonstrate a reason the claimant could not have continued the documented treatment she was receiving, to reflect, at the very minimum, a continued pattern of complaints lending support to the claimant's allegations of disability even if no treatment was available to resolve the symptoms. The record does not suggest that the claimant was unable to afford, at the very minimum, continuation of treatment she had received prior to when the treatment notes terminate. The absence of a continuous pattern of, at the very least, complaints suggests the claimant's symptoms are not as severe as she alleges them to be.

(R. 26-27).

The Tenth Circuit has stated 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. 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. Plaintiff’s allegations of disabling pain and limitations are not supported by any medical evidence. The ALJ did not err in concluding--and demonstrating by specific and substantial evidence--that the plaintiff’s complaints of pain and other symptomatology were disproportionate to the objective findings and not credible beyond requiring certain lifting, standing, and stooping limitations.

B. The ALJ’s Consideration of Plaintiff’s Mental Impairment

Plaintiff asserts that the ALJ erred by “failing to consider [plaintiff’s] limited mental aptitude as an additional nonexertional impairment.” Plaintiff’s Memorandum Brief at 4. Plaintiff argues that the facts that she attended special education classes and that a physician once commented on her “slightly dull mentality” were not examined as thoroughly as required by law. This claim is without merit.

The ALJ considered plaintiff’s claim of a learning disability in great detail, noting that there were no medical records either recommending her for a mental evaluation or evaluating her mental condition. (R. 28-29). The ALJ observed that neither the consultative expert nor the medical expert found mental limitations, and that her testimony at the hearing showed no mental deficiency. (R. 28-29).

The ALJ thoroughly considered the issue of plaintiff's mental status and the fact that, although she completed the tenth grade,⁴ she claimed she had only a second or third grade education due to a learning disability. (R. 28-29). The ALJ noted that treatment notes did include references to plaintiff having a "slightly dull mentality." (R. 20). However, the ALJ accurately observed that those notes related to treatment of the plaintiff in 1961 and 1967 for pyelonephritis or interstitial cystitis, not to treatment for any type of mental or emotional condition. (R. 28).

The ALJ stated in his report:

[t]he claimant has not submitted any other treatment notes from the remote past either recommending the claimant for evaluation or evaluating her on the basis of these observations. Furthermore, the more current treatment notes...only very rarely raise the issue of a mental or emotional condition. In July 1988, well before the date from which the claimant alleges disability, she was being seen for her nerves and skin sores. Subsequent entries do not suggest continued followup. Treatment notes closer in time to the date from which the claimant alleges disability do not establish a basis for a determination that the claimant suffers from any mental or emotional condition. Furthermore, the consultative examiner, apparently based upon the remarks of the claimant, reported that she had not received treatment for nervousness or mental problems, and he drew no conclusions from his own observations about any limitations due to such a condition. The medical expert, reviewing all of the medical documents in evidence, seemed to feel that the claimant had no limitations with respect to mental factors. Again, going back to the contentions of the claimant's representative that the claimant, although completing the 10th grade, had achieved an education of only the 2nd to 3rd grade level because of a learning disability, the Administrative Law Judge observes the remarks of the consultative examiner that the claimant had been able to fill out the patient information sheet herself, writing in a legible longhand and printing. More significantly, the record contains several forms and/or writings purporting to be by the claimant.... Although the claimant's writing samples indicate errors in grammar and spelling, they are impressive for the clarity of expression and thought exhibited in the sentence and paragraphing structure. Furthermore, the Administrative Law Judge on the occasion of both the original and

⁴ Plaintiff's statements about the grade level she has completed are contradictory, at least in so far as they appear in the record. Cf. plaintiff's statements in the September 21, 1993 ALJ hearing ("tenth grade")(R. 371) and the January 4, 1994 supplemental hearing ("11th grade in special education")(R. 346). This contradiction is inconsequential to this Court's review of the Commissioner's decision in this case and is mentioned only for purposes of clarity.

supplemental hearing observed no obvious deficiencies in the claimant's mental or emotional processes. The Administrative Law Judge concludes the claimant has no medically determinable mental or emotional condition affecting her ability to perform work-like activity.

(R. 28-29).

This Court's review of the decision of the Commissioner is limited to whether the decision is supported by substantial evidence. Substantial evidence is more than a scintilla and less than a preponderance. Richardson, 402 U.S. at 401, 91 S.Ct. at 1427, 28 L.Ed.2d 842 (1971). Based on the findings detailed above, it is clear that the ALJ's conclusions regarding plaintiff's alleged mental impairment are supported by substantial evidence.

C. The ALJ's Duty to Develop the Record

Plaintiff asserts that the ALJ failed to properly develop the record by not obtaining certain medical evidence, specifically (1) evidence of plaintiff's IQ and (2) evidence of medical records from two instances of hospitalization of Plaintiff during the course of the administrative process. These claims are without merit.

Plaintiff's argument that the ALJ, based on the evidence before him, had a duty to determine whether plaintiff had a low IQ does not withstand scrutiny. 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). But it is difficult to determine what entails 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 Commissioner'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).

According to the Listings, plaintiff's IQ scores would be considered disabling only if they registered seventy or less. 20 C.F.R. pt. 404, subpt. P, app. 1, § 112.05(D). There was absolutely no objective evidence presented by plaintiff that established or even began to suggest that plaintiff has an IQ below 70. Beyond IQ scores, plaintiff made a few, scattered statements of "nerves" or depression. No objective evidence was presented to establish such a mental impairment. The ALJ had no duty to further investigate plaintiff's IQ or any other type of mental impairment.

Similarly, the instances of hospitalization raised by the plaintiff at the supplemental hearing do not constitute objective evidence suggesting the existence of a condition which could have a material impact on the disability decision. The fact that plaintiff stated that in September of 1993 she was admitted to the hospital for chest pains and released the next day has no material impact on the disability alleged in this case. Neither does the claim that an "abscess burst in her lower stomach" on

May 4, 1994. (R. 288). The ALJ was not required to further develop the record because of these isolated and unsupported comments by plaintiff and her counsel.

D. The ALJ's Step Five Burden

Plaintiff finally asserts that the ALJ, by not obtaining vocational expert testimony, failed to meet his Step Five burden to show that plaintiff could do work in spite of her nonexertional impairments. This final claim is without merit.

The ALJ did not err in applying the medical-vocational guidelines developed by the Social Security Administration. These “grids” relate a claimant’s age, education and job experience with her ability to engage in work in the national economy at various levels of exertion to determine a claimant’s ability to work. The court found in Huston, that:

[A]pplication of the grids is appropriate only where a claimant’s residual functional capacity (RFC) and other characteristics (age, work experience, education) precisely match a grid category.... RFC is primarily a measure of exertional capacity, i.e., strength. Residual capacity, however, sometimes is curtailed by nonexertional limitations, such as postural or sensory limitations. Where such is the case, the grids may not be applied mechanically but may serve only as a framework to aid in the determination of whether sufficient jobs remain within a claimant’s RFC range (sedentary, light, medium, heavy, and very heavy).

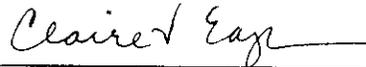
838 F.2d at 1131. However, “the mere presence of a nonexertional impairment does not automatically preclude reliance on the grids. Use of the grids is foreclosed only ‘[t]o the extent that nonexertional impairments further limit the range of jobs available to the claimant.’” Channel v. Heckler, 747 F.2d 577, 582 n. 6 (10th Cir. 1984) (quoting Grant v. Schweiker, 699 F.2d 189, 192 (4th Cir. 1983)). After concluding that plaintiff had failed to show any nonexertional impairments which curtailed her residual functional capacity, the ALJ correctly applied the grids.

It is only when a claimant's residual functional capacity is diminished by both exertional and nonexertional impairments that the ALJ must produce expert vocational testimony or other similar evidence to establish the existence of jobs in the national economy. Hargis v. Sullivan, 945 F.2d at 1491; Channel, 747 F.2d at 580. Having found no such combination of impairments, the ALJ was not required to consider vocational expert testimony.

V. Conclusion

The decision of the Commissioner is supported by substantial evidence and is a correct application of the regulations. The decision is AFFIRMED.

DATED this 19th day of February, 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

FEB 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VANCE MASON,)
)
Plaintiff,)
)
vs.)
)
WASHINGTON COUNTY, et al.,)
)
Defendants.)

No. 97-CV-1053-BU (W)

ENTERED ON DOCKET

DATE 2-20-98

ORDER

On November 26, 1997, Plaintiff submitted a complaint (Docket #1), alleging violations of his civil rights pursuant to 28 U.S.C. § 1983, and an affidavit of financial status (Docket #2). In an Order filed December 10, 1997 (Docket #3), the Court directed Plaintiff to cure, by December 31, 1997, a number of deficiencies in both his § 1983 Complaint and his affidavit of financial status. In addition, Plaintiff was advised that "[f]ailure to comply with the order of the Court may result in dismissal of this action."

To date, Plaintiff has failed to comply with the Court's December 10, 1997 Order. The Court finds, therefore, that this action should be dismissed without prejudice for failure to prosecute. See Fed. R. Civ. P. 41(b).

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's complaint is dismissed without prejudice for failure to prosecute.

SO ORDERED THIS 19th day of February, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 2-20-98

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

FILED

FEB 19 1998 *10*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THRIFTY RENT-A-CAR SYSTEM,)
INC., an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
BEST LEASING, INC., and)
ALDO MUROS, an individual,)
)
Defendants.)

Case No. 96-CV-1136-BU

ORDER

This matter comes before the Court upon the motion of Plaintiff, Thrifty Rent-A-Car System, Inc., for summary judgment pursuant to Rule 56(b), Fed. R. Civ. P. Defendants, Best Leasing, Inc. and Aldo Muros, have responded to the motion and Plaintiff has replied thereto. Upon due consideration of the parties' submissions and the oral arguments of counsel at the hearing on February 18, 1998, the Court makes its determination.

Background

On October 1, 1990, Plaintiff, Thrifty Rent-A-Car System, Inc. ("Thrifty"), and Defendant, Best Leasing, Inc. ("Best"), entered into an agreement entitled "License Agreement for Vehicle Rental, Leasing & Parking" ("License Agreement").¹ The License Agreement granted Best the right to operate a Thrifty franchise in the territory specified in the License Agreement and referred to as Newark, New Jersey. In connection with the execution of the License Agreement, Defendant, Aldo Muros ("Muros"), executed a

¹ The effective date of the License Agreement was October 3, 1990.

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document entitled "Personal Guarantee," pursuant to which he unconditionally guaranteed the performance of all obligations of Best and the payment of all sums or damages due Thrifty under the License Agreement. On October 17, 1991, Thrifty and Best entered into another agreement entitled "Master Lease Agreement" ("Master Lease Agreement"). This agreement was also personally guaranteed by Muros. It provided for the leasing of vehicles to Best for use in Best's operation of the Thrifty franchise. The Master Lease Agreement incorporated by reference the terms of the Annual Lease Program ("Lease Program") which set forth the terms for leasing of vehicles by Best from Thrifty.

On June 29, 1995, Thrifty and Best entered into an agreement entitled "Work-Out Agreement Among and Between Best Leasing Inc. dba Thrifty Car Rental and Thrifty Rent-A-Car System, Inc." The intent of this agreement, in part, was for Best to restructure the payment obligations due to Thrifty. In connection with the agreement, Best executed a promissory note dated July 1, 1995, in the amount of \$150,000.00. The promissory note was personally guaranteed by Muros.

Thereafter, on August 18, 1995, Thrifty and Best entered into an agreement entitled "Courtesy Vehicle Lease Agreement." The purpose of this agreement was to lease courtesy vehicles to Best for use in the operation of its franchise. This agreement was also personally guaranteed by Muros.

On February 10, 1997, Thrifty filed an Amended Complaint against Best and Muros alleging four claims for relief. These

claims included breach of the License Agreement ("Count I"), breach of the Master Lease Agreement and the Courtesy Vehicle Lease Agreement ("Count II"), breach of covenant and unfair competition ("Count III"), and default on the promissory note ("Count IV"). As to Counts I, II, and IV, Thrifty specifically alleged that Best had failed to pay certain amounts due and owing to Thrifty under the subject agreements and that as a result of Best's failure to pay those amounts, Best and Muros were indebted to Thrifty, for which indebtedness Thrifty was entitled to recover a judgment.

Thereafter, on February 14, 1997, Best and Muros filed an Amended Answer to the Complaint and Counterclaims. In their pleading, Best and Muros denied Thrifty's claims, asserted various affirmative defenses to the claims and alleged three counterclaims. The three counterclaims included breach of the License Agreement ("Count I"), negligent or intentional misrepresentation ("Count II") and rescission ("Count III"). As to Count I, Best and Muros alleged that Thrifty breached the License Agreement by failing to develop adequate advertising and public relation programs to properly promote Best's "Thrifty business" in the New York/New Jersey airport area market. Best and Muros alleged that under the License Agreement, Thrifty had a duty to use good faith and diligence in advertising, promoting and publicizing Best's "Thrifty business" in order to increase and develop patronage by the public. They also alleged that Thrifty had agreed under the License Agreement to provide to Best its knowledge, expertise and experience in establishing, managing and operating Best's "Thrifty

business." Best and Muros additionally alleged that Thrifty breached the License Agreement by refusing to allow Best to operate its "Thrifty business" as a "parking only facility" when it became clear that Best could not operate the business profitably on a consistent basis. They alleged that as a result of Thrifty's refusal to permit the "parking only facility," Best allowed Thrifty to terminate the License Agreement.

In regard to Count II, Best and Muros alleged that Thrifty misrepresented and failed to disclose eleven material facts, specifically listed in paragraph 19, concerning the operation of the "Thrifty business" in the New York/New Jersey airport market area. According to Best and Muros, Thrifty agreed to provide Best its knowledge, expertise and experience in establishing, managing and operating Best's "Thrifty business." In addition, they alleged that explicit and implicit in the relationship between Thrifty and Best was good faith dealings between the parties, full disclosure of all market conditions, especially those relevant to Best's territory, and provision of relevant information so as to enable Best to successfully operate its business. In connection with Count II, Best and Muros also alleged that Thrifty convinced Best to give up its minority preference for an "in-airport" location in the Newark Airport expansion so that Dollar Rent A Car Systems, Inc.'s opportunity for an "in-airport" location would improve. They further alleged that Thrifty provided certain inducements to wrongfully encourage Best to assume Dollar Rent A Car Systems, Inc.'s lease obligation on the Route 1 and 9 location, so that

Dollar Rent A Car Systems, Inc. could move forward with its plan for an "in-airport" location at the Newark airport. Further, Best and Muros alleged that Best relied upon all of Thrifty's misrepresentations and omissions to its detriment.

As to Count III, Best and Muros alleged that Thrifty's conduct toward Best and Muros with respect to the License Agreement and the circumstances surrounding the operation of a rental car business in the New York/New Jersey area resulted in a failure of consideration with respect to the subject agreements. In addition to the stated allegations with respect to Count I and Count II, Best and Muros alleged that Thrifty engaged in a course of conduct relating to Best's "Thrifty business" which made it impossible to operate in a profitable manner. According to Best and Muros, Thrifty imposed operational terms and conditions which prevented Best from operating the "Thrifty business" in a profitable manner. In addition, Best and Muros alleged that Thrifty, as part of a corporate strategy with its parent and sister companies, engaged in a deliberate course of action to reduce its presence in the New York/New Jersey airport market. They alleged that after Best acquired the "Thrifty business," the licensees at LaGuardia Airport and John F. Kennedy International Airport ceased operations. According to Best and Muros, Thrifty continued to operate a "Thrifty business" at these airports for a period of time but then ceased all operations. Best and Muros alleged that the operation of a successful Thrifty car rental business at the New York/New Jersey airport area depended, in part, upon the availability of

other Thrifty rental car locations to rent and drop off the rental cars. Best and Muros further alleged that Thrifty failed to develop and/or failed to assist Best in adopting business/marketing strategies to compensate for the loss of critical operations at the LaGuardia Airport or John F. Kennedy International Airport. Best and Muros alleged that Thrifty did not undertake any efforts to assist Best because it made a business decision with its parent and sister companies to limit its presence in the New York/New Jersey market area. Based upon Thrifty's conduct, Best and Muros alleged that they are entitled to rescission of the subject agreements.

Summary Judgment Standard

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Thrifty Rent-A-Car System, Inc. v. Brown Flight Rental One Corporation, 24 F.3d 1190, 1194 (10th Cir. 1994). The moving party bears the initial burden of showing an absence of any issue of material fact. Id. If the moving party meets this burden, the non-moving party has the burden to come forward with specific facts showing a genuine issue for trial as to the elements essential to his case. Id. To sustain his burden, the non-moving party cannot rest upon mere allegations in pleadings but must designate specific facts showing there is a genuine issue for trial. National Union Fire Insurance v. Emhart Corporation, 11 F.3d 1524, 1528 (10th Cir.

1993).

Discussion

A. Count I - Breach of the License Agreement

In its motion, Thrifty contends that Best and Muros' counterclaims are legally and factually insufficient. With regard to Count I, Thrifty asserts that it did not breach any provision of the License Agreement. Thrifty contends that it was not required under the License Agreement to provide local advertising for Best's operations in New Jersey. According to Thrifty, the burden of local advertising rests with the licensees while national advertising is handled by the National Advertising Committee, which is made up and controlled by Thrifty licensees like Best. Thrifty contends that under the National Advertising Program, which is described in section 5.6 of the License Agreement, the National Advertising Committee, has the "sole discretion" to make decisions about national advertising. According to Thrifty, Muros, during his deposition, conceded that Thrifty, as distinguished from the National Advertising Committee, had no contractual duty under the License Agreement to develop advertising or promotions on Best's behalf. In addition, Thrifty contends that its failure to condone Best's operation as a "parking only facility" was not a breach of the License Agreement. Thrifty contends that under the License Agreement, Best was permitted to run a Thrifty parking lot but only in connection with a Thrifty car rental business. Thrifty points to the fact that the License Agreement required Best to acquire and maintain at least 200 vehicles available for rental at all times.

Thrifty states that no other Thrifty licensee operates a Thrifty parking business without also renting vehicles. Nonetheless, even if the refusal to allow Best to operate a Thrifty "parking only facility" was a breach of the License Agreement, Thrifty argues that Best cannot show it sustained any damages.

In response, Best and Muros contend that Thrifty had a contractual duty under section 4.3 of the License Agreement to provide local advertising. They assert that Thrifty was obligated under section 4.3 to provide whatever assistance Best needed and such assistance included local advertising. Best and Muros also argue that section 4.12 and sections 5.6 through 5.6.6 of the License Agreement, which address national advertising, do not rule out an obligation by Thrifty to provide local advertising. They specifically note that "national advertising" is not defined by the License Agreement.

Upon review, the Court finds that summary judgment is appropriate as to Best and Muros' breach of contract counterclaim based upon Thrifty's failure to provide local advertising for Best's franchise. The Court concludes that Thrifty had no contractual duty under the Licensing Agreement to provide local advertising. Section 4.3 merely affords the licensee the right to consult with Thrifty's Sales, Marketing, Advertising, Travel and Tour Sales, and Commercial Sales Departments, regarding advertising, promotion and publicity. It does not impose any obligation on Thrifty's part to provide local advertising, promotion and publicity to its licensee. While the last sentence

of section 4.3 states that Thrifty "agrees, upon request of a licensee, to furnish guidance, make recommendations and generally give the licensee the benefit of Thrifty's knowledge and experience," such language cannot reasonably be construed to require Thrifty to provide and pay for local advertising, promotion and publicity. Likewise, the Court finds that section 4.12 and sections 5.6 through 5.6.6 of the License Agreement do not obligate Thrifty to provide local advertising for Best's franchise. Although the License Agreement does not define national advertising, it is well-settled that words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense or unless a special meaning is given to them by usage. Kerr-McGee Corp. v. Admiral Ins. Co., 905 P.2d 760, 763 (Okla. 1995); Okla. Stat. Ann. tit. 15, § 160 (West 1993). In the instant case, the Court concludes that the term "national" must be given its plain and ordinary meaning. "National" is defined in the dictionary as "[o]f, pertaining to, or belonging to a nation as an organized whole." The American Heritage Dictionary 831 (2d ed. 1982). The Court finds that "national advertising," as used in the License Agreement, relates to advertising for Thrifty businesses as an organized whole. It does not pertain to advertising for a licensee in its own market.

Although not discussed by the parties, the Court notes that local advertising is specifically addressed in sections 5.1 through 5.5 of the License Agreement. These sections, however, only

discuss the licensee's obligations in regard to advertising its Thrifty business locally. There is no mention of any obligation on the part of Thrifty to advertise for its licensee's business. The Court concludes that these sections support the Court's finding that Thrifty does not have a contractual duty to provide local advertising.

Additionally, the Court finds that summary judgment is appropriate in regard to Best and Muros's breach of contract counterclaim based upon Thrifty's refusal to permit Best to operate as a "parking only facility." Although "Thrifty Business" is defined in section 1.17 of the License Agreement as a Thrifty Car Rental Business or a Thrifty Parking Business or both," Best and Muros have not proffered and the Court has not found any provision in the License Agreement which obligates Thrifty to permit a licensee to operate a "parking only facility," when it is unable to profitably operate a Thrifty car rental business. It is clear from the License Agreement that the parties intended that Best was to operate a Thrifty car rental business. Indeed, Exhibit 6, appended to and made a part of the License Agreement, set forth the minimum numbers of automobiles which Best had to acquire and maintain in its inventory for rental. While section 10.5 authorized the parties to amend the License Agreement, it did not require either party to accept a proposed amendment. To be valid, the proposed amendment had to be reduced to writing and executed by the parties.

The Court notes that Best and Muros, in their response brief, claim that Thrifty's failure to disclose certain material facts and

failure to provide certain assistance to Best also constituted breaches of the License Agreement. Best and Muros specifically contend that under section 4.3 Thrifty was required to make full disclosure of all material facts related to the Thrifty business and under section 4.8, Thrifty was obligated to assist Best in procuring at favorable prices, either through Thrifty or from other sources, equipment, supplies and services used in the conduct of Best's Thrifty business. The Court, however, declines to address Best and Muros' contentions. Best and Muros did not allege in Count I that Thrifty's failure to disclose material facts and failure to provide assistance to procure equipment at favorable prices was a breach of the License Agreement. Thrifty's failure to disclose material facts was only alleged in connection with Count II. A response brief may not be used to raise claims not previously pled to defeat summary judgment. Bass v. Hendricks, 931 F.Supp. 523, 528 (S.D.Tex. 1996).

Similarly, the Court notes that Best and Muros argue in their response brief that Thrifty breached its implied duty of good faith and fair dealing under the License Agreement. At the hearing on February 18, 1998, the Court specifically inquired of Best and Muros where this counterclaim was alleged in their pleading. Best and Muros pointed solely to the language in paragraph 3 which states that Thrifty had a "duty to use good faith and diligence in advertising, promoting and publicizing Best's 'Thrifty business' in order to increase and develop patronage by the public." As stated at the hearing, the Court finds that such language does not allege

a contractual claim for breach of the implied duty of good faith and fair dealing. Because the theory was not properly pled, the Court declines to address the merits of this counterclaim.

B. Count II - Negligent or Intentional Misrepresentation

As to Count II, Thrifty contends that Best and Muros' counterclaim is insufficient because they cannot show an affirmative statement by Thrifty which constitutes a negligent misrepresentation. Thrifty asserts that an omission cannot give rise to a negligent misrepresentation. Of the eleven allegations set forth in paragraph 19 of Count II, Thrifty contends that five explicitly rely upon a failure to advise theory. Thrifty also contends that none of the eleven allegations point to a specific statement or representation, thereby leading to a conclusion that each of the eleven are based upon an omission or a failure to advise.

Thrifty contends that the closest Best and Muros come to alleging an affirmative misrepresentation is the allegation in paragraph 20 and 21 of Count II that Thrifty convinced Best to give up its minority reference for an in-airport location at the Newark airport. However, Thrifty states that this allegation is no different than the allegations in paragraph 19 as there is no assertion that anyone at Thrifty made a misrepresentation. Thrifty states that Muros' deposition testimony reveals Best did not rely upon anything Thrifty said in deciding to move to the Route 1 and 9 location rather than to move to the in-airport location. Thrifty states that Muros admitted in his deposition that he alone made the

decision to move to the Route 1 and 9 location and there were no misrepresentations of any kind by Thrifty.

Thrifty contends that Best and Muros' negligent misrepresentation counterclaim is insufficient for two other reasons. First, Thrifty contends that Best and Muros did not rely upon any of the alleged misrepresentations to buy the Thrifty franchise. According to Thrifty, Muros admitted during his deposition that he had decided to become a Thrifty licensee based on the representations of Robert Bettinger, who previously owned the Thrifty franchise, and not upon any of the alleged misrepresentations in the counterclaim. Second, Thrifty asserts that the allegations in the counterclaim cannot be supported by any evidence.

Best and Muros, in response, argue that the terms negligent misrepresentation and constructive fraud are used interchangeably by the courts. According to Best and Muros, fraud may be established by showing a concealment of material facts which one is bound under the circumstances to disclose. They argue that a duty to disclose material facts may arise from a partial disclosure or from a special relationship, such as a fiduciary relationship. Best and Muros specifically argue that the License Agreement created a fiduciary relationship between Best and Thrifty. In support of their argument, Best and Muros rely upon section 4.3 of the agreement which requires Thrifty to "give Licensee the benefit of Thrifty's knowledge and experience in establishing, managing and operating Thrifty Businesses" and section 5.6.2 which provides

that "advertising fees of all licensees of the Thrifty Rent-A-Car System shall be held in trust by Thrifty for the benefit of the licensees of the Thrifty Rent-A-Car System for the purpose of financing the advertising program."

Upon review, the Court finds that Thrifty is entitled to summary judgment on Best and Muros' counterclaim of negligent or intentional misrepresentation. From the evidence in the record, the Court concludes that Best and Muros have failed to raise a genuine issue of fact as to whether Thrifty had a duty to disclose the information alleged in the counterclaim.² The Oklahoma courts have not specifically addressed whether a fiduciary relationship may arise out of a franchiser-franchisee contract. Nonetheless, the Court, similar to the Tenth Circuit in Devery Implement Co. v. J.I. Case Co., 944 F.2d 724, 730 (10th Cir. 1991), concludes that the Oklahoma courts would recognize a fiduciary relationship arising out of a franchiser-franchisee contract if the transaction involved the facts and circumstances indicative of the imposition of trust and confidence. Notwithstanding this conclusion, the Court finds that Best and Muros have not presented adequate evidence to show that the relationship between Best and Thrifty was indicative of anything other than a normal commercial relationship. Best and Muros rely upon the License Agreement to establish the

² For its discussion, the Court need not determine whether an omission may be relied upon to support a negligent misrepresentation claim. However, the Court notes that in Ragland v. Shattuck National Bank, 36 F.3d 983, 991 (10th Cir. 1994), the Tenth Circuit, applying Oklahoma law, identified "a misrepresentation or omission of material fact" as an element of a negligent misrepresentation claim.

fiduciary relationship. However, a franchise contract cannot alone establish a fiduciary relationship. Devery Implement Co., 944 F.2d at 731. While Best and Muros cite to specific sections which they contend give rise to the fiduciary relationship, the Court finds, upon examination, that these sections do not raise a genuine issue as to the existence of a fiduciary relationship. Section 4.3 merely states that upon the licensee's request, Thrifty agrees to furnish guidance, make recommendations and generally give the licensee the benefit of its knowledge concerning the management and operation of a Thrifty business. This section does not, in the Court's view, establish that the parties are dealing on unequal terms and that Thrifty has an overmastering influence on Best. Devery Implement Co., 944 F.2d at 729 (a fiduciary relationship occurs when the circumstances make it certain the parties do not deal on equal terms, but on the one side there is an overmastering influence, or on the other, weakness, dependence or trust, justifiably reposed). Best, as a licensee, is in control of whether it wishes to consult with Thrifty. Nothing in section 4.3 substitutes Thrifty's will over Best. In addition, Section 5.6.2 simply provides that the advertising fees received by the licensees will be held in trust by Thrifty for the purpose of financing the advertising program as the National Advertising Committee shall direct. The Court concludes that this section does not give rise to a fiduciary relationship as section 5.6.3 provides that the expenditure of advertising fees is the responsibility and within the "sole discretion" of the National Advertising Committee.

Clearly, when read in conjunction with section 5.6.3, section 5.6.2 does not demonstrate that there is confidence reposed on Thrifty with a resulting domination and influence over Best. Although Thrifty may hold the funds in trust, the National Advertising Committee decides how they are to be spent.

The Court also finds that Best and Muros have failed to raise a genuine issue as to whether Thrifty made a partial disclosure to Best which required Thrifty to disclose all information alleged in Count II. Although Best and Muros contend that Pete Garcia's statement concerning the Newark franchise invoked a duty to disclose, the Court finds otherwise. According to the record, Mr. Garcia, upon inquiry, provided Muros with a formula to calculate the price of a franchise and stated that if Thrifty were selling the Newark franchise, it would be selling it for \$525,000.00. However, Mr. Garcia did not provide any information to Muros as to the profitability of the Newark franchise. Indeed, Mr. Garcia informed Muros that he could not comment on whether the Newark franchise was profitable. Mr. Garcia's statement regarding to price of the Newark franchise has not been challenged as false or inaccurate without the disclosure of the information in Count II. There is nothing to show that Mr. Garcia's statement without the other information would convey a false impression. Indeed, the non-disclosures in Count II are in no way related to Mr. Garcia's statement. The Court therefore concludes that Mr. Garcia's statement did not invoke a duty upon Thrifty to disclose the information alleged in paragraph 19.

Even if Best and Muros could show that Mr. Garcia's statement gave rise to a duty to disclose, the Court finds that Best and Muros have failed to raise a genuine issue of fact as to whether they reasonably relied upon the alleged non-disclosures in paragraph 19. The evidence reveals that at the time Muros purchased the franchise, he knew that he might make "a little profit" or a loss.³ It also reveals that Muros knew that wear and tear on rental cars would be more a significant problem in Newark than in other places in the country, that car theft was a major problem and that there would be no-shows or cancellations. It also reveals that he knew Thrifty had the right to have special and national accounts. As to incentives and subsidies, Best and Muros have presented no evidence to show that Thrifty knew of incentives and subsidies given by other car rental agencies. And the License Agreement imposed no obligation upon Thrifty to provide incentives to its licensees.

The Court further finds that Best and Muros cannot show any reasonable reliance upon Mr. Garcia's statement as Mr. Garcia specifically advised Muros that he could not comment on the profitability of the Newark franchise and he directed Muros to Mr. Bettinger to obtain that information.

As to the alleged misrepresentation related to the Route 1 and 9 location, the Court also finds that Best and Muros cannot establish that they reasonably relied upon a misrepresentation by

³ Indeed, Muros was advised in a letter dated August 30, 1990 by Thrifty representative, Mary Miller, that the "business currently leaves very little room for error."

Thrifty. Muros conceded at his deposition that he made the decision to move to the Route 1 and 9 location rather than to move to the in-airport location. He also conceded that no representative of Thrifty made any false statement in connection with the Route 1 and 9 location.

The Court notes that Best and Muros contend in their response that Thrifty should have disclosed its decision to withdraw from the New York airport market in light of Mr. Garcia's statement and the statement in the Uniform Offering Circular for Prospective Franchisees that Thrifty's primary focus is the airport market. However, Best and Muros have not presented any evidence to show that Thrifty had knowledge of the closings of the New York airport locations at the time Best purchased the franchise. According to the record, those locations did not close until approximately four years after the License Agreement was executed. The Court therefore concludes that Best and Muros have failed to raise a genuine issue as to whether Thrifty had a duty to disclose this information.

Without any duty to disclose and without any reliance upon an alleged misrepresentation or omission, the Court finds that Best and Muros' negligent or intentional misrepresentation counterclaim cannot withstand summary judgment.

C. Count III - Rescission

In regard to Count III, Thrifty contends that it is entitled to summary judgment on Best and Muros' counterclaim of rescission. Thrifty contends that Best and Muros received consideration for the

subject agreements. As to the License Agreement, Thrifty contends that Best received the use of the Thrifty's trade name, Thrifty's service marks and trademarks and Thrifty's business methods. For the Master Lease Agreement, Best was able to lease vehicles from Thrifty. Thrifty asserts that Best leased vehicles pursuant to the Master Lease Agreement for six years. As consideration for the Work-Out Agreement, Thrifty asserts that it agreed to restructure Best's payment obligations to Thrifty and such restructuring was achieved.

Best and Muros, in response, specifically contend that there was an absence of consideration for the Master Lease Agreement dated October 17, 1991. They argue that Best and Thrifty entered into a Master Lease Agreement dated October 3, 1990 for the lease and rental of vehicles from Thrifty. This agreement, they contend, was to last for the term of the License Agreement. However, according to Best and Muros, Thrifty unilaterally changed the terms of the 1990 Master Lease Agreement and forced Best to enter into the 1991 Master Lease Agreement under a threat not to lease vehicles. Best and Muros argue that the 1991 Master Lease Agreement lacks the necessary consideration because Thrifty already had an obligation under the 1990 Master Lease Agreement to lease vehicles for the term of the License Agreement.

Best and Muros additionally argue that Thrifty's breaches of the License Agreement, its failure to disclose certain material facts and its course of conduct merits rescission of the License Agreement. As to Thrifty's course of conduct, Best and Muros

contend that Thrifty dealt unfairly with Best from the beginning of the relationship with regard to omissions and non-disclosures. Best and Muros also contend that while the company was struggling, Thrifty recommended that closing the Thrifty locations was not the right thing to do. Best and Muros further contend that Thrifty's conduct with regard to the timing of this lawsuit was nothing more than a blatant act of increasing monetary amounts owed to Thrifty. They contend that Thrifty's conduct and dealing with Best was in bad faith and breached the implied covenant of good faith and fair dealing.

The Court concludes that Best and Muros' rescission counterclaim fails as a matter of law. The Court finds that consideration existed for the 1991 Master Lease Agreement. Under Oklahoma law, good consideration for a promise includes any benefit conferred, or agreed to be conferred upon the promisor, by any other person. Okla. Stat. Ann. tit. 15, § 106 (West 1996). In the 1991 Master Lease Agreement, Thrifty conferred certain benefits which did not exist in the 1990 Master Lease Agreement. For example, Best was not required under the 1991 Master Lease Agreement to rent vehicles only from locations listed at the worldwide reservation center. With new benefits conferred, the Court finds the 1991 Lease Master Agreement was not absent consideration.

In addition, the Court finds that Best and Muros may not rescind the subject agreements based upon Thrifty's alleged breaches of the License Agreement and Thrifty's failure to disclose

certain material facts. The Court has herein concluded that Thrifty did not breach the License Agreement and that Thrifty had no duty to disclose the alleged material facts. Therefore, the alleged breaches and non-disclosure of facts cannot justify rescission.

In regard to Thrifty's alleged course of conduct, the Court finds that Best and Muros have not demonstrated that the conduct resulted in a failure of consideration for the subject agreements. Best and Muros' rescission counterclaim is based upon a failure of consideration. Under Oklahoma law, a party to a contract may rescind the same, if through the fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part. Okla. Stat. Ann. tit. 15, § 233 (1993 West). "Failure of consideration," which is distinguished from "want of consideration," means that a bargained-for consideration, originally in existence and good, has since become worthless or has ceased to exist or been extinguished, partially or entirely. Bonner v. Oklahoma Rock Corp., 863 P.2d 1176, 1186 (Okla. 1993). Where partial failure of consideration is raised, the court must determine whether the called-for performance which has failed to occur is so important that the contract would not be made without it. Id. In other words, the test is whether the failure of performance defeats the object of the contract. Id.

In the instant case, Best and Muros have not identified or submitted any evidence of specific conduct resulting in the failure of the called-for performance and have not demonstrated that any

such called-for performance was so indispensable that the subject agreements would not have been made without it.

The Court notes that in their Amended Answer to the Complaint and Counterclaims, Best and Muros alleged that Thrifty, as a part of corporate strategy with its parent and sister companies, engaged in a deliberate course of action to reduce its presence in the New York/New Jersey airport market area. They alleged that Thrifty ceased all business operations at the LaGuardia Airport and the John F. Kennedy International Airport and they further alleged that the successful operation of a Thrifty car rental business in the New York/New Jersey market depended, in part, upon the availability of other Thrifty car rental locations to rent and drop off rental cars. In response to Plaintiff's summary judgment motion, Defendants failed to present any evidence in regard to these allegations. However, the Court discussed the issue of Thrifty's operation of car rental businesses at the New York airports with the parties during the February 18, 1998 hearing. Defendants admitted during the hearing that Thrifty had no duty under the License Agreement to keep the LaGuardia or Kennedy airports open. The summary judgment record also shows that Muros admitted in deposition testimony that there was no provision in the License Agreement that committed Thrifty to keep any car rental location open. Further, Muros conceded that no one at Thrifty made a statement to him committing to keep the LaGuardia or Kennedy airports open. The Court therefore finds that no genuine issue of fact exists as to whether Best and Muros are entitled to rescission

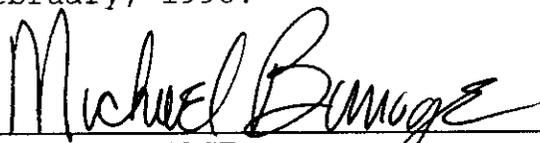
of the subject agreements based upon Thrifty's course of conduct in tailing to keep the LaGuardia and Kennedy airports open.

The Court further finds that Best and Muros are not entitled to rescission as they have not offered and have not shown that they are able to return all of the benefits received from Thrifty under the subject agreements. Okla. Stat. Ann. tit. 15, § 235(2) (1993 West), requires that a party seeking rescission must restore the other party everything of value which he has received from the contract or must offer to restore the same. Best and Muros' inability to restore everything of value to Thrifty is fatal to their request for rescission. Sneed v. Ex rel. Dep't of Transp., 683 P.2d 525, 528 (Okla. 1983).

Conclusion

Based upon the foregoing, Plaintiff, Thrifty-Rent-A-Car, Inc.'s Motion for Summary Judgment (Docket Entry #124) in regard to Defendants' counterclaims is **GRANTED**.

Entered this 19th day of February, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FEB 17 1998 *mw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Case No. 85-C-437-E /

ENTERED ON DOCKET

DATE FEB 19 1998

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on ~~January~~ ^{February} 6, 1998, for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

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

The Court hereby awards the firm Bullock & Bullock uncontested attorney fees and expenses in the amount of \$81,645.33.

IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority and the Department of Rehabilitation Services are each jointly and severally liable for the payment to plaintiffs' counsel, Bullock & Bullock, for attorney fees and expenses in the amount of \$81,645.33, and a judgment in the amount of \$81,645.33 is hereby granted on this day.

8/16

ORDERED this 17th day of Feb., 1998.

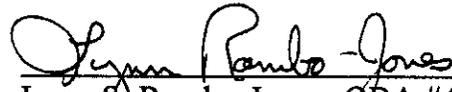

HONORABLE JAMES O. ELLISON
United States District Court


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ATTORNEYS FOR PLAINTIFFS

ATTORNEYS FOR DEFENDANTS

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

FEB 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT COWAN,)

Plaintiff,)

vs.)

UNITED STATES OF AMERICA,)
DEPARTMENT OF HEALTH AND)
HUMAN SERVICES, and THE FOOD)
AND DRUG ADMINISTRATION,)

Defendants.)

Case No. 97-CV-1124-B

ENTERED ON DOCKET
DATE FEB 19 1998

ORDER

The Court has for consideration Plaintiff's Objections to the Court's Recommendations and Findings entered by Magistrate Judge Sam Joyner (hereinafter "R&R") and filed January 15, 1998, (Docket #8) in which the Magistrate Judge recommends that Plaintiff's Application for a Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction be denied. Following de novo review by the Court as required by 28 U.S.C. § 636(b)(1)(C), the Court concludes Plaintiff's objections should be overruled and the R&R adopted by this Court, as modified by this order.

Plaintiff raises two propositions in his Objections which parallel the positions urged before the Magistrate Judge. (Docket #9) Defendants' response (Docket #10) addresses Plaintiff's assertions and additionally challenges the jurisdiction of this Court to enter any

order in this matter. First, Defendants assert Plaintiff failed to properly commence a civil action by filing a complaint with this Court. Defendants next question whether Plaintiff has standing to raise the issues to be reviewed. As these go to the fundamental authority of this Court, the jurisdictional issues must be addressed first.

Plaintiff filed an initial pleading on December 22, 1997, (Docket #1) styled "Plaintiff's Application for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction." By order entered December 22, 1997, (Docket #2) Plaintiff's Application for Temporary Restraining Order was denied in part for failure to comply with Fed.R.Civ.P. 65(b)(1) and (2). Plaintiff then filed Supplementary Application for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction ("Supplementary Application", (Docket #3)), which addresses the deficiencies of his original pleading and the case was referred to the United States Magistrate Judge for hearing and entry of Report and Recommendation.

Defendants initial pleading, Defendants' Memorandum in Opposition to Plaintiff's Application for a Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction, filed one day prior to hearing, (Docket #4) first raised the jurisdictional issue that Plaintiff had not filed a complaint with the Court as required by the federal rules. The Court notes this issue was raised by Defendants in every pleading. Following entry of the R&R, this Court obtained copies of the audiotapes of the proceedings held before the Magistrate Judge on December 31, 1997, and directed their non-certified transcription by court personnel to aid the Court in its de novo review. Counsel for Defendants raised the

issue of no complaint being filed in the hearing, to which Plaintiff's counsel responded by stating the issue would be addressed in post-hearing briefing and that the requisite complaint would be prepared. The Court notes, however, that no complaint was filed nor was the failure to file addressed in Plaintiff's Response to Defendants' Memorandum in Opposition to Plaintiff's Application for a Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction. (Docket #6) The issue was again raised by Defendants in their reply brief (Docket # 7) and finally in Defendants' Response to Plaintiff's Objections to the Court's Recommendations and Findings. (Docket # 10)

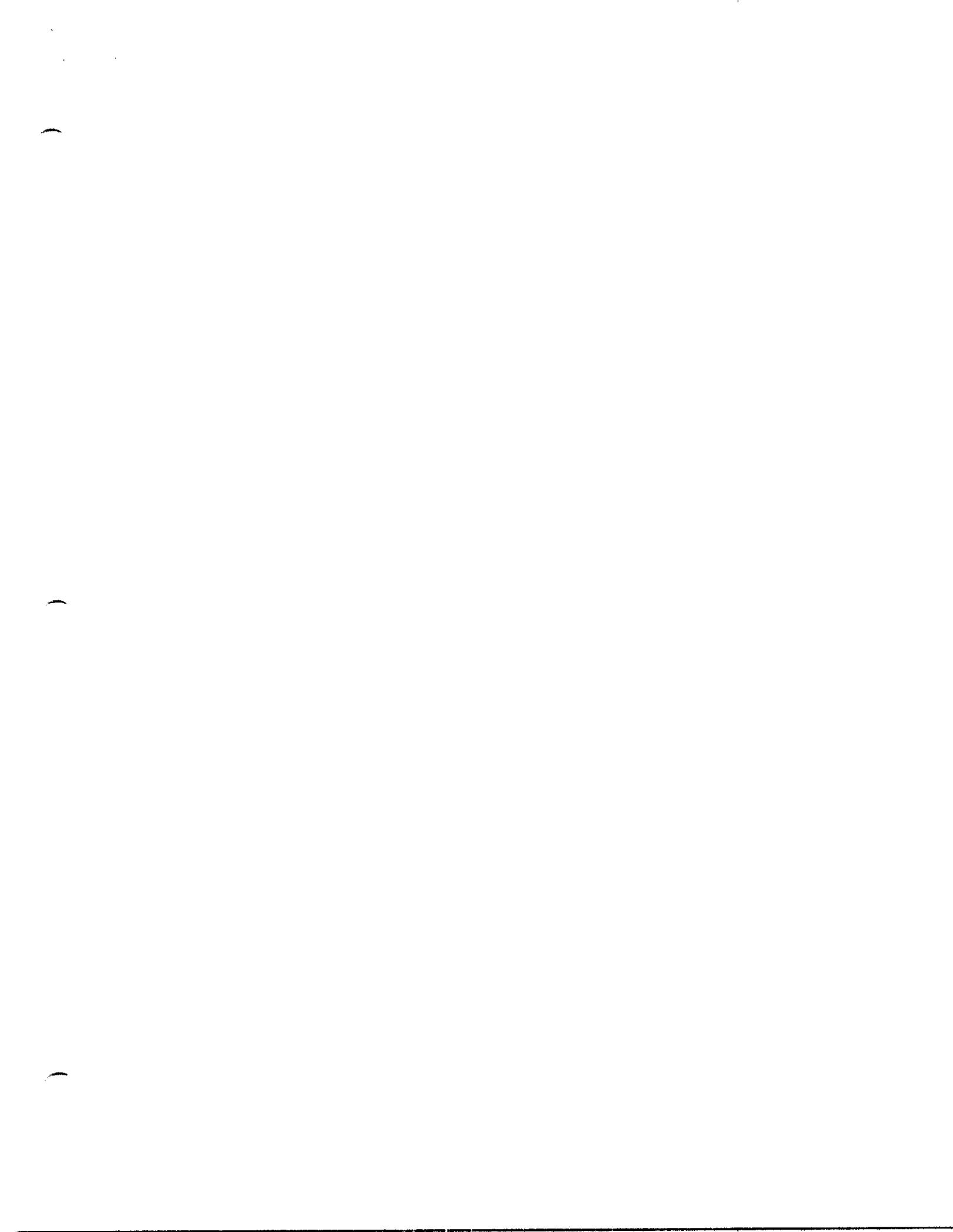
The Court has independently reviewed Plaintiff's Supplementary Application in light of Defendants' continuing objection and concludes it minimally satisfies the requirements of Fed. R.Civ.P.8.(a), which requires a short and plain statement of the grounds upon which the court's jurisdiction is based, a short and plain statement of the claim showing the pleader is entitled to relief, and a demand for judgment for the relief sought. Rule 8.(f), provides that all pleadings are to be construed so as to do substantial justice. The purpose of this rule is to facilitate a proper decision on the merits. Conley v. Gibson, 355 U.S. 41(1957). This Court concludes that the technical failure of Plaintiff to include in the style of his pleading the word "complaint" does not justify this Court's finding no jurisdiction to consider this action, and although Plaintiff has failed to state the statutory basis for jurisdiction, the pleading filed calls upon the Court's power to issue declaratory relief pursuant to 28 U.S.C.§2201.

The issue of Plaintiff's standing to seek relief from this forum, a point on which

Plaintiff and his pleadings also appear conspicuously silent, is somewhat more elusory. Defendants cite Allen v Wright, 468 U.S. 737,750(1984), in support of their position . This Court finds little guidance in that decision. In Allen, Justice O’Conner held that black parents did not have standing to prevent the government from violating the law in granting tax exemptions to private schools absent allegations of direct injury. At page 3324, the Court states: “ Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant’s raising another person’s legal rights . . . and the requirement that a plaintiff’s claim fall within the zone of interests protected by the law invoked.”

It would certainly appear that a person suffering from a terminal illness would have a claim which would fall within this definition. However, in the context of litigation which has addressed the rights of individuals suffering from debilitating or terminal illness who are attempting to enjoin the government from denying them access to a new or unapproved treatment, numerous courts have held standing is conferred only upon those involved in the statutory application process. A 1984 decision from the western district of Oklahoma is illustrative.

In Duncan v. United States, 590 F. Supp. 39 (W.D. Okla.1984), the Court found parents of a child suffering from Down’s Syndrome did not have standing to seek review of a decision on the new drug application of another. Duncan cites numerous cases which would seemingly provide precedent to this Court to deny Plaintiff’s standing before this Court. Duncan also provides an exhaustive analysis and history of United States v.



Rutherford, 442 U.S. 544,554-557(1979), the case on which this Court relies to find Plaintiff does have standing to raise the issues now before the Court.

Though cited by Defendant's, Rutherford does not, in fact, directly confront whether the terminally ill patient has standing. Rather, the failure of Rutherford to address the issue implies the Court determined it was not one which required examination. It is not for this Court to presume the highest court in the land overlooked the question of its jurisdiction, whether raised by the litigants or not.

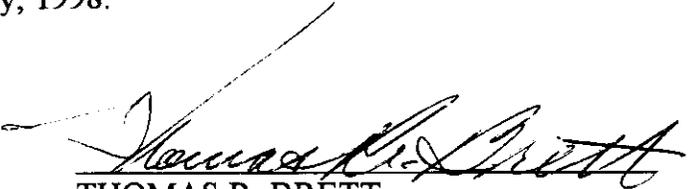
Likewise, the Magistrate Judge does not directly address the issue of Plaintiff's standing in his R&R. Arguably, at page 12 of the R&R, he indirectly approaches this issue by urging Plaintiff's physician to pursue approval of his Investigational New Drug application as quickly as possible. This Court concludes this does not constitute a finding that this Plaintiff does not have standing, but rather a commentary on what must be the ultimate holding by this Court.

The Court has reviewed in great depth the substantive arguments raised by Plaintiff in his objections to the R&R. Plaintiff's assertions that the goat serum anti-body is not subject to regulation by the FDA simply is not supported by the weight of authority. Likewise, this Court finds the extensive discussion by the Magistrate Judge of the statutory scheme and its application to the facts of this case is dispositive of the remaining issues raised. After careful consideration of the record and the issues, the Court has concluded that the R&R should be and the same is hereby AFFIRMED as modified by this order.

It is therefore ORDERED that Plaintiff's Application for a Temporary Restraining

Order, Preliminary Injunction, and Permanent Injunction be denied for the reasons more fully set forth in the R&R.

DATED this 18th day of February, 1998.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett", written in black ink. The signature is positioned above the printed name and title.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

FEB 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LEWIS RAINES and K.R. BURGESS,)
)
 Plaintiffs,)

vs.)

Case No. 96-C-0128-C

DISNEY ENTERPRISES, INC.,)
DISNEY BOOK PUBLISHING, INC.,)
WESTERN PUBLISHING COMPANY,)
and WALT DISNEY PICTURES AND)
TELEVISION,)

Defendants.)

ENTERED ON DOCKET

DATE FEB 19 1998

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

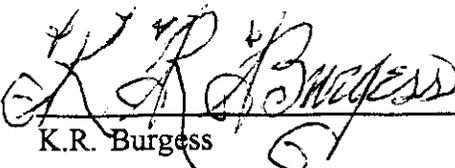
Plaintiffs, Lewis Raines and K.R. Burgess, and Defendants, Disney Enterprises, Inc., Disney Book Publishing, Inc., and Walt Disney Pictures and Television, and Golden Book Publishing Company, Inc. (formerly known as Western Publishing Company, Inc.), pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby jointly stipulate for the dismissal of this cause with prejudice.

The parties are to bear their own attorneys' fees and costs.

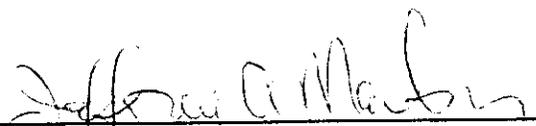
DATED: February 9, 1998.



Lewis Raines

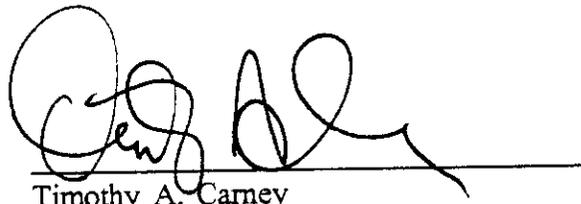


K.R. Burgess



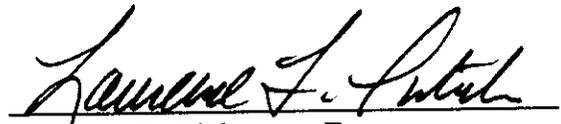
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COMPANY, INC.)**

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

ROBERT MOSES,

Plaintiff,

v.

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

Defendant.

FEB 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-0377-EA

ENTERED ON DOCKET

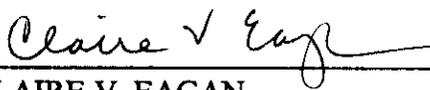
DATE FEB 19 1998

ORDER

Defendant has filed a motion to remand and an amended motion to remand this case pursuant to sentence 4 of 42 U.S.C. § 405(g). [Doc. Nos. 10 and 11]. Plaintiff has no objection. Defendant's motion is, therefore, **GRANTED**. This action is hereby remanded to the Commissioner for further administrative action.

IT IS SO ORDERED.

Dated this 18th day of February, 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

page

FILED

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

FEB 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ZIAC HILMI,)
)
Plaintiff,)
vs.)
)
DISCOP COMPANY, a corporation)
in the State of Texas, formerly)
known as PROPERTY COMPANY OF)
AMERICA,)
)
Defendant.)

Case No. 97-C-679-BU

ENTERED ON DOCKET

DATE FEB 19 1998

ADMINISTRATIVE CLOSING ORDER

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

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

Entered this 18 day of February, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

F I L E D

SCOTT, CLARA R.,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner of the Social)
Security Administration,¹)
)
Defendant.)

FEB 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-0649-EA ✓

ENTERED ON DOCKET

DATE FEB 19 1998

JUDGMENT

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

It is so ordered this 18th day of February, 1998.

Claire V. Eagan
Claire V. Eagan
United States Magistrate Judge

¹Effective 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).

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

FILED

FEB 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FARMER'S INSURANCE COMPANY)
)
Plaintiff,)
)
v.)
)
LANCE HENDRICKS,)
)
Defendant.)

Case No. 97-CV-983-H

ENTERED ON DOCKET

DATE 2-18-98

ORDER

This matter comes before the Court on a motion to dismiss (Docket # 5) by Defendant Lance Hendricks.

Plaintiff Farmer's Insurance Company ("Farmer's") brought this declaratory judgment action, requesting that the Court declare that Defendant's fire insurance policy with Plaintiff was void and unenforceable due to Defendant's alleged fraudulent conduct in attempting to recover under the policy. Defendant has moved to dismiss this case, claiming that Plaintiff has abused the process of the declaratory judgment action, using it as a "race to the courthouse." Def. Br. Supp. Mot. Dis. at 3.

To prevail on a motion to dismiss, a defendant must establish that there is no set of circumstances upon which the plaintiff would be entitled to relief. Jenkins v. McKeithen, 395 U.S. 411 (1969); Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992). In applying this standard, the Court accepts as true all material allegations in the complaint. Ash Creek Mining, 969 F.2d at 870.

For purposes of this motion, the following facts are uncontroverted. Plaintiff issued a policy of fire insurance to Defendant. On May 26, 1997, Defendant's residence burned.

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Defendant filed a claim with Plaintiff on May 27, 1997, alleging losses totaling \$151,368.84. By letter dated October 30, 1997, Plaintiff notified Defendant that it believed he had submitted fraudulent receipts as part of his claim. Plaintiff stated in its letter that it considered the policy void and that:

At this time, Farmers Insurance Company, Inc., based on its investigation will be filing a declaratory judgment action in the United States District Court for the Northern District of Oklahoma to get a declaration by the court as to the status of your claim and coverage for same. You may act accordingly.

Pl. Ex. 2. That same day, Plaintiff filed the instant action and sent a courtesy copy of the complaint to Defendant's lawyer. Defendant filed his motion to dismiss on December 10, 1997. Defendant also simultaneously filed an answer and counterclaim, contending that Plaintiff had breached its contract with him, and that its denial of coverage constituted bad faith.

Defendant alleges that Plaintiff has abused the federal statute by filing its lawsuit under the circumstances of this case by using it to "race to the courthouse" in an attempt to frustrate Defendant's choice of forum. In the absence of the Plaintiff's action here, Defendant would have instituted a coercive action in state court to resolve the coverage dispute between the parties. Defendant relies upon State Farm Fire and Casualty Co. v. Taylor, 118 F.R.D. 426 (M.D.N.C. 1988), in which a district court described such use of the declaratory judgment process as "procedural fencing" and dismissed such an action. In Taylor, the company notified the insured that his claim had been denied three days after it had filed a declaratory judgment action in federal court. Taylor, 118 F.R.D. at 428.

Plaintiff denies that it has engaged in procedural fencing, asserting further that: (1) Defendant has waived his arguments in furtherance of discretionary dismissal by asserting

counterclaims in his answer; (2) that Plaintiff filed this action as a precaution against Defendant's anticipated claim that Plaintiff has failed to promptly respond to his claim as required under Oklahoma law; and (3) dismissal would be a futile waste of judicial resources in that Defendant would simply file an action in state court which Plaintiff here would then remove to this Court in any event. Plaintiff also cites two Tenth Circuit decisions that it claims compel the Court to narrowly construe discretionary dismissal based upon procedural fencing, ARW Exploration Co. v. Aguirre, 947 F.2d 450 (10th Cir. 1991) and Kunkel v. Continental Casualty Co., 866 F.2d 1269 (10th Cir. 1989).

The federal declaratory judgment statute provides in pertinent part: "in any case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201.

The question of whether to exercise the power granted by this statute is within the discretion of the trial court. St. Paul Fire and Marine Ins. Co. v. Runyon, 53 F.3d 1167 (10th Cir. 1995). The Tenth Circuit has set forth factors to aid the district court in determining whether to exercise its discretion under this statute: (1) whether a declaratory action would settle the controversy; (2) whether it would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of procedural fencing; (4) whether use of the declaratory action would increase friction between federal and state courts, thereby improperly encroaching upon state jurisdiction; (5) whether there is an alternative remedy which is better or more effective. Id. at 1169 (citing State Farm Fire and Casualty Co. v. Mhoon, 31 F.3d 979, 983 (10th Cir. 1994)).

Although the Tenth Circuit did not expressly reach the question of procedural fencing

either in Kunkel or ARW, in Runyon, the Tenth Circuit upheld a district court's refusal to entertain a declaratory judgment action where the district court believed the insurance company filed the federal action to frustrate the injured party's plan to file a state court action. Thus, it is clear that the Tenth Circuit recognizes procedural fencing as a basis for dismissal of an action. In Runyon, the only evidence cited by the Tenth Circuit opinion as supporting the district judge's perception that fencing had occurred was timing evidence: the insurance company knew the party intended to file the state action and when the party planned to file it. Id. at 1170.

In the instant case, the Court finds Plaintiff's contention that it did not engage in procedural fencing is without merit. At the outset, the Court observes that implicit in the Tenth Circuit analysis in Runyon is the requirement that there be an actual controversy between the parties. The Court notes that Defendant filed this declaratory action at the same time it denied the insured's claim. In fact, the notice of denial expressly referred to the present lawsuit. Thus, at the time of the filing, there was no "actual controversy" for this Court to resolve under the Declaratory Judgment Act. While there may indeed be a controversy between the parties now that the insured has filed an answer and counterclaim, the Court finds that no such controversy can exist until the insured is notified that the company has denied his claim and the insured has an opportunity to either accept or contest such denial. As in Taylor, the insured in this case did not have notice of the denial of the claim before he was outraced to the courthouse. Therefore, the Court concludes that dismissal is proper here because the Plaintiff used the declaratory judgment process for the purpose of procedural fencing.

Further, the Court rejects Plaintiff's contention that it was required to file this action to prevent the insured's claim of bad faith under state law. Under Plaintiff's theory, insurance

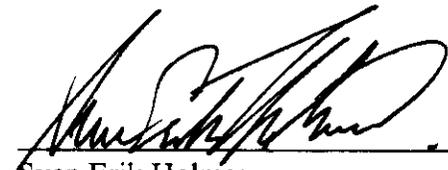
companies would be required to file declaratory judgment actions upon the denial of every insurance claim. The Court does not believe that such a practice would be an appropriate use of the declaratory judgment action.¹

The Court finds no authority for Plaintiff's assertion that Defendant has waived its right to argue that dismissal is proper in this case because he has asserted a counterclaim. Plaintiff cites no legal authority for this proposition and Defendant's answer clearly apprises the Court of his view that the Court should decline to exercise jurisdiction in this case.

Finally, Plaintiff's futility argument was rejected in Taylor. The insured in this case may very well file a state court action which Plaintiff here will remove successfully to this Court. However, in that event, the proper procedures for bringing an action in federal court will have been respected.

IT IS SO ORDERED.

This 12TH day of February, 1998.



Sven Erik Holmes
United States District Judge

¹ Moreover, the Court observes that Defendant has already asserted this claim based on Defendant's failure to cover his claim in the five months following its submission.

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

REROOF AMERICA, INC.,
FABTEC, INC., and
HAROLD SIMPSON, INC.

Plaintiffs,

v.

ARMCO, INC.

Defendant.

ENTERED ON DOCKET

DATE FEB 18 1998

FILED

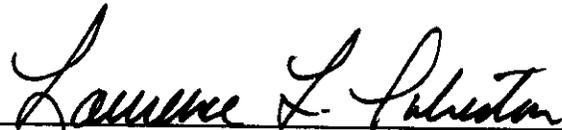
FEB 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97CV 356 (J)

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiffs, ReRoof America, Inc., Fabtec, Inc., and Harold Simpson, Inc., and Defendant, Armco, Inc., hereby jointly stipulate to the dismissal of this action with prejudice, each party to bear their own costs and attorney fees.



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Attorney for Plaintiffs



Ronald N. Ricketts, Esq.
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Tulsa, Oklahoma 74119-5447
Attorney for Defendant

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

FILED

FEB 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EDWARD MONROE MARSHALL, SR.)
and EDWARD MONROE MARSHALL,)
JR.,)
Plaintiffs,)

vs.)

LIBERTY MUTUAL FIRE INSURANCE)
COMPANY, a foreign insurance)
corporation,)
Defendant.)

Case No. 97-CV-793H (M)

ENTERED ON DOCKET

DATE 2-17-98

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties hereto and stipulate that the above
entitled cause is dismissed with prejudice to refiling. Each party
to bear its own costs.


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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 NELSON CHOUTEAU,)
)
 Defendant.)

Civil Action No. 97CV994 H

ENTERED ON DOCKET

DATE 2-17-98

**AMENDED
DEFAULT JUDGMENT**

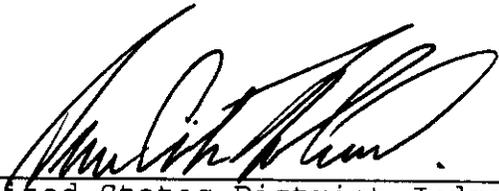
This matter comes on for consideration this 12TH day of FEBRUARY, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Nelson Chouteau, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Nelson Chouteau, was served with Summons and Complaint on December 9, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

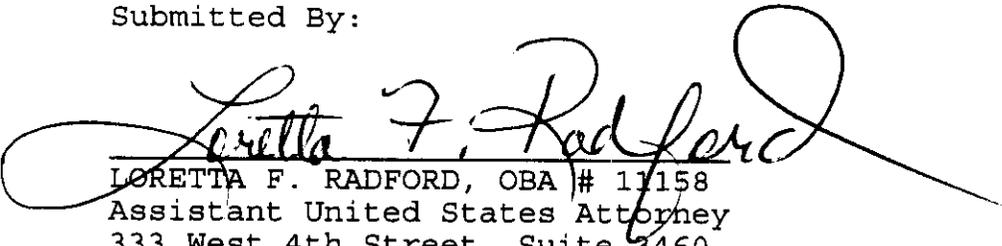
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Nelson Chouteau, for the principal amount of \$1,718.27 and \$4,568.23, plus accrued interest of \$145.04 and \$674.21, plus administrative charges in the amount of \$57.83 and \$46.19, plus interest

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thereafter at the rate of 8 and 7.51 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.23 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

LFR/jmo

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

CHARLES MCGREW,

Plaintiff,

vs.

CLEVELAND AREA HOSPITAL
AUTHORITY,

Defendant.

ENTERED ON DOCKET

DATE 2-17-98

No. 96-C-627-H

FILED

FEB 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on a motion for summary judgment by Defendant Cleveland Area Hospital ("Cleveland") (Docket # 17). Plaintiff Charles McGrew brought this action under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq. (the "ADEA"), alleging that Defendant, his former employer, fired him because of his age. Plaintiff's complaint sets forth two causes of action for alleged violations of the ADEA. In the first, Plaintiff claims he was fired as a direct result of his age. In his second cause of action, Plaintiff claims that Defendant's use of facially neutral employment practices has caused a disparate impact to persons over the age of forty.

I

The following facts are uncontroverted. Plaintiff began working in Defendant's maintenance department as a full-time employee in 1978. Plaintiff was the sole maintenance employee; his tasks included performance of routine maintenance duties, de-icing the sidewalks, cleaning gutters, and adjusting temperature controls. Plaintiff was a "call back" employee in that he was required to return to the hospital after scheduled work hours in the event of a maintenance emergency.¹

¹ Plaintiff's position is distinguishable from an "on-call" employee who during certain periods is required to carry a pager and remain within a specified radius of the hospital. Plaintiff,

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On the evening of April 16, 1997, during a strong rain storm, two nurses at the hospital noticed that the roof was leaking into the front entrance way and emergency room of the hospital, flooding these areas. Norma Robertson, a nurse at the hospital, considered the leaking to be a threat to patient safety, and telephoned Plaintiff for assistance. Plaintiff was at his church, where he is the minister, near the hospital. Ms. Robertson spoke with Plaintiff, who told her that he could not address the problem in such weather. Further, Plaintiff informed Ms. Robertson that he would have to wait until daylight to determine the cause of the leak. Ms. Robertson then called Stacy Holland, the hospital administrator at the time. Mr. Holland, who also considered this to be a potential threat to patient safety, went to the hospital, climbed onto the roof, cleared the gutters, and stopped the leaking. In his deposition, Plaintiff stated that the situation constituted an emergency but that he could not stop the rain, which was the cause.² Mr. Holland terminated Plaintiff's employment the next day.

Defendant alleges that Plaintiff was not performing his job in a satisfactory manner. In particular, Defendant alleges:

- (1) Plaintiff refused to de-ice the sidewalks;
- (2) Plaintiff refused to scrape gum off the sidewalks;
- (3) Plaintiff refused to adjust the heating and air-conditioning controls although he was the only person with access to them;
- (4) Plaintiff was believed to be inaccessible to other employees, left work early, and had an attendance problem.

Def. Br. Supp. Summ. J. at 4. Plaintiff contends he was a good employee and that he never received a reprimand.

on the other hand, did not have a pager and was not required to remain at home. Plaintiff contends that he was never required to report to the hospital in the event of an emergency as a condition of his employment. Instead, he contends his agreement with the hospital consisted of his obligation to report if he were contacted and if the situation were one with a solution within his expertise.

² Plaintiff also contends the leaking was caused by the failure of the hospital to install the proper gutters, a problem which he had previously brought to the hospital's attention.

Plaintiff was replaced by Mark Pestel, a housekeeping employee who Defendant transferred to the maintenance department. Mr. Pestel was 39 years old at the time.

II

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

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

477 U.S. at 322.

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

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

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

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250

("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

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

III

In the absence of direct evidence, a plaintiff claiming intentional age discrimination should proceed in accordance with the rules announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). To set forth a prima facie case, a plaintiff must establish that: (1) he was within the protected age group; (2) he was doing satisfactory work; (3) he was discharged despite the adequacy of his work; and (4) his position was filled by a younger person. McDonald v. Delta Airlines, 94 F.3d 1437, 1441 (10th Cir. 1996); Denison v. Swaco Geolograph Co., 941 F.2d 1416, 1420 (10th Cir. 1991).

Once a plaintiff establishes the elements of a prima facie case, the employer bears the burden of production to show a legitimate, nondiscriminatory reason for the challenged action. Ellis v. United Airlines, Inc., 73 F.3d 999, 1004 (10th Cir. 1996). If the employer articulates such a reason, the burden shifts back to the plaintiff to demonstrate that the employer's proffered justification was pretextual and that the age of the employee was a factor in the employer's decision. Id.

In the instant case, Defendant contends that Plaintiff has not established a prima facie case because Defendant contends that Plaintiff was not performing his job in a satisfactory manner. However, in MacDonald v. Eastern Wyoming Mental Health Center, 941 F.2d 1115, 1119 (10th

Cir. 1991), the Tenth Circuit held that it is improper to consider a defendant's proffered reasons for discharge in considering whether a plaintiff has set forth a prima facie case. To do so forces a plaintiff to disprove the reasons for discharge just to establish a prima facie case. Under the McDonnell Douglas burden shifting paradigm, a plaintiff is required to prove not that a defendant's proffered reasons for the discharge are false, but that those reasons are merely a pretext for discrimination.

Short-circuiting the analysis at the prima facie case state frustrates a plaintiff's ability to establish that the defendant's proffered reasons were pretextual and/or that age was the determining factor; if a plaintiff's failure to overcome the reasons offered by the defendant for discharge defeats the plaintiff's prima facie case, the court is then not required to consider plaintiff's evidence on these critical issues.

Id. at 1119. Instead,

a plaintiff may make out a prima facie case of discrimination in a discharge case by credible evidence that she continued to possess the objective qualifications she held when she was hired, or by her own testimony that her work was satisfactory, even when disputed by her employer, or by evidence that she had held her position for a significant amount of time.

Id. at 1122 (citations omitted). Therefore, under this authority, the Court must disregard for the moment the evidence presented by Defendant that Plaintiff's job performance had declined throughout his employment. For the purposes of establishing a prima facie case, the Court observes that it is uncontroverted that Plaintiff held his position for nearly twenty years. Further, Plaintiff alleges he was performing satisfactorily and received no reprimands during his employment. The Court finds that such evidence is sufficient for Plaintiff to establish a prima facie case under the Tenth Circuit's analysis in MacDonald.

Accordingly, the burden shifts to Defendant to articulate a legitimate, nondiscriminatory reason for its decision to discharge Plaintiff. McDonnell Douglas Corp., 411 U.S. at 802. "The [defendant] need not persuade the court that it was actually motivated by the proffered reasons, but satisfies its burden merely by raising a genuine issue of fact as to whether it discriminated against the plaintiff." Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1425 (10th Cir. 1993)

(internal quotations omitted). Defendant asserts that Plaintiff was fired because his work performance became lackadaisical throughout the years, and he failed to report to work during an emergency. Thus, Defendant has articulated a nondiscriminatory reason for its actions and the burden shifts to Plaintiff to demonstrate that these reasons are a subterfuge for intentional discrimination. Once Defendant meets its burden of production by offering a legitimate rationale in support of its employment decision, the burden shifts back to Plaintiff to show that Defendant's proffered reasons were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804-05. A plaintiff can carry his burden by "showing either that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." Tomsic v. State Farm Mutual Auto. Ins. Co., 85 F.3d 1472, 1478 (10th Cir. 1996) (quoting Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 530 (10th Cir. 1994)) (internal quotations omitted).

Plaintiff has offered no evidence to rebut Defendant's contentions. Instead, Plaintiff attacks the credibility of Defendant's witnesses, claims that he could do nothing to remedy the leaking roof in the middle of the storm, insists that he was a satisfactory employee, and claims that he was replaced because of his age and by Defendant's desire to hire someone at a lower salary. Plaintiff claims Mr. Pestel was hired at half of Plaintiff's salary.

Plaintiff's attack of Defendant's witnesses in his response is insufficient to create a genuine issue of material fact for resolution by a jury. While it is true that credibility issues generally are best determined by the jury, at the summary judgment stage, the nonmoving party must come forward with affidavits or other evidence to demonstrate that issues of fact exist. A nonmoving party may not rely solely on the allegations in the pleadings. See Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 530 (10th Cir. 1994) (conclusory allegations will not suffice to create a material issue of fact to defeat summary judgment).

Likewise, Plaintiff's bare allegations that he was a satisfactory employee cannot create an issue of fact as to pretext in this case. Plaintiff admits that he did not report to work during the storm. Further, Plaintiff's claim that he was unable to repair the roof to stop the leaking during the storm do not amount to evidence that Defendant fired him because of his age or that Defendant's stated reason for discharge is pretextual and "unworthy of credence." Tomsic, 85 F.3d at 1478.

Defendant claims that it fired Plaintiff because he refused to report to work when called to assist with an emergency. Plaintiff, in his deposition, concedes that the events during the rainstorm played a role in his dismissal. Pl. Exh. 8, at 108. In fact, Plaintiff testified as follows in his deposition:

Q. Stacy Holland told you that he fired you because you didn't come in on April 16th; correct?

A. Yes.

Q. Do you have any reason to tell me that that is wrong?

A. No.

Pl. Exh. 8, at 109-110.

Finally, Plaintiff's contention that Defendant fired him to reduce its costs for his salary is insufficient to create a jury question as to pretext when Plaintiff has offered no evidence whatsoever to support his theory that he was fired because he was paid a high salary. Further, even if his salary were the reason for his discharge, Plaintiff has not offered any evidence that his relatively higher salary was somehow a proxy for age. See Hazen Paper v. Biggins, 507 U.S. 604, 612-613 (1993).

The Court concludes that Plaintiff has failed to demonstrate that Defendant discriminated against him on the basis of age because Plaintiff has not presented any evidence whatsoever of pretext, or any evidence whatsoever to show that age was even a factor in his termination. Thus, Plaintiff has failed to raise a genuine issue of material fact so as to defeat summary judgment.

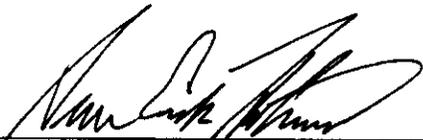
For the reasons stated above, Defendant's motion for summary judgment as to Plaintiff's disparate treatment claim under the ADEA is hereby granted.

IV

Plaintiff also claims that Defendant's use of facially neutral employment practices has caused a disparate impact to persons over the age of forty. However, the Tenth Circuit has held that disparate impact claims are not cognizable under the ADEA. Ellis v. United Airlines, 73 F.3d 999, 1007 (10th Cir. 1996); Furr v. Seagate Technology, Inc., 82 F.3d 980, 986 (10th Cir. 1996). Accordingly, Defendant's motion for summary judgment as to Plaintiff's disparate impact claim under the ADEA is hereby granted.

IT IS SO ORDERED.

This 13TH day of February, 1998.



Sven Erik Holmes
United States District Judge

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

DAVID POWELL,

Plaintiff,

v.

OFFICIALS OF NATIONAL ASSOCIATION
FOR INTERCOLLEGIATE ATHLETICS,

Defendants.

ENTERED ON DOCKET

DATE 2-17-98

Case No. 97-C-893-H ✓

FILED

FEB 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter came before the Court for a status conference on February 12, 1998. David Powell filed his complaint on September 29, 1997. However, Defendants have not yet been served.

Rule 4(m) of the Federal Rules of Civil Procedure, which the time limit for service, states in pertinent part as follows:

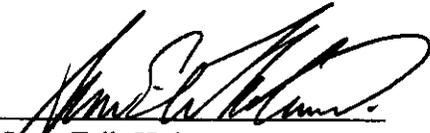
If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend time for service for an appropriate period.

Fed. R. Civ. P. 4(m). The Court, finding that the 120-day time period has expired, and that Plaintiff has not demonstrated good cause for the failure to timely effect service, hereby dismisses

this action without prejudice.

IT IS SO ORDERED

This 12TH day of February, 1998.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RANDALL L. NICHOLS,
SSN: 440-60-5299

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{1/}

Defendant.

ENTERED ON DOCKET
DATE FEB 17 1998

No. 96-C-1088-J ✓

F I L E D

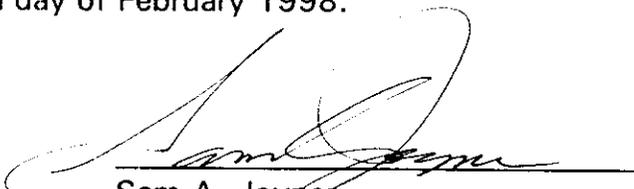
FEB 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

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

It is so ordered this 13th day of February 1998.



Sam A. Joyner
United States Magistrate Judge

^{1/} On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

(16)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RANDALL L. NICHOLS,
SSN: 440-60-5299

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{1/}

Defendant.

ENTERED ON DOCKET

DATE FEB 17 1998

No. 96-C-1088-J ✓

F I L E D

FEB 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER^{2/}

Plaintiff, Randall L. Nichols, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{5/} Plaintiff asserts that the Commissioner erred because (1) the ALJ improperly concluded that Plaintiff could return to his past relevant work under Step Four, (2) the ALJ improperly evaluated Plaintiff's credibility, and (3) the ALJ declined to accept the vocational expert's testimony that if Plaintiff's testimony was fully credible, Plaintiff could not work.

^{1/} On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

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

^{3/} Administrative Law Judge Stephen C. Calverese (hereafter "ALJ") concluded that Plaintiff was not disabled on November 22, 1995. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on September 20, 1996. [R. at 3].

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For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on March 15, 1955, and was 40 years old at the time of the hearing before the ALJ. [R. at 38]. Plaintiff attended high school until the eleventh grade, and also obtained his GED. [R. at 38].

Plaintiff testified that he had back problems which prevented him from sitting for more than an hour, that he had pain at the base of his skull, in his shoulders, his middle and lower back, his legs, his left knee, and right ankle. [R. at 42]. Plaintiff additionally testified that he sometimes experienced blind spells where everything was blurred. According to Plaintiff, the blind spells lasted from three to fifteen hours, and occurred as often as four to five times each month. [R. at 43].

Plaintiff testified that in 1977 he had surgery to remove a bone spur from his ankle, that in 1981 he had surgery on his lower back for a herniated disk, that in 1982 he had surgery to remove 60% of a disk, that in 1983 he had surgery to fuse two levels on his spine, that in 1984 he had surgery to redo the fusion, and that in 1992 he had his gall bladder removed. [R. at 45-47].

Plaintiff testified that he sat in his recliner during the day and also stayed in his bed. [R. at 50]. Plaintiff estimated that he watched television for approximately ten

hours each day.^{4/} [R. at 55]. Plaintiff stated that his two children did the cleaning and housework, and that his son did the yard work.^{5/} [R. at 51-52].

Plaintiff reported that he took aspirin (sometimes three or four tablets every two to three hours) to relieve his pain. [R. at 127]. In his application, completed before August 1993, Plaintiff noted that he shopped for groceries approximately one time each month and that it took him one to two hours. [R. at 132]. Plaintiff testified that he shopped, at most, one time each month, but not for more than 15-20 minutes. [R. at 55].

The record contains a limited number of medical records.^{6/}

A Residual Functional Capacity Assessment ("RFC Assessment") completed by Vallis Anthony, M.D., on October 7, 1993, noted that Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand or walk six hours in an eight hour day, sit six hours in an eight hour day, and push or pull an unlimited amount. [R. at 76]. An RFC Assessment completed on October 21, 1994 reported similar limitations. [R. at 92].

^{4/} Plaintiff additionally reported that he enjoyed watching police shows and court room dramas, and watched television for approximately 16-18 hours each day. [R. at 136-139].

^{5/} Plaintiff's son is on social security disability. [R. at 152].

^{6/} Plaintiff was represented by counsel during the hearing before the ALJ. In addition, Plaintiff's counsel handles numerous social security appeals. The Court notes that if counsel believed additional records were necessary or would have benefitted Plaintiff's case, he would have either submitted the medical records, or informed the ALJ or the Commissioner. See, e.g., Hawkins v. Chater, 113 F.3d 1162 1167 (10th Cir. 1997).

An examination completed by the State of Oklahoma Disability Determination noted that Plaintiff's range-of-motion of his hips, legs, shoulders, elbows and hands were all normal. [R. at 144-45]. The examiner concluded that Plaintiff had "chronic interscapular and neck pain, cramping fashion, associated with writer's cramps, typical symptoms of dystonia type of problem." [R. at 145].

A consultative examiner, on September 20, 1994, reported that Plaintiff was taking approximately 20 aspirin each day and that Plaintiff reported that he could not afford other drugs. [R. at 151]. Plaintiff additionally informed the examiner that he smoked approximately one and one-half packages of cigarettes each day. [R. at 151]. Plaintiff's vision was reported as 20/20. The examiner reported that none of Plaintiff's joints were hot or swollen, that Plaintiff had good grip strength, good range of motion, and a stable gait. [R. at 151-154]. In addition, the examiner noted that Plaintiff had a decreased range-of-motion in both knees and pain with range of motion in his spine. [R. at 151-154].

On September 11, 1995, Plaintiff reported that he was taking hydrocodone for pain, hydroxyzine for stress, skelaxin for muscle spasms and sulindac for inflammation. [R. at 164].

On January 26, 1995, Plaintiff complained to his doctor that he was "98 percent disabled."^{7/} Plaintiff's doctor recommended water aerobics. [R. at 168]. On

^{7/} Plaintiff received a Worker's Compensation rating based on his previous back surgeries. [R. at 140-144].

June 22, 1995, Plaintiff reported headaches and that he was having blind spells. [R. at 167]. Plaintiff complained of cluster headaches on August 18, 1995. [R. at 166].

On February 24, 1995, Benjamin G. Benner, M.D., reported that X-rays of Plaintiff's neck showed normal curvature. Dr. Benner noted that he did observe some "arthritic processes going on especially in the right shoulder and right ankle and to a lesser extent your left knee." [R. at 171]. The doctor additionally notes that Plaintiff was tested for degenerative arthritis and that "we did not find any confirmation for either rheumatoid arthritis, ankylosing spondylitis, or general inflammation index elevation with a sed rate." [R. at 171]. Dr. Brennan wrote that Plaintiff's electrical test demonstrated no evidence of nerve damage or irritation in the left arm or neck. [R. at 171]. A February 21, 1995 electromyogram indicated a normal study. [R. at 174]. Dr. Benner wrote on February 16, 1995, that Plaintiff ambulated slowly but deliberately, and that Plaintiff had a 40% range of motion on his back. [R. at 177].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

Disability under the Social Security Act is defined as the

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

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

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

42 U.S.C. § 423(d)(2)(A). The Commissioner has established a five-step process for the evaluation of social security claims.^{8/} See 20 C.F.R. § 404.1520.

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

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

^{8/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

"The finding of the Secretary^{9/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff was not disabled at Step Four of the sequential evaluation. The ALJ determined that Plaintiff retained the RFC to perform light work, but that Plaintiff was limited by his ability to reach overhead. The ALJ found no other exertional or non-exertional limitations. Based on the testimony of the Plaintiff and the testimony of a vocational expert, the ALJ determined that Plaintiff could perform his

^{9/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

past relevant work as a telephone solicitor, a motel operator, and a service station attendant. [R. at 22].

IV. REVIEW

Step Four

Plaintiff initially asserts that the ALJ improperly analyzed Step Four. Plaintiff asserts that the ALJ did not appropriately evaluate his past relevant work, did not make findings of fact that Plaintiff could perform his past relevant work, and did not properly evaluate Plaintiff's past relevant work considering Plaintiff's complaints of pain and limited mobility.

Initially, the burden of proof at Step Four is on the Plaintiff. Plaintiff has the burden to establish that his impairments or combination of impairments prevents him from returning to his past relevant work. In conjunction with this burden that is placed on the Plaintiff, the Commissioner is required to make findings concerning the claimant's RFC, the physical and mental demands of the claimant's past relevant work, and specifically find that the claimant can return to his past relevant work. See Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994); Henrie v. United States Dep't of Health & Human Services, 13 F.3d 359, 361 (10th Cir. 1993). In determining whether or not the claimant can return to his past relevant work, the Commissioner may consider the claimant's past relevant work as the claimant performed it, or the claimant's past relevant work as that work is generally performed in the community. See, e.g., Andrade v. Secretary of Health & Human Services, 985 F.2d 1045, 1050 (10th Cir.

1993) (holding that "past relevant work" includes not only claimant's particular former job, but also claimant's former occupation as it is generally performed in the national economy).

In this case, the ALJ found that Plaintiff had the residual functional capacity to perform light work, limited only by his ability to perform tasks which required overhead reaching due to his shoulder complaints. [R. at 21]. The ALJ noted that Plaintiff's past relevant work included work as a telephone solicitor, a motel operator, and a service station attendant. [R. at 22]. The ALJ found that none of these positions required lifting over twenty pounds, and that none of the positions required overhead reaching. In addition, the ALJ relied on the vocational expert who testified that Plaintiff could perform his past relevant work. [R. at 22].

Initially, Plaintiff suggests that the ALJ erred by failing to "completely evaluate [Plaintiff's past relevant work] in light of the Plaintiff's pain and limited mobility." The ALJ concluded, however, that Plaintiff had the residual functional capacity to perform light work, limited solely by the ability to reach overhead. The ALJ found that Plaintiff's past relevant work required no physical requirements in excess of "light work," and required no overhead reaching. Plaintiff's argument that the ALJ should consider his past relevant work in conjunction with his pain and limited mobility presumes that the ALJ made a finding that Plaintiff had such pain and limited mobility. The ALJ made no such finding.

Plaintiff also asserts that the ALJ failed to make complete findings with respect to the physical demands of Plaintiff's past relevant work. As noted above, the ALJ

found Plaintiff's RFC, found that Plaintiff's past relevant work did not preclude an individual with Plaintiff's RFC from performing it, found that the testimony of the vocational expert supported a conclusion that Plaintiff could perform his past relevant work as it was regularly performed in the national economy, and concluded that Plaintiff could perform his past relevant work. The Court notes prefer that the ALJ have made more detailed findings. However, under the circumstances in this case, the Court finds that the ALJ's conclusion that Plaintiff could perform his past relevant work is supported by substantial evidence.^{10/} The ALJ determined that Plaintiff was limited to light work with a limited ability to reach overhead. The vocational expert testified that an individual who had a decreased range of motion in his knees, decreased range of motion in his shoulders, marked pain with range of motion in his spine, severe pain with bending, stooping, twisting or any kind of range of motion activity, a weak heel/toe walk, limited to sedentary due to walking difficulties, and pain with straight leg raising could perform Plaintiff's past relevant work as a telephone solicitor.^{11/} The ALJ concluded, based on the testimony of Plaintiff and the vocational

^{10/} In Townsend v. Chater, 1996 WL 366207 (10th Cir. July 1, 1996), the Tenth Circuit noted that "[h]ere, because the hypothetical question posed to the vocational expert included all the ALJ's findings regarding claimant's residual functional capacity, the vocational expert's response constituted substantial evidence to support the ALJ's step-four conclusion that claimant was capable of performing his past relevant work as performed in the national economy." Wilkerson v. Chater, 1997 WL 26563 (10th Cir. Jan. 24, 1997) (affirming use of vocational expert testimony to support Step Four decision with alternate conclusion at Step Five); Jason v. Chater, 1995 WL 275725 (10th Cir. May 10, 1995) (noting the Step Four and Step Five vocational testimony difficulties).

^{11/} Plaintiff does not specifically assert that the ALJ improperly framed the question to the vocational expert. Plaintiff's argument is that the ALJ did not appropriately develop Plaintiff's past relevant work at Step Four. Regardless, the Court concludes that the limitations of decreased range of motion in the shoulders and severe pain with any range of motion adequately presented the limitations which the ALJ concluded that Plaintiff had.

expert, that Plaintiff would not be prohibited from performing his past relevant work. The vocational expert testimony provides substantial evidence to support the ALJ's conclusion that Plaintiff could return to his past relevant work as a telephone solicitor as that work is performed in the national community. The vocational expert further testified that the claimant could perform other substantial gainful activity in the community. Had the ALJ proceeded to Step Five, the record certainly contains adequate evidence to support a conclusion that Plaintiff could perform other substantial gainful activity. Based on this record, the Court concludes that the decision of the Commissioner should be affirmed.

Evaluation of Plaintiff's Credibility

Plaintiff additionally contends that the ALJ improperly evaluated Plaintiff's credibility. Plaintiff relies on Winfrey v. Chater, 92 F.3d 1017 (10th Cir. 1996) and asserts that substantial evidence supports Plaintiff's complaints and credibility. Plaintiff suggests that he has consistently sought relief for his pain, that he has been willing to try any type of treatment, that he has had as much contact with his doctors as he could afford, and that his daily activities do not constitute "substantial gainful activity." Plaintiff additionally argues that the ALJ first decided that Plaintiff was not credible and then concluded that Plaintiff's medical records should be discounted.

The ALJ initially noted that many of Plaintiff's complaints lacked the appropriate nexus. The ALJ observed that "[s]ubjective testimony that the claimant suffers pain, by itself, cannot support a finding of disability. Objective medical evidence must establish an impairment that reasonably could be expected to produce the alleged pain

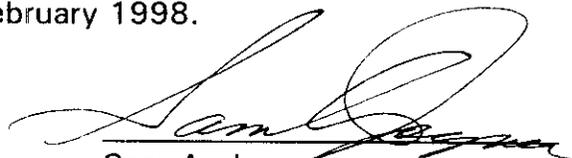
asserted in the statements regarding the intensity and persistence of the pain." [R. at 19]. In addition, the ALJ concluded that Plaintiff's complaints were disproportionate to the objective findings in the record. The ALJ noted that he found "troubling inconsistencies in claimant's testimony and statements when compared to the medical evidence of record and other required factors of evaluation." The ALJ noted that Plaintiff initially reported taking only aspirin for his pain but in September 1995 he reported prescription medication in addition to the aspirin. The ALJ observed that Plaintiff had a "marked absence of treatment record, considering his numerous complaints and years of taking only aspirin." [R. at 20]. The ALJ also found not credible Plaintiff's allegation that he could not afford to seek medical attention considering Plaintiff's various worker's compensation claims and considering that Plaintiff did see a doctor in January 1995 after his reconsideration of denial of benefits. The ALJ also noted that Plaintiff complained of poor eyesight or sudden blindness but had 20/20 vision (by a consultative examiner), reported watching as much as 16 hours of television per day, and did not actively seek treatment for this condition. The Court concludes that the ALJ's evaluation of Plaintiff's credibility is supported by substantial evidence. See also Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995) ("Credibility determinations are peculiarly within the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence.").

Hypothetical Question

Plaintiff additionally asserts that when a hypothetical question was posed to the vocational expert which included all of Plaintiff's ailments, the vocational expert concluded that Plaintiff would be unable to work. Plaintiff seems to be asserting that substantial evidence exists to support a finding that Plaintiff is disabled. However, at this stage of the review process, the Court is limited to reviewing the actual decision of the ALJ and determining whether or not that decision is supported by substantial evidence. In this case, the ALJ concluded that Plaintiff's testimony with respect to his limitations was not credible. Consequently, the ALJ did not err by declining to accept the conclusion of the vocational expert that, if all of Plaintiff's testimony was accepted as true Plaintiff would be incapable of substantial gainful activity. See, e.g. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990) (the ALJ is not required to accept all of a plaintiff's testimony with respect to restrictions as true, but may pose such restrictions to the vocational expert which are accepted as true by the ALJ).

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

Dated this 13th day of February 1998.



Sam A. Joyner
United States Magistrate Judge

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

INDUSTRIAL POWER, BUSINESS SERVICES)
and VELMA ROSE GAY, trustee,)

Plaintiffs,)

v.)

UNITED STATES of AMERICA, INTERNAL)
REVENUE SERVICE, REVENUE OFFICER)
HOMER WALKER, ARKANSAS VALLEY)
STATE BANK, and BOATMEN'S FIRST)
NATIONAL BANK,)

Defendants.)

ENTERED ON DOCKET

DATE 2-13-98

Case No. 97-C-483-H

FILED

FEB 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on a motion to dismiss by Defendant United States of America ("United States") (Docket # 14) dated July 14, 1997 in which it contends that Defendant Internal Revenue Service ("IRS") and Defendant Homer Walker ("Walker") should be dismissed from this action because neither is a proper party. The Court also considers Plaintiffs' motion to strike (Docket # 17) Defendant's motion to dismiss, filed July 29, 1997, and Plaintiffs' motion for a hearing on the motion to strike (Docket # 19), filed August 8, 1997.

To prevail on a motion to dismiss, a defendant must establish that there is no set of circumstances upon which the plaintiff would be entitled to relief. Jenkins v. McKeithen, 395 U.S. 411 (1969); Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992). In applying this standard, the Court accepts as true all material allegations in the complaint. Ash Creek Mining, 969 F.2d at 870.

In its motion to dismiss, Defendant United States argues that this Court should dismiss the Internal Revenue Service and Homer Walker, an IRS agent, because neither is a proper party.

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Specifically, Defendant United States claims that it is the only proper party in this instance.

Plaintiffs filed a motion to strike Defendant's motion in which she alleges that Defendants have violated several constitutional provisions, and that Defendant's motion to dismiss "is deceitful, without merit, misleading fraudulent, and degrading." Pl. Mot. To Strike at 7. Plaintiffs also request that counsel for Defendants, United States Attorney Stephen C. Lewis and Laurence K. Williams be added as parties here, and be disbarred for perjury. Plaintiffs also request \$1,000,000 in punitive damages.

Here, where the relief sought ostensibly relates to the legality of Internal Revenue taxes, the action is one against the United States rather than against the agency. See Rochefort v. Gibbs, 696 F. Supp. 1151 (W.D. Mich. 1988). Further, 26 U.S.C. § 7426 expressly prohibits any officer or employee of the United States from being named as a defendant in any section 7426 action. Plaintiffs cite no authority creating an exception to this clear statutory provision. Therefore, the Court finds that neither the IRS nor Mr. Walker are proper parties in the instant case. Accordingly, the Court orders that the motion to dismiss as to the IRS and Mr. Walker is hereby granted. Plaintiffs' motion to strike is hereby denied. Plaintiffs' motion for a hearing on the motion to strike is denied as moot. The Court further advises Plaintiffs to move for leave to amend the complaint in this matter should they desire to add parties or claims.

Defendant United States also moves to dismiss this action until plaintiffs are represented by counsel. Velma Rose Gay claims to be the "special trustee" of Industrial Power and Business Services. Defendant United States asserts that a trustee is not qualified to represent other parties in a lawsuit. Plaintiffs have not responded to these contentions. The Court sets this matter down for a status hearing on March 4, 1998, at 9:00 ~~AM~~PM for consideration of this and the remaining issues in this case.

In summary, the motion to dismiss by Defendant United States (Docket # 14) is granted. Plaintiff's motion to strike (Docket # 17) is denied and Plaintiffs' motion for a hearing on the motion to strike (Docket # 19) is denied as moot.

IT IS SO ORDERED.

This 12TH day of February, 1998.



Sven Erik Holmes
United States District Judge

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

HENRY ROWLAND,
Petitioner,

vs.

RITA ANDREWS,
Respondent.

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No. 95-CV-814-H

ENTERED ON DOCKET
DATE 2-13-98

FILED
FEB 12 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Petitioner's application for a writ of habeas corpus submitted pursuant to the authority of 28 U.S.C. § 2254. In his petition, Petitioner contends that he is being subjected to cruel and unusual punishment in violation of the Eighth Amendment because the Oklahoma Department of Corrections (DOC) refuses to give him work-time credits and that the DOC's refusal to give him credits pursuant to Okla. Stat. tit. 57 (1957), § 138 amounts to a due process violation.¹

As an initial matter, the Court finds that the provisions of the Antiterrorism and Effective Death Penalty ("AEDPA"), enacted April 24, 1996, do not apply to this case, filed August 18, 1995 and pending at the time of the AEDPA's enactment. See Lindh v. Murphy, 117 S.Ct. 2059, 2063 (1997) (holding that amendments to the habeas corpus statutes effected by the enactment of the AEDPA do not apply to cases pending on the date of enactment).

BACKGROUND

On January 8, 1959, Petitioner was convicted of Murder and was sentenced to life imprisonment. He was paroled on February 14, 1974, and remained free on parole until August 4,

¹Pursuant to the terms of this Court's Order filed November 12, 1996, only Petitioner's due process claim remains pending in this case.

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1989, when the Pardon and Parole Board revoked Petitioner's parole. The Governor of the State of Oklahoma ordered that Petitioner be reincarcerated to serve ten years of his life sentence due to a parole violation, evidenced by his conviction in Tulsa County District Court Case No. CRF-88-5041. This ten-year "term" was ordered to run concurrent with the new ten-year sentence imposed following Petitioner's conviction in Case No. CRF-88-5041.

Petitioner contends that he is entitled to earned credits for work and good conduct pursuant to Okla. Stat. tit. 57 § 138 since the Governor of the State of Oklahoma "only revoked ten years of his life sentence." See doc. #9, at 2. Petitioner attempts to find a constitutional violation by arguing that Oklahoma's refusal to award good time and work credits violates the due process clause of the federal constitution. Respondent asserts that Petitioner is not entitled to earned credits, as he is serving a life sentence and not a term of ten years. See doc. #15, at 1-2.

Petitioner raised the above claim before the district court of Muskogee County in an application for a writ of habeas corpus. On February 24, 1995, the district court summarily denied relief by minute order and ordered the Clerk to send a stamped, filed copy of the minute to the parties in the case. The Clerk filed the minute order on February 27, 1995. On April 25, 1995, Petitioner filed an appeal contending, at page 2 of the Brief in Support of the Appeal, that "the District Court only informed the Petitioner of [the] denial after the time limit of the appeal had expired th[us] forcing the Petitioner to file this appeal out of time." The Oklahoma Court dismissed the appeal on May 10, 1995, noting that "Petitioner failed to file his application within the time provided by law, and this Court is barred from considering it."

Respondent contends Petitioner procedurally defaulted the claims presented in the instant petition because he failed to appeal the denial of his application for a writ of habeas corpus in a timely

manner (doc. #s 3 and 9). In reply, Petitioner argues that he received his copy of the district court's order denying his petition for habeas corpus after the time period for submitting an appeal had already run. In support of his argument, Petitioner submitted the Legal Mail Log from Jess Dunn Correctional Center, where he was incarcerated during the time in question (doc. #11). The Legal Mail Log for February and March of 1995 reveals that Petitioner did not receive any legal mail from the Muskogee County Court Clerk until March 17 and March 27, 1995, the latter date being an entire month after entry of the dismissal order.

ANALYSIS

On habeas review, this Court does not address issues that have been defaulted in state court on an independent and adequate state procedural ground, unless cause and prejudice or a fundamental miscarriage of justice is shown. Coleman v. Thompson, 501 U.S. 722, 750 (1991); Harris v. Reed, 489 U.S. 255, 263 (1989); Steele v. Young, 11 F.3d 1518, 1521 (10th Cir. 1993).

A state court finding of procedural default is independent if it is separate and distinct from federal law. Duvall v. Reynolds, 131 F.3d 907, 935 (10th Cir. 1997). In this case, the procedural bar was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995). The Oklahoma Court of Criminal Appeals consistently applies its procedural rules concerning time limits for bringing appeals and dismisses appeals that are not timely filed. Thus, the state court's procedural rule used in this case, Rule 10.1, *Rules of the Court of Criminal Appeals*, 22 O.S. Supp. 1994, Ch. 18, App., was "adequate."

Because Petitioner defaulted his federal claims in state court under an adequate and

independent state procedural rule, habeas review of his federal claim is barred unless he demonstrates "cause for the default and actual prejudice as a result of the alleged violation of federal law, or ... that failure to consider the claims will result in a fundamental miscarriage of justice." Hoxsie v. Kerby, 108 F.3d 1239, 1243 (10th Cir. 1997). "Cause" must be an objective, external factor that impeded Petitioner from raising his claim earlier, such as interference by officials or a showing of the reasonable unavailability of factual or legal basis for a claim. Murray v. Carrier, 477 U.S. 478, 488 (1986). 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 its November 12, 1996 Order, the Court found, after reviewing the record submitted by the parties, that Petitioner had shown sufficient outside cause for failing to appeal timely the order denying his petition for a writ of habeas corpus. As stated in that Order, the prison mail record reveals that Petitioner did not receive a copy of the minute order for at least three weeks, and more likely, four weeks after it was entered. Moreover, the copy of the February 27, 1995 Court Minute, which is a part of the record in this case, reveals that the Clerk did not certify the minute order as being true and correct until March 24, 1995, thus providing further support for Petitioner's contention that he did not receive a copy of the district court's minute until after the appeal time had expired. See Ex. A attached to Respondent's June 7, 1996 response, doc. #9.

The next step of the analysis requires the Court to determine whether Petitioner can show actual prejudice resulting from the errors of which he complains. United States v. Frady, 456 U.S. 152 (1981). In this case, Petitioner must establish actual prejudice resulting from the alleged due

process violations of which he complains in order to excuse his procedural default. In order to make this determination, the Court, in its November 12, 1996 Order, directed Respondent to submit authority for the proposition that Petitioner "'is serving a life sentence' although only ten years of his life sentence were revoked on August 4, 1989." Respondent complied with the Order and submitted a supplemental brief on December 19, 1996 (doc. #15). Petitioner responded to the supplemental brief on December 30, 1996 (doc. #16).

After reviewing the parties' briefs, the Court now concludes that Petitioner cannot demonstrate that he suffered actual prejudice resulting from the due process violation of which he complains. If Petitioner were entitled to an award of time credits earned for work or good behavior which would effectively reduce his time served and prison officials refused to credit his time served accordingly, Petitioner would have suffered actual prejudice. However, Petitioner's reincarceration after revocation of parole occurred pursuant to a life sentence imposed after his conviction for Murder and should not be considered a "term of years" as urged by Petitioner. As pointed out by Respondent, Petitioner will serve this sentence for the rest of his life whether he is incarcerated in a penal institution or on parole. According to the Supreme Court,

[r]ather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules *during the balance of the sentence*.

Morrissey v. Brewer, 408 U.S. 471, 477 (1972) (citations omitted) (emphasis added). In this case, Petitioner was serving a life sentence at the time of his parole, during his parole and even now during his reincarceration due to revocation of his parole. See also Blaik v. United States, 117 F.3d 1288,

1295 (11th Cir. 1997) (quoting Maleng v. Cook, 490 U.S. 488, 491 (1989), for the proposition that a prisoner placed on parole is "still in custody under his unexpired sentence" because the "petitioner's release from physical confinement . . . was not unconditional; instead, it was explicitly conditioned on his reporting regularly to his parole officer, remaining in a particular community, residence, and job, and refraining from certain activities"). In this case, the 10-year "term" of reincarceration does not alter the fact that Petitioner is serving a life sentence.

At the time of Petitioner's murder conviction, Okla. Stat. tit. 57, § 138 (1957) provided that time credits were allowed only "through as many years as may be the term of the sentence," thus implicitly excluding for all purposes life sentences and death sentences. In 1976, while Petitioner was on parole, the Oklahoma Legislature amended Okla. Stat. tit. 57, § 138 to codify explicitly what had previously been implicit: that inmates serving a sentence of life imprisonment were not entitled to earned credits. See Collins v. State, No. 95-6099, 1995 WL 405112 (10th Cir. July 10, 1995). The amended statute reads in pertinent part as follows:

No deductions shall be credited to any inmate serving a sentence of life imprisonment; however, a complete record of the inmate's participation in work, school, vocational training, or other approved program shall be maintained by the Department for consideration by the paroling authority.

Okla. Stat. tit. 57, § 138 (Supp. 1976). Quite simply, because Petitioner is serving a life sentence, he is not entitled to an award of earned credits under either version of the statute. Collins, 1995 WL 405112, at *1. Petitioner's claim that the state's refusal to award earned credits pursuant to statute in violation of the due process clause is baseless. Petitioner has not suffered a due process violation since the provisions of Okla. Stat. tit. 57, § 138 do not apply to him. The Court concludes, therefore, that Petitioner cannot demonstrate that he suffered actual prejudice resulting from the errors of which he complains.

The only other recognized exception to the procedural bar doctrine requires a showing that failure to consider the claims would result in a "fundamental miscarriage of justice." As stated supra, a "fundamental miscarriage of justice" 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 this case, Petitioner has neither alleged nor demonstrated "actual innocence." The Court finds that Petitioner cannot overcome the procedural bar due to a "fundamental miscarriage of justice."

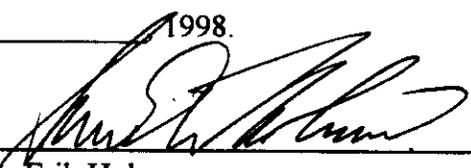
CONCLUSION

Although Petitioner has demonstrated cause for his failure to appeal timely the state district court's denial of his petition for writ of habeas corpus, he cannot demonstrate that he suffered actual prejudice resulting from the errors of which he complains. In addition, the "fundamental miscarriage of justice" exception to the procedural default doctrine has no applicability in this case. Therefore, Petitioner is procedurally barred from habeas review in federal court on the due process claim raised in this petition. The petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for writ of habeas corpus is **denied**.

IT IS SO ORDERED.

This 12TH day of FEBRUARY 1998.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BANT BRYAN BAIRD,
Plaintiff,

vs.

RON CHAMPION, Facility Head of
Dick Conners Correctional Center, *et. al*,
Defendants.

ENTERED ON DOCKET

DATE 2-13-98

Case No. 97-CV-227-H(J) ✓

FILED

FEB 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

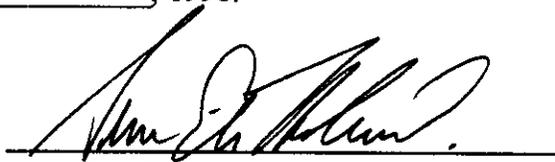
The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge filed on January 22, 1998, in this civil rights action brought pursuant to 42 U.S.C. § 1983. The Magistrate Judge recommends that Plaintiff's case be dismissed. None of the parties has filed an objection to the Report and the deadline for filing objections has passed.

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

ACCORDINGLY, IT IS HEREBY ORDERED that the Report and Recommendation of the Magistrate Judge (Docket #8) is **adopted and affirmed**. Plaintiff's complaint is **dismissed**.

IT IS SO ORDERED.

This 12TH day of FEBRUARY, 1998.



Sven Erik Holmes
United States District Judge

9

DATE 2-13-98

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

EDDIE DeRIGNE and PAMELA)
 DeRIGNE, husband and wife,)
)
 Plaintiffs,)
)
 vs.)
)
 HEIDELBERGER DRUCKMASCHINEN)
 AKTIENGESELLSCHAFT, a German)
 corporation, and HEIDELBERG USA,)
 INC., and HEIDELBERG EASTERN,)
 INC.,)
)
 Defendants.)

Case No. 96-CV-912K /

FILED

FEB 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

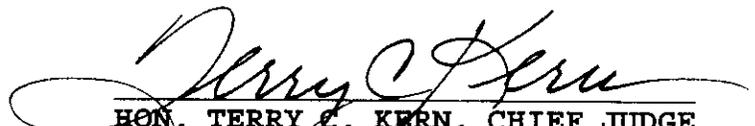
ORDER OF DISMISSAL WITH PREJUDICE

COMES NOW before me the undersigned Judge, the parties' Joint Application for Order of Dismissal With Prejudice. Upon consideration of the premises and based upon representations made in the Application, the Court finds that good cause is shown in support of same, and therefore grants the Joint Application.

The Court hereby Orders that this cause is accordingly dismissed forever and for all time, with prejudice to plaintiffs' right to file any claim asserted, or that might have been asserted, in this action.

Neither fees nor taxable costs are assessed in favor of, nor against, any party to this action, as all parties are to bear their own costs and fees.

IT IS SO ORDERED.



HON. TERRY C. KERN, CHIEF JUDGE
OF THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF
OKLAHOMA

171

ENTERED ON DOCKET

DATE 2-13-98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JENNIFER A. KOONCE,

Defendant.

)
)
)
)
)
)
)
)
)
)

Civil No. 97CV729 K (J) ✓

FILED

FEB 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 11th day of February, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Jennifer A. Koonce, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Jennifer A. Koonce, was served with Summons and Complaint on September 12, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

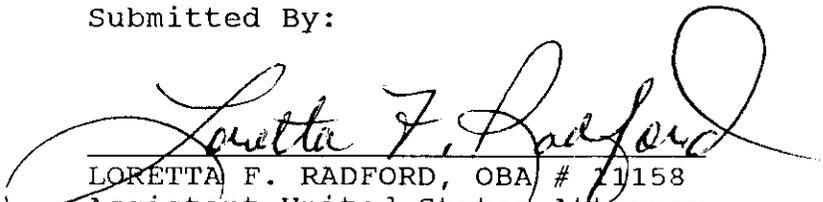
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Jennifer A. Koonce, for the principal amount of \$10,505.38, plus accrued interest of \$4,530.60, plus interest thereafter at the rate of 9 percent per annum until judgment, plus filing fees in the amount of

6

\$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.23 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

LFR/11f

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

STEPHEN T. PEAKE,Plaintiff,)
)
v.)
)
PROVIDENT LIFE AND ACCIDENT)
INSURANCE COMPANY,Defendant.)

No. 97K-CV-1091K(M)

FILED
 FEB 13 1998
 Phil Lombardi, Clerk
 U.S. DISTRICT COURT

STIPULATED JOURNAL ENTRY OF JUDGMENT

The above-styled and numbered cause of action comes on for hearing pursuant to regular setting and upon Joint Application of the parties.

Introduction

The issue is whether the Plaintiff's remedy for complaints about the disability policy he procured as a result of his previous employment with Tulsa Anesthesiologists, Inc., is preempted by provisions of ERISA. The Court, having reviewed the pleadings before it, determines that the disability policy in question is an "Employee Benefit Plan" (having been established by Plaintiff's former employer) and ERISA therefore governs. The Court will not, however, dismiss the Plaintiff's action. It will grant the Defendant's Motion as to extracontractual claims as stated hereinafter.

The Court finds, as noted above, that Plaintiff's disability policy is an employee benefit plan under ERISA as noted in Defendant's Motion to Dismiss or for Summary Judgment previously filed herein. Therefore, ERISA preempts Plaintiff's state law claims. Under ERISA a participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of plan or to clarify his rights to future benefits under the terms of the Plan." Plaintiff is entitled to retain his claims for attorney fees, costs and other relief available through the

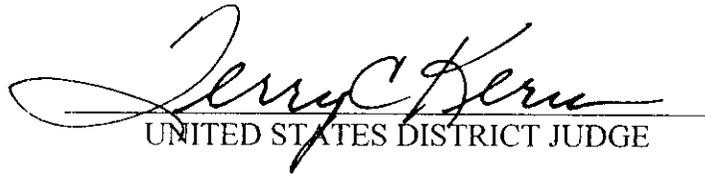
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ERISA statutes. Plaintiff's alleged claims for all other damages, including but not limited to, compensatory damages, claims for emotional distress and trauma, claims for punitive damages or any claims other than the claim to recover benefits due him under the terms of his Plan, if proved, should be and the same are hereby dismissed.

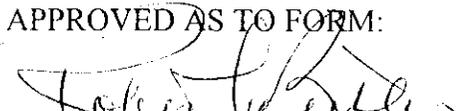
AND IT IS SO ORDERED.

The Plaintiff is directed within thirty (30) days from the entry of the judgment herein to file his Amended Complaint with respect to his ERISA-based claims.

AND IT IS SO ORDERED.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:


ROBERT M. BUTLER, OBA#1380
Counsel for Plaintiff
1714 South Boston Avenue
Tulsa, Oklahoma 74119
Telephone (918) 585-2797
Facsimile (918) 585-2798


JOHN R. WOODARD, III, OBA# 9853
FELDMAN, FRANDEN, WOODARD & FARRIS
Counsel for Defendant
525 South Main, Suite 1000
Tulsa, Oklahoma 74103-4514
Telephone (918) 583-7139
Facsimile (918) 584-3814

ENTERED ON DOCKET

DATE 2-13-98

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

FILED

FEB 11 1998

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

ELMO COLE, JR.

Plaintiff,

vs.

Case No. 96-CV-1189-K

CARL SLOAN, BOB GREEN, and RICK
STEPHENS

Defendants.

REPORT AND RECOMMENDATION

Defendants' MOTION TO DISMISS [Dkt. 8] and Plaintiff's MOTION TO AMEND [Dkt. 15, 20] are before the undersigned United States Magistrate Judge for report and recommendation.

BACKGROUND

Plaintiff proceeding pro se brings this civil rights action pursuant to 42 U.S.C. § 1983. According to the complaint filed December 27, 1996, Plaintiff was arrested in Tulsa County with an invalid warrant and without probable cause. Plaintiff claims that Defendants intentionally went beyond the scope of a Mayes County warrant to arrest him outside that jurisdiction in Tulsa County without the assistance of Tulsa County authorities. He alleges these actions violate the 4th and 14th Amendments to the United States Constitution and 18 U.S.C. § 1503. Plaintiff seeks actual and punitive damages of \$3 million.

Plaintiff has moved to amend his complaint to add Robert Price as a defendant in this action. Mr. Price was his attorney. Plaintiff alleges that Mr. Price acted in

concert with the other defendants to deprive him of his rights and to conceal that deprivation from him. [Dkt. 15, 20].

Defendants Bob Green and Rick Stephens seek dismissal of this action pursuant to Fed.R.Civ.P. 12(b)(6) for "failure to state a claim upon which relief can be granted." They argue that Plaintiff's § 1983 action is barred by the statute of limitations. They also assert that pursuant to the holding of *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), Plaintiff's claims are not cognizable under § 1983 because his conviction has not been invalidated. Defendant Carl Sloan has not been served with process and Plaintiff agrees that he should be dismissed. [Dkt. 11].

LEGAL STANDARD

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P 12(b)(6). However, a complaint may not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)(footnote omitted). A court reviewing the sufficiency of a complaint under Rule 12(b)(6) presumes all of the plaintiff's factual allegations are true and construes them in the light most favorable to the Plaintiff. *Hall v. Bellmon*, 935 F.2d 1106,1109 (10th Cir. 1991).

Rule 12(b) provides that if a motion for failure to state a claim relies on matters outside the pleadings, the court shall treat the motion as one for summary judgment under Fed. R. Civ. P. 56, and shall give all parties "reasonable opportunity to present

all material made pertinent to such a motion by Rule 56." See Fed. R. Civ. P. 12(b), *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991). The Court has determined that the Defendants' motion should be treated as one for summary judgment. The parties were granted additional time to file supplemental briefs. Plaintiff was advised of his right to file counter-affidavits or other responsive material and was informed that his failure to do so might result in the entry of summary judgment against him. [Dkt. 17]. The additional time granted for supplemental briefing has passed and the matter is now at issue.

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the pleadings, affidavits and exhibits show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). To survive a motion for summary judgment, the non-moving party "must establish that there is a genuine issue of material fact . . ." and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1455-56 (1986).

UNCONTROVERTED FACTS

From the materials submitted, the Court finds the uncontroverted facts to be, as follows:

(1) On July 24, 1994, pursuant to an information filed by the district Attorney of Mayes County charging Elmo Ray Cole, Jr. with Murder in the First Degree, a warrant of arrest was issued by a judge of the district court of Mayes County, Oklahoma.

(2) The officer's return reflects that Elmo Ray Cole, Jr. was arrested in Tulsa, Oklahoma on July 25, 1994 by Rick Stephens, OSBI.

(3) On June 5, 1995, following a plea of nolo contendere to Murder in the Second Degree, Elmo Ray Cole, Jr. was sentenced to 25 years imprisonment with the Oklahoma Department of Corrections.

(4) Mr. Cole has not appealed his conviction.

DISCUSSION

In *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 2372, 129 L.Ed.2d 383 (1994), the Supreme Court ruled that when a state prisoner seeks damages in a § 1983 civil rights suit, and the district court determines that a judgment in favor of the Plaintiff would imply the invalidity of his conviction or imprisonment, the complaint must be dismissed unless the Plaintiff can demonstrate that the conviction or sentence has already been invalidated. A § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence *does not accrue* until the

conviction or sentence has been invalidated. *Id.* 114 S.Ct. at 2374. Plaintiff's conviction has not been invalidated.

Although Plaintiff does not challenge his conviction or sentence, *per se*, *Heck* could be applicable to bar his § 1983 claims stemming from his allegedly illegal arrest.

The *Heck* Court instructed that when a state prisoner seeks damages in a §1983 suit:

the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

Id., 114 S.Ct. at 2372. It is debatable whether Plaintiff's claims are barred by *Heck*.

Compare *Simpson v. Rowan*, 73 F.3d 134, 136 (7th Cir. 1995) (holding plaintiff's claims relating to illegal search and improper arrest not barred by *Heck* because, if successful, they would not necessarily undermine convictions), *cert. denied* 117 S.Ct. 104 (1996) with *Schilling v. White*, 58 F.3d 1081, 1086 (6th Cir. 1995) ("The fact that a Fourth Amendment violation may not necessarily cause an illegal conviction does not lessen the requirement [under *Heck*] that a plaintiff show that a conviction was invalid as an element of constitutional injury.") The Tenth Circuit has not addressed the issue. See *Whitney v. New Mexico Guarantee Student Loan Agency*, 105 F.3d 670 (Table), 1997 WL 9741 (10th Cir. 1997). Because a § 1983 does not accrue until the conviction or sentence has been invalidated, the question of whether *Heck* applies to this case is relevant to, and may be determinative of, defendant's statute of limitations defense. However, this Court finds it unnecessary to decide the question because defendants are entitled to judgment on other grounds.

Plaintiff claims that he was seized pursuant to an invalid warrant and without probable cause in violation of the 4th and 14th Amendments to the Constitution. According to Plaintiff, the arrest warrant was invalid because the Mayes County warrant was served in Tulsa County without the assistance of Tulsa County authorities. Oklahoma law, 22 Okla. Stat. § 175, provides that warrants may be served in any county in the state and may be served by any peace officer¹ to whom they may be directed or delivered. Plaintiff makes no complaint about the manner in which the warrant was executed so as to raise a claim of excessive force, or other potential constitutional violation. The Court concludes that, as a matter of law, the arrest warrant was not invalidated by the circumstances of its execution.

The execution of a facially valid arrest warrant does not give rise to a constitutional claim. *Baker v. McCollan*, 443 U.S. 137, 143-44, 99 S.Ct. 2689, 2694, 61 L.Ed. 2d 433 (1979) (arrest of wrong man under a facially valid arrest warrant did not constitute an illegal seizure for Fourth Amendment purposes). Plaintiff has failed to satisfy the requirement that he be deprived of a right secured by the Constitution and laws of the United States as required to maintain an action under 42 U.S.C. § 1983. His claim is not cognizable under that section and should therefore be dismissed.

Plaintiff also alleges that he was arrested without probable cause in violation of his constitutional rights. This claim is also without merit. Plaintiff entered a plea

¹ Peace officer is broadly defined to include "any sheriff, police officer, federal law enforcement officer, or any other law enforcement officer whose duty it is to enforce and preserve the public peace." 21 Okla. Stat. § 99.

of nolo contendere which in Oklahoma "has the same legal effect as a guilty plea except that it may not be used against the defendant as an admission in any civil suit based on the act upon which the criminal prosecution is based." *Morgan v. State*, 744 P.2d 1280, 1281 (Okla. Crim. App. 1987). A plea of guilty is a complete defense to a § 1983 action asserting arrest without probable cause. *Malady v. Crunk*, 902 F.2d 10, 11-12 (8th Cir. 1990), *Cameron v. Fogarty*, 806 F.2d 380, 388 (2nd Cir. 1986).

Plaintiff's motions to amend his complaint to add his trial attorney as a defendant should be denied. Under 42 U.S.C. § 1983, a plaintiff must allege that the defendants deprived him of a right secured by the United States Constitution while they acted under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Trial counsel does not act under color of state law and therefore is not subject to a civil rights complaint under § 1983. Even public defenders performing in the traditional role of attorney for the defendant in a criminal proceeding represent their client, not the state, and therefore cannot be sued in a 42 U.S.C. § 1983 action. *Polk County v. Dodson*, 454 U.S. 312, 325, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981). *See also Brown v. Schiff*, 614 F.2d 237, 238-39 (10th Cir. 1980), *cert. denied*, 446 U.S. 941 (1980).

Although Plaintiff asserts that his counsel should be exempt from this rule because he allegedly conspired with state officials to deprive him of federal rights, the conclusion that Plaintiff's rights were not violated removes this claim as a basis for liability. The Court concludes that amendment of the complaint as proposed by

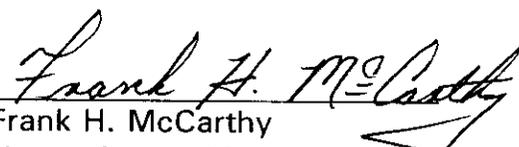
Plaintiff would be futile and therefore his motions to amend should be denied. See *Ketchum v. Cruz*, 961 F.2d 916, 920 (10th Cir. 1992) (futility of amendment is an adequate justification to refuse to grant leave to amend).

CONCLUSION

The undersigned United States Magistrate Judge RECOMMENDS that defendants be granted summary judgment and that plaintiff's motions to amend [Dkt.15, 20] be DENIED.

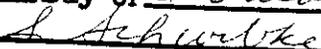
In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from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

DATED this 11th day of February, 1998.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 13 Day of February, 1998.



ENTERED ON DOCKET
DATE 2-13-98

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

MARK LAWRENCE GUTHRIE,)
)
 Petitioner,)
)
 vs.)
)
 MIKE CARR,)
)
 Respondent.)

No. 97-CV-1043-K (W)

F I L E D

FEB 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Petitioner, a state prisoner appearing *pro se*, has paid the filing fee to commence this habeas corpus action filed pursuant to 28 U.S.C. § 2254. Petitioner originally filed his petition in the United States District Court for the Eastern District of Oklahoma. On November 25, 1997, the petition was transferred to this Court.

Petitioner is currently in the custody of the Oklahoma Department of Corrections at the Muskogee Community Correctional Center, Muskogee, Oklahoma. Petitioner pled guilty in case numbers CRF-92-4406, obtaining a certificate of deposit by forged instrument; CRF-93-138, burglary of an automobile; CRF-95-638, unlawful possession; and, CRF-95-123, obtaining a certificate of deposit by forged instrument. He was convicted in each case and sentenced to 3 years, 8 years, 10 years, and 10 years, respectively, all to run concurrent.

Petitioner raises two issues in this federal habeas action. First, Petitioner claims he was denied due process when he was twice removed from an early release program ("SSP") without a due process or Morrissey¹ hearing. Petitioner asserts that "after being released twice to early release program (SSP) and twice being removed from said program, Petitioner was not allowed due process

¹See Morrissey v. Brewer, 408 U.S. 471 (1972).

(or Morrissey) hearings." (Doc. #1). Petitioner describes the second issue as "a liberty issue." Petitioner avers he was "release[d] incorrectly by D.O.C. on two (2) occasions. Petitioner was then removed from liberty after D.O.C. caught their mistake. Petitioner did not violate terms of program." (Doc. #1, at 7).

Petitioner admits that neither issue has been exhausted in the state courts of Oklahoma. However, as grounds for non-exhaustion, Petitioner submits that neither "issue was [] brought to state court because state court would be an inappropriate venue due to fact that the state is ultimately the respondent." (Doc. #1, at 6).

ANALYSIS

The Supreme Court has long held that "a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (*per curiam*).

It is clear from the record in this case that Petitioner has not exhausted the grounds for relief he has alleged. Although Petitioner argues state court would be inappropriate venue due to the fact the state is the respondent, an application for a writ of habeas corpus shall not be granted *unless it appears* that (A) the applicant has exhausted the remedies available in the courts of the State; or

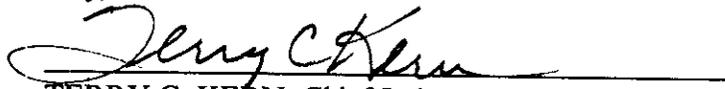
(B)(I) there is an absence of available State corrective process, or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant. See 28 U.S.C. § 2254(b)(1). Petitioner has a remedy available in the state courts of Oklahoma to challenge revocation of release to "early release program" without due process. According to the Oklahoma Court of Criminal Appeals, an application for a writ of habeas corpus is appropriate when a prisoner contends his confinement is unlawful. See Harper v. Young, 852 P.2d 164, 165 (1993), *rev'd on other grounds*, 64 F.3d 563 (10th Cir. 1995), *aff'd*, 117 S.Ct. 1148 (1997). Because Petitioner has an available state remedy, i.e., to petition the state district court having jurisdiction for a writ of habeas corpus to determine whether Petitioner's due process rights were violated during his removal from an early release program without a hearing, this action should be dismissed without prejudice for failure to exhaust state remedies.

CONCLUSION

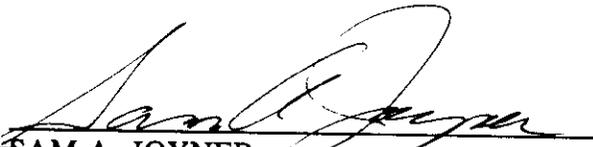
The issues which Petitioner seeks to raise in this petition have never been presented to the state's highest court. Petitioner has an available state court remedy, a petition for writ of habeas corpus submitted to the state district court having jurisdiction. The Court finds, therefore, that the Petitioner's application for writ of habeas corpus should be dismissed without prejudice for failure to exhaust state remedies.

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

SO ORDERED this 11th day of February, 1998.

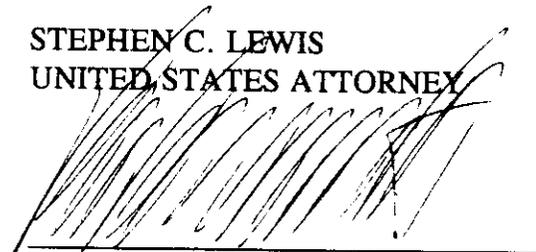

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

It is so ORDERED THIS 10 day of February 1998.


SAM A. JOYNER
UNITED STATES MAGISTRATE JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
UNITED STATES ATTORNEY



PETER BERNHARDT, OBA #741
ASSISTANT UNITED STATES ATTORNEY
333 W. Fourth St., Suite 3460
Tulsa, OK 74103-3809
581-7463

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

GERALD J. DOYLE, an individual,)
)
 Plaintiff,)
)
 vs.)
)
 CIMCASE INTERNATIONAL)
 CORPORATION, an Oklahoma corporation,)
)
 Defendant.)

ENTERED ON DOCKET

DATE 2-12-98

Case No. 97-CV-122-H

FILED
FEB 12 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL, WITH PREJUDICE

The parties hereto, by and through their attorneys of record, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), hereby stipulate that this action should be, and the same is hereby dismissed, with prejudice. Each party is to bear his or its own attorney's fees and costs.

NICHOLS, WOLFE, STAMPER, NALLY,
FALLIS & ROBERTSON, INC.

BULLOCK & BULLOCK



David E. O'Meina, OBA No. 6779
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Michele T. Gehres, OBA No. 10986
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(918) 584-2001

ATTORNEY FOR DEFENDANT
WRIGHT TREE SERVICE, INC.

ATTORNEY FOR PLAINTIFF
GERALD J. DOYLE

9

2/15

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE FEB 12 1998

ICI EXPLOSIVES USA INC.)

Plaintiff,)

vs.)

PERFORMANCE VALVE AND)
CONTROLS, INC. A/K/A PVC)

Defendant.)

NOTICE OF DISMISSAL

97 CV 1095 E ✓

FILED

FEB 11 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PLEASE TAKE NOTICE that plaintiff ICI Explosives USA Inc. ("ICI") hereby dismisses its Complaint against defendant Performance Valve and Controls, Inc. ("PVC") based on the consent of PVC to the jurisdiction of the United States District Court for the Western District of Missouri. Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, this dismissal is without prejudice.

Dated: February 10th, 1998

**PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR**

By Frank Spiegelberg

Frank Spiegelberg
900 Oneok Plaza, Suite 900
100 W. Fifth Street

~~██████████~~
Tulsa, OK 74103-4218
(918) 583-1777

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendant herein, hereby certifies that on this 11th day of February, 1998 a true and correct copy of the above and foregoing **Notice of Dismissal** was served upon all parties herein by depositing the same in the United States mail, postage prepaid, and properly addressed, as follows:

Richard Dan Wagner
I. Michele Drummond
902 S. Boulder
Tulsa, OK 74119-4483


FRANK D. SPEIGELBERG

FILED

FEB 11 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

EDDIE L. ANDERSON,)
)
) Plaintiff,)
)
 vs.)
)
) UNITED STATES FIDELITY AND)
) GUARANTY COMPANY, a foreign)
) corporation,)
)
) Defendant.)

No. 94-C-1193-B

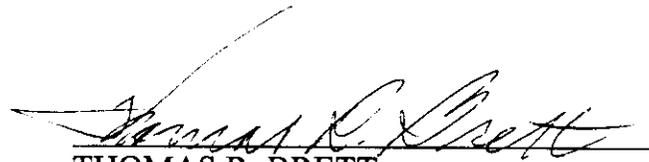
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DATE FEB 12 1998

JUDGMENT

In keeping with the Order sustaining the motion for summary judgment of the Defendant, United States Fidelity and Guaranty Company, (Docket #23) relative to Plaintiff Eddie L. Anderson's tort claim for intentional infliction of emotional distress, judgment is hereby entered in favor of the Defendant, United States Fidelity and Guaranty Company, and against the Plaintiff, Eddie L. Anderson, and Plaintiff's action is hereby dismissed. Costs are to be assessed against the Plaintiff if timely filed pursuant to Local Rule 54.1, and the parties are to pay their respective attorneys' fees.

DATED this 11th day of February, 1998.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

FEB 11 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EDDIE L. ANDERSON,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES FIDELITY AND)
 GUARANTY COMPANY, a foreign)
 corporation,)
)
 Defendant.)

No. 94-C-1193-B

ENTERED ON DOCKET

DATE FEB 12 1998

ORDER

The Court has for decision the motion for summary judgment concerning Plaintiff's tort claim of alleged infliction of emotional distress (Docket #23) of the Defendant, United States Fidelity and Guaranty Company ("USF&G").

The matter has been held in abeyance pending the following certified question asked of the Supreme Court of Oklahoma pursuant to the Uniform Certified Question of Law Act, Okla.Stat. tit. 20, §§ 1601-11 (1991):

Does Oklahoma law recognize the tort of bad faith for unjustified denial of workers' compensation insurance coverage or the assertion of a groundless defense, based on alleged damages incurred for the carrier's conduct that predated the claimant's worker's compensation award?

By opinion dated October 14, 1997, the Supreme Court of Oklahoma answered the question in the negative, stating, *inter alia*,

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Therefore, we answer the certified question that Oklahoma law does not recognize the tort of bad faith for unjustified denial of worker's compensation insurance coverage or the assertion of a groundless defense based on alleged damages incurred for the carrier's conduct that predated the claimant's worker's compensation award.

Eddie L. Anderson v. United States Fidelity and Guaranty Company, Supreme Court No. 86,102, opinion filed October 14, 1997. The opinion of the Oklahoma Supreme Court is now final regarding the answer to the certified question.

Undisputed Facts

1. Plaintiff filed his Amended Petition in May of 1993 alleging that USF&G breached its duty of good faith and fair dealing in the handling of his claim for worker's compensation benefits in that USF&G had no medical opinion joining issue with Plaintiff's undisputed medical opinion regarding change of condition. (Defendant's Ex. A).

2. Plaintiff further alleges that the same acts which constitute bad faith also constitute intentional infliction of emotional distress. (Defendant's Ex. A).

3. At the time of Plaintiff's initial injury, USF&G was the worker's compensation insurer for Plaintiff's former employer, the L. B. Jackson Drilling Company. (Defendant's Ex. B).

4. Plaintiff contends and the Workers' Compensation Court found that Plaintiff was initially injured while employed and on the job for L. B. Jackson Drilling Company on July 4, 1984, when an object was thrown from a lawn mower striking Plaintiff's left eye. (See Workers' Compensation Court Order of March 18, 1988-Plaintiff's Ex. 1).

5. Plaintiff subsequently filed a worker's compensation claim against his

employer and was adjudged 100% permanently partially disabled in his left eye by Order dated March 18, 1988). (Defendant's Ex. A).

6. The manner in which USF&G handled Plaintiff's worker's compensation claim from its inception until April, 1991 is not at issue in this lawsuit. (Defendant's Ex. A).

7. On April 1, 1991, Plaintiff filed a Motion to Reopen his worker's compensation claim, alleging that he had suffered a change of condition for the worse, attaching a supporting medical report thereto. (Defendant's Ex. A; and Motion to Reopen, Ex. D).

8. On April 29, 1991, USF&G filed a Form 10, contesting that Plaintiff suffered a change of condition for the worse, and also filed an objection to the medical report attached to the Motion to Reopen. (Defendant's Ex. E).

9. On January 21, 1992, USF&G accepted Plaintiff's change of condition as compensable, and authorized medical treatment. (Defendant's Ex. G and H).

10. On June 17, 1992, the Workers' Compensation Court awarded Plaintiff temporary total disability benefits ("TTD") of \$2,224.34 for the period of February 26, 1992, through June 1992. The court reserved for consideration Plaintiff's request for TTD from June, 1991 to February, 1992. (Defendant's Ex. I).

11. On July 2, 1992, USF&G issued a check to Plaintiff in payment of the June 17, 1992, court order. (Defendant's Ex. B and J).

12. On January 7, 1993, the Workers' Compensation Court awarded Plaintiff TTD of \$5,450.86 for the period of June, 1991 through February, 1992. (Defendant's Ex. K).

13. On February 11, 1993, USF&G issued a check to Plaintiff in payment of the January 7, 1993, court order. (Defendant's Ex. B and L).

The Standard of Fed.R.Civ.P. 56
Motion for Summary Judgment

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

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

477 U.S. at 322.

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

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

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

In essence, the inquiry for the Court is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 992).

Legal Analysis and Conclusion

It reasonably follows that if such conduct would not support a bad faith tort claim, neither would it support an intentional infliction of emotional distress tort claim.

Regarding the tort of alleged infliction of emotional distress, the Supreme Court of Oklahoma stated in *Breeden v. League Services Corporation*, 575 P.2d 1374, 1376 (Okla. 1978):

“The general state of the law is succinctly summarized at Section 46, Restatement of Torts (Second), 1965, which provides in part:

‘§ 46. Outrageous Conduct Causing Emotional Distress

“(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.’ ”

“Comment d to that Section provides in part:

“* * *Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”

The case of *Eddy v. Brown*, 715 P.2d 74, 76 (Okla. 1986), states:

“Conduct which, though unreasonable, is neither ‘beyond all possible bounds of decency’ in the setting in which it occurred, nor is one that can be ‘regarded as utterly intolerable in a civilized community,’ falls short of having actionable quality.”

Eddy v. Brown, at 76 also states:

“It is the trial court’s responsibility initially to determine whether the defendant’s conduct may reasonably be regarded as sufficiently extreme and outrageous to meet the § 46 standards. Only when it is found that reasonable men would differ in an assessment of this critical issue may the tort-of-outrage claim be submitted to a jury.”

The Court concludes that the uncontroverted facts herein do not, as a matter of law, permit this case to be submitted to the trier of fact, because conduct meeting the requirements of § 46, Restatement of Torts (Second) (1977), Breeden and Eddy, is not revealed by the record.

For the reasons stated herein, Defendant’s motion for summary judgment pursuant to Fed.R.Civ.P. 56 is hereby sustained. A separate Judgment in keeping with the Court’s order will be filed contemporaneously herewith.

IT IS SO ORDERED this 17th day of February, 1998.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 06 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DELOIS C. ANTWINE,
SSN: 440-54-0388

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{1/}

Defendant.

No. 97-C-41-J

ENTERED ON DOCKET

DATE 2-11-98

JUDGMENT

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

It is so ordered this 6th day of February 1998.


Sam A. Joyner
United States Magistrate Judge

^{1/} On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

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

F I L E D

DELOIS C. ANTWINE,)
SSN: 440-54-0388)

FEB 06 1998 *cl*

Plaintiff,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

v.)

No. 97-C-41-J

KENNETH S. APFEL, Commissioner)
of Social Security Administration,^{1/})

Defendant. ;

ORDER^{2/}

Plaintiff, Delois C. Antwine, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{3/} Plaintiff assert that the Commissioner erred because (1) the ALJ did not properly determine Plaintiff's Residual Functional Capacity ("RFC"), (2) the record does not contain substantial evidence to support the decision of the ALJ, and (3) the ALJ erred in presenting questions to the vocational expert. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

^{1/} On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

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

^{3/} Administrative Law Judge Stephen Calvarese (hereafter "ALJ") concluded that Plaintiff was not disabled on December 27, 1995. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on November 15, 1996. [R. at 5].

B

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on December 17, 1995, and was 43 years old at the time of her hearing before the ALJ. [R. at 50]. Plaintiff completed the tenth grade, and does not have a GED. [R. at 50-51].

An RFC completed on May 24, 1994 by Vallis Anthony, M.D. indicated that Plaintiff could occasionally lift 20 pounds, frequently lift 10 pounds, stand or walk for six hours, and sit for six hours. [R. at 99]. An RFC completed on February 8, 1995, contains similar findings. [R. at 127].

On February 3, 1990, Plaintiff was injured while lifting a 300 pound patient. Plaintiff was again injured in April of 1990 when she broke the fall of a patient. Plaintiff complained of pain in her neck radiating to her right shoulder and hand, and pain in her lower back radiating to her left leg and foot. [R. at 203-09]. Plaintiff had a series of epidural blocks during July and August of 1990. [R. at 209].

An independent medical examination was conducted by William R. Gillock, M.D., on January 8, 1991. He noted that Plaintiff was not currently temporarily totally disabled, and that no further medical treatment for Plaintiff was needed. He observed that Plaintiff's gait, sitting, and standing were all normal. [R. at 227].

Plaintiff was injured on March 20, 1992. Plaintiff was examined by Ted T. Peters, M.D., who noted that Plaintiff was temporarily totally disabled. [R. at 237]. Plaintiff reported pain and swelling in her right shoulder. Plaintiff had surgery on September 24, 1992, and was discharged on September 26, 1992. [R. at 244]. Plaintiff was reported to be "doing very well" on October 5, 1992. On October 19,

1992, Plaintiff's range of motion had increased; Plaintiff was to begin physical therapy, and Plaintiff was "returned to light duty" on October 20, 1992, but was restricted from lifting over 20 pounds. [R. at 259].

An MRI of Plaintiff's lumbar spine on October 26, 1992 was interpreted as showing normal alignment with no evidence of compression. [R. at 263]. On January 28, 1993, Plaintiff's doctor again noted that Plaintiff was permitted to return to light duty work with no lifting over 5 pounds and no working overhead. [R. at 268].

Plaintiff was again examined by Dr. Gillock on March 17, 1993. He reported that her gait was normal and that her range of motion for her back was 90 degrees. In his opinion Plaintiff required no additional medical treatment, but he recommended that she avoid heavy lifting and repeated bending at the waist. [R. at 290].

When examined on February 26, 1994, Plaintiff was reported as sitting primarily on her right hip, appearing to be in discomfort, and having a restricted range of motion. Plaintiff's doctor assessed her as having a 40% impairment to the whole person, and noted that her condition would deteriorate. [R. at 301].

Plaintiff visited the emergency room on March 18, 1994. Plaintiff was holding her ten month old granddaughter when her back began hurting. [R. at 306]. X-rays of her spine were taken on March 18, 1994 and compared to her prior X-rays on September 7, 1988, and no significant change was noted. [R. at 307].

Plaintiff again visited the emergency room on April 18, 1994, when she slipped on a water spill in a store. [R. at 310]. X-rays revealed no evidence of a recent dislocation. [R. at 312].

A social security examination was conducted on May 10, 1994. The examiner concluded that Plaintiff had mild degenerative disk disease, low back and leg pain, and right shoulder discomfort. [R. at 313].

A cervical myelogram on March 28, 1995 was reported as unremarkable. [R. at 363].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

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

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

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

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

^{4/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

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

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

"The finding of the Secretary^{5/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more

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

than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

III. THE ALJ'S DECISION

The ALJ in this case determined that Plaintiff was not disabled at Step Five of the sequential evaluation. The ALJ discounted Plaintiff's testimony as to her restrictions and concluded that Plaintiff had the residual functional capacity ("RFC") to perform light work but that she was limited by some shoulder pain and a decreased range of motion. In addition, the ALJ noted that Plaintiff was unable to raise her right arm over her head, that she walked with a limp and that she experienced moderate pain. Based on the testimony of a vocational expert, the ALJ concluded that a significant number of jobs existed in the national economy that Plaintiff was capable of performing.

IV. REVIEW

Residual Functional Capacity

Plaintiff asserts that the ALJ did not properly evaluate her RFC. Plaintiff states that the ALJ's finding with respect to Plaintiff's RFC are not consistent because he

found Plaintiff could perform less than a full range of light work but was also unable to perform a full range of sedentary work. Plaintiff does not explain this argument.

The ALJ found that Plaintiff had the RFC to perform light work, but with some restrictions. The ALJ initially consulted the Grids and concluded that Plaintiff was not presumptively disabled. However, because the ALJ had concluded that Plaintiff had non-exertional limitations, the ALJ additionally presented Plaintiff's RFC and the restrictions which he concluded that Plaintiff had in a hypothetical question to the vocational expert. Based on the testimony of the vocational expert, the ALJ concluded that a significant number of jobs existed in the national economy which Plaintiff could perform. See, e.g., Kelley v. Chater, 62 F.3d 335 (10th Cir. 1995) (reliance on vocational expert can constitute substantial evidence that the individual is not disabled).

Substantial Evidence & Pain

Plaintiff further asserts that the record does not contain substantial evidence to support the ALJ's findings that Plaintiff had the RFC to perform the prolonged sitting and/or standing requirements of sedentary and light work. Plaintiff notes that she has pain, and she summarizes Luna. Plaintiff then generally concludes that the ALJ's decision was not supported by substantial evidence.

A review of the record clearly indicates that the ALJ's conclusions regarding Plaintiff's RFC are supported by substantial evidence. Two RFC Assessments (May 24, 1994 and February 8, 1995) indicated that Plaintiff could occasionally lift 20 pounds, frequently lift 10 pounds, stand or walk for six hours, and sit for six hours.

[R. at 99, 127]. On October 20, 1992, Plaintiff was "returned to light duty," but was restricted from lifting over 20 pounds.

At an examination on March 17, 1993, Plaintiff's gait was reported as normal, and her range of motion for her back was 90 degrees. Dr. Gillock noted that Plaintiff required no additional medical treatment, but that she should avoid heavy lifting and repeated bending at the waist. [R. at 290].

X-rays taken on April 18, 1994 revealed no evidence of a recent dislocation to Plaintiff's back. [R. at 312]. A cervical myelogram on March 28, 1995 was reported as unremarkable. [R. at 363]. The ALJ's conclusions are supported by substantial evidence.

Plaintiff asserts that the ALJ is required to analyze Plaintiff's credibility. Plaintiff references Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995).

In Kepler, the Tenth Circuit determined that an ALJ must discuss a Plaintiff's complaints of pain, in accordance with Luna, and provide the reasoning which supports the decision as opposed to mere conclusions. Id. at 390-91. The Court specifically noted that the ALJ should consider such factors 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. at 391.

Plaintiff does not provide any specifics of how the ALJ did not comply with Kepler. The ALJ discussed Plaintiff's testimony, Plaintiff's medical treatment, Plaintiff's medical records, Plaintiff's medications, and contradictions in Plaintiff's testimony. A review of the ALJ's decision, in this case, indicates that he adequately complied with Kepler. In addition, an ALJ's determination of credibility is given great deference by the reviewing court. See Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995) ("Credibility determinations are peculiarly within the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence.").

Plaintiff additionally notes that the ALJ's observations that she attends church on Sunday, that she shops for groceries, and that she traveled to Las Vegas by car do not support a conclusion that Plaintiff can engage in substantial gainful activity. Plaintiff relies on Markham v. Califano, 601 F.2d 533 (10th Cir. 1979), and Cavitt v. Schweiker, 704 F.2d 1193 (10th Cir. 1984).

However, in this case, the ALJ did not reference Plaintiff's church attendance, Plaintiff's shopping, or Plaintiff's traveling as evidence that Plaintiff could perform substantial gainful activity. Rather, Plaintiff noted these activities as contradictory to Plaintiff's testimony regarding her physical limitations. This was not error.

Questions to the Vocational Expert

Plaintiff initially asserts that the ALJ's flaw in evaluating her RFC undermined the ALJ's assessment at Step Five. However, as noted above, the record contains substantial evidence to support the ALJ's analysis regarding her RFC. Plaintiff

additionally argues that the ALJ failed to include all of Plaintiff's "true" limitations in his question to the vocational expert.

An ALJ is not required to accept all of a plaintiff's testimony with respect to the his or her restrictions as true, but may pose such restrictions to the vocational expert which are accepted as true by the ALJ. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). See also Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995)(An ALJ need include only those limitations in the question to the vocational expert which he properly finds are established by the evidence).

In this case, the ALJ presented all of the restrictions which he determined Plaintiff had to the vocational expert. The vocational expert, based on those restrictions, testified that a number of jobs existed in the national economy that Plaintiff could perform. The ALJ's conclusions are supported by substantial evidence.

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

Dated this 6 day of February 1998.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

REGINA F. PENNINGTON,
SSN: 440-68-6756

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{1/}

Defendant.

FILED

FEB 06 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-C-59-J

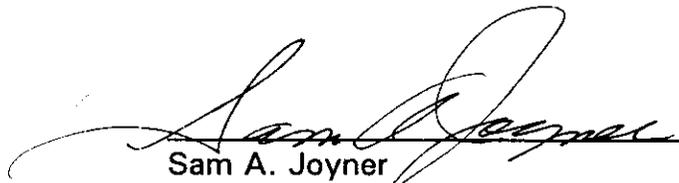
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JUDGMENT

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

It is so ordered this 6th day of February 1998.


Sam A. Joyner
United States Magistrate Judge

^{1/} On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

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

REGINA F. PENNINGTON,
SSN: 440-68-6756

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{1/}

Defendant.

No. 97-C-59-J

FILED

FEB 06 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER^{2/}

EOD 2/11/98

Plaintiff, Regina F. Pennington, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{3/} Plaintiff assert that the Commissioner erred because (1) the ALJ improperly applied Luna, (2) the ALJ did not properly assess Plaintiff's credibility, (3) the ALJ failed to properly consider the opinion of Plaintiff's treating physician as to Plaintiff's credibility, and (4) the Appeals Council erred in failing to reverse the ALJ's decision. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

^{1/} On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

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

^{3/} Administrative Law Judge Stephen C. Calvarese (hereafter "ALJ") concluded that Plaintiff was not disabled by Order dated January 25, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on November 15, 1996. [R. at 7].

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I. PLAINTIFF'S BACKGROUND & MEDICAL HISTORY

Plaintiff was born on August 21, 1964, and at the time of her April 16, 1993 hearing, was twenty-eight years old. [R. at 50]. Plaintiff completed the eighth grade in school. [R. at 52]. Plaintiff was injured on April 18, 1991 when she lifted a trash can at work. [R. at 226]. Plaintiff felt a stabbing sensation in her lower back, and was unable to continue working. [R. at 52, 268].

Plaintiff testified that, in general, her day consisted of waking at approximately 7:00 a.m., waking her girls at 7:30 a.m., fixing breakfast, taking one of her daughters to school, returning home and straightening the house, picking her daughter up from school, straightening up, sitting down a lot, fixing supper, and using a TENS unit at times. [R. at 62]. Plaintiff stated that she took care of her two children and drove approximately five or six blocks to take one of her daughters to preschool each day. [R. at 52].

Plaintiff testified that it was difficult to wash and dry clothes, and vacuum or mop. [R. at 66]. Plaintiff stated that she wears high top shoes and is unable to wear flats or heels. [R. at 69]. Plaintiff stated that she was able to sleep approximately four hours each night. [R. at 71]. According to Plaintiff, she has dull headaches and is depressed. [R. at 73].

Plaintiff testified that in the past she had enjoyed playing bingo, but that she was no longer able to play unless she went to Creek Nation. [R. at 73].

At her hearing on November 7, 1995, Plaintiff stated that she could stand for approximately 15 to 20 minutes if she was permitted to shift positions. [R. at 94].

Plaintiff stated that she still experienced pain and that one of her doctors told her she was taking too much pain medication. [R. at 96].

Plaintiff explained that she had had surgery to remove a device [pedicle screws] which had been placed on her spine because the device had not been properly approved by the FDA, and that Plaintiff was currently a member of a class action suit. [R. at 98]. Plaintiff testified that she had the screws removed in June of 1994. [R. at 98].

According to Plaintiff, she enrolled in a typing class which required her to sit for approximately one or two hours each Saturday. Plaintiff said that she was unable to sit for that long. [R. at 103]. Plaintiff testified that she was able to drive for approximately fifteen miles and that she could bend over her sink to do dishes for approximately fifteen minutes. [R. at 104]. Plaintiff additionally testified that cement floors bothered her and she usually fell approximately three times each week. [R. at 105].

From July 1993 until December of 1994, Plaintiff noted that she was able to do light dusting, dishes, some cooking, and grocery shopping (with the grocery store carrying out the groceries). [R. at 110].

On a pain questionnaire completed in January 1992, Plaintiff noted that she could not take care of her own children. [R. at 161]. By the time of her first hearing, in April 1993, Plaintiff was taking care of her children. [R. at 50].

A Residual Functional Capacity Assessment Form completed in October 1992, indicated that Plaintiff could occasionally lift 20 pounds, frequently lift 10 pounds,

stand or walk approximately six hours in an eight hour day, and sit approximately six hours in an eight hour day. [R. at 170].

An MRI scan of Plaintiff's lumbar spine on May 8, 1991 indicated normal alignment, no evidence of compression, and a normal MRI. [R. at 187]. Nerve conduction studies completed on October 11, 1991 were interpreted as normal. [R. at 189].

Plaintiff's initial evaluation by the physical therapist indicated that Plaintiff was injured on April 18, 1991 when she picked up trash at work. Plaintiff initially saw Dr. O'Shea and was prescribed muscle relaxers and Motrin. Plaintiff was described as leaning slightly to the left and as having a lumbar range of motion limited to 40 degrees. [R. at 228].

On August 28, 1991, Plaintiff's medical records indicate that she saw Dr. Simmons and that Plaintiff could return to work, but that she was limited to desk work, no lifting, and only light walking. [R. at 255]. By September 4, 1991, Plaintiff had indicated that her pain had increased upon her return to work. Dr. Simmons informed Plaintiff that she should return home. [R. at 255].

Dr. Schwarz examined Plaintiff on September 17, 1991. He noted that comparisons of Plaintiff's CT spine revealed a soft tissue bulge and possible protrusion at the L4-L5 region. [R. at 243].

By October of 1991, Plaintiff's records indicate that many of her tests were normal although some revealed a herniated disk. [R. at 245]. On November 7, 1991,

Plaintiff's doctor noted that Plaintiff had not shown improvement, and he was referring her to Dr. Billings for a second opinion. [R. at 245].

On December 6, 1991, Dr. Simmons wrote a letter noting that not all of Plaintiff's exams could be interpreted as "normal," and that Plaintiff had subjective complaints of pain. [R. at 237]. Dr. Simmons stated that, in his opinion, Plaintiff was unable to work. [R. at 237].

Dr. Billings reviewed Plaintiff's medical reports and concluded that the available CT and MRI scans did not provide an adequate picture of Plaintiff's condition due to the angle. [R. at 291, 273]. After obtaining additional X-rays, he concluded that the cause of Plaintiff's discomfort was due to an injury of her lower disk at the L5-S1 level. He recommended surgery and fusion of Plaintiff's back. [R. at 290]. Upon review, he concluded that Plaintiff had a herniated nucleus pulposus at L5-S1, subarticular facet stenosis L4-5 and L5-S1, and segmental instability at L4-5 and L5-S1. Plaintiff was admitted for surgery on her lower spine on January 6, 1992, and discharged on January 13, 1992. The post-operative report indicated that Plaintiff had a bilateral fusion of the L4-5, L5-S with left iliac bone graft and a "VSP segmental spinal instrumentation." [R. at 273].

X-rays in February 1992 indicated good spinal alignment. [R. at 296].

In May Plaintiff was started on a work program. [R. at 288]. An MRI on July 28, 1992, indicated that Plaintiff's neck was normal. [R. at 285]. Plaintiff had reported headaches which Plaintiff's doctor attributed to either tension or muscle spasm. An MRI of Plaintiff's spine indicated that no significant abnormalities were

present. [R. at 287]. The notation on the MRI additionally indicated that Plaintiff moved too much during the testing.

On September 9, 1992, Dr. Billings indicated that Plaintiff was discharged to return to work without restrictions. [R. at 283].

Plaintiff additionally saw Dr. Hicks. On August 10, 1992, Dr. Hicks noted that Plaintiff had achieved "maximum improvement." He observed that Plaintiff's fusion is solid, that she could forward flex 31 degrees, extend 12 degrees, bend to the right 10 degrees, and bend to the left 14 degrees. Dr. Hicks concluded that Plaintiff had a 30% partial permanent impairment to her body as a whole, in accordance with Worker's Compensation. [R. at 295]. Dr. Hicks additionally noted that he did not believe that Plaintiff should return to her previous job. Instead, "I would recommend she undergo a program of aptitude testing, job retraining and job rehabilitation. If in fact within the City a job with light duty physical demands is available, I think Ms. Alverson could begin work in that capacity at this point in time." [R. at 295].

Plaintiff was rated for the purpose of Worker's Compensation. Plaintiff's rating was described as total physical impairment of 30% due to Plaintiff's back surgeries. [R. at 284].

Plaintiff was examined in connection with worker's compensation claim by Dr. Merchant on September 21, 1992 and November 30, 1992. [R. at 298]. He noted that Plaintiff complained of numbness in her knees, pain in her low back and right hip which radiated to her legs, discomfort in her neck, and headaches. Dr. Merchant reported a permanent partial disability of 79%. [R. at 303]. Dr. Merchant additionally

concluded that Plaintiff had been temporarily totally disabled from the date of her injury (April 18, 1991) until the date of his examination (November 30, 1992). Dr. Merchant additionally noted that he believed that Plaintiff was "incapable of returning back to work." [R. at 303].

On August 10, 1992, Dr. Hicks noted that Plaintiff continued to complain of pain. After examination, Dr. Hicks "recommend[ed] that [Plaintiff] have aptitude testing, job retraining and job rehabilitation as she is going to have to work in a capacity where she is not forced to lift more than 20 pounds on a frequent basis or 25 pounds on an occasional basis." [R. at 466].

On March 17, 1993, the City of Tulsa reviewed Plaintiff's status and determined that Plaintiff could not continue in her current job and that no other jobs were available for Plaintiff to perform. [R. at 305].

A Residual Functional Capacity Assessment completed December 6, 1994, indicated that Plaintiff could occasionally lift 20 pounds, frequently lift 10 pounds, stand or walk approximately six hours in an eight hour day, sit approximately six hours in an eight hour day and push or pull an unlimited amount. [R. at 351].

Plaintiff received a lumbar epidural steroid injection on March 14, 1994. [R. at 429]. X-rays of her lumbar spine on August 19, 1994 indicated that no significant abnormalities were present. [R. at 433]. A CT scan indicated some degenerative changes at the L3-4 level and L5-S1 level. [R. at 435].

Plaintiff had surgery in June of 1994 to remove the spinal instrumentation that had been previously implanted on her lumbar spine. [R. at 464].

In August 1994, Dr. Billings noted that a review of Plaintiff's X-rays indicated that her cervical spine was completely normal. In addition, the lumbar spine showed satisfactory fusion with slight "levoscoliosis" at the L2 level. The CT scan indicated that the L3 spinal canal was normal. At the L5-S1 level, Dr. Billings noted possible compromise of the S1 nerve root. Dr. Billings noted, "[t]he pain [that Plaintiff reports] is more on the right side and this side seems adequately decompressed so I do not have a solution for her problems." [R. at 438]. Dr. Billings discharged Plaintiff on August 31, 1994 indicating that "she is unable to carry out the duties of her previous occupation for the City of Tulsa and I recommend vocational retraining." [R. at 439]. In his letter to Plaintiff, dated August 31, 1994, Dr. Billings noted that the Plaintiff's X-rays were completely normal, that the lumbar spine showed satisfactory fusion from L4 to the sacrum and no other evidence of additional disk herniation was present. "I don't see anything that could be accounting for the symptoms that you are having. I am, therefore, going to discharge you from my care since there is nothing more than [sic] I can do for you and rate you out as permanently disabled." [R. at 440]. On September 14, 1994, Dr. Billings noted that Plaintiff was no better and that he could be of no benefit to her. [R. at 438]. On October 19, 1994, Dr. Billings wrote to Plaintiff's attorney and noted that Plaintiff will require periodic prescriptions of muscle relaxants, analgesics, and anti-inflammatory medications in addition to periodic physical therapy. [R. at 437].

Dr. Hicks wrote to Plaintiff's attorney in November 1994 and noted that he had seen Plaintiff on July 5, 1994. [R. at 459]. Dr. Hicks commented that Plaintiff's

fusion was "rock solid," and that he wanted to continue to see Plaintiff on a yearly basis. During each yearly examination, Dr. Hicks estimated that X-rays would be obtained. Dr. Hicks anticipated that Plaintiff might continue to need anti-inflammatories or muscle relaxants but that he did not anticipate a need for narcotics. [R. at 459]. Dr. Hicks additionally noted, by letter dated August 30, 1994, that he had recently removed spinal instrumentation from Plaintiff's back but that the removal did not in any way impact Plaintiff's impairment rating. [R. at 460].

In March of 1995 Plaintiff reported that she was falling more frequently. [R. at 394]. In April of 1995, Dr. Billings noted that Plaintiff reported falling as much as three times in one day. [R. at 478]. In his narrative report Dr. Billings notes

I have always felt uneasy with this patient because she is a genuine person who seems quite reliable, and although she is in severe pain and has considerable muscle spasm, I have been unable to document any nerve root entrapment except for some possible encroachment quite far laterally on the left side at the L5-S1 on saggital imaging which is the more asymptomatic side.

* * *

When I examined her she had severe limitation of motion of the lower back. The lower back was rigid in nature, and was tilted 15 degrees on the pelvis. She was unable to straighten up. Achilles tendon reflexes were 2+ on the right, and 3+ on the left with unsustained clonus.

[R. at 480]. Dr. Billings wrote to Plaintiff on April 19, 1995 and told her that she was taking far too much Lortab. [R. at 479]. On April 24, 1995, Dr. Billings noted that a review of her MRI was completely normal with some mild scarring at the L5-S1 level. He discharged Plaintiff from his care to Dr. Sikka for pain control. [R. at 477].

An Residual Functional Capacity Questionnaire was completed on January 10, 1996. The signature on the Questionnaire appears to reflect that it was completed by "Anthony C. Billings." In the remarks section it notes that it "reflects Mrs. Regina Pennington's status while I was treating her from 1/8/92 to 4/19/95." He notes that Plaintiff could sit two hours in an eight hour day, stand two hours in an eight hour day, walk one hour in an eight hour day, but work no hours in an eight hour day. [R. at 506]. Plaintiff could frequently lift and carry up to ten pounds, occasionally lift 11-20 pounds. [R. at 506]. He noted that Plaintiff's objective indications of pain included posture, muscle spasm, facial expression, spinal deformity, and abnormal gait. In addition he noted that Plaintiff's pain was "moderate" which was described as "could be tolerated but would cause marked handicap in the performance of the activity precipitating the pain." [R. at 508].

Plaintiff saw Dr. Sikka on April 25, 1995. Plaintiff described her typical day as "gets up, gets daughter ready for school and takes her to school, comes home and cleans, takes care of her 4 year-old, walks, picks daughter up from school and cooks dinner." [R. at 526]. Plaintiff described her pain as varying from 8 to 10 on a scale of one to ten. [R. at 527]. On examination Plaintiff did not appear to be in acute distress. Dr. Sikka noted that Plaintiff's flexion was 45 degrees, her extension was ten degrees and lateral bending was twenty degrees. Dr. Sikka reported that Plaintiff did not give full effort to the straight leg raising and that she somewhat resented the testing. [R. at 528]. Dr. Sikka also noted that Plaintiff did not give full effort to her grip strength. He reported that her gait was within normal limits and that her toe

walk was within normal limits. [R. at 528]. Dr. Sikka additionally reported that Plaintiff's "hobby is walking." [R. at 527].

Plaintiff saw Dr. Sikka on May 2, 1995 and reported that Plaintiff was sleeping better. [R. at 524]. On July 6, 1995, Dr. Sikka noted that it was very important that Plaintiff have four weeks of a pain program on a daily basis and that after completion of such therapy vocational retraining might be considered. [R. at 516]. In August Dr. Sikka noted that Plaintiff was temporarily totally disabled and that she should continue in an outpatient program including occupational therapy. [R. at 514].

A "Physical Capacities Form" was completed by on May 20, 1993 by an individual who indicated that Plaintiff had been last seen on November 25, 1991. Plaintiff was described as being able to stand or walk from zero to two hours each day and sit from zero to two hours each day. [R. at 531].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

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

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

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

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

42 U.S.C. § 423(d)(2)(A).

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

^{4/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

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

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

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

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

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

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff was not disabled at Step Four of the sequential evaluation. The ALJ determined that Plaintiff had the residual functional capacity to perform light work, and that Plaintiff was fully capable of returning to her previous work.

IV. REVIEW

Luna & Evaluation of Pain

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Id. at 164.

In this case, the Plaintiff asserts that the ALJ improperly applied Luna. Plaintiff notes that the ALJ identified the standard Luna analysis, but that the ALJ proceeded, after discussing Luna, to assess Plaintiff's residual functional capacity and Plaintiff's credibility. Plaintiff asserts that the ALJ therefore skipped the first and second "steps" of Luna. Plaintiff argues that the ALJ, by evaluating credibility before considering the nexus, committed error and must be reversed.

Assuming Plaintiff's argument as true, reversal is not required. If, as Plaintiff asserts, the ALJ skipped the first two steps of Luna, the ALJ's action only benefitted Plaintiff. A Plaintiff can be denied at each step of Luna. If the ALJ had decided at "step one" of Luna, that no medical evidence supported Plaintiff's claim, or at "step two" of Luna, that Plaintiff's subjective complaints could not reasonably be expected to result from Plaintiff's impairments, the ALJ could have concluded that Plaintiff was not suffering from a pain-producing impairment. If, as Plaintiff argues, an ALJ "skips" the first two steps and jumps to the last step (assessing the credibility of the Plaintiff), this operates solely in Plaintiff's favor and does not require a reversal of the Commissioner's decision.

Credibility Determination

Plaintiff asserts that the ALJ improperly evaluated Plaintiff's credibility. Plaintiff relies on Gatson v. Bowen, 838 F.2d 442 (10th Cir. 1988). Plaintiff suggests that the ALJ, in part, relied on the lack of medical evidence to support an impairment in his assessment that Plaintiff was not fully credible. Plaintiff argues that this is improper pursuant to Gatson.

In Gatson, The ALJ concluded that "based on the medical evidence of record" the claimant's subjective complaints of pain were not credible. The Tenth Circuit observed that the ALJ offered no other explanation for his conclusion that the plaintiff was not credible. Id. at 447.

No additional explanation for this conclusion is offered, suggesting that the ALJ believed the medical evidence did not confirm, was inconsistent with, or in some way overcame the claimant's testimony. Although it is true that subjective pain testimony alone is not sufficient to produce a determination of disability, a careful reading of the 1984 Congressional pain provision makes clear that medical evidence need not confirm or prove the degree of pain alleged. Under the statute, the medical evidence must establish an impairment that could reasonably be expected to produce the alleged pain, and statements regarding the intensity and persistence of the pain must be reasonably consistent with the medical findings and signs.

Id. (footnotes and citations omitted). Gatson, like Luna, required that an ALJ consider all of a claimant's subjective complaints of pain if the medical evidence provides the appropriate nexus. In Gatson, the ALJ, contrary to Luna, merely evaluated the medical evidence and, based on it concluded that the claimant's subjective complaints of pain were not as credible as the claimant had alleged. In accordance with Luna, an ALJ

first considers whether the medical complaints which the claimant has could reasonably produce reasonably the alleged pain. If the answer to this is "yes," the ALJ then should consider the claimant's allegations as to the intensity and persistence of the pain.

In this case, the ALJ's decision with respect to Plaintiff's disability was based on more than the "medical evidence of record." In evaluating Plaintiff's credibility, the ALJ noted:

Ms. Pennington's statements concerning her impairments and their impact on her ability to work on the date her insured status expired are not entirely credible in light of the claimant's own description of her activities and life style, the degree of medical treatment required, discrepancies between the claimant's assertions and information contained in the documentary reports, the reports of the treating and examining practitioners, and the medical history.

The Administrative Law Judge is not persuaded by the claimant [sic] continued complaints of pain precluding her from standing more than 15 minutes, walking more than 10 minutes, sitting more than 15 minutes, or lifting more than 10 pounds. When asked about her daily activities, the claimant states she dusts her house, helps with the laundry, and is able to go grocery shopping (where her groceries are carried out). The claimant testified that she takes care of her two children, ages 5 and 8. It is likely, the responsibility of small children and maintaining a household requires the expenditure of energy in contradiction to the claimant's allegations that she is no [sic] able to do anything.

* * * *

While the claimant testified she frequently falls, Dr. Billings stated that he could find no objective medical findings as to the cause of her falling. Dr. Billings stated on August 22,

1994, that although the claimant continued to complain of pain and discomfort, after a complete evaluation, he did not understand why she was having such a difficult time. . . .

The Administrative Law Judge is persuaded the claimant exaggerates her complaints to include disabling symptoms. On her "Request for Hearing", the claimant stated Dr. Billings recommended she not go to class because she was having difficulty sitting. However, the record reflects the claimant has exaggerates [sic] her symptoms and on November 8, 1993, Dr. Billing's [sic] noted the claimant complained of pain while sitting for prolonged periods of time and he wrote a letter addressed, "To Whom it May Concern", asking that, because she has difficulty sitting for long periods, she be permitted to stand for a few minutes or walk back and forth for a few minutes to relieve pain and discomfort. The record does not imply Dr. Billings indicated the claimant not attend her classes.

* * * *

The Administrative Law Judge recognizes that Dr. Billings, the claimant's treating physician, stated she would not be able to return to her former work as a custodian for the City of Tulsa. However, he clearly recommended vocational retraining and the only limitations placed on the claimant were by Dr. Hicks, when he stated she could not lift more than 25 pounds occasionally and 20 pounds frequently.

[R. at 20-22].

In Kepler v. Chater, 68 F.3d 387, (10th Cir. 1995), the Tenth Circuit determined that an ALJ must discuss a Plaintiff's complaints of pain, in accordance with Luna, and provide the reasoning which supports the decision as opposed to mere conclusions.

Id. at 390-91. The Court specifically noted that the ALJ should consider such factors

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. at 391.

An ALJ's determination of the credibility of the claimant is given great deference by the reviewing court. See Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). On appeal, the court's role is limited to verifying whether substantial evidence in the record supports the ALJ's decision. The court should not substitute the court's judgment for that of the ALJ. Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995) ("Credibility determinations are peculiarly within the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence."); Musgrave v. Sullivan, 966 F.2d 1371, 1374 (10th Cir. 1992). As noted above, substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401.

After reviewing the decision and findings of the ALJ, the record, and considering the case law, the Court concludes that the ALJ's findings as to Plaintiff's credibility are supported by substantial evidence.

Dr. Billings's Credibility Assessment

The record is clear that Plaintiff retains "insured status" only until December 31, 1994. An individual must establish that he or she was disabled prior to the expiration of his or her "insured status." Potter v. Secretary of Health and Human Services, 905 F.2d 1346, 1348-49 (10th Cir. 1990) ("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. This is especially true where the disease is progressive.") (citations omitted, emphasis added).

In this case, the ALJ noted that Plaintiff's insured status expired on December 31, 1994, and the ALJ concentrated on the medical evidence and records which were during this time period. During this time period, Dr. Billings, on September 9, 1992, discharged Plaintiff to return to work without restrictions. [R. at 283]. In August 1994, Dr. Billings noted that a review of Plaintiff's X-rays indicated that her cervical spine was completely normal. Dr. Billings noted, "[t]he pain [that Plaintiff reports] is more on the right side and this side seems adequately decompressed so I do not have a solution for her problems." [R. at 438]. Dr. Billings discharged Plaintiff on August 31, 1994 indicating that "she is unable to carry out the duties of her previous occupation for the City of Tulsa and I recommend vocational retraining." [R. at 439]. Consequently, as of August 1994, Dr. Billings was recommending vocational retraining for Plaintiff. In a letter to Plaintiff's attorney dated October 19, 1994, Dr. Billings observed that Plaintiff would require periodic prescriptions of muscle relaxants,

analgesics, and anti-inflammatory medications in addition to periodic physical therapy. [R. at 437].

Plaintiff concentrates on a letter which Dr. Billings wrote in April of 1995, and argues that the ALJ erred by not specifically addressing Dr. Billings' statements. In April of 1995, Plaintiff "returned to our office for a change of condition for the worse." [R. at 480, emphasis added]. Dr. Billings notes that he previously discharged Plaintiff in August 1994 and suggested vocational retraining, that Plaintiff had attended school, but that Plaintiff's pain had been "gradually . . . increas[ed] in severity and ultimately now her legs seem to be getting weak." [R. at 480]. Dr. Billings observed that Plaintiff reported that she was falling as much as three times in one day. [R. at 478]. Dr. Billings noted that Plaintiff seems to be a "genuine person who seems quite reliable," but that he has been unable to document any nerve root entrapment. [R. at 480].

In August of 1994, Dr. Billings discharged Plaintiff and recommended vocational retraining. Plaintiff's insured status expired in December 1994. In April of 1995 Dr. Billings again saw Plaintiff due to a "change in condition for the worse." The record supports the ALJ's conclusion that Plaintiff was not disabled prior to December 31, 1994. Regardless, Dr. Billings' April 1995 letter does not dictate a finding of disability. Dr. Billings seems puzzled because although he expresses that he believes Plaintiff's complaints that she is, at this time (in April 1995), falling as much as three times per day, he can find no medical evidence to support her statements. Consequently, Dr. Billings again released Plaintiff, this time to the care of Dr. Sikka for

pain management. Dr. Sikka, in his initial examination of Plaintiff in April 1995, noted that Plaintiff walked with a normal gait, that she reported her hobby as "walking," and that Plaintiff did not give full effort during her examination. [R. at 526-28]. The Court concludes that the ALJ did not err by failing to specifically address Dr. Billings April 1995 letter.

Error of Appeals Council

Plaintiff asserts that after the ALJ issued an opinion, Plaintiff submitted additional Exhibits to the Appeals Council. [R. at 506-531]. Plaintiff asserts that the three additional exhibits are from treating physicians and that proper consideration by the Appeals Council of these additional exhibits would have required a reversal of the ALJ's decision.

The regulations provide that a claimant may submit additional records to the Appeals Council. The Court of Appeals for the Tenth Circuit has determined that such records become part of the record and should be reviewed by the court on appeal. See, e.g., O'Dell v. Shalala, 44 F.3d 855 (10th Cir. 1994). See also Stephens v. Callahan, 971 F. Supp. 1388 (N.D. Okla. 1997) (discussing the unique position that this type of review places upon the court).

In this case, the Appeals Council reviewed the records submitted by Plaintiff but concluded that such records did not provided a basis to change the decision of the ALJ. [R. at 7]. The Court concludes that the Appeals Council is correct.

The records include a residual functional capacity assessment from one of Plaintiff's doctors which contains little detail but concludes that Plaintiff can sit for

only two hours, stand for only two hours, and walk for only two hours. [R. at 506]. The signature on the record is unclear but appears to be from Dr. Billings who was one of Plaintiff's treating physicians. Although the RFC assessment from Dr. Billings would indicate that Plaintiff was unable to work, the assessment is not consistent with the other medical records provided by Dr. Billings and relied upon by the ALJ. Plaintiff was referred to Dr. Billings on November 7, 1991. [R. at 245]. Dr. Billings reviewed Plaintiff's medical records and concluded that Plaintiff had a herniated nucleus pulposus at L5-S1. Surgery occurred on January 6, 1992, and Plaintiff was discharged January 13, 1992. Plaintiff began a work program in May. [R. at 288]. On September 9, 1992, Dr. Billings indicated that Plaintiff was discharged to return to work without restrictions. [R. at 283]. Plaintiff was additionally treated by Dr. Hicks. Although Dr. Hicks did not believe that Plaintiff could return to her previous work, he concluded that Plaintiff could perform "light duty physical demand" work. [R. at 295]. On August 10, 1992, Dr. Hicks recommended that Plaintiff return to a job in which she did not have to lift more than 20 pounds on a frequent basis or 25 pounds on an occasional basis." [R. at 466]. In August of 1994, Dr. Billings, upon review of Plaintiff's X-rays, noted that Plaintiff's cervical spine was completely normal. Dr. Billings again discharged Plaintiff on August 31, 1994, and indicated that Plaintiff should complete vocational retraining. [R. at 439]. Dr. Billings again saw Plaintiff in March of 1995. In April of 1995 he noted that he felt "uneasy" about Plaintiff because although Plaintiff appeared to be genuine he could not medically document anything that would account for Plaintiff's symptoms. [R. at 480].

Plaintiff is correct that a treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). In this case, the residual functional assessment which Plaintiff submitted to the Appeals Council (r. at 506) is brief, conclusory, unsupported by medical evidence, and contrary to the other conclusions and opinions previously provided by Plaintiff's doctor. Consequently, the Appeals Council was not improper in declining to reverse the decision of the ALJ based on those records.

Plaintiff additionally submitted supplemental records from Dr. Sikka. Plaintiff's records from Dr. Sikka do not begin until April 25, 1995. Plaintiff's insured status expired December 31, 1994. The relevant inquiry is whether or not Plaintiff was disabled during the insured status period. Medical records after the date on which Plaintiff was first insured can be relevant to determining Plaintiff's status during the time that she was insured. However, disability must be established before the expiration of the insured period. See e.g. Potter v. Secretary of Health and Human Services, 905 F.2d 1346, 1348-49 (10th Cir. 1990). In any case, the records from Dr. Sikka, do not dictate a different result.

Plaintiff additionally points to a residual functional capacity assessment dated May 30, 1993. The assessment is sketchy, providing no details, and indicates that the individual completing the assessment last saw Plaintiff on November 25, 1991 when the Plaintiff was referred to Dr. Billings. The assessment does not dictate a result different from that reached by the ALJ.

The "Reopening" Issue

Plaintiff asserts that the ALJ effectively reopened the prior denial of benefits because the ALJ did not deny reopening and addressed some of the evidence during the time period of the prior hearing. Defendant asserts that the prior hearing was *res judicata*, and that the ALJ did not reopen it. Because the Court concludes that the ALJ's decision to deny benefits was supported by substantial evidence, it declines to address the issue of whether or not a *de facto* reopening occurred.

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

Dated this 6 day of February 1998.


Sam A. Joyner
United States Magistrate Judge

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

SHERLYN SNOW, individually and as)
Treasurer, Vice President and Chairman of)
the Board of SNOWMEN BROADCASTING,)
INC., a Missouri corporation,)

Plaintiff,)

v.)

R.C. AMER, JR., individually and as agent for)
VISION COMMUNICATIONS, INC., a)
Missouri corporation, DAVID OSELAND,)
individually and as President of SNOWMEN)
BROADCASTING, INC., a Missouri)
corporation, and DON HANCOCK,)
individually and as Secretary and Vice President)
of SNOWMEN BROADCASTING, INC., a)
Missouri corporation,)

Defendants.)

ENTERED ON DOCKET

DATE 2-11-98

Case No. 97-CV-1060-H

FILED

FEB 10 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on a motion to dismiss (Docket # 3) by Defendants R.C. Amer, Jr. and Vision Communications, Inc. ("Vision").

Plaintiff Sherlyn Snow brought this declaratory judgment action, requesting that the Court declare that no enforceable contract exists, with respect to the sale of a radio station located in Springfield, Missouri, between Plaintiff Snowmen Broadcasting, Inc. ("Snowmen Broadcasting") and the various Defendants. Ms. Snow, an Oklahoma resident, owns 55% of the stock in Snowmen Broadcasting, a Missouri corporation. Don Hancock and David Oseland, two Defendants in this suit, each own 22.5% of the remaining stock.

Defendant Amer is a Missouri citizen and an agent for Vision, also a Missouri corporation. Mr. Amer, station manager of a radio station owned by Snowmen Broadcasting, entered into a

Time Brokerage Agreement (“the Agreement”) with Mr. Oseland, which provided that Mr. Amer and Vision could purchase the station after February 28, 1996, if certain conditions had been satisfied. Mr. Amer and Vision filed suit in the Circuit Court of Greene County, Missouri to enforce the Agreement. Plaintiff subsequently brought this action to declare the Agreement invalid. Plaintiff contends that the Agreement is unenforceable since it was not ratified by the Board of Snowmen Broadcasting and signed by two officials, as required in the company’s bylaws. Defendants have moved to dismiss the claim, alleging the following grounds: lack of personal jurisdiction, lack of standing, failure to comply with the shareholder derivative suit requirements, lack of diversity jurisdiction, abstention of jurisdiction, and improper venue.

To prevail on a motion to dismiss, a defendant must establish that there is no set of circumstances upon which the plaintiff would be entitled to relief. Jenkins v. McKeithen, 395 U.S. 411 (1969); Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992). For the purposes of this analysis, the Court accepts as true all material allegations in the complaint. Ash Creek Mining, 969 F.2d at 870.

Defendants have first moved to dismiss the complaint for lack of personal jurisdiction.¹ Defendants claim that since they are both Missouri residents and since neither has conducted business in Oklahoma with respect to the Time Brokerage Agreement, Ms. Snow, or Snowmen Broadcasting, the Court lacks personal jurisdiction over them in this matter. In response, Plaintiff contends that Mr. Amer knew or should have known that the contract would be ratified in

¹ The Court applies the law of the forum state, in this case, Oklahoma, to determine whether it has jurisdiction over a nonresident defendant in a lawsuit based on diversity of citizenship. Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Co-op., 17 F.3d 1302, 1304 (10th Cir. 1994); see also Fed. R. Civ. P. 4(e).

Oklahoma. Plaintiff alleges that she was involved in an automobile accident and could not travel outside the state. Thus, as the majority shareholder of Snowmen Broadcasting, she alleges that Mr. Amer knew action concerning the Agreement must take place in Oklahoma.

In this regard:

[t]he plaintiff bears the burden of establishing personal jurisdiction over the defendant. Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party.

Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1417 (10th Cir. 1988) (citations omitted).

Thus, the Court must “determine whether the plaintiff’s allegations, as supported by affidavits, make a prima facie showing of the minimum contacts necessary to establish jurisdiction over each defendant.” Id.

“The test for exercising long-arm jurisdiction in Oklahoma is to determine first whether the exercise of jurisdiction is authorized by statute and, if so, whether such exercise of jurisdiction is consistent with the constitutional requirements of due process. In Oklahoma, this two-part inquiry collapses into a single due process analysis, as the current Oklahoma long-arm statute provides that “[a] court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States.” Id. at 1416 (citations omitted).

The Rambo court stated that:

[j]urisdiction over corporations may be either general or specific. Jurisdiction over a

defendant in a suit arising out of or related to the defendant's contacts with the forum state is "specific jurisdiction." In contrast, when the suit does not arise from or relate to the defendant's contacts with the forum and jurisdiction is based on the defendant's presence or accumulated contacts with the forum, the court exercises "general jurisdiction."

839 F.2d at 1418 (citations omitted); Doe v. Nat'l Medical Servs., 974 F.2d 143, 145 (10th Cir. 1992) ("Specific jurisdiction may be asserted if the defendant has 'purposefully directed' its activities toward the forum state, and if the lawsuit is based upon injuries which 'arise out of' or 'relate to' the defendant's contacts with the state."). The Supreme Court has explained that:

[j]urisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the foreign state . . . it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communication across state lines, thus obviating the need for physical presence within a state in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another state, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction.

Burger King, 471 U.S. at 476.

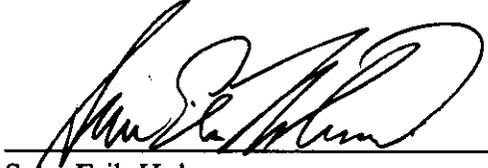
In the instant case, Plaintiff does not allege that Defendants are subject to the general jurisdiction of Oklahoma courts. Instead, Plaintiff asserts that Defendants are subject to specific jurisdiction for activities taken in connection with the agreement at issue here. Applying the standards set forth above, the Court finds that it does not have personal jurisdiction over Mr. Amer, a Missouri citizen, and Vision, a Missouri corporation, with respect to a contract executed in Missouri for the sale of a Missouri radio station. Specifically, Defendants state that Mr. Amer and representatives of Vision have never been within Oklahoma to conduct business with Ms. Snow or Snowmen Broadcasting. Defendants further state that they have never "had any telecommunications contacts with any person or entity within the State of Oklahoma concerning" Vision and the matters in the instant dispute. Def.'s Aff. Plaintiff has offered no evidence

whatsoever to controvert these statements. Further, Plaintiff has offered no evidence whatsoever that would make a prima facie showing of personal jurisdiction in this matter. The Court finds that the mere possibility that Ms. Snow might ratify the contract in Oklahoma does not constitute a contact sufficient to assert personal jurisdiction over Defendants in this state. See Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1534 (10th Cir. 1996) (holding that defendant's mere sending of an opinion letter to plaintiff in another state was not a sufficient basis for personal jurisdiction) (citing Burger King, 471 U.S. at 473); Oklahoma Publ'g Co. v. National Sportsmen's Club, Inc., 323 F. Supp. 929, 930-31 (W.D. Okla. 1971) (holding that there was not personal jurisdiction over defendants because "the act of signing the contract in Oklahoma by plaintiff, evidencing plaintiff's acceptance of the contract, was not an act of the defendant done or performed in Oklahoma, but plaintiff's own act").

Therefore, under the aforementioned standard for resolving the issue of personal jurisdiction, specific jurisdiction over both Defendants Amer and Vision is inappropriate. The motion to dismiss for lack of personal jurisdiction by Defendants Amer and Vision (Docket # 3) is hereby granted.

IT IS SO ORDERED.

This 10TH day of February, 1998.



Sven Erik Holmes
United States District Judge

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

HARTFORD FIRE INSURANCE COMPANY,)
a Connecticut corporation,)

Plaintiff,)

vs.)

R & M FLEET SERVICE, INC., an)
Oklahoma corporation; BERT EDWARD)
YOUNG, an individual; JUANITA M.)
HOWARD, by and through her)
natural guardian and next friend,)
Lester Howard; LESTER L. HOWARD,)
individually; and ROBERT McQUARY,)
an individual,)

Defendants.)

ENTERED ON DOCKET

DATE 2-11-98

No. 97CV 681H (J)

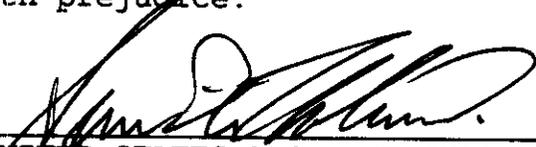
FILED

FEB 10 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

NOW on this 10TH day of FEBRUARY, 1998, upon
the Stipulation of Dismissal of the Plaintiff and Defendants, by
and through their legal counsel of record, the Court orders the
Defendants be dismissed with prejudice.


UNITED STATES DISTRICT JUDGE

4. Although he did not graduate, Mr. Dorough studied mechanical engineering and math at Southern Methodist University and the University of Texas.

5. After leaving college, Mr. Dorough worked as a mechanical engineer. Subsequently, he became the manager of a steel manufacturing plant. The company fabricated furnaces for chemical plants and refineries. Eventually, Mr. Dorough and another individual purchased the steel manufacturing company out of bankruptcy. Thereafter, Mr. Dorough was the president and general manager of the company, which operated under the name of Mohawk Steel.

6. Mr. Dorough's responsibilities at Mohawk Steel included sales, financing, and the approval of equipment purchases.

7. In 1980 or 1981, Mr. Dorough and the other owner sold Mohawk Steel to a larger publicly held corporation for \$6 million. At that time, Mr. Dorough owned 45 to 51 percent of the company. After the sale, Mr. Dorough continued to work at Mohawk Steel as the general manager.

8. Upon selling the company, Mr. Dorough opened a brokerage account at Dean Witter and an individual named Tom Berry became his investment adviser. Mr. Berry would recommend stocks to Mr. Dorough. Mr. Berry was aware that Mr. Dorough wanted to be in "safe" investments.

9. After the sale of Mohawk Steel, Mr. Dorough was approached about investing in Whitman by Jack Leming, a certified public accountant. Mr. Leming had provided services to the company and prepared Mr. Dorough's personal income tax returns. Mr. Leming's partner, Jack Thomas, did most of the actual accounting work for Mohawk Steel.

10. Mr. Leming first proposed the investment in Whitman to Mr. Dorough when they were meeting to discuss the preparation of Mr. Dorough's personal tax returns following the sale of Mohawk Steel.

11. Mr. Dorough had only one meeting with Mr. Leming in which they discussed his prospective investment in Whitman, and that meeting did not last more than thirty minutes.

12. The business that Whitman reportedly planned to engage in was the exploitation of plastic recycling machines. Whitman purportedly intended to lease recycling machines from a company established as part of the tax shelter promotion. The recycling machines were to be purchased by the leasing company for \$1,520,000 each and placed in businesses that utilized plastics in their operations. The machines would process the plastic scrap from each business into "pellets," which purportedly could be sold in competition with "virgin" plastics for use in the manufacture of new plastic products.

13. At the time he was approached about investing in Whitman, Mr. Dorough had never heard of the plastics recycling industry; nor did he know of anyone who had made any money in plastics recycling.

14. Although Mr. Dorough was given a copy of the Offering Memorandum for Whitman, he did not read it. That Offering Memorandum contained, among other things, the following warnings:

- a. The business had no operating history;
- b. The General Partner had "limited experience marketing recycling or similar equipment" and was only required to devote such time to the business as he, in his absolute discretion, deemed necessary;
- c. The General Partner had potential conflicts of interest;
- d. There was no established market for the recycling equipment;
- e. The recycling equipment had no history of commercial use;
- f. There could be no assurance there would be any profits;
- g. The manufacturer of the equipment had no prior experience in manufacturing and operating the recycling equipment;

- h. The manufacturer did not intend to patent the equipment;
- i. There was no established market for recycled plastic pellets; and
- j. In order for there to be a profit the recycled pellets had to sell for at least \$.37 per pound -- virgin pellets were then selling for \$.45 to \$.47 per pound, with sellers offering virgin pellets in the spot market below the published prices -- and recycled pellets would sell below the selling price of virgin pellets.

15. In deciding whether to invest in Whitman, Mr. Dorough relied entirely on the advice of Mr. Leming. Mr. Leming was neither a promoter nor an "offeree representative" and received no commission from the promoters of Whitman with respect to Mr. Dorough's investment.

16. Mr. Leming personally conducted no investigation into the validity and economic viability of Whitman. Although, Mr. Leming reviewed the Whitman Offering Memorandum, he did nothing to evaluate the risks identified in the warnings contained in the Offering Memorandum. Specifically, Mr. Leming *inter alia* did not attempt to verify that companies using plastics would be willing to have recyclers placed at their business and did not attempt to verify that companies would be willing to purchase recycled pellets.

17. In a separate transaction, Mr. Leming himself invested a limited partnership similar to the investment made by Mr. Dorough in Whitman. Before making his own investment in that partnership, Mr. Leming consulted with a William L. Story, who earned commissions on investments in that partnership. Mr. Story had previously been a partner with Mr. Leming in an accounting practice. There is no evidence that Mr. Story had any expertise in the business of plastic recycling. Mr. Story reportedly visited a packaging factory in New York and observed a recycling machine in operation. Although Mr. Leming was aware that the tax benefits claimed by the promoters of Whitman depended on the value of the equipment that was to be leased, he did not question Mr. Story on the valuation of that equipment.

18. Mr. Leming knew nothing about the recycling business. Furthermore, as an accountant, Mr. Leming had limited experience in actual business management. In fact, based on the record, Mr. Dorough personally was more qualified to evaluate the business operations of Whitman than was Mr. Leming.

19. Mr. Leming simply did not have either the expertise or knowledge necessary to evaluate an investment in Whitman from a business and economic standpoint and therefore to the extent that Mr. Dorough relied upon his business advice, as opposed to his tax advice, such reliance was unreasonable.

20. Mr. Leming acknowledged that the tax aspects of the Whitman shelter played a large role in his favorable view of the investment.

21. On or about October 29, 1982, Mr. Dorough invested \$50,000 in Whitman.

22. Other than his Dean Witter account, this \$50,000 investment in Whitman was the largest single investment Mr. Dorough had ever made.

23. Based upon his investment in Whitman, Mr. Dorough reported a portion of losses suffered by Whitman during calendar year 1982 in the amount of \$39,265 as a deduction on his 1982 income tax return. Mr. Dorough also claimed a portion of an investment tax credit attributable to Whitman in the amount of \$77,292 on his 1982 income tax return.

24. On or about March 10, 1995, Mr. Dorough was issued a Notice of Deficiency by the Internal Revenue Service (the "Service"), informing him that it considered the deduction in the amount of \$39,265 and the investment tax credit in the amount of \$77,292 to be improper, and disallowed them. This notice assessed a deficiency for additional taxes in the principal amount of \$61,911 for income taxes for taxable year 1982.

25. In addition, the Service assessed a negligence penalty against Mr. Dorough under section 6653 of the Code, an overvaluation penalty under section 6659, and substantial underpayment penalty interest under section 6621(c).

26. Mr. Dorough consented to the deficiency, and paid all principal, interest, and penalties assessed, as follows:

<u>Description</u>	<u>Amount</u>
Underpayment of Tax	\$ 61,911
Motivated Interest [6653(a)(1)B]	121,474
Penalties [6653(a)(1)(A)]	3,096
Penalties [6659]	18,574
Penalty Interest [6621(c)]	<u>21,830</u>
TOTAL	\$226,885

27. Mr. Dorough filed a timely Form 1040X (Claim for Refund) claiming a refund in the amount of the taxes, penalties, and interest paid.

28. On or about March 3, 1995, the Service issued to Mr. Dorough a Notice of Disallowance that his claim for refund was denied.

29. Mr. Dorough no longer contests the additional principal tax assessed against him in the amount of \$61,911. However, Mr. Dorough continues to contest the penalties assessed against him and any interest paid on such penalties.

30. Mr. Dorough's entire investment of \$50,000 in Whitman was lost.

Conclusions of Law

1. This Court has subject matter jurisdiction over this case, personal jurisdiction over the parties, and venue for this action is proper in the Northern District of Oklahoma.

2. In a civil tax case, the taxpayer has the burden of proving his or her entitlement to a refund. United States v. McMullin, 948 F.2d 1188, 1192 (10th Cir. 1991); Doyal v. Commissioner, 616 F.2d 1191, 1192 (10th Cir. 1980). It is not enough for the taxpayer to show that a tax assessment is erroneous in some respects; the taxpayer must show a clear entitlement to a refund. United States v. Janis, 428 U.S. 433, 440 (1976).

3. The assessment of penalties by the Service is presumptively correct and taxpayers bear the burden of proving that the Service's determination was incorrect. Page v. Commissioner, 823 F.2d 1263, 1272 (8th Cir. 1987) ("The Commissioner's assessment of addition to tax, however, is entitled to a presumption of correctness and appellants bear the burden of proving that such determinations were improper"). Accord Edison Homes, Inc. v. Commissioner, 903 F.2d 579, 584 (8th Cir. 1990); Allen v. Commissioner, 925 F.2d 348, 353 (9th Cir. 1991); McGee v. Commissioner, 979 F.2d 66, 71 (5th Cir. 1992).

I

4. Section 6653 of the Code provided, at the times relevant to this action, as follows:

If any part of any underpayment (as defined in subsection (c)) is due to negligence or disregard of rules or regulations, there shall be added to the tax an amount equal to the sum of --

- (A) 5 percent of the underpayment, and
- (B) an amount equal to 50 percent of the interest payable under section 6601 with respect to the portion of such underpayment which is attributable to negligence for the period beginning on the last date prescribed by law for payment of such underpayment (determined without regard to any extension) and ending on the date of the assessment of the tax (or, if earlier, the date of the payment of the tax).

5. For purposes of this provision, an underpayment is defined as the amount by which the actual tax liability exceeds the amount shown by the taxpayers on their return as their tax liability plus amounts previously assessed and after taking into account any credits, abatements or refunds due the taxpayers.¹ 26 U.S.C. § 6211.

¹ It is settled law that if any part of any underpayment of taxes is due to negligence or intentional disregard, the portion of the penalty provided for in subsection (A) applies to the entire underpayment, not just that portion due to such negligence or disregard. The portion of the penalty provided for in subsection (B) applies only to the portion of the underpayment due to negligence or intentional disregard. In Commissioner v. Asphalt Products Co., 482 U.S. 117, 120 (1987), the Supreme Court held that:

Section 6653(a)(1) could not be clearer. If "any part of any underpayment" is due to negligence, the Commissioner shall add to the tax a penalty of "5 percent of the underpayment." It is impossible to further explain the statute without merely

6. For purposes of section 6653, negligence is defined as “the lack of due care or the failure to do what a reasonable and prudent person would do under similar circumstances.” Allen v. Commissioner, 925 F.2d 348, 353 (9th Cir. 1991).

7. Intentional disregard for purposes of Section 6653 “occurs when a taxpayer who knows or should know of a rule or regulation chooses to ignore its requirements.” Hansen v. Commissioner, 820 F.2d 1464, 1469 (9th Cir. 1987).

8. The Supreme Court articulated the general rule applicable to reliance on the advice of professionals as follows:

When an accountant or attorney advises a taxpayer on a matter of tax law, . . . it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require the taxpayer to challenge the attorney, to seek a “second opinion,” or to try to monitor counsel on the provisions of the Code himself would nullify the very purpose of seeking the advice of a presumed expert in the first place.

United States v. Boyle, 469 U.S. 241, 251 (1985).

9. However, reliance upon an accountant’s advice does not preclude a finding of negligence. Sacks v. Commissioner, 82 F.3d 918, 920 (9th Cir. 1996).

10. Furthermore, in a case where the taxpayer claims to have relied on his or her tax adviser, the validity of that reliance turns upon “the quality and objectivity of the professional advice which they obtained.” Swayze v. Commissioner, 785 F.2d 715, 719 (9th Cir. 1986).

11. In the instant case, Plaintiffs assert that they were entitled to rely on the advice of their accountant, Mr. Leming, who recommended the Whitman investment to them. An accountant’s advice, however, cannot shield a taxpayer from liability if the accountant knew nothing firsthand about the business of the venture. Collins v. Commissioner, 857 F.2d 1383,

repeating its language -- the penalty is imposed on “the underpayment,” not on the “part of the underpayment” attributable to negligence. By contrast (if contrast is thought necessary), the very next paragraph of the statute . . . limits the 50% penalty on interest due on negligent underpayments to “the portion of the underpayment . . . which is attributable to the [taxpayer’s] negligence.

1386 (9th Cir. 1988). See also Leonhart v. Commissioner, 414 F. 2d 749, 750 (4th Cir. 1969) (taxpayers cannot rely on accountant's advice when that advice is not based on knowledge of all the facts). Under the law applicable to this case, Plaintiffs have the burden of showing that their reliance on the advice of Mr. Leming was reasonable. See Goldman v. Commissioner, 39 F.3d 402, 408 (2d Cir. 1994) ("while reliance on professional advice can, in certain circumstances, provide a defense to a negligence penalty under § 6653(a), such advice must be objectively reasonable"); Lax v. Commissioner, 76 A.F.T.R.2d 95-7724, 95-7727 (3rd Cir. 1995) (unpublished decision) ("reliance alone is not sufficient it must be reasonable under the circumstances"); Kozlowski v. Commissioner, 76 A.F.T.R.2d 95-7744, 95-7746 (9th Cir. 1995) ("Good faith reliance on professional advice is a defense to negligence provided that the reliance is reasonable").

12. In Goldman, the court held that "[r]eliance on expert advice is not reasonable where the 'expert' relied on knows nothing about the business in which the taxpayer invested." Goldman, 39 F.3d at 408. Simply stated, if the adviser is not familiar with the business in which the taxpayer invested, reliance upon such ill-informed advice is not justified. David v. Commissioner, 43 F.3d 788, 789-790 (2d Cir. 1995).

13. In Illes v. Commissioner, 982 F.2d 163, 166 (6th Cir. 1992), the court held that the suggestion of an accountant "that this was a good investment to make for a retirement type situation" was not sufficient to meet the taxpayer's burden of proof. See also Lax, 76 A.F.T.R.2d at 95-7727 ("His good-faith reliance on Feinman and Burr as to the legitimacy of the venture was not reasonable because Feinman and Burr were not knowledgeable about the oil and gas business, as Mr. Lax was aware. Their expertise in tax law does not alter the fact that they obviously were unqualified to advise Mr. Lax as to the soundness of MCDA II . . ."); Kozlowski, 76 A.F.T.R.2d at 95-7746 ("Mr. Kozlowski admitted that he consulted Mr. Russo for advice on the tax aspects of the transaction, and not for advice on whether the transactions were bona fide").

14. The taxpayer must make a reasonable inquiry into the validity of questionable tax shelter benefits. Collins v. Commissioner, 857 F.2d 1383, 1386 (9th Cir. 1988). In the event that a real examination of the business of the proposed investment would have caused a reasonable person to conclude that the scheme would not have worked, the negligence penalty is appropriate. Freytag v. Commissioner, 89 T.C. 849, 889 (1987).

15. As noted above, Mr. Dorough was better qualified to evaluate the business operations of Whitman than was Mr. Leming. Nevertheless, Mr. Dorough asserts that he invested in Whitman solely in reliance on Mr. Leming's advice and sought the advice of no one else. Mr. Leming, however, was not qualified to render business advice regarding the Whitman investment, and Mr. Dorough was aware of that fact. The record establishes that if there had been any real examination of Whitman, no reasonable person would have expected the business to succeed. The record further establishes that Mr. Leming: (1) had no expertise in the plastics business; (2) did not hire experts to advise him concerning the plastics industry or plastics recycling; (3) relied on the biased representations of interested parties regarding the industry; and (4) ignored the warnings of the Offering Memorandum. Based on these facts, Plaintiffs could not have reasonably relied on the advice of Mr. Leming. Plaintiffs' asserted reliance on Mr. Leming, therefore, is no defense to the penalties assessed against them.

II

16. Section 6659(a) of the Code, 26 U.S.C. § 6659(a) (repealed), provided at times relevant to this action, that if an individual "has an underpayment of the tax imposed by chapter 1 for the taxable year which is attributable to a valuation overstatement, then there shall be added to the tax an amount equal to the applicable percentage of the underpayment so attributable."

17. Section 6659(e) further provided that the “Secretary may waive all or any part of the addition to tax provided by this section on a showing by the taxpayer that there was a reasonable basis for the valuation . . . and that such claim was made in good faith.”

18. “[T]he most important factor in determining reasonable cause and good faith is the extent of the taxpayer’s efforts to assess his proper tax liability under the law.” Mailman v. Commissioner, 91 T.C. 1079, 1084 (1988). The “taxpayer must show that the reasonable cause and good faith is so clear that the commissioner’s refusal is arbitrary, capricious and without sound basis in fact.” Cundiff v. United States, 73 A.F.T.R.2d 94-480, 94-482 (W.D. Va. 1993).

19. In Mauerman v. Commissioner, 73 A.F.T.R.2d 94-2002, 2005 (10th Cir. 1994), the Court held that “[w]e review the Commissioner’s decision under section 6661 for abuse of discretion.”² See also Caufield v. Commissioner, 33 F.3d 991, 994 (8th Cir. 1994) (“Courts review the Commissioner’s decision not to waive the penalty for abuse of discretion”); Karr v. Commissioner, 924 F.2d 1018, 1026 (11th Cir. 1991) (“The review of the Commissioner’s decision to not waive the addition to tax penalty is limited to whether the Commissioner’s discretion has been exercised arbitrarily, capriciously, or without sound basis in fact.”); Klavan v. Commissioner, 66 T.C.M. 68, 85 (1993) (“The administrator’s judgment and ability to provide uniform treatment to similarly situated taxpayers deserves our deference, and the question for the Court is not whether it would have decided the matter differently . . . but whether the [Service’s] not granting petitioner’s request was arbitrary”).

20. In the present case, Plaintiffs did not make the requisite efforts to determine their proper tax liability for the taxable year at issue. Based on the findings of this Court set forth in the Findings of Fact and paragraph 15 of the Conclusions of Law, the Court concludes that the taxpayers have not met their burden of demonstrating reasonable cause and good faith.

² Section 6661 contained language concerning the discretion of the Secretary that was virtually identical to the language contained in § 6659.

21. The Service did not abuse its discretion by failing to waive the overvaluation penalty and therefore Plaintiffs are not entitled to a refund of payments made in connection with such penalty.

III

22. Plaintiffs argue that because the overvaluation penalty under section 6659 of the Code cannot be applied in this case, the Service may not assess penalty interest under section 6621(c). Since the Court has rejected Plaintiffs' claim in connection with section 6659, this argument must fail.

For the reasons set forth above, the Court concludes that Plaintiffs have failed to meet the burden of proving their claim to a refund in this case. Within two weeks of the file date of this order, Defendant United States of America shall submit a proposed order of judgment agreed to as to form by Plaintiffs consistent with the Findings of Fact and Conclusions of Law set forth herein.

IT IS SO ORDERED.

This 10TH day of February, 1998.


Sven Erik Holmes
United States District Judge

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

F I L E D

FEB 10 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHARON PITMAN, Wife of GAIL)
PITMAN, Deceased,)
)
Plaintiff,)

vs.)

Case No. 92-C-451-E ✓

BLUE CROSS AND BLUE SHIELD OF)
OKLAHOMA, individually and as)
Trade Name of GROUP HEALTH)
INSURANCE OF OKLAHOMA, INC.,)
)
Defendant.)

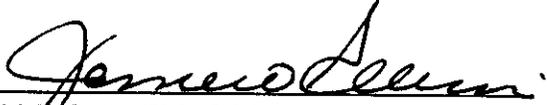
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DATE FEB 11 1998

J U D G M E N T

In accord with the Orders filed this date finding that the decision to deny benefits under these particular circumstances was the result of a conflict of interest and in violation of Blue Cross's fiduciary duty, and awarding damages therefore, the Court hereby enters judgment in favor of the Plaintiff, Sharon Pitman, and against the Defendant, Blue Cross and Blue Shield of Oklahoma, in the amount of \$100,236.09.

IT IS SO ORDERED THIS 9TH DAY OF FEBRUARY, 1998.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

FEB 10 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHARON PITMAN, Wife of GAIL)
PITMAN, Deceased,)

Plaintiff,)

vs.)

Case No. 92-C-451-E /

BLUE CROSS AND BLUE SHIELD OF)
OKLAHOMA, individually and as)
Trade Name of GROUP HEALTH)
INSURANCE OF OKLAHOMA, INC.,)

Defendant.)

ENTERED ON DOCKET

DATE FEB 11 1998

ORDER

This Court entered judgment in favor of plaintiff, finding that the denial of benefits was a breach of Blue Cross's Fiduciary duty. The court now has before it the issue of the amount of damages thereby suffered by plaintiff. The Court, upon consideration of the evidence presented at the hearing, the briefs submitted, and arguments of counsel, enters the following findings of fact and conclusions of law:

Findings of Fact

1. St. Francis Hospital has a balance due and owing for the ABMT/HDC procedure in the amount of \$62,571.45, and Cancer Care Associates has a balance due and owing for the services of Dr. Strnad in the amount of \$5,383.84. The parties have stipulated as to the reasonableness of these charges for the care rendered.
2. St. Francis Hospital and Cancer Care Associates would not have undertaken the HDC/ABMT for Gail Pitman without the payments of Christ United Methodist Church

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in the amount of \$32,280.80. Further, Blue Cross would have been obligated to pay these amounts had it continued with its certification of Mr. Pitman's case under the policy.

3. Christ United Methodist Church made payment with the understanding that the money would be repaid. The Pitmans also understood that the money was to be repaid to the Church and they communicated this understanding to the Church in the course of the fundraising effort.

4. Plaintiff is the proper personal representative of the Estate of her husband and is entitled to receive the payments ordered by the Court in trust for the above creditors.

5. Neither St. Francis Hospital nor Cancer Care Associates has attempted to hold either Ms. Pitman or Mr. Pitman's Estate accountable for the payment of any interest on Mr. Pitman's patient account. Both St. Francis Hospital and Cancer Care Associates have indicated their willingness to accept the unpaid balance of Mr. Pitman's patient account as payment in full for services rendered in connection with the HDC/ABMT.

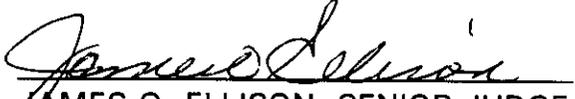
6. Any findings of fact that are actually conclusions of law should be considered as such.

Conclusions of Law

7. Defendant is obligated to pay the balance due St. Francis Hospital, the balance due Cancer Care Associates, and the balance due Christ United Methodist Church in the amount of \$100,236.09. Blue Cross has no obligation to pay interest on these covered claims.

8. Any conclusions of law that are actually findings of fact should be considered as such.

IT IS SO ORDERED THIS 10TH DAY OF FEBRUARY, 1998.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

FEB 10 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHARON PITMAN, Wife of GAIL PITMAN,)
Deceased,)
)
Plaintiff,)
)
vs.)
)
BLUE CROSS AND BLUE SHIELD OF)
OKLAHOMA, Individually and as Trade)
Name of GROUP HEALTH INSURANCE OF)
OKLAHOMA, INC.,)
)
Defendant.)

Case No. 92-C-451-E

ENTERED ON DOCKET

DATE FEB 11 1998

C R D E R

Now before the Court is the Motion to Reconsider (Docket #90) of the Defendant Blue Cross and Blue Shield of Oklahoma (Blue Cross).

Blue Cross argues that this Court should reconsider its Findings of Fact and Conclusion of Law because the conclusion that "Blue Cross had a conflict of interest in its decision to amend its benefit plan" is contrary to law. Blue Cross argues that, under the authority of Averhart v. U.S. West Mngmt. Pension Plan, 46 F.3d 1480, 1488 (10th Cir. 1994), review of a fiduciary's decision to amend the plan is error. In the alternative, Blue Cross asks for clarification that the Court's ruling does not invalidate the Endorsement itself, but the application of the endorsement to a "continuing course of medical care commenced prior to the effective date of the Endorsement."

Plaintiff acknowledges the defendant's power to amend the Plan at any time, for any reason. Plaintiff argues that the language of

the Order makes it clear that the Court's focus was on the denial of benefits, not the decision to amend the plan. In essence, while plaintiff does not necessarily see a need for clarification, plaintiff concedes that the clarification sought by defendant is a correct interpretation of the law and the facts in this case.

The Court finds therefore, that the Motion to Reconsider (Docket #90) should be denied, but that the request for clarification is granted. The Findings of Fact and Conclusions of Law are clarified to reflect that the decision to deny benefits under these particular circumstances was the result of a conflict of interest, and in violation of Blue Cross's Fiduciary duty.

IT IS SO ORDERED THIS 9th DAY OF FEBRUARY, 1998.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT