

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

**FILED**  
MAR 31 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JAMES BAUHAUS, )  
)  
Petitioner, )  
)  
vs. )  
)  
RON WARD, )  
)  
Respondent. )

Case No. 96-CV-929-H  
(Base File)

96-CV-1033-H

ENTERED ON DOCKET

**ORDER** DATE 3-31-98

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, appearing *pro se* and currently confined in the Oklahoma Department of Corrections, challenges his conviction in Tulsa County District Court, Case No. CRF-73-24. Respondent has filed a Rule 5 response to which Petitioner has replied.

Petitioner has also filed the following motions currently pending in this matter: (1) in Case No. 96-CV-1033-H, "Petition for Order Forcing OK to Run the Killer's Fingerprints (in Tulsa Police Dept. File 11001) Thru the National Crime Computer" (#11),<sup>1</sup> "Petition for Order Allowing Me First Access to the Killer's DNA" (#12), "Petition for Summary Judgement" (#13), and "Three Judge District Court Requested and Petition for Recusal of Judge McCarthy" (#14); and (2) in Case No. 96-CV-929-H, "Petition for Order to Force OK to Run the Killer's Fingerprints, in Tulsa Police Dept. File 11001, Thru the National Crime Computer" (#18), "Petition for Summary Judgement" (#19), "3 Judge District Court Requested Petition for Default

<sup>1</sup>Numbers refer to the docket number assigned to the document as filed in the Court record.

Judgement" (#20), "Motion for Relief" (#22), "Request for Relief Motion" (#23), "Motion for Ruling on Relief Motions" (#26), "Petition for Summary Judgement" (#34), "Motion for Prompt Ruling" (#35), "Motion for Evidentiary Hearing" (#36), "Motion for Order Granting Motions" (#37), "Petition for Writ of Error Coram Nobis (Fed. R. Civ. P 60A & B(1), (2), (3) and (6))" (#38), "Motion for Leave to Proceed *In Forma Pauperis*" (#39), and "Petition for Summary Judgement" (#40).

As more fully set out below, the Court concludes that this petition should be denied. As a result, each of Petitioner's pending motions should be denied as moot.

### ***BACKGROUND***

On June 4, 1974, Petitioner was tried by jury after being charged with the crime of murder in Tulsa County District Court, Case No. CRF-73-24. The jury returned a verdict of guilty and recommended a sentence of life imprisonment. The trial court sentenced Petitioner accordingly.

On February 19, 1975, the Oklahoma Court of Criminal Appeals ("OCCA") affirmed the judgment and sentence in a published opinion, Bauhaus v. State, 532 P.2d 434 (Okla. Crim. App. 1975). During the more than twenty years since his conviction was affirmed on appeal, Petitioner has filed several applications for post-conviction relief in the Oklahoma state courts. Records provided by Respondent indicate that Petitioner's most recent application for post-conviction relief filed in Tulsa County District Court was denied on July 19, 1996, a decision affirmed by the OCCA on October 8, 1996. The OCCA Order indicates that Petitioner had previously filed three

(3) other applications for post-conviction relief, all of which were denied.<sup>2</sup>

In Petitioner's habeas corpus petition filed in case number 96-CV-929-H, Petitioner alleges that evidence discovered since his conviction became final conclusively demonstrates that he is innocent of the crime for which he was convicted and that the State of Oklahoma has deprived him of his due process rights by concealing exculpatory blood and fingerprint evidence. In Petitioner's second habeas corpus petition filed in case number 96-CV-1033 and later consolidated and made a part of the instant case, he also asserts his innocence and additionally alleges that (1) he received "no fast, speedy, fair, impartial trial by impartial jury or effective assistance of counsel," and (2) his trial was tainted by "ineffective assistance of counsel, police/media bias, prosecutorial misconduct, judicial error."

Respondent contends that pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA" or "Act"), amending the habeas corpus statutes to impose a one-year statute of limitations, this habeas action filed more than twenty (20) years after Petitioner's conviction became final, is time-barred. In the alternative, Respondent argues that the petition is barred by laches. Respondent also contends that the petition should be denied since Petitioner supplies no evidence in support of his claims and raises issues that are not cognizable in a federal habeas proceeding.

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<sup>2</sup>Petitioner indicates that two of his previous applications for post-conviction relief were styled petitions for the writ of mandamus, both seeking analysis of blood and fingerprint evidence allegedly suppressed by the Tulsa Police Department and the State of Oklahoma.

## *ANALYSIS*

### **A. Applicability of the Antiterrorism and Effective Death Penalty Act**

On April 24, 1996, President Clinton signed the AEDPA into law. Because Petitioner filed his petition for writ of habeas corpus on October 10, 1996, more than five (5) months after enactment of the AEDPA, the Court concludes that the provisions of the Act apply to this case.<sup>3</sup>

### **B. Statute of Limitations/Laches**

Pursuant to 28 U.S.C. 2244(d), a one-year period of limitation shall apply to an application for a writ of habeas corpus submitted by a state prisoner. Respondent contends that in this case, since Petitioner's conviction became final on February 19, 1975 when his conviction was affirmed by the OCCA, the one-year limitations period expired on February 19, 1976. As a result, the instant petition, filed on October 10, 1996, is time-barred. However, the Tenth Circuit Court of Appeals has held that in this circuit, prisoners, such as the petitioner in this case, whose convictions became final on or before April 24, 1996 had to file their habeas corpus actions before April 24, 1997 to avoid the time bar imposed by the AEDPA's one-year statute of limitations codified at 28 U.S.C. § 2244(d). United States v. Simmonds, 111 F.3d 737, 746 (10th Cir. 1997) (citing Lindh, 96 F.3d at 866, for the proposition that the time period imposed by the Antiterrorism and Effective Death Penalty Act is "short enough that the 'reasonable time' after April 24, 1996, and the one-year statutory period coalesce; reliance interests lead us to conclude

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<sup>3</sup>Although no effective date is specified for those provisions of the AEDPA applicable to non-capital cases, rules of general construction provide that new statutory law applies to cases filed on or after the date of enactment. See Lindh v. Murphy, 117 S.Ct. 2059 (1997); Landgraf v. USI Film Products, 511 U.S. 244 (1994).

that no collateral attack filed by April 23, 1997, may be dismissed under 28 U.S.C. § 2244(d) and . . . 28 U.S.C. § 2255."). Consequently, because Petitioner in this case filed his § 2254 petition prior to April 23, 1997, the Court concludes that the petition was timely filed.

Respondent also urges that because the writ of habeas corpus is an equitable remedy, Smith v. Secretary of N.M. Dep't of Corrections, 50 F.3d 801, 821 n.30 (10th Cir.), *cert. denied*, 116 S.Ct. 272 (1995), the petition is subject to the doctrine of laches. Without citing legal authority, Respondent also states that while formerly the doctrine of laches required a showing of prejudice by the respondent, with the one-year statute of limitations, a non-rebuttable presumption of prejudice is made. However, as discussed supra, Petitioner filed his petition within the one-year grace period authorized by Simmonds. Since the limitations argument is inapplicable, a showing of prejudice by Respondent would be required to find this action barred by laches. Apparently assuming no showing of prejudice would be required, Respondent failed to make such showing. Based on this failure, the Court declines to reach the question of whether the doctrine of laches applies in this case.

**C. Petitioner's Claim of Innocence**

In Herrera v. Collins, 506 U.S. 390 (1992), Chief Justice Rehnquist wrote:

Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding . . . This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution -- not to correct errors of fact.

Id. at 400 (citing Moore v. Dempsey, 261 U.S. 86, 87-88 (1923) ("[W]hat we have to deal with

[on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved.")); Hyde v. Shine, 199 U.S. 62, 84 (1905) ("[I]t is well settled that upon habeas corpus the court will not weigh the evidence."); Ex parte Terry, 128 U.S. 289, 305 (1888) ("As the writ of habeas corpus does not perform the office of a writ of error or an appeal, [the facts establishing guilt] cannot be re-examined or reviewed in this collateral proceeding.")); see also Barefoot v. Estelle, 463 U.S. 880, 887 (1983) ("Federal courts are not forums in which to relitigate state trials.").

In this case, Petitioner has filed a number of motions and other papers asserting his innocence based on "newly discovered" evidence. Petitioner contends that his "newly discovered" evidence includes previously concealed police records evidencing the existence of blood samples and fingerprints collected at the crime scene. According to Petitioner, "in a fit of conscience, an officer gave up the entire set of Tulsa police reports . . . ." (96-CV-929-H, #32, at 1). Also, and without providing any supporting evidence whatsoever, Petitioner contends that in 1979, three witnesses saw the "real killer" at the Oklahoma State Penitentiary ("OSP"), located in McAlester, Oklahoma. Petitioner identifies the three witnesses as himself, Quinion Leigh, and John Shelton (see Case No. 96-CV-929-H, #6). Apparently, Leigh and Shelton were Petitioner's fellow inmates at OSP. Petitioner further states that witness Shelton is now deceased, allegedly murdered by Department of Corrections officials because of his connection to Petitioner's case. However, Petitioner provides no other evidence supporting the alleged sighting of the "real killer," or concerning the death of witness Shelton.

Pursuant to Herrera, absent an independent constitutional violation occurring in the underlying state criminal proceeding, Petitioner's claim of actual innocence based on "newly

discovered" evidence cannot provide a basis for habeas relief. In this consolidated habeas action, Petitioner does supplement his claim of actual innocence with three categories of claims alleging constitutional violations. Specifically, Petitioner asserts that (1) the State of Oklahoma has deprived him of his due process rights by concealing exculpatory police records revealing the existence of blood and fingerprint evidence and other identification evidence including police sketches, (2) he received "no fast, speedy, fair, impartial trial by impartial jury," and (3) his trial was tainted by "ineffective assistance of counsel, police/media bias, prosecutorial misconduct, judicial error." The Court will address each of these categories of claims in turn.

*1. Suppression/Concealment of Exculpatory evidence*

Petitioner argues that the State of Oklahoma concealed exculpatory evidence at trial and continues to conceal blood and fingerprint evidence today. As stated supra, this Court's habeas powers extend to insure only that Petitioner's constitutional rights were not violated during his criminal proceeding and do not authorize this Court to order the State of Oklahoma to conduct the additional forensic testing requested by Petitioner.

As to Petitioner's claim that the prosecution concealed exculpatory evidence at the time of his trial, in Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The materiality requirement is met "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). In other words, evidence is material "when the Government's evidentiary suppression 'undermines confidence in the outcome

of the trial." Kyles v. Whitley, 514 U.S. 419, 434 (1995) (quoting Bagley, 473 U.S. at 678); see also United States v. Hernandez, 94 F.3d 606, 610 (10th Cir. 1996).

In this case, Petitioner attempts to support his contention that the prosecution withheld exculpatory evidence at trial by providing copies of police records evidencing the existence of lineup photographs, blood samples and fingerprints collected at the scene of the murder, and a sketch of the suspect allegedly "posted at strategic points throughout the [police] station." (Case No. 96-CV-1033-H, #1). Petitioner believes, based on his review of the trial transcript which contains no reference to these records, that the police reports were withheld at trial<sup>4</sup> and that had they been available, the outcome of the trial would have been different. See 96-CV-929-H, #32.

However, regardless of whether the police records themselves were "concealed" from Petitioner at trial, the existence of the "exculpatory" evidence allegedly withheld, i.e., blood and fingerprint evidence, was in fact clearly known to Petitioner at the time of his trial. The trial transcript is replete with references to blood and fingerprint evidence found at the crime scene (Tr. Trans., at 54-55, 114-120, 123-126, 129-133, 196, 203, 216-220, 225, 240-243). In addition, the Tulsa Police Department's chief investigating officer assigned to the case and author of at least two (2) of the police reports now submitted by Petitioner, Jess McCullough, testified at trial concerning the blood and fingerprint evidence. Furthermore, as noted by the Oklahoma Court of Criminal Appeals in its decision affirming Petitioner's conviction, neither the blood specimen comparison nor fingerprint identification formed any part of the proof offered by the

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<sup>4</sup>Petitioner states "[s]imply reading the [trial] transcript proves none of these numerous items of exculpatory evidence were (sic) revealed at trial. Each was dated a year before trial & each were (sic) crucial to the trial, yet never evidenced at trial, & therefore concealed. OK's only possible reason for concealing all these separate items of exculpatory evidence is to prevent due process & equal protection & other previously stated federal laws." (96CV-929-H, #32, at 2).

State. Bauhaus v. State, 532 P.2d 434, 443 (Okla. Crim. App. 1975). Therefore, even had the existence of the blood and fingerprint evidence been withheld at trial, and the record reflects it was not, the Court finds it was not material since any such suppression would not have undermined confidence in the outcome of the trial. See Hernandez, 94 F.3d at 610.

Petitioner also challenges the trial testimony of the prosecution's witnesses based on information contained in the "concealed" police reports. Petitioner contends the police reports reflect that only a few days after the murder, the witnesses described the culprit as having short, neat brown hair while at trial, they testified that he had "black wavy hair." Petitioner further contends that the "concealed" police reports, including his mugshot and a newspaper photograph, demonstrate he had "black frizzy" hair at the time of his arrest. The Court finds that this information does not undermine confidence in the outcome of the trial and would not even justify a new trial, let alone indicate a due process violation. See United States v. Bradshaw, 787 F.2d 1385, 1391 (10th Cir. 1986) ("The newly discovered evidence must be more than impeaching or cumulative; it must be material to the issues involved; it must be such as would probably produce an acquittal; a new trial is not warranted by evidence which, with reasonable diligence, could have been discovered and produced at trial."). Even if the police reports had been concealed by the prosecution, the discrepancies identified by Petitioner simply do not create a reasonable probability of acquittal on the charge against Petitioner. Therefore, the Court concludes that the evidence was not material and hence that its omission does not constitute a violation under Brady.

It should be emphasized that, under 28 U.S.C. § 2254(e)(1), this federal habeas court generally must accord a presumption of correctness to a state court's factual determinations to which the petitioner was a party. See Steele v. Young, 11 F.3d 1518, 1520 n.2 (10th Cir. 1993)

(federal court applies presumption of correctness to both explicit and implicit findings of fact by state trial and appellate courts); Cantu v. Collins, 967 F.2d 1006, 1015 (5th Cir. 1992) (finding that witness had sufficient opportunity to identify petitioner implicit in state court finding that identification validly made); Martinez v. Sullivan, 881 F.2d 921, 929 (10th Cir. 1989) (presumption applied to state court findings pertaining to admission of co-defendant's statement when findings fairly supported by record). The Supreme Court as well as numerous lower federal district courts have applied the section 2254(e)(1) presumption of correctness to state courts' factual findings regarding witness identifications. See Sumner v. Mata, 455 U.S. 591, 597 (1982) (per curiam) (holding that although the constitutionality of pretrial identification procedures is a mixed question of law and fact, a presumption of correctness must be accorded to state court factual findings regarding the circumstances of the identification procedures); see also Cantu, 967 F.2d at 1015 (5th Cir. 1991) (state court factual findings regarding repeated showing of petitioner's photo to victim presumed correct); McMillan v. Barksdale, 823 F.2d 981, 984 (6th Cir. 1987) (state court factual findings regarding line-up presumed correct); Rodriguez v. Peters, 63 F.3d 546, 556 (7th Cir. 1995) (state court factual findings underlying determination of reliability of in-court identifications presumed correct); Mack v. Caspari, 92 F.3d 637, 642 (8th Cir. 1996) (state court factual findings on reliability of witness identification accorded large measure of deference), *cert. denied*, 117 S.Ct. 1117 (1997); Tomlin v. Myers, 30 F.3d 1235, 1242 (9th Cir. 1994) (state court factual findings regarding reliability of photographic line-up presumed correct). The state court's factual findings are presumed correct unless the petitioner can show by clear and convincing evidence that the findings were erroneous. 28 U.S.C. § 2254(e)(1).

The alleged "new evidence" provided by Petitioner in this case, including the police sketches, the newspaper photograph, and the police reports, simply does not satisfy the "clear and convincing" standard necessary to overcome the presumption of correctness this Court must afford the state court's factual findings. In sum, the Court finds that Petitioner's contention that the State of Oklahoma violated his right to due process by concealing exculpatory evidence at trial must fail.

2. *Failure to Provide a Speedy Trial*

In support of his claim that the state violated his due process rights by failing to provide a speedy trial, Petitioner states only that it "took OK 19 months to try me." (Case No. 96-CV-1033-H, #1, at 8). He provides no other information concerning events affecting the passage of time. The record, however, reflects that Petitioner raised this claim in his direct appeal. The OCCA considered the claim on the merits and concluded that based on the facts, the delay did not deny Petitioner's right to a speedy trial. When confronted with a mixed question of law and fact, this Court may not grant habeas relief unless the ruling by the OCCA either "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Petitioner makes no argument to support either showing required by § 2254(d) and the Court finds no basis for disagreement with the state court's ruling. Therefore, this Court cannot grant habeas relief on Petitioner's allegation that the state failed to provide a speedy trial.

3. *Claims of Ineffective Assistance of Counsel, Prosecutorial Misconduct*

Petitioner also asserts that his trial was tainted by "ineffective assistance of counsel, police/media bias, prosecutorial misconduct and judicial error."<sup>5</sup> However, Petitioner alleges no facts whatsoever in his petition to support these bare assertions. It is well-established that "in order to warrant relief, or, as an initial matter, even an evidentiary hearing, a habeas corpus petitioner must allege sufficient facts to establish a constitutional claim." Hatch v. State, 58 F.3d 1447, 1469 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 1881 (1996) (citing Wiggins v. Lockhart, 825 F.2d 1237, 1238 (8th Cir.1987)); see also Andrews v. Shulsen, 802 F.2d 1256, 1266 (10th Cir. 1986) ("A habeas petitioner must provide supporting factual allegations."). In this habeas action, Petitioner has not alleged any facts whatsoever in support of his claims of ineffective assistance of counsel, prosecutorial misconduct, police/media bias, or judicial error. Therefore, the Court concludes Petitioner has failed to allege a constitutional claim warranting habeas relief.

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<sup>5</sup>The Court notes that the OCCA also considered Petitioner's claims of prosecutorial misconduct on the merits in Petitioner's direct appeal and concluded that "although there are respects in which the conduct of the prosecutor cannot be condoned, we hold against this proposition as there is no error sufficiently prejudicial to require reversal." Bauhaus v. State, 532 P.2d at 444 (Okla. Crim. App. 1975). This Court may not grant habeas relief on claims adjudicated by the OCCA absent a finding specified by 28 U.S.C. § 2254(d)(1) or (2). Neither provision of § 2254(d) applies to this claim precluding a grant of habeas relief by this Court.

**CONCLUSION**

Petitioner has failed to establish that he is imprisoned in violation of the Constitution. Absent an independent constitutional violation occurring in the underlying state criminal proceeding, Petitioner's claim of actual innocence cannot provide a basis for habeas relief. 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 further ordered that any pending motion in either of the consolidated cases is **denied as moot**.

IT IS SO ORDERED.

This 31<sup>st</sup> day of March, 1998.

  
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Sven Erik Holmes  
United States District Judge

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

ENTERED ON DOCKET

MARTY GOSSETT, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 STATE OF OKLAHOMA, ex rel. )  
 BOARD OF REGENTS FOR LANGSTON )  
 UNIVERSITY AND THE )  
 AGRICULTURAL AND MECHANICAL, )  
 COLLEGES, ERNEST HOLLOWAY )  
 as President of Langston )  
 University, CAROLYN KORNEGAY )  
 as Dean of the School of )  
 Nursing of Langston )  
 University, )  
 )  
 Defendants. )

DATE 3-31-98

No. 97-C-115-K

**FILED**  
MAR 31 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of the defendants State of Oklahoma, ex rel. Board of Regents for Langston University and the Agricultural and Mechanical Colleges, Ernest Holloway and Carolyn Kornegay for summary judgment in their official capacities. Plaintiff brings this action pursuant to 42 U.S.C. §1983 and Title IX, 20 U.S.C. §1681(a), for the alleged violation of plaintiff's rights in an academic setting. Plaintiff, a white male, was enrolled in the nursing program at Langston University ("Langston"). In the fall semester of 1994, plaintiff received a D grade in the course Nursing Process II. The Langston Nursing School requires that all students make a C or higher grade in every class in order to be permitted to continue in the program. Plaintiff pursued administrative "grade appeals" within Langston

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which were ultimately denied February 5, 1996. Plaintiff was dismissed from the nursing program. He alleges gender discrimination and lack of due process.

The present motion, which was filed when plaintiff only asserted a §1983 claim, argues for partial summary judgment as to the defendants in their official capacity on Eleventh Amendment grounds. Plaintiff concedes the argument, as he must. See Seibert v. Univ. of Oklahoma Health Sciences Center, 867 F.2d 591, 594-95 (10th Cir.1989) (state universities in Oklahoma and their employees sued in their official capacity are entitled to Eleventh Amendment immunity); see also Harris v. Champion, 51 F.3d 901, 905-906 (10th Cir.1995) ("[n]either the state, nor a governmental entity that is an arm of the state for Eleventh Amendment purposes, nor a state official who acts in his or her official capacity, is a 'person' within the meaning of § 1983.") For liability for damages to exist under §1983, the defendant must be a person. Accordingly, summary judgment is appropriate in the limited sense which defendants seek.<sup>1</sup>

However, since the filing of defendants' motion, plaintiff has filed an amended complaint which adds a claim under Title IX. Title IX abrogated the states' Eleventh Amendment immunity from

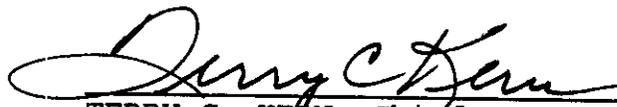
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<sup>1</sup>Plaintiff correctly notes that the Eleventh Amendment does not bar a suit brought in federal court seeking to prospectively enjoin a state official from violating federal law. Johns v. Stewart, 57 F.3d 1544, 1552 (10th Cir.1995). To the extent plaintiff seeks injunctive relief under §1983, his claim proceeds. It does not appear that plaintiff asserts a claim against the individual defendants in their individual capacity. See Hafer v. Melo, 502 U.S. 21, 30-31 (1991) (state official sued in his or her individual capacity under §1983 is not cloaked with the state's Eleventh Amendment immunity from suit in federal court).

suit. See Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir.1997).

It is the Order of the Court that the motions of the defendants State of Oklahoma Ernest Holloway and Carolyn Kornegay for summary judgment regarding Eleventh Amendment immunity (#6) is hereby GRANTED. Plaintiff's claim for damages pursuant to 42 U.S.C. §1983 against the defendants in their official capacity is hereby dismissed. Plaintiff's claim for injunctive relief pursuant to 42 U.S.C. §1983 and plaintiff's claim under Title IX proceed.

ORDERED this 30 day of March, 1998.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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

**FILED**

MAR 31 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BETH ANN WHITEHEAD, as )  
Executrix of the Estate of )  
Colleen Whitehead, an )  
individual and as a )  
representative of Unknown )  
Members of the Class; et al., )  
 )  
Plaintiffs, )  
vs. )  
 )  
RAINEY, ROSS, RICE & BINNS, )  
an Oklahoma legal partnership, )  
et al., )  
 )  
Defendants. )

Case No. 97-C-566-BU

ENTERED ON DOCKET  
DATE MAR 31 1998

**ORDER**

Plaintiffs, Beth Ann Whitehead, as Executrix of the Estate of Colleen Whitehead, Fred Blaylock, and Barney Taylor originally commenced this action in the District Court of Creek County, Drumright Division, State of Oklahoma. Shortly after receipt of Plaintiff's Petition, Defendants, Rainey, Ross, Rice & Binns and Gardner, Carton & Douglas, timely filed their Notice of Removal. In the Notice of Removal, Defendants asserted that this Court had original jurisdiction of this action pursuant to 28 U.S.C. § 1331 and that removal was proper under 28 U.S.C. § 1441(b). Specifically, Defendants asserted that Plaintiffs' claims for breach of fiduciary duty, professional negligence and gross negligence, based upon Defendants' legal advice to and representation of OG&E, the OG&E Retirement Plan and the fiduciaries of the OG&E Retirement Plan, arise under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq.

(21)

Presently before this Court are Plaintiffs' Motion to Remand and Motion for an Award of Costs and Attorney Fees Against Defendants for Their Improvident Removal of this Case and Defendants' Motion to Dismiss. Upon careful consideration of the parties' submissions, the Court makes its determination.

The jurisdictional rules for removal are well established. Under 28 U.S.C. § 1441(a), a defendant may remove "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." The Supreme Court, in Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 207 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987), discussed removal under section 1441:

Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal question jurisdiction is required. The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

See also, Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64, 107 S.Ct. 1542, 1546-47, 95 L.Ed.2d 55 (1987); Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-12, 103 S.Ct. 2841, 2846-48, 77 L.Ed.2d 420 (1983).

A case may not be removed to federal court on the basis of a federal defense to a state law cause of action. Caterpillar, Inc., 482 U.S. at 393, 107 S.Ct. at 2430. This rule exists because while "such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do

not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution." Franchise Tax Board, 463 U.S. at 10-11, 103 S.Ct. at 2846-2847 (quoting Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152, 29 S.Ct. 42, 53 L.Ed. 126 (1908)). Federal preemption is ordinarily asserted as a defense to the plaintiff's complaint and does not appear on the face of the complaint. Metropolitan Life Ins. Co., 481 U.S. at 63, 107 S.Ct. at 1546. Therefore, federal preemption, although it may be the central or only issue in a case, does not provide adequate jurisdictional ground for removal. Id. at 63-64, 107 S.Ct. at 1546-47.

An "independent corollary" to the well-pleaded complaint rule is the "complete preemption doctrine." Caterpillar, Inc., 482 U.S. at 393, 107 S.Ct. at 2430. Under this doctrine, "the preemptive force of a statute is so 'extraordinary' that it converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." Metropolitan Life Ins., 481 U.S. at 65, 107 S.Ct. at 1547. In an area where state law has been completely preempted by federal law, the state law claim is "considered, from its inception, a federal claim, and therefore arises under federal law." Id. Accordingly, the state law claim may be removed to federal court on the basis of federal question jurisdiction.

The "complete preemption doctrine" was originally applied to claims falling within section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185. Caterpillar Inc., 482 U.S.

at 393, 107 S.Ct. at 2430. However, in Metropolitan Life Ins., the Supreme Court extended the doctrine to claims falling within the civil enforcement provisions of section 502(a) of ERISA, 29 U.S.C. § 1132(a). Under Metropolitan Life Ins., removal of a state law claim is appropriate, notwithstanding the well-pleaded complaint rule if (1) such claim is pre-empted by ERISA and (2) such claim falls within section 1132(a). The second condition follows as a result of the Supreme Court's earlier decision in Franchise Tax Board:

In Franchise Tax Board, the Court held that ERISA pre-emption, without more, does not convert a state claim into an action arising under federal law. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S., at 25-27. The court suggested, however, that a state action that was not only pre-empted by ERISA, but also came 'within the scope of § 502(a) of ERISA' might fall within the Avco [Corp. v. Aero Lodge No. 735, Intern. Ass'n of Machinists and Aerospace Workers], 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968)] rule. Id., 463 U.S. at 24-25. The claim in this case, unlike the state tax collection suit in Franchise Tax Board, is within the scope of § 502(a) and we therefore must face the question specifically reserved by Franchise Tax Board.

Metropolitan Life Ins., 481 U.S. at 64, 107 S.Ct. at 1547.

The Court in Metropolitan Life Ins. held that the complete preemption doctrine should be extended to claims falling within section 1132(a) because the language of the "jurisdictional subsection of ERISA's civil enforcement provision, 29 U.S.C. § 1132(f), closely paralleled that of the civil enforcement provision of the LMRA." Id. at 65, 107 S.Ct at 1547. The Court also found that the legislative history of ERISA's civil enforcement provisions indicated that Congress intended to endow the civil enforcement provisions with the preemptive power of section 301 of

the LMRA. Id. at 65-66, 107 S.Ct. at 1547-48. Therefore, the Court concluded that a cause of action which falls within the scope of section 1132(a) is necessarily federal in character. As such, it "arise[s] under the . . . laws . . . of the United States," and is removable to federal court under section 1441.

In their Petition, Plaintiffs rely exclusively on state law for their three claims against Defendants. The Petition does not allege on its face any basis for federal question jurisdiction. Thus, under the well-pleaded complaint rule, the Petition does not permit removal to this Court. Removal jurisdiction would therefore only exist if any of Plaintiffs' claims are rendered federal in nature under the complete preemption doctrine. In order for any of Plaintiffs' claims to be rendered federal in nature, they must, as held in Metropolitan Life Ins., be preempted by ERISA and fall within the civil enforcement provisions of section 1132(a).

ERISA preempts "any and all State laws" that "relate to" an ERISA plan. 29 U.S.C. § 1144(a). For ERISA preemption purposes, "State law" includes both statutory and common law. 29 U.S.C. § 1144(c)(1). The United States Supreme Court has given the phrase "relate to" a "broad common-sense meaning." Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47, 107 S.Ct. 1549, 1552-53, 95 L.Ed.2d 39 (1987) (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983)). A state law "relates to" an employee benefit plan and thus is preempted by ERISA, "if it has a connection with or reference to such a plan." New York State Conference of Blue Cross & Blue Shield Plans v. Travelers

Ins. Co., 514 U.S. 645, 115 S.Ct. 1671, 1676, 131 L.Ed.2d 695 (1995) (quoting Shaw, 463 U.S. at 96-97, 103 S.Ct. at 2899-2900). Under this construction, a state law may "relate to" an employee benefit plan and be preempted even if the law is not specifically or directly designed to affect such plans. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990).

Though broad, ERISA's preemption provision does have limits. The Supreme Court has recognized that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner" to warrant a finding that they "relate to" a plan. Shaw, 463 U.S. at 100 n. 21, 103 S.Ct. at 2901-02 n. 21. Consequently, a law of general applicability "that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan" may fall outside ERISA's otherwise broad preemptive reach. See, Ingersoll-Rand, 498 U.S. at 139, 111 S.Ct. at 483. An example of such law is the state garnishment law at issue in Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988). In that case, the Supreme Court explained that ERISA does not preempt "run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan" even though such claims "obviously affect[] and involv[e] ERISA plans and their trustees." Id. at 833, 108 S.Ct. at 2187.

The Tenth Circuit has recognized four categories of laws which have been held to be preempted because they "relate to" ERISA

plans:

First, laws that regulate the type of benefits or terms of ERISA plans. Second, laws that create reporting, disclosure, funding, or vesting requirements for ERISA plans. Third, laws that provide rules for the calculation of the amount of benefits to be paid under ERISA plans. Fourth, laws and common-law rules that provide remedies for misconduct growing out of administration of the ERISA plan.

Airparts Co., Inc. v. Custom Benefit Servs., Inc., 28 F.3d 1062, 1064-65 (10<sup>th</sup> Cir. 1994). The Tenth Circuit has further summarized the type of state claims which fall on either side of preemption:

[L]aws that have been ruled preempted are those that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee. Those that have not been preempted are laws of general application--often traditional exercises of state power or regulatory authority--whose effect on ERISA plans is incidental.

Airparts, 28 F.3d at 1065 (quoting Monarch Cement Co. v. Lone Star Indus., Inc., 982 F.2d 1448, 1452 (10<sup>th</sup> Cir. 1992)).

"Ultimately, if there is no effect on the relations among the principal ERISA entities--the employer, the plan, the plan fiduciaries, and the beneficiaries--there is no preemption." Id. 1065. "As a corollary, actions that affect the relations between one or more of these plan entities and an outside party similarly escape preemption." Id.

The issue of whether ERISA preempts state professional malpractice law has been addressed on numerous occasions. Uniformly, courts, including the Tenth Circuit in Airparts, have concluded that ERISA does not preempt state malpractice or similar negligence or fraud actions against outside nonfiduciary providers

of professional services to ERISA plans. See, Custer v. Sweeney, 89 F.3d 1156, 1166 (4<sup>th</sup> Cir. 1996) (cases therein cited).

Upon review, the Court finds that Plaintiffs' legal malpractice claim against Defendants does not fall within the scope of ERISA's preemptive provision. The claim does not relate to an ERISA plan. Specifically, the state law involved does not regulate the type of benefits or terms of the plan; it does not create reporting, disclosure, funding, or vesting requirements for the plan; it does not affect the calculation of benefits; and it is not a common law rule designed to rectify faulty plan administration. Airparts, 28 F.3d at 1065. Defendants were not fiduciaries to the ERISA plan and were not responsible in any way for the plan's administration. These Defendant lawyers were outside professionals who advised the plan's fiduciaries and who "did not directly perform any administrative act vis-a-vis the plan." Id. at 1066. Consequently, Plaintiffs are not seeking state remedies for misconduct stemming from administration of an ERISA plan. Id. at 1064-65. Likewise, Plaintiffs' claim does not and will not have any effect whatsoever on the relations among the traditional ERISA plan entities, i.e., the principal, the employer, the plan fiduciaries and the beneficiaries. A recovery from Defendants will not come from the ERISA plan. It will come from Defendants themselves.

In addition, Plaintiffs' claim will have no effect upon the structure, the administration, or the type of benefits provided by the ERISA plan. Airparts, 28 F.3d at 1066. There are no

allegations based upon any rights under the plan or allegations attempting to modify or enforce the plan. There are no ERISA provisions which address malpractice claims and they are no provisions which in any way conflict with such claims. Consequently, there will also be no threat that "conflicting regulations will emerge which will destroy the structural unity of the ERISA scheme" if this action is allowed to proceed. Airparts, 28 F.3d at 1066.

Plaintiff's claim does not require interpretation of the plan. Plaintiffs' claim is based upon whether Defendants breached their alleged duty of loyalty and fidelity to Plaintiffs by advising OG&E, the OG&E Retirement Plan, and the fiduciaries in a manner directly adverse to Plaintiffs' interest and by representing OG&E, the OG&E Retirement Plan and the fiduciaries in a separate lawsuit brought by Plaintiffs. No provision of the subject ERISA plan need be interpreted to determine whether Defendants engaged in simultaneous adverse representation of multiple clients.

Although Defendants argue that Plaintiffs' claim is preempted because it contains "enhanced benefits" as a component of compensatory damages, the Court finds otherwise. The mere fact that Plaintiffs' measure of damages includes benefits does not warrant preemption. Forbus v. Sears, Roebuck & Co., 30 F.3d 1402, 1406 (11<sup>th</sup> Cir. 1994); Rozell v. Security Services, Inc., 38 F.3d 819 (5<sup>th</sup> Cir. 1994); Pizlo v. Bethlehem Steel Corp., 884 F.2d 116, 120 (4<sup>th</sup> Cir. 1989); Drescher v. Union Underwear Company, 858 F. Supp. 653 (W.D.Ky. 1994); Horton v. Cigna Individual Financial

Services Co., 825 F. Supp. 852 (N.D. Ill. 1993).

The Court also finds that Plaintiffs' claims for breach of fiduciary duty and gross negligence do not fall with the preemptive provision of ERISA. Both of these claims relate to the alleged legal malpractice of Defendants. The duties giving rise to both claims are based upon state law rather than ERISA. For the same reasons expressed above, the Court finds that these claims do not relate to the ERISA plan and are not subject to preemption.

In light of the Court's finding that Plaintiffs' claims are not within ERISA's preemptive scope, the Court need not decide whether ERISA's preemptive force would trump the well-pleaded complaint rule and convert Plaintiffs' claims into one "arising under" ERISA. The Court finds that the complete preemption doctrine does not apply and that this matter should be remanded to state court as the Court lacks subject matter jurisdiction over Plaintiffs' claims.

Plaintiffs requests their attorneys' fees and costs associated with Defendants' improper removal. An order granting a motion to remand "may require payment of just costs and any actual expenses, including attorneys fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). Prior to its amendment in 1988, section 1447(c) simply authorized payment of "just costs" when a case had been "removed improvidently and without jurisdiction." Daleske v. Fairfield Communications, Inc., 17 F.3d 321, 324 (10<sup>th</sup> Cir.), cert. denied, 511 U.S. 1082, 114 S.Ct. 1832, 128 L.Ed.2d 461 (1994). The statute was amended to remove the requirement that the case be

removed improvidently and to add authority for an award of attorney's fees. Id. These revisions "have been interpreted to negate any requirement that the removal be in bad faith before fees can be awarded." Id.

Upon review, the Court, in its discretion, finds that Plaintiffs should not be awarded costs and attorneys' fees. Although removal need not be in bad faith to obtain costs and fees, the Court finds that Defendants raised an arguable question regarding the existence of federal jurisdiction. The Court declines to award costs and fees on such basis.

Based upon the foregoing, Plaintiffs' Motion to Remand (Docket Entry #4-1) is **GRANTED**. Plaintiffs' Motion for an Award of Costs and Attorney Fees Against Defendants for Their Improvident Removal of this Cause (Docket Entries #4-2 and #4-3) is **DENIED**. Defendants' Motion to Dismiss (Docket Entry #7) is **DECLARED MOOT**. The Clerk of the Court is directed to effect the remand of this action to the District Court of Creek County, Drumright Division, State of Oklahoma.

ENTERED this 30<sup>th</sup> day of March, 1998.

  
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MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**FILED**

MAR 31 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ELMO COLE, JR., )

Plaintiff, )

vs. )

CARL SLOAN, )

Defendant. )

No. 96-CV-1189-K ✓

ENTERED ON DOCKET

DATE MAR 31 1998

**JUDGMENT**

This matter came before the Court for consideration of the Report and Recommendation of the Magistrate Judge, recommending that the motion for summary judgment of Defendant be granted. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

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

SO ORDERED THIS 31st day of March, 1998.

  
TERRY C. KEEN, Chief Judge  
UNITED STATES DISTRICT COURT

25

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

ELMO COLE, JR., )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 CARL SLOAN, BOB GREEN, )  
 and RICK STEPHENS, )  
 )  
 Defendants. )

No. 96-CV-1189-K ✓

ENTERED ON DOCKET  
DATE MAR 31 1998

**F I L E D**

MAR 31 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge filed on February 11, 1998 (doc. #22), in this prisoner's civil rights action pursuant to 42 U.S.C. § 1983. On September 8, 1997, the Court advised the parties that Defendants' motion to dismiss, or in the alternative, for summary judgment would be treated as a motion for summary judgment pursuant to Fed. R. Civ. P. 56 (doc. #15). The parties were afforded an opportunity to present all material pertinent to such a motion. The Magistrate Judge now recommends that Defendants' motion for summary judgment be granted as to Plaintiff's Fourth and Fourteenth Amendment claims. Plaintiff has filed his objection to the Report.

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which Plaintiff has objected. Based on careful review of the facts of this case as well as the applicable law, the Court finds that the Report should be adopted and affirmed.

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## BACKGROUND

Plaintiff, proceeding *pro se* and *in forma pauperis*, alleges he was arrested on July 25, 1994 in Tulsa County with an invalid warrant and without probable cause. Plaintiff claims Defendants intentionally exceeded the scope of a Mayes County, Oklahoma warrant to arrest him outside that jurisdiction in Tulsa County without the assistance of Tulsa County authorities. Plaintiff filed his civil rights complaint on December 27, 1996, seeking actual and punitive damages of \$3,000,000. He also seeks to amend his complaint to add Robert Price, his attorney, as a defendant, alleging Mr. Price conspired with the other Defendants to deprive him of his rights.

Defendants argue Plaintiff's claims are (1) barred by the applicable two-year statute of limitations and (2) not cognizable under § 1983 because his underlying conviction has not been invalidated, see Heck v. Humphrey, 512 U.S. 477 (1994). Defendant Sloan has not been served and Plaintiff agrees he should be dismissed (doc. #11).

As stated supra, the Magistrate Judge recommends that Defendants' motion for summary judgment be granted and that Plaintiff's motions to amend be denied. Plaintiff objects on the grounds that (1) Heck does not apply in this case because he "seeks neither reversal of his conviction nor compensatory damages, but asks instead for Three(3) million in punitive damages from each Defendant" (doc. #23), and (2) Robert Price, his trial counsel is a key figure in the alleged conspiracy to deprive Plaintiff of his constitutional rights and should be added as an additional defendant.

## ANALYSIS

### A. Summary Judgment Standard

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 Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court 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") (emphasis in original). "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 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. [citation omitted]. If the evidence is merely colorable, [citation omitted], or is not significantly probative, summary judgment may be granted.").

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).

#### **B. Elements of a Civil Rights Claim**

Title 42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States,<sup>1</sup> and that defendant acted under color of law.<sup>2</sup> Adickes v. S. H. Kress

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<sup>1</sup>The rights set forth in the Bill of Rights are held exclusively by the states, secured from infringement by the federal government. Flagg Bros. v. Brooks, 436 U.S. 149 (1978). Therefore, constitutional civil rights claims of individuals apply to the states only through the Fourteenth Amendment and require state action to afford relief under section 1983. See Monroe v. Pape, 365 U.S. 167 (1961), overruled on other grounds, Monell v. Dept. of Social Services, 436 U.S. 658 (1978). The state action test requires: (1) that the deprivation be caused by the exercise of a right or privilege created by the state or by a person for whom the state is responsible, and (2) that the actor must be someone who is a state actor. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). A state official, such as a sheriff, clearly meets this test.

<sup>2</sup>There is an overlap between the state action requirement under the Fourteenth Amendment and action under color of law. See Lugar, 457 U.S. at 926. Where the plaintiff has already demonstrated state action under the first element the necessity to show action under color of law is also satisfied.

& Co., 398 U.S. 144, 150 (1970).

With these elements in mind, the Court will address each of Plaintiff's objections to the Report.

*Objection 1: Heck v. Humphrey does not apply.*

Relying on Simpson v. Rowan, 73 F.3d 134 (7th Cir. 1995), Plaintiff claims the Magistrate Judge misunderstands his complaint and has applied Heck in error (doc. #23). Because the Court adopts the recommendation of the Magistrate Judge and dismisses this civil rights action on other grounds, the Court overrules this objection.<sup>3</sup>

*Objection 2: Trial Counsel "key figure" and must be added as defendant.*

Plaintiff argues the Magistrate Judge erroneously stated that Plaintiff's trial counsel, Robert Price, did not act under color of state law and is not subject to 1983 civil right complaint. Plaintiff alleges the intentional misconduct by attorney Price deprived Plaintiff of his federal rights, that attorney Price is a "key figure" in the complaint, and that attorney Price conspired with the other defendants to secure Plaintiff's conviction. Plaintiff claims that attorney Price was aware that Plaintiff's arrest and warrant were not supported by a showing of probable cause, and therefore, Plaintiff should be allowed to amend his complaint.

Plaintiff claims that he was seized pursuant to an invalid warrant and without probable cause in violation of the United States Constitution. According to Plaintiff, the arrest warrant was invalid because the Mayes County warrant was served in Tulsa County without the assistance of Tulsa

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<sup>3</sup>Absent a showing that the limitations period has been tolled, to the extent Plaintiff stated a claim for a constitutional violation that did not necessarily imply the invalidity of the underlying conviction, then his § 1983 claim would be barred by the applicable statute of limitations. See Okla. Stat. tit. 12, § 95(3). However, because the Court concludes Plaintiff has failed to assert a constitutional violation, it is unnecessary to address whether Plaintiff's claim is time-barred. (The applicable statute of limitations for civil rights actions under Oklahoma law is the two-year limitations period for "an action for injury to the rights of another." Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988)).

County authorities. Pursuant to Oklahoma statutory law, warrants may be served in any county in the state and may be served by any peace officer to whom they may be directed or delivered. See Okla. Stat. tit. 22, § 175. The Magistrate Judge found that Plaintiff made no complaint about the manner in which the warrant was executed, and therefore, concluded as a matter of law that the arrest warrant was not invalidated by the circumstances of its execution.

Citing Baker v. McCollan, 99 S.Ct. 2689, 2694 (1979), for the holding that "the execution of a facially valid arrest warrant does not give rise to a constitutional claim," the Magistrate Judge determined Plaintiff failed to satisfy the requirements that he be deprived of a right secured by the Constitution and laws of the United States as required to maintain a § 1983 action. Thus, the Magistrate Judge recommended Defendant's motion for summary judgment be granted.

Further, the Magistrate Judge concluded Plaintiff's claim that he was arrested without probable cause was also without merit. Plaintiff entered a plea of *nolo contendere* to the "murder in the second degree" charge (doc. #19, Ex. A). In Oklahoma, a *nolo contendere* plea "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). Moreover, "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). Consequently, the Magistrate Judge determined Plaintiff failed to state a constitutional violation as to the alleged lack of probable cause.

Although Plaintiff objects to the report and requests that he be allowed to amend to include his counsel as a co-conspirator in violation of Plaintiff's constitutional rights, the conclusion that Plaintiff's rights were not violated eliminates this claim as a basis for liability. The Magistrate Judge

concluded that amendment of the complaint as proposed by Plaintiff would be futile, and therefore, recommends that Plaintiff's 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). Accordingly, the Court finds that Plaintiff's objection is meritless and, therefore, overruled.

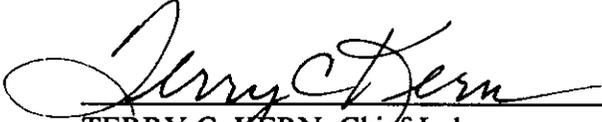
### CONCLUSION

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which the Plaintiff has objected and has concluded that the Report should be adopted and affirmed. Defendants' motion for summary judgment should be granted.

### ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) The Report and Recommendation of the Magistrate Judge (doc. #22) is **adopted and affirmed**;
- (2) Defendants' motion to dismiss (doc. #8) has been treated as one for summary judgment under Rule 56, and is **granted**.
- (3) Plaintiff's motions to amend (doc. #15, #20) are **denied**.

SO ORDERED this 30 day of March, 1998.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

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

**F I L E D**

MAR 30 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DANA S. ROSS,

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant.

No. 97-C-1141-B ✓

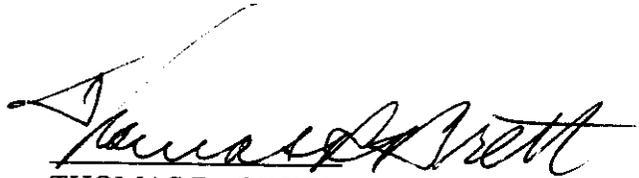
ORDER

ENTERED ON DOCKET

DATE MAR 31 1998

Before the Court is Plaintiff's Application for Order Dismissing Action Without Prejudice. The Court grants said application and dismisses this action without prejudice, with costs assessed against the Plaintiff, Dana S. Ross.

ORDERED this <sup>th</sup> 30 day of March, 1998.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT COURT

DATE 3-31-98

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

JOHNATHON STRUBLE, TOM ALLRED,  
CHUCK KING, KARMAN WHITEHOUSE,  
JERRY WHITE, DOYLE JUNKER,  
RICHARD A. LEECE, JAQUELINE WRIGHT  
AND ALL OTHER SIMILARLY SITUATED  
EMPLOYEES,

Plaintiffs,

v.

NATIONAL EDUCATION CENTERS, INC.  
D/B/A SPARTAN SCHOOL OF  
AERONAUTICS, D/B/A NATIONAL  
EDUCATION CENTER-NATIONAL  
INSTITUTE OF TECHNOLOGY CAMPUS,  
D/B/A NATIONAL EDUCATION CENTER-  
SPARTAN SCHOOL OF AERONAUTICS  
CAMPUS,

Defendant.

**F I L E D**

MAR 31 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

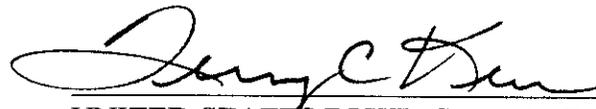
Case No. 97CV384 K (M) ✓

Judge Terry C. Kern

**ORDER GRANTING PLAINTIFFS'  
APPLICATION FOR DISMISSAL WITH PREJUDICE**

Upon the Plaintiffs' Application for Dismissal with Prejudice, and for good cause shown, the Court orders that the above-entitled cause and all claims contained therein shall be and are hereby Dismissed with Prejudice.

IT IS HEREBY ORDERED on this 30 day of March, 1998.

  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 3-31-98

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

PHILLIP EUGENE GARDNER, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 RON CHAMPION, Warden, )  
 )  
 Respondent. )

Case No. 97-CV-148-K (W) ✓

**FILED**

MAR 31 1998 *PL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

On November 26, 1997, the Court entered its Order (Docket #9) finding Petitioner's claims raised in this § 2254 habeas corpus action to be unexhausted. However, the Court directed the parties to brief whether it would be futile to require Petitioner to return to the state courts of Oklahoma to exhaust these claims. The Court also deferred ruling on that portion of the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #7) recommending that the petition for writ of habeas corpus be dismissed without prejudice for failure to exhaust available state remedies, pending a review of the parties' supplemental briefs on the futility issue.

After reviewing the parties' supplemental briefs and as more fully set out below, the Court now concludes that the Report and Recommendation should be adopted and affirmed. Respondent's motion to dismiss should be granted and the petition for writ of habeas corpus dismissed without prejudice for failure to exhaust state remedies.

## **BACKGROUND**

Petitioner is currently incarcerated at the Dick Conner correctional Center pursuant to judgment and sentences entered in Tulsa County District Court in Case Nos. CF-88-4392, CF-88-5288, CF-88-5302. Petitioner pled guilty to Robbery by Force in Case No. CF-88-4392; to six counts of Robbery with a Dangerous Weapon in Case No. CF-88-5288; and to Robbery with a Dangerous Weapon (Count I) and Assault and Battery with a Dangerous Weapon (Count II) in Case No. CF-88-5302. He was sentenced to 60 years imprisonment on each count except for Count II in Case No. CF-88-5302 for which he received a 10-year term, all to run concurrently. At Petitioner's plea and sentencing, he was represented by both a public defender and a private attorney. Although the record indicates Petitioner was advised of the right to appeal the conviction, no direct appeal was filed.

Approximately 6 ½ years later, Petitioner filed his first Application for Post Conviction Relief in Tulsa County District Court. In his application, Petitioner presented one (1) claim: that his "sentences [were] disproportionate to sentences given other criminal defendants for same crime." (#4, Ex. A). The district court determined that Petitioner offered no reason for his failure to file a timely direct appeal, and therefore, had waived all issues which *could have been raised* in a direct appeal. Therefore, the trial court denied the application. (#4, Ex. A).

Petitioner appealed the denial to the Oklahoma Court of Criminal Appeals ("OCCA") on September 25, 1996, by filing a Petition-in-Error, alleging only that "the district court erred by not entering written findings of fact or conclusions of law with regard to the Petitioner's claim that he was denied an appeal of his conviction through ineffective assistance of counsel." (#4, Ex. B). Petitioner did not raise his claim of disproportionate sentence before the OCCA. (#4, Ex. B). In its

Order affirming the trial court's denial of post conviction relief, the appellate court stated the "sole issue which Petitioner raises in this appeal *was not properly presented* to the District Court below and therefore Petitioner is not entitled to appellate relief." (#4, Ex. C, at 1) (Emphasis added). The OCCA explained that Petitioner had attached to his Petition in Error a copy of the Application for Post-Conviction Relief which he filed with the district court. In Part B of the Application, Petitioner maintained he had only one proposition for post-conviction relief: "Petitioner's sentences are disproportionate to sentences given other criminal defendants for same crime." In response to Question no. 5 of Part B ("if you did not timely appeal the original conviction, set forth facts showing how you were denied a direct appeal through no fault of your own"), Petitioner typed his answer: "Petitioner informed his counsel that he desired to appeal but counsel advised him there were no grounds upon which an appeal could [be] based." Because Petitioner made no other references to his alleged desire to initiate a direct appeal, made no "mention of any acts of *per se* ineffectiveness on the part of trial counsel," and requested no relief as concerns the denial of a direct appeal, the OCCA concluded Petitioner was precluded from raising the issue of denial of a direct appeal. The court further observed that Petitioner had provided no explanation as to why he had waited over 6-1/2 years to bring the denial of a direct appeal because of ineffective counsel, submitting the doctrine of laches "would seem to prevent" Petitioner from raising any claim of being illegally denied a direct appeal "without a sufficient reason for Petitioner's delay in seeking relief on this issue." The OCCA affirmed the denial of Petitioner's post-conviction relief on January 28, 1997. (#4, Ex. C).

Petitioner filed the instance federal habeas corpus action on February 10, 1997, raising two grounds in support of his claim to habeas relief: (1) his sentences were disproportionate to sentences given other criminal defendants for the same crime, and (2) he was denied a direct appeal of his

conviction through ineffective assistance of counsel.

In his motion to dismiss, Respondent urges that this action must be dismissed because Petitioner has not exhausted his available state remedies as to either claim as required by 28 U.S.C. § 2254(b)(1)(A). Petitioner, relying on the authority of United States v. Youngblood, 14 F.3d 38 (10th Cir. 1994), and United States v. Neff, 525 F.2d 361 (8th Cir. 1975), argues that the ineffective assistance of counsel issue was adequately raised in the motion for evidentiary hearing attached to Petitioner's reply to the State's response to the application for post conviction relief, but that the issue was not considered by the state court.

In the Report, the Magistrate Judge recommends that because Petitioner failed to follow proper procedural requirements to raise his claim of ineffective assistance of appellate counsel, this case should be dismissed without prejudice. In his objection to the Report, Petitioner asserted the state courts were provided a "full and fair opportunity" to rule on the ineffective assistance of appellate counsel claim. Further, Petitioner argued that the state court's refusal to address the merits of his habeas claims for procedural reasons entitles the "federal court to construe the claim as being exhausted."

In compliance with the Court's November 26, 1997 Order, the parties have now submitted supplemental briefs on the issue of futility. In his brief, Respondent contends that it may not be futile to require Petitioner to return to the state courts to raise his claims of ineffective assistance of counsel and disproportionate sentencing. In reply, Petitioner argues that the state corrective process is inadequate to protect his constitutional rights because it permits application of a procedural bar rule without adequate notice and the opportunity to defend in violation of due process rights.

## *DISCUSSION*

As explained by the Magistrate Judge in the Report, a federal court is prohibited from issuing a writ of habeas corpus on behalf of a prisoner in state custody unless the prisoner demonstrates either (1) that he "has exhausted the remedies available in the courts of the State," (2) that "there is an absence of available State corrective process," or (3) that "circumstances exist that render such process ineffective to protect the rights of the [prisoner]." 28 U.S.C. § 2254(b)(1)(A) and (B). A prisoner "shall not be deemed to have exhausted the remedies available in the courts of the State...if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). See Picard v. Conner, 404 U.S. 270 (1971) (discussing § 2254's exhaustion requirement).

The exhaustion requirement is designed to give states the initial opportunity to address and correct their own alleged violations of federal law and is satisfied only when the prisoner seeking habeas relief has "fairly presented" the facts and the legal theory (i.e., the "substance") supporting his federal claims to the state's highest court. Picard, 404 U.S. at 275-76. See also, Coleman v. Thompson, 501 U.S. 772 (1991); Rose v. Lundy, 455 U.S. 508 (1982); Duckworth v. Serrano, 454 U.S. 1 (1981); Darr v. Burford, 339 U.S. 200 (1950). Exhaustion in a state court is not required if the state provides absolutely no opportunity to obtain redress or if the opportunity actually provided by the state is so clearly deficient as to render futile any effort to obtain relief. See 28 U.S.C. § 2254; see also Steele v. Young, 11 F.3d 1518, 1524 (10th Cir. 1993).

In the instant case, Petitioner inadequately raised the claim of ineffective assistance of counsel in his application for post-conviction relief in the state district court. As a result, the OCCA refused to consider the claim on appeal. In its November 26, 1997 Order, this Court concluded that

Petitioner failed to fairly present the claim to the OCCA and that, therefore, the claim is unexhausted. The Court also concluded that Petitioner's claim of the disproportionality of his sentence was not raised before the Oklahoma Court of Criminal Appeals and is also unexhausted.

In his supplemental brief addressing the futility issue, Respondent notes that in affirming the trial court's denial of post-conviction relief, the OCCA ruled that Petitioner failed "to properly present the claim of ineffective assistance to the trial court." In so ruling, the OCCA recognized that Petitioner had stated in response to a question on the application for post-conviction relief that he did not pursue a direct appeal because counsel advised him that he had no grounds to raise in an appeal. According to Respondent, this clearly indicates that "the Court of Criminal Appeals found the issue was inadequately raised." (#10, at 2). Thus, Respondent indicates it is possible the state courts may address Petitioner's claims based on the exception expressly provided in the Post-Conviction Procedure Act itself:

[a]ny ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, *unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.*

Okla. Stat. tit. 22, § 1086 (emphasis added). Although Petitioner argues the Oklahoma procedures are inadequate to protect his due process rights, the Court finds that, based on the exception expressly provided in the Post-Conviction Procedure Act, the state courts may consider Petitioner's claims if he articulates "sufficient reason" for having inadequately raised his claim in his prior application. See § 1086; see also Paxton v. State, 910 P.2d 1059, 1061 (Okla. Crim. App. 1996) (noting exceptions to rule that claims not raised on direct appeal are waived); Pickens v. State, 910

P.2d 1063, 1069 (Okla. Crim. App. 1996) (stating that for ineffective assistance of counsel claims raised for the first time in post-conviction proceedings, the court will "review each case on its individual merits, examining each specific proposition in connection with the specific facts of each case as the need arises").

As stated supra, in its order affirming the trial court's denial of post-conviction relief, the OCCA also expressed concern that Petitioner's action could be barred by the doctrine of laches. However, in Thomas v. State, 903 P.2d 328, 332 (Okla. Crim. App. 1995), the OCCA emphasized that "the applicability of the doctrine of laches necessarily turns on the facts of each particular case." Thus, the state appellate court's recognition of laches does not impact this Court's futility analysis since Petitioner may be able to articulate a reason for his delay in seeking post-conviction relief.

Therefore, the Court concludes that because Petitioner's claims are unexhausted and an available state remedy exists, the State of Oklahoma should be afforded the opportunity to address Petitioner's federal claims. Petitioner may file an application for post-conviction relief, first in the state trial court, and attempt to demonstrate sufficient reason for his failure to raise adequately his claim of ineffective assistance of counsel in his prior application and convince the court that his claims should now be heard.

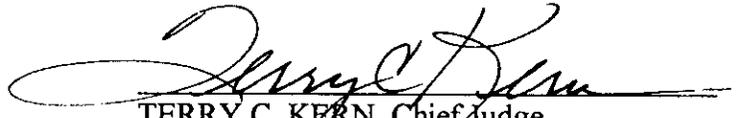
### *CONCLUSION*

Having reviewed de novo those portions of the Report to which the Petitioner has objected and in accordance with 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. Respondent's motion to dismiss should be granted and the petition for writ of habeas corpus dismissed without prejudice for failure to exhaust state remedies.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

1. The Report and Recommendation of the United States Magistrate Judge (Docket #7) is **adopted and affirmed**.
2. Respondent's motion to dismiss (Docket #3) is **granted**.
3. The petition for writ of habeas corpus is **dismissed without prejudice** for failure to exhaust state remedies.

SO ORDERED THIS 30 day of March, 1998.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 3-31-98

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

ADOLFINA L. DYER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DR. FREDERICK H. NORTHROP, )  
 )  
 Defendant. )

No. 97-C-451-K

**FILED**

MAR 31 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 30 day of March, 1998.

  
TERRY C. VERN, Chief  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 3-31-98

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

KLENDIA, GORDON & GETCHELL, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 RECONVERSION TECHNOLOGIES, )  
 )  
 Appellee. )

No. 97-C-903-K

**FILED**

MAR 31 1998

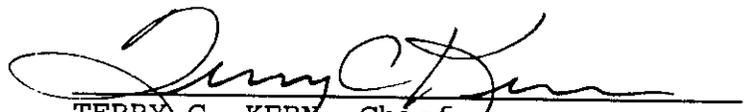
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 30 day of March, 1998.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

9

DATE 3-31-98

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

**FILED**

MAR 31 1998

MICHEAL F. CALLAHAN

Plaintiff,

v.

SOUTHWESTERN BELL TELEPHONE CO.

Defendant.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 97-CV-686-K

**FILED**

MAR 31 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ADMINISTRATIVE CLOSING ORDER**

The Court, having been advised that the parties to this action have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

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

ORDERED this 30 day of March, 1998.

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

**MAR 30 1998**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

VIVIAN S. SMITH,  
SSN: 441-38-9285,

Plaintiff,

v.

KENNETH S. APFEL,  
Commissioner of Social Security,<sup>1</sup>

Defendant.

Case No. 96-CV-1155-EA

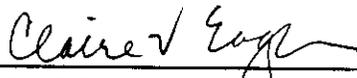
ENTERED ON DOCKET

DATE MAR 31 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 30<sup>th</sup> day of March 1998.

  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

<sup>1</sup> Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need to 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

VIVIAN S. SMITH,  
SSN: 441-38-9285,

Plaintiff,

v.

KENNETH S. APFEL,  
Commissioner of Social Security,<sup>1</sup>

Defendant.

**F I L E D**

**MAR 30 1998**

**Phil Lombardi, Clerk  
U.S. DISTRICT COURT**

Case No. 96-CV-1155-EA

**ENTERED ON DOCKET  
MAR 31 1998  
DATE \_\_\_\_\_**

**ORDER**

Claimant, Vivian S. Smith, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.<sup>2</sup> 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.

Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

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

<sup>2</sup> On May 19, 1994, claimant applied for disability benefits under Title II (42 U.S.C. § 401 *et seq.*). Claimant's application for benefits was denied in its entirety initially (October 13, 1994), and on reconsideration (November 15, 1994). A hearing before Administrative Law Judge Larry C. Marcy (ALJ) was held September 21, 1995, in Tulsa, Oklahoma. By decision dated October 19, 1995, the ALJ found that claimant was not disabled on or before December 31, 1993 (the date claimant was last insured for disability benefits under Title II). On November 7, 1996, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

## **I. CLAIMANT'S BACKGROUND**

Claimant was age 54 as of December 31, 1993. (R. 32) She is married and lives with her husband in Manford, Oklahoma; there are no children at home. (R. 32) She is a high school graduate, but has had no other education or training. (R. 32) She has only done a small amount of work on a computer. (R. 49) Her past relevant work is medical receptionist. (R. 17, 35, 49)

## **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.<sup>3</sup>

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<sup>3</sup> 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 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.

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 claimant was 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 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 made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform a full range of sedentary work of an unskilled or semi-skilled nature and had no nonexertional impairments to reduce further her sedentary occupational base. The ALJ concluded that she could not perform her past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that she could perform, based on her RFC, age, education, and work experience. Having concluded that

there were a significant number of jobs which claimant could perform, the ALJ concluded that she was not disabled under the Social Security Act on or before December 31, 1993.

#### **IV. MEDICAL HISTORY OF CLAIMANT**

In March 1991, claimant was diagnosed with glaucoma. (R. 201-208) Medications, including Timoptic, Betopic, Betagan, and Optipranolol, were prescribed. (R. 201-202) Testing showed that she had numerous blind spots in her visual field. (R. 203-206) On September 22, 1993, her far vision was 20/25 and 20/20. (R. 201) On August 10, 1994, her corrected vision was 20/50 and 20/50, but she told her doctor that she had progressively worsening visual acuity. (R. 209-210)

Claimant underwent a mastectomy of her right breast in July 1992. (R. 119-153) She did not have any subsequent complaints. (R. 154-156) Following surgery, she had the usual restricted range of motion and numbness of her right arm. (R. 163) She underwent radiation therapy in August and September 1992 and the radiation treatments did not cause her any problems. (R. 160-170) She was told to take Tamoxifen and continued it for several months. (R. 190, 191, 196) Bellergal was prescribed for her hot flashes (R. 194), and she reported that it caused some drowsiness. (R. 186) Claimant's general range of motion following surgery and radiation appeared to be "good" (R. 194), and she had "a very good psychosocial adaptation" to the carcinoma. (R. 194) On October 25, 1993, two months prior to the expiration of her insured status, claimant's treating physician reported that claimant "has done well." (R. 181)

At the hearing, claimant testified that her husband helps her dress and eat breakfast each day and she sleeps a lot. (R. 37) She helps cook, wash dishes, watches television, shops for groceries twice a week, drives, goes to church every Sunday, and plays cards with her friends once a week. (R. 38-39) She stated that she can lift up to ten pounds, walk a quarter mile, stand for 45 minutes,

and sit for 45 minutes. (R. 39) She claimed that she is not able to raise her right arm above her head (R. 40), and that there is no time when she is pain-free. (R. 44)

There is absolutely no objective medical evidence during the relevant period supporting claimant's claims regarding her ability to sit, stand, or walk. In fact, just days before her mastectomy, on July 9, 1992, her doctor stated: "patient denies muscle weakness in the arms or legs. She denies painful or swollen joints. She denies muscle aches and pains." (R. 125) The doctor found that "[t]he patient has good muscle tone," and when she was observed in the walking, seated, standing, and supine positions, she had no abnormality of gait. (R. 126)

On August 10, 1994, more than six months after her insured status expired, Dr. Robert Baker did a consultative examination of claimant. (R. 209-211) He reported that she told him that she had had pain in both shoulders and her left hip for years which was progressively worsening, and she was losing her range of motion in those areas. (R. 209) She also claimed that she was unable to raise her right arm above her shoulder due to pain and tightness, and her left arm was somewhat better as far as range of motion but was progressively worsening and pain in it was increasing. (R. 209) She stated that she could no longer reach up in her kitchen cabinets due to the pain and restricted motions. (R. 209) She also complained of progressive pain, as well as a "catch," in her left hip. (R. 209) The doctor ran no tests, but observed that she walked with a "significant limp involving her left hip and leg" and demonstrated tenderness of shoulders and left hip to palpation. (R. 210) He concluded that she had "[d]egenerative joint disease" and found some limitation of range of motion in her shoulders and hips. (R. 211-212) However, a radiology report of September 28, 1994 shows a "normal left hip" with normal bony density, no fracture or dislocation, and joint space well maintained, and a

“normal right shoulder” with normal bony density, no fracture or dislocation, and joints within normal limits. (R. 216).

## V. REVIEW

Claimant alleges the following errors by the ALJ:

- (1) The ALJ’s finding that claimant could perform a full range of sedentary work is not based on substantial evidence, because the evidence shows that she has impairments that prevent her from performing any sedentary work, including vision problems, side effects from her medication, and degenerative joint disease, which were not incorporated into the questions posed to the vocational expert.
- (2) The ALJ failed to prove that claimant, age 54 and lacking computer skills, was able to make the considerable adjustment to the alternative jobs listed by the vocational expert.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984). Here, claimant had the burden to prove disability that prevented her from working for at least the twelve consecutive months before December 31, 1993, as her disability insurance coverage expired on that date. 42 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A).

Claimant contends that she has been unable to work since May 15, 1988 because of lack of energy, left shoulder and hip pain, lower back pain, headaches, and blurred vision. (R. 33, 34, 63) The ALJ concluded that claimant could not perform her past relevant work and relied on testimony of a vocational expert that her past relevant skills were transferable to sedentary work such as order clerk and assembler, jobs which exist in significant numbers in the national and regional economy. (R. 18-19, 55)

**A. Substantial Evidence**

There is no merit to claimant's alleged error that the ALJ's decision was not based on substantial evidence. Much of the medical evidence claimant relies on does not pertain to the relevant period before December 31, 1993. The only relevant exhibits are 14 through 23, and parts of 24 and 25. The remaining parts of exhibits 24 and 25, and all exhibits thereafter, contain medical evaluations or treatment after December 31, 1993. The relevant exhibits consist of examinations in which the doctors were primarily concerned with her recovery from surgery and radiation treatment, and they uniformly indicate a good recovery, good general health, and no significant complaints. Her glaucoma is controlled by medications, and her vision during the relevant period was normal. (R. 201-206)

Even if claimant is suffering degenerative joint disease, as evidenced by the pain and loss of motion in her shoulders and hip, the ALJ did include shoulder pain, lower back pain, and left hip pain in one of his hypothetical questions to the vocational expert, and the response was that such an individual could still perform the sedentary jobs of order clerk and unskilled assembly. (R. 55-56) It appears that the ALJ, recognizing some limitations of her right shoulder and arm, gave her the benefit of the doubt by determining that she could no longer perform light work and was limited to sedentary work. (R. 19-20) There is substantial evidence to support this conclusion.

It is true that "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 724 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion.

Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). The ALJ properly questioned the vocational expert.

There is no merit to claimant's allegations that the side effects caused by her several medications for glaucoma, including lack of energy, nausea, and vomiting, were disabling. While one medical report from Dr. Steven Buck in May 1993 indicated that she complained of sedation from her Bellergal, neither nausea nor vomiting were mentioned. (R. 186) Reports dated July 26 and October 25, 1993 do not mention complaints of nausea, vomiting, or lack of energy. (R. 181, 184) Failure to report adverse side effects to the doctor undermines her claim that such effects are disabling. The ALJ found these purported side effects not disabling.

Courts generally treat credibility determinations made by an ALJ as binding upon review. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence." Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990). The Court finds that the ALJ's determination, that claimant's testimony was credible to the extent that it is consistent with an RFC of sedentary (R. 18), is supported by substantial evidence.

**B. Age and Adjustment**

There is no merit to claimant's contention that the ALJ did not meet his "higher burden" to show that she had job skills that would allow her to do sedentary work because she was 54 years old. Under the Social Security Medical-Vocational Guidelines (the "grids"), persons approaching advanced age (age 50-54) may be significantly limited in vocational adaptability if they are restricted to sedentary work, and if they have no transferable skills, will be deemed to be disabled (20 C.F.R.

Pt. 404, Subpt. P, App. 2 § 201.00(g)). Claimant turned 54 on December 2, 1993, 29 days before the date she was last insured. Therefore she falls in the category of approaching advanced age. However, the vocational expert testified that she had acquired work skills transferable to several sedentary jobs. (R. 53-54)

Claimant argues error because there was no testimony that her skills were transferable to a “significant” number of skilled jobs. The vocational expert testified that her skills were transferable to the sedentary jobs of order clerk (104,000 nationally; 13,000 regionally) or assembly worker (144,000 nationally; 18,000 regionally). (R. 55) In Trimiar v. Sullivan, 966 F.2d 1326 (10th Cir. 1992), the court stated:

This Circuit has never drawn a bright line establishing the number of jobs necessary to constitute a “significant number” and rejects the opportunity to do so here. Our reluctance stems from our belief that each case should be evaluated on its individual merits.

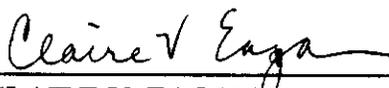
Id. at 1330. The court, while refusing to draw any bright line, found that 850-1100 potential jobs were a significant number of jobs. Id. at 1330-32. Accord, Lee v. Sullivan, 988 F.2d 789, 794 (7th Cir. 1993) (1,400 jobs constituted a significant number); Barker v. Secretary of Health & Human Servs., 882 F.2d 1474, 1479 (9th Cir. 1989) (1,266 positions were significant); Hall v. Bowen, 837 F.2d 272, 275 (6th Cir. 1988) (1,350 positions were a significant number); Jenkins v. Bowen, 861 F.2d 1083, 1087 (8th Cir. 1988) (500 jobs were found to be a significant number); Allen v. Bowen, 816 F.2d 600, 602 (11th Cir. 1987) (174 positions were seen as significant). The Court finds that there is substantial evidence for the ALJ determination that there were a significant number of other jobs that claimant could perform consistent with her impairments. (R. 19)

Claimant points out that the vocational expert testified that a billing/order clerk required computer skills which would require a "considerable adjustment." (R. 58-59) Claimant argues that she cannot be expected to make such a considerable adjustment at age 54. However, claimant admitted at the hearing that she worked on a computer one hour a day for a week while working as a doctor's receptionist. (R. 49) She has a high school degree, has no problems reading or writing, and has no learning disabilities. (R. 32) The medical evidence does not support her claim that she cannot make the adjustment because of her headaches, vision problems, lack of energy, nausea, and vomiting.

#### VI. CONCLUSION

The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is **AFFIRMED**.

DATED this 30<sup>th</sup> day of March, 1998.

  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

MAR 27 1998

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

JAMES E. RICE  
274-52-1737 Plaintiff,

vs.

KENNETH S. APFEL,  
Commissioner,  
Social Security Administration,  
Defendant.

Case No. 97-CV-12-M.

ENTERED ON DOCKET

DATE MAR 31 1998

**JUDGMENT**

Judgment is hereby entered for Defendant and against Plaintiff. Dated this  
27th day of March, 1998.

*Frank H. McCarthy*  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

15

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

**FILED**

MAR 27 1998

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

JAMES E. RICE

274-52-1737

Plaintiff,

vs.

KENNETH S. APFEL,  
Commissioner,  
Social Security Administration,

Defendant.

Case No. 97-CV-12-M

ENTERED ON DOCKET

DATE MAR 31 1998

ORDER

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

Plaintiff has appended a 7 1/2 page "medical summary" to her brief, which the Commissioner has moved to strike as having exceeded the 5 page brief limit established by this Court's scheduling order. The Court is required to "meticulously examine the record," which it has done. *Broadbent v. Harris*, 698 F.2d 407, 414 (10th Cir. 1983). The Court has not considered Plaintiff's appendix, in any respect. In the future, if the parties find that the Court's page limit is too restrictive, the

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<sup>1</sup> Plaintiff's February 3, 1994, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held January 25, 1995. By decision dated March 8, 1995, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on October 31, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

appropriate course is to file a motion, with supporting rationale to request permission to exceed the page limit.

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born August 15, 1952 and was 42 years old at the time of the hearing. He has a 10th grade education, with additional training as a nurse assistant. He has formerly worked as a nurse aide, cashier/checker, personal attendant, commercial cleaner and restaurant worker. He claims to be unable to work as a result of pain in the lower back, hips and legs. The ALJ determined that Plaintiff could not

return to his former work. Based on Plaintiff's own description of his restrictions, the ALJ found that he was able to perform light work, restricted by the need to change positions from time to time and limited to standing for an hour at a time, walking only an hour at a time, and sitting for an hour at a time. [R. 22, 54-55]. Relying on the testimony of a vocational expert, the ALJ determined that there are a significant number of light and sedentary jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to make adequate credibility findings; and (2) failed to order an orthopedic consultative examination.

There is no support for Plaintiff's claim that the ALJ failed to apply the appropriate standards in the evaluation of his pain and credibility. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 and appropriately applied the evidence to those

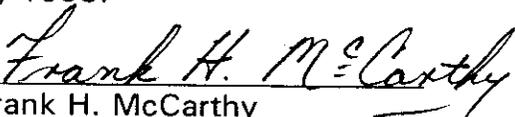
guidelines. The ALJ discussed Plaintiff's own testimony concerning his daily activities and limitations, the medications he takes on a regular basis, and the lack of side-effects from those medications. Based on that information, the ALJ concluded that although Plaintiff does experience pain, the pain does not preclude all work activity. [R. 22-23]. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Secretary and the courts.

Plaintiff argues that the case should be reversed and remanded because the ALJ failed to develop the record concerning his back pain. Plaintiff contends that the ALJ should have ordered a consultative orthopedic evaluation. The Tenth Circuit recently discussed at some length the ALJ's duty "to ensure that an adequate record is developed . . . consistent with the issues raised." *Hawkins v. Chater*, 113 F.3d 1162, 1164 (10th Cir. 1997) (quotation omitted). In particular *Hawkins* addressed the question: "How much evidence must a claimant adduce in order to raise an issue requiring further investigation?" The Court instructed that some objective evidence in the record must suggest the existence of a condition which could have a material impact on the disability decision requiring further investigation. The claimant must in some fashion raise the issue, which on its face must be substantial. Claimant has the burden to make sure the record contains evidence to suggest a reasonable possibility that a severe impairment exists. Once that burden is satisfied, it becomes the ALJ's burden to investigate further. *Id.*

However, the Court stated that "when the claimant is represented by counsel at the hearing, the ALJ should ordinarily be entitled to rely on the claimant's counsel to structure and present claimant's case in a way that the claimant's claims are adequately explored." *Id.* at 1167-68. It is appropriate for the ALJ to require counsel to identify issues requiring further development. In the present case, Plaintiff's counsel submitted the records that Plaintiff asserts establish the need for a consultative evaluation. [R. 194, 258]. Counsel did not, however, request that a consultative evaluation be performed. Although the ALJ has a basic obligation to ensure that an adequate record is developed during the disability hearing consistent with the issues raised, it is not the ALJ's duty to become the claimant's advocate. *Henrie v. United States Dept. of Health and Human Servs.*, 13 F.3d 359, 360-61 (10th Cir. 1993). If Plaintiff believed that it was necessary to order a consultative examination, it was the obligation of Plaintiff and his counsel to bring that information to the attention of the ALJ.

The Court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts. The Court further finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

SO ORDERED this 27<sup>th</sup> day of March, 1998.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

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

WILLIAM DEAN SHORT, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 H. N. "SONNY" SCOTT, )  
 )  
 Respondent. )

ENTERED ON DOCKET  
DATE MAR 31 1998

Case No. 97-CV-254-K ✓

**F I L E D**

MAR 31 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently confined at Joseph Harp Correctional Center serving time for four (4) convictions of robbery with a firearm entered by Tulsa County District Court, Case Nos. CF-90-1361, CF-90-1360, CF-90-1298, and CF-90-826. In his habeas corpus petition, Petitioner contends that he is being improperly denied good time credits by the Oklahoma Department of Corrections due to a "misconception" of the facts and law applicable to his case. Respondent has filed a motion to dismiss for failure to exhaust state remedies (Docket #3) to which Petitioner has responded (Docket #5). As more fully set out below the Court concludes that Respondent's motion to dismiss should be granted and this petition dismissed without prejudice for failure to exhaust available state remedies.

**BACKGROUND**

On April 30, 1990, Petitioner pled guilty to four (4) separate charges of Robbery with a Firearm in Tulsa County District Court. Four (4) separate Judgment and Sentences were entered, each reflecting a sentence of fifteen (15) years to run concurrent with each other. In addition, each

(6)

Judgment and Sentence specifically indicates "sentence enhanced pursuant to 21 O.S. 801."<sup>1</sup> (#4, Exs. A, B, C, and D). Petitioner did not file a motion to withdraw his guilty pleas and did not otherwise perfect a direct appeal from these convictions.

As stated supra, Petitioner contends that he is being improperly denied good time credits by the Oklahoma Department of Corrections due to a "misconception" of the facts and law. Petitioner has sought relief on this claim through the Oklahoma Department of Corrections administrative grievance procedures, complaining that he is being denied good time credits erroneously (#4, Ex. E). However, his efforts have been unsuccessful (#4, Ex. F). Petitioner has also presented this claim to the Cleveland County District Court in a petition for writ of habeas corpus. (See #4, Ex. G). The district court denied relief and Petitioner appealed the denial to the Oklahoma Court of Criminal Appeals ("OCCA"). The OCCA affirmed the district court's denial of habeas relief and held that Petitioner was really attacking the validity of his judgment and sentences since he contended that they were improperly enhanced under § 801, and therefore, "the proper procedure is to file an application for post-conviction relief seeking an appeal out of time in the proper District Court" (#4, Ex. H).

### *ANALYSIS*

A federal court is prohibited from issuing a writ of habeas corpus on behalf of a prisoner in state custody unless the prisoner demonstrates either (1) that he "has exhausted the remedies available in the courts of the State," (2) that "there is an absence of available State corrective process," or (3)

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<sup>1</sup>Okla. Stat. tit. 21, § 801 provides, in pertinent part, as follows:

The sentence imposed . . . shall not be reduced to less than ten (10) calendar years, nor suspended, nor shall any person be eligible for probation or parole or receive any deduction from his sentence for good conduct until he shall have served ten (10) calendar years of such sentence.

that "circumstances exist that render such process ineffective to protect the rights of the [prisoner]." 28 U.S.C. § 2254(b)(1)(A) and (B); see also White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). A prisoner "shall not be deemed to have exhausted the remedies available in the courts of the State...if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). See Picard v. Conner, 404 U.S. 270 (1971) (discussing § 2254's exhaustion requirement).

The exhaustion requirement is designed to give states the initial opportunity to address and correct their own alleged violations of federal law and is satisfied only when the prisoner seeking habeas relief has "fairly presented" the facts and the legal theory (i.e., the "substance") supporting his federal claims to the state's highest court. Picard, 404 U.S. at 275-76. See also, Coleman v. Thompson, 501 U.S. 772 (1991); Rose v. Lundy, 455 U.S. 508 (1982); Duckworth v. Serrano, 454 U.S. 1 (1981); Darr v. Burford, 339 U.S. 200 (1950). Exhaustion in a state court is not required if the state provides absolutely no opportunity to obtain redress or if the opportunity actually provided by the state is so clearly deficient as to render futile any effort to obtain relief. See 28 U.S.C. § 2254; see also Steele v. Young, 11 F.3d 1518, 1524 (10th Cir. 1993).

After carefully reviewing the record in this case, the Court concludes that because Petitioner presented his claim in the state courts in a procedural context in which its merits would not be considered, he must return to the state courts to present his claim via the proper procedures. See Castille v. Peoples, 489 U.S. 346, 351 (1989) (presentment of a claim for the first and only time in a procedural context in which its merits will not be considered does not constitute "fair presentation" for purpose of exhaustion of state remedies). Petitioner is in fact challenging the validity of the

enhancement of his sentences pursuant to Okla. Stat. tit. 21, § 801. This claim has not been "fairly presented" to the state courts. Furthermore, as noted by the OCCA, a remedy exists whereby the Oklahoma state court may consider Petitioner's claim, i.e., to file an application for post-conviction relief seeking an appeal out of time in the proper District Court. In this case, Petitioner should file his application for post-conviction relief seeking an appeal out of time in Tulsa County District Court, the state court where his convictions were entered. If Tulsa County District Court denies his application, he must then appeal to the OCCA to satisfy the exhaustion requirements of 28 U.S.C. § 2254(b). If the OCCA affirms the denial, then Petitioner may attempt to seek habeas corpus relief in this federal district court.

#### *CONCLUSION*

After carefully reviewing the record in this case, the Court concludes that Petitioner has failed to exhaust available state remedies. Therefore, Respondent's motion to dismiss should be granted and the petition for writ of habeas corpus dismissed without prejudice.

#### **ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) Respondent's motion to dismiss for failure to exhaust state remedies (#3) is **granted**.
- (2) The petition for a writ of habeas corpus is **dismissed without prejudice**.

SO ORDERED THIS 30 day of March, 1998.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

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

**FILED**

MAR 27 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FIRST COLONY LIFE INSURANCE )  
COMPANY, a foreign insurance )  
corporation, )

Plaintiff, )

v. )

NO. 95-C-755B

JULIE ANN BENSON, )  
individually and as personal )  
representative of the Estate )  
of Robert Marshall Benson, )  
Deceased, )

Defendant. )

ENTERED ON DOCKET

DATE MAR 30 1998

**ORDER OF DISMISSAL  
APPLICATION TO DISMISS OF PLAINTIFF  
FIRST COLONY LIFE INSURANCE COMPANY**

Upon the application of plaintiff, First Colony Life Insurance Company, advising the Court the subject matter of this lawsuit has been resolved by Order of the District Court of Tulsa County which was affirmed on appeal, there is nothing left in this action to determine and the captioned case is ORDERED DISMISSED.

DATED this 26 day of Mar, 1998.

  
UNITED STATES DISTRICT JUDGE

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

**FILED**

ROBERT J. SMART,  
SSN: 248-84-6951,

Plaintiff,

v.

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

Defendant.

CASE NO. 96-CV-1193-M

**ENTERED ON DOCKET**  
**DATE MAR 30 1998**

MAR 27 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**JUDGMENT**

Judgment is hereby entered for Plaintiff and against Defendant. Dated  
this 27<sup>th</sup> day of MARCH, 1998.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born December 3, 1948 and has a seventh grade education. [R. 59, 102]. He last worked in February 1994 and claims to have been unable to work since then due to residuals from a myocardial infarction and hyperkeratosis of both hands.

The ALJ determined that Plaintiff has a severe impairment consisting of status post myocardial infarction and that he can not return to his past relevant work (PRW) as a mechanic or truck driver. He concluded that Plaintiff has the residual functional capacity (RFC) to perform a wide range of light work reduced by his inability to perform work requiring balancing or repetitive overhead reaching, or exposure to unprotected heights. [R. 25]. The case was thus decided at step five of the five-step

evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the Vocational Expert's testimony regarding the availability of jobs in the light category that Plaintiff could perform was "confusing at best" and based upon a misunderstanding of the definite requirements of light work. [Plf's Brief, p. 3]. Plaintiff also asserts that the ALJ erroneously discounted Plaintiff's hand complaint and that the record does not support the finding that Plaintiff could do sedentary work. [Plaintiff's Brief, p. 5].

There is no dispute that Plaintiff suffered a myocardial infarction on February 11, 1994, that he was successfully treated by catherization while hospitalized and that his condition had stabilized upon his release from treatment. [R. 167-168, 202]. Plaintiff's claimed exertional limitations, as to his cardiac condition, are that he cannot lift, walk, drive, stand or otherwise perform any strenuous activity. [Plaintiff's's Brief, p. 3]. A medical expert (ME), Dr. Krishnamurthi, testified at the hearing as to Plaintiff's residual functional capacity (RFC). The RFC assessment by Dr. Krishnamurthi was that Plaintiff is able to sit 2 hours at one time, 5 hours during an entire 8-hour day; stand 2 hours at one time, 4 hours during an entire 8-hour day; walk 2 hours at one time, 3 hours during an entire 8-hour workday; lift up to 20 pounds frequently, 25 pounds occasionally; carry up to 20 pounds frequently, 25 pounds occasionally; no limitations on repetitive motion of legs, hands or fingering; able to bend, squat, crawl, climb, reach occasionally and mild restriction of activities involving unprotected heights. [R. 329-331]. Plaintiff does not contest Dr.

Krishnamurthi's evaluation of his RFC. He argues that the testimony of the vocational expert (VE), upon which the ALJ relied in determining that Plaintiff is not disabled, did not comport with the limitations set forth by the ME in his testimony.

Plaintiff complains the VE named jobs within the "light work category" without providing testimony as to the sit/stand requirements of those jobs. Although the questioning of the VE was somewhat fragmented, the end result was that she identified two jobs in the light strength demand category that Plaintiff could do, with the limitations set forth in Dr. Krishnamurthi's RFC assessment, parking lot attendant and automatic carwash attendant. [R. 91]. This she did in response to the hypothetical question presented by the ALJ. That question was not whether Plaintiff could do the full range of light work, but whether he could perform sedentary and light jobs with limitations, including those dealing with the sit/stand restrictions. [R. 87]. The ALJ's hypothetical properly set forth impairments which were accepted as true by the ALJ. *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990).<sup>3</sup> The ALJ cited light and sedentary jobs of parking lot attendant, auto car wash attendant, weight recorder and assembler as examples of jobs that Plaintiff could perform with the residual functional capacity for work except for lifting over 10 pounds frequently, 20 pounds occasionally, balancing or repetitive overhead reaching and exposure to unprotected heights. The Court finds Plaintiff's first argument is without merit.

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<sup>3</sup> In an unpublished opinion dated August 16, 1995, the Tenth Circuit found no error in a similar hypothetical question. In *Pauley v. Chater*, 1995 WL 490281, \*2 (10th Cir. (Okla.)) the ALJ asked the vocational expert to assume Plaintiff had the physical capacity for light and sedentary work with a list of restrictions.

Plaintiff also complains that the ALJ erred in discounting his "hand complaint due to minimal medical evidence and absence of a grip strength test." [Plaintiff's brief, p. 5]. For the reasons stated below, the Court finds this case must be remanded to the Commissioner for reconsideration of the evidence and reconsideration of Plaintiff's RFC after further development of the record with regard to Plaintiff's claims of impairment due to hyperkeratosis of the hands.<sup>4</sup>

Included in the evidence before the ALJ when he made this determination, were records from the University of Oklahoma College of Medicine - Tulsa, Adult Medicine Clinic. The first report of a "few itching lesion[s] in hand, scaly" was treatment on May 11, 1995, for what was thought to be a fungal infection of the hand. [R. 252]. A problem with rash on the hands was reported May 23, 1995. [R. 251]. Plaintiff was given an ointment and later diagnosed with dyshidrotic eczema of the hands. [R. 250].<sup>5</sup> Hyperkeratotic palmar surface, tight skin and inability to

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<sup>4</sup> Hyperkeratosis is defined in *Dorlands Medical Dictionary*, 28th Ed., p. 795 as hypertrophy (overgrowth) of the corneous layer of the skin

Palmoplantar keratoderma (of palms and soles), is defined at page 878 as: a group of mostly inherited disorders characterized by the excessive formation of keratin on the palms and soles, sometimes with painful lesions resulting from fissuring of the skin, which may occur alone or may accompany or be part of another disorder.

<sup>5</sup> Eczema is defined in *Dorlands Medical Dictionary*, 28th Ed., p. 528: as a pruritic papulovesicular dermatitis occurring as a reaction to many endogenous and exogenous agents, characterized in the acute stage by erythema, edema associated with a serous exudate between the cells of the epidermis and an inflammatory infiltrate in the dermis, oozing and vesiculation, and crusting and scaling; and in the more chronic stages by lichenification or thickening or both, signs of excoriations, and hyper pigmentation or hypopigmentation or both.

Dyshidrotic e., a subcategory of "eczema" is defined as: pompholyx, *Id.*

Pompholyx: [Gr. "bubble"], a recurrent eczematous reaction characterized by the development of a vesicular eruption on the palms and soles, particularly along the sides and between the digits, accompanied by pruritus, and a burning sensation and hyperhidrosis. It is a self-limited condition usually lasting a few weeks. Called also dyshidrotic eczema. *Id.*, p. 1333.

fully extend the fingers were noted. *Id.* On June 12, 1995, scaly, hyperkeratoic, hardened lesions on the right hand with decreased range of motion of the fingers were noted by the examining physician. [R. 249]. Plaintiff was given triamcinolone cream to apply to his hands. A Dermatologist at the clinic diagnosed onychomycosis and tinea pedis.<sup>6</sup> [R. 296-297].

Based upon this evidence, the ALJ stated:

There is very little medical evidence regarding the claimant's hands and there is no record of grip strength testing in the medical evidence since the claimant's diagnosis in May 1995. Based on the minimal medical evidence regarding his hands, there were never any bleeding sores noted. The Administrative Law Judge finds that, based on lack of evidence proving otherwise, that the claimant's hyperkeratosis of the hands is mild and treatable, and would not have any affect on his ability to perform work-related activities.

The ALJ's assessment of Plaintiff's RFC, therefore, did not include any impairment or limitation regarding Plaintiff's ability to use his hands for the performance of work-related activities.

Two documents from O.U. Medicine Clinic that were generated six months after the hearing were submitted to the Appeals Council by Plaintiff four months after the decision of the ALJ was entered.<sup>7</sup> The first is a treatment record dated March 4,

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<sup>6</sup> Onychomycosis is defined in *Dorlands Medical Dictionary*, 28th Ed., p. 1178: tinea unguium, which is defined at page 1714 as tinea (ringworm) involving the nails in which the invasion is restricted to white patches or pits on the nail surface or the lateral or distal edges of the nail are first involved, followed by establishment of the infection beneath the nail plate.

Tinea Pedis: tinea involving the feet. *Id.*

<sup>7</sup> The hearing was held September 12, 1995, the decision of the ALJ was rendered November 14, 1995 and the dates of the medical records at issue are March 4, 1996 and March 14, 1996.

1996 which reported that Plaintiff had given a one year history of increased skin thickness on the palms. [R. 333]. The second contains a note he claims was written by his treating physician stating "Patient is impaired to use his hands for work" dated March 14, 1996. [R. 332]. The Appeals Council, after consideration of the new evidence, concluded the additional evidence "does not provide a basis for changing the [ALJ's] decision." [R. 5].

Social Security regulations specify that:

If new and material evidence is submitted, the Appeals Council shall consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision. The Appeals Council shall evaluate the entire record including the new and material evidence submitted if it relates to the period on or before the date of the administrative law judge hearing decision. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

20 C.F.R. § 404.970 (b). Where, as here, the Appeals Council denies review, the ALJ's decision becomes the Secretary's final decision. See 20 C.F.R. § 404.981. The decision is reviewed for substantial evidence, based on "the record viewed as a whole." *O'Dell v. Shalala*, 44 F.3d 855, 858 (10th Cir. 1994) (quoting *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994)). In *O'Dell* the Tenth Circuit held that new evidence submitted to the Appeals Council pursuant to 20 C.F.R. § 404.970(b) becomes part of the administrative record to be considered by the court when evaluating the Commissioner's decision for substantial evidence. *O'Dell*, 44 F.3d at 859. The Court must, therefore, include the medical

records submitted to the Appeals Council in its review of the ALJ's decision. Pursuant to *O'Dell* this court is required to review the new treatment records and to determine whether, considering even the new evidence, the ALJ's decision is supported by substantial evidence.

This Court has previously voiced its reluctance to speculate as to how the ALJ would have weighed these records had they been available for the original hearing. See *Stephens v. Callahan*, 971 F.Supp. 1388 (N.D. Okla. 1997). Here, as there, the Court is constrained to follow the dictates of *O'Dell*. Because the Appeals Council did not provide any analysis of the new evidence or state reasons for denial of review, the Court is forced into the role of fact finder. This being so, the Court finds the evidence is material to the determination of disability and there is a reasonable possibility the outcome of the claim might be changed in light of the statement of Plaintiff's physician that he is "impaired." Therefore, the Court cannot say that the decision is supported by substantial evidence in the record as a whole. Accordingly, the case must be remanded for consideration of this evidence, for further development of the record, for consideration of all the evidence regarding Plaintiff's hands, for evaluation of Plaintiff's RFC after having considered the effect, if any, the hand condition might have on Plaintiff's ability to perform work-related activities and, if needed, for supplemental hearing wherein a vocational expert might testify as to the impact, if any, this condition has upon the jobs available that Plaintiff can perform with his RFC. In doing so, the Court does not dictate the result. Rather, remand is

ordered to assure that a proper analysis is performed and the correct legal standards are invoked in reaching a decision based on the facts of the case. *Kepler*, at 391.

It is therefore the order of the Court that the Commissioner's decision is REMANDED for further proceedings consistent with this Order.

Dated this 27<sup>th</sup> day of MARCH, 1998.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

MAR 27 1998

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

DAVID M. MONTGOMERY,  
SSN: 486-62-2995,

Plaintiff,

v.

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

Defendant.

CASE NO. 96-CV-1161-M ✓

ENTERED ON DOCKET

DATE MAR 30 1998

**JUDGMENT**

Judgment is hereby entered for Plaintiff and against Defendant. Dated  
this 27<sup>th</sup> day of MARCH, 1998.

*Frank H. McCarthy*  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

13

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

**FILED**

MAR 8 7 1998

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

DAVID M. MONTGOMERY,  
SSN: 486-62-2995,

Plaintiff,

v.

KENNETH S. APFEL,  
Commissioner of the Social  
Security Administration,<sup>1</sup>

DEFENDANT.

NO. 96-CV-1161-M

ENTERED ON DOCKET  
DATE MAR 30 1998

ORDER

Plaintiff, David M. Montgomery, seeks judicial review of a decision of the Commissioner of the Social Security Administration granting Social Security disability benefits during a closed period of time, March 5, 1991 to May 11, 1994, and denying benefits for time periods before and after those dates. In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this Order will be directly to the Circuit Court of Appeals.

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

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<sup>1</sup> Kenneth S. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Kenneth S. Apfel should be substituted for John J. Callahan, Acting Commissioner, who was previously substituted for Shirley S. Chater, as defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

#### Claim History

This case has an extensive procedural history. Plaintiff had a prior period of disability benefits for an injury to his hip and knee in 1974, with termination of benefits on January 26, 1976. [R. 140-164]. No further action was taken on that claim. Plaintiff filed applications for Supplemental Security Income benefits and Disability Insurance Benefits on May 30, 1989, one month after his first myocardial infarction (MI). [R. 167-174]. The claims were denied initially and upon reconsideration. [R. 175-186]. An administrative law judge (ALJ) entered a hearing decision dated March 7, 1991, which was remanded by the Appeals Council on December 5, 1991. [R. 672-688]. The purpose of the remand was to further develop

the record with regard to Plaintiff's mental impairment claim and to reevaluate Plaintiff's subjective complaints of pain. [R. 698-697]. A second hearing was held May 26, 1992. By this time, Plaintiff's hip and knee condition had deteriorated to the extent that arthroplasty and joint replacement were being considered by his physician. [R. 512]. A decision was entered by the ALJ on July 20, 1992, finding Plaintiff unable to return to his past relevant work (PRW) but capable of doing the full range of light and sedentary work until March 5, 1991. The ALJ determined Plaintiff's hip impairment met the requirements of Listing 1.03A and granted disability benefits commencing that date. [R. 519-533]. Plaintiff appealed the determination of the "onset" date to the Appeals Council. [R. 545]. The ALJ's decision was vacated and remanded by the Appeals Council on July 30, 1993; this time for a subjective complaint evaluation and because the hearing tape had been lost. [R. 551-552].

A different ALJ was assigned the claim and conducted the third hearing on this case on August 23, 1994. [R. 67-139]. On April 14, 1995, he entered the decision which is the basis of this appeal. [R. 28-49].<sup>2</sup> In this decision, the ALJ also found that Plaintiff's hip impairment met the degree of severity required in Listing 1.03A and that his disability commenced March 5, 1991. [R. 44]. That date was determined by inferring the onset date to be one year prior to March 5, 1992, the day he reported to an orthopedic surgeon for treatment of his hip. [R. 44, 512]. This decision,

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<sup>2</sup> The Appeals Council affirmed the findings of the ALJ on October 25, 1996. [R. 7-8]. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

however, differed from the previous ALJ's decision in two respects, both of which are contested by Plaintiff. The ALJ determined in this decision that, prior to March 5, 1991, Plaintiff was capable of performing his past relevant work and that Plaintiff's disability period ended May 11, 1994.<sup>3</sup>

Plaintiff claims disability since April 1989 and claims that disability continues after May 1994. Plaintiff has not seriously contested the findings of the ALJ regarding his physical ailments. The crux of his complaints are the failure of the ALJ to make specific findings in assessing Plaintiff's residual functional capacity (RFC) regarding his mental impairment and his failure to develop the record as to the mental demands of Plaintiff's past work.

#### Background and Relevant Medical History

Plaintiff was born May 15, 1956 and has a high school and vo-tech education. [R. 100-101,167]. His past relevant work is as a master automobile technician in an auto/truck repair shop, a department manager in an automotive department store, a station manager at a service station, an electronics motor technician, a shift manager at a service station and assistant manager at a pizza restaurant. [R. 191-202].

As stated above, Plaintiff's left hip and leg were injured in a motorcycle accident in 1974 for which he received social security benefits until January 1976. [R. 140-164, 285-286]. He apparently recovered sufficiently to work from this time

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<sup>3</sup> It is not clear how the ALJ determined May 11, 1994 to be the date that Plaintiff's hip and knee impairment had improved sufficiently to allow him to perform sedentary work as Plaintiff's orthopedic surgeon did not release him to return to work until August 30, 1994. [R. 710]. However, this finding is not contested by Plaintiff. [Plaintiff's brief, p. 4].

period until his first myocardial infarction on April 23, 1989. In March 1992, Plaintiff was seen by Dr. Vosburgh, the same surgeon who had operated on his hip and knee in 1974. [R. 512]. Advanced osteoarthritis and degenerative changes were indicated by x-ray. *Id.* Dr. Vosburgh determined Plaintiff to be "temporarily totally disabled" in terms of ability to work. *Id.* On March 17, 1994, a total hip arthroplasty was performed. Dr. Vosburgh released Plaintiff to do "purely sedentary" type work on August 30, 1994. [R. 710]. The ALJ found that Plaintiff's period of disability due to his hip and knee impairment ended in 1994.

The ALJ determined Plaintiff's myocardial infarction had not resulted in severe coronary impairment. [R. 32]. This determination was supported by cardiologist, Wayne N. Leimbach, M.D.'s report on January 8, 1990, that Plaintiff would not be considered disabled by any of the Social Security Administration's criteria for disability, based upon his last coronary angiogram and excellent performance on the treadmill. [R. 473].

Plaintiff complains the ALJ erred in failing to make specific findings concerning Plaintiff's mental condition as it existed in 1989 and based his determination that Plaintiff is not disabled on a conclusory statement that he has no mental impairment in spite of medical evidence to the contrary. The Court agrees that the ALJ failed to apply the correct legal procedures or to show that he had done so. *Winfrey v. Chater*, 92 F.3d at 1019.

The record contains a letter to the Social Security Disability Determination Unit (DDU) from Pat West, RN, BA, Psychiatric Nurse for Grand Lake Mental Health

Center, Inc., dated July 20, 1989. [R. 343]. West reported that Plaintiff had been seen at the center regularly since April 7, 1989, that he had been diagnosed with adjustment disorder with depressed mood and that his prognosis for working would improve as his physical condition improved. *Id.* West wrote again on October 17, 1989 that Plaintiff was still being seen at the Center, that his mental state had remained fairly stable and that he felt very limited since he has been unable to work. [R. 458]. Plaintiff had not been placed on anti-depressants due to the propensity of those drugs to affect cardiac functioning. He had been requested to talk with his cardiologist regarding anti-depressants but had not done so. West opined that it would be difficult for Plaintiff to work "at this point due to his depression." *Id.*

A psychiatrist, David P. Bhend, M.D. examined Plaintiff for the DDU in November 1989. [R. 466-469]. Dr. Bhend devoted a considerable portion of his report to repetition of Plaintiff's medical history, Plaintiff's accounting of his daily activities and Plaintiff's descriptions of his feelings of depression and his reactions to stress. Dr. Bhend's mental status examination of Plaintiff revealed an alert, cooperative, neatly dressed, tense and sad faced young man who manifested no abnormal motor behavior, speech or memory functions. His "affect was sad and was appropriate." He had good retention and recall, denied any specific phobias, compulsions, hallucinations, passivity feelings, thought blocking, thought disorganization, ideas of reference, ideas of guilt or worthlessness, paranoid delusions or any suicidal or homicidal ideas or impulses. Insight was felt to be fairly good. [R. 468-469]. Despite these findings, Dr. Bhend diagnosed Plaintiff "as having 'major

depression'." [R. 469]. He stated he felt that this major depression had definitely and directly arisen from the extreme stress regarding his extremely serious physical health problem. Dr. Bhend felt that, at that time, Plaintiff's energy was sufficiently low that he would have extreme difficulty successfully attempting any sort of sedentary job. Dr. Bhend stated he felt Plaintiff would have extreme difficulty concentrating, tolerating almost all job stress, interacting with fellow workers or supervisors and coping with the public. He felt this condition had been present since Plaintiff's first heart attack in April 1989. He noted that "definitive treatment of his physical health problem would probably be the most effective way of treating his depressive condition" but suggested anti-depressant medication and psychotherapy as treatment aids. *Id.*

Another psychiatric examination for the DDU was conducted by Ronald C. Passmore, M.D. on March 13, 1992. [R. 502-507]. Dr. Passmore reported that Plaintiff appeared to be depressed secondary to his physical problems and family problems. He stated that Plaintiff "should be on medication." Social stressors were noted as "moderate to severe"; adjustment "fair"; "[h]e can relate and concentrate when he has to." *Id.*

The Psychiatric Review Technique Form (PRT) filled out and signed by the ALJ and attached to his April 14, 1995 decision marked the presence of affective disorders, depressive syndrome and adjustment disorder with depressed mood for the time period "4/23/89 to present." [R. 47-49].

Dr. Cullen J. Mancuso, a clinical psychologist, was called to testify at the

hearing on August 23, 1994 as a consultative medical expert. [R. 70-100]. In the body of his decision, the ALJ discussed the medical evidence as to Plaintiff's mental condition and the testimony of the medical expert at the hearing. He stated that Plaintiff's mental condition did not preclude his ability to engage in substantial gainful activity that he had done in the past. [R. 38]. The ALJ wrote:

The medical expert testified that, based on his study of the record, to include statements of the claimant, the claimant was not mentally precluded from engaging in all forms of substantial gainful activity. It was the opinion of the medical expert that the claimant was limited in his ability to deal with the public and to deal with work stresses; that his abilities in these areas was fair (seriously limited, but not precluded).

[R. 38]. The ALJ's reliance upon the testimony of the medical expert for his determination that Plaintiff has not been precluded from engaging in work activity, due to a mental impairment, is misplaced. Even the medical expert found some evidence of a mental limitation during the relevant time period. *Id.* Describing a functional ability as "fair" would seem to imply no disabling impairment. However, as noted by the ALJ, "fair" is defined to mean: "[a]bility to function in this area is seriously limited but not precluded." *Cruse v. U.S. Dept. of Health & Human Services*, 49 F.3d 614, 618 (10th Cir 1995). The *Cruse* court concluded that "seriously limited but not precluded" is essentially the same as the listing requirements' definition of the term "marked". "Marked" is defined at § 12.00 C:

Where "marked" is used as a standard for measuring the degree of limitation, it means more than moderate, but less than extreme. A marked limitation may arise when several activities or functions are impaired or even where only one

is impaired, so long as the degree of limitation is such as to seriously interfere with the ability to function independently, appropriately and effectively.

In *Cruse*, the Court found that use of the term "fair" as it is defined on the medical assessment form is evidence of *disability*. *Cruse*, at 618.

Looking at Dr. Mancuso's assessment in that light, there is evidence to support a finding that Plaintiff met the threshold showing that his mental impairments were medically severe enough to interfere with his ability to do basic work activities. The ALJ was thus required to fully develop the factual record regarding the claimant's residual functional capacity (RFC) and the claimant's past relevant work (PRW), make specific findings of fact regarding the claimant's RFC and PRW, and then compare the two to determine if the claimant's RFC would permit a return to his or her PRW. SSR 82-62. Specific findings must be included in the decision:

In finding that an individual has the capacity to perform a past relevant job, the determination or decision must contain, among other findings, the following specific findings of fact:

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

In the present case the Court finds that the ALJ did not perform the analysis required by SSR 82-62. The ALJ's finding of no significant mental impairment is not supported by the evidence and an RFC assessment was crucial to evaluation of Plaintiff's capacity to engage in substantial gainful work activity. *Cruse*, 49 F.3d,

619. And, unlike the physical demands of Plaintiff's past relevant work, the mental requirements of Plaintiff's work as an automobile technician, department manager in an automotive store, service station and shift manager or electronics motor technician were neither explored by the ALJ with the VE nor discussed in the ALJ's decision.

1989-1991

The Court finds insubstantial support in the record for the Commissioner's finding that Plaintiff could return to his past relevant work prior to 1991. To the contrary, it is evident from the record that Plaintiff had a medically determinable mental impairment from 1989 that significantly limited Plaintiff's ability to do work on a sustained basis. More than eight years have passed since Plaintiff first applied for disability benefits under the Social Security Act. Three hearings have been held with the Appeals Council reversing the decision of the ALJ twice. None of the three ALJ decisions properly analyzed the mental impairment claims of Plaintiff. It is clear that no further evidence can be developed as to Plaintiff's mental condition between 1989 and 1991. Review of the record as a whole only supports the conclusion that Plaintiff was disabled within the meaning of the Act and the Commissioner's own regulations. Nothing can be gained by remanding for further hearing, the issue of Plaintiff's disability prior to 1991.

When a decision of the Commissioner is reversed on appeal, it is within the court's discretion to remand either for further administrative proceedings or for an immediate award of benefits. 42 U.S.C. § 405(g). *Ragland*, 992 F.2d at 1060. Further administrative proceedings would only prolong an already too lengthy process

and delay the long-overdue receipt of benefits for this time period. *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987); *Emory v. Sullivan*, 936 F.2d 1092, 1093-95 (10th Cir. 1991) (reversing step four determination and directing award of benefits). "[O]utright reversal and remand for immediate award of benefits is appropriate when additional fact finding would serve no useful purpose." *Dollar v. Bowen*, 821 F.2d 530, 534 (10th Cir. 1987).

Accordingly, the court exercises its discretion pursuant to 42 U.S.C. § 405(g) and REVERSES and REMANDS the case for an immediate award of disability benefits from April 23, 1989 to March 5, 1991.

#### Post 1994

Plaintiff concedes the ALJ was "within his province in concluding that [he] had regained the capacity to perform the physical demands of sedentary work by May 1994." [Plaintiff's Brief, p. 4]. However, the ALJ again failed to fully address Plaintiff's ability to perform sedentary work in light of Plaintiff's mental impairments. While the ALJ included Dr. Mancuso's conclusion that Plaintiff is limited in his ability to deal with the public, the ALJ failed to include, or explain his rejection of, Dr. Mancuso's finding that Plaintiff is seriously limited in his ability to deal with work stresses.

Unlike the time period from 1989 to 1991, it is possible that the ALJ can properly articulate the basis of his decision for denying benefits post May 1994. The Court, therefore, REMANDS this portion of the claim to the Commissioner for further proceedings.

Conclusion

The case is REVERSED and REMANDED for the purpose of awarding benefits from April 23, 1989 to March 5, 1991; for proper mental RFC assessment and analysis of the mental demands of sedentary work as to Plaintiff's claim for disability benefits post May 1994; and, for such further development of the record and other proceedings as deemed necessary by the Social Security Administration in light of this Order.

SO ORDERED THIS 27<sup>th</sup> day of MARCH, 1998.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

**FILED**

**MAR 27 1998**

**PHI Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**

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

<b>LEON LENZY,</b>	)
	)
<b>Plaintiff,</b>	)
	)
<b>v.</b>	)
	)
<b>KENNETH S. APFEL,</b>	)
<b>Commissioner, Social</b>	)
<b>Security Administration,</b>	)
	)
<b>Defendant.</b>	)

Case No. 96-C-47-~~W~~<sup>EA</sup>

**ENTERED ON DOCKET  
MAR 30 1998  
DATE \_\_\_\_\_**

**ORDER**

On December 10, 1997, this Court remanded this case to the Commissioner for further proceedings. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(d), and defendant's response, the parties have stipulated that an award in the amount of \$2,139.50 for attorney fees (no costs) for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees in the amount of \$2,139.50 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller

award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986).

This action is hereby dismissed.

It is so ORDERED THIS 27<sup>th</sup> day of March 1998.

*Claire V Egan*  
~~JOHN LEO WAGNER~~ CLAIRE V. EAGAN  
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS  
United States Attorney

*Paul Reel*  
- 52 WYN DEE BAKER, OBA #465  
Assistant United States Attorney  
333 West 4th Street., Suite 3460  
Tulsa, Oklahoma 74103-3809  
(918) 581-7463

UNITED STATES COURT OF APPEALS

JAN 30 1998

FOR THE TENTH CIRCUIT

**PATRICK FISHER**  
Clerk

**FILED**

KATHY M. LONG,  
Plaintiff-Appellant,

MAR 27 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

v.

KENNETH S. APFEL, Commissioner,  
Social Security Administration,  
Defendant-Appellee.

No. 97-5111  
(D.C. No. 95-CV-835-W)  
(N.D. Okla.)

A true copy  
Teste

Patrick Fisher  
Clerk, U.S. Court of  
Appeals, Tenth Circuit

**ORDER AND JUDGMENT\*\***

By *Opelle Carter*  
Deputy Clerk

Before **BROBRY, BARRETT, and BRISCOE**, Circuit Judges.

ENTERED ON DOCKET

DATE 3/30/98

After examining the briefs and appellate record, this panel has determined  
unanimously to grant the parties' request for a decision on the briefs without oral

\* Pursuant to Fed. R. App. P. 43(c), Kenneth S. Apfel is substituted for John J. Callahan, former Acting Commissioner of Social Security, as the defendant in this action.

\*\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff appeals the district court order affirming the denial of plaintiff's application for supplemental security income benefits. In what became the final decision of the Commissioner, the administrative law judge (ALJ) found that plaintiff's heart condition, back pain, and ankle problems prevented her from performing her past relevant work. The ALJ further concluded, however, that plaintiff could perform other work that exists in significant numbers in the national economy, despite her impairments.

Plaintiff raises two principle challenges on appeal: (1) the ALJ did not properly evaluate plaintiff's physical impairments and their impact on her ability to do work; and (2) the hypothetical question the ALJ propounded to the vocational expert (VE) at the hearing did not accurately reflect plaintiff's impairments. We review the Commissioner's decision to determine whether the correct legal standards were applied and whether his "factual findings are supported by substantial evidence in the record viewed as a whole." Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1028 (10th Cir. 1994). "If supported by substantial evidence, the [Commissioner's] findings are conclusive and must be affirmed." Sisco v. United States Dep't of Health & Human Servs., 10 F.3d 739, 741 (10th Cir. 1993). "In evaluating the appeal,

we neither reweigh the evidence nor substitute our judgment for that of the agency.” Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991).

As a preliminary matter, we note that some of the arguments plaintiff makes in support of her first challenge were not urged in the district court. Specifically, the arguments that plaintiff advances on appeal in support of her contention that the ALJ erred in assessing the credibility of her subjective allegations of pain and other limitations are different than those she advanced in the district court in support of this proposition. “Absent compelling reasons, we do not consider arguments that were not presented to the district court.” Crow v. Shalala, 40 F.3d 323, 324 (10th Cir. 1994). The record before us presents no compelling reasons to consider plaintiff’s new arguments. Therefore, in examining whether the ALJ properly evaluated plaintiff’s physical impairments and their impact on her ability to do work, we will not consider the propriety of the ALJ’s credibility assessment; we will consider only whether the ALJ improperly gave more weight to the opinion of Dr. Sutton, a consulting physician, than he gave to the opinion of Dr. Ferguson, plaintiff’s treating physician, and whether the record supports the ALJ’s finding that plaintiff can sit for four hours at a time, up to eight hours per day. We turn to the first of plaintiff’s arguments.

Generally, the report of a physician who has treated a patient should be given greater weight than that of a physician who has not treated the patient. See Broadbent v. Harris, 698 F.2d 407, 412 (10th Cir. 1983). Here, the ALJ concluded that Dr. Sutton's March 1994 report was actually more favorable to plaintiff than was Dr. Ferguson's June 1992 report, because "Dr. Sutton's assessed limitations are more restrictive tha[n] the limitations of Dr. Ferguson," Appellant's App., Vol. II at 29, and Dr. Sutton's report took into account limitations arising from the broken ankle plaintiff suffered in 1993, after Dr. Ferguson's examination.

Indeed, Dr. Ferguson merely stated that plaintiff's ability to sit, stand, move about, lift, carry, and handle objects was "impaired significantly," id. at 144, without otherwise quantifying her limitations. As plaintiff's former counsel acknowledged at the hearing before the ALJ, what Dr. Ferguson considered a "significant" limitation is uncertain and cannot be quantified in any meaningful way. See id. at 246. Dr. Sutton, by contrast, made an assessment of plaintiff's residual functional capacity (RFC) that specifically quantified her ability to do various work-related activities, such as sit, stand, walk, lift, and carry. He found, for instance, that plaintiff could sit for only four hours at one time, for a total of eight hours in an eight-hour day; that she could stand for only one hour at a time, for a total of three to four hours in a day; and that she could

walk for only thirty minutes at a time, for a total of one to two hours in a day.

See id. at 185, 191.

Based upon our review of the record, we conclude that the ALJ did not err in using Dr. Sutton's specific limitations as the basis for his own assessment of plaintiff's RFC, rather than Dr. Ferguson's ambiguous and, arguably, less restrictive assessment of plaintiff's ability to work. Dr. Sutton's limitations are supported by his own examination of plaintiff and by other evidence in the record.

Having determined that the ALJ did not err in relying on Dr. Sutton's assessment of plaintiff's RFC, we necessarily reject plaintiff's second argument, that the record does not contain support for the ALJ's finding that plaintiff can sit for four hours at a time, for a total of eight hours per day.

We turn, then, to plaintiff's final challenge to the ALJ's decision. Plaintiff argues that the ALJ did not propound a proper hypothetical question to the VE and, therefore, that the VE's response to the question does not constitute substantial evidence upon which to base a finding of no disability. A proper hypothetical question need include only the impairments that the ALJ permissibly finds are established by the evidence. See Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993). The ALJ based his hypothetical question on the limitations set forth in Dr. Sutton's report. Because we have already upheld the ALJ's

determination that Dr. Sutton's report accurately reflects plaintiff's limitations, the ALJ did not err in basing his hypothetical question on those limitations.

The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED.

Entered for the Court

Wade Brorby  
Circuit Judge

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT  
OFFICE OF THE CLERK  
BYRON WHITE UNITED STATES COURTHOUSE  
1823 STOUT STREET  
DENVER, COLORADO 80257  
(303) 844-3157

PATRICK FISHER  
CLERK

ELISABETH A. SHUMAKER  
CHIEF DEPUTY CLERK

March 24, 1998

Mr. Phil Lombardi  
Clerk  
United States District Court for the N. District of Oklahoma  
333 W. Fourth Street  
Room 411 United States Courthouse  
Tulsa, OK 74103

Re: 97-5111, Long v. Apfel  
Dist/Ag docket: 95-CV-835-W,

RECEIVED

MAR 27 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Dear Mr. Lombardi:

In accordance with Fed. R. App. P. 41, I enclose a certified copy of the court's order and judgment, which constitutes the mandate in the subject case. By direction of the court, the mandate shall be filed immediately in the records of the trial court or agency.

The clerk will please acknowledge receipt of this mandate by file stamping and returning the enclosed copy of this letter. Any original record will be forwarded to you at a later date.

Please contact this office if you have questions.

Sincerely,

PATRICK FISHER  
Clerk

By:   
A.J. Schuler  
Deputy Clerk

PF:as

cc:

Paul F. McTighe Jr.  
Peter Bernhardt, Asst. U.S. Attorney  
Christopher Carillo

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

**FILED**

**MAR 27 1998**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LARRY D. SCARBROUGH, )  
SSN: 510-58-8636, )

Plaintiff, )

v. )

KENNETH S. APFEL, )  
Commissioner of Social Security,<sup>1</sup> )

Defendant. )

Case No. 96-CV-0440-EA

ENTERED ON DOCKET

DATE MAR 30 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 27<sup>th</sup> day of March 1998.

*Claire V Eagan*  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

<sup>1</sup> Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need to 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**

**LARRY D. SCARBROUGH,** )  
SSN: 510-58-8636, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
**KENNETH S. APFEL,** )  
Commissioner of Social Security,<sup>1</sup> )  
 )  
Defendant. )

**ENTERED ON DOCKET**

**DATE MAR 30 1998**

Case No. 96-CV-0440-EA

**FILED**

**MAR 27 1998**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Claimant, Larry D. Scarbrough, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.<sup>2</sup> 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.

Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

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

<sup>2</sup> On June 15, 1993, claimant applied for disability benefits under Title II (42 U.S.C. § 401 *et seq.*). Claimant's application for benefits was denied initially (August 24, 1993), and on reconsideration (September 22, 1993). A hearing before the Administrative Law Judge (ALJ) was held May 31, 1994 in Tulsa, Oklahoma. By decision dated November 18, 1994, the ALJ found that the claimant was not disabled within the meaning of the Social Security Act. On April 11, 1996, the Appeals Council denied review of the ALJ's decision. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20. C.F.R. § 404.981.

## **I. CLAIMANT'S BACKGROUND**

Claimant was born on March 7, 1952 and lives in Tulsa, Oklahoma. He was 42 years old at the time of the ALJ's decision. Claimant completed the sixth grade,<sup>3</sup> and does not have a GED high school equivalency certificate. He has worked as a laborer and welder's helper. Claimant claims that he became disabled on September 10, 1992 due to a back and neck injury, high blood pressure, cirrhosis of the liver, bleeding ulcer, hepatitis-B, and mental retardation.

## **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

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<sup>3</sup> There is conflicting evidence in the record regarding claimant's education. Although the ALJ found that claimant had completed the eighth grade (R. 15), claimant testified at the hearing before the ALJ that he "went to the seventh grade" but "didn't complete it." (R. 37) The ALJ posed his hypothetical question to the vocational expert based on a sixth grade education. (R. 65) However, in the Disability Report submitted by claimant in 1993, he certified that he completed the eighth grade in 1968. (R. 134) In an October 1991 medical examination of claimant for a worker's compensation impairment rating, claimant stated that he was educated through the tenth grade (R. 162), but in a June 1991 evaluation claimant stated he completed the eleventh grade in 1969. (R. 174) Resolution of this conflict, and the correctness of the ALJ's finding of an eighth grade education, is not necessary to this decision because there is substantial evidence of claimant's "dull normal intelligence" (R. 19, 275-284) on which the ALJ relied to reach his decision, and the ALJ correctly posed the hypothetical question based on the hearing evidence.

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.<sup>4</sup>

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 claimant was 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.

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<sup>4</sup> 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 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.

1981). Nevertheless, the court must review the record as a whole, and “the substantiality of the evidence 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 made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform the physical exertional requirements of work, except for lifting over ten pounds frequently or twenty pounds occasionally. He concluded that claimant was unable to perform his past relevant work as a laborer or welder’s helper. The ALJ found that claimant’s RFC for the full range of light work was reduced by his inability to perform complex or detailed job tasks or work with more than minimal contact with the public or coworkers, and that he did not have any acquired work skills which were transferable to the skilled or semi-skilled work functions of other work. The ALJ found that, although the claimant’s additional nonexertional limitations did not allow him to perform the full range of light work, there were a significant number of jobs in the national economy which he could perform, such as assembly, cleaning crew, solderer, hand packager, and parking lot attendant. Having determined that there were jobs in the national economy that claimant could perform, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

#### IV. MEDICAL HISTORY OF CLAIMANT

Claimant contends that he has been unable to work since September 10, 1992 (R. 80)<sup>5</sup> due to back problems, high blood pressure, cirrhosis of the liver, pain and numbness in his legs, bleeding ulcers, mild mental retardation, and a neck injury. (R. 41, 130) He suffered a fracture in his neck on March 15, 1983 and was temporarily disabled. (R. 266) However, x-rays showed satisfactory alignment of the fracture fragments, and full range of motion returned. (R. 263-265) He was released to work in October of 1983, but was found to have a 12% permanent partial impairment. (R. 263-265)

In November of 1990, claimant slipped into a sump hole and injured his back. (R. 220) An MRI showed as follows: “[t]he lumbar vertebral bodies are normal in alignment without evidence of compression deformities or significant abnormal marrow signal activity,” but there was degenerative disk disease at the L4-5 and L5-S1 level, and a moderate herniated disk protrusion within the midline and just to the left of the midline at the L5-S1 level. (R. 156) X-rays showed intact cervical and lumbar vertebral bodies and normal cervical and lumbar curvature and vertebral alignment, no narrowing of any of the disc spaces or neural foramina, no gross arthritic or degenerative changes, and no evidence of a fracture, subluxation or spondylolisthesis. (R. 221) Claimant was diagnosed with lumbar strain, and medication was prescribed. (R. 159, 218)

In December of 1990, his physician, Dr. Kenyon Kugler, found claimant to be neurologically intact with a restricted range of motion of the back and lower extremities due to pain. (R. 159)

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<sup>5</sup> Claimant also claimed he has been unable to work since September 17, 1992 (R.130), and since November 8, 1990, the date of his “original injury.” (R. 126, 129) However, because claimant continued in substantial gainful activity until September 10, 1992 (R. 126), the Court finds that the September 10, 1992 date was the appropriate date for the ALJ to consider as when claimant claimed he became unable to work. (R. 16)

Physical therapy and a work hardening program were recommended, and the doctor stated that he would be able to return to "light duty" in a few weeks and heavy lifting in one or two months. (R. 159) Dr. Kugler saw him again in February of 1991, and he complained of continuing pain, but he was doing stretching and strengthening exercises and taking medication. (R. 157).

Claimant saw Dr. John Vosburgh in March and April of 1991, and was referred to physical therapy. (R. 260) He had an "excellent initial response" to the therapy, and his back gained almost full range of motion. (R. 260) By April 18, 1991, he was talking about retraining, perhaps to driving a taxi cab. (R. 260) He was released from care on May 2, 1991, and the doctor stated that he could do work that would not require frequent bending, stooping or lifting over twenty-five pounds and would permit him to alternately sit and stand throughout his work day. (R. 258)

On June 2, 1991, Dr. Lawrence Reed found that claimant was 41% permanently disabled for workers' compensation purposes, based on restricted motion in his spine, a herniated lumbar disc, and disturbance of station and gait. (R. 177) On October 8, 1991, Dr. Casey Truett found him 15% permanently disabled for workers' compensation purposes, noting that x-rays of the cervical spine were normal and x-rays of the lumbar spine showed only "very minimal degenerative changes at L5 and S1, with an extremely minimally narrowed disk space." (R. 163, 165)

On December 10, 1991, Dr. John Jennings reported that claimant was suffering gastric distress caused by alcohol abuse. (R. 306) On February 1, 1992, he was seen at the hospital for pain radiating down his back and into his legs. (R. 199) A CAT scan on February 6 showed diffuse disc bulging at L4-L5. (R. 205) Another scan on May 23, 1992 revealed disc degeneration from L4 to S1 respectively and a small midline bulging disc with probable small midline associated extruded fragments at L4-L5 and L5-S1. (R. 208).

On September 25, 1992, claimant reported that he had hurt his back and neck two weeks earlier while tearing down scaffolding and reinjured it lifting concrete. (R. 215, 255) X-rays showed an old healed fracture of the spinous process of C6 with smooth margins. The cervical spine was otherwise unremarkable, and there was no recent fracture or other abnormality. (R. 216)

On September 28, 1992, claimant was seen again and reported that his back pain was worse and his hip was numb. (R. 214) However, by October 2, 1992, he told the doctor he was mowing the lawn and the pain returned. (R. 211) The doctor treated him conservatively, suggested that he had a herniated nucleus pulposus at the lumbosacral level on the left, and reported on October 7, 1992 that he had responded to treatment "quite satisfactorily." (R. 255-256) However, on December 29, 1992, he was given an epidural steroid injection for continuing pain. (R. 225-226)

On January 26, 1993, a lumbar diskogram revealed that claimant had disc degeneration at L4-5, a posterocentrally herniated disc, and a degenerated, narrowed L5-S1 disc. (R. 229-234) On March 10, 1993, claimant underwent a bilateral L4, L5-S1 laminectomy with medial facetectomy, possible disc excision, and instrumentation with lateral mass fusion at L4-S1. (R. 236-252, 272) By April 1, 1993, he was doing walking exercises and had "gotten resolution of his back and leg symptoms." (R. 268) On April 29, 1993, the doctor told him he could stop wearing his back brace. (R. 268) By June 10, 1993, he was walking up to two miles a day and mowing the lawn. (R. 268)

Dr. John Atwood did a psychiatric evaluation of claimant on August 13, 1993. (R. 275-279) The doctor concluded that he was functioning in the dull normal range of intellectual abilities and should be able to perform and learn cognitive/intellectual tasks at a level slightly below that of same aged peers. (R. 278) The doctor stated that claimant could perform activities involving verbal skills at about the same level as he could tasks which involve visual-motor abilities. (R. 278) The doctor

stated that “[i]ndividuals of similar intellectual ability usually function best in unskilled or semiskilled occupations, which involve concrete relatively repetitive tasks. Some supervision is usually necessary except for tasks which have been well-practiced.” (R. 278).

On January 6, 1994, claimant once again saw a doctor for low back pain. (R. 295-296) On February 18, 1994, x-rays showed that his hardware for L4, L5-S1 was in good position, and there was no evidence for spondylolisthesis or abnormal mobility during flexion/extension. (R. 299).

## V. REVIEW

### A. Substantial Evidence

Claimant alleges the following errors by the ALJ:

- (1) The ALJ’s decision is not supported by substantial evidence;
- (2) The ALJ ignored the opinion of claimant’s treating physician;
- (3) The ALJ ignored the impact of claimant’s prior neck impairment;
- (4) The ALJ erred in his findings that claimant’s pain was not disabling and claimant was not credible; and
- (5) The ALJ did not submit proper hypothetical questions which incorporated all of his physical limitations to the vocational expert.

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

The ALJ pointed out that, on April 29, 1993, Dr. Hayes told claimant he could stop wearing his back brace, and, on June 10, 1993, claimant was walking up to 2 miles a day, exercising every other day, and cutting the yard. (R. 18) The ALJ also noted that physical examinations from October 5, 1993, to April 11, 1994, had been essentially normal. (R. 18)

However, the ALJ concluded that claimant's impairments of dull normal intelligence and status post laminectomy and fusion at L4-5 and L5-S1 were expected to interfere more than minimally with his ability to perform work-related activities. (R. 16) Claimant's status post laminectomy and fusion limited his ability to lift over ten pounds frequently or twenty pounds occasionally. (R. 18) The ALJ noted that Dr. Atwood had stated that claimant could tolerate work pressure if it did not require academic challenge, could sustain attention required for simple repetitive tasks, could avoid simple dangers, and, in work situations requiring assembly, could do better as he gained familiarity with the material. (R. 18) The ALJ found that claimant had slight restriction in activities of daily living, moderate difficulties in maintaining social functioning, often experienced deficiencies of concentration, persistence, or pace resulting in failure to complete tasks in a timely manner, and never experienced episodes of deterioration or decompensation in work or work-like settings. (R. 18) The ALJ found that claimant's dull normal intelligence limited his ability to perform complex or detailed job tasks or work with more than minimal contact with the public or co-workers. (R. 18)

The ALJ reviewed claimant's claim that he suffered disabling back and leg pain under the standard set out in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). In that case, the court discussed the factors in addition to medical test results that agency decision makers should consider when judging the credibility of subjective claims of pain greater than that usually associated with a particular impairment.

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

Id. at 165.

The ALJ noted that claimant testified at the hearing on May 31, 1994 that he could walk a half to one mile, sit for thirty minutes to one hour, stand for thirty minutes to one hour, and lift twenty-five to thirty pounds. (R. 18, 44-46) He stated that he could not reach or bend, his left arm is numb, and he has a sharp, stabbing pain in his back and legs. (R. 18-19, 44-46) He testified that he used to drink, but had not been drinking for a year. (R. 19, 52) During the day he watches television, and eats. (R. 19, 49-50) His medications help his pain and he drives about twenty miles a week to visit his mother. (R. 19, 37, 49-50) The ALJ noted that the claimant testified at the hearing that he could not make change, but when questioned regarding his workers' compensation, he gave the exact amount he received, the date he began receiving it, and how long he had received it, with no apparent confusion. (R. 19, 40-41) He stated on August 13, 1993, "I'm slow, but I'm not dumb." (R. 19, 279) The ALJ pointed out that claimant claimed that he had been unable to perform any type of work activity since September 10, 1992, but on June 10, 1993, Dr. Hayes noted that he was walking two miles a day, exercising every other day, and cutting the yard. (R. 19) The ALJ found that there was no medical evidence in the record to support claimant's contention that he had high blood pressure, cirrhosis of the liver, bleeding ulcers, and hepatitis-B. (R. 19)

The ALJ concluded that claimant's testimony was inconsistent with the record as a whole, and objective findings showed the ability to perform light work. (R. 20) He found that claimant had restricted his lifestyle, but these restrictions were self-imposed. (R. 20) The ALJ found that

claimant's allegations of inability to work due to back and leg pain were not credible to the extent alleged and not consistent with the record as a whole. (R. 20)

There is no merit to claimant's contentions that the ALJ's decision is not supported by substantial evidence. There is substantial evidence for the ALJ's conclusion that claimant has the RFC to do light work, reduced by his inability to do complex or detailed tasks and work with the public. Following his back surgery in March of 1993, he recovered well and was able to walk two miles a day and mow his lawn by June. (R. 268) While he complains that he can only sit, stand, and walk for short periods, this is not supported by any objective medical evidence. Much of the evidence he discusses is dated before the date he claims he became disabled, and the vast majority of his arguments go to the weight of the evidence. He argues the strength of the evidence in his favor and seeks to discredit the evidence the ALJ relied on. However, the court's limited scope of review precludes it from reweighing the evidence or substituting its judgment for that of the ALJ. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1500 (10th Cir. 1992); Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991). As long as substantial evidence supports the ALJ's determination, the Secretary's decision stands. 961 F.2d at 1500.

**B. Alleged Failure to Consider Opinion of Treating Physician**

There is no merit to claimant's contention that the ALJ erred when he did not mention the opinion of one of claimant's treating physicians, Dr. Vosburgh, and failed to give a reason for disregarding the doctor's records. It is true that the ALJ did not discuss the doctor's records, but there is nothing in those records to suggest that claimant was disabled after September 17, 1992. Although Dr. Vosburgh recommended surgery as early as 1991 (R. 260), Dr. Vosburgh treated claimant's back pain conservatively and recommended that he stop doing heavy labor work and do

work requiring infrequent bending or stooping and lifting of less than 25 pounds which allowed alternation of sitting and standing. (R. 258) The doctor's records relate to a period of time before claimant's 1993 surgery. The doctor's opinion does not refute the ALJ's conclusion that claimant could do light work after his surgery in 1993.

**C. Impact of Prior "Neck Impairment"**

There is no objective medical evidence to support claimant's contention that his prior "neck impairment" had a disabling impact. He did heavy labor for at least seven or eight years after he fractured his neck in 1983, and x-rays showed that the fracture fragments aligned well and full range of motion returned. (R. 263-265) To determine whether claimant's neck pain was disabling, the ALJ was required to examine the medical record and evaluate his credibility, and the subjective complaints of pain by themselves were insufficient to establish disability. Talley v. Sullivan, 908 F.2d 585, 587 (10th Cir. 1990). The medical records were not consistent with the claimant's nonmedical testimony as to the severity of his neck pain. Id. "To establish disabling pain without the explicit confirmation of treating physicians may be difficult." Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988). It has been recognized that "some claimants exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Frey v. Bowen, 816 F.2d 508, 517 (10th Cir. 1987).

**D. Credibility Regarding Pain Complaints**

There is no merit to claimant's contention that the ALJ erred in finding that his complaints of pain were not credible. Courts generally treat credibility determinations made by an ALJ as binding upon review. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not

upset such determinations when supported by substantial evidence.” Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990). The ALJ’s findings as to credibility were specifically articulated, and included the comments by doctors in 1993 that he was walking two miles a day and mowing the lawn, the lack of restrictions on physical activity imposed by doctors, and the lack of objective medical support for the claims of disabling pain.

**E. Hypothetical Questions**

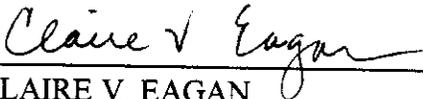
Finally, there is no merit to the claim that the ALJ did not submit proper hypothetical questions to the vocational expert which incorporated all of claimant’s physical limitations. It is true that “testimony elicited by hypothetical questions that do not relate with precision all of a claimant’s impairments cannot constitute substantial evidence to support the Secretary’s decision.” Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

Initially the ALJ established that the vocational expert had studied claimant’s record and heard his testimony. (R. 63) The ALJ’s hypothetical question assumed that claimant could do light and sedentary work limited to occasional stooping or bending and simple work with little public contact. (R. 65) It was only when the expert was asked to assume impairments that the ALJ properly deemed unsubstantiated that she found he could not work. (R. 68-78) These opinions, based on unsubstantiated assumptions, were not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993).

**VI. CONCLUSION**

The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is **AFFIRMED**.

DATED this 27<sup>th</sup> day of March, 1998.

  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

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

DATE 3-28-98

GRUPO CARBALLOY, S.A. DE )  
C.V., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
BORN INC. )  
 )  
Defendant. )

Case No. 97-CV-235-K

**FILED**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER OF DISMISSAL WITH PREJUDICE**

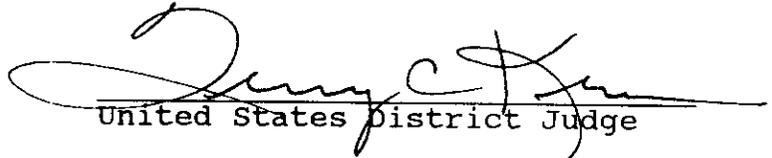
NOW this Court having reviewed the Stipulation of Dismissal with Prejudice filed by the parties, dismissing this action against the Defendant, Born Inc., with prejudice, in its entirety, the Court finds that the claims asserted against the Defendant Born Inc., should be, and are hereby dismissed with prejudice. This Order of Dismissal with Prejudice terminates this litigation.

IT IS SO ORDERED this 19 day of March, 1998.

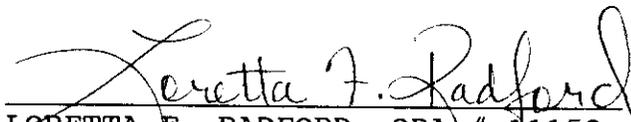
  
HONORABLE TERRY C. KERN  
Chief Judge, United States District Court  
for the Northern District of Oklahoma



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 5.41 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/llf

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

**F I L E D**

MAR 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CHEROKEE NATION OF OKLAHOMA, )

Plaintiff, )

vs. )

WILMA PEARL MANKILLER, )  
AETNA CASUALTY & SURETY )  
COMPANY and HARTFORD FIRE )  
INSURANCE COMPANY, )

Defendants. )

No. 96-CV-791-B ✓

ENTERED ON DOCKET  
DATE MAR 27 1998

J U D G M E N T

This action having come before the Court on determination of Motions to Dismiss or in the alternative for Summary Judgment filed by Defendants Aetna Casualty & Surety Company and Hartford Fire Insurance Company, and the Court having found the Summary Judgment Motions to be meritorious as reflected by the Order filed herewith,

IT IS THEREFORE ORDERED that Plaintiffs Cherokee Nation of Oklahoma and Cherokee Nation Enterprises take nothing from the Defendants, Aetna Casualty & Surety Company and Hartford Fire Insurance Company, that the action be dismissed on the merits as to those Defendants, and that the Defendants recover of the Plaintiffs their costs

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of action to be determined upon proper application under N.D. LR 54.1. The parties shall pay their own respective attorney's fees.

DATED THIS 26<sup>TH</sup> DAY OF MARCH, 1998.

  
THE HON. THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

MAR 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CHEROKEE NATION OF OKLAHOMA, )

Plaintiff, )

vs. )

WILMA PEARL MANKILLER, )

AETNA CASUALTY & SURETY )

COMPANY and HARTFORD FIRE )

INSURANCE COMPANY, )

Defendants. )

No. 96-CV-791-B /

ENTERED ON DOCKET  
DATE MAR 27 1998

**ORDER**

The Court has before it Defendant Aetna Casualty & Surety Company's ("Aetna") Motion for Judgment on the Pleadings filed January 28, 1998 (Docket #47), Motion for Summary Judgment, or in the alternative, Motion for Partial Summary Judgment (Docket #45) and Motion in Limine (Docket # 48). Also before the Court is Motion for Summary/Partial Summary Judgment Filed by Defendant Hartford Fire Insurance Company (Docket # 49), which adopts by reference the arguments and authorities presented by Aetna.

**BACKGROUND**

Plaintiff Cherokee Nation of Oklahoma ("Cherokee Nation") originally filed this action, seeking recovery herein of approximately \$300,000.00 in alleged improper

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severance payments made by Defendant, Wilma Pearl Mankiller (“Mankiller”), then Chief of the Cherokee Nation, to long-term employees who were believed to be targeted for termination by the incoming change of administration. Plaintiff seeks recovery from Mankiller personally and from Defendants' Aetna and Hartford Fire Insurance Company (“Hartford”) on fidelity bonds issued by them. Plaintiff also seeks punitive damages from the bond defendants for bad faith refusal to pay claims.

This Court initially addressed jurisdictional issues, during which time the question of whether Cherokee Nation was a proper party as to Aetna was raised. Plaintiff conceded that the fidelity bond written by Aetna under which Plaintiff seeks to recover \$218,663.10 was issued to Cherokee Outpost, Inc., now Cherokee Nation Enterprises (“CNE”) and not to Cherokee Nation. By Order of August 8, 1997, this Court granted Plaintiff until August 25, 1997, to join CNE as an additional party plaintiff. Aetna reserved the real party in interest defense in its answer filed shortly thereafter.

On August 25, 1997, CNE filed a Motion to Join Additional Party Plaintiff (“Docket # 35”) and attorney appearances (“Docket # 34”). The Court entered an order submitted with the motion granting same. At pretrial, CNE had never filed an amended complaint nor any pleading adopting the complaint filed by Cherokee Nation. Further, Cherokee Nation never filed an amended pleading and never asserted CNE’s claim had been assigned to it in any manner.

CNE, joined by Cherokee Nation, countered Aetna’s motion by reciting three positions, none of which excused the failure to file a complaint or join in the original

complaint.

Motions for judgment on the pleadings pursuant to Fed. R. Civ. P. 12.(c) have historically been viewed with disfavor. This is in keeping with the policy which favors litigants receiving a full and impartial hearing on the merits of their claims. See *Roemhild v. Jones*, 239 F.2d 492 (8th Cir.1957). Before the Court can address whether this policy should be invoked in a given situation, however, the parties must properly be before the Court.

In evaluating a motion for judgment on the pleadings, the court must view the pleadings in the light most favorable to and draw all inferences in favor of the nonmoving party, taking the well-pleaded facts alleged *in the complaint* as admitted; the court may not dismiss *the complaint* unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. (emphasis added) *Shechter v Comptroller of City of New York*, 79 F.3d 265 (C.A.2 N.Y.1996); *Revis v. Slocomb Industries, Inc.*, 765 F. Supp. 1212 (D.Del.1991).

In the case at bar, CNE filed no complaint, but relied upon the fact that an order was entered allowing it to be added as a party plaintiff to excuse compliance with the necessity of setting forth its claims against the defendant or defendants. Aetna properly answered the initial complaint of Cherokee Nation, denying any claim raised by that entity.

The Court addressed the unresolved status of the pleadings with the parties at pretrial held March 12, 1998, and solicited and obtained from counsel for CNE a commitment to file a pleading which would appropriately place CNE before this Court.

CNE filed an amended complaint on March 13, 1998, ratifying and affirming the cause of action previously set forth in the complaint filed by the Cherokee Nation. Aetna filed an answer on March 23, 1998, also adopting the positions taken in its original answer to the complaint filed by Cherokee Nation. The Court therefore finds the motion for judgment on the pleadings to now be moot.

#### SUMMARY JUDGMENT STANDARD

The Court next considers the motions 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 (10th Cir. 1986). In *Celotex*, the court stated: "The 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 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." 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). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

\* \* \*

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

*Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

#### STATEMENT OF UNCONTROVERTED FACTS <sup>1</sup>

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<sup>1</sup>Pursuant to N.D. LR. 56.1 B., Hartford and Aetna's statements of undisputed facts are deemed admitted in that Cherokee Nation wholly failed to state any grounds or cite to any evidence or any reference in the record to controvert any fact asserted by Hartford or Aetna. A mere recitation that a fact is controverted, without supporting authority, is not sufficient to create a controverted fact, particularly where Hartford and Aetna have supported their statements of facts with references to the record and evidence in the case. The Court nevertheless reviewed the statements of undisputed facts and finds them to be substantially supported by the evidentiary material submitted. This order sets forth those facts deemed relevant for background purposes, unless otherwise referenced herein.

The Court finds the following facts to be uncontraverted:

1. Mankiller was Principal Chief of the Cherokee Nation from 1985 to 1995. She had previously served as the elected Deputy Chief beginning in 1983 under former Chief Ross Swimmer ("Swimmer") until his resignation in 1985, at which time she assumed the duties of Principal Chief. She was then elected Chief in 1987.
2. Aetna issued an "Employee Dishonesty Policy" to the predecessor of CNE in 1995.<sup>2</sup> CNE is a corporate entity separate and distinct from Cherokee Nation. One hundred percent of its stock is owned by Cherokee Nation. CNE is controlled by a Board of Directors.
3. Mankiller did not seek re-election at the end of her third term. Joe Byrd ("Byrd") was elected to be her successor. In early August, 1995, prior to the change in administration, CNE's Board of Directors agreed to terminate the working relationships of some of the current staff. The contract of CEO Tommy Thompson was canceled and "bought out". The Board also approved the issuance of severance pay to four other departing employees. The Board's action was done "for the best long term interest of [CNE] and to provide a cohesive transition with the incoming administration and new Board". It was widely believed the new administration intended to replace certain employees and officials who had supported Byrd's opponent.
4. Mankiller was an incorporator of CNE and was a member of the Board from its inception. As Chief, she also made appointments to the Board.

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<sup>2</sup>All references will be to CNE rather than the predecessor corporation, Cherokee Nation Outpost, Inc.

5. Mankiller maintains she did not believe that she was acting illegally or violating any policy or regulation, tribal or federal, in her actions as a Board member regarding the authorization and issuance of the severance payments. She was aware of such payments being made in the past, under the Swimmer administration, for certain departing employees. She was aware of no policy or procedure prohibiting severance pay.
6. Mankiller maintains she did not intend to cause loss to CNE, but believed she was acting in its best interests and the best interests of the targeted employees by allowing them to "get out of the way".
7. Aetna was first notified of an alleged loss via correspondence of September 6, 1995, from CNE's counsel "with regard to unauthorized payments made by former Chief Wilma Mankiller...". Aetna was directed to communicate with CNE through its counsel regarding the purported claim.
8. Aetna responded on September 13, 1995, by acknowledging receipt of the "Notice of Potential Loss", providing a Proof of Loss form for the insured to fill out and submit, and requesting basic information about the claim.
9. Aetna received the Proof of Loss form on December 5, 1995. Included with it were copies of severance checks, correspondence, and other documents, but none of the information requested in Aetna's previous letter.
10. Aetna responded to the submission by letter dated December 11, 1995, enclosing a copy of its September 13 letter and again requesting the basic information previously sought. This letter also referenced concerns regarding coverage based upon the

definitions and terms of the policy, which excluded employee benefits from coverage. The letter also reserved Aetna's right to raise other coverage issues as and when they became apparent. The letter also advised any action taken by Aetna on the claim was subject to a full reservation of rights.

11. The information requested by Aetna was never provided. A lawsuit was then instituted by Cherokee Nation in Tribal Court, seeking contractual and punitive damages for "bad faith" breach of the insurance contract.

12. Aetna never formally denied the claim but states the subsequent litigation has uncovered additional defenses to coverage.

13. Hartford issued a commercial crime insurance policy to Cherokee Nation prior to 1995.

14. CNE was not a named insured under the Hartford policy at the time of the alleged loss.

15. Hartford received its first notice of a claim by letter from Cherokee Nation counsel dated September 13, 1995, purporting to provide Hartford with "notice of loss with regard to unauthorized payments made by Wilma Mankiller".

16. On September 20, 1995, Hartford's claims manager responded to the September 13 letter, requesting facts, documents and information necessary to review and evaluate the alleged loss. Information sought included, among other things, copies of employment applications of the employees alleged to have received the severance pay, W-2 forms, copies of the last pay stubs received by the employees and the last known addresses and

telephone numbers of each employee. A Proof of Loss form was also included with detailed instructions regarding its completion and a request for its prompt return.

17. On or about December 4, 1995, the Proof of Loss form was returned, signed and dated November 28, 1995. Most of the requested information was not provided.

18. On December 7, 1995, Hartford was notified that Cherokee Nation had filed litigation against Mankiller in United States District Court for the Eastern District of Oklahoma. Hartford was asked to participate in a settlement conference in that litigation.

19. On December 18, 1995, Hartford again requested basic information regarding the claim as set forth in its December 4 letter.

20. On December 22, 1995, Hartford advised Cherokee Nation that as a result of not having been provided with an opportunity to conduct an investigation into the claim, Hartford could not participate in a settlement conference.

21. Hartford again requested information not previously provided by letter dated February 2, 1996. Hartford outlined in detail the information needed and also outlined coverage issues, including Hartford's position that there would be no coverage if Mankiller's actions were not committed with the manifest intent to cause the Cherokee Nation a loss or if the severance payments constituted employee benefits. Hartford advised it reserved all rights as to coverage issues pending further investigation.

22. Hartford did not receive the information requested prior to Cherokee Nation instituting this litigation.

23. Hartford has never formally denied the claim but has determined coverage issues

raised are defensible.

24. Cherokee Nation has never taken any action to recover the severance payments from the individual employees who received the payments.

#### LEGAL ANALYSIS AND CONCLUSION

Aetna and Hartford were sued for breach of contract and bad faith by their respective insureds. They stand in identical positions with respect to the claims made by Plaintiffs except for the identity of the insureds and the amount of coverage. Hartford's insured is Cherokee Nation and the coverage limit is \$500,000.00. Aetna's insured is CNE with a coverage limit of \$100,000.00.<sup>3</sup>

Aetna's first proposition, adopted by Hartford, urges Cherokee Nation's claims are not covered by the clear and unambiguous terms of the policy. Aetna urges that under the fidelity policy issued, there are three reasons plaintiff's claims are not covered under the policy provision titled "Employee Dishonesty". The first is that employee benefits earned in the normal course of employment are excepted and that the severance payments made fall within that exception. Aetna's second argument is that no dishonest act was committed, thereby removing the payments from coverage. Aetna's last assertion is that Mankiller did not act with the manifest intent to cause a loss to the insured. The Court finds the first issue dispositive.

Each policy provides a list of employee benefits earned in the normal course of employment which are excluded from the definition of financial benefits which constitute

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<sup>3</sup>CNE's total claim against Aetna based upon the severance pay paid to CNE employees is \$218,663.10.

covered acts. Aetna cites *J.B.Lansing Sound, Inc., v. National Union Fire Insurance Company of Pittsburg PA.*, 801 F.2d 1560 (9th Cir. 1986) in support of its proposition that severance pay, though not listed specifically, falls into this category. This Court agrees with the ultimate conclusion, but finds *Lansing* is inapplicable. In *Lansing*, the court dealt with exclusionary language similar to that found in the Aetna and Hartford policies. That policy however specifically listed commissions in its list of exclusions and the issue was whether fraudulently earned commissions would be considered earned in the normal course of business.

The district court cases cited by Aetna are more on point. In *Morgan, Olmstead, Kennedy & Gardner, Inc., v. Federal Insurance Co., et. al.*, 637 F. Supp. 973 (S.D.N.Y.1986), the issue was whether profit sharing fell within the definition of "other emoluments" as set forth in the exclusionary language of the challenged policy. The court held that it did and granted summary judgment for the insurance defendant. The *Morgan* court further held that the policy language was unambiguous even though the specific wording of "profit sharing" was not set forth in the listed exclusions. In this case, we address the meaning of severance pay.

Black's Law Dictionary 1232 (5th ed.1979), defines severance pay as "[p]ayment by an employer to employee beyond his wages on termination of his employment. Generally, it is paid when the termination is not due to employee's fault and many union contracts provide for it." See *Mace v. Conde Nast Publications, Inc.*, 237 A.2d 360,361 (Conn. 1967). The list of excluded employee benefits in both policies includes "salaries,

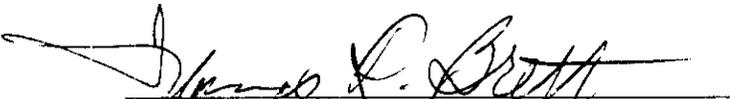
commissions, fees, bonuses, promotions, awards, profit sharing or pensions". This Court finds that severance pay would be included as a bonus or an award in that it constitutes a payment made to reward long term service in the normal course of business. Such payment is excluded under the unambiguous terms of the policies.

Aetna and Hartford additionally move for summary judgment on plaintiffs' bad faith claims. It necessarily follows from the forgoing that these too should be sustained.

IT IS THEREFORE ORDERED that Hartford and Aetna's Motions for Summary Judgment are granted. All other pending motions are rendered moot by this Order. The matter will proceed to trial as to the remaining defendant as scheduled on April 20, 1998.

A separate judgment in keeping with this Order shall be filed contemporaneously.

Dated this 26<sup>th</sup> day of March, 1998.

  
\_\_\_\_\_  
THE HON. THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

MAR 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

HILTI, INC., )  
)  
Plaintiff, )  
)  
vs. )  
)  
ARROW ABRASIVES LIMITED, )  
)  
Defendant. )

Case No. 98-CV-229-BU

ENTERED ON DOCKET

DATE 3-27-98

**ORDER**

On March 24, 1998, Defendant removed this action from the District Court of Tulsa County, Oklahoma, pursuant to 28 U.S.C. § 1441, et seq., and Rule 81 of the Federal Rules of Civil Procedure. In its Notice of Removal, Defendant asserted that the Court has jurisdiction over this action by reason of diversity of citizenship and amount in controversy pursuant to 28 U.S.C. § 1332.

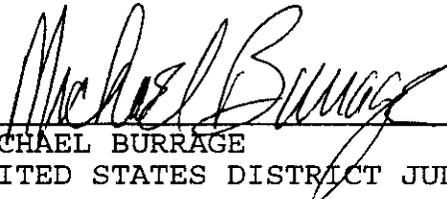
In order for a federal court to have original jurisdiction in a diversity case, the amount in controversy must exceed \$75,000.00. 28 U.S.C. § 1332(a). The amount in controversy is generally determined by the allegations in the complaint, or, where they are not dispositive, the allegations in the notice of removal. Laughlin v. Kmart Corporation, 50 F.3d 871, 873 (10th Cir.), cert. denied, 116 S.Ct. 174 (1995). "The burden is on the party requesting removal to set forth, in the notice of removal itself, the "underlying facts supporting [the] assertion that the amount in controversy exceeds [\$75,000]." Id. (quoting Gaus v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992) (emphasis in original)). Furthermore, there is a presumption against removal jurisdiction. Id.

In the instant case, Plaintiff's Petition does not set forth allegations which establish the requisite jurisdictional amount. Under each of the three theories of liability set forth in the Petition, Plaintiff merely alleges that it has sustained damages in excess of \$10,000.00. Consequently, Defendant bears the burden of actually proving the facts to support the jurisdictional amount. Gaus, 980 F.2d at 566-67. Here, Defendant, in the Notice of Removal, has not offered any underlying facts to support the Court's exercise of diversity jurisdiction. Defendant has only alleged in the Notice of Removal that it "is informed and believes . . . that the total actual, incidental and consequential damages sought in the State Court Action are in excess of Seventy-Five Thousand Dollars (\$75,000.00)." This conclusory allegation does not, however, satisfy Defendant's burden of setting forth, in the removal notice itself, the underlying facts to establish the requisite amount in controversy.

Section 1447(c) of Title 28 of the United States Code provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). In the instant case, the face of Plaintiff's Petition does not affirmatively establish the jurisdictional amount and the Notice of Removal does not set forth specific facts to establish that there is more than \$75,000.00 at issue in this case. Thus, the Court finds it lacks subject matter jurisdiction over this matter. In accordance with 28 U.S.C. § 1447(c), the Court hereby **REMANDS** this matter to state court. The Clerk of the Court is directed to mail a certified copy of this

order to the Clerk of the District Court of Tulsa County, Oklahoma.

ENTERED this 20<sup>th</sup> day of March, 1998.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

BRENDA MONROE, as mother, next )  
of kin and Personal )  
Representative for the )  
Estate of LEANNA BETH HAND, )  
deceased, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MARK WILLARD and WILLARD )  
ENTERPRISES, INC. d/b/a )  
COLORADO CHOICE MEAT COMPANY, )  
and JOHN DOES ONE THROUGH )  
TEN, )  
 )  
Defendants. )

**FILED**

MAR 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 98-CV-116-BU

ENTERED ON DOCKET

DATE 3-27-98

**ORDER**

This matter came before the Court for hearing on March 25, 1998 on Plaintiff's Motion to Remand and Request for Attorneys' Fees. Upon due consideration of the parties' submissions and the oral statements and arguments of counsel, the Court makes its determination.

On February 12, 1998, Defendants, Mark Willard and Willard Enterprises, Inc., removed this action from the District Court of Tulsa County, State of Oklahoma, pursuant to 28 U.S.C. § 1446. In their Notice of Removal, Defendants asserted that this Court has subject matter jurisdiction over this action by reason of diversity of citizenship and amount in controversy pursuant to 28 U.S.C. § 1332(a)(1).

In her motion, Plaintiff contends that this matter should be remanded to state court on the basis that there is not complete diversity of citizenship between the parties. According to

Plaintiff, Defendant, Willard Enterprises, Inc., is incorporated in both Oklahoma and Texas. Because a corporation, for diversity purposes, is deemed to be a resident in any state by which it has been incorporated, see, 28 U.S.C. § 1332(c)(1), Plaintiff contends that Defendant is an Oklahoma resident. As Plaintiff is likewise an Oklahoma resident, she asserts that the Court lacks subject matter jurisdiction over this case.

In addition, Plaintiff contends that complete diversity of citizenship does not exist because Defendant, Sterling Williams, is an Oklahoma resident. Although Plaintiff acknowledges that a final default judgment was entered against Defendant, Sterling Williams, in state court, she maintains that removal is not proper because the default judgment does not constitute a voluntary dismissal. According to Plaintiff, only a voluntary dismissal or a fraudulent joinder of a resident defendant escapes the application of the general rule that diversity jurisdiction is determined at the time of the petition and at the time of removal. Because there is no issue as to Defendant's presence in the lawsuit and the default judgment was not a voluntary dismissal, the general rule applies and diversity jurisdiction does not exist.

Defendants, in response, state that Defendant, Willard Enterprises, Inc., is not incorporated in two states. Rather, they state there are two separate corporations, one incorporated in Oklahoma and one incorporated in Texas. Defendants assert that the corporations maintain separate corporate minutes, separate bank accounts and separate tax identification numbers. Defendants

assume Plaintiff is seeking to recover against the Texas corporation as the Oklahoma corporation was not in existence at the time of the alleged incident in this case. Defendants states that if Plaintiff makes its intention clear that it is suing the Oklahoma corporation, then it will concede to a remand of this case.

Despite the fact that Defendant, Sterling Williams, was named in the lawsuit, Defendants contend that removal is proper because the default judgment is final and Defendant is no longer a part of the lawsuit. Defendants assert that the default judgment is akin to a voluntary dismissal by Plaintiff.

The Court concludes that Defendants have failed to demonstrate diversity of citizenship. Upon inquiry from the Court, Plaintiff indicated that even if two separate corporations named Willard Enterprises, Inc. existed, she was suing both corporations. Plaintiff represented and the record reflects that she obtained service of Willard Enterprises, Inc. by serving Mark Willard. Defendants conceded that Mr. Willard was service agent for both corporations. Because it appears that Plaintiff is suing both corporations and has obtained service of process upon both corporations, the Court finds that complete diversity of citizenship does not exist between the parties.

Likewise, the Court finds that the entry of default judgment against Defendant, Sterling Williams, did not permit removal of this case. In an action against a resident and a nonresident defendant, the action is removable if the plaintiff voluntarily

dismisses the action against the resident defendant. Powers v. Chesapeake & Ohio Railway, Co., 169 U.S. 92, 98, 18 S.Ct. 264, 266, 42 L.Ed. 673 (1898). If the resident defendant is involuntarily dismissed from the action, the case is not removable. Lathrop, Shea & Henwood Co. v. Interior Construction and Improvement Co., 215 U.S. 246, 251, 30 S.Ct. 76, 78, 54 L.Ed. 177 (1909); DeBry v. Transamerica Corp., 601 F.2d 480, 488 (10<sup>th</sup> Cir. 1979). Contrary to the arguments of Defendants, the Court concludes that the default judgment was not a voluntary act on the part of Plaintiff. New England Explosives Corporation v. Maine Ledge Blasting Specialist, Inc., 542 F. Supp. 1343, 1347 n. 7 (D. Me. 1982); Burke v. General Motors Corp., 492 F. Supp. 506, 508 (N.D. Ala. 1980); Higgins v. Yellow Cab Co., 68 F. Supp. 453, 454 (N.D. Ill. 1946). Therefore, because the default judgment was not a voluntary act of Plaintiff, the Court finds that diversity jurisdiction is lacking and remand is required.<sup>1</sup>

In her motion, Plaintiff requests an award of attorneys' fees based upon Defendants' improper removal. Plaintiff contends that Defendants' lack of candor concerning the incorporation of Willard Enterprises, Inc., justifies an award of attorneys' fees. In support of her request, Plaintiff cites to 28 U.S.C. § 1447(c), which provides that "[a]n order remanding the case may require

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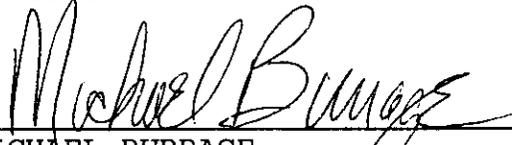
<sup>1</sup> While the parties do not dispute that the default judgment was final, the Court finds this of no consequence to its ruling. Self v. General Motors Corp., 588 F.2d 655, 658 (9<sup>th</sup> Cir. 1978); Abels v. State Farm Fire and Casualty Co., 694 F. Supp. 140, 145 (W.D. Pa. 1988); Jenkins v. Nat. Union Fire Ins. Co. of Pennsylvania, 650 F. Supp. 609, 614-15 (N.D. Ga. 1986).

payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c).

Upon review, the Court declines to award attorneys' fees. The Court does not believe that Defendants were not candid with the Court in their Notice of Removal. It appears that Defendants in good faith believed that the Texas and Oklahoma corporations were separate entities and that Plaintiff was suing the Texas corporation because the incident at issue occurred prior to incorporation of the Oklahoma corporation.

Accordingly, Plaintiff's Motion to Remand (Docket Entry #3-1) is GRANTED and Plaintiff's Request for Attorneys' Fees (Docket Entry #3-2) is DENIED. The Clerk of the Court is DIRECTED to effect the transfer of this case to the District Court for Tulsa County, State of Oklahoma.

ENTERED this 26<sup>th</sup> day of March, 1998.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

MAR 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MIDWEST MUTUAL INSURANCE )  
COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
LLOYD A. SCHERWINSKI and RETA )  
M. SCHERWINSKI, )  
 )  
Defendants. )

Case No. 97-CV-1125-BU

**ORDER**

This matter came on for hearing before the Court on March 26, 1998 upon Defendants' Motion to Dismiss for Failure to State a Claim and Alternative Motion to Compel Arbitration and Stay This Action. As stated by the Court at hearing, the Court concludes that Plaintiff's claims fall within Section 11.7 of the Stock Purchase Agreement and that a stay of these proceedings, rather than dismissal, is appropriate.

Accordingly, the Court ORDERS as follows:

1. Defendants' Motion to Dismiss for Failure to State a Claim (Docket Entry #4-1) is DENIED.
2. Defendants' Motion to compel Arbitration (Docket Entry #4-2) is GRANTED.
3. Defendants' Motion to Stay This Action (Docket Entry #4-3) is GRANTED.
4. The Clerk of the Court is DIRECTED to administratively close this matter in his records pending resolution of the arbitration proceedings. The parties are DIRECTED to notify the

Court when resolution of the arbitration proceedings has occurred so that the Court may reopen these proceedings, if necessary, for final resolution of the action.

ENTERED this 26<sup>th</sup> day of March, 1998.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 3-27-98

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

THOMAS D. LUCAS,  
SSN: 444-74-0192

Plaintiff,

v.

KENNETH S. APFEL, Commissioner  
of Social Security Administration,<sup>1/</sup>

Defendant.

MAR 26 1998

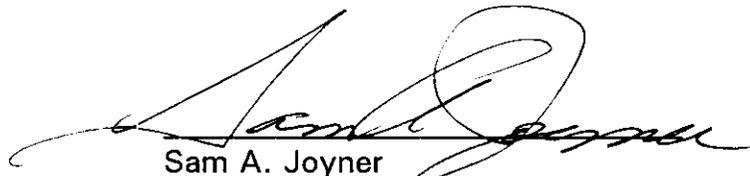
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 97-C-292-J ✓

**JUDGMENT**

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

It is so ordered this 26th day of March 1998.

  
Sam A. Joyner  
United States Magistrate Judge

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<sup>1/</sup> 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.

ENTERED ON DOCKET

DATE 3-27-98

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

**FILED**

MAR 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

THOMAS D. LUCAS, )  
SSN: 444-74-0192 )

Plaintiff, )

v. )

KENNETH S. APFEL, Commissioner )  
of Social Security Administration,<sup>1/</sup> )

Defendant. )

No. 97-C-292-J ✓

**ORDER**<sup>2/</sup>

Plaintiff, Thomas D. Lucas, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.<sup>3/</sup> Plaintiff asserts that the Commissioner erred because (1) the ALJ failed to give appropriate weight to the opinions of the physicians who treated Plaintiff, (2) the ALJ noted that numerous records related to a workers' compensation claim (3) the ALJ relied on one of Plaintiff's physician's statements that Plaintiff could perform "light work" but ignored "clinical findings and laboratory tests" that Plaintiff is permanently disabled, and (4)

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<sup>1/</sup> 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.

<sup>2/</sup> 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.

<sup>3/</sup> Administrative Law Judge James D. Jordan (hereafter "ALJ") concluded that Plaintiff was not disabled on April 22, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on February 28, 1997. [R. at 5].

the testimony of the vocational expert supports a finding of disability if the opinions of the treating physician's is not ignored. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

### **I. PLAINTIFF'S BACKGROUND**

Plaintiff was born June 10, 1959. [R. at 33]. Plaintiff testified that he attended high school until the eleventh grade. [R. at 33]. Plaintiff testified that he has a drivers license, that the farthest he had recently driven was two weeks before the hearing when he drove to Newark, Texas, and that he had driven to the hearing that morning. [R. at 37-38].

Plaintiff testified that he can no longer work because he injured his back and still has muscle spasms, pain, and tingling in his back. [R. at 44-49]. Plaintiff additionally testified that he was legally blind in his right eye, and had difficulty seeing out of his left eye. [R. at 49].

Plaintiff testified that in the three months prior to the hearing before the ALJ the farthest he had walked was approximately one block. He additionally stated that he could probably walk five miles but he would experience significant pain. [R. at 52]. Plaintiff noted that he could stand for only five to twenty minutes. [R. at 61].

A Residual Functional Capacity Assessment completed December 22, 1994, provides that Plaintiff can lift 50 pounds occasionally and 25 pounds frequently. In addition, Plaintiff can stand or walk six hours in an eight hour day, and sit six hours in an eight hour day. The doctor noted that Plaintiff's pain did not further limit his RFC. [R. at 91].

In a report submitted to the Social Security Administration, dated November 24, 1994, Plaintiff noted that he shopped once each week with his wife (but was unable to carry the groceries), that he emptied and burned the trash one time each week, that he fed the chickens, that he fished approximately once or twice each month, and that he drove his car two or three times each week. [R. at 119]. Plaintiff additionally noted that it was difficult to put on his shoes and that he could not rake or mow the yard. [R. at 126].

Plaintiff was injured in 1991 in an on-the-job injury. Plaintiff saw Mark A. Hayes, M.D. on Plaintiff 19, 1993. [R. at 134]. He reported that Plaintiff had first degree spondylolisthesis with instability around disk L4-5. He recommended an awake lumbar diskogram, which was done on October 19, 1993. [R. at 135]. Plaintiff had surgery on November 3, 1993. Plaintiff had a fusion of the L4-5, and L5-S1. In addition, Plaintiff had a pedicle screw segmental fixation, a right iliac crest bone graft, and a decompressive laminectomy. [R. at 150].

On November 29, 1994, Dr. Hayes reported

Tom Lucas is in for follow up visit. He is finished with his therapy at this time. He has plateaued out in the treatment from therapy. At this time though, I have reassessed his condition. He has some back pain and if he had a job where he could go back to what he was doing light duty or light work, it would be satisfactory. However, he is only trained for heavy manual labor. He does not have a high school diploma, probably is not functionally literate and has one eye. His ability to be retrained for a job in which he will be competitive is not that high. I think he should be considered for permanent total disability.

[R. at 150].

Plaintiff's condition was assessed by Leroy E. Young, D.O., on May 10, 1994. He concluded that Plaintiff had sustained a five percent permanent partial impairment to his whole body and was in need for further medical treatment for at least six months. [R. at 177].

Lawrence A. Reed, M.D. noted that Plaintiff could sit for ten minutes, stand for ten minutes, and in an eight hour day, sit or stand for a total of two hours. He noted that Plaintiff needed to walk approximately 90 minutes each day in increments of ten minutes at a time, and that Plaintiff needed to lie down frequently. [R. at 179-186].

Plaintiff was examined by William R. Gillock, M.D., on June 10, 1992. He concluded that Plaintiff had no permanent impairment to his groin, abdomen, bladder or back. [R. at 191-198]. He noted that Plaintiff was not temporarily totally disabled. [R. at 191].

On July 3, 1995, Plaintiff's doctor noted that Plaintiff had taken Soma from a friend and that it had helped. His doctor noted that Plaintiff could take one every two or three days, but that a supply of 30 should last him for more than two months. [R. at 209]. Plaintiff's doctor reported that Plaintiff was doing "okay," that his fusion "looks great" and had solidly healed. "He really has no donor site pain or hardware pain that I can tell. He stands satisfactorily. He has a good lumbar lordosis." [R. at 209].

An X-ray on April 29, 1993 of Plaintiff's lumbar spine was interpreted as having intervertebral disc spaces well maintained and vertebral body heights normal. Plaintiff's alignment was reported as good. [R. at 215].

Plaintiff was evaluated by LDH Consultants in connection with his Workers' Compensation claim on March 25, 1996. [R. at 240]. They noted that Plaintiff could sit or stand for 10-15 minutes, and walk for 15-20 minutes. They additionally noted that Plaintiff fed the animals on his property by using a one gallon bucket of water that he refilled several times. [R. at 242]. LDH noted that Plaintiff had previously applied for Social Security on two occasions but had been turned down. Based on Plaintiff's limitations and his educational restrictions, the consultants concluded that Plaintiff was not a viable candidate for retraining and would have difficulty returning to the competitive labor market. [R. at 243].

## **II. SOCIAL SECURITY LAW & STANDARD OF REVIEW**

The Commissioner has established a five-step process for the evaluation of social security claims.<sup>4/</sup> 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 . . . .

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<sup>4/</sup> 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).

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

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

42 U.S.C. § 423(d)(2)(A).

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

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

"The finding of the Secretary<sup>5/</sup> 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 determined that Plaintiff was restricted to doing light or sedentary work. Although the ALJ had a vocational expert testify at the hearing, the ALJ did not rely on any vocational expert testimony in concluding that Plaintiff was not disabled. The ALJ noted that Plaintiff had back problems and recognized that Plaintiff was legally blind in one eye. The ALJ found that Plaintiff was not disabled based on the

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<sup>5/</sup> 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."

Grids.<sup>6/</sup> The ALJ additionally applied Social Security Regulation 85-15 with respect to Plaintiff's visual acuity problems.

#### IV. REVIEW

##### **SSR 85-15<sup>7/</sup>**

The record clearly indicates that Plaintiff has a severe visual impairment in one eye. Plaintiff's records indicate that his eyesight in that eye is either 20/200 or 20/400. The ALJ found that Plaintiff was limited, due to exertional limitations to the performance of either light or sedentary work. The ALJ additionally noted that Plaintiff was "further limited by visual acuity." [R. at 17]. The ALJ referred to Social Security Regulation 85-15 ("SSR 85-15"), and concluded that as long as Plaintiff retained visual acuity sufficient to handle and work with large objects and avoid ordinary hazards in the workplace, a substantial number of jobs existed which Plaintiff could perform in the exertional levels. [R. at 19]. The ALJ also noted that Plaintiff had no transferrable skills and limited education. Concluding that Plaintiff could perform light and sedentary work, and that SSR 85-15 applied, the ALJ applied the Grids and concluded that Plaintiff was not disabled.

The flaw underlying the ALJ's conclusion is that SSR 85-15 is inapplicable to cases in which the claimant has an exertional and non-exertional impairment. In this case, the ALJ concluded that Plaintiff had an exertional impairment and was limited

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<sup>6/</sup> The Medical-Vocational Guidelines, commonly referred to as the "Grids," are located at 20 C.F.R. Pt. 404, Subpt. P, App. 2.

<sup>7/</sup> Plaintiff does not raise the applicability of SSR 85-15 in his list of errors. The Court addresses this issue *sua sponte* because the application by the ALJ of SSR 85-15 is a fundamental error.

to light and sedentary work. 20 C.F.R. § 404.1569a. However, the ALJ also found that Plaintiff had a non-exertional impairment of vision loss. Because the ALJ found both an exertional and non-exertional impairment, the ALJ was precluded from relying on SSR 85-15. The ALJ should have consulted a vocational expert in determining whether or not Plaintiff was disabled.

The title of SSR 85-15 clearly indicates that it applies when only non-exertional impairments are found. The title provides "Capability to do other Work – the Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments." See SSR 85-15 (emphasis added). In addition, the rule contemplates application when a claimant only has nonexertional impairments. The policy statement provides that "[g]iven that no medically determinable impairment limits exertion, the RFC reflecting the severity of the particular nonexertional impairment(s) with its limiting effects on the broad world of work is the first issue." SSR 85-15 at p. 2 (emphasis added). See also Roberts v. Shalala, 66 F.3d 179, 183 (9th Cir. 1995) ("SSR 85-15 has no application to Roberts because she claims both exertional and nonexertional impairments. . . .").<sup>8/</sup>

The Court concludes that the ALJ's reliance on the Grids in conjunction with SSR 85-15 in this case does not constitute substantial evidence to support the ALJ's decision. On remand, the ALJ should present the Plaintiff's limitations to a vocational

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<sup>8/</sup> In addition, SSR 85-15 provides that "a finding of disability could be appropriate in the relatively few instances in which the claimant's vocational profile is extremely adverse, *e.g.*, closely approaching retirement age, limited education or less, unskilled or no transferable skills, and essentially a lifetime commitment to a field or work in which good vision is essential." In this case, the ALJ concluded that Plaintiff had no transferable skills, and a limited education.

expert to determine whether or not a substantial number of jobs exist in the national economy that Plaintiff can perform.

### Treating Physician

Plaintiff asserts that the ALJ improperly evaluated the record and the opinions of Plaintiff's treating physician. Plaintiff argues that the opinions of physicians who treated Plaintiff should be accorded greater weight than the opinion of an examining physician.

Plaintiff is correct, 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). 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). However, if an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984).

Contrary to Plaintiff's assertion, however, the ALJ in this case did rely on the opinion of one of Plaintiff's treating physicians. The ALJ noted that Plaintiff's surgeon, Dr. Hayes, who operated on and treated Plaintiff, observed on November 29, 1994, Plaintiff was doing okay. He noted that although Plaintiff had some back pain he could do "light work." However, he concluded that because Plaintiff was trained solely for

heavy labor that Plaintiff should probably be considered for disability and declared disabled. [R. at 150].

An ALJ is not required to accept the vocational conclusions of a treating physician as binding. The ALJ evaluates the medical findings of the treating physician and then applies those findings to determine whether a substantial number of jobs exist in the national economy that the claimant can perform. In this case, Plaintiff's treating physician appears to indicate that Plaintiff can perform some level of work, but the physician concludes that because Plaintiff previously performed only heavy work, that Plaintiff was probably disabled. The ALJ is not required, under the treating physician rule, to accept the Plaintiff's doctors conclusions regarding vocational status. The ALJ properly evaluated the doctor's decision with respect to Plaintiff's exertional capability of performing work.

Furthermore, the ALJ gave greater weight to the opinion of Plaintiff's surgeon than to the opinions of some of the other doctors in the record. This is entirely appropriate. See, e.g., Goatcher v. United States Dep't of Health & Human Services, 52 F.3d 288 (10th Cir. 1995); 20 C.F.R. § 404.1527(d)(2)-(6).

#### **Workers' Compensation Claim**

Plaintiff additionally notes that the ALJ, in the ALJ's opinion, stated that some of Plaintiff's records related entirely to a workers' compensation claim. Plaintiff does not specify the error which Plaintiff complains was committed by the ALJ.

The ALJ noted that numerous records were related to Plaintiff's workers' compensation claim. The ALJ observed that the methods of determining disability in

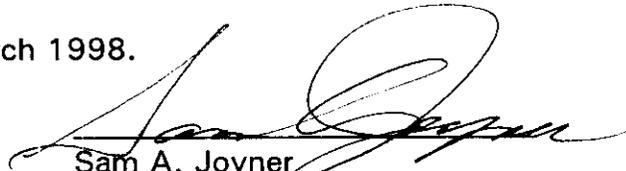
the workers compensation court differed from the social security standards. As such, findings of disability can be discounted. See, e.g., 20 C.F.R. § 404.1504 ("A decision by any nongovernmental agency or any other governmental agency about whether you are disabled or blind is based on its rules and is not our decision about whether you are disabled or blind. We must make a disability or blindness determination based on social security law. Therefore, a determination made by another agency that you are disabled or blind is not binding on us."). The record does not indicate that the ALJ ignored relevant medical evidence.

#### Vocational Expert

Plaintiff further asserts that if all of Plaintiff's allegations are taken as true, the vocational expert supports finding the Plaintiff disabled. However, an 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. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). See also Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995) (ALJ need include only those limitations in the question to the vocational expert which he properly finds are established by the evidence).

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

Dated this 26 day of March 1998.

  
Sam A. Joyner  
United States Magistrate Judge



officer approached David Willie Harjo.<sup>1/</sup> A crowd gathered. According to one of the police officers, Petitioner attempted to place himself between the officer and David Willie Harjo and pulled the officer away from David Willie Harjo. The officer also reported that Petitioner told the officer that the officer would die that day.

As the crowd increased, one of the officers pushed his hand radio button to request emergency assistance. Some individuals in the crowd had baseball bats. Petitioner was reported by one of the officers as carrying an aluminum bat.

David Willie Harjo, as he attempted to move away from the officers, tripped. The officer who followed and attempted to restrain David Willie Harjo unholstered his gun. Individuals in the crowd shouted that he had a gun. One of the officers was hit with a beer bottle, and several other objects were thrown at the officers.

The officers retreated to one of the police cruisers. One of the officers testified that Petitioner struck him with a baseball bat. The officers managed to climb into the police cruiser. The crowd began striking the car body and windows with bats. The rear window and driver's side windows were broken. Glass from the drivers side window shattered and stuck the officer facing that window. The officer began to bleed profusely. One of the officers testified that Petitioner struck the police cruiser with a bat and kicked the door of the cruiser with his foot.

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<sup>1/</sup> The Respondent notes that Mr. David Willie Harjo had three outstanding warrants against him and the police officers approached him to attempt to talk to him, and restrained him only when he attempted to leave. Petitioner notes that one of the officers attempted to arrest David Willie Harjo and a dispute arose and approximately 200 people gathered. David Willie Harjo ran, fell on some cable, and dislocated his knee.

The officers started the car and backed it away from the crowd. The crowd continued to smash the headlights, windows, and body of the other police cruiser. After approximately three to five minutes, numerous officers began to arrive on the scene. The crowd began to disperse. Petitioner was arrested at the scene.

Petitioner was tried with four other defendants in January of 1991. Petitioner was found guilty of a felony assault and battery on a police officer (after conviction of two or more felonies), riot (after conviction of two or more felonies), and malicious injury to an automobile. Petitioner was sentenced to forty-five years for assault and battery of a police officer, twenty-five years for riot, and was fined \$500.00 for maliciously injury to an automobile. Petitioner's sentences are being served consecutively.

Petitioner filed a direct appeal to the Oklahoma Court of Criminal Appeals. Petitioner's initial brief was filed September 4, 1992. Petitioner asserted that: (1) the trial court erred in overruling the magistrate's order dismissing the charge of assault and battery upon a police officer at the preliminary hearing, (2) the trial court improperly instructed the jury and improperly overruled Petitioner's motion for mistrial, (3) prosecutorial misconduct during closing arguments required a reversal of the conviction, (4) the trial court lacked jurisdiction because the dispute arose between "Indians in Indian country," and (5) under the facts and circumstances presented the Petitioner's sentence was excessive. On February 1, 1993, Petitioner filed a "supplemental" brief. Petitioner alleged that he had been denied effective assistance

of counsel at the trial. On June 16, 1994, the Oklahoma Court of Criminal Appeals affirmed the trial court.

Petitioner filed his first request for post-conviction relief in the Oklahoma Court of Criminal Appeals on June 27, 1995. Petitioner asserted that: (1) the trial court erred by applying a procedural bar to a jurisdictional defect, (2) the trial court erred in not applying Flores v. State to Petitioner's proceeding, and (3) the trial court erred in concluding that Petitioner was given effective assistance of appellate counsel. On February 28, 1996, the Oklahoma Court of Criminal Appeals affirmed the trial court's decision to deny Petitioner's request for relief.

Petitioner filed his Petition for a Writ of Habeas Corpus on October 31, 1996. Petitioner alleges that: (1) the trial court erred in overruling the magistrate's dismissal of the charge of assault and battery against a police officer at the preliminary hearing, (2) the trial court erred in improperly instructing the jury and in overruling the motion for mistrial, (3) prosecutorial misconduct during closing and the sentencing phase requires a reversal of the conviction, (4) the trial court lacked jurisdiction, (5) the sentence imposed on Petitioner was excessive, (6) Petitioner received ineffective assistance of trial counsel, and (7) Petitioner received ineffective assistance of appellate counsel.

## **II. EXHAUSTION AND EVIDENTIARY HEARING**

As a preliminary matter, a court must determine whether a Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by

establishing that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal petition. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986).

Respondent asserts that some of the issues raised by Petitioner were not exhausted in either Petitioner's direct appeal or his first post-conviction request for relief. 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). "[E]xhaustion of state remedies is not required where the state's highest court has recently decided the precise legal issue that petitioner seeks to raise on his federal habeas petition." Goodwin v. State of Oklahoma, 923 F.2d 156, 157 (10th Cir. 1991). 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).

In this case, however, Petitioner has already filed a direct appeal and a first request for post-conviction relief. To the extent that Petitioner has failed to exhaust his claims, the Magistrate Judge concludes that requiring further exhaustion would be futile. Because Oklahoma state courts have consistently declined to review claims which were not raised on direct appeal or in a first post-conviction application, Petitioner's failure to exhaust his state remedies should be excused.<sup>2/</sup>

The futility exception is a narrow one, and is supportable "only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief." Duckworth v. Serrano, 454 U.S. 1, 3 (1981). The Tenth Circuit has stated that a "rigorously enforced" exhaustion policy is necessary to serve the end of protecting and promoting the state's role in resolving the constitutional issues raised in federal habeas petitions. Naranjo v. Ricketts, 696 F.2d 83, 87 (10th Cir. 1982).

However, in Harris v. Champion, 48 F.3d 1127 (10th Cir. 1995), the Tenth Circuit Court of Appeals noted that

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<sup>2/</sup> Oklahoma has consistently declined to review claims which were not raised in the first request for post-conviction relief. "All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application." 22 O.S. 1991, § 1086.

If a federal court that is faced with a mixed petition<sup>3/</sup> determines that the petitioner's unexhausted claims would now be procedurally barred in state court, "there is a procedural default for purposes of federal habeas." Therefore, instead of dismissing the entire petition, the court can deem the unexhausted claims procedurally barred and address the properly exhausted claims.

Id. at 1131 n.3 (citations omitted). The Tenth Circuit referenced the Supreme Court decision in Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991). The Coleman court observed that

This rule [that a state court must articulate in its order its reliance on a procedural bar] does not apply if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims.

Coleman, 501 U.S. at 735 n.1. The majority opinion in Coleman, authored by Justice O'Connor, cites Harris v. Reed, 489 U.S. 255 (1988) (O'Connor, J., concurring). In Harris, Justice O'Connor noted that

I do not read the Court's opinion as addressing or altering the well-settled rule that the lower federal courts, and this Court, may properly inquire into the availability of state remedies in determining whether claims presented in a petition for federal habeas corpus have been properly exhausted in the state courts. . . . [I]n determining whether

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<sup>3/</sup> The Harris court's focus was on "mixed petitions." In Rose v. Lundy, 455 U.S. 509, 522 (1982), the Supreme Court determined that a district court "must dismiss habeas petitions containing both unexhausted and exhausted claims." Although Petitioner has not filed a "mixed petition," the Court finds that this "distinction" is not important for the purpose of this motion. Regardless of whether a court dismisses a mixed petition or a petition containing only unexhausted state claims the result is the same because the petitioner must return to state court.

a remedy for a particular constitutional claim is "available," the federal courts are authorized, indeed required, to assess the likelihood that a state court will accord the habeas petitioner a hearing on the merits of his claim.

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[W]e have held that where a federal habeas petitioner raises a claim which has never been presented in any state forum, a federal court may properly determine whether the claim has been procedurally defaulted under state law, such that a remedy in state court is "unavailable" within the meaning of § 2254(c).

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Moreover, dismissing such petitions for failure to exhaust state court remedies would often result in a game of judicial ping-pong between the state and federal courts, as the state prisoner returned to state court only to have the state procedural bar invoked against him.

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In sum, it is simply impossible to "require a state court to be explicit in its reliance on a procedural default," where a claim raised on federal habeas has never been presented to the state courts at all. In such a context, federal courts quite properly look to, and apply, state procedural default rules in making the congressionally mandated determination whether adequate remedies are available in state court.

Id. at 268-270 (citations omitted).

To the extent that some of Petitioner's claims were not presented in state court, they have not been "exhausted." However, requiring Petitioner to return to state court to exhaust those claims would be futile because the state court would decline to address those claims on their merits and the claims would be "procedurally barred." To the extent that Petitioner's claims are procedurally barred under state law, this Court should decline to dismiss Petitioner's petition, and should, instead, apply state procedural default rules.

The Magistrate Judge further addresses exhaustion and the assertion of procedural bar with respect to those errors which Petitioner has not already asserted in the Oklahoma courts, below.

The granting of an evidentiary hearing is discretionary with the court. Because the issues raised by Petitioner can be resolved on the basis of the record, the Magistrate Judge declines to hold an evidentiary hearing. See Townsend v. Sain, 372 U.S. 293, 318 (1963), *overruled in part* by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

### **III. RECOMMENDATION REGARDING ALLEGED ERRORS**

#### **A. The Trial Court's Alleged Error in Overruling the State Court Magistrate's Order of Dismissal at the Preliminary Hearing Does Not Violate the Federal Constitution.**

Petitioner notes that, at a hearing before the state court magistrate judge, the magistrate judge dismissed the charge of assault and battery against a police officer. The state appealed the decision of the magistrate judge to the state district court,<sup>4/</sup> and the district court reversed the decision of the magistrate judge. Plaintiff asserts that the district court's reversal of the magistrate judge was an incorrect decision. Petitioner asserts that the district court did not conduct an evidentiary hearing and that the testimony of the police officer was not credible.<sup>5/</sup> Respondent initially asserts that

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<sup>4/</sup> Oklahoma procedure provides that a preliminary hearing may be conducted by a magistrate with an appeal to the district court. The district court may examine the entire record in determining whether "in the light most favorable to the state, [the evidence] is sufficient to find that a felony crime has been committed and that the defendant probably committed said crime." 22 O.S. 1991, § 1089.5.

<sup>5/</sup> Petitioner argues that the police officer's testimony changed on re-direct. Petitioner asserts that during his direct testimony and cross-examination the police officer did not identify Petitioner. Petitioner  
(continued...)

Petitioner raises no federal constitutional issue. In his reply brief, Petitioner argues that "the state court procedure deprived him of . . . a fair and reliable determination of probable cause as a condition of restraining his liberty." [Petitioner Traverse, Doc. No. 5-1, at 4]. Petitioner asserts that the district court's reversal of the magistrate's dismissal of the charges, without a hearing, violates due process. Petitioner presented this issue in his first direct appeal to the Oklahoma Court of Criminal Appeals, and the issue therefore has been exhausted.

Petitioner "can obtain federal habeas corpus relief only if his custody is in violation of the Federal Constitution." Mabry v. Johnson, 467 U.S. 504, 505 (1984). See also Townsend v. Sain, 372 U.S. 293, 312 (1963); 28 U.S.C. § 2254(a). Petitioner generally complains that the reversal by the district court of the magistrate judge's dismissal of charges was improper. The only "constitutional" error which Petitioner seems to allege is that the district court's failure to provide Petitioner with a hearing violated Petitioner's due process rights.

In Gurstein v. Pugh, 95 S. Ct. 854 (1975), the Court addressed whether an individual arrested and held for trial on an information was entitled to a judicial determination of probable cause for detention. The Court concluded that independent evaluation of probable cause was necessary for pre-trial detention. The Court specifically noted that a hearing was not necessary.

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<sup>5/</sup> (...continued)  
argues that the police officer's testimony was not credible.

These adversary safeguards are not essential for the probable cause determination required by the fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings This issue can be determined reliably without an adversary hearing. That standard – probable cause to believe the suspect has committed a crime – traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.

Gerstein 95 S. Ct. at 120 (*emphasis added*).

Regardless, assuming that the district judge's decision to overrule the magistrate judge was in error, the "remedy" in this case would not result in the release of Petitioner from his current custody. The requirement of an initial impartial pretrial proceeding is to insure that prior to any pretrial restraint of liberty the state establishes probable cause. Therefore, assuming the state improperly determined probable cause to detain Petitioner, his pre-trial incarceration would have been improper. In this case, Petitioner was found guilty following a jury trial. Petitioner's current incarceration is the result of a jury trial, and whether or not the state of Oklahoma initially erred in detaining Petitioner prior to his trial does not render his current incarceration improper. Gerstein 95 S. Ct. at 865 ("Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction.") *citations omitted*.

**B. Alleged Errors by the Trial Court in Instructing the Jury and Declining to Grant a Mistrial Do Not Justify a Writ of Habeas Corpus.**

1. Jury Instruction/Prior Convictions

Petitioner notes that during closing arguments, counsel for one of the Defendants asserted, with respect to one of the Defendants but not the Petitioner, "incidentally, of all the defendants she has no felony record." Petitioner argues that the reference by one of his co-Defendant's attorneys pointed out to the jury that Petitioner had a prior record. In addition, the trial court instructed the jury, in one of the jury instructions, that "[e]vidence has been presented that the defendant has heretofore been convicted of an offense distinct from that charged in the information." Petitioner asserts that the jury was informed, at least twice, that Petitioner had a prior record. Petitioner argues that this constitutes fundamental error. Petitioner presented each of these errors to the Oklahoma Court of Criminal Appeals on direct appeal.

Respondent notes that the trial involved five co-defendants, that three of the co-defendants testified at trial, and that their testimony was impeached with the use of prior convictions. Respondent asserts that the comments (by co-counsel concerning prior convictions), and the jury instruction were directed at the three testifying co-defendants, each of whom acknowledged prior convictions. Respondent additionally argues that Petitioner's attorney did not object during the statement by co-counsel, and did not object to the proposed jury instruction. Respondent asserts that the appropriate standard for this Court to apply is whether the identified remarks and the jury instruction had a substantial and injurious effect on the jury's verdict. With

respect to the jury instruction Respondent additionally argues that Petitioner has failed to assert a violation of federal constitution, and that an erroneous jury instruction is error only if the error renders the trial so fundamentally unfair that it denied Petitioner a fair trial.

Generally, a habeas corpus petitioner "bears a 'great burden . . . when [he] seeks to collaterally attack a state court judgment based on an erroneous jury instruction.'" Lujan v. Tansy, 2 F.3d 1031, 1035 (10th Cir. 1993) (quoting Hunter v. New Mexico, 916 F.2d 595, 598 (10th Cir. 1990), *cert. denied*, 500 U.S. 909 (1991)), *cert. denied*, 114 S. Ct. 1074 (1994). Federal habeas corpus relief is not available for alleged errors of state law, and this Court examines only "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 482 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). Moreover, it is well established that "[h]abeas proceedings may not be used to set aside a state conviction on the basis of erroneous jury instructions unless the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial in the constitutional sense.'" Shafer v. Stratton, 906 F.2d 506, 508 (10th Cir. 1990) (quoting Brinlee v. Crisp, 608 F.2d 839, 854 (10th Cir. 1979), *cert. denied*, 444 U.S. 1047 (1980)), *cert. denied*, 498 U.S. 961 (1990). The Supreme Court explained in Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is

even greater than the showing required to establish plain error on direct appeal.

Id. at 154.

Petitioner suggests that the jury was informed on two occasions that Petitioner had a prior record. Once, when one of Petitioner's co-defendant's attorneys mentioned that his client was the only co-defendant without a record, and again when the trial court instructed the jury that evidence had been presented as to prior conviction of a different offense. Petitioner was not specified on either occasion. Three of Petitioner's co-defendants testified and were impeached with their prior convictions. Evidence was presented to the jury that three defendants in the trial had been convicted on prior offenses. No evidence was presented or admitted as to Petitioner's prior offenses. In addition, Petitioner did not object to the reference by the co-defendant's attorney, and did not object to the jury instruction. Although the jury instruction and the reference by co-defendant's counsel is confusing, the reference and the instruction do not rise to the level of depriving Petitioner of his constitutional rights.<sup>6/</sup> See, e.g., Spencer v. Texas, 385 U.S. 554 (1967); United States v. Bridwell, 583 F.2d 1135, 1140 (10th Cir. 1978) ("In this case, however, no limiting instruction was ever offered or requested, and no objection on this point was made to the court's final instructions. Defendant's counsel is ordinarily under an obligation to request a cautionary instruction. In the absence of such a request we may reverse only if plain

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<sup>6/</sup> In addition, the Magistrate Judge notes that the prosecuting attorney, during his closing statement, made the following remark, " The fact that someone has been convicted of a prior felony conviction cannot be used in your determination as to whether or not they committed these crimes. Flat out." Transcript of Proceedings at 533.

error exists. We do not believe the impact of this evidence was so critical that reversal is required.").

2. Jury Instruction – "presumed not guilty"

Petitioner additionally argues that the trial court erred in instructing the jury that Petitioner was presumed "not guilty," rather than presumed "innocent." Petitioner notes that the presumed "not guilty" instruction was subsequently found by the Oklahoma Court of Criminal Appeals in Flores v. State, 896 P.2d 558 (Okla. Ct. Crim. App. 1995), to be improper.

Respondent asserts that Petitioner's claims are procedurally barred. Respondent asserts that because Petitioner failed to raise these issues until his petition for post-conviction relief, he is prohibited from raising them in federal court unless he can establish cause and prejudice. Respondent argues that Petitioner cannot overcome the cause and prejudice standard or demonstrate actual innocence, and that Petitioner is therefore foreclosed from pursuing these arguments.

Petitioner did not raise, on direct appeal, the issue that the jury instruction of "presumed not guilty" was error. Petitioner did raise this argument in his first application for post-conviction relief. The Oklahoma Court of Criminal Appeals affirmed the district court's denial of Petitioner's application because Petitioner did not raise this issue on direct appeal.

Petitioner asserts in his reply brief that Flores had not been decided at the time of his direct appeal and that this court should not ignore fundamental error or find it procedurally barred.

The doctrine of procedural bar prohibits a federal court from considering a specific habeas claim where the highest court of the state declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or [can] demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2565 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S. Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). Petitioner suggests that this court should not follow this doctrine. However, the court is required to followed it.

"A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. Additionally, a finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. at 986 (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

The Oklahoma Court of Criminal Appeals declined to address Petitioner's arguments that the jury was not properly instructed because Petitioner did not raise the issue in his direct appeal. The state court's treatment of these issues, and Petitioner's failure to raise these issues on his direct appeal serves as a procedural bar.

The state court's refusal to address these issues is an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because

the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not raised in the district court and/or not briefed on appeal. See Jones v. State, 704 P.2d 1138 (Okla. Crim. App. 1985).

Because of his procedural default, this court may not consider Petitioner's claim unless Petitioner is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claim is not considered. See Coleman, 501 U.S. 722, 749-50. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. A petitioner is additionally required to establish prejudice, which requires showing "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The alternative is proof of a "fundamental miscarriage of justice," which 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).

Petitioner argues that the Flores v. State case which held that the "presumed not guilty" jury instruction was improper was not decided until after his direct appeal. However, Petitioner's argument does not satisfy the cause requirement where the case law at the time that Petitioner filed his direct appeal was adequate to support the argument he urges now. See, e.g., Smith v. Murray, 477 U.S. 527, 536 (1986) ("[T]he question is not whether subsequent legal developments have made counsel's

task easier, but whether at the time of the default the claim was 'available' at all." ). At the time that Petitioner filed his direct appeal Petitioner could have argued, based on the existing case law, that the "presumed not guilty" instruction was improper.

Petitioner additionally asserts ineffective assistance of counsel. Ineffective assistance of counsel may be sufficient to overcome the procedural bar hurdle. In this case, however, as discussed in greater detail below, the Magistrate Judge finds that Petitioner's counsel did not rise to the legal standard necessary to establish ineffective assistance of counsel.

Petitioner asserts that the trial court compounded its errors by failing to grant Petitioner's motion for a mistrial. Petitioner did not request a mistrial until after the jury verdict. Petitioner did not object to the two jury instructions which were given by the trial court. The failure of the trial court to grant Petitioner's request for a mistrial after the jury verdict was not error.

**C. Alleged Errors in Instructing the Jury and Comments Made by the Prosecutor Do Not Justify a Writ of Habeas Corpus.**

Petitioner additionally notes that during closing argument the prosecuting attorney made improper and inflammatory remarks. Petitioner asserts that the prosecutor referred to the war in the Persian Gulf and made racial innuendos, and that these comments require a reversal of Petitioner's conviction. Petitioner refers to no specific remarks, but generally references the closing argument.

Respondent asserts that any alleged improper comments by the prosecutor were harmless error and do not require reversal of Petitioner's conviction. In addition,

Respondent notes that Petitioner failed to object to the comments made by the prosecuting attorney.

Petitioner presented this argument in his direct appeal to the Oklahoma Court of Criminal Appeals. The Oklahoma Court noted that Petitioner had not objected to any comments during the closing argument and had therefore waived all objections other than for fundamental error.

In analyzing whether a petitioner is entitled to federal habeas relief for prosecutorial misconduct, a federal habeas corpus court must determine whether there was a violation of the criminal defendant's federal constitutional rights which so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Coleman v. Saffle, 869 F.2d 1377, 1395 (10th Cir. 1989), *cert. denied*, 494 U.S. 1090 (1990). The factors considered in this due process analysis are: (1) the strength of the state's case; (2) whether the judge gave curative instructions regarding the misconduct; and, (3) the probable effect of the conduct on the jury's deliberative process. Hopkinson v. Shillinger, 866 F.2d 1185, 1210 (10th Cir. 1989), *cert. denied*, 497 U.S. 1010 (1990).

The Magistrate Judge has reviewed the trial transcript and the comments in the prosecuting attorney's closing argument. The Magistrate Judge concludes that the comments about which Petitioner complains do not rise to the level required to affect Petitioner's federal constitutional rights.

**D. Petitioner's assertion that the trial court lacked jurisdiction because he was arrested on "Indian land" does not justify habeas relief.**

Petitioner argues that the "pow-wow" occurred in Mohawk Park which was "Indian land." Petitioner notes that this "fact" was mentioned during his preliminary hearing but was not asserted during his trial. Petitioner asserts that the land of Mohawk Park was traditionally Indian land, that it was acquired by the City of Tulsa, and that each year it is "leased" to the Indian tribes for an annual pow-wow. Petitioner asserts that the tribes have always provided their own security at the pow-wow and that the Tulsa Police Department was wrong for interfering with an Indian dispute which occurred at the park.

Respondent notes that Petitioner has not established that Mohawk Park is "Indian country," and that court cases have defined "Indian country" have limited it to land that is within the limits of an Indian reservation. Respondent argues that in this case the Indian tribe obtained a permit from the city park department to use Mohawk Park for a weekend. Respondent additionally asserts that Petitioner has not asserted a federal constitutional issue.

Petitioner presented this argument to the Oklahoma Court of Criminal Appeals. The Oklahoma Court concluded that Petitioner's argument was frivolous because Petitioner had asserted no factual or legal basis for his argument.

Petitioner does not assert a federal constitutional violation which has occurred in this instance. In addition, Petitioner acknowledges that the City of Tulsa owns Mohawk Park and permitted the Indian pow-wow to occur at the Park. Based upon

these facts, the court concludes that Petitioner has not raised an argument that justifies the grant of habeas relief.

**E. The Sentence Imposed on Petitioner is not Constitutionally Excessive.**

Petitioner notes that he was sentenced to 70 years in prison. Petitioner states that it is apparent from the record that he was "singled out" for a harsh punishment. Petitioner asserted this argument before the Oklahoma Court of Criminal Appeals.

Respondent asserts that Petitioner has not alleged a federal constitutional error. Respondent states that sentencing decisions are a matter for the state legislature. Respondent additionally notes Petitioner was sentenced to 45 years for assault upon a police officer after former conviction of two or more felonies, and 25 years for riot after former conviction of two or more felonies. Respondent refers to Petitioner as a "habitual offender," and under Oklahoma law the minimum sentence Petitioner could have received was 25 years on each charge (or 50 years total). According to Respondent, the sentences contain no maximum.

In Solem v. Helm, 463 U.S. 277, 284 (1983), in considering the constitutionality of a mandatory life sentence imposed pursuant to a South Dakota recidivist statute, the Supreme Court recognized that the Eighth Amendment requires that a sentence not be disproportionate to the severity of the crime or involve unnecessary infliction of pain. In so holding, the Court articulated three factors to be considered in conducting such a proportionality review: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime

in other jurisdictions. Id. at 292. The Court noted, however, that in reviewing the proportionality of a sentence, a court should "grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." Solem, 463 U.S. at 290. Under the Solem three-factor test, the Court found that the mandatory life sentence imposed pursuant to South Dakota's recidivist statute violated the Eighth Amendment's prohibition against cruel and unusual punishment.

The Supreme Court's most recent consideration of the constitutionality of a mandatory life sentence was in Harmelin v. Michigan, 501 U.S. 957 (1991). In Harmelin, the petitioner was convicted under a Michigan statute for possessing more than 650 grams of cocaine and was sentenced to a mandatory term of life in prison without the possibility of parole. 501 U.S. at 961. The petitioner's main contention was that the life sentence was "significantly disproportionate" to the crime committed.

Although the Harmelin Court upheld the sentence by a 5-4 vote, the majority split on the appropriateness of the "proportionality" principle in non-capital cases. Justice Scalia, joined by Chief Justice Rehnquist, argued that "Solem was simply wrong; the Eighth Amendment contains no proportionality guarantee." Harmelin, 111 S. Ct. at 2686. In support of this conclusion, Justice Scalia conducted an extensive historical survey of the Cruel and Unusual Punishment Clause, and found, "The Eighth Amendment is not a ratchet, whereby a temporary consent on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving

effect to altered conditions." Id. at 990. Justice Scalia found, therefore, that although proportionality review would still remain important for death penalty cases, "we will not extend it further" except in very rare instances." Id. at 994. Justice Kennedy, joined by Justices O'Connor and Souter, concluded that the "Eighth Amendment proportionality principle also applies to noncapital sentence," but found that "our proportionality decisions . . . require us to uphold petitioner's sentence." Id. at 997. Justice Kennedy wrote that "though our decisions recognize a proportionality principle, its precise contours are unclear." Id. at 998. Justice Kennedy concluded that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id. at 1001. Justice White, joined by Justices Blackmun and Stevens, concluded that the standards of Solem should be applied, and wrote that "the statutorily mandated punishment at issue here . . . fails muster under Solem and, consequently, under the Eighth Amendment to the Constitution." Id. at 2716. Justice Marshall wrote that he agreed with Justice White's opinion with the exception that, in Justice Marshall's opinion, "capital punishment is in all instances unconstitutional." Id. at 1027. Justice Marshall agreed, however, "that the Eighth Amendment also imposes a general proportionality requirement." Id. at 1028.

Solem is clear--the right to proportionality review exists in non-capital cases. By a 5-4 vote in Harmelin, the Justices agreed to modify or overrule Solem. However, only two Justices wrote that no right to a proportionality review exists in a non-capital case. The remaining seven Justices agreed that such a right still exists. The

confusion caused by Harmelin concerns the applicable standard that a court should apply when conducting such a review. Justices White, Blackmun, Stevens, and Marshall would continue to apply the factors outlined by Solem. Justices Kennedy, O'Connor, and Souter suggest that a more stringent standard than Solem is required. Regardless, a clear plurality, or seven Justices "agree" that, in a non-capital case a petitioner has a right to a proportionality review.

However, although Petitioner may have a right to a review, in federal court, of the alleged disproportionality of his sentence, the standard for finding a sentence disproportionate is exceedingly high. A federal court reviewing a claim for disproportionate sentencing is required to "grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." Solem v. Helm, 463 U.S. 277, 290. See also Rummell v. Estelle, 445 U.S. 263, 272 (1980) ("Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."); United States v. Youngpeter, 986 F.2d 349, 355-56 (10th Cir. 1993) (when sentence falls within statutory limits, as was defendant's in this case, the appellate court "generally will not regard it as cruel and unusual"); United States v. Acuna-Diaz, 1996 WL 282262 (10th Cir. May 29, 1996) (unpublished opinion) (noting that Eighth Amendment does not contain a proportionality guarantee and that sentence which falls within statutory limits, like defendant's forty-six-month sentence, was not cruel and unusual).

In this case, Petitioner received a sentence of 70 years. The minimum sentences for the crimes for which Petitioner was convicted is 50 years, and the statute contains no maximum. Petitioner does not assert any additional specifics or statistics to support his claim that his sentence was disproportionate. Under the facts and circumstances of this case, the Magistrate Judge concludes that Petitioner's sentence was not disproportionate.

**F. Petitioner's Counsel was not Constitutionally Ineffective.**

Petitioner further asserts that he received ineffective assistance of counsel both during his trial and on his direct appeal. Petitioner notes that his trial counsel failed to recognize or pursue the "presumed not guilty vs. presumed innocent" instruction, that trial counsel failed to pursue the possibility of a conspiracy behind the change in one of the officer's testimony, and that very limited discovery was conducted to determine the facts behind the incident at Mohawk Park. Petitioner additionally asserts that his appellate counsel was ineffective because appellate counsel did not raise the Flores argument on appeal and because appellate counsel did not object to the obvious disproportionate sentences.

Respondent initially asserts that some of Petitioner's arguments that his trial and appellate counsel were ineffective have not yet been raised before the Oklahoma Court of Criminal Appeals and are therefore procedurally barred.

The United States Court of Appeals for the Tenth Circuit holds that the general rules regarding review of claims procedurally barred in state court do not apply to ineffective assistance of counsel claims brought under the Sixth Amendment to the

United States Constitution. According to the Tenth Circuit, the general rule of procedural default "must give way because of countervailing concerns unique to ineffective assistance claims." Brecheen v. Reynolds, 41 F.3d 1343, 1363 (10th Cir. 1994) (relying on Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988)).<sup>7/</sup> In Brecheen the Court identified two factors which are unique to ineffective assistance claims -- the need for a petitioner to consult with separate counsel on appeal in order to obtain a meaningful and objective assessment of trial counsel's performance; and the possible need to develop facts in support of an ineffective assistance claim. Id. at 1363-64. According to the Tenth Circuit, both of these unique factors compel the conclusion that ineffective assistance claims may be brought for the first time in a collateral proceeding. Id. In other words, ineffective assistance claims not raised for the first time in a direct appeal are not waived.

The Tenth Circuit's holding that ineffective assistance claims not presented on direct appeal are not waived is at odds with the law of the state of Oklahoma. The Oklahoma Court of Criminal Appeals routinely refuses to hear all claims brought for the first time on collateral review, including ineffective assistance claims. The Oklahoma Court of Criminal Appeals, interpreting the specific language of Oklahoma's post-conviction relief statute, 22 O.S. 1991, § 1086, holds that any claim which could have been raised on direct appeal, but was not, is waived.

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<sup>7/</sup> See also United States v. Galloway, 56 F.3d 1239, 1242-43 (10th Cir. 1995) (*en banc*) (holding that general rule of procedural default does not apply to ineffective assistance claims raised for the first time on collateral attacks of federal criminal judgments under 28 U.S.C. § 2255).

In Brecheen v. Reynolds, 41 F.3d 1343 (10th Cir. 1994), the Tenth Circuit addressed Oklahoma's waiver rule as it relates to ineffective assistance claims. The Tenth Circuit held that Oklahoma's waiver rule is an "independent" procedural rule because it is not dependent in any way on federal law. However, the Tenth Circuit held that Oklahoma's waiver rule, as applied in the ineffective assistance context, was not an "adequate" procedural rule. According to the Tenth Circuit, Oklahoma's waiver rule denies any meaningful review of ineffective assistance claims and it takes away what Tenth Circuit precedent has already given -- the opportunity to raise an ineffective assistance claim on collateral review. Brecheen, 41 F.3d at 1364. Thus, federal courts do not apply Oklahoma's waiver rule to procedurally defaulted ineffective assistance claims.

Consequently, the Magistrate Judge concludes that Petitioner has not procedurally defaulted his ineffective assistance of counsel claims.

To establish ineffective assistance of counsel, Petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). Petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 466 U.S. at 687-88.<sup>8/</sup> To establish

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<sup>8/</sup> "The proper standard for measuring attorney performance is reasonably effective assistance." Gillette v. Tansy, 17 F.3d 308, 310-311 (10th Cir. 1994) (quoting Laycock v. New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989)). In doing so, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, at 690. There is a "strong  
(continued...)"

the second prong, Petitioner must show that this deficient performance prejudiced the defense, to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838, 842-44 (1993) (counsel's unprofessional errors must cause a trial to be "fundamentally unfair or unreliable").

After reviewing the record and the arguments asserted by Petitioner, the Magistrate Judge concludes that Petitioner was not deprived of his constitutional right to effective assistance of counsel, that Petitioner's claim is without merit, and that Petitioner cannot satisfy either prong of the Strickland test.

#### **CONCLUSION**

The United States Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be **DENIED**.

#### **OBJECTIONS**

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and

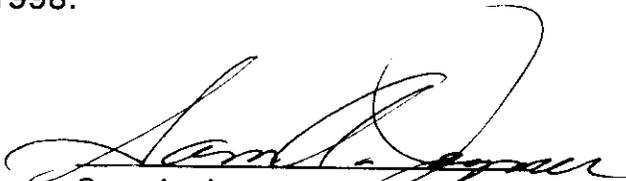
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<sup>8/</sup> (...continued)

presumption [however,] that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 695. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689.

Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). **THE FAILURE TO FILE WRITTEN OBJECTIONS TO THIS REPORT AND RECOMMENDATION MAY BAR THE PARTY FAILING TO OBJECT FROM APPEALING ANY OF THE FACTUAL OR LEGAL FINDINGS IN THIS REPORT AND RECOMMENDATION THAT ARE ULTIMATELY ACCEPTED OR ADOPTED BY THE DISTRICT COURT.** See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 26 day of March 1998.

  
Sam A. Joyner  
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 27 Day of March, 1998.

A. Schwelke



IN THE UNITED STATES DISTRICT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAR 25 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

No. 97-C-408-E

ENTERED ON DOCKET  
DATE MAR 26 1998

**ORDER**

Now before the Court are the Motions to Dismiss (filed in Texas) (Docket #1) of the defendants J. Peter Messler and Bradford Griffith, Donald B. Atkins, Lawrence A. G. Johnson, T. Brett Swab and Todd W. Singer, Brown J. Akin, III and Laurie E. Akin.

Plaintiff, Jean Marie Akin brings this claim pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 et seq., alleging a scheme to cause financial and emotional harm to herself and to her husband. Plaintiff's attorney, David Hoel (as trustee of several trusts set up by Brown Akin) became involved in a dispute between Brown, III and Laurie Akin (Brown Akin's children) and their step-mother Jean Marie Akin over the assets of these trusts after Brown died. The children then filed a civil suit against Jean Marie Akin and Hoel (seeking Hoel's

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removal as trustee), using Johnson as their attorney. Donald Atkins was appointed special master in that case, and returned a report critical of Hoel's actions as trustee. The Atkins amended the suit to seek money damages as well. The other defendants (Murdock, Swab, Singer, Messler, and Griffith) are all named for their role in bringing criminal charges against Hoel. Jean Marie Akin asserts that the actions of the defendants effected the outcome of the civil case, "cheated" her out of her share of the trust monies, and caused her emotional and financial harm.

This claim, in substantially the same form, was originally filed with Hoel as the plaintiff, and dismissed by this court because of failure to state a RICO claim. The Court found that the "requisite showing of interstate commerce simply has not been made in this case and does not appear possible on these facts." After that case was dismissed, Hoel, representing Jean Marie Akin, filed this case in Texas, making only minor changes in the original complaint. All defendants filed motions to dismiss in Texas arguing that Mrs. Akin failed to state a claim under RICO and that the case was barred by the doctrines of res judicata and collateral estoppel. The court in Texas transferred the case back to the Northern District of Oklahoma, finding that venue was improper, under either the general venue statute or the venue provision of the RICO statute, in Texas. After the case was transferred to this court, a status hearing was conducted, the motions to dismiss were converted to motions for summary judgment, and all parties were given an opportunity to supplement their briefs.

The defendants each filed motions with two primary arguments. The defendants assert that Jean Marie Akin has failed to allege an enterprise engaged in

interstate commerce, and that she has failed to allege a pattern of racketeering activity, thus failing to state a claim under RICO. 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, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The 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."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." 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).

Defendants argue, as they did previously, that the interstate commerce requirement of RICO is not met by plaintiff. As is clear from the plain language of the statute, RICO "prohibits only racketeering activity involving an enterprise "engaged in, or the activities of which affect, interstate or foreign commerce." Burcher v. McCauley, 871 F.Supp 864, 870 (E.D. Va. 1994). To be engaged in interstate commerce, an enterprise must be "directly engaged in the production, distribution, or

acquisition of goods and services in interstate commerce." United States v. Robertson, 115 S.Ct. 1732, 1733 (1995). On the other hand, "the 'affecting commerce' test was developed to define the extent of Congress's power over purely intrastate commercial activities that nonetheless have substantial interstate effects." Id.

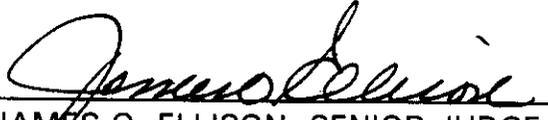
Plaintiff's attempt to meet this requirement is directed toward effecting interstate commerce rather than being engaged in interstate commerce. Plaintiff claims that the enterprise effected interstate commerce in that it forced her to move to Texas and caused the "seizure of records and files necessary for the plaintiff to protect herself in various actions involving the Internal Revenue Service," resulting in a lien being placed on her residence in Texas. Although this appears to be a very weak effect on interstate commerce, and the substitution of plaintiff's borders on gamesmanship aimed at circumventing the Court's prior Order, the Court is not prepared to dismiss on these grounds. See United States v. Juvenile Male, 118 F.3d 1344, 1349 (9th Cir. 1997)(only a de minimis effect on interstate commerce is necessary to establish jurisdiction under RICO statutes).

Nonetheless, plaintiff's complaint is not sufficient to state a claim under the RICO statutes. Plaintiff's complaint, and accompanying RICO Case Statement demonstrate, as a matter of law, that Plaintiff's claims do not meet the pattern requirements of RICO. A claim under RICO requires "(1) conduct (2) or an enterprise (3) through a pattern (4) of racketeering activity." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S.Ct. 3275, 3285, 87 L.Ed. 2d 346 (1985). The pattern

requirement of RICO requires a plaintiff to show continuity plus relationship. Boone v. Carlsbad Bancorporation, Inc., 972 F.2d 1545, 1555. The relationship test requires that predicate acts "have the same or similar purposes, results, participants, victims, or methods or commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." Id. The continuity test requires that plaintiff demonstrate a threat of continued criminal activity. Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1516 (10th Cir. 1990). In this case, there is simply no demonstration of a threat of continued criminal activity that meets the pattern requirement of RICO. Plaintiff alleges only a series of acts with one scheme, to accomplish one goal, "financial and emotional harm to herself and her husband," with no threat to extend to entities unrelated to the trusts at issue, and no threat of continuing illegal activity. Because the pattern requirement of RICO is not met, plaintiff's claim is appropriately dismissed for failure to state a claim.

The Motions to Dismiss (Docket #1) are granted. Although the grounds on which the Court dismisses Plaintiff's Complaint were not urged by all defendants, the Court finds that the Complaint, as a matter of law, failed to state a claim, and that this Order of Dismissal therefore applies to Plaintiff's claim against all defendants.

DATED this 25<sup>th</sup> day of March, 1998.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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

MAR 24 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

OKS CONSULTING SERVICES INC., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 POLY PLUS INCORPORATED, NEECO, )  
 INC.; DONALD G. NEEDHAM and JIM )  
 HARRIS, )  
 )  
 Defendants. )  
 and )  
 )  
 ORES PAUL SEAUX; THE LOMA COMPANY, )  
 LLC; SOLOCO, LLC; NEWPARK )  
 RESOURCES, INC. and KEN SEAUX, )  
 )  
 Additional Parties.

Case No. 97-C-108-B

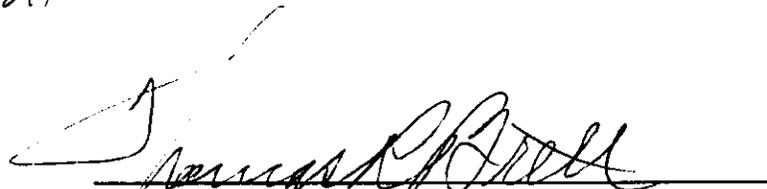
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DATE MAR 26 1998

**ADMINISTRATIVE CLOSING ORDER**

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

IF, by 6-31-98, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 24<sup>th</sup> day of March, 1998.



THOMAS R. BRETT, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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*mi*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA  
NO. 98-CV-88H(J)

**F I L E D**

MAR 25 1998

*l*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

NOMACO WEST, INC., )  
)  
Plaintiff, )  
)  
v. )  
)  
JOHN REDDEN, INSULATION )  
MATERIALS CORPORATION OF )  
AMERICA (presently known as AOCMI, )  
Inc., and WESTSTAR BANK, )  
)  
Defendant. )  
\_\_\_\_\_ )

STIPULATION OF  
DISMISSAL WITH PREJUDICE

ENTERED ON DOCKET

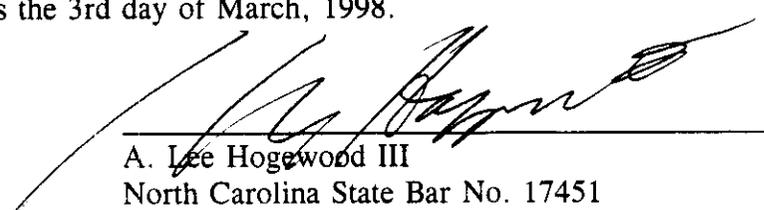
DATE 3-25-98

Nomaco West, Inc., John Redden, Insulation Materials Corporation of America (which is now known as AOCMI, Inc.) and Weststar Bank file this Stipulation of Dismissal With Prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure. The Plaintiff states that this matter has been settled and therefore all claims pending herein are hereby dismissed WITH PREJUDICE.

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*cts*

Respectfully submitted, this the 3rd day of March, 1998.

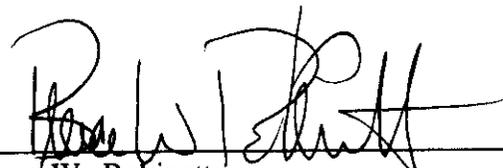


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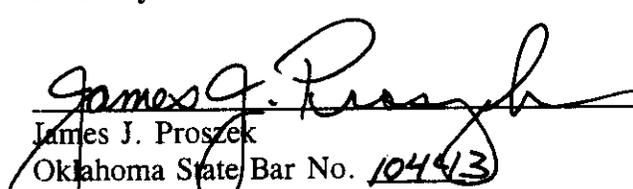
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IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAR 25 1998

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

MICHAEL J. LOMBARDO,  
458-84-9141 Plaintiff,

vs.

KENNETH S. APFEL,  
Commissioner,  
Social Security Administration,

Defendant.

Case No. 97-CV-005-M

ENTERED ON DOCKET

DATE 3-25-98

**ORDER**

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

Plaintiff's application for disability benefits with a protective filing date of June 7, 1990, was denied at the administrative level and was appealed to the district court. *Lombardo v. Department of Health & Human Services*, No. 92-C-1157-B (N.D. Okla. Feb. 11, 1994). [R. 713-717]. The Court determined: "The significant issue on appeal is whether the ALJ properly evaluated Mr. Lombardo's problems with alcohol." [R. 714]. The case was remanded for the ALJ to "develop the record as to whether the alcoholism is alone or in combination a disability." [R. 715]. On remand the ALJ was to "make specific inquiry into whether Mr. Lombardo's alcoholism, to which his seizures are secondary, is a result of voluntary or involuntary substance abuse." [R. 716]. The ALJ was instructed:

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On remand, the Secretary must have Mr. Lombardo undergo a psychological and physical examination concerning his alcoholism. In addition, the doctor who examines Mr. Lombardo must personally testify at supplemental hearing. Furthermore, a V [sic] Vocational Expert should also testify in light of the new evidence submitted by the medical expert.

[R. 716-17]. Pursuant to the Court's order, supplemental hearings were held March 29, 1995; and May 23, 1995. By decision dated October 10, 1995, the ALJ entered the findings that are the subject of this appeal.

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born September 29, 1949, and was 46 years old at the time of the hearing. He has a high school education with one semester of college. He formerly worked as a telephone installer/repairman; welder; and retail salesperson. He claims to be unable to work as a result of a seizure disorder and back and neck pain. The ALJ determined that Plaintiff is unable to perform his past relevant work. The ALJ found that Plaintiff's seizures could be controlled by medication, but they are not so controlled because of his alcohol abuse. He also found that Plaintiff's drinking is voluntary; that is, he retains the capacity to control his drinking. Under the law as it existed at the time of the ALJ's decision, the Plaintiff's ability to control his drinking precluded his collection of benefits. The ALJ found that although Plaintiff could not return to his former work, he is capable of performing light work, but cannot work around dangerous moving machinery. Based on the testimony of the vocational expert at the September, 1991 hearing before the court's remand, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to appropriately assess his residual functional capacity and (2) failed to obtain vocational testimony as ordered by the court on remand. The Commissioner asserts that under the recent

amendments to the Social Security Act<sup>1</sup> the role alcohol abuse plays in Plaintiff's case precludes his receipt of benefits.

In 1996 Congress amended the Social Security act to bar the award of disability benefits based on alcoholism or drug addiction:

An individual *shall not* be considered to be disabled for purposes of this subchapter if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled.

42 U.S.C. § 423(d)(2)(C). [emphasis supplied]. The amendment became effective March 29, 1996, and was made applicable to: "any individual who applies for, or whose claim is finally adjudicated by the Commissioner of Social Security with respect to, benefits under title II of the Social Security Act based on disability on or after the date of the enactment of this Act, . . . ." 110 Stat. at 852-53. Plaintiff's case was not finally adjudicated by the Commissioner of Social Security until October 28, 1996, after the effective date of the amendment. The amendment is therefore applicable to his claim. *Torres v. Chater*, 125 F.3d 166, 171-72 (3rd Cir. 1997)(holding date of adjudication, not time when disability exists triggers application of effective date of amendment).

The 1996 amendment removed the entire question of the ability to control one's drinking from the disability decision. Now the key question is whether alcohol

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<sup>1</sup> Contract with America Advancement Act, Pub. L. No. 104-121, §105(b)(1); and Technical Amendments Relating to Drug Addicts and Alcoholics, Balanced Budget Act of 1997, Pub. L. No. 105-33, §§5525(a), 5528; codified at 42 U.S.C. §§ 423(d)(2)(C), 1382c(a)(3)(J); and interpreted by the Commissioner at 20 C.F.R. § 404.1535.

abuse is "a contributing factor material" to the disability decision. The Commissioner's regulations addressing how a "contributing factor material to the determination of disability" is to be determined are found at 20 C.F.R. § 404.1535. The regulations require that the Commissioner determine which of the current physical and mental limitations would remain if the claimant stopped using alcohol and then determine whether those limitations would be disabling. If the remaining limitations would be disabling, then the alcohol abuse is not considered to be a "contributing factor material to the determination of disability." *Id.* If, however, the remaining limitations would not be disabling, then the alcohol abuse is a "contributing factor material to the determination of disability" which precludes an award of benefits.

The ALJ found that the Plaintiff's seizures would be brought under control with medication if he stopped abusing alcohol, "therefore making the claimant's alcohol abuse the 'material contributing factor' to the claimant's disability." [R. 703]. The ALJ thus performed essentially the same analysis as is required under the 1996 Amendment. His conclusion is supported by substantial evidence in the record. Plaintiff's seizure disorder is affected to such a great degree by his drinking that it cannot be considered as a disabling impairment even though he is not presently able to work. Therefore, under the 1996 Amendment, Plaintiff is not eligible to receive disability benefits unless he would be found disabled due to his other impairments.

The ALJ's determination that Plaintiff's back pain, weight loss and depression are not disabling is supported by substantial evidence. There is no merit to Plaintiff's claim that the ALJ failed to appropriately assess his residual functional capacity. The ALJ did not rely on the absence of evidence to determine that Plaintiff is capable of light work. The November, 1990 medical report by Kash K. Biddle, D.O. documented no radicular findings, no atrophy of the arms or legs, and normal range of movement and strength in the upper extremities. [R. 643]. Plaintiff was uncooperative with the testing performed by Dr. Karathanos in July, 1994. However, Dr. Karathanos documented well preserved strength of upper extremities. [R. 736].

Dr. Karathanos also completed an Assessment of Work-Related Activities (Physical) form in which he estimated that plaintiff could lift and carry 15 pounds occasionally; could stand or walk a total of 2 hours of an 8-hour day; and could sit 4 hours per day. [R. 738-39]. The form requests the examiner to specify the medical findings that support each assessment, but Dr. Karathanos did not provide that information. Plaintiff argues that the case should be remanded because the ALJ found that Plaintiff was capable of more strenuous work than indicated on the form Dr. Karathanos completed. The ALJ discounted Dr. Karathanos' restrictions as having been based on Plaintiff's statements, not on the entirety of the record. The ALJ's conclusion is supported by substantial evidence in the record.

The Court further finds that even if the 1996 amendment to the law prohibiting award of disability benefits based on disability related to alcohol were not applicable to this case, the ALJ's decision that Plaintiff retains the capacity to control his

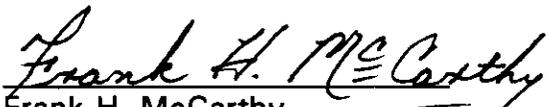
drinking, and therefore his seizures, is supported by substantial evidence. Accordingly, if the old rules were applicable to this case, the ALJ's denial of benefits would be affirmed.

There is no merit to the claim that the case should be remanded for failure to obtain vocational testimony as ordered by the court. The Court phrased some of its remand instructions in mandatory terms, some in permissive terms: "the Secretary must have Mr. Lombardo undergo a psychological and physical examination . . . the doctor who examines Mr. Lombardo must personally testify at a supplemental hearing. . . . a Vocational Expert should also testify in light of the new evidence submitted by the medical expert." [R. 716-17]. [emphasis supplied]. Concerning the testimony of a vocational expert at the supplemental hearing, the ALJ stated that since the additional medical information was not inconsistent with the previous residual functional capacity finding, it was not necessary to call another vocational expert to testify at the supplemental hearings. [R. 699]. The ALJ's finding is supported by substantial evidence and his rationale is a reasonable interpretation of the Court's order.

The Court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts. The Court further finds there is substantial evidence in the record to support the ALJ's decision.

Accordingly, the decision of the Commissioner finding Plaintiff not disabled is  
AFFIRMED.

SO ORDERED this 25<sup>th</sup> day of March, 1998.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

MAR 8 5 1998

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

MICHAEL J. LOMBARDO, )  
SSN: 458-84-9141, )  
 )  
Plaintiff, )

v. )

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

CASE NO. 97-CV-005-M

ENTERED ON DOCKET  
DATE 3-25-98

**JUDGMENT**

Judgment is hereby entered for Defendant and against Plaintiff. Dated  
this 25<sup>th</sup> day of MARCH, 1998.

*Frank H. McCarthy*  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

MAR 23 1996

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

ALTA L. HASTING

445-46-9984

Plaintiff,

vs.

Case No. 96-CV-1192-M

KENNETH S. APFEL,

Commissioner,  
Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE 3-25-98

**ORDER**

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

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

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<sup>1</sup> Plaintiff's January 9, 1995, (protectively filed) application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held December 21, 1995. By decision dated January 18, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on October 25, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born October 5, 1945, and was 50 years old at the time of the hearing. She has an 8th grade education and took a welding course, but was not certified. She claims to be unable to work as a result of shortness of breath. The Plaintiff's former work as a babysitter and trash hauler/driver did not qualify as past relevant work. The ALJ determined that she was capable of performing light work, restricted by the need to have reasonably clean air and no prolonged aerobic exercises. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to fully develop the

record; and (2) did not inform Plaintiff of her right to cross-examine the vocational expert.

Plaintiff claims that 20 C.F.R. Pt. 404, Subpt. P, App.1., § 3.00A required the ALJ to order that she undergo pulmonary function testing. It does not. Section 3.00A is found within that section of the relevant regulations known as the Listing of Impairments ("Listings"). The Listings describe, for each of the major body systems, impairments which are considered severe enough to prevent a person from performing any gainful activity. The determination of whether a claimant meets a listing is made on the basis of medical testing and clinical evaluation. The following statement quoted by Plaintiff to support her argument is taken out of context: "[p]ulmonary function testing is required to assess the severity of the respiratory impairment once a disease process is established by appropriate clinical and laboratory findings." The quoted statement is made in reference to the type of evidence acceptable to establish that a claimant meets a Listing for a respiratory disorder. It does not impose a requirement upon the ALJ to order pulmonary function testing whenever a respiratory disorder is alleged.

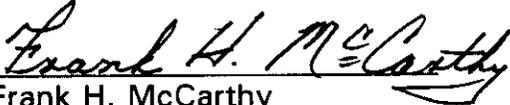
The ALJ has broad latitude in ordering consultative examinations. *Hawkins v. Chater*, 113 F.3d 1162, 1166 (10th Cir. 1997). A consultative examination is required where there is a direct conflict in the medical evidence requiring resolution, where the medical evidence in the record is inconclusive, or where additional tests are required to explain a diagnosis already contained in the record. *Id.* In this case the ALJ did order a consultative examination. In March 1995, the examiner found

Plaintiff's lungs to be clear to auscultation in all fields, breath sounds were not diminished, no wheezing, and a normal chest diameter. It was his impression that she suffered dyspnea (shortness of breath) on exertion, probably as a result of chronic obstructive pulmonary disease secondary to smoking. [R. 71]. In November 1995, Plaintiff was seen by another doctor for chest pain which he diagnosed as non-cardiac, chest wall pain. His examination of Plaintiff's lungs revealed relatively good air movement without wheezes and rhonchi. [R. 79]. Based on the daily activities Plaintiff reported in the disability report [R. 51], the disability interview outline [R. 56, 58], and the medical evidence in the record, it was within the ALJ's discretion to decline to order further testing.

There is no merit to Plaintiff's claim that she was not informed of her right to cross-examine the vocational expert. The ALJ clearly informed her that she was allowed to ask the vocational expert questions about her testimony. [R. 106].

The Court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts. The Court further finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is  
AFFIRMED

SO ORDERED this 23<sup>rd</sup> day of March, 1998.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

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

ALTA L. HASTING,  
SSN: 445-46-9984,

Plaintiff,

v.

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

Defendant.

CASE NO. 96-CV-1192-M

ENTERED ON DOCKET

DATE 3-25-98

**FILED**

MAR 24 1998

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

**JUDGMENT**

Judgment is hereby entered for Defendant and against Plaintiff. Dated  
this 24<sup>th</sup> day of MARCH, 1998.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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**FILED**

**MAR 23 1998**

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

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

JANIE DARWIN

557-66-2899

Plaintiff,

vs.

Case No. 96-CV-1167-M

KENNETH S. APFEL,<sup>1</sup>

Commissioner,

Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE 3-25-98

**ORDER**

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

Plaintiff has appended a 5 page "medical summary" to her brief, which the Commission has moved to strike as having exceeded the 5 page brief limit established by this Court's scheduling order. The Court is required to "meticulously examine the record," which it has done. *Broadbent v. Harris*, 698 F.2d 407, 414 (10th Cir. 1983). The Court has not considered Plaintiff's appendix, in any respect. In the

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<sup>1</sup> Kenneth S.. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Fed.R.Civ.P. 25(d)(1) Kenneth S. Apfel is substituted for Acting Commissioner John J. Callahan as the defendant in this suit.

<sup>2</sup> Plaintiff's September 19, 1994 application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held October 20, 1995. By decision dated January 25, 1996 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on October 18, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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future, if the parties find that the Court's page limit is too restrictive, the appropriate course is to file a motion, with supporting rationale to request permission to exceed the page limit.

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born August 4, 1944, and was 51 years old at the time of the hearing. She has a high school education and keypunch training. She formerly worked as a communications technician and supervisor for 20 years with the City of Tulsa. She claims to be unable to work as a result of residuals from surgery on both

hands as a result of carpal tunnel syndrome, fibromyalgia, and depression. Plaintiff had carpal tunnel surgery performed on her right hand on April 15, 1994 and on her left hand on May 24, 1994. She was released to return to work by her surgeon, Dr. Clendenin, on August 1, 1994. However, she continued to complain of hand and arm pain. Following a normal post-surgery EMG study, on September 13, 1994, Dr. Clendenin stated that he could find "no basis for her to remain incapable of returning to work." [R. 117]. Plaintiff was examined in September, 1994 by Dr. Denny who stated: "I think that she is certainly capable of returning back to work but will probably not tolerate a repetitive or physically demanding type of employment which involves her upper extremities. [R. 122]. Dr. Calvin diagnosed fibromyalgia. On March 29, 1995, he noted Plaintiff was "unable to return to position as technician, could try less physically demanding position--but [her] old position was eliminated." [R. 149]. On March 29, 1995, Dr. Calvin also completed a form in which he listed the following work restrictions: "unable to perform repetitious work, lifting and pulling, squatting and bending." [R. 159]. On September 21, 1995, Dr. Calvin completed an insurance company form utilized for calculation of disability status for the CUNA Mutual Insurance Group. [R. 161-162]. On the form he indicated that Plaintiff: was not able to lift; was not released to return to work; could not use her hands for any repetitive motion; could sit 1-3 hour in an 8-hour work day<sup>3</sup>; could not use her feet for repetitive movement; and could not bend/stoop, twist, squat, or

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<sup>3</sup> Dr. Calvin failed to indicate the length of time Plaintiff could stand/walk, although the form asked for that information and a space was provided to check "none."

climb. *Id.* Dr. Calvin also submitted a letter dated February 1, 1996, in which he stated his opinion that Plaintiff is permanently disabled. [R. 167]. The record thus contains considerable conflicting medical evidence concerning the nature and extent of Plaintiff's impairments.

The ALJ determined that although Plaintiff is unable to perform her past relevant work, she is capable of performing light work activity that does not require repetitive movements with her hands and that would allow her to change positions at will. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that: (1) the record contains no evidence to support the ALJ's conclusion that she can perform the lifting, or standing requirements of light work; (2) the ALJ failed to perform a proper credibility analysis; and (3) the ALJ failed to develop the record concerning Plaintiff's alleged mental impairment.

Dr. Clendenin and Dr. Denny concluded that Plaintiff was not putting forth full effort on strength testing. [R. 117, 122]. However, Dr. Denny found normal motor strength in Plaintiff's arms and legs, no atrophy of the muscles in her hands, and

bilaterally good grip. [R. 125]. Plaintiff walked in the mall for exercise on the recommendation of Dr. Calvin. [R. 53, 153]. Contrary to Plaintiff's allegations, the record contains substantial evidence to support the ALJ's finding that Plaintiff retains the ability to perform the requirements of light work.

However, the ALJ did not conduct an adequate credibility analysis. The ALJ determined that Plaintiff's complaints of pain were not wholly credible. Such a decision is entirely within the province of the ALJ as the Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). To be entitled to such deference the ALJ is required to assess the claimant's allegations of pain employing the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 which require consideration of claimant's signs and symptoms; the nature, duration, frequency, and intensity of the pain; the factors precipitating and aggravating the pain; the dosage, effectiveness, and side effects of the medication taken for relief of pain; the claimant's functional restrictions; and the impact on daily activities.

In this case the ALJ recapped Plaintiff's testimony concerning her pain and stated: "As to the claimant's allegations of totally disabling pain, her testimony was evaluated and compared with prior statements and other evidence. It is the

conclusion of the Administrative Law Judge that the pain experienced by the claimant is limiting but, when compared with the total evidence, not severe enough to preclude all types of work." [R. 17]. The ALJ's decision must contain a discussion of his credibility analysis. The foregoing does not qualify as an adequate analysis as it does not discuss any of the required factors or discuss any of the evidence. Elsewhere in the decision the ALJ mentioned the medications plaintiff takes, but provided no discussion of how the dosage or effectiveness entered into the credibility analysis. He also pointed out that Plaintiff did not testify to side-effects from her medications, the Court notes, however, that she was not asked about side-effects. Similarly, the ALJ noted that Plaintiff is "independent in her self-care" [R. 18], but again did not elaborate as to how that affected her credibility. Since the decision does not contain an adequate discussion of the ALJ's analysis, the Court has no basis upon which to determine whether the decision is supported by substantial evidence. Therefore, the case must be remanded for a proper pain and credibility evaluation. *Kepler v. Chater*, 68 F.3d 387 (10th Cir. 1995).

Plaintiff argues that the case should be reversed and remanded because the ALJ failed to develop the record concerning her depression. The Tenth Circuit recently discussed at some length the ALJ's duty "to ensure that an adequate record is developed . . . consistent with the issues raised." *Hawkins v. Chater*, 113 F.3d 1162, 1164 (10th Cir. 1997) (quotation omitted). In particular *Hawkins* addressed the question: "How much evidence must a claimant adduce in order to raise an issue requiring further investigation?" The Court instructed that some objective evidence

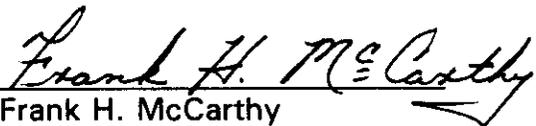
in the record must suggest the existence of a condition which could have a material impact on the disability decision requiring further investigation. However, isolated and unsupported comments by the claimant will not suffice to raise the issue. The claimant must in some fashion raise the issue, which on its face must be substantial. The claimant has the burden to make sure the record contains evidence to suggest a reasonable possibility that a severe impairment exists. Once that burden is satisfied, it becomes the ALJ's burden to investigate further. *Id.* However, the Court stated that "when the claimant is represented by counsel at the hearing, the ALJ should ordinarily be entitled to rely on the claimant's counsel to structure and present claimant's case in a way that the claimant's claims are adequately explored." *Id.* at 1167-68. It is appropriate for the ALJ to require counsel to identify issues requiring further development.

Although the ALJ has a basic obligation to ensure that an adequate record is developed during the disability hearing consistent with the issues raised, it is not the ALJ's duty to become the claimant's advocate. *Henrie v. United States Dept. of Health and Human Servs.*, 13 F.3d 359, 360-61 (10th Cir. 1993). If there was significant additional information relevant to Plaintiff's depression and its impact on her ability to do work, it was the obligation of Plaintiff and her counsel to bring that information to the attention of the ALJ. The *Hawkins* Court said that an "ALJ does not have to exhaust every possible line of inquiry in an attempt to pursue every potential line of questioning. The standard is one of reasonable good judgment." 113 F.3d at 1168. Applying this precept, the Court finds that the ALJ exercised

reasonable good judgment with respect to development of the record concerning Plaintiff's depression.

Since the ALJ did not conduct the required credibility analysis, the case is REVERSED and REMANDED for a proper credibility evaluation. In remanding this case, the Court does not dictate the result. Remand is ordered to assure that a proper analysis is performed and the correct legal standards are invoked in reaching a decision based upon the facts of the case. *Kepler*, at 391.

SO ORDERED this 23<sup>rd</sup> day of March, 1998.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**  
MAR 8 8 1998

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

JANIE DARWIN,  
SSN: 557-66-2899,

Plaintiff,

v.

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

Defendant.

CASE NO. 96-CV-1167-M

ENTERED ON DOCKET

DATE 3-25-98

**JUDGMENT**

Judgment is hereby entered for Plaintiff and against Defendant. Dated  
this 23<sup>rd</sup> day of MARCH, 1998.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

15

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

**FILED**

MAR 24 1998

*SP*

SAMUEL JAY WILDER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CURTIS ECKWOOD - ECKWOOD )  
 ENTERPRISES; CITY OF TULSA; )  
 TULSA COUNTY COMMISSIONERS )  
 (JUDGES - MICHAEL GASSETT, )  
 GORDON McALLISTER, HOWARD )  
 MEFFORD), )  
 )  
 Defendants. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 97-C-258-BU /

ENTERED ON DOCKET

DATE 3-25-98

**ORDER**

This matter comes before the Court upon various motions filed by the parties and the Court **ORDERS** as follows:

1. Plaintiff's Motion for Declaratory and Injunctive Relief - Trespass to Real and Personal Property - Entry of Dwelling House and Removal of Property (Docket Entry #25) and Plaintiff's Motion for Declaratory and Injunctive Relief - Trespass to Real and Personal Property - Entry of Dwelling House and Removal of Property (Docket Entry #30) are **DENIED**. Plaintiff's complaint does not request declaratory or injunctive relief. It only requests monetary relief. The Court granted Plaintiff leave until June 20, 1997, to amend his complaint. Plaintiff failed to amend his complaint within that time. To the extent Plaintiff's motions may be construed as motions to amend Plaintiff's complaint, the Court finds that the motions should be and are hereby **DENIED**. The Court finds that the proposed amendment would be futile. Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 230, 9 L.Ed. 222 (1962) (futility of

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amendment adequate justification to refuse to grant leave to amend). The amendment is directed as to Defendant, Curtis Eckwood - Eckwood Enterprises. The amendment does not establish a claim against Defendant under RICO or section 1983.

2. In light of the Court's dismissal of the claims against Defendant, Curtis Eckwood - Eckwood Enterprises, Plaintiff's First Application for Enlargement of Time (Docket Entry #26) is **DECLARED MOOT**.

3. In light of the Court's dismissal of the claims against Defendant, Curtis Eckwood - Eckwood Enterprises, Plaintiff's Request to File Postmaster's Response to Mail Loss/Rifling Report Regarding Civil Rights Complaint Mailed to Defendant Curtis Eckwood - Eckwood Enterprises (Docket Entry #27) is **DECLARED MOOT**.

4. Plaintiff's Motion to Transfer or Change of Venue (Docket Entry #28) is **DENIED**. In the case of a 28 U.S.C. § 1404(a) transfer, both transferor and transferee courts have venue over the matter, but it is more efficient to prosecute the action in the latter court. Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1515 n.3 (1991). Plaintiff has failed to show that the District Court of the Western District of Oklahoma would have venue over this action. To the extent the motion may be construed as a motion to recuse, the Court finds that it should be and is hereby **DENIED**.

5. Plaintiff's Motion to File Supplemental Petition and Brief (Filed Previously in Tulsa County District Court) (Docket

Entry #29) is **DENIED**. The proposed amendment is directed to Defendant Curtis Eckwood - Eckwood Enterprises, as he is the only Defendant mentioned in the pleading. The Court finds that the amendment would be futile as it does not establish a claim against Defendant under RICO or section 1983.

6. Plaintiff's Motion to File Answer and Counterclaim of Defendants Curtis Eckwood - Eckwood Enterprises and Attorney Kenneth King (Docket Entry #31) is **DENIED**.

7. Plaintiff's Motion to Add the Housing Authority of the City of Tulsa as a Defendant (Docket Entry #33) is **DENIED**. Plaintiff is not alleging a claim against the Housing Authority over which this Court would have subject matter jurisdiction and the Court declines to exercise supplemental jurisdiction over the claim sought to be alleged against the Housing Authority.

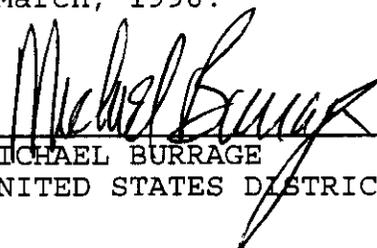
8. In light of the Court's dismissal of the claims against Defendant, Curtis Eckwood - Eckwood Enterprises, Plaintiff's Motion to File Return Receipt and Consumer Service Card P.S. Form 4314-C (Docket Entry #34) is **DECLARED MOOT**.

9. In light of the Court's dismissal of the claims against Defendant, Curtis Eckwood - Eckwood Enterprises, Plaintiff's Motion to File Unclaimed Certified Letter Concerning Plaintiff's Motion for Declaratory and Injunctive Relief - Trespass to Real and Personal Property - Entry of Dwelling House and Removal of Property (Docket Entry #35) is **DECLARED MOOT**.

10. Plaintiff's Request for the Clerk to Enter Default as to

Eckwood Enterprises, Curtis Eckwood (Docket Entry #37) is **DENIED**. Pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), the Court has concluded that Plaintiff has failed to state a claim against Defendant, Curtis Eckwood - Eckwood Enterprises, in the complaint and has dismissed Defendant, Curtis Eckwood - Eckwood Enterprises, from this action.

ENTERED this 24<sup>th</sup> day of March, 1998.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**FILED**  
MAR 24 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SAMUEL JAY WILDER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CURTIS ECKWOOD - ECKWOOD )  
 ENTERPRISES; CITY OF TULSA; )  
 TULSA COUNTY COMMISSIONERS )  
 (JUDGES - MICHAEL GASSETT, )  
 GORDON McALLISTER, HOWARD )  
 MEFFORD), )  
 )  
 Defendants. )

Case No. 97-C-258-BU /

ENTERED ON DOCKET

DATE 3-25-98

**ORDER**

In his complaint, Plaintiff has alleged claims against Defendant, Curtis Eckwood - Eckwood Enterprises, under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and 42 U.S.C. § 1983. Section 1915(e)(2)(B)(ii) of Title 28 of the United States Code provides in pertinent part that "the court shall dismiss the case at any time if the court determines that ... the action ... fails to state a claim on which relief may be granted ...." 28 U.S.C. § 1915(e)(2)(B)(ii).

The Court finds that Plaintiff has failed to state a claim against Defendant, Curtis Eckwood - Eckwood Enterprises, under RICO. Plaintiff has failed to allege an injury in his business or property. Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1169 (3<sup>rd</sup> Cir. 1987). Plaintiff has also failed to allege a pattern of racketeering activity. Boone v. Carsbad Bancorp., Inc., 972 F.2d 1545, 1555 (10<sup>th</sup> Cir. 1992). The Court therefore concludes that Plaintiff's RICO claim against Defendant must be dismissed under §

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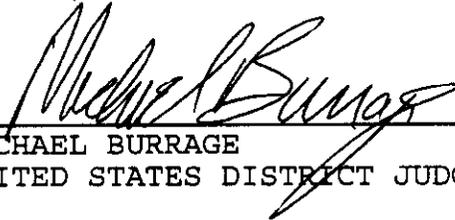
1915(e)(2)(B)(ii).

As to the section 1983 claim, the Court additionally finds that Plaintiff has failed to state a claim against Defendant, Curtis Eckwood - Eckwood Enterprises. Specifically, the Complaint fails to allege any facts tending to show that Defendant was a "state actor." Section 1983 provides that "every person" who acts "under color of" state law to deprive another of constitutional rights shall be liable in a suit for damages. To state a claim under section 1983, a plaintiff must show in part that the alleged violation was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988). In Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 928 (1982), the Court noted that if a defendant's conduct satisfies the requirement of "state action" under the fourteenth amendment, it also satisfies the "under the color of state law" requirement for section 1983. The Lugar Court made clear that for conduct of a private party to constitute "state action" it must be "fairly attributable to the State." 457 U.S. at 937. Thus, to be a state actor, the defendant must be a state official or have acted together with or obtained significant aid from a state official or have done something otherwise chargeable to the state. Id. Here, Plaintiff has failed to allege conduct on the part of Defendant that can be fairly attributed to the state. There are no factual allegations from which the Court might conclude that the alleged deprivation of Plaintiff's constitutional rights resulted from any concerted action, whether conspiracy, prearranged plan, customary procedure

or policy that substituted the judgment of a private party for that of the police or allowed a private party to exercise state power. Carey v. Continental Airlines, Inc., 823 F.2d 1402, 1404 (10<sup>th</sup> Cir. 1987). The Court thus concludes that Plaintiff's section 1983 claim against Defendant must be dismissed pursuant to § 1915(e)(2)(B)(ii).

Accordingly, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), Plaintiff's complaint against Defendant Curtis Eckwood, Eckwood Enterprises, is DISMISSED.

ENTERED this 24<sup>th</sup> day of March, 1998.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**FILED**

MAR 23 1998 *W*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

THOMAS R. HUTCHINSON and ANNE E. HUTCHINSON, )

Plaintiffs, )

vs. )

RICHARD B. PFEIL, MARY JOAN PFEIL, )  
ART SERVICES INTERNATIONAL, INC., )  
WILLIAM H. GERDTS, DAVID BERNARD )  
DEARINGER, SONA JOHNSTON, AND SOUTH )  
CHINA PRINTING COMPANY, )

Defendants. )

Case No. 94-C-711-E

ENTERED ON DOCKET

DATE MAR 24 1998

A M E N D E D J U D G M E N T

In accord with the Order entered August 1, 1995 sustaining defendants' Motion for Summary Judgment, and the Order entered February 27, 1998, granting judgment in favor of South China Printing Company, the Court hereby enters judgment in favor of the Defendants, Richard B. Pfeil, Mary Joan Pfeil, Art Services International, Inc, William H. Gerdts, David Bernard Dearing, Sona Johnston, and South China Printing Company, and against the Plaintiff, Thomas R. Hutchinson, individually and as Personal Representative of the Estate of Anne E. Hutchinson, deceased. Plaintiff shall take nothing of his claim. Costs and attorney fees may be awarded upon proper application.

Dated, this 23<sup>rd</sup> day of March, 1998.

*James O. Ellison*  
\_\_\_\_\_  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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**F I L E D**

MAR 23 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

ROSENHECK & CO. INC., )

Plaintiff, )

vs. )

UNITED STATES OF AMERICA, ex rel )

INTERNAL REVENUE SERVICE and )

WALTER EDWARD KOSTICH, JUNIOR )

AND DRUG ADMINISTRATION, )

Defendants. )

Case No. 97-CV-28-B

ENTERED ON DOCKET

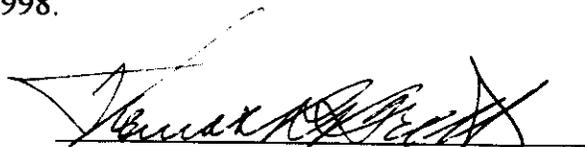
DATE MAR 24 1998

J U D G M E N T

In keeping with the Order adopting Magistrate Judge Sam Joyner's Report and Recommendation filed December 23, 1997, judgment is hereby granted in favor of the Plaintiff, Rosenheck & Co., Inc., in the amount of One Thousand One Hundred Ninety-Four Dollars (\$1,194.00), plus interest dating from March 11, 1997 at the rate of 5.67% per annum against the Defendant, Walter E. Kostich, Jr.

IT IS THEREFORE ORDERED that the clerk of court shall immediately disburse \$1,247.05 to Plaintiff Rosenheck & Co. and \$687.45 to Defendant Walter E. Kostich and that this action be dismissed. Each party is to bear its own attorney fees and costs.

DATED this 23<sup>rd</sup> day of March, 1998.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**  
MAR 23 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ROSENHECK & CO. INC., )  
)  
Plaintiff, )  
)  
vs. )  
)  
UNITED STATES OF AMERICA, ex rel )  
INTERNAL REVENUE SERVICE and )  
WALTER EDWARD KOSTICH, JUNIOR )  
AND DRUG ADMINISTRATION, )  
)  
Defendants. )

Case No. 97-CV-28-B /

ENTERED ON DOCKET  
DATE MAR 24 1998

ORDER

The Court has for consideration Defendant William Edward Kostich's ("Kostich") Objections to the Court's Recommendations and Findings entered by Magistrate Judge Sam Joyner (hereinafter "R&R") and filed December 23, 1998, (Docket #49), in which the Magistrate Judge recommends that the \$1,934.50 garnished from Kostich's employer, Universal Fidelity ("Universal") to satisfy Rule 11(c)(1)(B) sanctions imposed on Kostich and awarded to Rosenheck & Co. Inc. ("Rosenheck") currently held in the Court's registry be dispersed to Kostich in the amount of \$687.45 and to the plaintiff Rosenheck in the amount of \$1,247.05.<sup>1</sup> No response brief to Kostich's objection was filed by either party.

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<sup>1</sup>On March 11, 1997 judgment was entered against Kostich in favor of Rosenheck as a sanction for violating Fed. R. Civ. P. 11. The judgment was in the amount of \$1,194.00 plus interest at a rate of 5.67% a year. With interest, Kostich now owes Rosenheck \$1,247.05.

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Following de novo review by the Court as required by 28 U.S.C. § 636(b)(1)(C), the Court concludes Kostich's objections should be overruled and the R&R adopted by this Court.

Kostich raises six propositions in his Objection in response to the findings of the Magistrate Judge. (Docket #50).

Kostich challenges the categorization in the R&R of Rosenheck's garnishment of his wages as a "continuing earnings garnishment." Kostich alleges that the Garnishment Summons of May 12, 1997 superseded the Continuing Wage Garnishment Summons of April 29, 1997 and that therefore the garnishment of wages from Universal after May 12, 1997 was improper. However, the May 12, 1997 Garnishment Summons could not supersede the Continuing Wage Garnishment Summons of April 29, 1997, which was issued pursuant to Okla. Stat. tit. 12, § 1173.4. Section 1173.4(H)(1) states that: "A garnishment lien under this section has priority over any subsequent garnishment lien or garnishment summons served on the garnishee during the period it is in effect." *Id.* It was therefore proper for Universal to send funds to the Court after May 12, 1997.

Kostich's second objection is to the Magistrate Judge's finding that the language of Okla. Stat. tit. 12 § 1173.4(I) is ambiguous. However, the R&R resolved the interpretation of this section in Kostich's favor on the basis of the ambiguity in § 1173.4(I) and the express terms of the summons issued to Universal. The R&R therefore found that 75% of the money garnished from Universal and in the Court's registry was improperly paid to the Court. Kostich appears to be disputing an issue upon which both he and the Magistrate Judge agree.

Kostich's third assertion is that pursuant to Okla. Stat. tit. 31, § 1.3, his income from

Universal was exempt from garnishment. However, as the Magistrate Judge cogently points out in the R&R, §§ 1.1 and 1.3 only provide a hardship exemption for a debtor with a family or other dependents. Since Kostich admitted that he is single and has no dependents, §§ 1.1 and 1.3 have no relevance to a determination of what amount of his wages were properly subject to garnishment.

Kostich's fourth objection asserts there was no continuing wage garnishment in place at the time his wages were garnished from Universal. This issue is addressed above.

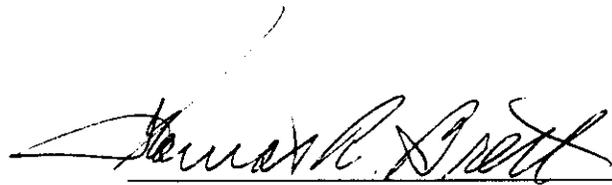
Fifthly, Kostich questions whether the Court violated its legal obligations when it accepted and deposited his garnished wages in the amount of \$962.14 on July 8, 1997 even though at the time an automatic bankruptcy stay was in effect. The Magistrate Judge found that these monies had been improperly deposited in the Court's registry. The Court's deposit of these monies created, in effect, a trust account on Kostich's behalf. The Court agrees with the Magistrate Judge's finding in the R&R that 100% of this payment should be returned to Kostich (subject to the \$1,247.05 owed by Kostich to Rosenheck).

In his sixth objection, Kostich alleges that the Court is seeking to coerce him against his will into waiving any claims to wage garnishment exemption and due process of law. The R&R explains that Okla. Stat. tit. 12, § 850 permits the judge to "order any property of the judgment debtor, not exempt by law, in his possession or under his control to be applied toward the satisfaction of the judgment..." Of the monies which the Court currently holds in trust for Kostich, \$1,247.05 are legally claimed by Rosenheck as judgment creditors. Therefore, pursuant to law, this Court finds that these monies are to be paid to Rosenheck.

The Court has reviewed in great depth the substantive arguments raised by Kostich his objections to the R&R. His assertions are simply not supported by law. 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.

IT IS THEREFORE ORDERED that \$1,247.05 be paid from the Court's registry to Rosenheck and that \$687.45 be paid to Kostich. A separate judgment is being entered contemporaneously with this Order.

DATED this 23<sup>rd</sup> day of March, 1998.



---

THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**  
MAR 23 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MICHAEL FRANK BRIGAN, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
CITY OF CLAREMORE, et al., )  
 )  
Defendants. )

Case No. 97-CV-125-BU ✓  
ENTERED ON DOCKET  
DATE 3-24-98

**ORDER**

This matter comes before the Court upon Plaintiff's Motion to Dismiss, wherein Plaintiff prays for dismissal of two of the Defendants, City of Claremore and Richard D. Jones. Upon inquiry from the Court, Plaintiff has represented that the dismissal is to be with prejudice and Defendants have represented that they have no objection to the dismissal with prejudice. Upon due consideration, the Court finds that Plaintiff's motion should be granted.

Accordingly, Plaintiff's Motion to Dismiss (Docket Entry #15) is **GRANTED**. Defendants, City of Claremore and Richard D. Jones, are **DISMISSED WITH PREJUDICE**.

ENTERED this 23<sup>rd</sup> day of March, 1998.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

In re: )  
)  
O'CARROLL, James (NMI) )  
)  
Debtor. )  
)  
JAMES O'CARROLL, )  
)  
Appellant, )  
)  
vs. )  
)  
THE STATE OF OKLAHOMA ex rel. )  
)  
THE OKLAHOMA TAX COMMISSION, )  
)  
Appellee. )

**FILED**

MAR 23 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DISTRICT COURT  
CASE NO. 95-CV-1005-BU

ENTERED ON DOCKET

DATE 3-24-98

**ORDER DISMISSING APPEAL**

The Appellant having requested the Court to enter an Order dismissing this appeal stating as cause that the parties have settled all of their differences; and, a copy of the Motion having been served upon the Appellee with no objection to the Motion being filed within the time allowed for response,

**THE COURT FINDS** that this appeal should be dismissed.

**AND, IT IS SO ORDERED.**

DATED: 3/23, 1998.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

*Jm*

ENTERED ON DOCKET

DATE 3-24-98

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

PATRICK I. CHAPMAN, )  
)  
Plaintiff, )  
)  
vs. )  
)  
VINTAGE GAS, INC.; VINTAGE )  
PIPELINE, INC.; and VINTAGE )  
PETROLEUM, INC., )  
)  
Defendants. )

Case No. 97-CV-662 (M) ✓

**F I L E D**

MAR 23 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**STIPULATION FOR  
DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, Plaintiff and Defendants hereby stipulate that this action may be and hereby is dismissed with prejudice, with each party to bear his or its own costs and expenses.

*Richard B. Noulles*  
Richard B. Noulles, OBA #6719  
**GABLE GOTWALS MOCK SCHWABE  
KIHLE GABERINO**  
2000 NationsBank Center  
15 West Sixth Street  
Tulsa, Oklahoma 74119-5447  
(918) 582-9201  
**ATTORNEY FOR PLAINTIFF**

*20*

*cl-*

*T. Lane Wilson*

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T. Lane Wilson, OBA #16343

**HALL ESTILL HARDWICK GABLE**

**GOLDEN & NELSON**

320 South Boston Avenue, Suite 400

Tulsa, Oklahoma 74103-3708

(918) 594-0400

**ATTORNEYS FOR DEFENDANTS**



**ACCORDINGLY, IT IS HEREBY ORDERED** that this case is terminated and any pending motion is **denied as moot**.

IT IS SO ORDERED.

This 19<sup>th</sup> day of March, 1998.

  
Sven Erik Holmes  
United States District Judge

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

**FILED**

MAR 20 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
MELVIN E. EASILEY, a.k.a. Melvin )  
Easiley, a.k.a. Melvin Eugene Easiley, et al., )  
)  
Defendants. )

No. 95-C-437-B

ENTERED ON DOCKET

DATE MAR 23 1998

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This matter came on for trial before the Court on March 3, 1997 with Loretta Radford representing Plaintiff United States, Eric B. Bolusky representing Defendants Melvin E. Easiley and Lisa Easiley, and Defendant Donald J. Bahnmaier appearing *pro se*.

**A. FINDINGS OF FACT**

After hearing the testimony and reviewing the exhibits and other evidence introduced during the trial of this matter, the Court makes the following findings of fact:

1. The United States of America on behalf of its agency, the United States Department of Housing and Urban Development ("HUD") (hereinafter collectively "the United States") is the plaintiff in this case; thus this Court has jurisdiction pursuant to 28 U.S.C. § 1345. The real property which is the subject of this action is located within the jurisdictional confines of the Northern District of Oklahoma and therefore, venue is proper pursuant to 28 U.S.C. §1391.

2. This is a civil action for an in rem judgment and foreclosure of a mortgage on the following described real property located within the Northern Judicial District of Oklahoma:

LOT TWENTY-EIGHT (28), BLOCK NINE (9), OF "LOTS 1-7 OF BLOCK 2, LOTS 6-20 OF BLOCK 3, LOTS 4-19 OF BLOCK 4, LOTS 6-20 OF BLOCK 5, AND ALL BLOCKS 6 THROUGH 19 KENDALWOOD IV ADDITION" TO THE CITY OF GLENPOOL, TULSA COUNTY, OKLAHOMA, ACCORDING TO THE RECORD PLAT THEREOF (the "Real Property").

The Real Property is also known as 13621 South Oak Street, Glenpool, Oklahoma.

3. On September 30, 1987, Ernest R. Cuellar and Juanita Cuellar executed and delivered to Oak Tree Mortgage Corporation ("Oak Tree"), their mortgage note in the amount of \$77,901.00, payable in monthly installments, with interest thereon at the rate of ten percent per annum. As security for the payment of the mortgage note, Ernest R. Cuellar and Juanita Cuellar, husband and wife, executed and delivered to Oak Tree, a real estate mortgage dated September 30, 1987, covering the Real Property. The mortgage was recorded on October 2, 1987, in Book 5055, Page 1895, in the records of Tulsa County, Oklahoma.

4. On July 1, 1989, Ernest R. Cuellar and Juanita Cuellar, husband and wife, executed a General Warranty Deed to Melvin E. And Denise L. Easiley, husband and wife. The General Warranty Deed was recorded with the Tulsa County Clerk on July 5, 1989, in Book 5192, page 2243. The General Warranty Deed provided in part:

Parties of the Second Part agree to assume and pay existing Mortgage to Oak Tree Mortgage and/or assigns "Subject, however to a first mortgage in favor of Oak Tree Mortgage Corporation."

Thus, pursuant to the General Warranty Deed, defendants Melvin E. Easiley and Denise L. Easiley became joint obligors and assumptors on the original note and mortgage in favor of Oak Tree.

5. The defendant Melvin E. Easiley [hereinafter "Melvin Easiley"] is also known as Melvin Easiley and Melvin Eugene Easiley.

6. Defendant Melvin Easiley separated from his wife Denise L. Easiley and moved out of the Real Property in January 1990.

7. Melvin and Denise L. Easiley were in default of the above described mortgage note and mortgage in September 1990 when they stopped making monthly payments.

8. On February 28, 1991, Melvin Easiley filed a Petition for Divorce against Denise L. Easiley in the District Court in and for Tulsa County Oklahoma, Case No. FD 91-01212.

9. On March 26, 1991, Oak Tree filed a petition to foreclosure on said Real Property against Melvin E. and Denise L. Easiley and Ernest R. and Juanita Cuellar in the District Court in and for Tulsa County Oklahoma, Case No. CJ 91-1404 for failure to pay monthly installments on the above described mortgage note and mortgage since September 1990.

10. On April 15, 1991, Ernest R. Cuellar and Juanita Cuellar filed a disclaimer in Case No. CJ-91-1404, stating that they "disclaim any and all right, title or interest in the" Real Property.

11. On August 5, 1991, Melvin Easiley, through his counsel Caesar C. Latimer, filed an answer in the foreclosure action asserting the Oak Tree had no right to foreclose on the Real Property "for the reason that an extension of time for payment has been granted to pay and reduce the amount of said mortgage."

12. On July 26, 1991, Oak Tree dismissed its foreclosure action, Case No. CJ-91-1404 without prejudice and assigned the above described mortgage note and mortgage to the United States Secretary of Housing and Urban Development of Washington, D.C., his successors and

assigns. This Assignment of Mortgage was recorded on July 29, 1991, in Book 5338, page 415, in the records of Tulsa County, Oklahoma.

13. On July 23, 1991, Denise L. Easiley entered into an agreement with HUD reducing the amount of the monthly installments due under the mortgage note in exchange for HUD's forbearance of its right to foreclose on the Real Property. This agreement was purportedly signed by both Melvin and Denise Easiley. However, Melvin Easiley's signature was forged. Therefore, only Denise L. Easiley was a party to the agreement with HUD. Superseding agreements were reached between Denise L. Easiley and HUD in July 1992, July 1993 and July 1994.

14. On January 29, 1992, a Decree of Divorce was entered in Case No. FD 91-01212 divorcing Melvin Easiley from Denise L. Easiley, and by agreement of the parties, awarding the subject Real Property and assigning responsibility for the mortgage payments to Denise L. Easiley. The Decree of Divorce was formally filed on September 23, 1997.

15. The terms and conditions of the mortgage note and mortgage described above, as well as the terms and conditions of the HUD forbearance agreements have been breached in that Defendant Denise L. Easiley has failed to make monthly installments thereon although payment has been demanded.

16. As a result of the default on the mortgage note and mortgage as well as on the HUD forbearance agreements, the United States filed this foreclosure action on May 15, 1995. At the time of the filing of the foreclosure action, the United States was unaware that Denise L. Easiley had been awarded the subject Real Property as a term of the divorce decree and that Melvin Easiley had no right, title or interest in the Real Property.

17. On March 8, 1996 the Court Clerk entered default against Melvin E. Easiley,

Denise L. Easiley and the City of Glenpool.

18. On March 15, 1996, this Court entered a Judgment of Foreclosure for the United States, finding that Defendants Melvin E. Easiley, Denise L. Easiley and the City of Glenpool were in default and foreclosing any interest in the Real Property held by Defendants.

19. The Real Property was sold on August 5, 1996 pursuant to a Marshal's Sale and a Marshal's Deed was issued to the Defendant Donald J. Bahnmaier on November 8, 1996 for good and valuable consideration.

20. On September 4, 1997, Plaintiff United States filed a Motion with Memorandum Brief to Vacate Judgment of Foreclosure, to Vacate Sale, and to Permit Filing Second Amended Complaint on the basis that "Melvin Easiley has informed the Plaintiff, United States of America that he was not served with the foreclosure Complaint in this case." The United States moved to amend the Complaint so that proper service could be made upon Melvin Easiley; to show that Melvin E. Easiley is also known as Melvin Easiley and Melvin Eugene Easiley; and to add Lisa Easiley, the current spouse of Melvin Easiley, and Donald J. Bahnmaier as defendants. This Court granted the motion, vacating Judgment of Foreclosure, vacating sale and permitting filing of second amended complaint by its Order of September 15, 1997. On October 3, 1997, the United States filed the Second Amended Complaint.

21. In his Answer to the Second Amended Complaint, Melvin Easiley admitted that the Real Property was conveyed to him and Denise L. Easiley by General Warranty Deed from Ernest R. and Juanita Cuellar but denied being a current assumptor of the subject indebtedness. Melvin and Lisa Easiley also filed counterclaims for fraud and breach of legal and equitable duty against the United States alleging the following: (1) there is no record in the Clerk's Office of

Tulsa County indicating that Melvin Easiley is liable to the United States on any mortgage; (2) despite this, the United States without notice to Melvin Easiley falsely executed agreements exclusively with Defendant Denise L. Easiley and concealed such from him; (3) as a result of the United States' concealment and failure to provide him with notice of the foreclosure, the United States prevented him from keeping the Real Property out of foreclosure. Melvin and Lisa Easiley cross-claimed against Denise L. Easiley alleging that "[a]ny judgment rendered against Defendant, Melvin Easiley, concerning the mortgage to Oaktree [sic] Mortgage Corporation dated September 30, 1987, is recoverable from Denise L. Easiley by virtue of the divorce decree dated January 29, 1992, filed September 23, 1997." Melvin Easiley dismissed his cross-claim against Denise L. Easiley on March 3, 1993 during the trial on this matter.

22. At the time HUD executed the assignment program (payment reduction agreement) with Denise L. Easiley in July 1991, Melvin Easiley was no longer residing on the premises. The United States concealed no material facts from Melvin Easiley nor did it defraud Melvin Easiley.

23. Under the terms of the mortgage note and mortgage, upon default in the payments due or breach of any of the conditions, HUD is entitled to declare the balance due and payable immediately, and pursuant thereto, HUD has elected to declare the balance due and payable. As of March 3, 1988, there was due and owing under the mortgage note and mortgage, after full credit for all payments made, the principal sum of \$121,539.77, which includes penalty charges in the amount of \$1,930.14, plus accrued interest in the amount of \$12,569.38, plus interest accruing thereafter at the rate of ten percent per annum until judgment, plus interest thereafter at the legal rate until fully paid.

24. Defendant Lisa Easiley does not claim any right, title or interest in the Real Property and is named as a defendant solely by virtue of her status as the current spouse of Melvin Easiley.

25. The Defendant City of Glenpool has defaulted in this matter.

26. The Defendant Denise L. Easiley has defaulted in this matter.

27. The Defendant Tulsa County Board of Commissioners does not claim any right, title or interest in the Real Property.

28. The Defendant Tulsa County Treasurer claims \$26.00 in unpaid personal property taxes as a lien on the Real Property.

29. The Defendant Donald J. Bahnmaier claims an interest in the Real Property by virtue of a Marshal's Deed, dated November 8, 1996, and recorded on November 19, 1996, in Book 5862, Page 1014, in the records of Tulsa County, Oklahoma. Donald J. Bahnmaier also counterclaims against the United States for damages incurred as a result of vacating the sale of the Real Property to him.

30. The United States concedes the true and proper owner of the subject Real Property is Defendant Donald J. Bahnmaier.

31. The Defendant Melvin Easiley was erroneously offered, prior to trial, the equitable right of redemption and rejected that offer.

## B. CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 28 U.S.C. §1345 and venue is proper pursuant to 28 U.S.C. §1391.

2. Any Finding of Fact above which might be properly characterized a Conclusion of Law is incorporated herein.

3. As of January 29, 1992, Defendant Melvin Easiley ceased to have any equitable right of redemption to the Real Property. On said date, the Real Property was conveyed to Denise L. Easiley by minute order and a Final Decree of Divorce signed and dated by the Tulsa County District Court in Case No. FD 91-01212 and filed in the court records on September 23, 1997.

4. Although Plaintiff United States filed the Second Amended Complaint to cure any defect in service upon Defendant Melvin Easiley, such was unnecessary as Melvin Easiley did not hold any right, title or interest in the Real Property when the Complaint was originally filed on May 15, 1995 or when the Second Amended Complaint was filed on October 3, 1997.

5. If, however, any equitable right of redemption in Defendant Melvin Easiley survived the conveyance of the Real Property to Denise L. Easiley in the Final Divorce Decree, Melvin Easiley rejected the exercise of such right, and his interest in the Real Property is thus hereby foreclosed.

6. The Defendant Donald J. Bahnmaier's counterclaim against the United States is denied, except insofar as Donald J. Bahnmaier's right, title and interest in the Real Property is hereby recognized.

7. The Court concludes there is no evidence that the United States committed any acts of fraud, concealment or deceit against Melvin Easiley and therefore grants judgment in favor of the Plaintiff United States on Defendant Melvin Easiley's counterclaims.

8. The second foreclosure proceeding in this case was unnecessary as the first

foreclosure commenced by the Amended Complaint filed August 15, 1995 was proper regardless of whether Melvin Easiley was properly served with summons. Denise L. Easiley was properly served with summons in reference to the first foreclosure on September 2, 1995. At that time Melvin Easiley had no right, title or interest in the subject Real Property because the divorce decree of January 29, 1992 vested title in said Real Property in Denise L. Easiley. Thus, service upon Melvin Easiley of the Amended Complaint in the first foreclosure proceeding was not required.

9. Accordingly, the Court vacates and sets aside its Order of September 15, 1997 vacating the judgment of foreclosure and sale of the subject Real Property.

10. The Court orders that all right, title and interest in said Real Property is vested in Defendant Donald J. Bahnmaier by virtue of the Marshal's Deed, dated November 8, 1996, and recorded on November 19, 1996, in Book 5862, Page 1014, in the records of Tulsa County, Oklahoma, nunc pro tunc. The Court hereby quiets title in said Real Property in Donald J. Bahnmaier.

11. The lien of the Tulsa County Treasurer in the amount of \$26.00 is hereby acknowledged and ordered as a lien on the subject Real Property.

12. In the event of an appeal of the Order and Judgment in this case, Plaintiff United States and/or Defendant Donald J. Bahnmaier may make a timely application for an appropriate supersedeas bond.

The United States is directed to present a form of Judgment reflecting the Court's findings above on or before March 25, 1998.

IT IS SO ORDERED, this 20<sup>th</sup> day of March, 1998.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

IN RE:

FULLER, RICK E.,  
FULLER, MARY E.,

Debtors,

UNITED STATES OF AMERICA,

Appellant,

v.

FULLER, RICK E. and MARY E.,

Appellees.

**FILED**

MAR 20 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 97-CV-661-H

ENTERED ON DOCKET

DATE 3-23-98

**ORDER**

This matter comes before the Court on the Report and Recommendation of the United States Magistrate Judge filed on January 5, 1998 (Docket # 5). Appellant United States of America ("United States") filed objections to the Report on January 13, 1998.

The trial court's consideration of a Report and Recommendation is governed by Rule 72(b) of the Federal Rules of Civil Procedure which provides in pertinent part that:

[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.

Fed. R. Civ. P. 72(b).

In an appeal from the an order of the Bankruptcy Court, the District Court is bound by the findings of facts of the Bankruptcy Court unless they are clearly erroneous, while conclusions of law are reviewed by the Court de novo. *In re Fullmer*, 962 F.2d 1463, 1466, 1467 (10th Cir. 1992).

Pursuant to Fed. R. Civ. P. 72(b), the Court has made a de novo review of the record on appeal, the briefs and arguments of the parties, and the Report. Based upon this review, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge. The Court

agrees with Magistrate McCarthy that the findings of the Bankruptcy Court cannot be found to be clearly erroneous. Accordingly, the order of the Bankruptcy Court granting the debtors' Amended Motion to Determine Tax Liability is hereby affirmed.

IT IS SO ORDERED.

This 19<sup>TH</sup> day of March, 1998.

  
\_\_\_\_\_  
Sven Erik Holmes  
United States District Judge

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

**FILED**

MAR 20 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ROBERT DALE GALLIMORE, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MIKE KELLY, et al., )  
 )  
 Defendants. )

Case No. 96-CV-1200-H (J)

ENTERED ON DOCKET

DATE 3-23-98

**ORDER**

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge filed on September 16, 1997 (Docket #28), in this prisoner's civil rights action pursuant to 42 U.S.C. § 1983. The Magistrate Judge recommends that Defendant Kelly's motions to dismiss be granted and the case dismissed with prejudice in its entirety as time-barred.

On September 26, 1997, Plaintiff requested an extension of time to file his objection to the Report and also requested that he be provided copies of all pleadings. On October 22, 1997, the Court granted Plaintiff's requests, providing a copy of the file to Plaintiff at a cost of \$40.00 and allowing an additional twenty days for Plaintiff to file his objection to the Report.

Plaintiff filed his objection to the Report on November 25, 1997. Defendant Mike Kelly filed his response to Plaintiff's written objections on November 24, 1997.<sup>1</sup>

As a preliminary matter, the Court notes that Plaintiff objects to that portion of the Court's

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<sup>1</sup>The Certificate of Service executed by Plaintiff indicates the Objection was mailed to Defendants on November 9, 1997.

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October 22, 1997 Order charging Plaintiff \$40.00 for the copy of the court file. In his motion for extension of time, Plaintiff stated as follows:

The plaintiff is currently incarcerated in the Cass County Detention Center in Harrisonville Missouri and his personal file of this case is being held in the Ottawa County Sheriffs Dept in Miami Oklahoma. And thus far they have refused to give my attorney any of my legal materials or personal property as requested. (See attached affidavit and letter).

The plaintiff will be unable to timely file his objections to the report and recommendation of this court without reviewing all the pleadings in this case, so he could properly respond.

\* \* \* \* \*

The plaintiff is indigent and has no way of paying for the costs of the copies of the record, but would be glad to make an effort in the near future to pay partial payments to the court for the costs, if the court deems that necessary. The plaintiff has been making payments on his filing fee during the pendency of the action, maybe it would be reasonable to add these additional costs of the pleadings, along with the costs of a copy of the "Court Rules" to the remainder of the filing fee, and allow the plaintiff to continue the payments from future monies from his account until the fees and expenses are paid in full.

See Docket # 29, at 2-3. On October 22, 1997, based on Plaintiff's representations, the Court granted Plaintiff's motion for extension of time and for copies of all pleadings (Docket # 31). The Clerk of Court was directed to send Plaintiff a copy of the court file maintained in this case. The Clerk was also directed to charge Plaintiff \$40.00 for the copying. In addition, the Order provided that Plaintiff had 20 days from the date the Clerk mailed the copies, as evidenced by the Clerk's certificate of service, to file objections to Magistrate Joyner's Report and Recommendation. By separate Order, Ottawa County Jail officials were directed to continue collecting monthly payments from Plaintiff's prison account(s) until the remaining balance of Plaintiff's filing fee and the \$40.00 copy fee are paid in full (Docket #30).

Plaintiff now objects to the \$40.00 charge, arguing that it exceeds the "fair market value" of

the copies and should be reduced accordingly. The Court is unpersuaded by Plaintiff's argument and declines to adjust the charge as requested by Plaintiff.<sup>2</sup>

As to Plaintiff's objections to the Magistrate Judge's Report and Recommendation, in accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which Plaintiff has objected. Based on careful review of the facts of this case as well as the applicable law, the Court finds that the Report should be adopted and affirmed.

### ***BACKGROUND***

In his complaint, Plaintiff alleges that Defendants (1) violated his Eighth Amendment right to be free from cruel and unusual punishment by using excessive force to arrest him and by denying him proper medical treatment after his arrest, and (2) violated his Fourteenth Amendment right to due process when they transported him from Oklahoma to Missouri without first having an extradition hearing. The factual background of Plaintiff's claims is summarized succinctly in Section I of the Magistrate Judge's Report. That section is adopted herein. Significant to the arguments presented by Plaintiff in his objection to the Report is the fact that the events giving rise to Plaintiff's claim occurred during the daylight hours of April 13, 1994, the date he was arrested in Oklahoma after being pursued by Kansas law enforcement officials from Kansas across the state line into Oklahoma. After bringing the car to a stop in Oklahoma, Plaintiff alleges that various police officers fired their weapons at him. Shots continued to be fired as Plaintiff attempted to run away, fearing for his life.

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<sup>2</sup>Plaintiff is advised that the standard copy charge assessed by the Clerk's Office is \$.50 per page.

Apparently, Plaintiff was struck by two shots. After being shot, Plaintiff was arrested by Oklahoma law-enforcement officers and was transported to a hospital in Missouri for treatment where he was released into the custody of Missouri law-enforcement officials. Plaintiff claims that he was denied proper medical care while hospitalized in Missouri. Based on pleadings filed by Plaintiff in a similar lawsuit in the United States District Court for the Western District of Missouri and made a part of the record in this case (see Docket #25), Plaintiff was hospitalized until approximately April 18, 1994. More than two years and eight months later, on December 30, 1996, Plaintiff filed the instant lawsuit.

### *DISCUSSION*

In his Report and Recommendation, the Magistrate Judge concluded that the two-year limitations period for "injury to the rights of another" as provided by 12 Okla. Stat. § 95(Third) is the limitations period applicable to Plaintiff's § 1983 claims. The Magistrate Judge also carefully analyzed and rejected each of Plaintiff's proposed reasons<sup>3</sup> for tolling the limitations period in this case. After reviewing the record, the Magistrate Judge concluded that Plaintiff's claims accrued on or before April 18, 1996. Because the instant lawsuit was filed December 30, 1996, more than two years and eight months later, the Magistrate Judge recommended that the complaint be dismissed with prejudice as time-barred.

Plaintiff objects to the Report, arguing that the Magistrate Judge's conclusions were erroneous for the following reasons:

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<sup>3</sup>Plaintiff argued that the limitations period should be tolled based on numerous legal theories including: the discovery rule; fraudulent concealment; legal disability due to incarceration, Okla. Stat. tit. 12, § 96; absence from the state of Oklahoma during his incarceration in Missouri, Okla. Stat. tit. 12, § 98; filing of a similar lawsuit, dismissed as to the Oklahoma defendants for lack of jurisdiction; and the theory of relation back, Fed. R. Civ. P. 15(c).

- (1) this Court should apply the three-year statute of limitations for civil rights actions provided by the State of Missouri;
- (2) the applicable limitations period in this case is five years as provided by Okla. Stat. tit. 12, § 95(5);
- (3) the Court should find that the limitations period in this case has been tolled due to the following considerations:
  - (a) Plaintiff's incarceration is a legal disability, allegedly recognized by the State of Missouri as a basis for tolling a limitations period,
  - (b) Defendants fraudulently concealed the fact that an unauthorized weapon was used during the shooting,
  - (c) Plaintiff has been unable to "discover" whether or not he received adequate medical treatment either in Missouri, because he did not even realize he had been transported to Missouri until 24-48 hours after he had been shot, or in Oklahoma, because the hospital in Miami, Oklahoma, continues to conceal his medical records,
  - (d) Plaintiff's instant complaint in fact "relates back," pursuant to Fed. R. Civ. P. 15(c), to the date he filed a separate complaint in the United States District Court for the Western District of Missouri,
  - (e) the limitations period should be equitably tolled in this case;
- (4) the Court should find that because Plaintiff is given, by law, an additional year to refile a suit dismissed without prejudice, essentially extending a two year limitations period to three years, this action was timely filed;
- (5) the Magistrate Judge erred in recommending that this action be dismissed *with prejudice*.

The Court will address each of Plaintiff's grounds for objecting to the Report.

As discussed by the Magistrate Judge in the Report, no limitations period is specified in 42 U.S.C. § 1983. However, it is well-established, bright-line law that the forum state's personal injury statute of limitations should be applied to all § 1983 claims. Wilson v. Garcia, 471 U.S. 261, 280 (1985). This Court sits in the State of Oklahoma. Therefore, the forum state is Oklahoma and the applicable limitations period is to be provided by Oklahoma law, not Missouri law. This Court declines to apply Missouri law as urged by Plaintiff.

In addition, Oklahoma's general personal injury statute of limitations is found at Okla. Stat. tit. 12, § 95(Third). Since established Supreme Court precedent requires this Court to apply Oklahoma's two-year personal injury limitations period to this case, *see id.*, the Court rejects Plaintiff's contention that the applicable limitations period is the five year period provided by Okla. Stat. tit. 12, § 95(Fifth) relating to actions on an "official bond or undertaking."<sup>4</sup>

Similarly, the Court rejects each of Plaintiff's arguments concerning tolling of the applicable limitations period. As discussed *supra*, this Court applies Oklahoma law, not Missouri law, when resolving issues concerning the application of the statute of limitations, including tolling issues, in § 1983 cases. Although Plaintiff urges that this Court should apply Missouri law in this instance, this Court must follow clearly established Supreme Court precedent requiring the application of Oklahoma law. Oklahoma has *never* recognized incarceration as a legal disability.<sup>5</sup>

Furthermore, the Court finds that Plaintiff's allegations concerning fraudulent concealment by Defendants and his own inability to "discover" certain medical records are insufficient to toll the limitations period in this case. Apparently Plaintiff had sufficient information to bring similar claims in federal court in Missouri on September 14, 1994, only five months after the events giving rise to his claims took place. As the Oklahoma defendants were dismissed from that lawsuit in January of 1995, more than one year *before* the Oklahoma limitations period expired, Plaintiff could have filed his claims in this Court before the two-year limitations period expired. Plaintiff was not prevented

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<sup>4</sup>Plaintiff continues to misunderstand the term "undertaking" in the context of § 95(Fifth). The term, when read in the context of the entire statute, connotes a form of security given by one of the listed officials. It does not relate to the "breach of an oath" as urged by Plaintiff.

<sup>5</sup>The Court notes that in 1990, the State of Missouri amended Mo. Rev. Stat. § 516.030 to delete incarceration as a legal disability. *See* Defendant Mike Kelly's Response to Plaintiff's Written Objections to the Magistrate's Report and Recommendation (Docket #32, Ex. B).

from filing his claim by Defendants' "fraudulent concealment" or by his own inability to "discover" his medical records.

For the reasons discussed by the Magistrate Judge, Petitioner's instant complaint does not "relate back" to his separate lawsuit filed in federal court in Missouri. Plaintiff's reliance on Fed. R. Civ. P. 15(c) is misplaced. (Docket #33, ¶ 23). Rule 15(c) clearly applies to relation back of *amendments* to pleadings in an existing lawsuit. Quite simply, the complaint filed by Plaintiff in the instant lawsuit is not an *amendment* to the separate complaint filed in his Missouri lawsuit, and therefore, does not "relate back" to that previous lawsuit.

Finally, the Court rejects Plaintiff's contention that the limitations period in this case should be equitably tolled. (Docket #33, ¶¶ 18-19). The doctrine of equitable tolling is reserved for rare instances of complex proceedings or facts where a plaintiff has diligently sought to protect his rights. See Calderon v. United States Dist. Court for the Central Dist. of Cal., 127 F.3d 782 (9th Cir. 1997) (stating that equitable tolling will be available when "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time"); see also Beeler, 112 F.3d at 391; Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir.1996); Scholar v. Pacific Bell, 963 F.2d 264, 267-68 (9th Cir.), *cert. denied*, 506 U.S. 868 (1992). While the Court does not foreclose the possibility that some particular difficulties could require tolling in some instances, this is not one of them. Plaintiff has not demonstrated the existence of "extraordinary circumstances" beyond his control which prevented the timely filing of his complaint.

Without citing any applicable law, Plaintiff also contends that the instant suit was timely filed because after the Missouri lawsuit was dismissed without prejudice, Plaintiff was entitled to refile and "by law is given an additional year to do so" and that the additional year "must be applied after the

original two year limitations period has expired, which in effect gives the plaintiff a total of three years (3) to file the complaint." (Docket #33, ¶ 24). Plaintiff may be relying on Oklahoma's "savings" statute, Okla. Stat. tit. 12, § 100, which provides that when a timely filed action has been dismissed other than on the merits *after* the limitations period has expired, the action may be refiled within one year of the dismissal. See Sun Oil Co. v. Fleming, 469 F.2d 211 (10th Cir. 1972). However, Plaintiff's reliance on the "savings" statute is misplaced because the Oklahoma defendants were dismissed from the Missouri lawsuit *prior to* the expiration of the limitations period. Therefore, the "savings" statute is inapplicable and does not provide Plaintiff with an additional year within which to file the instant lawsuit.

Plaintiff also objects to the Magistrate's recommendation that this action be dismissed *with prejudice*. A dismissal *without prejudice* implies that conditions may exist whereby the claimant could refile the dismissed claims at a later date. However, when a Court determines that a claim is barred by the statute of limitations, the result is that the claimant will never be able to bring the claims due to the imposition of a time bar. See Putnam v. Morris, 833 F.2d 903, 904-05 (10th Cir. 1987); see also Lovelace v. Acme Markets, Inc., 820 F.2d 81, 85 (3d Cir. 1987); Wei v. State of Hawaii, 763 F.2d 370, 372 (9th Cir. 1985) (*per curiam*). Therefore, the Magistrate Judge's recommendation that Plaintiff's claims be dismissed *with prejudice* is entirely appropriate and should be affirmed. Because any attempt to amend this complaint would be futile, Plaintiff's belated request for leave to amend asserted in his objection must be denied. See Hall v. Bellmon, 935 F.2d 1106, 1109-1110 (10th Cir. 1991) (stating that a complaint may be dismissed without affording an opportunity to amend "when it is 'patently obvious' that the plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile").

**CONCLUSION**

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which the Plaintiff has objected and has concluded that the Report should be adopted and affirmed. Plaintiff's complaint should be dismissed with prejudice as time-barred.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) Plaintiff's request for a reduction in the copy charge assessed in the Court's Order of October 22, 1997, is **denied**;
- (2) The Report and Recommendation of the Magistrate Judge (Docket #28) is **adopted and affirmed**;
- (3) Defendant Mike Kelly's motions to dismiss (Docket #s 10 and 23) are **granted**;
- (4) This case is **dismissed with prejudice** as to all Defendants;
- (5) Any pending motion is **denied as moot**.

IT IS SO ORDERED.

This 19<sup>TH</sup> day of March, 1998.

  
\_\_\_\_\_  
Sven Erik Holmes  
United States District Judge

7

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
MAR 20 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ROBERT D. LOWERY, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 KENNETH S. APFEL, Commissioner )  
 of Social Security Administration,<sup>1/</sup> )  
 )  
 Defendant. )

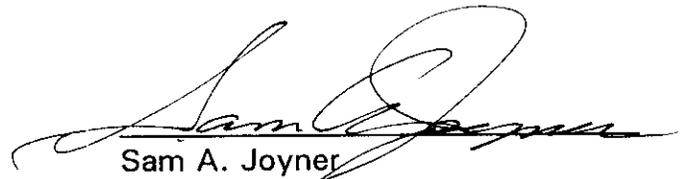
334  
No. 97-C-~~344~~-J

ENTERED ON DOCKET  
DATE 3-23-98

JUDGMENT

Upon the motion of Defendant, this case was remanded to the Commissioner.  
Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the  
Court's Order.

It is so ordered this 19th day of March 1998.

  
Sam A. Joyner  
United States Magistrate Judge

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<sup>1/</sup> 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.

19

ENTERED ON DOCKET

DATE 3-23-98

UNITED STATES DISTRICT COURT FOR THE **F I L E 1**  
NORTHERN DISTRICT OF OKLAHOMA

MAR 19 1998 *P*

**ROBERT D. LOWERY,** )  
 )  
 **Plaintiff,** )  
 )  
 v. )  
 )  
 **KENNETH S. APFEL,** )  
 **Commissioner of the Social** )  
 **Security Administration,** )  
 )  
 **Defendant.** )

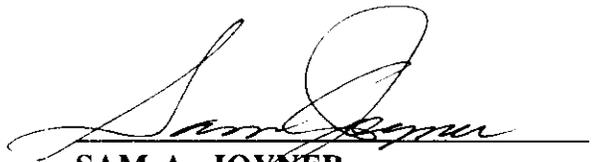
**Phil Lombardi, Clerk**  
**U.S. DISTRICT COURT**

Case No. 97-CV-334-J ✓

**ORDER**

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

DATED this 19 day of MARCH, 1998.



**SAM A. JOYNER**  
**UNITED STATES MAGISTRATE JUDGE**

SUBMITTED BY:

STEPHEN C. LEWIS  
United States Attorney



CATHRYN McCLANAHAN, OBA #14853  
Assistant United States Attorney  
333 W. Fourth St., Suite 3460  
Tulsa, OK 74103-3809



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

KENNETH RILEY, an individual )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SECURITY LIFE OF DENVER INSURANCE )  
 COMPANY, a Colorado corporation, )  
 )  
 Defendant. )

Case No. 97-CV-494-K(M)

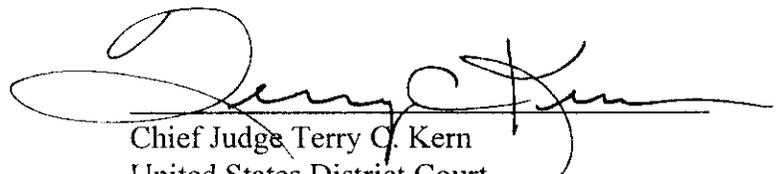
FILED

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

Now, on this 19 day of March, 1998, comes on for consideration the above referenced matter, and the Court being fully advised in the premises finds that the parties have jointly agreed that dismissal is appropriate in this matter. The Court has reviewed the facts and is in agreement with the parties that dismissal should take place in this action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that dismissal of this case with prejudice should be and is hereby ordered.

  
 Chief Judge Terry Q. Kern  
 United States District Court  
 Northern District of Oklahoma

DATE 3-25-98

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

**F I L E D**

AZEEZ BAKHSH and RAHIM BAKHSH, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 VICTORIA SMEDLEY, et al., )  
 )  
 Defendants. )

MAR 23 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 97 CV 695 K

**JOURNAL ENTRY OF JUDGMENT UPON AGREED SETTLEMENT**

NOW ON this 19 day of March, 1998 this matter comes on for consideration before the undersigned Judge of the United States District Court. Plaintiffs appear by and through their attorney of record, Allen M. Smallwood and Defendants appear by and through their attorneys of record Mark H. Newbold and John E. Dorman, Senior Assistant City Attorneys.

The Court, having reviewed the allegations set forth in Plaintiffs' Complaint and, upon being advised that the parties have agreed to entry of a consent judgment against Defendant City of Tulsa in the sum of Thirty Thousand Dollars (\$30,000.00), being satisfied that Plaintiffs fully understand the nature of this action with regard to its finality which precludes additional or further compensation for damages arising from the occurrence of the event identified in Plaintiffs' Complaint, and upon being further advised by Plaintiffs that it is their desire to settle the entirety of all claims and causes of action relating to the events identified in their Complaint upon payment of damages in the sum of Thirty Thousand Dollars (\$30,000.00), the Court finds:

1. Jurisdiction over the subject matter of this lawsuit and the parties hereto exists;
2. Plaintiffs are fully aware of their rights in this matter and it is Plaintiffs' desire to

compromise their right to trial by jury;

3. Plaintiffs desire to accept as full, final and complete settlement the sum of Thirty Thousand Dollars (\$30,000.00) for any and all damages, losses, and expenses, including, but not limited to, attorney fees, court costs, and judgment interest, they sustained as a result of the events identified in Plaintiffs' Complaint;

4. By agreement of the parties, Defendant City of Tulsa's' payment to Plaintiffs will stand as full compensation to Plaintiffs and preclude any further or separate action by Plaintiffs against the City of Tulsa, Defendants Victoria Smedley, Scott Rogers, Amy Beth Zellis, and/or any other employee(s) of the City of Tulsa, arising from or relating to the events described in Plaintiffs' Complaint;

5. The Mayor of the City of Tulsa has formally authorized settlement of Plaintiffs' lawsuit in the sum of Thirty Thousand Dollars (\$30,000.00);

6. All parties request approval and finalization on their mutual settlement by this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT, that Plaintiffs have and recover from Defendant City of Tulsa, damages in the sum of Thirty Thousand Dollars (\$30,000.00) as full, final and complete compensation for any and all damages, losses and expenses, including, but not limited to, attorney fees, court costs, and judgment interest, incurred or sustained by Plaintiffs incident to the events described in Plaintiffs' Complaint.

IT IS FURTHER ORDERED BY THE COURT that payment to Plaintiffs by Defendant City of Tulsa, will preclude any further or separate action by Plaintiffs against the City of Tulsa, Defendants Victoria Smedley, Scott Rogers, Amy Beth Zellis, and/or any other employee(s) of the City of Tulsa, arising from or pertaining to the events described in Plaintiffs' Complaint.



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Judge, United States District Court  
Northern District of Oklahoma

APPROVED AS TO FORM AND CONTENT:



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Allen M. Smallwood  
Attorney for Plaintiffs



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Mark H. Newbold  
John E. Dorman  
Attorneys for Defendants