UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of the Secretary of Veterans Affairs,	)	
Plaintiff,	)	
v.	)	
GLENN S. AKINS;	)	
MARIAN P. AKINS;	)	
CURTIS W. DICESARE;	)	
CINDY S. DICESARE;	)	
COUNTY TREASURER, Tulsa County, Oklahoma;	)	
BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	
Defendants.	)	CIVIL ACTION NO. 96-C-310-H

FILED
APR 15 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 4-20-98

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15th day of April, 1998, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on March 2, 1998, pursuant to an Order of Sale dated November 25, 1997, of the following described property located in Tulsa County, Oklahoma:

> Lot Nine (9), Block Five (5), of the Amended Plat of Lots 1 and 36, Block 17 and Blocks 1-2-3-4-5 and 13, FEDERAL HEIGHTS SECOND ADDITION to Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

Appearing for the United States of America is Wyn Dee Baker, Assistant United States Attorney. Notice was given the Defendants, Glenn S. Akins and Marian P. Akins, through their attorney Curtis W. Fisher; Defendants, Curtis W. Dicesare and Cindy S. Dicesare, through their attorney Carl A. Barnes; Defendants, County Treasurer, Tulsa County,

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Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

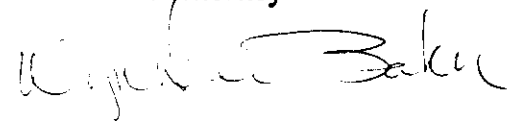
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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

Report and Recommendation of United States Magistrate Judge
Case No. 96-C-310-H (Akins)

WDB:cas

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 [illegible] to their attorneys of record on the 20th day of April, 1998.

C. Castelley, Deputy Clerk

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

FILED
APR 20 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CAROL A. VARSHAY, Plaintiff,	)	
vs.	)	No. 95-C-830-H
AMERICAN AIRLINES, INC., a corporation, Defendant.	)	ENTERED ON DOCKET DATE 4-20-98

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41, Federal Rules of Civil Procedure, and by reason of settlement, the parties do now stipulate to dismissal of the referenced action, with prejudice to refiling, each party to bear their own attorney fees and costs.

Dated this 20th day of April, 1998.

JAMES E. POE, OBA #7198
Attorney for Plaintiff
Suite 740, Manhattan Bldg.
111 West 5th Street
Tulsa, OK 74103-4267
(918) 585-5537

DAVID R. CORDELL, OBA #11272
Attorney for Defendant
3700 First Place Tower
15 East 5th Street
Tulsa, Oklahoma 74103-4344
(918) 586-5711

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of the Secretary of Veterans Affairs, Plaintiff, v. PHILLIP A. BEATY aka Phillip Anthony Beaty aka Phillip Beaty; THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS OF CHERYL BEATY aka Cheryl R. Beaty aka Cheryl Roberta Beaty, Deceased; ROBERT BEATY; ANTHONY BEATY; TULSA DEVELOPMENT AUTHORITY; STATE OF OKLAHOMA ex rel. Oklahoma Tax Commission; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	FILED APR 15 1998 Phil Lombardi, Clerk U.S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA ENTERED ON DOCKET DATE 4-20-98 CIVIL ACTION NO. 96-CV-1195-H

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15th day of April, 1998, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on March 2, 1998, pursuant to an Order of Sale dated November 5, 1997, of the following described property located in Tulsa County, Oklahoma:

> Lot Six (6), Block Forty-seven (47), VALLEY VIEW ACRES THIRD ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

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Appearing for the United States of America is Phil Pinnell, Assistant United States Attorney. Notice was given the Defendants, Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, Deceased; Robert Beaty; and Anthony Beaty, by publication; Defendant, Tulsa Development Authority, through its attorney Darven L. Brown, by mail; Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, through Kim D. Ashley, Assistant General Counsel, by mail; Defendants, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and

execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
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(918) 581-7463

Report and Recommendation of United States Magistrate Judge
Case No. 96-CV-1195-H (Beaty)

PP:cas

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 20th Day of April, 1998.

C. Lasley, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of the Secretary of Veterans Affairs,	)	**F I L E D**
Plaintiff,	)	APR 15 1998
v.	)	Phil Lombardi, Clerk U.S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA
LEONARD L. GLASS aka Leonard Lloyd Glass; ANGELIA R. GLASS aka Angelia Rae Glass; COUNTY TREASURER, Delaware County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Delaware County, Oklahoma; STATE OF OKLAHOMA ex rel. Oklahoma Tax Commission,	)	ENTERED ON DOCKET DATE 4-20-98
Defendants.	)	CIVIL ACTION NO. 97-CV-221-H

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15th day of April, 1998, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on March 3, 1998, pursuant to an Order of Sale dated October 20, 1997, of the following described property located in Jay County, Oklahoma:

> A tract of land lying in Lot Four (4), Section 19, Township 20 North, Range 24 East, Delaware County, State of Oklahoma, according to the U.S. recorded survey thereof, more particularly described as follows, to wit:
> Commencing at NW corner of Lot 4, thence South 248.70 feet for a point of beginning, thence South 104.35 feet, thence East 208.71 feet, thence North 104.35 feet, thence West 208.71 feet to the point of beginning.

Appearing for the United States of America is Peter Bernhardt, Assistant United States Attorney. Notice was given the Defendants, Leonard L. Glass aka Leonard Lloyd Glass;

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Angelia R. Glass aka Angelia Rae Glass; County Treasurer, Delaware County, Oklahoma and Board of County Commissioners, Delaware County, Oklahoma, through Jennifer T. Earls, Assistant District Attorney, Delaware County, Oklahoma; State of Oklahoma ex rel. Oklahoma Tax Commission, through Kim D. Ashley, Assistant General Counsel, by mail; and Purchasers, Jesse Glass and Tena Glass, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Delaware County Journal, a newspaper published and of general circulation in Delaware County, Oklahoma, and that on the day fixed in the notice the property was sold to Jesse Glass and Tena Glass, P.O. Box 43, Kansas, Oklahoma 74347, they being the highest bidders. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchasers, Jesse Glass and Tena Glass, P.O. Box 43, Kansas, Oklahoma 74347, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchasers by the United State Marshal, the purchasers be granted possession of the property against any or all persons now in possession.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

Report and Recommendation of United States Magistrate Judge
Case No. 97-CV-221-H (Glass)

PB:css

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 20th Day of April, 1998.

C. Portillo, Deputy Clerk

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

FILED
APR 17 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROSCOE C. KNIGHT and CYNTHIA KNIGHT, husband and wife,	)	
Plaintiffs,	)	
vs.	)	Case No. 98-CV-0283B(J)
COLONIAL PENN MADISON INSURANCE CO., a/k/a COLONIAL PENN AUTO INSURANCE, a/k/a COLONIAL PENN INSURANCE COMPANY (a Pennsylvania Corporation).	)	
Defendant.	)	

ENTERED ON DOCKET
DATE APR 20 1998

ORDER

On this 17th day of April, 1998, upon Motion by Defendant Colonial Penn Madison Insurance Co., the Court finds as follows:

1. Plaintiffs' counsel has no objection to this case being remanded to Wagoner County District Court;
2. Due to clerical error, the case was inappropriately removed to the United States District Court for the Northern District of Oklahoma from Wagoner County District Court which sits in the Eastern District of Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above styled and numbered cause is hereby remanded to Wagoner County District Court.

UNITED STATES DISTRICT JUDGE

981234sm/HH

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
APR 17 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

WILMA I. McGUIRK,	)	
SSN: 440-46-2715,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 94-CV-1002-B (E)**
	)	
KENNETH S. APFEL,	)	
Commissioner of Social Security,[1]	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE APR 20 1998

PROPOSED FINDINGS AND RECOMMENDATIONS[2]

Claimant, Wilma I. McGuirk, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of Social Security ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.[3] For the reasons discussed below, the

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

2 By minute order dated February 5, 1998, this case was referred to the undersigned for all further proceedings in accordance with her jurisdiction pursuant to the Federal Rules of Civil Procedure.

3 On April 17, 1992, claimant protectively filed applications for disability insurance benefits under Title II (42 U.S.C. § 401 et seq.) and for Supplemental Security Income under Title XVI (42 U.S.C. § 1381 et. seq.). Claimant's applications for benefits were denied in their entirety initially (August 6, 1992), and on reconsideration (December 9, 1992). A hearing before Administrative Law Judge Stephen C. Calvarese (ALJ) was held December 9, 1993, in Tulsa, Oklahoma. By decision dated March 16, 1994, the ALJ found that claimant was not disabled. On September 29, 1994, the Appeals Council denied review of the ALJ's findings. Claimant filed this case on October 26, 1994. The defendant moved to remand on the grounds that a complete transcript of the December 9, 1993 hearing could not be prepared because the tape was inaudible. The Court granted the motion on April 6, 1995, and ordered the case remanded for further administrative action. By order of the Appeals Council dated April 18, 1995, the case was remanded to the ALJ for further administrative action. A supplemental hearing before the ALJ was held on August 8, 1995. By decision dated October 27, 1995, the ALJ again found that claimant was not disabled. 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.

undersigned recommends that the District Court **DENY** claimant's motion for judgment on the pleadings (Docket #11), and **AFFIRM** the Commissioner's decision.

I. CLAIMANT'S BACKGROUND

Claimant is a 59 year old woman living in Craig County, Oklahoma. At the time of the original administrative hearing, claimant was 55 years old. Claimant attended school through eighth grade; she does not have a GED high school equivalency certificate. Her past relevant work was as seamstress, maid, and poultry worker. Claimant has not engaged in substantial gainful activity since November 10, 1991.

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 her "physical or mental impairment or impairments are of such severity that she is not only unable to do her previous work but cannot, considering her 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.[4]

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 1482, 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 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (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,

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[4] Step One requires the claimant to establish that she is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510. Step Two requires that the claimant establish that she has a medically severe impairment or combination of impairments that significantly limit her 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 she does not retain the residual functional capacity (RFC) to perform her past relevant 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 her age, education, work experience, and RFC--can perform. See Diaz v. Secretary of Health & Human Servs., 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 alternative work.

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 (1951).

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at Step Four of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform a full range of medium work, except work requiring excellent visual acuity. The ALJ concluded that claimant could perform her past relevant work. Thus, the ALJ concluded that claimant was not disabled within the meaning of the Social Security Act at any time on or before the date of his decision.

IV. MEDICAL HISTORY OF CLAIMANT

A. Spinal Arthritis/Degenerative Disc Disease

Claimant was seen by Dr. J.F. Lance for back pain caused by strain in the thoraco-lumbar area in November 1976. (R. 158) She claimed that she got relief from extra-strength Excedrin. (R. 158) Examination showed kyphosis in the lower dorsal area. (R. 158) A dorsolumbar support brace was prescribed. (R. 157) Dr. Lance reported that x-rays showed a probable developmental fusion of the bodies of several vertebrae, and some degenerative changes of arthritis in the adjacent joints and vertebrae. (R. 159) The record indicates that claimant may have claimed disability benefits in December 1976. (R. 166) By February 1977, claimant reported "doing well" as long as she wore her brace. (R. 158) She had a full range of motion without pain.

The next evidence in the record relating to claimant's back is a report of December 1984/ January 1985 referral to and visits with Dr. Charles Pence for "increasing back pain." (R. 153-156) The referral letter reports that claimant "feels she is no longer able to do her job with her increasing back problems," and "is seeking disability." (R. 156) Dr. Pence reviewed x-rays and examined

claimant, and found that she had "significant degenerative changes with some slight increased kyphosis at the thoracolumbar junction." (R. 153) Dr. Pence recommended use of a back support and anti-inflammatory medication. She was to lose weight and avoid any repeated bending, stooping, or heavy lifting. (R. 153)

In connection with her April 1992 application for disability insurance and Supplemental Security Income benefits, claimant reported she was taking "Tolectin for arthritis." (R. 86) She reported that she could make the bed, cook, clean, shop, walk every day, drive a car and pickup, and push the mower. (R. 88) At that time, Dr. E.D. Peffly reported that he had treated claimant since 1984 for "hypertension and minor ailments." He reported that, on July 22, 1991, she had a lumbar backache and was treated with Tolectin. (R. 102) On July 28, 1991, claimant fell at work and claimed that x-rays showed she had a cracked rib, so Tolectin was continued. On August 23, 1991, claimant stated she wished to return to work and she felt well. (R. 102) When Dr. Peffly saw claimant on February 21, 1992, she "was having no difficulty in ambulation . . . ." (R. 102)

Claimant was sent to Dr. Kathleen Dahlmann for a consultative examination on July 3, 1992. Dr. Dahlmann recited claimant's complaints of pain in her back and neck, and stated that she was on no medication for her back pain except for aspirin and Excedrin. (R. 106) The doctor's examination resulted in the following observation:

> Examination of the LUMBOSACRAL SPINE reveals full range of motion of the lumbosacral spine. Please seen [sic] back sheet for further details. There is no tenderness noted on palpation of the lumbosacral spine. There is no muscle atrophy or weakness in any flexor or extensor group of either lower extremity. Leg lengths and limb circumferences are equal. Heel and toe walking are adequately performed. Straight leg raising sign was positive in the sitting position on the left. Deep tendon reflexes were 3+ and equal in both the Achilles and patellar areas. The gait is safe and stable without the use of an assistance device. There was no sensory deficit in any dermatome of either lower extremity.

> Examination of CERVICAL SPINE reveals full range of motion of the cervical spine. There was no loss of muscle mass or weakness in any flexor or extensor group of either upper extremity and no sensory deficit in any dermatome of either upper extremity.

(R. 107). Dr. Dahlmann diagnosed claimant with "[o]steoarthropathy, both hips, lumbosacral spine and cervical spine, without limitation of range of motion or radiculopathy." (R. 107) Dr. Dahlmann concluded that claimant possessed no medical abnormality that would preclude work, but she would be limited to work that did not require excellent visual acuity. (R. 108)

In September 1992, x-rays taken at Oswego City Hospital of claimant's lumbar spine indicated degenerative changes mainly in the upper lumbar spine. (R. 119) After initial denial of benefits, on reconsideration claimant was sent to Coffeyville Regional Medical Center for radiological consultation. X-rays indicated mild to moderate degenerative change of the lumbar spine, some ligament fusion in the lower thoracic region, and the possibility of ankylosing spondylitis. The sacroiliac joints appeared normal. (R. 114)

In 1993 and 1995, claimant reported taking no prescription medication for back pain. (R. 137, 252)

B. <u>Corneal Dystrophy and Cataracts</u>

In her April 1992 disability report, claimant described "cataracts on both eyes" as part of her disabling condition. (R. 85) In the July 1992 consultative examination, Dr. Dahlmann reported visual acuity with glasses 20/50-1 right eye, 20/40 left eye, and 20/40 both eyes. (R. 107) She was diagnosed with cataracts, and the assessment was that she would be limited to work that did not require excellent visual acuity. (R. 108)

In December 1992, claimant was diagnosed by Dr. William Campbell with bilateral corneal dystrophy and an extremely mild cataract. (R. 121) Best corrected visual acuity was 20/50 right eye, 20/80 left eye. (R. 121) Dr. Campbell stated that the corneal dystrophy needed only to be watched "until she has problems but will, eventually, need surgery, ..." (R. 122) Claimant's decreased visual acuity was diagnosed by Dr. Charles Sherrod in September 1994 as secondary to cataract lens changes, as well as corneal changes consistent with corneal dystrophy. (R. 235) He found that her level of vision would make driving difficult and would create problems in jobs requiring a high degree of visual efficiency. (R. 235) Dr. Sherrod opined that claimant's visual acuity likely could be improved with cataract surgery. (R. 235)

In April and May 1995, claimant underwent cataract surgery on her two eyes. Postoperatively, she was noted to have visual acuity corrected to 20/40+2 right eye, and 20/40 left eye. (R. 253) Claimant's corneas "held up quite well," and she was told by Dr. Jeffrey Grisham that with her current level of vision she should be able to drive a car. (R. 253)

Dr. Grisham saw claimant in May 1996 for a follow-up evaluation. He reported that both eyes have done very well surgically, and that in the future claimant may require corneal transplantation. (R. 7)

V. REVIEW

Claimant alleges the following errors by the ALJ:

A. The ALJ's RFC evaluation is not supported by substantial evidence;

B. The ALJ did not properly consider claimant's non-exertional visual impairments; and

C. Claimant can perform light work, as opposed to medium work, and that based on claimant's age and education, claimant would be disabled under the Medical-Vocational Guidelines (the "Grids").

A. Substantial Evidence

Claimant argues that substantial evidence does not support the determination of the ALJ that plaintiff could return to her past relevant work. Plaintiff asserts that the physical requirements of her past work as maid or poultry worker preclude her from returning to those types of work.

A claimant bears the burden of proving disability. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984). The claimant's burden includes the Step Four burden of establishing that claimant does not retain the RFC to return to her past relevant work. Potter v. Secretary of Health & Human Servs., 905 F.2d 1346, 1349 (10th Cir. 1990); Ray v. Bowen, 865 F.2d 222, 224 (10th Cir. 1989). That burden was not met by claimant in this case.

Claimant asserts that her work as a maid or poultry worker required lifting, which her impairment now prevents her from doing. Substantial evidence supports the ALJ's determination that claimant's RFC is such that claimant can perform her past relevant work, as demonstrated below.

Dr. Dahlmann conducted a consultative examination of claimant on July 3, 1992. Dr. Dahlmann found that claimant's gait was safe and stable without the use of an assistance device, grips and fine motor movements were within normal limits, range of motion in the lumbosacral spine was within normal limits, and range of motion in the cervical spine was full. (R. 107) There was no evidence of sensory loss, diminished reflexes, loss of strength or atrophy of either the upper or lower extremities. (R. 107) Dr. Dahlmann concluded that claimant possessed no medical abnormality that

would preclude her participation in the labor force, except for work that required excellent visual acuity. (R. 108)

Based on this examination, claimant's case was rated as "nonsevere" by Dr. Thurma Jo Fiegel on August 4, 1992. (R. 62) On reconsideration, a Physical Functional Capacity review was conducted in October 1992. Claimant was found to have the RFC to, inter alia, lift 50 pounds occasionally and 25 pounds frequently, and to have limited visual acuity and depth perception. (R. 53-60) X-rays of claimant's lumbar spine in October 1992 revealed mild to moderate degenerative change of the lumbar spine, some ligament fusion in the lower thoracic region, and no significant additional lumbar abnormalities. (R. 114)

After reviewing the records and hearing the testimony, the ALJ concluded:

> The undersigned Administrative Law Judge is persuaded that the claimant's residuals from neck and back pain prevent her from lifting more than 50 pounds occasionally and 25 pounds frequently. The claimant would be further limited by her slightly decreased vision, secondary to corneal dystrophy and cataracts, and would be precluded from work requiring excellent visual acuity. (R. 15)

In spite of this evidence, claimant complains that severe back pain renders her disabled, and unable to return to her past relevant work. The ALJ, in assessing claimant's ability to return to her past relevant work, followed the guidelines for judging credibility and pain set forth by the Tenth Circuit in Luna v. Bowen, 834 F.2d 161, 163-64 (10th Cir. 1987). That analysis requires the ALJ to consider:

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

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

The ALJ found that claimant's subjective complaints of pain and blurred vision were not of such a disabling nature as to prevent her from performing her past relevant work. (R. 17) The ALJ wrote:

> Although the claimant testified she suffers from severe arthritis in her spine and shoulders and uses a cane to walk, X-rays performed on October 5, 1992, revealed only mild to moderate degenerative changes. It is further noted that the claimant has not sought medical treatment for pain in her back or shoulders since October, 1992. While the claimant described her back pain as sharp and knife-like, she is not receiving any type of active medical care or treatment for her back pain. Back surgery has not been recommended nor has it been performed. The claimant takes no medications for pain relief other than over-the-counter Tylenol, and while she stated she uses a cane, there is no indication one has been prescribed or recommended by a treating physician. Dr. Dahlmann noted in July, 1992, the claimant's gait was safe and stable without an assistive device. If the claimant were in the constant and disabling painful condition as alleged, it is reasonable to assume she would exhaust every means possible to obtain relief of that pain
>
> . . .
>
> After giving due consideration to credibility, motivation, and the medical evidence, the Administrative Law Judge is persuaded that this claimant exaggerates her symptoms to include disabling pain. The Administrative Law Judge finds such complaints to be inconsistent with the record as a whole and finds that the claimant has the residual functional capacity to engage in medium work activity with limitation, which includes not being able to perform work which requires excellent vision. Although the claimant has a severe impairment which would certainly impact her ability to perform the full ranges of work activities, to the extent her testimony is consistent with the record and this residual functional capacity, it is here found credible. The claimant's pain is no more than mild at an exertional level of medium and the mere inability to work without some pain does not necessarily establish disability. (R. 16, 17)

This Court generally gives great deference to the credibility determinations made by an ALJ. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence." Diaz v. Secretary of Health & Human

Servs., 898 F.2d 774, 777 (10th Cir. 1990). Moreover, the Tenth Circuit has stated that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Unsubstantiated subjective evidence is not sufficient to prove disability. Diaz, 898 F.2d at 777. It has been recognized that "some claimants exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Frey, 816 F.2d at 517. Claimant's testimony as to the extent of her pain is not supported by any medical evidence. The ALJ noted that claimant did not seek medical treatment for "disabling" pain, and that she did not take any strong medication for pain. (R. 16) These reasons are adequate for discounting claimant's allegation of disabling pain. See Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991). The ALJ did not err in concluding--and demonstrating by specific and substantial evidence--that the claimant's complaints of pain were disproportionate to the objective findings and not credible beyond certain limitations.

Claimant argues that she can perform light work only, and that the ALJ erred in determining she could perform medium work. (Claimant's Memorandum of Law, Docket #12, at 5) Choosing which type of work claimant could perform (medium versus light) was arguably a close question. This Court should affirm an ALJ decision that is supported by substantial evidence. The possibility that two inconsistent conclusions could be drawn from the evidence does not prevent the conclusion reached by the ALJ from being supported by substantial evidence. See NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 299-300 (1939). "Where conflicting evidence allows reasonable minds to differ as to whether a claimant is disabled, the responsibility for that decision falls on the [Commissioner]." Walker v. Bowen, 834 F.2d 635, 640 (7th Cir. 1987) (overruled on other

grounds). Here, the Commissioner (by virtue of the ALJ determination) made the decision that claimant retained the RFC to perform medium work. His decision should be affirmed because it is supported by substantial evidence.

However, even if this Court were to decide that the ALJ erred in resolving this close question by finding that claimant retained the RFC to perform medium work, and that the evidence supported a finding of maximum sustained capacity to perform light work, affirmance of the ALJ would be mandated.

In the Vocational Report completed on April 27, 1992, claimant reported her work in 1992 at a chicken plant (R. 75), and described the heaviest weight lifted there as 10 pounds. (R. 80) Claimant testified at the August 8, 1995 hearing that she could lift a 20 pound bag of potatoes. (R. 301) The vocational expert, Glen Marlowe, testified at the December 9, 1993 hearing that claimant's work at the chicken plant was light work. (R. 201) The vocational expert, Cheryl Mallon, testified at the August 8, 1995 hearing that claimant's job at the chicken plant was light work. (R. 306) This testimony, including claimant's own description of her lifting limitations, is substantial evidence upon which the ALJ could rely. The ALJ found that "[i]f someone can do medium work, it is also determined that she can also do sedentary and light work." (R. 17) Claimant now admits that she can do light work:

> Indeed, the medical evidence, the Claimant's testimony, and the testimony of the vocational expert, based on the hypotheticals posed by the Judge and by counsel for the Claimant, was to the effect that the Claimant's maximum sustained work capacity was for light work.

Claimant's Memorandum of Law, Docket #12, at 5.

If claimant has the RFC for light work, and her past relevant work includes light work at a chicken plant, she is not disabled. The decision of the ALJ was correct.

B. Non-Exertional Visual Impairments

Claimant asserts that the ALJ did not properly consider claimant's non-exertional visual impairments. It is the claimant's duty to show that she could not perform her past relevant work because of the combined effect of her exertional and non-exertional impairments. The issue presented is whether there is substantial evidence to support the ALJ's determination that claimant did not meet her burden.

The ALJ found that claimant has been diagnosed with corneal dystrophy, had cataract surgery on both eyes, would be limited by her slightly decreased vision, and would be precluded from work requiring excellent visual acuity. (R. 15) The ALJ considered this non-exertional impairment as a limitation in addition to the exertional impairment from back pain. (R. 15) He also reviewed the medical evidence relating to her visual impairment (R. 16), and made a specific finding relating to her eyesight in each eye. (R. 18-19) The ALJ concluded that claimant's vision problems were not so severe as to preclude her past relevant work as a maid or poultry worker. (R. 19)

Claimant presented no evidence that either of these jobs requires close work or visual acuity. Moreover, claimant's treating physician, Dr. Grisham, reported that after claimant's cataract surgery, her corneas had "held up quite well," and she should be able to drive a car. (R. 253) The Court finds that claimant failed to meet her burden at Step Four to prove that her exertional and non-exertional impairments made her unable to perform her past relevant work. See Potter v. Secretary of Health & Human Servs., 905 F.2d 1346, 1349 (10th Cir. 1990). The contention that the ALJ failed to consider claimant's non-exertional impairment is without merit.

C. The Medical Vocational Guidelines (the "Grids")

20 C.F.R. § 404.1560 governs when vocational factors, such as age and education, will be considered. Section 404.1560(b) provides:

> Past relevant work. We will first compare your residual functional capacity with the physical and mental demands of the kind of work you have done in the past. If you still had the residual functional capacity to do your past relevant work, we will find that you can still do your past work, and we will determine that you are not disabled, without considering your vocational factors of age, education, and work experience.

20 C.F.R. § 404.1560(b). An analysis of whether claimant's age or education would negatively affect her ability to perform medium work is a vocational consideration relevant to a determination at Step Five of the sequential evaluation process. At Step Four, vocational factors of age, education, and work experience are not considered. Here, substantial evidence supports the ALJ's determination at Step Four that claimant could return to her past relevant work. See section A, supra. Thus, contrary to claimant's assertions, the Grids do not control the analysis.

VI. CONCLUSION

For the foregoing reasons, the undersigned recommends that the District Court **DENY** claimant's motion for judgment on the pleadings (Docket #11), and **AFFIRM** the Commissioner's decision. Any objection to these proposed findings and recommendations must be filed with the Clerk of the Court within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992); Niehaus v. Kansas Bar Ass'n., 793 F.2d 1159, 1164-65 (10th Cir. 1986) (superseded by rule on grounds not relevant to holding on waiver).

DATED this 17th day of April, 1998.

Claire V Eagan

CLAIRE V. EAGAN
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 20 Day of April, 1998.

FILED

APR 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 98CV0023E(M)
	)	
BOBBI L. SUNDE,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE APR 20 1998

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 17th day of April, 1998.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

Loretta F. Radford

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

CERTIFICATE OF SERVICE

This is to certify that on the 17th day of April, 1998, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Bobbi L Sunde, RR 2, Box 1046, , Sand Springs, OK 74063.

Libbi L. Felty

Libbi L. Felty
Paralegal Specialist

3

CJ

FILED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

APR 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ELMO LOUISE THOMPSON,	)	
SSN: 432-74-8038,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 96-CV-0874-EA**
	)	
KENNETH S. APFEL,	)	
Commissioner of Social Security,[1]	)	
	)	ENTERED ON DOCKET
Defendant.	)	DATE APR 20 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 17th day of April 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

FILED

APR 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ELMO LOUISE THOMPSON, **SSN: 432-74-8038,**	)	
Plaintiff,	)	
v.	)	**Case No. 96-CV-0874-EA**
KENNETH S. APFEL, **Commissioner of Social Security,**[1]	)	ENTERED ON DOCKET DATE APR 20 1998
Defendant.	)	Phil Lombardi, Clerk

ORDER

Claimant, Elmo Louise Thompson, 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.[2] In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Circuit Court of Appeals.

The Commissioner determined that claimant was disabled within the meaning of the Social Security Act as of January 22, 1994, but not prior to that date. Claimant appeals the unfavorable

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

2 On October 25, 1993, claimant applied for disability benefits under Title II (42 U.S.C. § 401 et seq.) and Title XVI (42 U.S.C. § 1381 et seq.), with a protective filing date of September 29, 1993. Claimant's application for benefits was denied in its entirety initially January 24, 1994, and on reconsideration March 31, 1994. A hearing before Administrative Law Judge Leslie S. Hauger, Jr. ("ALJ") was held November 29, 1994, in Tulsa, Oklahoma. By decision dated December 6, 1994, the ALJ found that claimant was disabled within the meaning of the Social Security Act as of January 22, 1994, but not before that date. On December 6, 1994, 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.

portion of the decision of the Commissioner and asserts that the Commissioner erred where the ALJ (1) improperly assessed claimant's residual functional capacity, and (2) incorrectly applied the legal standards required at the fifth step of the sequential evaluation process. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. CLAIMANT'S BACKGROUND

Claimant was born January 22, 1939. Claimant finished the tenth grade and has not obtained a GED high school equivalency certificate. She has trained as a Certified Medication Aide and a Nurse's Aide. Within the past 15 years, claimant has worked as a nurse's aide, a Certified Medication Aide, a "private sitter" (attending to the basic care of incapacitated people in their own homes), and a cashier. Claimant lives in an apartment with her adult daughter.

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 her "physical or mental impairment or impairments are of such severity that she is not only unable to do her previous work but cannot, considering her age, education, and work experience, engage in any other kind of substantial gainful work in the national economy...." Id., § 423(d)(2)(A). Social Security

regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.[3]

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hargis v. Sullivan, 945 F.2d 1482, 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 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (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,

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[3] Step One requires the claimant to establish that she is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510. Step Two requires that the claimant establish that she has a medically severe impairment or combination of impairments that significantly limit her 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 she does not retain the residual functional capacity (RFC) to perform her past relevant 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 her age, education, work experience, and RFC--can perform. See Diaz v. Secretary of Health & Human Servs., 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 alternative work.

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 (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 light work of an unskilled nature and had no nonexertional impairments to reduce further her light work occupational base. At Step Four, the ALJ concluded that claimant could not perform her past relevant work. At Step Five, the ALJ found that claimant was disabled on and after January 22, 1994, but not before that date.

IV. MEDICAL HISTORY OF CLAIMANT

A previous application by claimant for Social Security disability benefits was denied on March 26, 1993, pursuant to an ALJ decision which was affirmed by the Appeals Council. That decision was not appealed beyond the administrative level. This Court accepts March 27, 1993 as the beginning date for any period of disability proven by claimant.

On October 2, 1990, claimant was admitted to the emergency room at Hillcrest Medical Center after an accidental injury in which claimant was kicked in the stomach and chest area. (R. 307) Tests showed a negative chest report and an unremarkable abdomen. (R. 312-313)

On May 31, 1991, claimant was examined by Dr. David W. Hayes of Oklahoma Heart, Inc.. Claimant was diagnosed as having (1) atypical chest pain with a negative exercise treadmill test, (2) a history of multiple syncopal episodes, probably benign syncope, and (3) poor exercise tolerance from chronic deconditioning. (R. 123) Dr. Hayes noted claimant's complaints of several years of chest pain and syncope. Id. Claimant's blood pressure, heart rate, HEENT, and neck were all found

to be normal. (R. 124) Dr. Hayes stated that claimant's electrocardiogram was essentially normal and that the cardiac examination "revealed a normal S-1 and S-2 with no murmurs or gallops that I can appreciate." Id. Claimant was unable to complete an exercise treadmill test, according to Dr. Hayes, due to rapid heart rate, high blood pressure, and complaints of shortness of breath, dizziness, and chest pains. Id. Dr. Hayes noted that the test revealed no evidence of ischemic changes. Id. Dr. Hayes concluded:

> It is my impression that claimant probably does not have significant cardiac disease at this time. She is markedly deconditioned and it is my impression that she probably hyperventilates very easily with small amounts of exercise. . . . I feel her risk of ischemic coronary disease is extremely small given her very favorable risk factor profile and the negative maximal exercise test.

Id. Claimant was seen again by Dr. Hayes on August 23, 1991. At that time, Dr. Hayes diagnosed claimant as having (1) idiopathic dizziness, possibly exacerbated by Lopressor, (2) non-cardiac chest pain, and (3) multiple somatic complaints. Dr. Hayes reported that the examination revealed nothing remarkable. (R. 120) He stated:

> [Claimant's] chest pain is very atypical for angina pectoris and I am quite competent [sic] that it is non-cardiac in origin. She does continue to experience multiple episodes of chest pain a day and continues to be quite concerned about these. Additionally, she had complaints of dizziness on her last visit and a holter monitor was done which also showed only normal sinus rhythm during periods of chest pain and during periods of subjective complaints of dizziness.

Id.

Dr. Gary R. Davis was requested to perform a consultative examination of claimant, which he did on March 3, 1992. Dr. Davis noted that claimant was depressed and complained of pain in her chest and abdomen. (R. 136-137) Upon examination of claimant's heart, Dr. Davis found that the

S-1 and S-2 were normal, but reported a grade ½ systolic ejection murmur. (R. 137) Dr. Davis's impressions were very different from that of Dr. Hayes. Dr. Davis concluded:

> This patient is a 53-year-old female, with pain consistent with what sounds like angina, secondary to arthrosclerotic coronary vascular disease. In my opinion, this patient needs a full cardiovascular work-up, either stress testing, thallium stress and possible cardiac catheterization. Her pain is frequent, increasing in severity and responding poorly to medications, which she gets on an intermittent basis. The other problems, which center mainly around her psychological status, which consist of moderate depressive anxiety, in my opinion, deserves [sic] treatment and evaluation by a psychiatrist, and long term follow-up. In my opinion, this patient is not employable, from those two perspectives, her cardiovascular status, producing angina, which is unstable and her psychological status, consistent of a severe to moderate depression.

Id. Claimant was treated by Dr. Davis in his office from July 24, 1992 to November 5, 1992. Claimant was diagnosed in various appointments as having high blood pressure, diabetes, depression, migraine headaches, bronchitis, and low back pain syndrome. (R. 157-167)

A consultative examination of claimant was made by Dr. Jerry D. First on May 11, 1992. Dr. First noted claimant's complaints of nervousness and pain in her chest, back, and joints. (R. 145) Upon examination, Dr. First found that claimant's heart exhibited a regular rhythm and had no murmurs, gallops, or extrasystoles. (R. 147) Dr. First noted that there was no indication of swelling in claimant's left knee, despite claimant's claim that sometime the knee will swell to twice its normal size. (R. 145, 147) Dr. First reported that an electrocardiogram showed no old infarctions. Id. A treadmill test had to be stopped because of fatigue, but Dr. First stated that claimant's blood pressure was normal and that there was no suggestion of myocardial ischemia. Id. Dr. First noted his impressions as (1) chest pain, atypical for angina, (2) essential hypertension, (3) degenerative arthritis, and (4) situational anxiety/depression. Id.

On May 14, 1992, claimant was admitted to the emergency room of Hillcrest Medical Center complaining of chest pain and shortness of breath. (R. 300) The diagnostic impression was hyperventilation syndrome. (R. 301) Tests showed a normal chest. (R. 303)

A consultative examination was performed on claimant on December 4, 1992, this time by Dr. E. Joseph Sutton II. Dr. Sutton listed his impressions as being (1) depression, (2) a history of recent hemoptysis in the face of a chronic cough, (3) chest pain, noncardiac in origin, (4) hypertension well-controlled, (5) perhaps some degree of arthritis or bursitis in the right shoulder by history, and (6) peptic ulcer disease by clinical examination. (R. 172) Dr. Sutton indicated that his examination did not find objective support for many of claimant's complaints, remarking "[t]he patient has the appearance of depression and I suspect that is a great deal of her problem." (R. 170-172) In evaluating claimant's residual functional capacity, Dr. Sutton concluded:

> [Claimant] should be able to sit, stand, and walk a total of eight hours at one time; or, sit, stand or walk a total of eight hours in an 8 hour day. She should be able to lift or carry any weight commensurate with her size. [Claimant] has normal reflexes, muscle strength, and grip strength. I see no objective evidence of disability. There are no limitations with regard to the patient's lower extremities for performing repetitive movements. She would have no difficulty pushing or pulling leg controls. [Claimant] has no disability of her hands and would be able to perform normal grasping movements. [Claimant] would be able to continuously bend, squat, crawl, climb, or reach; and I see no objective evidence that should indicate she would not be able to perform these activities. There are no restriction of activities regarding any of the environmental factors.

(R. 172)

On December 11, 1992, at the request of the Social Security Administration, Dr. Donald R. Inbody, a psychiatrist, assessed claimant's mental status. Dr. Inbody reported that claimant listed a "multitude" of complaints and said that claimant "is very preoccupied with illness and with pain." (R. 178) Dr. Inbody stated:

> [Claimant] showed no signs of loosening of associations in thinking and no psychotic symptomatology. She was oriented in all spheres and appears to be of average intelligence. She did not appear to be particularly anxious, nor were there any significant signs of clinical depression. She has occasional suicidal ideation without plan or attempt. . . . There are no disturbances in recent or remote memory and her fund of general information was fairly good, as were mathematical computations, similarities and proverbs. There were no disturbances in attention and concentration and judgment is felt to be intact.

(R. 179-180) Dr. Inbody found that claimant's ability to make occupational adjustments, her ability to make performance adjustments, her ability to make personal-social adjustments, and her ability to perform other work-related activities were all fair or good. (R. 180-183) Dr. Inbody noted that claimant suffered from "[a]djustment disorder with depressed mood, moderate, currently being treated with antidepressants." (R. 180-181) Dr. Inbody found claimant's psychosocial stressors to be moderate and rated claimant as having a Global Assessment of Functioning ("GAF") of 55, with a high of 60 during the year before the exam.[4] (R. 180)

A medical assessment of claimant's ability to perform work related activities was made on February 26, 1993. That evaluation found that claimant could not sit, stand, or walk for more than 30 minutes at a time or sit, stand, or walk for more than 30 minutes during an 8-hour day. (R. 314) Claimant was said to only infrequently be able to lift up to 5 pounds and never be able to lift any

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[4] The court in Irwin v. Shalala, 840 F. Supp. 751 (D. Or. 1993), explained the significance of a GAF score:

> The Global Assessment of Functioning Scale ("GAF") ranges from 90 (absent or minimal symptoms) to 1 (persistent danger of severely hurting self or others, or unable to care for herself). A score between 41 and 50 is defined as manifesting "serious symptoms" (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job). . . . A GAF between 51 and 60 is indicative of "moderate symptoms" (e.g., flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts with co-workers).

Id. at 759 n. 5 and n. 6.

greater weight. Id. Claimant was said to not be able to carry any weight up to five pounds or greater. Id. Claimant was said to have limited use of her right hand for repetitive movements, including grasping. (R. 314) Claimant was said to only infrequently be able to bend, squat, crawl, climb, or reach. (R. 315) The signature of the person who made this assessment is illegible and the record does not otherwise indicate the author.

As stated above, claimant's previous application for social security disability benefits was denied on March 26, 1993. Consequently, administrative *res judicata* makes March 27, 1993 the beginning date for any period of disability proven by claimant.

On July 21, 1993, an echocardiograph was performed on claimant by Dr. Vincent J. Quinn. Dr. Quinn found that claimant had (1) normal left and right ventricular size and systolic function, (2) normal atrial size, (3) morphologically normal cardiac valves without significant pericardial effusion or obvious intracardiac mass or cardiac thrombus, and (5) no obvious evidence for pulmonary hypertension. (R. 318-319)

On August 15, 1993, claimant was admitted to St. John's Medical Center complaining of chest pain, shortness of breath, and abdominal pain. (R. 320-321) Dr. Bobby Jacobs reported that claimant's cardiac profile was negative. (R. 321) Laboratory data showed claimant to have low potassium; claimant's potassium level was restored over the course of two days. (R. 321) On August 16, 1993, a radiology consultation report stated that claimant's chest, including lungs and heart, were normal and that there was no significant abnormality of the abdomen. (R. 372) On August 17, 1993, a treadmill test was performed. The performing doctor noted that a somewhat increased left ventricular cavity suggested a degree of left ventricular dysfunction, but that there were no perfusion defects. (R. 332) Claimant was discharged on August 18, 1993. (R. 320-321)

On October 22, 1993, claimant was again admitted to St. John's complaining of chest pain. (R. 387) A cardiac catheterization was performed on October 27, 1993. (R. 414) The catheterization showed no coronary artery disease, but did indicate a possibility of moderate mitral valve prolapse and I.H.S.S. (R. 387) An echocardiograph was performed on claimant on October 28, 1993 to investigate these possibilities The echocardiograph showed normal left ventricular dimensions, with systolic and probably diastolic function; normal right heart anatomy and functional parameters; and mild mitral insufficiency. (R. 412-413) Claimant was discharged on October 29, 1993. (R. 387)

On October 25, 1993, less than four months after the Appeals Council denied review of the previous application, claimant filed the application for disability benefits that is the subject of the case before this Court.

On January 11, 1994, a consultative examination was performed on claimant by Dr. Angelo Dallesandro. Dr. Dallesandro reported that claimant stated "I have arthritis and I've had two heart attacks." (R. 422) Dr. Dallesandro noted that claimant identified herself as positive for diabetes mellitus noninsulin dependent and chronic fatigue. (R. 423) Claimant further stated to Dr. Dallesandro that claimant is nervous and depressed, has been hospitalized for psychiatric reasons, and has tried suicide twice. Id. Dr. Dallesandro recorded his impressions as (1) osteoarthritis, (2) diabetes mellitus, (3) hypertension, (4) myocardial infarctions by history, and (5) anxiety depressive illness. (R. 424) Dr. Dallesandro stated:

> This is a 54-year-old female in no distress when she walked in the exam room. Gait was normal to speed. She was using a cane, but stability and safety appeared good. . . . There are no joint deformities or swelling or redness noted. About half way through the examination [claimant] started to complain of pain with any joint movement and started to become uncooperative. When asked to move a joint, she

> stated that she was unable to do it and that she was getting dizzy and ready to collapse. It then became difficult to truly evaluate the joints properly. At this time anxiety may be a big factor in her problems.

Id.

Dr. Donald Inbody performed a second psychiatric evaluation of claimant on January 12, 1994. Dr. Inbody noted the changes in claimant's physical health and medications since his first examination of December 11, 1992, including claimant having been diagnosed as having insulin dependent diabetes. (R. 428) Dr. Inbody found that claimant has moderate adjustment disorder, moderate psychosocial stressors, and a GAF of 60, with a high of 60 during the year preceding the exam. (R. 429-430)

V. REVIEW

This is a Step Five case. Where a claimant has proven at Step Four that she can no longer return to her past relevant work, the burden shifts to the Commissioner at Step Five to prove that the claimant retains the residual functional capacity to perform alternate work which exists in significant numbers in the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774 (10th Cir. 1988). To assist the ALJ in making a determination at Step Five, the Commissioner has developed Medical-Vocational Guidelines, also known as "the grids," 20 C.F.R., pt. 404, subpt. P, app. 2, which chart a claimant's ability to do work based on a claimant's age, education, work experience, and residual functional capacity.

In the instant case, the ALJ found that claimant is limited to light work and has previous work experience of a semiskilled, non-transferrable nature. Claimant reached the age of 55 years on January 22, 1994. Thus, during the relevant time period for disability, claimant was considered a person approaching advanced age (50-54) before January 22, 1994 and a person of advanced age (55

and over) on and after January 22, 1994. 20 C.F.R. § 404.1563(c) and (d). Under the grids, a person who has the RFC to perform light work, has previous work experience of a semiskilled, non-transferrable nature, and is approaching advanced age must be found to not be disabled. 20 C.F.R., pt. 404, subpt. P, app. 2 § 202.11. A person who has the RFC to perform light work, has previous work experience of a semiskilled, non-transferrable nature, and is of advanced age must be found to be disabled. 20 C.F.R., pt. 404, subpt. P, app. 2 § 202.02. Thus, the ALJ concluded that claimant was disabled on or before January 22, 1994, but not before that date.

Plaintiff asserts that the ALJ erred by improperly assessing claimant's RFC and incorrectly applying the legal standards required at Step Five. Specifically, claimant alleges that (1) the ALJ failed to properly address claimant's chest pain and other impairments, and (2) substantial evidence did not support a finding that claimant's depression and anxiety were not a significant nonexertional impairment.

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

Claimant challenges the ALJ's finding that claimant had the RFC to perform light work, specifically alleging that the ALJ erred by not properly considering claimant's chest pain, shortness of breath, and other pain. There is no merit to this contention.

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

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

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

This court generally gives great deference to the credibility determinations made by an ALJ. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence." Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990). However, the ALJ's credibility determinations must be closely and affirmatively linked and logically connected to substantial evidence. See Kepler, 68 F.3d at 391.

In the case at bar, the ALJ found that plaintiff's subjective complaints of chest pain, ulcer pain, sinusitis, shortness of breath, and vision problems were not credible. (R. 21). This court finds that the determinations of the ALJ are supported by substantial evidence and specifically and logically connected to that evidence.

The ALJ found that the medical evidence contradicted claimant's allegations of chest pain arising from a heart impairment. (R. 21) Claimant contends that the August 17, 1993 impression of ventricular dysfunction and the October 27, 1993 indication of moderate mitral valve prolapse are sufficient to require a rejection of the ALJ's conclusions regarding claimant's credibility as to her pain. In his report, the ALJ wrote "the claimant's allegations of heart problems have been ruled out by the available medical evidence which also demonstrates that the claimant did not have a heart attack, contrary to her statements during a hospitalization. The objective medical evidence shows the claimant's heart to be functioning normally." Substantial evidence supports this determination. "[P]ain testimony should be consistent with the degree of pain that could be reasonably expected from a determinable medical abnormality." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988).

There is absolutely no objective medical evidence that claimant has ever had a heart attack, despite her repeated statements to that effect. As to disorders of the left ventricle or the mitral valve, an echocardiograph performed on October 28, 1993 showed normal left ventricular dimensions, normal right heart anatomy and functional parameters, and only mild mitral insufficiency. (R. 412-413) Repeated tests have found claimant's heart and chest to be normal, as listed *supra*. The ALJ's determination that claimant's complaints of pain were not credible is substantiated by the evidence.

Nor did the ALJ err in finding claimant's complaints of shortness of breath to be insufficient to prevent claimant from performing light work. The ALJ found that this impairment was not substantiated by any objective medical evidence. The Tenth Circuit has stated that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Unsubstantiated subjective evidence is not sufficient to prove disability. Diaz, 898 F.2d at 777. It has been recognized that "some claimants exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Frey, 816 F.2d at 517. Claimant's allegations of pain and limitations premised on heart disorder, shortness of breath, sinusitis, and a host of other maladies are simply not supported by objective medical evidence. The ALJ did not err in concluding--and demonstrating by specific and substantial evidence--that claimant's complaints of pain were disproportionate to the objective findings and not credible beyond limiting claimant to light work.

B. Claimant's Mental Status

The ALJ relied on the Medical-Vocational Guidelines, also known as "the grids," 20 C.F.R., pt. 404, subpt. P, app. 2, to make his determination at the fifth step of the sequential evaluation process that claimant could, in light of her impairments, still perform other jobs existing in significant numbers in the national economy. It is well established that an ALJ may not rely conclusively on the grids unless he finds: (1) that the claimant has no significant nonexertional impairment; (2) that the claimant can do the full range of work at some RFC level on a daily basis; and (3) that the claimant can perform most of the jobs in that RFC level. Furthermore, "[e]ach of these findings must be supported by substantial evidence." Thompson v. Sullivan, 987 F.2d 1482, 1488 (10th Cir. 1993).

Claimant asserts that her depression and anxiety are a significant nonexertional impairment, such that the ALJ, by relying on the grids, failed to meet his Step Five burden. There is, as claimant asserts, evidence of record that may suggest some level of nonexertional impairment; but, the weight of the evidence supports a finding that whatever nonexertional impairment exists is not significant and does not detract from claimant's ability to perform work such that reliance on the grids was error. Claimant's assertion is without merit.

The record contains various statements of examining physicians that claimant's extensive--and impliedly exaggerated--physical complaints may be a result of depression or anxiety. (R. 137, 145-147, 170-172, 424) The report and Psychological Review Technique Form (PRTF) filed by the ALJ in the previous application, however, recorded a finding that claimant suffered from a non-severe affective disorder, specifically adjustment disorder with depressed mood, but that the disorder did not detract from claimant's ability to perform work of medium exertion. (R. 212, 217-219) Most importantly, the psychological evaluations of claimant deny the existence of a significant mental

impairment. Dr. Inbody's December 11, 1992 assessment of claimant's mental status, as detailed *supra*, reported no significant mental impairment. Primarily, Dr. Inbody found that claimant was preoccupied with claims of illness. (R. 178) Dr. Inbody found that claimant did not exhibit signs of anxiety or clinical depression. (R. 179-180) Dr. Inbody did report that claimant suffered from moderate adjustment disorder and moderate psychosocial stressors, but found that claimant's ability to make occupational, performance, and personal-social adjustments, as well as her ability to perform other work-related activities were all fair or good. (R. 180-183) Dr. Inbody in December 1992 rated claimant as having a GAF of 55, with a high of 60 in the preceding year. (R. 180) On January 12, 1994, upon examining claimant for a second time, the only significant change in claimant's mental status noted by Dr. Inbody was an increase in his rating of claimant's GAF to 60, with a high of 60 during the year preceding the exam. (R. 429-430)

The PRTF filed by the ALJ in the present application documents a finding that claimant suffers from neither an affective disorder nor any other type of mental disorder. Although this Court might find fault with the lack of detail of the ALJ's discussion of claimant's mental impairment, it is still the determination of this Court that substantial evidence supports a finding that claimant's mental impairment is not a significant nonexertional impairment. Because substantial evidence supports the ALJ's finding that no significant nonexertional impairment existed, the ALJ did not apply incorrect legal standards by relying on the grids to meet his Step Five burden.

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 17th day of April, 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

NANCY PHILLIPS, Plaintiff, v. KENNETH S. APFEL, Commissioner of Social Security Administration,[1/] Defendant.	))))))))))	ENTERED ON DOCKET DATE APR 17 1998 No. 97-C-776-J FILED APR 16 1998 Phil Lombardi, Clerk U.S. DISTRICT COURT

JUDGMENT

Pursuant to the request of the Commissioner, an Order of Remand has been entered in this case on this date. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 16 day of April 1998.

Sam A. Joyner
United States Magistrate Judge

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

(9)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NANCY PHILLIPS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 97-CV-776-J**
	)	
KENNETH S. APFEL, Commissioner of the Social Security Administration,	)	ENTERED ON DOCKET APR 17 1998 DATE
	)	
Defendant.	)	

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 16 day of APRIL, 1998.

SAM A. JOYNER
UNITED STATES MAGISTRATE JUDGE

(8)

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

ENTERED ON DOCKET
DATE 4-17-98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of the Secretary of Veterans Affairs,	)	
Plaintiff,	)	
v.	)	
MICHAEL G. BARBER aka Mike Barber; CHRIS BARBER aka Christine Linda Barber aka Christine Barber Shocklee aka Christine Linda Shocklee; BROWN, BLOYED & ASSOCIATES, INC.; MARY FRAZHO; STATE OF OKLAHOMA ex rel. Oklahoma Tax Commission; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	
Defendants.	)	CIVIL ACTION NO. 96-CV-1198-K

FILED
APR 15 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15th day of April, 1998, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on March 2, 1998, pursuant to an Order of Sale dated November 5, 1997, of the following described property located in Tulsa County, Oklahoma:

> Lot Twenty-six (26), Block Two (2), SOUTHBROOK II, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Phil Pinnell, Assistant United States Attorney. Notice was given the Defendants, Michael G. Barber aka Mike Barber; Chris Barber aka Christine Linda Barber aka Christine Barber Shocklee aka Christine Linda Shocklee; Mary Frazho; State of Oklahoma ex rel. Oklahoma Tax Commission through Kim D. Ashley, Assistant General Counsel; County Treasurer, Tulsa County, Oklahoma and Board of County

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Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, by mail; Defendant, Brown, Bloyed & Associates, Inc., by publication; and Purchaser, Ty-Kait, Inc., by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Ty-Kait, Inc., 5520 South Memorial, Tulsa, Oklahoma 74145, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Ty-Kait, Inc., 5520 South Memorial, Tulsa, Oklahoma 74145, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

Report and Recommendation of United States Magistrate Judge
Case No. 96-CV-1198-K (Barber)

PP:css

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 17 Day of April, 1998.

A Schwebke

ENTERED ON DOCKET

DATE 4-17-98

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

FILED

APR 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN E. HURN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 97-CV-808K(M)
	)	
TULSA COMMUNITY COLLEGE, formerly TULSA JUNIOR COLLEGE,	)	
	)	
Defendant.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

All the parties to this action hereby stipulate that any and all causes of action and claims against the Defendant, Tulsa Community College formerly Tulsa Junior College, are hereby dismissed with prejudice with all parties bearing their own attorney fees and costs.

John E. Hurn

R. Lawrence Roberson, OBA # 14076
Shawn S. Taylor, OBA # 14145
5555 S. Peoria Ave
Tulsa, Oklahoma 74105-6840
Telephone: 918-712-1994
Facsimile: 918-712-1995

ATTORNEY FOR PLAINTIFF

Thomas L. Vogt, OBA # 10995
15 E. 5th, # 3800
Tulsa OK 74103
Telephone: 918-581-8200

ATTORNEY FOR DEFENDANT

ENTERED ON DOCKET
DATE 4-16-98

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

ONDRAL L. WRIGHT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 98-CV-0053-K
	)	
STATE OF OKLAHOMA,	)	
	)	
Defendant.	)	

FILED
APR 15 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On January 20, 1998, Plaintiff, a state prisoner appearing pro se, submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983. By order entered February 3, 1998, the Court informed Plaintiff of deficiencies in this matter. Specifically, Plaintiff was advised that this action could not proceed unless he (1) paid the $150.00 filing fee or submitted a motion for leave to proceed in forma pauperis in compliance with 28 U.S.C. §1915(a), (b); (2) signed the complaint; (3) provided completed summons and Marshal forms for each named defendant; and (4) provided sufficient conformed copies of the complaint for service on each named defendant. In addition, the Clerk of Court was directed to mail Plaintiff the forms and information necessary for preparing the documents ordered by the Court. Plaintiff was also advised that these deficiencies were to be cured by March 5, 1998, "otherwise, the Court will dismiss this action without prejudice and without further notice."

To date, Plaintiff has only partially complied with the Court's February 3, 1998 Order. While Plaintiff has submitted two Marshal forms, neither are signed by the Plaintiff. Similarly, Plaintiff has submitted two summonses, but neither correctly identifies a defendant as named in this civil rights

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action.[1] Also, on March 26, 1998, Plaintiff submitted a motion for leave to proceed in forma pauperis. However, the motion lacks the required Statement of Institutional Accounts signed by an authorized prison official as well as the required certified copy of Plaintiff's trust fund account statement for the six-month period immediately preceding the filing of this action. See 28 U.S.C. § 1915(a). Finally, Plaintiff has failed to sign and return the original signature page of his complaint as directed in the February 3, 1998 Order.

However, after reviewing the § 1983 complaint submitted by Plaintiff, the Court finds that, regardless of the remaining deficiencies, this action should be dismissed as frivolous. The Prison Litigation Reform Act of 1996, added a new section to the in forma pauperis statute, entitled "Screening." See 28 U.S.C. § 1915A. That section requires the Court to review prisoner complaints filed against a governmental entity or an employee of a governmental entity before docketing, or as soon as practicable after docketing, and "dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted. Id.

"The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Id. A claim that is totally incomprehensible may be dismissed

[1]In general, the papers submitted by Plaintiff are incomprehensible. Plaintiff consistently identifies himself as the defendant and the State of Oklahoma as plaintiff leading the Court to conclude that Plaintiff mistakenly views this civil rights action as part of his criminal proceedings.

as frivolous as it is without an arguable basis in law. Jackson v. Arizona, 885 F.2d 639, 641 (9th Cir. 1989); Mayfield v. Collins, 918 F.2d 560, 561 (5th Cir. 1991).

Even liberally construing the complaint submitted in this case, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes Plaintiff's allegations are factually frivolous, generally incomprehensible, do not raise constitutional claims, and thus, lack an arguable basis in law. West v. Atkins, 487 U.S. 42, 48 (1988). Plaintiff identifies his causes of action in this civil rights action as follows:

Count I:	Murder 1st degree
Supporting Facts:	I was not telling ah (sic) lie about I don't know Travis Williams and investigations lead to palm print sir I knew this male as ah (sic) different name and yes I was there to visit before but couldn't catch on to who you guys was talking about
Count II:	Possession of f/arm
Supporting Facts:	I was never knowing about ah (sic) firearm 22 cali never have I seen such of ah (sic) weapon never have I had such of ah (sic) fire arm 22 cali in posseion (sic) immediate control 1283 also TPD supplemental report will va/tch (sic) File # 698838
Count III:	Public Drunk
Supporting Facts:	I never had such of bottle in hands in public nor was I drinking in public nor was I drunk or abuses laws will va/tch (sic) sir

(Docket #1, at 3). The Court finds these virtually incomprehensible claims have no arguable basis in law and do not allege constitutional violations. Therefore, Plaintiff's complaint should be dismissed as frivolous without leave to amend. Hall, 935 F.2d at 1110 (a court may dismiss *sua sponte* "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). However, the Court notes that based on the

"causes of action" identified by Plaintiff, i.e., "murder 1st degree," "possession of f/arm," and "public drunk," it seems Plaintiff may be challenging his conviction(s) rather his conditions of confinement. Therefore, the Clerk of Court will be directed to send habeas corpus forms to Plaintiff along with a copy of this Order.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for leave to proceed in forma pauperis (Docket #3) is **granted.**
2. Plaintiff's civil rights action is hereby **dismissed without prejudice** as frivolous pursuant to 28 U.S.C. § 1915A.
3. The Clerk is directed to **"flag"** this dismissal as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).
4. The Clerk is directed to send to Plaintiff a blank petition for writ of habeas corpus (2254pet.hc), a blank motion for leave to proceed in forma pauperis (ifp-hc.dis), and the Information and Instructions for each.

SO ORDERED this 14 of April, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

JDI/tmm

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

FILED
APR 15 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

TRACEY E. SMITH, an individual, and JAYNIE L. SMITH, an individual,	)	
Plaintiffs,	)	
vs.	)	Case No. 97CV-792-E (J)
ENVIROTEK FUEL SYSTEMS, INC., a Florida Corporation, WES MORGAN, individually, STEVE M. WOOD, individually, EXOKO, L.L.C. an Oklahoma Limited Liability Corporation, EXOKO GAS TECHNOLOGIES, INC.,	)	ENTERED ON DOCKET DATE APR 16 1998
Defendants.	)	

ORDER REMANDING CASE

Now before the Court is Defendants Steve M. Wood, Exoko, L.L.C., and Exoko Gas Technologies, Inc.'s Motion to Remand and Brief in Support.

Upon review of this Motion and for good cause shown, this Court determines that the Motion to Remand should be and is hereby granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this matter be remanded back to the District Court in and for Nowata County, State of Oklahoma.

~~IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all pleadings and other matters filed in the District Court for the Northern District of Oklahoma be transmitted to the Court~~

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~~Clerk of the District Court of Nowata County, State of Oklahoma.~~

IT IS SO ORDERED this 15th day of April, 1998.

JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing document was deposited in the U.S. Mail this _____ day of April, 1998, with proper postage thereon fully prepaid and addressed to:

Carl G. Gibson
Attorney at Law
125 North Maple
Nowata, OK 74048

Dennis A. Caruso
Attorney at Law
15 West Sixth Street, Suite 2800
Tulsa, OK 74119-5415

_____

FILED
APR 15 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

MELVIN WAYNE LUNSFORD, JR.,

Petitioner,

vs.

RON CHAMPION,

Respondent.

Case No. 96-CV-694-B(M)

ENTERED ON DOCKET
DATE APR 16 1998

REPORT AND RECOMMENDATION

The Respondent seeks dismissal of this PETITION FOR HABEAS CORPUS because Petitioner has failed to exhaust available state remedies. The matter has been referred to the undersigned United States Magistrate Judge for report and recommendation.

Petitioner, Melvin Wayne Lunsford, an Oklahoma state inmate, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254 alleging his sentence for a 1993 Osage County conviction was improperly enhanced based on a constitutionally invalid prior 1988 Tulsa County conviction.

For reasons stated below, the undersigned United States Magistrate Judge RECOMMENDS that the petition for habeas corpus be DISMISSED.

BACKGROUND

In 1988 Petitioner pled guilty to three charges in Tulsa County Case No. CR-88-375 and received a suspended sentence of five years for each count, to be served concurrently. [Dkt. 2, Ex. 2]. In 1992, as a result of a new felony charge against Petitioner, the State filed an application to revoke the suspended sentence. Petitioner

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waived his right to a revocation hearing and confessed to the allegations in the State's application. [Dkt. 2, Ex. 3]. Petitioner did not appeal the 1988 convictions or the revocation in 1992. He claims that he was prevented from appealing the 1988 conviction and the revocation, because, although he was made aware of his right to appeal, he was not informed of his right to court-appointed counsel on appeal. In 1993, Petitioner pled guilty to three counts in Osage County Case No. CF-92-150 and was sentenced to 25 years on each count, sentences to run concurrently. [Dkt. 2, Ex. 4].

In January 1995, the Tulsa County Court denied Petitioner's application for post-conviction relief which alleged ineffective assistance of counsel and that he was not fully advised of his appeal rights. The Tulsa County Court ruled that Petitioner's counsel acted in a reasonable, competent manner, and Petitioner made no effort to discuss the possibility of appealing his case with his attorney. The Tulsa County Court also concluded that the Petitioner was advised of his right to appeal, took no steps to attempt to perfect a timely direct appeal, and failed to offer any sufficient reason for his lack of a timely direct appeal. [Dkt. 2, Ex. 7]. That ruling was affirmed by the Oklahoma Court of Criminal Appeals which stated, "Petitioner has not asserted sufficient reasons for his failure to comply with the procedural prerequisites to appeal, and thus has failed to show that he is entitled to any relief in a post-conviction proceeding." Dkt. 2, Ex. 8].

Also in January 1995, the Osage County court denied Petitioner's application for post-conviction relief in Case No. CF-92-150. The Court found that "Petitioner's

remedy lies in the county(s) where the prior conviction he complains of originated. No other trial court has jurisdiction to take any action." [Dkt. 2, Ex. 5]. On February 5, 1995, Petitioner filed a form document with the Oklahoma Court of Criminal Appeals wherein he sought a writ of habeas corpus, a writ of mandamus, and to appeal denial of post-conviction relief. [Dkt. 13, Ex. 2]. On February 15, 1995, the Court of Criminal Appeals issued its order denying relief. The appellate court agreed with the trial court that "[t]he proper and most efficient method of attacking a former conviction is in the court imposing the judgment and sentence for that former conviction." [Dkt. 2, Ex. 6].

DISCUSSION

A. Exhaustion.

A state prisoner bringing a federal habeas corpus action bears the burden of showing he has exhausted all available state remedies. *Miranda v. Cooper*, 967 F.2d 392 (10th Cir. 1992), *cert. denied,* 506 U.S. 924, 113 S.Ct. 347, 121 L.Ed.2d 262 (1992). However, the exhaustion requirement may be waived when it would be futile for the petitioner to attempt to exhaust his claims. *See Harris v. Reed*, 489 U.S. 255, 263 n.9, 109 S.Ct. 1038, 1043 n.9, 103 L.Ed.2d 308 (1989) ("Of course, a federal habeas court need not require that a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred."); *see also Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991) (applying the futility rule in *Harris* to waive the exhaustion requirement of section 2254 because of a state procedural bar). Concurring in *Harris,* Justice O'Connor noted one of the dangers in strictly applying

the exhaustion requirement in cases where exhaustion would be futile is that a dismissal in such circumstances "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." *Harris*, 489 U.S. at 269, 109 S.Ct. at 1047 (O'Connor, J., concurring).

Oklahoma's courts would refuse to consider any appeal of the denial of his Osage County application for post-conviction relief. Oklahoma's Post-Conviction Procedure Act specifically requires that any ground for relief available to an applicant must be raised in his first application for post-conviction relief or it will be considered waived in subsequent applications. Okla. Stat. tit. 22, § 1086. Further, the Act requires that any appeal must be filed within thirty days from the entry of the judgment. Okla. Stat. tit. 22, § 1087. Clearly, it would be futile to require Petitioner to return to the state court to present an appeal of the Osage County denial of his application for post-conviction relief. Therefore, the Court concludes that Respondent's motion to dismiss for failure to exhaust should be denied.

B. Procedural Bar.

If a state prisoner fails to meet a state procedural requirement, and the last state court to address the matter refuses, or would refuse, to address the merits of the claims because of the procedural default, the claims are procedurally barred in federal habeas proceedings. In these cases, the state judgment rests on independent and adequate state procedural grounds. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565, 115 L.Ed. 2d 640 (1991). "On habeas review, we do not

address issues that have been defaulted in state court on an independent and adequate state procedural ground, unless cause and prejudice or a fundamental miscarriage of justice is shown." *Steele v. Young*, 11 F.3d 1518, 1521 (10th Cir. 1993). Applying these principles to this case, the Court concludes that Petitioner's claim is barred by the procedural default doctrine and should therefore be dismissed.

Petitioner has shown neither cause for his state default nor a fundamental miscarriage of justice. "Cause" must be "something external to the petitioner, something that cannot fairly be attributed to him . . . ." *Coleman*, 501 U.S. at 753, 111 S.Ct. at 2566. Petitioner has offered nothing to suggest that external factors prevented him from complying with the Rules of the Court of Criminal Appeals in perfecting a timely appeal of the Osage county denial of post-conviction relief. The fundamental miscarriage of justice exception is available only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence. *Steele*, 11 F.3d at 1522 (quoting *Herrera v. Collins*, 506 U.S. 390, 404, 113 S.Ct. 853, 862, 122 L.Ed.2d 703 (1993)). Petitioner has not made any showing or claim that he is factually innocent. Therefore, since the state judgment rests on adequate and independent state procedural grounds, Petitioner's claims are procedurally barred from federal habeas review and should be DISMISSED WITH PREJUDICE.

CONCLUSION

Based on the foregoing, the undersigned United States Magistrate Judge RECOMMENDS that the Petition for Writ of Habeas Corpus be DISMISSED WITH PREJUDICE.

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

DATED this 15th day of April, 1998.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 16 Day of April, 1998.

ENTERED ON DOCKET

DATE 4-16-98

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

MARTIN MORRIS MOSES, SR.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 98-CV-126-K (M)
	)	
STANLEY GLANZ; CAPTAIN WAKEFIELD; LIEUTENANT TURLEY; CORP. GEIGER; CORP. PALMER; CORP. SPURLOCK; DET. OFFICER PETITT; DET. OFFICER INGRAM,	)	
	)	
Defendants.	)	

FILED

APR 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On February 17, 1998, Plaintiff filed his civil rights complaint pursuant to 42 U.S.C. § 1983 and a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a), as amended by The Prison Litigation Reform Act, Pub.L.No. 104-134, 110 Stat. 1321 (1996). Based on the representations contained in the motion seeking pauper status, this Court granted leave to proceed in forma pauperis and Plaintiff was directed either to pay an initial partial filing fee of $13.70 or to show cause for his failure to do so on or before March 27, 1998. Plaintiff was advised that failure to comply with the Order could result in the dismissal of his case without prejudice.

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Upon review of the record, the Court finds that Plaintiff has not paid the initial partial filing fee or shown cause in writing for his failure to do so as directed. Accordingly, Plaintiff's complaint is hereby **dismissed without prejudice** for failure to pay the filing fee. See Local Rule 5.1(F).

IT IS SO ORDERED this 14 day of April, 1998.

TERRY C. KERN, Chief Judge
United States District Court

ENTERED ON DOCKET

DATE 4-16-98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of the Secretary of Veterans Affairs,	)	**F I L E D**
Plaintiff,	)	APR 15 1998
v.	)	Phil Lombardi, Clerk U.S. DISTRICT COURT
MICHAEL D. HAGGARD, et al.,	)	
Defendants.	)	CIVIL ACTION NO. 97-CV-158-K

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 14 day of April, 1998.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

CATHRYN D. MCCLANAHAN, OBA #014853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

CDM:cas

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ENTERED ON DOCKET

DATE 4-16-98

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

LONNIE D. MAYS, individually and as the spouse of KRISTINA M. MAYS,	)	
Plaintiffs,	)	
vs.	)	**Case No: 98 CV0045K(M)**
Medical and Dental Group Benefit Plan for Employees of Best Buy Co., Inc. and BEST BUY CO. INC.,	)	
Defendants.	)	

FILED

APR 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before this Court is the Joint Stipulation for Dismissal with Prejudice in the above styled matter. For good cause shown, this action is hereby terminated, with prejudice, and without costs to either party.

Dated this 14 day of April, 1998.

Terry C. Kern
Judge of the United States District Court

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
APR 13 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RENEE BROWN-JOYNER, Plaintiff, v. KENNETH S. APFEL, Commissioner of the Social Security Administration, Defendant.	)))))))))))	No. 97-CV-539-M ENTERED ON DOCKET DATE APR 15 1998

ADMINSTRATIVE CLOSING ORDER

This case was remanded to the Commissioner of Social Security (Commissioner) under sentence six of 42 U.S.C. §405(g). In accordance with N.D. LR 41, it is hereby ordered that the Clerk administratively close this action. This case may be reopened for final determination upon application of either party once the proceedings before the Commissioner are complete.

IT IS SO ORDERED.

Dated this 13th day of APRIL, 1998.

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

(16)

FILED

APR 18 1998

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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RENEE BROWN-JOYNER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No. 97-C-539-M
KENNETH S. APFEL, Commissioner of the Social Security Administration,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET

DATE ~~APR 15 1998~~

ORDER

Upon the motion of the defendant, Acting Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnelll, 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.

DATED this 13th day of April 1998.

Frank H. McCarthy

FRANK H. McCARTHY
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

Phil Pinnell

PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PATIENCE SARPONG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 98-CV-0013-K (E)**
	)	
BRAUM'S ICE CREAM, INC.,	)	
	)	ENTERED ON DOCKET
Defendant.	)	DATE 4-14-98

PROPOSED FINDINGS AND RECOMMENDATIONS

This matter came on for hearing this 13th day of April, 1998, on defendant's Motion to Enforce Settlement Agreement and Dismiss Plaintiff's Complaint (Docket #6). Defendant appeared by counsel Kris Ted Ledford, and plaintiff appeared by counsel Jeff Nix and R. Scott Scroggs. Based upon the pleadings and representations of counsel, it is recommended that the defendant's motion be granted and plaintiff's complaint be dismissed.

This lawsuit arose from plaintiff's employment with defendant as a sales clerk for a period of three and one-half months from September 8, 1996 to December 22, 1996. After defendant terminated plaintiff's employment, plaintiff filed a complaint with the Oklahoma Human Rights Commission ("Commission") claiming that she had been subject to discrimination because of her national origin. On June 13, 1997, plaintiff, by and through her Commission representative, entered into a settlement agreement with defendant resolving all of her claims against defendant in return for defendant's payment of $151.24 to plaintiff. Plaintiff subsequently refused to honor the settlement agreement and filed this lawsuit on December 12, 1997. Defendant counterclaimed (Docket #2) seeking specific performance of the settlement agreement. Plaintiff did not reply to the counterclaim, and did not respond to the motion to enforce the settlement agreement.

At the hearing, plaintiff's counsel did not deny defendant's recitation of the facts, and stated that he had no evidence to the contrary. The motion to enforce should be deemed confessed. If the parties voluntarily enter into a valid settlement agreement, the Court should summarily enforce the agreement. Reid v. Graybeal, 437 F. Supp. 24, 27 (W.D. Okla. 1977).

IT IS THEREFORE RECOMMENDED that the motion to enforce the settlement agreement be **GRANTED** and that plaintiff's complaint be **DISMISSED**. The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise these Proposed Findings and Recommendations or whether to recommit the matter to the undersigned. As part of his review of the record, the District Judge will consider the parties' written objections to these Proposed Findings and Recommendations. A party wishing to file objections must do so within ten days after being served with a copy of these Proposed Findings and Recommendations. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in these Proposed Findings and Recommendations that are accepted or adopted by the District Court. See Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992); Niehaus v. Kansas Bar Ass'n., 793 F.2d 1159, 1164-65 (10th Cir. 1986) (superseded by rule on grounds not relevant to holding on waiver of right to appeal).

Dated this 13th day of April, 1998.

Claire V Eagan

CLAIRE V. EAGAN
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 14th Day of April, 1998.

C. Portillo, Deputy Clerk

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

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

BETTY J. DURBIN,	)	
Plaintiff,	)	
vs.	)	No. 96-C-829-K
AMERICAN AIRLINES, INC.,	)	
Defendant.	)	

ENTERED ON DOCKET
DATE 4-14-98

ORDER

Before the Court is the motion of the defendant for summary judgment. This is an action in which plaintiff sues her former employer for disability discrimination under the Americans with Disabilities Act (ADA) and sex discrimination under Title VII.

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." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

Under a view of the record most favorable to plaintiff, the following facts exist. Plaintiff commenced employment with

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defendant October 2, 1989 and essentially functioned thereafter as a "Specialist" (i.e., call taker) for defendant's customer service department in connection with SABRE, defendant's computer system. In 1993, the position of Land Area Network (LAN) Administrator within plaintiff's department was posted for bid through the Career Development Program (CDP). Plaintiff and others applied for the LAN Administrator position, but Ron Guthrie was selected for the position. Plaintiff's lawsuit does not involve any claim based upon the fact that Mr. Guthrie was selected over plaintiff for the LAN Administrator position in 1993.

As a result of applying for the LAN Administrator position in 1993, plaintiff was placed on a list of primary candidates which, provided the list was not too old, would be reviewed if another position became available in the department. In early 1994, plaintiff was assigned to provide assistance to the LAN Administrator. This was a temporary duty assignment, without any increase in salary or benefits. In February 1994, plaintiff suffered a back injury at work. Plaintiff continued to work, while seeking medical treatment. During the summer of 1995, Brad Weaver and Michael Kennedy were also providing temporary assistance with LAN Administration duties.

Around June 1995, defendant created a position of assistant to the LAN Administrator. Plaintiff asserts that she was told by her supervisor Suzanne Ritvo in June 1995 that plaintiff would be given the position, which would involve a 20% salary increase. (Defendant denies that plaintiff was promised the position or that

it involved a raise). Plaintiff asserts that in July 1995, she informed Ritvo that the pain due to her back injury had increased to the point that surgery was necessary. Plaintiff asserts that Ritvo, upon being told of the surgery, said there may be a "problem" with the job change.

In July 1995, plaintiff took a leave of absence to have back surgery. Her doctor declared her temporarily totally disabled. The position of assistant to the LAN administrator, which plaintiff contends had been promised to her, was reopened by the defendant for application. (Defendant contends that Ritvo was mistaken in telling plaintiff that the position would not have to be "posted for bid"; in fact, because the list of primary candidates, compiled from the 1993 applicants for LAN Administrator, was over one year old, defendant's regulations required the reposting.) Plaintiff was interviewed by telephone by a five-person panel, which did not include Ritvo. The panel selected Michael Kennedy to fill the position. Panel member Debra Sherrill states by affidavit that Kennedy was selected because, among other things, the panel considered plaintiff's interpersonal skills to be less than those of Mr. Kennedy.

In January 1996, plaintiff returned to work and was placed in her position as Specialist. Plaintiff contends that she requested the ability to take short, frequent breaks of a minute or so, but such breaks were not provided by defendant. (Defendant contends that plaintiff was provided with a footstool as she requested and was not denied the opportunity to take breaks). Ultimately, the

pain forced plaintiff to ask her doctor to place her medical leave again. She was placed on medical leave until early 1997. Plaintiff has apparently still not returned to defendant, but has been employed at St. Francis Hospital, at Intex and MIS Technology. During 1996, plaintiff filed for Social Security disability benefits, contending that she was temporarily totally disabled.

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual. . . ." 42 U.S.C. §12112(a). A plaintiff establishes a prima facie case by showing (1) she is a disabled person within the meaning of the ADA; (2) she is qualified, that is, she is able to perform the essential functions of the job, with or without reasonable accommodation; (3) that the employer terminated her employment under circumstances which give rise to an inference that the termination was based on her disability. Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir.1997).

Once plaintiff establishes the prima facie showing, a presumption is created that the defendant engaged in unlawful discrimination. The burden of production then shifts to the defendant to produce evidence of a legitimate nondiscriminatory reason for the challenged employment decision. If the defendant comes forward with such reason, the burden reverts back to the plaintiff who must then demonstrate that there is a genuine dispute of material fact as to whether the employer's proffered reason for the challenged action is pretextual--i.e., unworthy of belief. Id.

The ADA defines a disability, as relevant here, as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. §12102(2). Although the ADA does not define major life activities, the Court is guided by EEOC regulations issued to implement the statute. Bolton v. Scrivner, Inc., 36 F.3d 939, 942 (10th Cir.1994), cert. denied, 115 S.Ct. 1104 (1995). The regulations state that "[m]ajor life activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. §1630.2(i).

An individual's impairment constitutes a "disability" under the ADA, however, only if it "substantially limits" a major life activity. An impairment is substantially limiting if it significantly restricts the "condition, manner or duration under which an individual can perform a particular major life activity as compared to . . . the average person in the general population." 29 C.F.R. §1630.2(j)(1)(ii). Three factors must be considered in determining whether a substantial limitation is present: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; (3) the expected permanence or long term impact. Bolton, 36 F.3d at 943, citing 29 C.F.R. §1630.2(j)(2).

First, defendant argues that plaintiff has failed to demonstrate any of the three elements of a prima facie case. It contends that plaintiff's impairment does not substantially restrict any major life activity. Defendant notes that numerous

cases have found that plaintiff's restrictions (no lifting over fifty pounds and no prolonged sitting or standing), have been found not to be a substantial limitation.

Plaintiff responds by citing cases which hold that a "back injury" can be considered a disability under the ADA. While this is undisputable, the determination of whether a particular impairment constitutes a disability must be made on a case-by-case basis. Blanket determinations that a particular condition is not a disability should be avoided. See 29 C.F.R. pt. 1630, App. §1630.2(j) ("the determination of whether an individual has a disability is. . . based. . . on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others . . . ."). Plaintiff contends that her injury significantly impairs the major life functions of working and caring for oneself.

To support a finding of significant impairment of caring for oneself would require evidence of constant medical care, which plaintiff has not provided. Caring for oneself does not simply mean hindrance in doing housework and personal grooming, as plaintiff suggests. Plaintiff has a lesser burden in demonstrating that her injury constitutes a significant impairment to her ability to work. Viewing the record most favorably to plaintiff, her testimony of her pain indicates that she was significantly impaired in her ability to perform the "Specialist" job.

However, defendant notes that to qualify as disabled under the ADA, a plaintiff must have an impairment which significantly

restricts the individual from performing "a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." Bolton, 36 F.3d at 942. Defendant argues, and plaintiff has not successfully disputed, that plaintiff's subsequent employment and her own testimony indicates that she is not precluded from working in the computer industry and that she is qualified for many computer positions.[1] Plaintiff's prima facie case fails on this basis.

Defendant also contends plaintiff is not a "qualified" individual due to her representations to the Social Security Administration that she is disabled. "A significant number of federal courts have. . . decided that a person who characterizes herself as 'totally disabled' in order to receive state, federal, or even insurance benefits will normally be estopped from proving that she is a qualified individual with a disability within the meaning of the ADA or similar state laws." Dush v. Appleton Elec. Co., 124 F.3d 957, 961 (8th Cir.1997). "Different courts have positioned themselves on the other side of this dispute, holding that one who represents herself as 'totally disabled' for purposes extraneous to the ADA should still have an opportunity to recover under the statute." Id.

In view of its disposition of the case on other grounds, this

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[1]In her deposition, plaintiff testified that her injury does not preclude her from working in the computer industry (depo. at 317) and that she could do "any" computer job "out there" (Id. at 320). See also id. at 361.

Court need not decide what position the Tenth Circuit would take on the "estoppel" issue. This Court also declines to find plaintiff is not "qualified" because she could not perform the essential functions of the position, with or without reasonable accommodations. Factual issues exist, which must be resolved in plaintiff's favor at this stage.

Assuming arguendo that plaintiff has established a prima facie case, defendant has fulfilled its burden of articulating a legitimate nondiscriminatory reason for its decision regarding the assistant to LAN Administrator position. Plaintiff has failed in her ultimate burden of demonstrating disability discrimination. Even if Ritvo changed her representations to plaintiff once Ritvo learned of the surgery, Ritvo was not a member of the five-member panel who made the selection. Plaintiff has presented no direct evidence that the panel members took her surgery into account in its decision, or even evidence from which such an inference could be drawn. Apparently, no member of the panel has been deposed as to what factors influenced their decision. The only evidence on this point, the Sherrill affidavit, is favorable to defendant. The Court concludes summary judgment is appropriate as the ADA claim.

Plaintiff also brings a claim of discrimination (in lack of promotion) based upon gender. To establish a prima facie case of disparate treatment gender discrimination, plaintiff must show: (1) she belonged to the protected class; (2) she was adversely affected by the employer's action; (3) she was qualified for the position; (4) she was treated less favorably than her male

counterparts. Cole v. Ruidoso Mun. Schools, 43 F.3d 1373, 1380 (10th Cir.1994). Even if a prima facie case were established, the Court finds that, similarly to the disability discrimination claim, plaintiff has made no evidentiary showing of pretext for gender-based discrimination. Summary judgment is appropriate.

It is the order of the Court that the motion of the defendant for summary judgment (#19) is hereby GRANTED.

ORDERED this 13 day of April, 1998.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

FILED

APR 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

BETTY J. DURBIN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 96-C-829-K
	)	
AMERICAN AIRLINES, INC.,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE 4-14-98

JUDGMENT

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

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

ORDERED THIS DAY OF 13 APRIL, 1998

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

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

QUINN AARON KLEIN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 98-CV-149-BU (M)
	)	
MR. & MRS. JOHN GATLIN,	)	
	)	
Defendants.	)	

ENTERED ON DOCKET
DATE APR 14 1998

ORDER

Plaintiff, a prisoner confined at the Oklahoma State Reformatory in Granite, Oklahoma, seeks to bring this 42 U.S.C. § 1983 civil rights suit *in forma pauperis* against the parents of his former girlfriend, Mr. & Mrs. John Gatlin. Based on representations in the motion for leave to proceed *in forma pauperis*, it appears that Plaintiff is unable to pay the filing fee and he is granted leave to proceed *in forma pauperis*. However, under 28 U.S.C. § 1915(e)(2), part of the Prison Litigation Reform Act of 1996 (PLRA), the Court is directed to dismiss a suit brought *in forma pauperis* at any time if the Court determines that it is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. For the reasons discussed below, the Court finds that this case should be dismissed.

ANALYSIS

A. Failure to allege prima facie elements of a civil rights claim

In his complaint, Plaintiff alleges that while he was living with Defendants' daughter, "He (Defendant [Mr. Gatlin]) busted out the window of my apt. bedroom window and removed several

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things not belonging to his daughter." Plaintiff seeks "reimbursement for missing articles, cut sheets from glass out of broke window, & pain, grief & suffering." (Docket #1).

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,[1] and that defendant acted under color of law.[2] Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. Leatherman v. Tarrant Cty. Narcotics Unit, 507 U.S. 163, 168 (1993) (rejecting heightened pleading requirements in civil rights cases against local governments). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade,

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[1]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).

[2]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.

841 F.2d at 1526 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). While pro se complaints are held to less stringent standards and must be liberally construed, nevertheless, the Court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Haines, 404 U.S. at 520; Hall, 935 F.2d at 1110.

In the instant case, Plaintiff has completely failed to allege a deprivation of a right secured by the Constitution of the United States or to identify any conduct whereby Defendants were acting under color of state law. Construing Plaintiff's *Complaint* liberally in accord with his pro se status, the Court concludes that Plaintiff has failed to establish the essential elements of a civil rights action pursuant to section 1983: that defendant deprived him of a right secured by the Constitution and laws of the United States while acting under color of state law. Therefore, Plaintiff has failed to state a claim upon which relief can be granted, and accordingly, his *Complaint* should be dismissed.

B. Payment of filing fee

Although Plaintiff has been granted leave to proceed *in forma pauperis*, the PLRA requires the district court to assess and collect the $150 filing fee even when a case is dismissed before service of the summons and complaint. See 28 U.S.C. § 1915(b)(1). As of the date of Plaintiff's financial certificate, Plaintiff lacked funds to make even an initial partial fee payment. However, the trust fund officer at Plaintiff's current place of incarceration is hereby ordered to collect, when funds exist, monthly payments from Plaintiff's prison account(s) in the amount of 20% of the preceding month's

income credited to the account. Monthly payments collected from Plaintiff's prison account(s) shall be forwarded to the clerk of court each time the account balance exceeds $10 until the full $150 filing fee is paid. Separate deductions and payments shall be made with respect to each action or appeal filed by Plaintiff. All payments shall be sent to the Clerk, 411 United States Courthouse, 333 West Fourth Street, Tulsa, Oklahoma 74103-3819, attn: PL Payments, and shall clearly identify Plaintiff's name and the case number assigned to this action. The Clerk shall send a copy of this Order to the trust fund officer at the Oklahoma State Reformatory, P.O. Box 514, Granite, OK 73547-0514.

This dismissal counts as one of Plaintiff's three allotted dismissals under 28 U.S.C. § 1915(g). The Court also takes notice this dismissal constitutes the second time[3] Plaintiff has brought a civil action in this Court under 28 U.S.C. § 1915 which was dismissed for failure to state a claim or as frivolous.

CONCLUSION

After liberally construing Plaintiff's allegations, Haines v. Kerner, 404 U.S. 519, 520 (1972), the Court concludes that Plaintiff has failed to allege either a deprivation of a right secured by the Constitution of the United States or that Defendants acted under color of state law. See Baker v. McCollum, 443 U.S. 137 (1979); see also Wilhelm v. Gray, 766 P.2d 1357, 1358 (Okla. 1989). Therefore, Plaintiff's *Complaint* should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B) for failure to state a claim upon which relief can be granted. However, Plaintiff must nonetheless pay the $150 filing fee in full.

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[3]Plaintiff's other case filings in this Court include: Case No. 97-CV-937-K, dismissed without prejudice on January 30, 1998, for failure to pay initial partial payment of filing fee as ordered; and Case No. 98-CV-150-K, dismissed pursuant to § 1915(e)(2)(B) for failure to state a claim, April, 1998.

ACCORDINGLY, IT IS HEREBY ORDERED that:

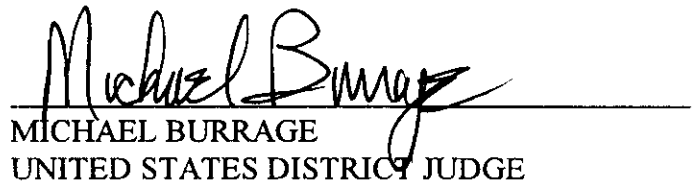
1. Plaintiff's motion for leave to proceed *in forma pauperis* is **granted.** However, Plaintiff shall make monthly payments of 20% of the preceding month's income credited to his account(s). Prison officials having custody of Plaintiff shall forward payments from Plaintiff's account(s) to the Clerk at the above-cited address each time the amount in the account(s) exceeds $10 until the filing fee is paid.

2. This action is **dismissed with prejudice** pursuant to 28 U.S.C. 1915(e)(2)(B).

3. The Clerk of the Court is directed to "**flag**" this dismissal as a "prior occasion" for purposes of §1915(g).

4. The Clerk shall send a copy of this Order to the trust fund officer at the Oklahoma State Reformatory, P.O. Box 514, Granite, OK 73547-0514.

SO ORDERED 7th day of April, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

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

MATTHEW JAMES HAMPTON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 96-CV-470-E
	)	
H. N. "SONNY" SCOTT,	)	
	)	
Respondent.	)	

ENTERED ON DOCKET
DATE APR 14 1998

ORDER

This is a *pro se* proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his enhanced sentences imposed after he was convicted of three drug-related offenses in Tulsa County. Respondent has filed a response to which Petitioner has replied. Petitioner has also filed motions for an evidentiary hearing and for summary judgment. As more fully set out below, the Court concludes that Petitioner's application for a writ of habeas corpus, motion for evidentiary hearing, and motion for summary judgment should be denied.

BACKGROUND

Petitioner was charged with unlawful delivery of a controlled drug (cocaine) (Count One), failure to obtain a drug stamp (Count Two) and unlawful possession of a controlled drug (crack cocaine) (Count Three), all after former conviction of two or more felonies. After a jury found him guilty of all three counts in the initial phase of the bifurcated trial, the prosecution introduced evidence that Petitioner had been convicted of two felonies in 1991. The jury instruction on the burden of proof stated in part that "[y]ou are instructed that the defendant is presumed to be not

guilty of the allegations against him in the second part of the information [i.e., the prior felony convictions] unless these allegations are established by evidence beyond a reasonable doubt." Petitioner's attorney did not object to the introduction of the prior convictions or to the jury instructions. The jury found that Petitioner had been formerly convicted of two of more felonies, and Petitioner was sentenced to 36 years, 20 years, and 20 years imprisonment on the three counts, to run consecutively, for a total of 76 years. Fines totaling $8500 were also imposed.

In his timely direct appeal, Petitioner through new counsel raised the following issues:

(1) Evidence of other crimes was received into evidence without advance notice to the Petitioner when the police decoy testified that during the drug buy she spoke with Petitioner about buying additional cocaine in exchange for furnishing him marijuana;

(2) The trial court deprived Petitioner of his liberty during trial, resulting in prejudice to Petitioner, when it summarily revoked his bail at the end of the first day of trial;

(3) Petitioner was denied effective assistance of counsel at trial in that counsel:

(a) waived opening statements during the guilt and sentencing stages of proceedings,

(b) failed to object to evidence of other crimes offered by the State,

(c) failed to object to inappropriate arguments by opposing counsel,

(d) failed to cross-examine a witness who appeared to lack personal knowledge,

(e) referenced a 'gun' in closing arguments when no evidence had been offered as to firearms,

(f) made no objection to the court's instructions, and indicated he had not read the instructions, and

(g) failed to conduct pretrial discovery or meaningful plea negotiations; and

(4) The punishment imposed by the jury was excessive.

On August 17, 1995, the Oklahoma Court of Criminal Appeals affirmed the district court's decision in an opinion addressing each issue raised by Petitioner.

Petitioner then filed an application for post-conviction relief with the trial court, raising three grounds for relief:

(1) He was denied effective assistance of counsel because trial and appellate counsel failed to object to the erroneous application of the sentencing statute, 21 O.S. § 51(B);

(2) His sentence was illegally enhanced under § 51(B) by prior convictions which arose out of the same transaction, when he should have been sentenced under § 51(A); and

(3) That the court during the second stage of his trial incorrectly instructed the jury that Petitioner was presumed "not guilty" rather than presumed "innocent," and incorrectly instructed the jury about the state's duty to establish all material allegations beyond a reasonable doubt.

The District Court for Tulsa County denied Petitioner's application for post-conviction relief in an order filed November 30, 1995. That court first determined that these issues were procedurally barred because they had not been raised at trial or upon appeal. The court then addressed the merits of Petitioner's second claim, interpreting it as an objection to enhancement pursuant to § 51(B) because his prior convictions were drug related. The court determined that this ground was without merit because the state is free to elect to enhance the sentence under § 51(B) (rather than 63 O.S. § 2-402) where both drug related and non-drug related convictions are alleged. The court next turned to the merits of Petitioner's claim of ineffective assistance of counsel, and concluded it was without merit because trial and appellate counsel acted as reasonably competent attorneys and need not advance every conceivable argument, regardless of merit.

Petitioner appealed and on March 6, 1996, the Oklahoma Court of Criminal Appeals affirmed the denial of his state application for post-conviction relief on the basis that Petitioner had failed to show that he was now entitled to raise these issues. That court concluded that counsel was not ineffective, and counsel's actions did not establish sufficient reason for the default, merely because counsel failed to either recognize the grounds for a constitutional claim or failed to raise the claim even if recognized, citing Webb v. State, 835 P.2d 115, 116 (Okla. Crim. App. 1992). Because Petitioner offered nothing to show that some external impediment prevented him or his appellate counsel from constructing or raising a claim concerning the enhancement of his sentence, or a claim under Flores v. State[1] regarding the "presumed not guilty" phrasing of the jury instructions, the court concluded that Petitioner had waived and bypassed these issues, citing Johnson v. State, 823 P.2d 370, 373 (Okla. Crim. App. 1991).

In the instant petition pursuant to § 2254, Petitioner raises the same issues as in his state application for post-conviction relief, phrasing them in his brief as follows:

(1) his due process rights were violated because 21 O.S.A. § 51(B) was incorrectly applied to enhance his sentences on the basis of two prior convictions which arose out of the same transaction;

(2) ineffective assistance of trial and appellate counsel in failing to raise the alleged enhancement sentencing error establishes "cause for procedural default;"

(3) his due process rights were violated by the trial court's instructions that petitioner was presumed to be "not guilty" and by an instruction about the prosecution's burden of proof that required the State to prove "all material allegations" rather than "all elements" of the second page of the information (the "Flores issues");

(4) ineffective assistance of trial and appellate counsel for failing to raise the Flores issues at the second stage of trial or upon appeal.

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[1] 896 P.2d 558 (Okla.Crim.App. 1995), reh'g denied 899 P.2d 1162 (Okla.Crim.App. 1995).

Petitioner requests that his sentences be reversed and remanded for resentencing under the provisions of 21 O.S. § 51(A) to a minimum of 10 years on each count to run concurrently.

Respondent asserts that Petitioner's first three grounds for relief are procedurally barred by either the application of 28 U.S.C. § 2254(d) or traditional procedural default considerations because he either failed to raise these issues in his direct appeal or they were raised and dismissed as barred in his state application for post-conviction relief. Further, Respondent contends that because the Flores case was decided on January 24, 1995, it was not established law at the time of Petitioner's trial and appeal. As a result, defense counsel was not ineffective in failing to raise this issue in 1993 when Petitioner was tried or in 1994 when the Petitioner filed his direct appeal. As to the enhancement issue, Respondent asserts that Petitioner has not shown that the two convictions used for enhancement arose out of the same transaction, and so his attorneys were not ineffective for failing to raise this issue at trial or upon direct appeal. Respondent also alleges that Petitioner does not meet the "fundamental miscarriage of justice" standard for overcoming a procedural bar because Petitioner fails to allege that he is actually innocent of the crimes charged.

In his reply, Petitioner makes two arguments. First, Petitioner contends that § 2254(d), as amended, should not apply to his petition because the amendments were not in effect at the time of his conviction and state court post-conviction proceedings. Second, Petitioner asserts that he meets the "actual innocence" exception necessary to overcome the procedural bar because he has shown that he is actually innocent of having two prior convictions that meet the requirements of the enhancement statute. As to his claims under Flores, Petitioner states that the Flores case was decided while his direct appeal was pending; thus, his appellate counsel's representation was deficient when he failed to amend the appellate brief to raise this issue.

ANALYSIS

As a preliminary matter, the Court finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record. See Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). Thus, Petitioner's motion for an evidentiary hearing is denied.

Next, after a careful review of the record, the Court determines that Petitioner has met the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Coleman v. Thompson, 501 U.S. 722, 732 (1991); Rose v. Lundy, 455 U.S. 509 (1982).

A. Application of AEDPA

Petitioner filed this habeas petition on May 24, 1996, one month after the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). Therefore, the Court reviews this petition under the amended provisions of 28 U.S.C. § 2254. See Lindh v. Murphy, 117 S.Ct. 2059, 2068 (1997); Richmond v. Embry, 122 F.3d 866, 870 (10th Cir. 1997), cert. denied 118 S.Ct. 1065 (1998). Contrary to Petitioner's assertions, this case does not involve the retroactive application of the AEDPA, because Petitioner's petition was not pending or even filed at the effective date of the AEDPA's amendments to § 2254.

B. Procedural Default as to Claims (1)(enhancement) and (3)(jury instructions)

The doctrine of procedural default prohibits a federal court from considering specific habeas claims where the state's highest court declined to reach the merits of those claims on

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

Applying these principles to the instant case, the Court concludes that Petitioner's claims (1) and (3) are barred by the procedural default doctrine. The Oklahoma Court of Criminal Appeal's procedural bar as applied to Petitioner's claims as presented in his state application for post-conviction relief was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently applied a procedural bar and denied such claims unless the petitioner provides "sufficient reason" for his failure to raise the claim earlier. Moore v. State, 889 P.2d 1253 (Okla. Crim. App. 1995).

Because of his procedural default, this Court may not consider Petitioner's claims unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The "cause" standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier,

477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The "fundamental miscarriage of justice" exception 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 attempts to demonstrate "cause" as to Claim (1) relating to sentencing enhancement by alleging that his trial and appellate counsel provided ineffective assistance of counsel by failing to object that the prior convictions used for enhancement arose out of the same transaction. Petitioner does not specifically assert that ineffective assistance of counsel in failing to object to the jury instructions serves as "cause" excusing his default as to Claim (3); however, he does separately raise the issue of ineffective assistance of counsel for failing to raise a Flores objection. Construing Petitioner's *pro se* petition liberally as required by Haines v. Kerner, 404 U.S. 519, 520 (1972), the Court examines whether Petitioner meets the burden of establishing "cause" as to both claims. After careful review of the record and as discussed below, the Court determines that Petitioner has not established "cause" justifying the procedural default.

Ineffective assistance of counsel may serve as "cause" excusing a procedural bar, Murray v. Carrier, 477 U.S. at 488, and to establish ineffective assistance of counsel a petitioner must show that his counsel's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984). There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Id. at 688. In making this determination, 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." Id., at 690. 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.

1. Petitioner fails to show "cause" overcoming the procedural default as to Claim (1)(sentence enhancement)

As to Claim (1), Petitioner asserts that he was improperly sentenced under the habitual offender enhanced sentencing statute, 21 O.S. §51(B). This statute provides in relevant part that:

> Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses [sic] within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of not less than twenty (20) years. *Felony offenses relied upon shall not have arisen out of the same transaction or occurrence or series of events closely related in time and location.*
>
> (emphasis added).

Petitioner alleges that the two prior felony offenses used to enhance his sentences did arise out of the same transaction or occurrence, and that he told trial counsel this but that counsel declined to raise the issue at trial. Petitioner has included with his reply a copy of the Information charging him in Tulsa County of Count One, Unlawful Delivery of Controlled Drug, and Count Two, Assault and Battery Upon a Police Officer. Petitioner alleges that these prior charges arose when a police officer attempted to arrest Petitioner during a drug delivery and Petitioner struck the officer and fled.

Petitioner cites the case of Smith v. State, 736 P.2d 531 (Okla. Crim. App. 1987) to support his argument that his sentences were improperly enhanced under § 51(B). In that case

the Oklahoma Court of Criminal Appeals noted that criminal defendants had the burden of proving that their prior convictions arose out of the same conviction and thus constituted an exception to the enhancement statute. Id. at 534. In that case the defendant, while fleeing from the scene of an armed robbery, had pointed a pistol at someone to restrain him from interfering with the defendant's flight. The Court of Criminal Appeals held that these two convictions did meet the exception of arising out of the same transaction, and remanded the case for modification of sentencing. Id.

In the present case, the State introduced at trial certified copies of the Judgment and Sentences of the two prior felony convictions and presented a witness from the Oklahoma Department of Corrections who identified Petitioner by name and birth date and stated that Petitioner had two prior convictions from a 1990 case. Once the state has proven that prior convictions exist that meet the requirements of § 51(B), the burden of demonstrating that the statutory exception to enhancement applies shifts to the defendant. Rackley v. State, 814 P.2d 1048 (Okla. Crim. App. 1991). Petitioner's assertion that the judgments in the prior convictions were entered on the same day and shared the same case number does not provide sufficient proof that the convictions arose out of the same transaction within the meaning of the enhancement statute. Rackley, 814 P.2d at 1050. Although Petitioner attempts to offer proof that the prior convictions were related by describing the events underlying his arrest on those charges, this Court is barred from considering additional factual evidence on this issue pursuant to 28 U.S.C.

§ 2254(e)(2) (as amended by the AEDPA), which provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that —
>
> (A) the claim relies on —
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Petitioner's claim does not meet the requirements of § 2254(e)(2)(A) because it does not involve a new rule of constitutional law or newly discovered evidence that was unavailable previously; thus, the Court does not consider Petitioner's factual assertions when determining whether counsel was ineffective in failing to raise the affirmative defense that the prior convictions met the "related occurrence" exception to the enhancement statute.

Even assuming that this claim has merit, however, Petitioner's trial and appellate counsel were not ineffective by the mere fact that they failed to recognize either the factual or legal basis for a constitutional claim, or failed to raise the claim even if recognized. Murray v. Carrier, 477 U.S. at 486. Instead, "[t]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Id. at 488. No such external factors are alleged to be present in this case which would have prevented his trial or appellate counsel from presenting evidence of an affirmative defense that the prior convictions arose out of the same transaction.

The case cited by Petitioner of United States v. Kissick, 69 F.3d 1048 (10th Cir. 1995) can be distinguished from the instant case. In Kissick, a federal criminal defendant's trial attorney failed to challenge the use of a prior conviction to classify the defendant as a career offender under the United States Sentencing Guidelines. The Court of Appeals for the Tenth Circuit held that because that prior conviction was "facially insufficient" to satisfy the career offender provisions, the attorney's failure to object to its use was ineffective assistance of counsel. Id. at 1056. Along this same line, the Tenth Circuit, in an unpublished decision dealing with the Oklahoma enhancement statute, found failure to object to the use of a prior conviction which had been completed prior to the specified 10 year period constituted ineffective assistance of counsel on the basis that the conviction was "facially insufficient" to satisfy the requirements of § 51(B). Johnson v. Cody, No. 95-6172, 1996 WL 78324 (10th Cir. 1996).

In contrast, the prior convictions used to enhance Petitioner's sentences *were* "facially sufficient" to meet the requirements of 21 O.S. § 51(B) in that they were felony convictions executed within the 10 years preceding Petitioner's present convictions. Petitioner does not contend that the prior convictions were facially insufficient; rather, Petitioner's complaint is that further evidence was not put on to establish that those convictions met the exception of arising out of the same transaction, an affirmative defense distinct from the State's initial burden of proving facially sufficient prior felony convictions attributable to Petitioner and completed within the foregoing 10 years. See, Cobb v. State, 773 P.2d 371, 372 (Okla. Crim. App. 1989) (citing Bickerstaff v. State, 669 P.2d 778 (Okla. Crim. App. 1983)).

The Court finds that trial and appellate counsel were not ineffective for failing to object to the use of Petitioner's prior convictions and Petitioner has failed to establish "cause" for the

procedural default as to this claim. Having determined Petitioner cannot establish cause, the Court need not address the prejudice inquiry, Klein v. Neal, 45 F.3d 1395, 1400 (10th Cir.1995).

2. *Petitioner fails to show "cause" overcoming the procedural default as to Claim (3)(improper jury instructions)*

Respondent also raises the defense of procedural default with respect to Petitioner's claim that he was denied due process because at the sentencing phase of his trial the jury received erroneous instructions on the presumption of innocence and the prosecution's burden of proof.

Applying the principles of procedural default enunciated above to the facts surrounding this claim, the Court initially determines that this claim is barred under the same rationale discussed previously. Therefore, the Court cannot reach the merits of this 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 claims are not considered. Coleman, 510 U.S. at 750.

Petitioner attempts to show "cause" by alleging that his trial counsel and appellate counsel were ineffective for failing to object at trial and on appeal to the "non-standard" jury instructions regarding the presumption of innocence and the prosecution's burden of proof. The Court finds this argument unpersuasive for the reasons discussed below.

The instructions at issue provide:

> **Instruction No. 1.** "You are instructed that the *burden of proof in this case is upon the State to establish by evidence beyond a reasonable doubt all the material allegations* contained in the second page of the information, and unless the State has met its duty in this respect, you cannot find the defendant guilty of "SECOND OR SUBSEQUENT VIOLATION."

> **Instruction No. 2.** "You are instructed that the defendant is *presumed to be not guilty* of the allegations against him in the second page of the Information unless these allegations are established by evidence beyond a reasonable double, and that this presumption continues with the defendant *unless every material allegation of the second page of the Information is proved by evidence beyond a reasonable doubt.*"
> (emphasis added)

As previously discussed, the Court must indulge a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Strickland v. Washington, 466 U.S. at 688. Petitioner argues alternatively that trial and appellate counsels' performances were deficient for failing to make an objection or appeal claim under Flores or that the Flores case represents a change in the law and therefore this claim was properly raised for the first time in his application for post-conviction relief.

In Flores, the Oklahoma Court of Criminal Appeals held that a trial judge's deviation from the uniform jury instructions regarding the presumption of innocence and the state's burden of proof when the jury was deciding the guilt or innocence of a defendant was reversible error. Flores v. State, 896 P.2d 558, 562.

Here, however, Petitioner had already been found guilty by a jury on the three counts on which he was subsequently sentenced as a habitual offender. In accordance with Oklahoma law, Petitioner's trial took the form of a bifurcated enhancement proceeding, with consideration given first to his guilt or innocence of the primary charges, and only after the jury returned the verdicts on those charges did the jury then (1) consider the fact of the prior felony convictions, and (2) assess punishment. 22 O.S. § 860; see generally, Johnson v. Cowley, 40 F.3d 341, 344 (10th Cir.1994). Petitioner is not challenging the jury instructions at the first (guilt/innocence) stage of

his trial, but instead only objects to the phrasing of the instructions at the sentencing stage. As such, consideration of these jury instructions is not controlled by the Flores decision. Cf., Ledbetter v. State, 933 P.2d 880 (Okla. Crim. App. 1997) (Flores determination that instruction charging state with burden of proving "all material allegations of a crime" versus "all elements of a crime" was confusing, did not apply to an instruction dealing with the prosecution's duty of proving the "material allegations" in a Bill of Particulars where those allegations constituted the aggravating circumstances supporting imposition of the death penalty).

The Court also finds no error in the jury instructions at issue that in themselves "'so infected the entire trial that the resulting conviction violates due process.'" Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Cupp v. Naughten, 414 U.S. 141 (1973)). Because this issue is without merit, the failure of Petitioner's counsel to raise it at trial or on appeal does not excuse Petitioner's procedural default.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 506 U.S. 390 (1993); Sawyer v. Whitley, 505 U.S. 333 (1992). This exception applies to a narrow class of cases in which a petitioner can show that a constitutional violation probably resulted in the conviction of an innocent person. Schlup v. Delo, 513 U.S. 298, 323-32 (1995); Murray v. Carrier, 477 U.S. at 496. The United States Supreme Court has acknowledged that the "actual innocence" exception extends to capital sentencing proceedings, see Sawyer v. Whitley, 505 U.S. 333 (1992) (citing Smith v. Murray, 477 U.S. 527, 537 (1986)), but has not addressed whether the exception should apply to the sentencing phase of noncapital cases.

In United States v. Richards, 5 F.3d 1369, 1371 (10th Cir. 1993), the Tenth Circuit held

that "a person cannot be actually innocent of a noncapital sentence" and refused to apply the exception in the context of successive motions to correct sentence pursuant to 28 U.S.C. § 2255. See also, Reid v. Oklahoma, 101 F.3d 628, 630 (10th Cir. 1996) (petitioner's claim that he was "innocent of the [Oklahoma] enhancement charge" did not fall within the potential scope of the miscarriage of justice exception allowing successive § 2254 petition to be reviewed on its merits). In discussing the actual innocence exception as it applied to a double jeopardy claim, however, the Tenth Circuit appeared to endorse use of the exception in habitual offender cases, stating that "[i]n a habitual offender case, the petitioner is actually innocent of the sentence if he can show he is innocent of the fact — i.e., the prior conviction — necessary to sentence him as an habitual offender. In any event, actual innocence of the sentence still requires a showing of factual innocence." Selsor v. Kaiser, 22 F.3d 1029, 1036 (10th Cir. 1994) (dictum).

Here, Petitioner does not claim that he is actually innocent of the crimes of which he was convicted, nor does he allege that he is innocent of the prior convictions used for enhancement of his sentences. Instead, he asserts that he is "innocent" of having two convictions that meet the requirements of § 51(B) because those convictions arose out of the same transaction. Even assuming that the actual innocence exception applies to habitual offender proceedings under a liberal reading of the Selsor case, Petitioner has failed to allege factual innocence sufficient to meet the exception.

Therefore, because Petitioner has not demonstrated cause and prejudice or that a fundamental miscarriage of justice will result, the Court concludes that it is procedurally barred from considering Petitioner's claims relating to sentence enhancement and jury instructions.

C. Claim (4): Ineffective Assistance of Counsel for Failing to Object to Jury Instructions under Flores

Having previously determined that the Flores decision does not apply to the jury instructions given at the second stage of Petitioner's trial and that such instructions did not violate Petitioner's due process rights, the Court concludes that his counsel did not err in failing to raise such an objection. Thus, Petitioner's claim of ineffective assistance of counsel is without merit.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. The petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1) Petitioner's petition for a writ of habeas corpus (#1) is **denied**;

2) Petitioner's motion for an evidentiary hearing (#10) is **denied**; and

3) Petitioner's motion for summary judgment (#13) is **denied** as moot.

SO ORDERED THIS 10th day of April, 1998.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED

APR 1 0 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRIAN DALE DUBUC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. 97-CV-650-B
	)	
THE CITY AND COUNTY OF TULSA; CLIFFORD E. HOPPER; SALLEY SELF; EDWARD RANDOLPH TURNBULL; RON WALLACE; PAULA J. ALFORD; DETECTIVE BILL A. WARD; TULSA CITY POLICE OFFICER RON MAYFIELD; OFFICER BRIAN FINNEY; OFFICER D. ELLIOT; OFFICER DERICK CARLOCK; OFFICER JEFF CASH; TIM CLARK; C. SHELBY CUNNINGHAM; LESLIE LUNN; and PATTY R. McKENZIE,	)	
	)	
Defendants.	)	

ENTERED ON DOCKET
DATE APR 13 1998

ORDER

Plaintiff, a state prisoner appearing *pro se* and *in forma pauperis*, has paid the initial partial filing fee to commence this civil rights action pursuant to 42 U.S.C. § 1983.

As a preliminary matter, the Court takes notice that Plaintiff is a frequent filer in the federal court system. In the United States District Court for the Eastern District of Oklahoma, Dubuc has filed three civil rights actions, two of which were dismissed as frivolous.[1] In the Northern District of Oklahoma, Dubuc has filed six cases: one habeas corpus action and five civil rights cases. Of particular significance to the disposition of the instant case, Plaintiff raised

[1] 93CV-192, filed 03/19/93, closed 01/30/95, dismissed as frivolous.
93CV-800, filed 10/21/93, closed 10/21/93
94CV-501, filed 09/07/94, closed 09/28/95, dismissed as frivolous.

9

substantially the same conspiracy claims against many of the same defendants named in this case in one of his previous civil rights actions, Case No. 94-CV-207-H.[2] In that 1994 action, upon report and recommendation of the United States Magistrate Judge, the Court granted one defendant's motion for summary judgment as Dubuc "failed to show any facts at issue for trial," and concluded that two of the defendants were entitled to immunity. In "light of [Dubuc's] unsubstantiated conspiracy" claim, the Court concluded Dubuc had failed to state a claim upon which relief could be granted and dismissed the § 1983 complaint. Judgment was entered on March 5, 1996 in favor of Defendants.

Dubuc appealed the judgment to the Tenth Circuit Court of Appeals. The Tenth Circuit reviewed the decision to dismiss Plaintiff's claims for failure to state a claim upon which relief could be granted *de novo*, and the affirmed the decision only after finding that "it appears that the plaintiff can prove no set of facts in support of the claims that would entitle him to relief, accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff." (Docket #46, Case No. 94-C-207-H) (citing Fuller v. Norton, 86 F.3d 1016, 1020 (10th Cir. 1996). The grant of summary judgment was also reviewed *de novo*, and the appellate court applied the same standards as the district court under Fed. R. Civ. P. 56(c). See Wolf v. Prudential Ins. Co., 50 F.3d 793, 796 (10th Cir. 1995). On April 2, 1997, the appellate court affirmed the district court judgment for "substantially the same reasons as set forth in the district court's order." (Docket #46, Case No. 94-C-207-H).

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[2]Case No. 94-CV-207-H was originally assigned to Judge James O. Ellison and later transferred to Judge Sven Erik Holmes.

ANALYSIS

A. The Prison Litigation Reform Act

The Prison Litigation Reform Act of 1995, added a new section to the in forma pauperis statute, entitled "Screening." See 28 U.S.C. § 1915A. That section requires the Court to review before docketing, or as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity and to "dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted." Id. In addition, the district court shall dismiss a civil claim against any defendant at any time if the court determines that the action "(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A suit is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

B. Plaintiff's Claims Fail to State a Claim on which Relief may be Granted or are Legally Frivolous

The doctrine of *res judicata* prohibits relitigation of claims that have been, or could have been, litigated in a prior action. Allen v. McCurry, 449 U.S. 90, 94 (1980). "A claim is barred by *res judicata* if three elements exist: (1) a final judgment on the merits in the prior suit; (2) the prior suit involved identical claims as the claims in the present suit; and (3) the prior suit involved

the same parties or their privies." Satsky v. Paramount Communications, Inc., 7 F.3d 1464, 1467 (10th Cir. 1993) (citing Allen, 449 U.S. at 94). Parties cannot defeat the application of *res judicata* by simply alleging new legal theories. Clark v. Haas Group, Inc. 953 F.2d 1235, 1238 (10th Cir. 1992).

In Plaintiff's prior suit, Dubuc v. District Court of Tulsa County, et al., No. 94-C-207-H, summary judgment was granted in favor of Defendants Turnbull and Hopper and the case was dismissed for failure to state a claim as to the other defendants. Judgment was entered in favor of all defendants. It is well settled that a dismissal for failure to state a claim is a dismissal on the merits. See Restatement (Second) of Judgments § 19 comment d (1982); Federated Department Stores, Inc. V. Moitie, 452 U.S. 394, 399 n.3 (1981); Bell v. Hood, 327 U.S. 678, 682 (1946). Thus the first requirement for application of *res judicata* is satisfied.

Furthermore, Plaintiff's prior suit involved essentially the same allegations about the same underlying series of events as the instant lawsuit. Plaintiff adds only a slight twist to incorporate the reversal on direct appeal of his state court conviction.[3] Therefore, the claims in the two suits are identical and the second element is satisfied.

As to the third element, the present suit names many of the defendants from the prior suit or their privies, plus three additional defendants who were not specifically named in the prior suit. The Court will consider the propriety of applying *res judicata* as to each group of defendants.

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[3]The Court notes that the Oklahoma Court of Criminal Appeals reversed Plaintiff's convictions in the underlying criminal case on June 29, 1995, prior to the March 5, 1996 entry of judgment in Case No. 94-C-207-H and the April 2, 1997 affirmation on appeal by the Tenth Circuit Court of Appeals.

1. Claims against defendants City and County of Tulsa, Hopper, Self, Turnbull, Wallace, Alford, Ward, Mayfield, Finney, Elliot, Carlock, Cash, Clark

After comparing Plaintiff's complaint filed in Case No. 94-C-207-H to the instant complaint, the Court finds that Defendants City and County of Tulsa, Hopper, Self,[4] Turnbull, Wallace, Alford, Ward, Mayfield,[5] Finney, Elliot, Carlock, Cash, and Clark were either named defendants or are "privies" of the named defendants in the prior lawsuit. Therefore, after liberally construing Plaintiff's pro se pleading, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that as to this group of Defendants, all three elements of *res judicata* are satisfied. Plaintiff's action fails to state a claim upon which relief can be granted as it is clear from the face of the complaint that Plaintiff's alleged conspiracy claims against these Defendants are barred by *res judicata*. Plaintiff has had a "full and fair opportunity" to present his conspiracy claim pursuant to 42 U.S.C. §§ 1983 and 1988 against these Defendants and there is "no reason to doubt the quality, extensiveness, or fairness of procedures followed in [the] prior litigation." Montana v. United States, 99 S.Ct. 970 (1979). Because Plaintiff's claims were actually raised and fully litigated in the previous § 1983 action, 94-CV-207-H, he has forgone the right to raise additional claims or allege new legal theories against these Defendants.

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[4]Plaintiff names "Salley (sic) Self, Certified shorthand reporter and official Court Stenographer" as a Defendant in this action. Although not named as a defendant in Case No. 94-CV-207-H, Plaintiff alleges that Ms. Self was an employee of Tulsa County District Court, a named defendant in the prior lawsuit, at the time of the events giving rise to Plaintiff's claims. Therefore, she was clearly a privy of the defendants named in the previous lawsuit for purposes of *res judicata*.

[5]In the instant action, Plaintiff names "Ron Mayfield" as a defendant. In the previous suit, Plaintiff named "Ron Fields," allegedly a Tulsa Police Department Officer, as a defendant. However, as of June 2, 1994, "Ron Fields" was not listed as being employed by the Tulsa Police Department and was never located for Service of Process by the U.S. Marshal. Plaintiff's descriptions of "Ron Fields" in 94-CV-207-E and "Ron Mayfield" in 97-CV-650-B lead the Court to conclude he is the same person. However, even if "Ron Mayfield" is not the same person as "Ron Field," Plaintiff's claims against Ron Mayfield are barred by *res judicata* since Plaintiff alleges that he is a Tulsa Police Officer and would therefore be a privy of the defendants named in the previous lawsuit.

2. *Claims against C. Shelby Cunningham, Leslie Lunn, and Patty R. McKenzie*

Defendants Cunningham, Lunn and McKenzie were not named as defendants in Plaintiff's previous civil rights case. Therefore, the third element required for application of *res judicata* is missing. However, the Court finds that Plaintiff's claims against these defendants are nonetheless legally frivolous. 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,[6] and that defendant acted under color of law.[7] Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade, 841 F.2d at 1526 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935

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[6]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).

[7]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.

F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

In the instant case, Plaintiff alleges that Defendant C. Shelby Cunningham is "a private individual of no profession" who"was acting in a joint action with persons acting under color of state law. With a deliberate design to cause deprivation of plaintiff's Federally protected rights, privleges (sic), and immunities." (Docket #1, at 4). Similarly, Plaintiff alleges that Defendants Leslie Lunn and Patty R. McKenzie are his former girlfriends who also acted "in a joint action with persons acting under color of state law with a deliberate design to cause deprivation of Plaintiff's secured rights." (Docket #1, at 4). However, Plaintiff only provides conclusory, broad assertions concerning the alleged "joint action" involving these defendants. The Court finds the complaint fails to allege conduct by these defendants that constitutes action under color of state law. As a result, Plaintiff's claims against these three defendants are indisputably meritless. See Neitzke v. Williams, 490 U.S. 319, 327 (1989). Plaintiff's complaint against these three defendants should be dismissed as frivolous pursuant to 28 U.S.C. § 1915(e).

C. Applicability of 28 U.S.C. § 1915(g)

This is the third civil rights case filed by Plaintiff under the *in forma pauperis* statute to be dismissed as frivolous. Therefore, pursuant to 28 U.S.C. § 1915(g),[8] Plaintiff may not bring another civil case or appeal a decision entered in a civil case under the *in forma pauperis* statute unless he is under imminent danger of serious physical injury. See Green v. Nottingham, 90 F.3d 415, 420 (10th Cir. 1996) (holding that because the plain language of § 1915(g) strongly suggests that Congress intended courts to consider prisoner suits dismissed prior to the statute's enactment, and applying this procedural rule in such a manner would not have a retroactive effect, § 1915(g) requires the court to consider prisoner suits dismissed prior to the statute's enactment).

CONCLUSION

Plaintiff's civil rights claims against Defendants City and County of Tulsa, Hopper, Self, Turnbull, Wallace, Alford, Ward, Mayfield, Finney, Elliot, Carlock, Cash, and Clark are barred by *res judicata* and should, therefore, be dismissed for failure to state a claim on which relief can be granted. Plaintiff's civil rights claims against Defendants Cunningham, Lunn and McKenzie are indisputably meritless and are, therefore, legally frivolous. The Court concludes that the complaint should be dismissed with prejudice pursuant to 28 U.S.C. §§ 1915(e), 1915A. This dismissal counts as Plaintiff's "third strike" under 28 U.S.C. § 1915(g).

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[8]Section 1915(g) provides: In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's action is **dismissed with prejudice** as frivolous. The Clerk shall mail to Plaintiff a copy of the *Complaint* along with a copy of this Order.

2. Because Plaintiff has been granted *in forma pauperis* status and for purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to "**flag**" this dismissal as "**strike three**" under § 1915(g). Unless Plaintiff is under imminent danger of serious physical injury, Plaintiff may not seek leave to proceed *in forma pauperis* in any future civil action or appeal of a judgment in a civil action. Plaintiff must now prepay the required fees in order to commence a civil action.

SO ORDERED this 7th day of April, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR - 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LENA LORETTA FIARRIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 97-C-194-B**
	)	
KENNETH S. APFEL, Commissioner of the Social Security Administration,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE APR 13 1998

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 9 day of APRIL, 1998.

Sam A. Joyner
United States Magistrate Judge

(10)

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 IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

APR 1 0 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AARON D. HABBEN,	)	
	)	
Plaintiff	)	
vs.	)	Case No. 95-CV-1194-B
	)	
STANLEY GLANZ,	)	
	)	
Defendants	)	

ENTERED ON DOCKET
DATE APR 1 3 1998

ORDER OF DISMISSAL

After careful consideration of the Stipulation for Dismissal of Plaintiff, Aaron Habben and Defendant, Sheriff Stanley Glanz, filed in the above styled and numbered case, and for good cause shown, it is therefore ORDERED, that the above styled and numbered case be and is hereby dismissed with prejudice.

So Ordered this 9th day of April, 1998.

THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

(50)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	ENTERED ON DOCKET
	)	APR 13 1998
Plaintiff,	)	DATE _____
	)	
v.	)	Civil Action No. 98CV0069H
STEVE WALKER,	)	FILED
	)	
Defendant.	)	APR 10 1998
	)	Phil Lombardi, Clerk U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 9TH day of APRIL, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Steve Walker, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Steve Walker, was served with Summons and Complaint on March 6, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Steve Walker, for the principal amount of $2,906.73, plus accrued interest of $1,131.69, plus administrative charges in the amount of $5.65, plus interest thereafter at the rate of 8 percent per annum

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until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 97-CR-002-H
	)	
DEREK SCHELL,	)	
	)	
Defendant.	)	

FILED
APR 10 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE APR 13 1998

ORDER

NOW on this 9TH day of April, 1998, this cause comes on to be heard in the matter of the plaintiff's motion to forfeit cash bond. The Court finds that the motion is made for good cause shown and that the same should be and is hereby granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant Derek Schell's cash bond be forfeited.

SVEN ERIK HOLMES

13

ENTERED ON DOCKET

DATE 4-13-98

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

FILED

APR 10 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LONNIE D. MAYS, individually and as the spouse of KRISTINA M. MAYS,	)	
Plaintiffs,	)	
vs.	)	**Case No: 98 CV0045K(M)**
Medical and Dental Group Benefit Plan for Employees of Best Buy Co., Inc. and BEST BUY CO. INC.,	)	
Defendants.	)	

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The above entitled action, having been fully compromised and settled, is hereby stipulated by and between the parties hereto through their respective counsel, that the same may be and is hereby dismissed on its merits with prejudice but without costs to any party. The Court Administrator, upon the filing of this Stipulation, is hereby authorized and directed to so dismiss this action.

Dated this 10 day of April, 1998.

Respectfully submitted,

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