

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

F I L E D

MAY 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FREDDIE,;SCOTT,)
)
Plaintiff,)
)
vs.)
)
KENNETH SAWYER, et. al.)
)
Defendants.)
)

No. 98-CV-94-B

ENTERED ON DOCKET

DATE MAY 20 1998

ORDER

Before the Court are a Motion to Dismiss of Defendants Kenneth Sawyer ("Sawyer"), Robert Rubin ("Rubin"), the Internal Revenue Service ("IRS"), Margaret Richardson ("Richardson"), David Robinson ("Robinson"), Pamela Bigelow ("Bigelow"), John Callahan ("Callahan") and Charles Rossotti ("Rossotti") ("the federal defendants"); and a Motion to Dismiss, for Sanctions and Injunctive Relief of Defendants The Crosby Group, Inc. ("Crosby Group") and McKissick Products Division ("McKissick Products"), in regards to Plaintiff Freddie Scott's ("Scott") Complaint for Fraud of Contract, Misrepresentation, Racketeering, Conspiracy, Fraud upon instruments/contracts/agreements and a 1040 Form Adhesion Contract which Scott alleges made him a taxpayer so that the IRS could steal his property under color of law.

In his complaint, Scott, who is an employee of the McKissick Products Division of the Crosby Group, alleges that for the past nineteen years the above named defendants have been

engaging in fraud, conspiracy, and collusion to deprive him of his property by withholding federal taxes from his paychecks, for a total of \$77,337.77 to date. He alleges that these monies have been taken from him without due process and in the face of the IRS' failure to disclose information to him which is material to his ability to protect his personal property and money. Scott alleges "Constitutional torts . . . consistent with Title 42 Section 1986 for Breach of Oath of Office, Section 1985 for Conspiracy, and Section 1983 for Damages."

Scott previously filed a lawsuit against McKissick Products in Tulsa County on March 17, 1989 alleging that McKissick Products had been wrongly withholding social security taxes from his paychecks. On April 20, 1979 Scott had filed a lawsuit against the Crosby Group in the Northern District of Oklahoma in which he alleged that the Crosby Group wrongfully withheld federal income taxes from his paychecks as part of a conspiracy with the IRS to violate his constitutional rights.

Scott further alleges collusion between his employer the Crosby Group and the federal government resulting in the withholding of tax of a nonresident alien in violation of IRS Code Publication 515. Scott maintains that he is not a "taxpayer" as he never either consented or volunteered to be one.

He claims that the IRS' letters requesting that he submit information about his 1995 tax return is evidence of a continuing fraud. Scott lists eight frauds he alleges have been perpetrated against him by the IRS:

- 1) failure to respond and provide written disclosure
- 2) fraud
- 3) willful misrepresentation
- 4) false representation
- 5) deceit

- 6) failure to act in good faith
- 7) willful intent to establish deception
- 8) withholding facts about the law and not disclose [sic] information as requested, relating to their authority and powers.

Scott also alleges that the IRS 1040 form is an adhesion contract, and that “[w]hen you sign the Label, identified as the private corporate Internal Revenue Service, Inc. 1040 Label Form, you are attaching it as a codicil to your claim of the Bill of Rights, and under penalty of perjury, are agreeing to waive your Common Law rights to life, liberty, and property.” He alleges that this thereby is an act of fraud of contract.

Scott goes on to “accuse” the federal individual defendants Robert Rubin, Kenneth Sawyer, Margaret Richardson, David Robinson, Pamela Bigelow, John Callahan, and Charles Rossotti pursuant to 42 U.S.C. § 1986, of, *inter alia*, “recommending, or neglecting, or failing to prevent or correct the frauds, false representations, failure to answer, failure to disclose in writing, deceit, threath [sic] of imprisonment [sic], taking properties in money for the sum of \$77,337.77, [and] flase [sic] statements on which reliance was made causing damages.” He further “accuses” these individuals of violating 18 U.S.C. §§ 241, 872, and 1621, and claims monetary damages under 42 U.S.C. § 1986.

As damages, Scott demands 1) the return of all wages withheld as taxes by his employer for the past nineteen years in the sum of \$77,337.77 plus ten percent interest from the IRS and the United States Treasury, 2) \$45 million dollars in compensatory damages against the defendants jointly and severally, 3) \$550 thousand in compensatory damages against each of Earl Wilson, Robert Coleman, Larry Postelwait, the Crosby Group, Inc., and the McKissick Products Division, 4) his employer must stop withholding taxes from his paychecks, and 5) exemplary damages of \$2

million per count against all named defendants jointly and severally.

*Defendants' the Crosby Group, Inc., and McKissick Products Division
Motion to Dismiss, for Sanctions and Injunctive Relief*

The Crosby Group and the McKissick Products Division, Scott's employer, move the Court to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. They also move the Court to award them sanctions against Scott for bringing a frivolous action in bad faith, and to enjoin Scott from bringing any future action relating to the federal tax system against them or their employees.

Scott alleges in his initial complaint that the Court has jurisdiction over his complaints pursuant to "Public Law 103-141 [H.R. 1308] 'The Religious Freedom Act of 1993' Section 3(C) ("RFRA"). This section provided:

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-1(c). Scott, however, cannot state a claim under the RFRA as the Supreme Court has held the Act to be unconstitutional. *City of Boerne v. P. F. Flores*, _ U.S. _, 117 S. Ct. 2157 (1997).

In his response to his employers' motion to dismiss, Scott introduces a new basis for this Court's jurisdiction in this matter. The Court treats this new allegation as an amendment to Scott's original pleading pursuant to Federal Rules of Civil Procedure 15(a). Scott states

Plaintiff being a U.S. Slave's Descendant asserts jurisdiction under 'EXPATRIATION ACT' 15 Statute 223 and here in 'Exhibit C' Memorandum of Fact filed with this Court the act of Freddie, Scott as expatriating from U.S. citizenship under provisions of the 14th Amendment, which ow [sic] put

Freddie,;Scott, along with free status White people for the purpose of taxation and Citizenship under the Constitution for the united [sic] States of America, . . . Freddie,;Scott does not have ant [sic] documents showing that the United States nor [sic] the INTERNAL REVENUE SERVICE ever at any time provided him or any of the 49 milliond [sic] of U.S. Slaves' Descenadnts [sic] Group with said such documentation . . .”

The act referred to by Scott, 15 Stat. 223, was known as the Citizens' Rights Act (July 27, 1868, ch. 249, 15 Stat. 223). It has no currently effective sections. Thus, this is also not an appropriate basis upon which Scott may base the jurisdiction of this Court.

Scott alleges generalized constitutional torts in his complaint congruent with Title 42 U.S.C. §§ 1985, 1986, and 1983. Section 1985 allows a citizen to bring suit for damages against persons who conspire to deprive the citizen of his civil rights. Section 1986 allows the citizen to also bring suit against any party or parties who by neglect failed to prevent the deprivation of civil rights. Section 1983 allows a citizen to state a claim against any person who acts under color of state law to deprive the citizen of his constitutional rights. Scott has failed to state a valid claim against his employer based upon any of these statutes. His employer has not deprived Scott of any of his constitutional rights by withholding federal income tax from his paycheck, under color of either federal or state law.

Indeed, title 26 of the United States Code, section 7421(a) (the Anti-Injunction Act) provides:

Tax.--Except as provided in sections 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6672(b), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The statutory exceptions referenced pertain to “a redetermination of a proposed deficiency, 26

U.S.C. §§ 6212(a) and (c), 6213(a), and certain civil suits in the district court, 26 U.S.C. §§ 7426(a) and (b)(1), 6672(b), 6694(c) and 7429(b). Taxpayers may also sue in the proper district court or the United States Claims Court for a refund of taxes paid. 26 U.S.C. § 7422.” *Lonsdale v. United States*, 919 F.2d 1440, 1442 (10th Cir. 1990). There is also a judicial exception to the Anti-Injunction Act which allows an injunction “if the taxpayer demonstrates that: 1) under no circumstances could the government establish its claim to the asserted tax; and 2) irreparable injury would otherwise occur.” *Id. citing Bob Jones University v. Simon*, 416 U.S. 725, 737 (1974); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 6-8 (1962). Since Scott’s claim against his employers does not fall within any of the exceptions to the Anti-Injunction Act, he would be unable to maintain a cause of action against them even if the Court did have subject matter jurisdiction in the case because of Scott’s failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

Title 26 United States Code, section 3403, “Liability for tax,” mandates that employers withhold federal taxes from their employees’ wages and vitiates any potential liability to the employees for doing so: “The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment.” Furthermore, “the claims against plaintiff’s employer [Crosby Group and McKissick Products] and its employees [Robert Coleman and Earl Wilson] failed to state a cause of action since federal income tax withholding does not result in the taking of property without due process of law.” *Robinson v. A&M Electric, Inc.*, 713 F.2d 608, 609(10th Cir. 1983) (citing *Campbell v. Amax Coal Co.*, 610 F.2d 701 (10th Cir.1979); *United States v. Smith*, 484 F.2d 8, 10-11 (10th Cir.1973), *cert. denied*, 415 U.S. 978 (1974)). Thus, in regards to Scott’s

allegations against his employer, Scott has failed to establish both subject matter jurisdiction of the Court and a claim upon which relief may be granted.

*Motion to Dismiss of Defendants Kenneth Sawyer, Robert Rubin,
the Internal Revenue Service, Margaret Richardson,
David Robinson, Pamela Bigelow, John Callahan and Charles Rossotti*

The federal defendants move the Court to dismiss Scott's complaint against them seeking monetary damages for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. The motion is also based on lack of personal jurisdiction over David Robinson ("Robinson") and John Callahan ("Callahan").

"When an action is one against named individual defendants, but the acts complained of consist of actions taken by defendants in their official capacity as agents of the United States, the action is in fact one against the United States." *Atkinson v. O'Neill*, 867 F.2d 589, 590 (10th Cir. 1989). Scott asserts in his response to the federal defendants' motion to dismiss that he does not challenge the authority of the IRS to tax American citizens under the Constitution; rather, he challenges the authority of the IRS to tax Scott personally because of his alleged status as a "slaves' descendant of African Origin." The authority of the federal defendants to communicate with Scott about his tax liabilities derive from their position as agents of the United States government by virtue of their employment with the IRS. Scott does not allege that the federal defendants acted *ultra vires* or other than within their official capacities as agents of the United States. Therefore, Scott's action is regarded by the Court as in fact against the United States, even though the United States was not named as a party by Scott. *See id.*

As a sovereign, the United States has immunity from suit and may only be sued if it waives that immunity. *See Fostvedt v. United States*, 978 F.2d 1201, 1202-1203 (10th Cir. 1992). As a

taxpayer seeking to bring suit against the United States, the burden “to find and prove an ‘explicit waiver of sovereign immunity’” is upon Scott. *Id.* at 1203 (quoting *Lonsdale v. United States*, 919 F.2d 1440,1444 (10th Cir. 1990).

All of Scott’s alleged bases of subject matter jurisdiction fail to meet his burden of showing that the United States has waived sovereign immunity in this instance. In response to the federal defendants’ motion to dismiss for lack of subject matter jurisdiction, Scott alleges that the Citizens’ Rights Act of 1868, 15 Stat. 223, provides a basis for the Court’s subject matter jurisdiction. However, as explained above, this act has no currently effective sections and therefore cannot serve as a basis for jurisdiction. Scott also alleges that jurisdictional basis for the Court is to be found in the due process clause of the Fourteenth Amendment. However, “federal income tax withholding does not result in the taking of property without due process of law.”

Robinson v. A & M Electric, 713 F.2d 608, 609 (10th Cir. 1983) (citing *Campbell v. Amax Coal Co.*, 610 F.2d 701 (10th Cir. 1979); *United States v. Smith*, 484 F.2d 8 (10th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974)). The Fourteenth Amendment does not provide the Court with subject matter jurisdiction.

Scott also alleges subject matter jurisdiction under the United Nations Charter. Although the United States is a signatory to the U.N. Charter there is no provision within the Charter waiving the United States’ sovereign immunity in this matter. Contrary to Scott’s allegations, the Genocide Convention also does not confer subject matter jurisdiction upon the Court in this matter.

Even if it could have been found there, jurisdiction cannot be based upon the Religious Freedom Restoration Act as alleged by Scott in his complaint, since as described above this Act

was held unconstitutional by the Supreme Court in *City of Boerne v. P. F. Flores*, _ U.S. _ 117 S. Ct. 2157, 2172 (1997).

The Court also lacks subject matter jurisdiction under any allegations of constitutional torts under 42 U.S.C. §§ 1983, 1985, and 1986 advanced by Scott:

[Section] 1983 . . . does not apply to federal officers acting under color of federal law. *Kite v. Kelley*, 546 F.2d 334 (10th Cir. 1976). Further, in the absence of allegations of class based or racial discriminatory animus, the complaint fails to state a claim under § 1985. *Atkins v. Lanning*, 556 F.2d 485 (10th Cir. 1977). Hence, there can be no valid claim under § 1986 of neglect to prevent a known conspiracy in the absence of a conspiracy under § 1985. *Hamilton v. Chaffin*, 506 F.2d 904 (5th Cir. 1975).

Campbell v. Amex Coal Company, 610 F.2d 701, 702 (10th Cir. 1979). Scott does not allege that he has been discriminated against on the basis of race or class. He alleges that he is not a taxpayer. However, this bare allegation is not a sufficient basis upon which this Court can claim subject matter jurisdiction over Scott's requests for monetary relief.

Furthermore, the Court lacks subject matter jurisdiction over Scott's request for injunctive relief. Scott requests this Court to stop his employer from withholding taxes from his paychecks. However, as discussed above, the Anti-Injunction Act, 26 U.S.C. § 7421(a), statutorily bars Scott from bringing such a request before this Court.

As a taxpayer, Scott may bring suit under 28 U.S.C. § 1346(a)(1) for a refund of taxes. As a prerequisite to doing so, Scott must first pay the assessed tax and file an administrative claim with the IRS pursuant to 26 U.S.C. § 7422(a). *United States v. Dalm*, 494 U.S. 596, 601-602 (1990). Scott has not alleged that he has filed an administrative claim for a refund; rather, in his reply to the federal defendants' motion to dismiss he asserts that he need not apply for a refund because Title 26 of the United States Code "does not apply" to him. Because Scott has not

complied with the statutory requirements, this Court does not have jurisdiction over his claims under 28 U.S.C. § 1346(a)(1).

The Crosby Group and McKissick Products move this Court to grant them attorney fees and costs, as well as to issue a permanent injunction enjoining Scott from filing, without leave of Court, any suit or legal proceedings in any court against The Crosby Group, Inc. or its McKissick Products Division or any of their individual employees regarding any income tax related issue.¹

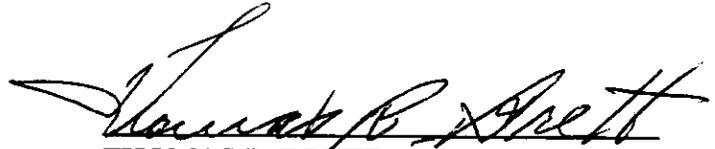
The Court finds the request for sanctions of attorney fees to be well-founded. Scott brought this clearly frivolous action after having previously brought substantially similar lawsuits against his employers in state and federal court which were dismissed for lack of subject matter jurisdiction. In 1979 Scott filed a lawsuit against The Crosby Group stating essentially the same causes of action as he now raises in this current action. In 1989 Scott brought suit against McKissick Products again alleging that his employer was illegally withholding taxes from his paychecks. An award of attorney fees is appropriate when a party has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240- 258-59 (1975). Scott's repetitive filing of frivolous lawsuits falls within these categories.

Accordingly, the Court orders that defendants The Crosby Group and McKissick Products be awarded reasonable attorney fees and costs. Said defendants should submit a timely bill of costs and file an application for attorney fees with attached affidavit within ten (10) days from the date of this Order.

¹The Court denies defendants' request for a permanent injunction. However, plaintiff is forewarned that any further litigation arising out of these same complaints could result in a court-imposed sanction of double costs and attorney fees.

As the Court lacks subject matter jurisdiction², the Complaint is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED this 19th day of May, 1998.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

²It appears that Scott failed to properly serve process upon Robinson and Callahan. However, as the Court is without subject matter jurisdiction, the Court will forego discussion of this point.

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

F I L E D

SUSAN LANDERS,

Plaintiff,

vs.

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

)
) **ENTERED ON DOCKET**
) **DATE** MAY 20 1998
)
)

MAY 19 1998

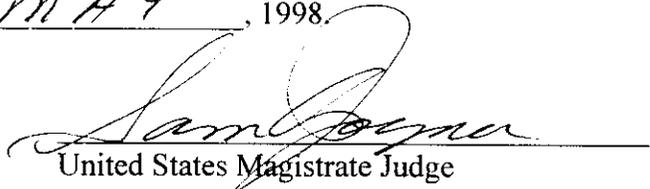
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-774-J ✓

ORDER OF DISMISSAL WITHOUT PREJUDICE

Having considered the *Stipulation of Dismissal* submitted by the parties herein, IT IS
HEREBY ORDERED that the *Complaint* of the Plaintiff filed on August 25, 1997, is hereby
dismissed.

Dated this 19 day of MAY, 1998.


United States Magistrate Judge

(11)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

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

RONALD L. McKAY,
(448-48-4808)

Plaintiff,

v.

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

Defendant.

Case No. 96-CV-787-J

ENTERED ON DOCKET
DATE MAY 20 1998

ORDER^{2/}

Now before the Court is Plaintiff's appeal of a decision by the Commissioner of the Social Security Administration ("Commissioner") denying him disability insurance benefits under Title II of the Social Security Act. The Administrative Law Judge ("ALJ"), Dana E. McDonald, denied benefits at step five of the sequential evaluation process used by the Commissioner to evaluate disability claims. The ALJ determined that Plaintiff retained the residual functional capacity ("RFC") to perform a limited range of light work and that there were significant jobs in the national economy Plaintiff could perform given his RFC. On appeal, Plaintiff argues that the ALJ (1) erroneously applied the test for determining whether or not Plaintiff's pain was disabling; (2) disregarded the findings of R.J. Wolf, D.O., a treating physician, in favor

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

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

12

of J.D. McGovern, M.D., a consultative examiner; (3) failed to evaluate Plaintiff's vision impairments in combination with Plaintiff's other impairments; and (4) gave undue weight to Plaintiff's work activities. The Court does not agree, and for the reasons discussed below, the Commissioner's decision is **AFFIRMED**.

I. STANDARD OF REVIEW

A 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 will be found disabled

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

42 U.S.C. § 423(d)(2)(A). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.^{3/}

^{3/} Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 404.1510 and 404.1572. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 404.1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). See 20 C.F.R. § 404.1525. If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

The standard of review applied by this Court to the Commissioner's disability determinations is set forth in 42 U.S.C. § 405(g). According to § 405(g), "the finding of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when

he/she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

II. DISCUSSION

A. PAIN STANDARD

Plaintiff alleges that ALJ's pain analysis was "flawed." As support for his argument, Plaintiff cites the Tenth Circuit's decision in Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995). Plaintiff argues that "[t]he Kepler court specifically found that where objective medical tests support the finding of a condition which might cause pain, it is the duty of the commissioner to give credence to the claimant's testimony." [Doc. No. 8, p. 5]. Plaintiff misperceives the Tenth Circuit's specific holding in Kepler and the Tenth Circuit's pain analysis holdings in general.

In Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987), the Tenth Circuit adopted the now familiar "nexus test" as a guide to explain when an ALJ must consider subjective complaints of pain. If the Claimant can establish that he is suffering from a medically-determinable impairment that is likely to cause pain and if the Claimant can establish a loose nexus between the pain-producing impairment and his alleged pain, Luna requires that an ALJ consider the claimant's subjective complaints of pain.

When the ALJ reaches the last step of Luna and considers subjective complaints of pain, he is entitled to judge the credibility of the claimant in light of all other evidence in the record. Luna, 834 F.2d at 161-63. The ALJ's credibility determinations are entitled to great deference by this Court. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). Even if the ALJ finds the

claimant to be credible, the mere existence of pain is insufficient to support a finding of disability. Claimant's pain must be "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988). "Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment." Id.

In this case, the ALJ reached the last step of the Luna analysis, and actually considered Plaintiff's subjective complaints of pain. The ALJ concluded, however, that Plaintiff's allegations of disabling pain were not credible considering all of the evidence in the record. The ALJ did not, as the Plaintiff alleges, apply the wrong pain standard.

B. VISION PROBLEMS

Plaintiff alleges that the ALJ "failed to consider the vision problems of [Plaintiff] and how those problems - combined with other physical impairments - impacted his ability to work." [Doc. No. 8, p. 7]. Without any explanation as to their relevance, Plaintiff cites Miller v. Chater, 99 F.3d 972 (10th Cir. 1996)^{4/} and 20 C.F.R. § 416.926^{5/} as support for his argument.

A review of the ALJ's opinion establishes that, unlike in Miller, the ALJ did in fact consider Plaintiff's eye problems. The ALJ stated several times in his opinion that

^{4/} In Miller, the Tenth Circuit reversed a denial of disability benefits in part because although the ALJ considered the claimant's lack of bilateral visual acuity he did not consider medical evidence establishing claimant's peripheral vision loss. Miller, 99 F.3d at 977.

^{5/} Plaintiff's citation to § 416.926 is incorrect. Section 416.926 only applies to applications for supplemental security income under Title XVI of the Social Security Act. This is a disability insurance benefits case controlled by Title II of the Social Security Act and part 404 of Title 20 of the Code of Federal Regulations. Section 416.926 is equivalent to § 404.1526 and the Court will assume that Plaintiff intended to rely on § 404.1526.

the Plaintiff's ability to perform the full range of light work was limited by Plaintiff's eye problems. Specifically, the ALJ found that because of his eye problems, Plaintiff could not perform "close-up" work requiring fine visual acuity and he could not drive at night. This demonstrates that the ALJ absolutely did consider how Plaintiff's vision problems impacted his ability to work.

C. PLAINTIFF'S WORK ACTIVITIES

Plaintiff argues that the ALJ was "blinded by [Plaintiff's] attempts at working to the reality of [Plaintiff's] disability." [Doc. No. 8, pp. 8-9]. In particular, Plaintiff alleges that the ALJ placed too much emphasis on the last few years that Plaintiff worked as a drill press operator. Plaintiff argues that the fact he continued to work as a drill press operator is misleading because co-workers made extraordinary efforts to allow him to keep his job. According to Plaintiff, his co-workers made extra-large marks on the metal so he could see where to drill and they lifted things for him.^{6/} The Court has reviewed the ALJ's opinion and finds no evidence that the ALJ placed undue emphasis on the fact that Plaintiff worked as a drill press operator. In fact, the ALJ determined that Plaintiff was no longer able to perform his past work as a drill press operator as that work was being performed by Plaintiff (i.e., with assistance).

Plaintiff quit working as a drill press operator when the company he was working for was merged with another company and then closed. After leaving his job

^{6/} Plaintiff also alleges that his company doctors told him not to return to work, but that Plaintiff begged and cajoled the company doctors to let him return to work and the doctors went ahead and approved him. The Court has reviewed the file and finds no support for the allegation that the company doctors approved Plaintiff for work when they in fact thought that he was incapable of returning to work. See R. at 149-157.

as a drill press operator, Plaintiff set up a small aluminum recycling business, which he operated, with assistance from his son, nephew and wife, for almost a year. Plaintiff alleges that the ALJ placed too much emphasis on Plaintiff's recycling business activities. Again, the Court has reviewed the ALJ's opinion and finds no evidence that the ALJ placed undue emphasis on the fact that Plaintiff worked at a recycling business for almost a year. In fact, the ALJ specifically found that Plaintiff's activities in connection with the recycling business did not even amount to substantial gainful activity. The ALJ did find that Plaintiff's efforts at the recycling business, while they were not substantial gainful activity, indicated that Plaintiff had the capacity for some work activity. *R. at 29*. This is not undue emphasis as alleged by Plaintiff.

D. TREATING PHYSICIAN RULE

Plaintiff alleges that R.J. Wolf, D.O. is one of Plaintiff's treating physicians and that the ALJ ignored Dr. Wolf's report and relied solely on the report of J.D. McGovern, a consultative examiner. The Court has reviewed the ALJ's opinion and finds no evidence that the ALJ relied on Dr. McGovern's report to the exclusion of Dr. Wolf's. The ALJ considered both doctors' reports. The ALJ did not, however, rely on either Dr. Wolf's conclusion that Plaintiff was 100% disabled or Dr. McGovern's ultimate conclusion that Plaintiff was capable of sedentary work. These ultimate conclusions are properly ignored because it is the ALJ's duty, and not a doctor's, to ultimately assess disability as that term is defined by the Social Security Act.

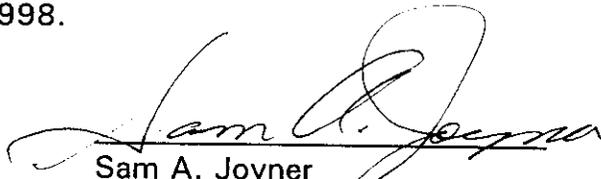
Dr. Wolf examined Plaintiff once in December 1993 and issued a detailed report in January 1994. *R. at 202-206.*⁷¹ Dr. McGovern examined Plaintiff once in January 1995 and issued a detailed report in January 1995. Dr. Wolf is an osteopathic doctor with a general practice and Dr. McGovern is a medical doctor who specializes in orthopedic surgery. Given these facts, the ALJ was justified in giving Dr. Wolf's and Dr. McGovern's reports similar weight. It is also the ALJ's job, not this Court's, to resolve conflicts in the evidence, as long as the ALJ's resolution of that conflict is supported by substantial evidence. The Court has reviewed the ALJ's opinion and finds that the ALJ considered all of the medical reports in the file and adopted a view of the objective medical evidence that is supported by substantial evidence.

CONCLUSION

The Commissioner's decision to deny Plaintiff disability insurance benefits under Title II of the Social Security Act is affirmed.

IT IS SO ORDERED.

Dated this 19 day of May 1998.


Sam A. Joyner
United States Magistrate Judge

⁷¹ Dr. Wolf apparently saw Plaintiff again in November 1994. In November 1994, Dr. Wolf prepared a short report stating nothing other than that Plaintiff's condition had not changed since January 1994. *R. at 215.* Dr. Wolf saw Plaintiff again in March 1995 for the sole purpose of measuring the length of Plaintiff's legs. *R. at 232.*

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT HARRELL,
SSN: 441-44-1022

Plaintiff,

v.

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

Defendant.

No. 96-C-884-B(J)

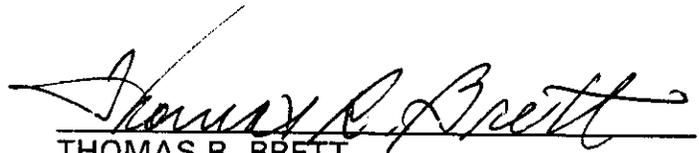
ENTERED ON DOCKET

DATE MAY 19 1998

ORDER

A Report and Recommendation of the Magistrate was filed December 17, 1997. No objections have been filed by the parties. The Court adopts the Magistrate's Report and Recommendation. For the reasons discussed in the Magistrate Judge's opinion, the Court **REVERSES AND REMANDS** the Commissioner's decision.

Dated this 18th day of May 1998.


THOMAS R. BRETT
UNITED STATES DISTRICT COURT 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.

3

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT HARRELL,
SSN: 441-44-1022

Plaintiff,

v.

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

Defendant.

No. 96-C-884-B(J)

ENTERED ON DOCKET

DATE MAY 19 1998

JUDGMENT

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

It is so ordered this 18th day of May 1998.



THOMAS R. BRETT
UNITED STATES DISTRICT COURT JUDGE

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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Veterans Affairs,)
)
Plaintiff,)

v.)

CHARLES MELVIN MARTIN)
aka Charles M. Martin aka Charley Melvin Martin;)
PATSY R. MARTIN aka Patsy Martin)
aka Patsy H. Martin aka Patsy Ruth Martin)
aka Patsy Howard Martin;)
JESSE G. SHARP;)
LOVELLE L. SHARP;)
CITICORP MORTGAGE, INC.)
fka Citicorp Person to Person Financial Center, Inc.;)
MIDWESTERN WINDOW COMPANY;)
BRIERCROFT SERVICE CORPORATION;)
TURNER CORPORATION OF OKLAHOMA, INC.;)
BANCOKLAHOMA MORTGAGE CORP.;)
BANK OF OKLAHOMA, N.A.;)
FIDELITY FINANCIAL SERVICES, INC.;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma;)
STATE OF OKLAHOMA ex rel.)
Oklahoma Tax Commission,)

Defendants.)

ENTERED ON DOCKET
DATE MAY 18 1998

CIVIL ACTION NO. 96-C-0162-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15TH day of May, 1998.

The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; that the Defendant, Fidelity Financial Services, Inc., appears by its attorney Robert J. Bartz; that

the Defendant, State of Oklahoma ~~ex rel.~~ Oklahoma Tax Commission, appears by Kim D. Ashley, Assistant General Counsel; that the Defendant, Citicorp Mortgage, Inc. fka Citicorp Person to Person Financial Center, Inc., appears not, having previously filed its Disclaimer; that the Defendant, Briercroft Service Corporation, appears not, having previously filed its Disclaimer; that the Defendant, Turner Corporation of Oklahoma, Inc., appears not, having previously filed its Disclaimer; that the Defendant, BancOklahoma Mortgage Corp., appears not, having previously filed its Disclaimer; that the Defendant, Bank of Oklahoma, N.A., appears not, having previously filed its Disclaimer; and the Defendants, Charles Melvin Martin aka Charles M. Martin aka Charley Melvin Martin, Patsy R. Martin aka Patsy Martin aka Patsy H. Martin aka Patsy Ruth Martin aka Patsy Howard Martin, Jesse G. Sharp, Lovelle L. Sharp, and Midwestern Window Company, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, Charles Melvin Martin aka Charles M. Martin aka Charley Melvin Martin, was served with Summons and Complaint by a United States Deputy Marshal on November 12, 1996; that the Defendant, Patsy R. Martin aka Patsy Martin aka Patsy H. Martin aka Patsy Ruth Martin aka Patsy Howard Martin, was served with Summons and Complaint by a United States Deputy Marshal on November 12, 1996; that the Defendant, Jesse G. Sharp, executed a Waiver of Service of Summons on June 11, 1996; that the Defendant, Lovelle L. Sharp, executed a Waiver of Service of Summons on June 11, 1996; that the Defendant, Citicorp Mortgage, Inc. fka Citicorp Person to Person Financial Center, Inc., executed a Waiver of Service of Summons on March 6, 1996; that the Defendant, Midwestern Window Company, executed a Waiver of Service of Summons on March 20, 1996; that the Defendant, Briercroft Service Corporation, filed its Entry of Appearance on May 2, 1997; that the Defendant, Turner Corporation of Oklahoma, Inc.,

was served by certified mail, return receipt requested, delivery restricted to the addressee on May 14, 1997; that the Defendant, BancOklahoma Mortgage Corp., executed a Waiver of Service of Summons on April 1, 1996; that Defendant, Fidelity Financial Services, Inc., executed its Waiver of Service of Summons on March 4, 1996; that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, filed their Entry of Appearance on March 21, 1996.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on March 21, 1996; that the Defendant, Citicorp Mortgage, Inc. fka Citicorp Person to Person Financial Center, Inc., filed its Disclaimer June 12, 1997; that the Defendant, Briercroft Service Corporation, filed its Disclaimer on May 2, 1997; that the Defendant, Turner Corporation of Oklahoma, Inc., filed its Disclaimer on May 29, 1997; that the Defendants, BancOklahoma Mortgage Corp. and Bank of Oklahoma, N.A., filed their Disclaimer on March 18, 1996; that the Defendant, Fidelity Financial Services, Inc., filed its Answer on March 14, 1996; that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, filed its Answer on September 5, 1997; and that the Defendants, Charles Melvin Martin aka Charles M. Martin aka Charley Melvin Martin, Patsy R. Martin aka Patsy Martin aka Patsy H. Martin aka Patsy Ruth Martin aka Patsy Howard Martin, Jesse G. Sharp, Lovelle L. Sharp, and Midwestern Window Company, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on July 1, 1983, Charles Melvin Martin and Patsy Ruth Martin aka Patsy Howard Martin filed their voluntary petition in bankruptcy in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 83-B-00943. The real property subject to this foreclosure action described below was a part of this bankruptcy estate.

Debtors were discharged on October 18, 1983; subsequently, Case No. 83-B-00943, United States Bankruptcy Court, Northern District of Oklahoma, was closed on February 17, 1984.

The Court further finds that on February 9, 1990, Charles Melvin Martin aka Charley Melvin Martin and Patsy Ruth Martin aka Patsy Howard Martin filed their voluntary petition in bankruptcy in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 90-00309-W. The subject real property was a part of the bankruptcy estate as shown in the bankruptcy schedules. Debtors were discharged on May 31, 1990; subsequently, Case No. 90-00309-W, United States Bankruptcy Court, Northern District of Oklahoma, was closed on July 3, 1990.

The Court further finds that on June 3, 1996, Charles Melvin Martin aka Charley M. Martin and Patsy Howard Martin filed their voluntary petition in Chapter 13 bankruptcy in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 96-02079-W. The subject real property was a part of the bankruptcy estate as shown on the bankruptcy schedules. An Order Dismissing Case was entered in this case on September 6, 1996; subsequently, Case No. 96-02079-W, United States Bankruptcy Court, Northern District of Oklahoma, was closed on December 6, 1996.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

The North 79 feet of Lot One (1), Block Twelve (12), ROCK HILL ADDITION to the City of Sand Springs, Tulsa County, State of Oklahoma, according to the recorded Plat thereof, LESS a strip, piece or parcel of land lying in part of Lot 1, Block 12, of ROCK HILL ADDITION a Re-Subdivision of Block E, Garden Heights Addition to the City of Sand Springs, in Tulsa County, Oklahoma. Said parcel of land

being described by metes and bound as follows: BEGINNING at the North West corner of said Lot 1; thence South along the West line of said Lot 1 a distance of 79.00 feet; thence North 88°32'32" East a distance of 209.00 feet; thence Northeasterly along a curve to the left having a back tangent of North 07°27'05" East and a radius of 14,523.95 feet a distance of 79.98 feet to a point on the North line of said Lot 1; thence West along said North line of said Lot 1 a distance of 220.22 feet to point of beginning, containing 0.39 acres, more or less.

The Court further finds that on May 24, 1976, Charles Melvin Martin and Patsy R. Martin executed and delivered to Turner Corporation of Oklahoma, Inc., their mortgage note in the amount of \$30,000.00, payable in monthly installments, with interest thereon at the rate of 8.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Charles Melvin Martin and Patsy R. Martin executed and delivered to Turner Corporation of Oklahoma, Inc., a real estate mortgage dated May 24, 1976, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on May 27, 1976, in Book 4216, Page 1592, in the records of Tulsa County, Oklahoma and was re-recorded on August 5, 1976, in Book 4226, Page 2231, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 1, 1991, Turner Corporation of Oklahoma, Inc. assigned the above-described mortgage note and mortgage to BancOklahoma Mortgage Corp. This Assignment of Mortgage was recorded on April 4, 1991, in Book 5313, Page 0149, in the records of Tulsa County, Oklahoma, and only referred to the mortgage recorded on August 5, 1976, in Book 4226, Page 2231, in the records of Tulsa County, Oklahoma. This Assignment of Mortgage was corrected to show the name of the assignee as Bank of Oklahoma, N.A. and

re-recorded on May 7, 1991, in Book 5320, Page 0024, in the records of Tulsa County, Oklahoma, and also only referred to the mortgage recorded on August 5, 1976, in Book 4226, Page 2231, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 30, 1992, Bank of Oklahoma, N.A. assigned the above-described mortgage note and mortgage to BancOklahoma Mortgage Corp. This Blanket Corporation Assignment of Mortgage/Deed of Trust was recorded on April 28, 1992, in Book 5400, Page 1107, in the records of Tulsa County, Oklahoma, and also only referred to the mortgage recorded on August 5, 1976, in Book 4226, Page 2231, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 1, 1992, Turner Corporation of Oklahoma, Inc. executed another assignment of the above-described mortgage note and mortgage to BancOklahoma Mortgage Corp. This Blanket Corporation Assignment of Mortgage/Deed of Trust was recorded on July 2, 1992, in Book 5417, Page 0428, in the records of Tulsa County, Oklahoma, and only referred to the mortgage recorded on August 5, 1976, in Book 4226, Page 2231, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 2, 1995, Bank of Oklahoma, N.A. assigned the above-described mortgage note and mortgage to BancOklahoma Mortgage Corp. This Assignment of Mortgage was recorded on February 7, 1995, in Book 5691, Page 1725, in the records of Tulsa County, Oklahoma, and referred to the mortgage recorded on May 27, 1976, in Book 4216, Page 1592, in the records of Tulsa County, Oklahoma and re-recorded on August 5, 1976, in Book 4226, Page 2231, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 17, 1995, BancOklahoma Mortgage Corp. assigned the above-described mortgage note and mortgage to the Secretary of Veterans Affairs.

This Assignment of Mortgage was recorded on March 15, 1995, in Book 5699, Page 0260, in the records of Tulsa County, Oklahoma, and referred to the mortgage recorded on May 27, 1976, in Book 4216, Page 1592, in the records of Tulsa County, Oklahoma and re-recorded on August 5, 1976, in Book 4226, Page 2231, in the records of Tulsa County, Oklahoma.

The Court further finds that Charles M. Martin and Patsy Martin executed and delivered to the United States of America on behalf of the Secretary of Veterans Affairs, a Modification and Reamortization Agreement dated December 20, 1994, pursuant to which the entire debt due on that date was made principal and the interest rate changed to 6.5 percent per annum.

The Court further finds that Defendants, Charles Melvin Martin aka Charles M. Martin aka Charley Melvin Martin and Patsy R. Martin aka Patsy Martin aka Patsy H. Martin aka Patsy Ruth Martin aka Patsy Howard Martin, made default under the terms of the aforesaid note, mortgage and modification and reamortization agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note, mortgage, and modification and reamortization agreement after full credit for all payments made, the principal sum of \$21,717.53, plus administrative charges in the amount of \$440.00, plus accrued interest in the amount of \$752.35 as of September 9, 1995, plus interest accruing thereafter at the rate of 6.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$10.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has liens on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$16.00 (\$8.00 1992 and \$8.00 1993) which became a

lien on the property as of June 25, 1993 and June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, Fidelity Financial Services, Inc., has a lien on the property which is the subject matter of this action in the amount of \$4,118.13, together with interest at the rate of 21 percent per annum from December 2, 1994 until paid, plus an attorney's fee in the amount of \$410.00 and all costs of this action accrued and accruing, by virtue of a Statement of Judgment, dated January 20, 1995, and recorded on January 20, 1985, in Book 5687, Page 1790 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action in the amount of \$14,785.41 together with interest and penalty according to law, by virtue of Tax Warrant No. ITI9601332200, dated October 8, 1996, and recorded on October 10, 1996, in Book 5852, Page 0401 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Citicorp Mortgage, Inc. fka Citicorp Person to Person Financial Center, Inc.; Briercroft Service Corporation; Turner Corporation of Oklahoma, Inc.; BancOklahoma Mortgage Corp.; and Bank of Oklahoma, N.A., disclaim any right, title or interest in the subject real property.

The Court further finds that Charles Melvin Martin aka Charles M. Martin aka Charley Melvin Martin, Patsy R. Martin aka Patsy Martin aka Patsy H. Martin aka Patsy Ruth Martin aka Patsy Howard Martin, Jesse G. Sharp, Lovelle L. Sharp, and Midwestern Window Company, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that the Internal Revenue Service has a lien upon the property by virtue of a Notice of Federal Tax Lien dated August 1, 1995, and recorded on August 4, 1995, in Book 5734, Page 0135 in the records of the Tulsa County Clerk, Tulsa County, Oklahoma. Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Internal Revenue Service is not made a party hereto; however, the lien will be released at the time of sale should the property fail to yield an amount in excess of the debt to the Secretary of Veterans Affairs.

The Court further finds that the Department of Housing and Urban Development has a lien upon the property by virtue of an Assignment of Lien, dated June 19, 1987, and recorded on June 25, 1987, in Book 5034, Page 1044 in the records of the Tulsa County Clerk, Tulsa County, Oklahoma. Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Department of Housing and Urban Development is not made a party hereto; however, the lien will be released at the time of sale should the property fail to yield an amount in excess of the debt to the Secretary of Veterans Affairs.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against Defendants, Charles Melvin Martin aka Charles M. Martin aka Charley Melvin Martin and Patsy R. Martin aka Patsy Martin aka Patsy H. Martin aka Patsy Ruth Martin aka Patsy Howard Martin, in the principal sum of \$21,717.53, plus administrative charges in the amount of \$440.00, plus accrued interest in the amount of \$752.35 as of September 9, 1995, plus interest accruing thereafter at the rate of 6.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.407 percent per annum until fully paid, plus the costs of this action in the amount of \$10.00 (fee for recording Notice of Lis Pendens), plus any

additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$16.00 (\$8.00 1992 and \$8.00 1993) which became liens on the property as of June 25, 1993 and June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Fidelity Financial Services, Inc., have and recover judgment in the amount of \$4,118.13, together with interest at the rate of 21 percent per annum from December 2, 1994 until paid, plus an attorney's fee in the amount of \$410.00 and all costs of this action accrued and accruing, by virtue of a Statement of Judgment, dated January 20, 1995, and recorded on January 20, 1995, in Book 5687, Page 1790 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, have and recover judgment in rem in the amount of \$14,785.41 together with interest and penalty according to law, by virtue of Tax Warrant No. ITI9601332200, dated October 8, 1996, and recorded on October 10, 1996, in Book 5852, Page 0401 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Charles Melvin Martin aka Charles M. Martin aka Charley Melvin Martin; Patsy R. Martin aka Patsy Martin aka Patsy H. Martin aka Patsy Ruth Martin aka Patsy Howard Martin;

Jesse G. Sharp; Lovelle L. Sharp; Citicorp Mortgage, Inc. fka Citicorp Person to Person Financial Center, Inc.; Midwestern Window Company; Briercroft Service Corporation; Turner Corporation of Oklahoma, Inc.; BancOklahoma Mortgage Corp.; Bank of Oklahoma, N.A.; and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff.

Third:

In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma;

Fourth:

In payment of the judgment rendered herein in favor of the Defendant, Fidelity Financial Services, Inc.;

Fifth:

In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.


UNITED STATES DISTRICT JUDGE

APPROVED:

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


DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Case No. 96-C-0162-B (Martin)

CDM:cas

OK OBA # 1668 D fee
ROBERT J. BARTZ, OBA #580
One Ten Occidental Place
110 West 7th Street, Suite 200
Tulsa, Oklahoma 74119-1018
(918) 599-7755
Attorney for Defendant,
Fidelity Financial Services, Inc.

Judgment of Foreclosure
Case No. 96-C-0162-B (Martin)

CDM:cas



KIM D. ASHLEY, OBA #14175

Assistant General Counsel

P.O. Box 53248

Oklahoma City, Oklahoma 73152-3248

(405) 522-5555

Attorney for Defendant,

State of Oklahoma *ex rel.* Oklahoma Tax Commission

A 97-552

Judgment of Foreclosure

Case No. 96-C-0162-B (Martin)

CDM:css

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

MAY 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LENA LORETTA FIARRIS,
SSN: 444-500-4548

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

No. 97-CV-194-B(J)

ENTERED ON DOCKET
DATE MAY 18 1998

JUDGMENT

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

It is so ordered this 15th day of May 1998.



Thomas R. Brett
United States District Judge

12

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

F I L E D

MAY 15 1998 *lw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LENA LORETTA FIARRIS,
SSN: 444-5000-4548

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

Case No. 97-C-194-B(J) ✓

ENTERED ON DOCKET

DATE MAY 18 1998

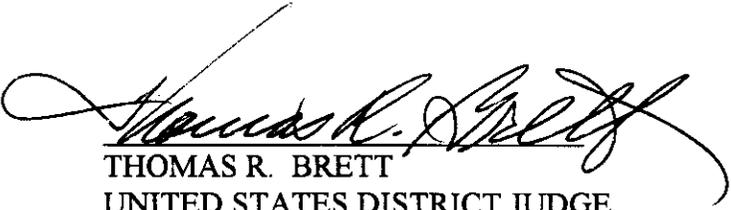
ORDER

The April 9, 1998 Order filed by Magistrate Judge Sam A. Joyner (Docket No. 10) is hereby vacated. Magistrate Joyner entered the Order erroneously assuming the parties had consented to his jurisdiction pursuant to 28 U.S.C. §636.

Before the Court is Defendant's motion to remand for further evaluation and development of the record. (Docket No. 9). For good cause shown, it is hereby ordered that this case is remanded to the Commissioner of the Social Security Administration for further administrative action. Because this case is remanded under sentence four of 42 U.S.C. §405(g), a separate judgment in favor of the plaintiff will be entered contemporaneous with this Order.¹ *Shalala v. Schaefer*, 509 U.S. 292, 303 (1993).

¹ In achieving this remand, plaintiff is the prevailing party, but the merits of her claim for benefits remain to be decided in the proceeding below.

Dated, this 15th day of May, 1998.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

MAY 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENERGY TITLE CONSULTANTS, INC.,)

Plaintiff,)

vs.)

MONEY MAN, INC.,)

Defendant.)

Case No. 97-CV 625K

ENTERED ON DOCKET

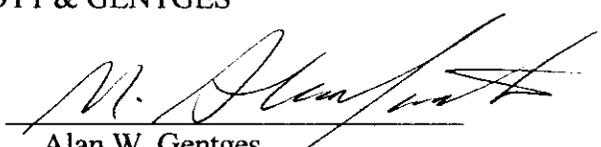
DATE 5-18-98

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41 of the Federal Rules of Civil Procedure, the parties hereto, Plaintiff Energy Title Consultants, Inc. and Defendant Money Man, Inc., stipulate to dismiss this action with prejudice.

SCOTT & GENTGES

BY:


Alan W. Gentges
M. Alan Souter
601 South Boulder, Suite 100
Tulsa, OK 74119-1301
(918) 599-9000

DOERNER, SAUNDERS, DANIEL &
ANDERSON, L.L.P.

By:


Richard P. Hix
Shelly L. Dalrymple
320 South Boston, Suite 500
Tulsa, OK 74103
(918) 582-1211

Exhibit A

SPZ

3/

47

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MAURICE VAN DUSEN,

Plaintiff,

v.

SMITH & NEPHEW RICHARDS,
INC. and DR. GEORGE
MAUERMAN,

Defendants.

Case No.: 97-CV-1073K (W)

ENTERED ON DOCKET

DATE 5-18-98

DISMISSAL WITHOUT PREJUDICE

Comes now the Plaintiff, by and through his attorney of record, Jeffrey L. Parker,
and hereby dismisses Dr. George Mauerman from this law suit, without prejudice to
refiling.

RESPECTFULLY SUBMITTED,



Jeffrey L. Parker, OBA #14974
PARKER, STAGGS & ASSOCIATES, P.C.
6506 South Lewis, Suite 220
Tulsa, Oklahoma 74136
(918) 748-8118

CJ

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY 18 1998

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

BLENDA J. ROBERTS,)
SSN: 444-70-1170,)

Plaintiff,)

v.)

KENNETH S. APFEL, Commissioner)
of the Social Security Administration,¹)

Defendant.)

Case No. 96-CV-0865-EA

**ENTERED ON DOCKET
MAY 18 1998
DATE _____**

JUDGMENT

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

It is so ordered this 15th day of May 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

BELINDA J. ROBERTS,
SSN: 444-70-1170,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security,¹

Defendant.

MAY 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-0865-EA

ENTERED ON DOCKET

DATE MAY 18 1998

ORDER

Claimant, Belinda J. Roberts, 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.

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 July 1, 1993, claimant applied for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 *et seq.*). Claimant's application for benefits was denied in its entirety initially (October 21, 1993), and on reconsideration (December 15, 1993). A hearing before Administrative Law Judge Richard J. Kallsnick (ALJ) was held February 10, 1995, in Tulsa, Oklahoma. Because claimant had filed a prior application on September 9, 1992 for both disability benefits and Supplemental Security Income benefits, which was denied but which could be reopened for good cause if there was new and material evidence, the ALJ considered the September 9, 1992 application as well. By decision dated May 4, 1995, the ALJ found that claimant was not disabled for purposes of her current and prior application. On July 31, 1996, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

I. CLAIMANT'S BACKGROUND

At the time of the ALJ hearing, claimant was 38 years old (R. 46) and had completed high school and one year of college, with a criminal justice diploma. (R. 48) Her work history includes security guard and motel housekeeper. Claimant alleges she became disabled due to Charcot-Marie-Tooth disease and anxiety.

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 [s]he 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,

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 light work based on her exertional capacity, but that claimant’s additional nonexertional impairments did not allow her to perform the full range of light work. The ALJ concluded that she could not perform her past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that she could perform, based on her RFC, age, education, and work experience. Having concluded that there were a significant number of jobs which claimant could perform, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

IV. MEDICAL HISTORY OF CLAIMANT

Claimant suffers from Charcot-Marie-Tooth (CMT) disease, a form of muscular dystrophy.

CMT disease is a

muscular atrophy of variable inheritance, beginning in the muscles supplied by the peroneal [fibular; leg] nerves and progressing slowly to involve the muscles of the hands and arms.

Dorland’s Illustrated Medical Dictionary 480 (28th ed. 1994). CMT disease is a progressive neuropathic syndrome characterized by weakness and atrophy. Id. at 480, 307. See Williams v. Chater, 923 F. Supp. 1373 (D. Kan. 1996).

Claimant was diagnosed with CMT disease in 1987. (R. 241) In 1989, her treating physician, Dr. James D. Harris, felt that she had a physical impairment and would do better in a more sedentary

type job. (R. 232) In August 1990, Dr. Robert D. Grubb reported that claimant's gait appeared somewhat clumsy, but she had adequate grip strength and dexterity of gross and fine manipulation of her fingers. (R. 247) In December, 1992, claimant was referred to Dr. Paul J. Krautter, who assessed an "[a]pparent heredity disorder of her distal lower extremities involving chronic pain, particularly with prolonged standing, decreased strength and decreased range of motion of her foot and ankle." (R. 419) Claimant was also diagnosed with severe emotional distress and depression in 1993, while claimant was undergoing a divorce proceeding. (R. 378) Dr. David Dean diagnosed general anxiety disorder and dysthymic disorder in September 1993. (R. 360-362) An October 1993 Psychiatric Review Technique (PRT) form completed by Janice C. Boon, Ph.D., indicated nonsevere affective disorder and anxiety related disorder; dysthymic disorder, mild to moderate; and only slight functional limitations. (R. 291-300)

Claimant fractured her left foot in February 1994. (R. 425) The same month she was diagnosed with metatarsalagia of the right foot. (R. 377)

The ALJ completed a PRT form in May 1995, finding affective disorders, anxiety related disorders, and mild dysthymic disorder present. (R. 32-35)

Claimant describes her impairments as loss of feeling in legs and feet, muscle spasms in legs, legs drawing up, lack of energy, leg weakness, tendency to fall, muscle cramps, swelling in legs and feet, broken ankles from falling, fingers drawing up, fingers locking up, and lessened grip. (R. 54-59)

V. REVIEW

Claimant alleges the following errors by the ALJ:

- A. The ALJ's assessment of claimant's RFC is contrary to law and not supported by substantial evidence in that:
 1. The ALJ failed to shift the burden of proof at Step Five;
 2. The ALJ failed to properly consider findings associated with a 1991 determination which has become administratively final; and
 3. The ALJ failed to properly consider claimant's pain and other nonexertional impairments.
- B. The ALJ's finding that claimant retained the RFC to perform a significant number of alternative jobs is not supported by substantial evidence, because the hypothetical question did not reflect claimant's true characteristics.

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

A. **SUBSTANTIAL EVIDENCE**

1. **Burden of Proof:**

Claimant contends that the ALJ failed to shift the burden of proof to the Commissioner at Step Five of the five-step evaluation process. See Williams v. Bowen, 844 F.2d 748, 750-52 (10th Cir. 1988) (burden at Step Five is on Commissioner). Claimant argues that there is a difference between the RFC assessment for purposes of Step Four, and a Step Five RFC assessment. She complains of error in that the ALJ shifted the burden only after making his RFC determination, and thus the burden remained on her. This Court disagrees.

In evaluating at Step Four whether claimant could perform her past relevant work, the ALJ was required to ascertain claimant's RFC, which he did. (R. 28) The ALJ then correctly stated that:

Because it has been established that the claimant cannot perform her past relevant work, due to her impairments, the burden shifts to the Commissioner to show that there are other jobs existing in significant numbers in the national economy which she can perform, consistent with her medically determinable impairments, functional limitations, age, education, and work experience.

Id. This excerpt from the ALJ's decision makes it clear that he correctly placed the Step Five burden on the Commissioner.

2. Consideration of Administratively Final 1991 Findings:

Claimant contends that the ALJ erred in failing to consider the administratively final findings of claimant's RFC as controlling on the issue of her condition as it existed in 1991. Claimant alleges that she has a degenerative, progressive condition (CMT disease) which can only worsen as time passes, and that there was no current RFC assessment from an examining physician to establish that claimant's condition had improved. Thus, claimant argues, there is not substantial evidence for a finding that claimant had the RFC to perform the jobs which the ALJ found she could perform.

The ALJ found that claimant could perform light work, but that her nonexertional impairments did not allow her to perform the full range of light work. (R. 30) The ALJ specifically found that claimant's RFC for the full range of light work was reduced by her inability to stand or walk for prolonged periods of time, as well as a need to change positions. (Id.)

The date of alleged onset for this application is November 15, 1991. (R. 29) As a result of an earlier application for benefits which was denied through the hearing level, a prior ALJ found on November 14, 1991:

5. The claimant has the residual functional capacity to perform the physical exertion and nonexertional requirements of work except for occasionally lifting of more than 10 pounds at a time; standing and walking more than 30 minutes at a time [sic]; standing for more than 3 hours in an 8-hour-work day; and walking more than 2 hours in an 8-hour-work day (20 CFR 404.1545 and 416.945).

...

7. The claimant's residual functional capacity for the full range of sedentary work is reduced by the limitations listed above.

...

12. Although the claimant's additional nonexertional limitations do not allow her to perform the full range of sedentary work, using the above-cited rules as a framework for decisionmaking, there are a significant number of jobs in the national economy which she could perform. Examples of such jobs are: bench assembly person, cashier, inspector, office helper, and telephone solicitor. There are 3,000 bench assembly jobs, 6,000 cashier jobs, 750 inspector jobs, 2,000 office helper jobs, and 1,500 telephone solicitor jobs, that exist in Oklahoma.

(R. 283) Prior findings of an ALJ are binding. Congress has clearly stated that res judicata prevents reappraisal of the Commissioner's findings that have become final: "The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. . . ." 42 U.S.C. § 405(h). The ALJ did not reopen the 1990 application which resulted in the 1991 findings by the ALJ. He reopened the September 9, 1992 application.

(R. 19) Thus, the 1991 RFC determination is binding on the ALJ insofar as it relates to claimant's RFC as of November 1991.

The prior ALJ found in November 1991 that claimant had the RFC to perform less than the full range of sedentary work. (R. 283) The ALJ found in May 1995 that claimant had the RFC to perform less than the full range of light work. (R. 30) Although the 1991 findings are final and

binding as to claimant's 1991 RFC, neither res judicata nor collateral estoppel apply to definitively determine claimant's RFC and disability status for a later period. However, the 1991 findings are final insofar as they provide a binding starting point for the ALJ's consideration of disability status for November 1991 forward. See Lively v. Secretary of Health & Human Servs., 820 F.2d 1391, 1392 (4th Cir. 1987) (a finding of RFC to perform light work precludes, absent new evidence, a finding two weeks later of RFC to perform medium work). At the very least, the 1991 findings define claimant's RFC as of November 15, 1991, the first day of the period of disability at issue. (See R. 20) For claimant to go from a binding finding of less than a full range of sedentary work in November 1991 to a finding of less than a full range of light work in May 1995 requires new evidence demonstrating that claimant's condition had improved. Evidence not considered in the earlier proceeding would be needed (and would have to be relied on by the ALJ) as an independent basis to sustain a finding contrary to the final earlier finding. Gavin v. Heckler, 811 F.2d 1195, 1199-1200 (8th Cir. 1987).

Medical conditions and impairments can change. Thus, findings as to a claimant's RFC during one period are not conclusive evidence of her RFC at a later date. However, claimant argues that there was no current (1995) RFC assessment from an examining physician to establish that claimant's condition had improved. The uniqueness of this case is occasioned by two factors: claimant has a progressively deteriorating disease, and the ALJ did not have a current RFC assessment in 1995.⁴

⁴ The only post-1991 RFC assessment was performed on December 20, 1993 (R. 308-315), some fourteen months before the ALJ hearing.

The record before the ALJ included the record before the prior ALJ, as well as additional evidence. (R. 1-7, 45) There was reference in the 1995 ALJ hearing to the November 1991 ALJ decision, and the 1991 ALJ findings were part of the record. (R. 5, 272-284) Thus, the ALJ had the 1991 findings before him, which defined claimant's RFC as of the beginning of the disability period at issue. Since this information was before him, the ALJ should have addressed and made express findings concerning the final 1991 findings of "less than full range of sedentary work" RFC.

The Court therefore orders a remand of this case for the Commissioner to make express findings concerning the final 1991 findings and claimant's RFC in light of those findings. This case is remanded for further development of the record, to include:

- a. consideration of the final 1991 findings;
- b. claimant's RFC as of November 15, 1991, the first day of the current disability period, pursuant to 42 U.S.C. § 405(h);
- c. whether there is any medical evidence of "improvement" of claimant's condition after November 15, 1991;
- d. any further development of the record deemed appropriate by the ALJ; and
- e. the Commissioner's Step Five analysis after consideration of the foregoing.

This remand "simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case." Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988).

When reviewing a decision of the Commissioner denying disability benefits, the Court is not to substitute its judgment for that of the Commissioner. The Commissioner's decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise.

Because the case is being remanded on the foregoing issues, the Court will briefly address the remaining issues claimant raises.

3. Claimant's Pain and Other Nonexertional Impairments:

The record presented shows that the ALJ properly considered claimant's pain and other nonexertional impairments. The ALJ, in assessing claimant's ability to 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 were not of such a level as to establish disability. (R. 28) The ALJ wrote:

The claimant contends, essentially, that she is and has been disabled and unable to work because of exertional pain. Inasmuch as the medical evidence does not contain clinical findings and/or laboratory tests which support the claimant's allegations of totally disabling pain, a determination of disability must rest in large part on her subjective complaints. With respect to her alleged component of pain associated with her impairment(s) and the degree to which her symptoms negatively impact on her potential occupational base, we turn to Social Security Ruling 88-13, 20 CFR 404.1529 and 416.929 and the Luna standard for further guidance. Ruling 88-13 provides for the comparison of subjective complaints of pain to both the medical signs of laboratory findings which may support that pain, and to more specific indices of pain, such as may be determined by reviewing the nature, location, onset, duration, frequency, radiation and intensity of the pain; precipitating and aggravating factors; type, dosage, effectiveness, and adverse side effects of pain medication; other treatment modalities; functional restrictions; and the claimant's daily activities. The court, in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987), recognized the difficulty of proving or disproving the severity of an individual's pain through medical test results, and instructed the decisionmaker to consider all the evidence presented which could possibly produce the pain alleged and utilize factors, in addition to the test

results, e.g., 1) the claimant's persistent attempts to obtain pain relief, 2) willingness to try any treatment prescribed, 3) regular use of crutches or a cane or other ambulation assistive device, 4) regular contact with a doctor or pattern of treatment, 5) the possibility that psychological disorders are combined with her physical problems, 6) daily activities, and, 7) dosage, effectiveness, and side effects of medication. Additionally, the court instructs that although the claimant's allegations of pain may not be disregarded based on lack of objective corroboration, the absence of an objective medical basis for the degree of severity of pain alleged may impact the weight to be given to the claimant's subjective allegations.

* * *

The claimant testified her treating physician is currently Dr. James Harris and she sees him every 6 months to a year. However, she has not seen Dr. Harris since February, 1994. In fact, the record establishes that the claimant has very rarely sought medical treatment for relief of her symptomatology. Her daily activities as well as her sporadic visits with her treating physician (of any physician) are not indicative of someone suffering from disabling pain. The claimant lives with her 6-year-old daughter and is able to manage the household activities for both of them. She is able to care for herself, as well as her daughter without any significant difficulties. Based on the claimant's medication list (Exhibit B-39) she takes no prescription medication for pain or any other of her symptoms. She did state she takes over-the-counter ibuprofen to relieve her pain and irritability.

* * *

The Administrative Law Judge has considered the testimony at the hearing and finds that this testimony is inconsistent with the record as a whole. Objective findings show the ability to perform light work with restrictions which include no prolonged standing or walking and a need to change positions (shift weight, sitting or standing). While the claimant may experience some pain, her pain is no more than mild to moderate at an exertional level of light and mere inability to work without pain does not establish disability. To the extent claimant's testimony is consistent with this residual functional capacity, it is here found credible.

(R. 25, 26, 27, 28)

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 medical evidence. The ALJ noted that claimant did not seek medical treatment for “disabling” pain, and she did not take any strong medication for pain. (R. 27) 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 asserts that the ALJ erred where he failed to properly evaluate claimant’s nonexertional impairments (anxiety). On this issue, the ALJ wrote:

The claimant further testified that she was diagnosed with generalized anxiety disorder and depression about one to one and a half years ago, by John Swartz in Tulsa. There are no records from Dr. Swartz in the claimant’s medical file. The Administrative Law Judge recognized that Dr. Dean opined on September 29, 1993, that the claimant does experience some mild dysthymia along with mild generalized anxiety, however, the claimant has never been treated in any psychiatric hospital nor is she taking any psychotropic medication. During Dean’s evaluation, the claimant stated that both she and her daughter were going to counseling together after the claimant went through divorce proceedings. The Administrative Law Judge finds

that the claimant's diagnosis of mild dysthymia and mild anxiety are situational and would not have any effect on her ability to perform work-related activities.

After reviewing all the evidence in this case, the Administrative Law Judge completed a Psychiatric Review Technique Form, which form is attached to this decision and made a part hereof. The undersigned concludes that the record establishes that claimant's affective and anxiety related disorder(s) have resulted in only slight restrictions of activities of daily living; moderate difficulties in maintaining social functioning; deficiencies of concentration, persistence or pace seldom resulting in failure to complete tasks in a timely manner; with no episodes of deterioration or decompensation in work-like settings.

(R. 27)

The ALJ determined that claimant's ability to perform work-related activities was not diminished by her anxiety. Substantial evidence supports the decision of the ALJ regarding the effect of claimant's nonexertional impairment.

B. THE ALJ'S HYPOTHETICAL QUESTION

Claimant asserts that the ALJ's finding that claimant retained the RFC to perform a significant number of alternative jobs is not supported by substantial evidence, in that the vocational testimony was elicited by a hypothetical question which did not reflect claimant's true characteristics.

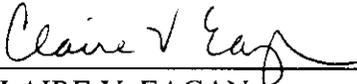
The Court notes that the ALJ posed a hypothetical to the vocational expert which the ALJ believed encompassed claimant's impairments. (R. 74-75, 29) It is true that "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530,

532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). Because the Commissioner's decision is remanded for additional findings, including a Step Five analysis, the Court need not reach the issue of the hypothetical question.

VI. CONCLUSION

The decision of the Commissioner is **REVERSED** and **REMANDED** for the purpose of making express findings in accordance with this Order, and for any further proceedings the ALJ finds necessary in light of those new findings.

DATED this 14th day of May, 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEBRA L. REEVES,
SSN: 462-27-9043

Plaintiff,

v.

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

Defendant.

No. 97-C-127-J ✓

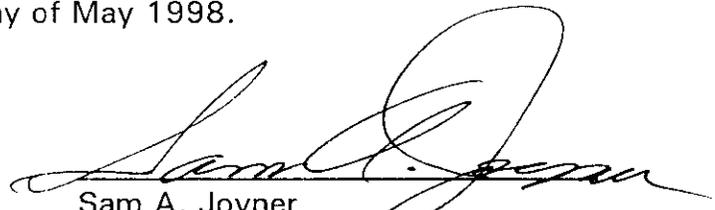
ENTERED ON DOCKET

DATE MAY 18 1998

JUDGMENT

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

It is so ordered this 15 day of May 1998.


Sam A. Joyner
United States Magistrate Judge

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

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

DEBRA L. REEVES,
SSN: 462-27-9043

Plaintiff,

v.

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

Defendant.

MAY 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-C-127-J

ENTERED ON DOCKET

DATE MAY 18 1998

ORDER^{2/}

Plaintiff, Debra L. Reeves, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{3/} Plaintiff asserts that the Commissioner erred because (1) the ALJ did not follow the treating physician rule, (2) the ALJ failed to incorporate appropriate limitations for Plaintiff from her cervical and right upper extremity, (3) the ALJ did not consider the RFC evidence submitted by Plaintiff's physician, and (4) the ALJ did not properly evaluate Plaintiff's complaints of

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

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

^{3/} Administrative Law Judge Richard J. Kallsnick (hereafter "ALJ") concluded that Plaintiff was not disabled on August 17, 1995. [R. at 12]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on December 10, 1996. [R. at 5].

(17)

pain in accordance with Luna. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born April 17, 1961, and was 32 years old at the time of the first hearing before the ALJ which occurred on December 9, 1993. [R. at 40]. She was 34 years old at the time of the second hearing before the ALJ in June 1995. [R. at 62]. Plaintiff had a GED. [R. at 68].

Plaintiff testified that she was unable to work due to back pain (radiating to her left leg and hip), numbness in her feet and legs, muscle spasms, thoracic outlet syndrome^{4/} which made her arm swell, swelling of her eyes, headaches, and stomach problems. [R. at 47-52]. At her hearing in 1993, Plaintiff testified that she could sit for only 10 to 15 minutes before she would have to stand or lie down, that she could walk for approximately one-half of a block, and that she could lift approximately 10 pounds. [R. at 54-55]. At her 1995 hearing, Plaintiff testified that she could sit for approximately 30 minutes, stand for approximately 30 to 45 minutes, and walk approximately one block. [R. at 82]. Plaintiff goes shopping once or twice each month. [R. at 84]. Plaintiff testified that she drives to the grocery store, which is approximately two or three miles. [R. at 68]. According to Plaintiff, Dr. Zeiders told her that she should not work.

^{4/} Taber's Cyclopedic Medical Dictionary 1984 (17th ed. 1993), defines "thoracic outlet compression syndrome as "a symptom complex caused by conditions in which nerves or vessels are compressed in the neck or axilla. Anatomically, the cause is compression by structures, such as the first rib pressing against the clavicle. Also, the condition may be associated with a cervical rib or scalenus anticus syndrome. It is characterized by brachial neuritis with or without vascular or vasomotor disturbance in the upper extremities."

W.T. Manning, M.D., wrote on February 12, 1993, that

I can see where patient is partially disabled from those occupations requiring a lot of standing, stooping, or lifting, but, in general, her health is such that other types of employment surely could be found. However, she lacks the skills and dexterity of office work, so finding suitable employment may be somewhat of a problem.

[R. at 170].

At an examination on March 17, 1993, the doctor reported that Plaintiff had full range of motion of the cervical and lateral spine, that Plaintiff was able to ambulate without difficulty, that Plaintiff did heel/toe walking without problems, and that Plaintiff had no real joint deformity. [R. at 177].

On November 8, 1993, James W. Zeiders, M.D., wrote that Plaintiff was initially seen by him in February of 1988 for evaluation and was diagnosed with thoracic outlet syndrome. Plaintiff was referred to Dr. John Hatchett who believed Plaintiff would improve with conservative treatment. Plaintiff was started on an exercise program and did improve over a course of years. Plaintiff's next problem was diagnosed in August 1993 as increasing low back pain and degenerative disc disease. Anti-inflammatories were tried, and Plaintiff's doctor's current approach was a back brace combined with a loss of weight.

From the restricted use of her neck and upper extremities due to the outlet syndrome and the myofascial inflammation, now associated with the lower back problem it is difficult to conceive that she is employable by anybody's standards. Retraining might be a possibility; however, it is difficult to imagine what areas that would be agreeable with her multiple areas of involvement.

[R. at 183].

Dr. Zeiders completed a RFC assessment on June 21, 1995. He noted that Plaintiff could sit for two hours at one time during an eight hour day, stand for one hour at a time, and walk for one hour. During an eight hour day, Plaintiff could sit for four hours total, stand for two hours, and walk one hour. [R. at 251]. He additionally reported that Plaintiff could lift five pounds continuously, six to ten pounds frequently, 11 - 20 pounds occasionally, and 21 - 25 pounds never. [R. at 251].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{5/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

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

^{5/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

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

42 U.S.C. § 423(d)(2)(A).

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

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

"The finding of the Secretary^{6/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support

^{6/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

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

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

III. THE ALJ'S DECISION

The ALJ concluded that based on Plaintiff's limitations she was limited to performing sedentary work which permitted her to sit or stand at will. [R. at 18]. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff could work as a cashier or an order clerk.

IV. REVIEW

Treating Physician Rule

Plaintiff asserts that the ALJ failed to properly evaluate the opinions of the treating physicians.

A treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who

merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). In Goatcher v. United States Dep't of Health & Human Services, 52 F.3d 288 (10th Cir. 1995), the Tenth Circuit outlined factors which the ALJ must consider in determining the appropriate weight to give a medical opinion.

(1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed; (3) the degree to which the physician's opinion is supported by relevant evidence; (4) consistency between the opinion and the record as a whole; (5) whether or not the physician is a specialist in the area upon which an opinion is rendered; and (6) other factors brought to the ALJ's attention which tend to support or contradict the opinion.

Id. at 290; 20 C.F.R. § 404.1527(d)(2)-(6).

W.T. Manning, M.D., wrote on February 12, 1993, that

I can see where patient is partially disabled from those occupations requiring a lot of standing, stooping, or lifting, but, in general, her health is such that other types of employment surely could be found. However, she lacks the skills and dexterity of office work, so finding suitable employment may be somewhat of a problem.

[R. at 170]. Dr. Zeider wrote that

From the restricted use of her neck and upper extremities due to the outlet syndrome and the myofascial inflammation, now associated with the lower back problem it is difficult to conceive that she is employable by anybody's standards. Retraining might be a possibility; however, it is difficult to imagine what areas that would be agreeable with her multiple areas of involvement.

[R. at 183]. Both doctors suggested that finding employment could be difficult. However, the determination of whether or not a job is available that Plaintiff can perform is the ultimate decision of the ALJ. Neither treating physician opinion requires a finding that Plaintiff is disabled. Each physician lists some limitations which Plaintiff has, but the ALJ is not required to conclude, based on those limitations, that Plaintiff is disabled.

Limitations from Cervical and Right Arm

Plaintiff asserts that the ALJ did not properly evaluate her RFC because the ALJ failed to include limitations in the RFC for Plaintiff's limited use of her neck and her upper arm.

One of Plaintiff's treating physicians discussed limitations due to Plaintiff's restricted use of her neck and upper extremities due to thoracic outlet syndrome and myofascial inflammation. [R. at 183]. The ALJ does not discuss the treating physician's opinion with respect to Plaintiff's restricted use of her neck or upper extremity.^{7/} The ALJ notes only that Plaintiff did not complain to other physicians of arm pain. This discussion is insufficient to determine whether or not the ALJ considered the treating

^{7/} Dr. Manning additionally noted that Plaintiff lacked the "skills and dexterity" of office work. [R. at 170].

physician opinion that Plaintiff had some limitations due to her neck and upper extremity. In addition, in the hypothetical presented to the vocational expert the ALJ included no neck or arm limitations. The Court concludes that the record does not contain substantial evidence to support the decision of the ALJ. On remand, the ALJ should review the record and Plaintiff's complaints of arm and neck limitations and determine whether any additional limitations should be included in the hypothetical question presented by the ALJ to the vocational expert.

Luna and Complaints of Pain

Plaintiff additionally asserts that the ALJ improperly evaluated Plaintiff's complaints of pain.

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

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

Id. at 164. In assessing the credibility of a claimant's complaints of pain, the following factors may be considered.

[T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

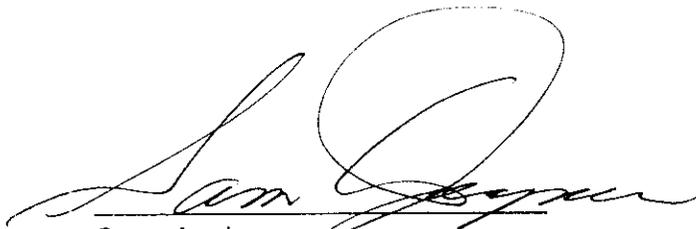
Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.").

Initially, the ALJ summarized Luna and its requirements, Plaintiff's medical record, and Plaintiff's testimony. *R. at 41-44*. The ALJ noted that Plaintiff did not complain of puffy eyelids on many occasions, and had limited complaints of headaches. [R. at 20]. The ALJ noted that none of Plaintiff's treating physicians had placed limitations on her that would preclude sedentary work and that the record did not indicate that Plaintiff needed to lie down during the day. The ALJ additionally evaluated Plaintiff's medications and complaints of side effects. The record indicates that the ALJ adequately evaluated Plaintiff's complaints of pain.

The mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment."). Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

The Commissioner's decision is **REVERSED AND REMANDED** for further evaluation of Plaintiff's claimed limitations of her neck and arm.

Dated this 15 day of May 1998.

A handwritten signature in black ink, appearing to read "Sam Joyner", written over a horizontal line.

Sam A. Joyner
United States Magistrate Judge

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

FILED

MAY 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY and DAVID YERKEY,)
individually and as husband and wife,)
)
Plaintiffs,)

vs.)

No. 97-CV-646-E (M)

RONALD H. SMITH, LEO BUFORD,)
and HARTFORD UNDERWRITERS)
INSURANCE COMPANY, a foreign)
corporation doing business in the State)
of Oklahoma,)

Defendants.)

ENTERED ON DOCKET
DATE MAY 15 1998

STIPULATION OF DISMISSAL WITHOUT PREJUDICE OF PLAINTIFF,
DAVID YERKEY, ONLY

Plaintiffs, MARY and DAVID YERKEY, individually and as husband and wife, and
Defendant, RONALD H. SMITH, file this Stipulation of Dismissal under Fed.R.Civ.P. 41(a)(1)(ii).

1. Plaintiffs sued Defendants, RONALD H. SMITH, LEO BUFORD, and
HARTFORD UNDERWRITERS INSURANCE COMPANY, a foreign corporation doing business
in the State of Oklahoma, on the 11th day of July, 1997.

2. The Defendant, LEO BUFORD, was dismissed from this action by way of
Stipulation of Dismissal Without Prejudice filed herein on the 3rd day of February, 1998.

3. The Defendant, HARTFORD UNDERWRITERS INSURANCE COMPANY, a
foreign corporation doing business in the State of Oklahoma, was bifurcated from the trial of this
matter by way of Agreed Order of Bifurcation of Hartford Underwriters Insurance Company filed

18

CL5

herein on the 3rd day of March, 1998.

4. Plaintiffs move to dismiss the claims of the Plaintiff, DAVID YERKEY, individually, only, against the Defendant, RONALD H. SMITH.

5. Defendant, RONALD H. SMITH, agrees to the dismissal.

6. This case is not a class action, and a receiver has not been appointed.

7. This action is not governed by any statute of the United States that requires an order of the Court for dismissal of this case.

8. Plaintiff has not dismissed an action based on or including the same claim or claims as those presented in this suit.

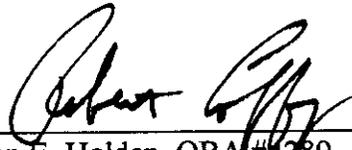
9. This dismissal is without prejudice.

Respectfully submitted,



Fred E. Stoops, Sr., OBA #8666
STOOPS & CLANCY, P.C.
2250 East 73 Street, Suite 400
Tulsa, Oklahoma 74136-6833
(918) 494-0007
(918) 488-0408 (FAX)

Attorneys for Plaintiffs



Steven E. Holden, OBA #4789
Robert P. Coffey, Jr., OBA #14628
**BEST, SHARP, HOLDEN, BEST,
SULLIVAN & KEMPFFERT**
100 West Fifth Street, Suite 808
Tulsa, Oklahoma 74103-4225
(918) 582-1234
(918) 585-9447 (FAX)

CERTIFICATE OF SERVICE

The undersigned attorney for Plaintiffs certifies that a true and correct copy of the foregoing STIPULATION OF DISMISSAL WITHOUT PREJUDICE OF PLAINTIFF, DAVID YERKEY, ONLY, was served by mail, postage prepaid, this 14th day of May, 1998, upon the following:

Attorneys for Defendant,
RONALD H. SMITH:

Messrs. Steven E. Holden
and Robert P. Coffey, Jr.
Best, Sharp, Holden, Best,
Sullivan & Kempfert
100 West Fifth Street, Suite 808
Tulsa, Oklahoma 74103-4225



Fred E. Stoops, Sr.

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

FILED

MAY 14 1998

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

KATHY N. CLINE,)
)
) Plaintiff,)
)
) v.)
)
) KENNETH S. APFEL,)
) Commissioner of the Social Security)
) Administration,)
)
) Defendant.)

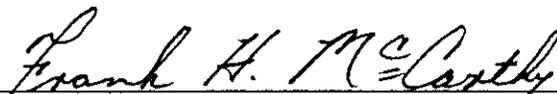
CASE NO. 97-CV-982-M

ENTERED ON DOCKET

DATE MAY 15 1998

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 14th day of MAY, 1998.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

FILED

MAY 13 1998

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

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

KATHY N. CLINE,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner of the Social)
Security Administration,)
)
Defendant.)

Case No. 97-CV-982-M

ENTERED ON DOCKET
DATE MAY 15 1998

ORDER

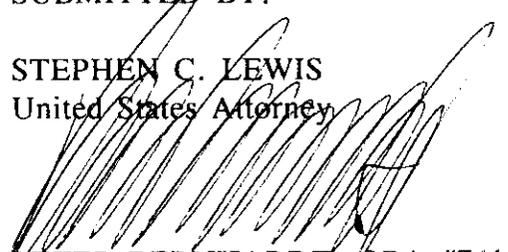
Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for additional proceedings pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

DATED this 13th day of MAY 1998.

Frank H. McCarthy
FRANK H. McCARTHY
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

JW

FILED

MAY 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

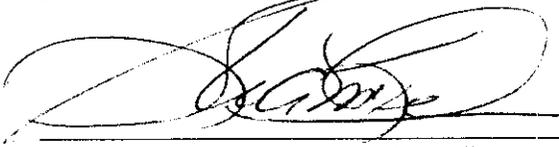
DAVID GOLZAR, an individual,)
)
Plaintiff,)
)
v.)
)
MILL CREEK LUMBER & SUPPLY CO,)
INC, an Oklahoma corporation,)
)
Defendant.)

Case No. 98-CV-230-BU(M)

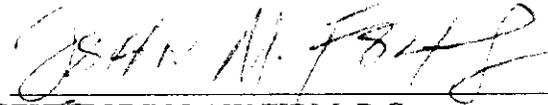
ENTERED ON DOCKET
DATE MAY 15 1998

STIPULATION FOR DISMISSAL WITH PREJUDICE

The plaintiff, by his counsel of record, Casey, Jones & McKenna, P.C., and the defendant, Mill Creek Lumber & Supply Co., an Oklahoma Corporation, by its counsel the Dunn Law Firm, P.C., hereby stipulate pursuant to FRCP 41 (a)(1) to the dismissal of the captioned case with prejudice to its refiling.



N. FRANKLYN CASEY, OBA #1547
BRUCE A. MCKENNA, OBA #6021
CASEY, JONES & MCKENNA, P.C.
Winston Square, Suite 2
3140 South Winston Avenue
Tulsa, Oklahoma 74135-2069
(918) 747-9654



~~THE~~ DUNN LAW FIRM, P.C.
JEFFREY T. DUNN, OBA #15223
JOHN MARTIN FOLKS, OBA #17622
2828 East 51st Street
Tulsa, OK 74105
(918) 746-7640

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing was deposited in the U.S. Mail this 14 day of May, 1998, with proper postage thereon fully prepaid, addressed to:

Jeffrey T. Dunn
2828 East 51st Street
Tulsa, OK 74105



BRUCE A. MCKENNA

3

clt

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

FILED
MAY 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DALE JEAN TERWILLIGER
on behalf of herself and all other
employees of HOME OF HOPE, INC.
similarly situated,

Plaintiff,

v.

HOME OF HOPE, INC.,

Defendant.

Case No. 96-C-1042-H ✓

ENTERED ON DOCKET

DATE 5-14-98

J U D G M E N T

This matter came before the Court on a Motion for Summary Judgment by Defendant as to the overtime claims of Mary Yost. The Court duly considered the issues and rendered a decision in accordance with the order filed on December 18, 1997.

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

IT IS SO ORDERED.

This 13TH day of May, 1998.



Sven Erik Holmes
United States District Judge

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

IN RE:)
)
 RECONVERSION TECHNOLOGIES,)
 INC.,)
)
 RECONVERSION TECHNOLOGIES OF)
 TEXAS, INC.,)
)
 Debtors.)
)
)
 KLEND A, GORDON & GETCHELL,)
 P.C., an Oklahoma Corporation,)
)
 Appellant.)
)
 v.)
)
 RECONVERSION TECHNOLOGIES,)
 INC.,)
)
 Appellee.)

DISTRICT COURT NO. 97-CV-903 K(E) ✓

FILED

MAY 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER DISMISSING APPEAL

Upon the Motion to Dismiss Appeal filed by Appellant, Klenda, Gordon & Getchell, P.C., and upon the representation that the parties to this appeal have reached a settlement under which this appeal is to be dismissed,

IT IS ORDERED that this appeal be and is hereby dismissed.

ENTERED this 13 day of May, 1998.

Jerry C Kern
United States District Judge

Sidney K. Swinson, OBA #8804
Gable Gotwals Mock Schwabe Kihle Gaberino
15 W. 6th St., Ste. 2000
Tulsa, OK 74119-5447
918-582-9201
918-586-8383 (fax)

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

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

Case No. 96-CV-652-Bu(J) ✓

REAL PROPERTY DESCRIBED AS FOLLOWS:)

ALL OF THAT PART OF LOT 3 OF THE)
SOUTHWEST QUARTER (SW/4) LYING)
NORTH OF THE FRISCO RAILROAD RIGHT OF)
WAY IN SECTION 9, TOWNSHIP 27 NORTH,)
RANGE 25 EAST OF THE INDIAN MERIDIAN,)
OTTAWA COUNTY, OKLAHOMA, LESS A)
TRACT DESCRIBED AS FOLLOWS:)

BEGINNING AT A POINT 653.0 FEET EAST OF)
THE NORTHWEST CORNER OF SAID LOT 3;)
THENCE S 0° 16' E 158.20 FEET; THENCE N)
58° 47' E ALONG THE FRISCO RAILROAD)
RIGHT OF WAY 305.23 FEET; THENCE WEST)
261.78 FEET TO THE BEGINNING,)

Defendant,)

and)

MICHAEL A. O'BRIEN,)

Claimant.)

FILED

MAY 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE MAY 14 1998

REPORT AND RECOMMENDATION

Plaintiff filed a motion for default judgment on January 27, 1998. [Doc. No. 29]. The undersigned held a hearing on the motion for default on March 4, 1998. Proceeding under the assumption that this was a case as to which all parties had

consented to magistrate jurisdiction under 28 U.S.C. § 636, the undersigned denied the motion for default judgment on the record at the March 4th hearing. For the reasons explained in an April 7, 1998 Order, the undersigned now finds that this case is not a consent case under § 636. [Doc. No. 33].^{1/}

In the April 7th Order, the undersigned notified the parties that if they consented, the March 4th ruling on the motion for default judgment would stand as an order of the Court and that if they did not consent, the ruling on the motion for default judgment would be converted to a Report and Recommendation. Both parties have not consented within the time permitted by the April 7th Order. Thus, the undersigned submits this Report and recommends that Plaintiff's motion for default judgment be denied for the reasons stated on the record at the March 4th hearing.

The undersigned finds that Plaintiff's attempts to serve Claimant were not sufficient to give him notice. Plaintiff served Claimant's wife at a time when the marriage was in trouble. At all relevant times, Claimant was located at a federal medical center. Plaintiff should have been aware of Claimant's location because the same United States Attorney's office that is prosecuting this forfeiture case prosecuted the criminal case which resulted in Claimant's incarceration at the federal medical center. Once the motion for default was served on Claimant, Claimant appeared and indicated he was ready and willing to defend this forfeiture action.

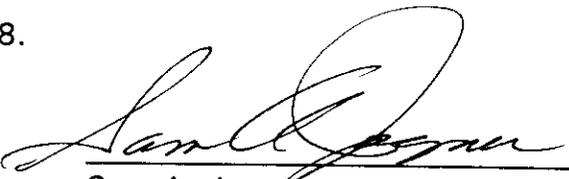
^{1/} The Court Clerk is directed to show this case as assigned to Judge Michael Burrage and as referred to Magistrate Judge Sam A. Joyner for all further proceedings consistent with his jurisdiction under 28 U.S.C. § 636. The case number shall also be changed to 96-CV-652-Bu(J).

Based on these facts, the undersigned finds no basis for entering default judgment against Claimant.

OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See *Moore v. United States*, 950 F.2d 656 (10th Cir. 1991); and *Talley v. Hesse*, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 12 day of May 1998.



Sam A. Joyner
United States Magistrate Judge

for poor work performance. Standerfer subsequently brought this action alleging age discrimination against Word for discharging her, failing to promote her, and discriminating against her in the conditions of her employment.

Summary Judgment Standard

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). Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *Thomas v. Internat'l Business Machines*, 48 F.3d 478, 485 (10th Cir. 1995).

Discussion

The ADEA prohibits employers from discharging, refusing to hire, or otherwise discriminating against individuals because of that individual's age. 29 U.S.C. § 623(a)(1). The protective provisions of the ADEA are limited to individuals who are at least 40 years of age. 29 U.S.C. § 631(a). To establish a claim for relief under the ADEA, a plaintiff must prove that age was a determining factor in the employer's adverse decision toward him. *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 557

(10th Cir. 1996). Although a plaintiff is not required to show that age was the sole reason for the employer's decision, he must show that age made the difference in the employer's decision. *Id.* A plaintiff may meet this burden either through presenting direct or circumstantial evidence of age discrimination, or he may rely on the proof scheme for a *prima facie* case established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981). *Id.* at 557-58.

Here, Plaintiff has produced no direct or circumstantial evidence of discrimination. The Court therefore assumes that Plaintiff seeks to rely on the *McDonnell Douglas* proof scheme. To establish a *prima facie* case under the ADEA, the Plaintiff must prove that (1) she was within the protected age group; (2) she was doing satisfactory work or that she was qualified for the position; (3) she was discharged or adversely affected by the defendant's employment decision; and (4) she was replaced by a younger person. *See Greene*, 98 F.3d at 558. The fourth element may be established by circumstantial evidence that a plaintiff was treated less favorably than younger employees. *Jones v. Unisys Corp.*, 54 F.3d 624, 630 (10th Cir. 1995). Once the Plaintiff establishes a *prima facie* case, there is a presumption that the employer unlawfully discriminated against the employee. *Id.* The burden then shifts to the employer to produce evidence that the adverse employment action took place for a legitimate non-discriminatory reason. *Greene*, 98 F.3d at 558. If the Defendant meets its burden of production, the presumption of discrimination is rebutted and drops from the case. *Id.* Then, in order to survive summary judgment, Plaintiff must put forth sufficient evidence to create a factual question as to whether the reasons stated by the Defendant were pretextual, and that the true reason for the Plaintiff's treatment was age discrimination.

Plaintiff has failed to establish a *prima facie* case. Defendant concedes that Plaintiff is within

the protected age group. Plaintiff fails, however, on other elements of the *prima facie* case. Defendant has offered unchallenged evidence that Plaintiff was performing her job unsatisfactorily. Standerfer's supervisor, June Simpson, warned Plaintiff that her work "was not meeting expectations and that improvement would be needed." *Def. 's Mot. Summ. J., Ex. C* ¶3 (Simpson Aff.). Simpson claims that she fired Standerfer for poor job performance. *Id.*, ¶ 4. Plaintiff has offered no evidence challenging Simpson's claims.

Plaintiff failed to show that she was denied promotion because of her age. When asked in her deposition if she had been denied promotional opportunities, Plaintiff answered, "I have never made the statement that I was denied a promotion." *Def. 's Mot. Summ. J., Ex. B.*, p. 31-2 (Standerfer Dep.). Plaintiff went on to state that the allegation in paragraph 4b of her complaint, alleging denial of promotion opportunities, was not correct. *Id.* at 32. Plaintiff does cite one instance in which an open "computer position" within Defendant went to a younger person instead of Plaintiff. At that time, however, Plaintiff received an open position within Defendant's engineering department, which she considered to be a roughly equivalent position to the computer position.

Plaintiff has also failed to demonstrate that she was either replaced by a younger person or that she was treated less favorably than younger employees. Plaintiff's only claim of less favorable treatment is that Simpson would yell at younger employees, but not at her. Plaintiff has failed to explain how Simpson's acts were more favorable to younger employees. Plaintiff's only basis for asserting that Simpson treated her differently because of age is her belief that Simpson felt the younger employees, unlike Plaintiff, could be "pushed around." *Id.* at 36. In support of her position, Plaintiff points only to a conversation between Simpson and Kathy Rieman, one of Plaintiff's coworkers, overheard by Plaintiff. In that conversation, Rieman reportedly stated to Simpson that

she and Plaintiff were too old for Simpson to be “screaming at.” *Id.* at 36. Simpson’s reported reply to Rieman’s comment was “yeah that’s a problem.” *Id.* at 36. Even accepting Plaintiff’s version of the conversation as true, Plaintiff has not demonstrated that she was treated less favorably because of her age.

Plaintiff has failed to offer any evidence which establishes a *prima facie* case of age discrimination and has failed to respond to Defendant’s Motion pursuant to Local Rule 7.1C. Accordingly, the Court GRANTS Defendant’s Motion for Summary Judgment.

ORDERED this 12 day of May, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 5-14-98

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

HARRY'S BROKERAGE, INC.,

Plaintiff,

vs.

HASTRAN LOGISTICS, INC., an
Oklahoma corporation, and WILLIAM
HASSEBERG, JR., an individual,

Defendants.

Case No. 97 CV 1010K (M)

F I L E D

MAY 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for hearing this 12 day of May, 1998 upon Plaintiff's motion duly made for judgment by default. It appears that Defendants herein are in default and that the Clerk of the United States District Court has previously searched the records and entered the default of the Defendants. It appears from the affidavit offered in conjunction with Plaintiff's motion for default that Defendants are, jointly and severally, indebted to Plaintiff in the sum of \$107,043.97 for damages incurred by Plaintiff due to the actions and/or omissions of Defendants. Furthermore, Plaintiff has incurred \$93.50 in costs and \$ 574.00 in attorney's fees in prosecuting this action. Therefore, the Court, being fully advised, finds that judgment should be entered for Plaintiff:

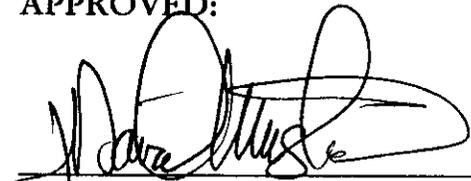
It is therefore ORDERED, ADJUDGED and DECREED that Plaintiff recover from Defendants, jointly and severally, the sum of \$ 107,043.97, with post-judgment interest taxed thereon at the rate of 9.22% until this judgment is satisfied in its entirety, together with costs in the sum of \$ 93.50 and a reasonable attorney's fee in the sum of \$ 574.00, for all of which let

execution issue.

JUDGMENT RENDERED THIS 12 DAY OF May, 1998.


UNITED STATES DISTRICT JUDGE

APPROVED:


J. David Mustain, OBA #13132
Counsel for Plaintiff

ENTERED ON DOCKET

DATE 5-14-98

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

AMERCOOL MANUFACTURING, INC.,)
a Texas corporation,)

Plaintiff,)

vs.)

No. 96-C-1016-K

ODESSA INDUSTRIES, INC., a foreign)
corporation; and UNIVERSAL COMPRESSION)
SERVICES, a foreign corporation, aka)
UNIVERSAL COMPRESSION SERVICES;)
and TSI COMPRESSION, a foreign corporation,)

Defendants.)

F I L E D

MAY 13 1998

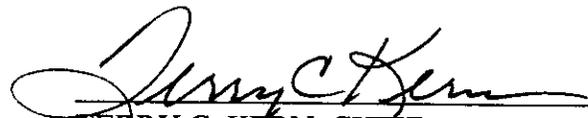
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Plaintiff's Objection to the administrative closing order entered in this case. The Court administratively closed this case on January 14, 1998. Plaintiff filed its objection to the administrative closing order on March 14, 1998. Plaintiff objects to the administrative closing of this case because its application for attorneys fees and costs remains pending and because good cause may exist for further litigation against Defendant TSI Compression (TSI). TSI does not object to Plaintiff's request to reopen the case based on the potential necessity for further litigation.

For good cause shown, the Court SUSTAINS Plaintiff's objection to the administrative closing order and VACATES the administrative closing order entered on January 14, 1998.

IT IS SO ORDERED ON THIS 12 DAY OF MAY, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

JESSIE RAY LAWS #156765,)
)
Plaintiff,)
)
vs.)
)
GRADY CO. SHERIFF'S DEPT.,)
Grady County, Oklahoma; and)
BRAD CRAWFORD,)
)
Defendants.)

DATE 5-14-98

No. 98-CV-158-K (E)

FILED

MAY 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, a state prisoner appearing *pro se* and *in forma pauperis*, has filed this action pursuant to 42 U.S.C. § 1983. After liberally construing the complaint, the Court finds that the alleged negligent loss of Plaintiff's photo album by Defendants does not rise to the level of a constitutional violation, and therefore, the complaint should be dismissed with prejudice.

BACKGROUND

Plaintiff alleges a photo album was used as part of the evidence in his Grady County, Oklahoma, trial. Although several attempts have been made by Plaintiff and others acting on his behalf to secure the return of the photo album, Defendant Crawford, a Grady County Officer, has "ignored" his attempts and the photo album has not been returned. Plaintiff states he has sought relief "by way of custodial case manager, Mrs. Kathy," and has also written and telephoned the Grady County Prosecutor's office. Plaintiff attaches two letters which were apparently written on

his behalf in an attempt to recover the album. Plaintiff seeks return of his personal property and imposition of a \$1,000-a-day fine for the deprivation by Defendants. (Docket #1).

ANALYSIS

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, and that defendant acted under color of law. 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, 113 S.Ct. 1160, 1163 (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).

When the court grants *in forma pauperis* status in a civil action, as in the instant matter, section 1915 mandates that the court dismiss the action at any time if it is determined that the claims are frivolous or malicious, fail to state a claim on which relief may be granted, or seek monetary relief against a defendant who is immune from such relief. See 28 U.S.C. § 1915(e)(2). Furthermore, section 1915A states that when a prisoner files a complaint in a civil action seeking redress from a governmental entity or officer or employee of a governmental entity, the court shall

review the complaint as soon as practicable after docketing and dismiss any claims that are "frivolous, malicious, or fails to state a claim upon which relief may be granted." *See* 28 U.S.C. S 1915A(b)(1).

Upon careful review and after liberally construing the complaint pursuant to Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action should be dismissed for failure to state a constitutional claim. The negligent loss of a prisoner's property, such as books, does not implicate the due process clause and is therefore insufficient to state a constitutional claim. Daniels v. Williams, 474 U.S. 327, 328, 332 (1986). The Supreme Court has held that neither a negligent nor an "unauthorized intentional" deprivation of a prisoner's property constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment *if a meaningful postdeprivation remedy for the loss is available*. See Hudson v. Palmer, 468 U.S. 517, 533 (1984) (remanded on other grounds) (holding an unauthorized intentional deprivation of property by a state employee does not constitute a violation of procedural requirements of due process clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available); see also Parratt v. Taylor, 451 U.S. 527 (1981) (holding that even an intentional destruction of property by a state employee does not violate due process if the state provides a meaningful postdeprivation remedy). Since Oklahoma provides common-law tort remedies that would compensate Plaintiff for his property loss, his § 1983 claim cannot proceed. And even if Plaintiff were claiming that his photo album was not returned as a result of Defendant's negligence, this claim also is foreclosed under the Supreme Court's holding in Daniels.

Therefore, Plaintiff's complaint should be dismissed for failure to state a constitutional

claim. This dismissal is without prejudice to the possibility that Plaintiff may be able to assert some claim in a state court of competent jurisdiction. However, this Court declines to exercise pendent jurisdiction over any state claims Plaintiff may have. See 28 U.S.C. § 1367(c)(3); see also United Mine Workers v. Gibbs, 383 U.S. 715, 725-26 (1966).

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's complaint is dismissed **without prejudice** for failure to state a claim upon which relief may be granted under 28 U.S.C. § 1915A.

- (a) The Clerk shall "**flag**" this dismissal as a "strike" pursuant to 28 U.S.C. § 1915(g).¹
- (b) All pending motions are denied as **moot**.

IT IS SO ORDERED this 12 day of May, 1998.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

¹28 U.S.C. § 1915(g): 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.

ENTERED ON DOCKET

DATE 5-14-98

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

F I L E D

MARTY EUGENE SANDERS

Petitioner,

vs.

RITA MAXWELL,

Respondent.

)
)
)
)
)
)
)
)
)
)
)

MAY 13 1998

M

Phil Lombardi, Clerk
U.S. DISTRICT COURT

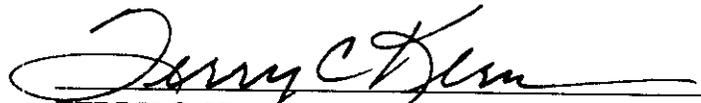
Case No. 98-CV-206-K

JUDGMENT

This matter came before the Court upon Petitioner's amended petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 12 day of May, 1998.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

6

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

F I L E D
MAY 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARTY EUGENE SANDERS,)
)
 Petitioner,)
)
 vs.)
)
 RITA MAXWELL,)
)
 Respondent.)

Case No. 98-CV-206-K

ORDER

Before the Court is Petitioner Marty Eugene Sanders' amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 (Dkt. #3). Petitioner, a state inmate currently incarcerated in the Jess Dunn Correctional Center in Taft, Oklahoma, is subject to a federal detainer arising out of a judgement and sentence imposed by this Court, Case No. 96-CR-126-K, in January, 1997. Petitioner seeks to have his federal sentence modified to specify that the period of federal imprisonment runs concurrently with the state sentences Petitioner is currently serving. As discussed below, the Court determines it is evident from the amended petition that Petitioner is not entitled to habeas corpus relief, see 28 U.S.C. § 2243, and the petition therefore should be dismissed.¹

¹ The Court initially determines that it has jurisdiction in this matter, see Garcia v. Pugh, 948 F.Supp. 20 (E.D. Pa 1996), and that traditional venue considerations do not require transfer to the Western District of Oklahoma where Petitioner is incarcerated. Instead, the "convenience of the parties" and the "interests of justice" support retaining the case in this district where Petitioner received the federal sentence which he seeks to have modified. See 28 U.S.C. § 1404(a).

BACKGROUND

On August 28, 1996 Petitioner, along with two other individuals, was charged in a complaint filed in this Court with conspiracy to counterfeit and pass U.S. obligations with the intent to defraud (#1, Case No. 96-CR-126-K). Other substantive counterfeiting counts and charges relating to the use of stolen credit cards were added in a superseding indictment filed October 4, 1996 (#13, Case No. 96-CR-126-K). On November 13, 1996, Petitioner pleaded guilty to one count of counterfeiting (Count V) pursuant to a plea agreement in which the government agreed to dismiss the other counts against him. On January 14, 1997, the Court pronounced judgment on Count V and sentenced Petitioner to 31 months custody with 3 years supervised release and ordered restitution of \$5,549.27 payable jointly with codefendant Carol Triplett (#28, Case No. 96-CR-126-K). The Court recommended that the Bureau of Prisons ("BOP") designate the facility at El Reno for Petitioner to serve his term and further recommended that the Petitioner receive chemical dependency counseling through the BOP Substance Abuse Programs.

At the time he was sentenced on the federal charge and indeed as far back as the date of his initial appearance in August, 1996, Petitioner was in state custody at the Tulsa County Jail (see writ of habeas corpus ad prosequendum (#s 2 and 3, Case No. 96-CR-126-K)), apparently awaiting disposition of state charges arising out of the same counterfeiting/stolen property incidents. On January 16, 1997, two days after his federal sentence was pronounced, Petitioner pleaded guilty to six counts in three state cases and was sentenced to ten years on each count, such time ordered to run concurrently on each count and also to run concurrently to the sentence imposed in the federal case, 96-CR-126-K. However, the portion of the orders concerning the federal case did not appear on the Judgment and Sentences in the state cases. Petitioner filed an Application for Post-Conviction Relief

in the state district court, and on September 25, 1997, the state trial judge entered an order amending the Judgment and Sentences to reflect that all felony sentences should run concurrently with the sentence in the federal case, 96-CR-126-K.

On February 23, 1998, Petitioner through counsel filed a motion in his criminal case (96-CR-126-K) to amend the judgment and sentence to have the federal time run concurrently with the state sentences. That motion alleged that Petitioner believed that it was his intention as well as that of the State of Oklahoma to run his sentences concurrently. The Court construed that motion as a petition for writ of habeas corpus pursuant to § 2241 because Petitioner sought to attack the execution of his sentence rather than its legality, and ordered Petitioner to file an amended petition on the court-approved form (#2). Petitioner has complied with that order. The sole ground for relief as stated in his amended petition for habeas corpus pursuant to § 2241 is:

That it was the intention of the State of Oklahoma to run sentence concurrent; but due to fact Defendnat [sic] was in custody of State of Oklahoma, Federal time was not run concurrently.

ANALYSIS

As a preliminary matter, the Court determines that Petitioner has exhausted his administrative remedies. See Williams v. O'Brien, 792 F.2d 986, 987 (10th Cir. 1986) (per curiam) (citing Smoake v. Willingham, 359 F.2d 386, 388 (10th Cir. 1966)).

Petitioner asserts that the State of Oklahoma intended his 10-year state felony sentences to run concurrently with his 31-month federal sentence; therefore, this Court should retroactively modify its sentence to specify that it is to be served concurrently with the subsequently-imposed state sentences. However, the Court has no authority to make such modification. See, 18 U.S.C.

§3582(c) (prohibiting modification of term of imprisonment once it has been imposed, except in circumstances not present here).

Moreover, the result in this case—that Petitioner will in effect serve his federal sentence "consecutively" to, or after, his state sentences—does not rise to the level of a constitutional violation, however much it frustrates Petitioner's or the state court's intentions. It merely represents the inevitable consequence when two separate sovereigns, the federal and state courts, exercise jurisdiction over one defendant's person. Well-established principles of state/federal comity dictate that the jurisdiction with custody over a defendant's body keeps such jurisdiction until it has finished imprisoning him, even if it delivers the defendant to appear in another jurisdiction to face separate criminal proceedings. See, Ponzi v. Fessenden, 258 U.S. 254 (1922); Williams v. Taylor, 327 F. 2d 322, 323 (10th Cir. 1964). Petitioner was in state custody as a pre-trial detainee on state charges when he was sentenced on the federal charge; after sentencing in this Court, he was returned to state custody. Thus, Petitioner's custody status did not change when he was brought into federal court on the writ of habeas corpus ad prosequendum and then, according to the terms of the writ, returned to state custody after completion of the federal sentencing proceedings.

Statutory authority provides that a federal sentence commences when the defendant is received into federal custody. 18 U.S.C. § 3585. The federal BOP cannot be forced to take a defendant such as Petitioner into custody, notwithstanding the state court's order that the state sentences are to run concurrently with the federal sentence. Bloomgren v. Belaski, 948 F.2d 688, 691 (10th Cir. 1991) (citing Smith v. United States Parole Comm'n, 875 F. 2d 1361, 1364 (9th Cir. 1988)); cf. Del Guzzi v. United States, 980 F.2d 1269, 1270 (9th Cir. 1992) (per curiam) ("[F]ederal authorities need only accept prisoners upon completion of their state sentence and need not credit

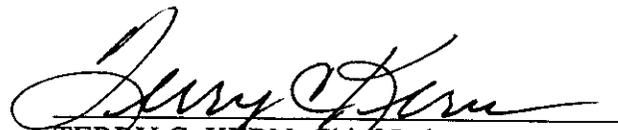
prisoners with time spent in state custody.") In Del Guzzi, Judge Norris, concurring, noted that concurrent sentences imposed by state judges were nothing more than recommendations to federal officials, who "remain free to turn those concurrent sentences into consecutive sentences by refusing to accept the state prisoner until the completion of the state sentence and refusing to credit the time the prisoner spent in state custody." Id. at 1272. The Tenth Circuit likewise has concluded that the federal prison officials' decision to accept a defendant only after he had completed his state sentence "is a federal matter which cannot be overridden by a state court provision for concurrent sentencing on a subsequently-obtained state conviction." Bloomgren, 948 F.2d at 690. See also Lionel v. Day, 430 F.Supp. 384, 386 (W.D. Okla. 1976) ("Obviously no comment or order by a state judge can control the service of a federal sentence.")

Thus, when Petitioner has completed his state sentences, the state authorities will deliver him to the federal BOP pursuant to the federal detainer lodged with the state authorities, and at that time Petitioner will begin to serve his 31-month federal sentence.

CONCLUSION

Accordingly, the Court is without authority to modify Petitioner's sentence or to require that his federal sentence be served concurrently with his subsequently-imposed state convictions, and it is hereby ordered that the amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 (#3) is dismissed.

SO ORDERED THIS 7 day of May, 1998.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 5-14-98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY 13 1998 *NO*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DELMER AND BARBARA ENGLER,)

Plaintiffs,)

v.)

THOMAS M. MADDEN CO., AN)
ILLINOIS CORPORATION;)

AMERICAN INTERNATIONAL)
COMPANIES, A NEW YORK)
CORPORATION LICENSED TO DO)
BUSINESS IN THE STATE OF)
OKLAHOMA;)

NATIONAL UNION FIRE INSURANCE)
CO. OF PITTSBURGH IS LICENSED)
TO DO BUSINESS IN THE STATE OF)
OKLAHOMA;)

THE LAW FIRM OF RHODES,)
HIERONMYUS, JONES, TUCKER, AND)
GABLE OF TULSA, OKLAHOMA;)

DISTRICT JUDGE DEBORAH)
SHALLCROSS TULSA COUNTY)
COURTHOUSE,)

Defendants.)

Case No. 98-CV-0179-K (E)

PROPOSED FINDINGS AND RECOMMENDATIONS

At issue before the Court is the Motion to Deem Defendants' Motion to Dismiss Confessed (Docket #5) ("Motion to Deem Confessed"), jointly filed by defendants Thomas M. Madden Co., American International Companies, National Union Fire Insurance Co., and Rhodes, Hieronymus, Jones, Tucker & Gable, P.L.L.C.. For the following reasons, the undersigned recommends that the Motion to Deem Confessed be **DENIED**.

7

BACKGROUND

Plaintiffs, who appear before this Court *pro se*, filed a lawsuit against Thomas M. Madden Co., Atlas Utility Co., and Dykon, Inc. in Tulsa County District Court on March 23, 1990 for damages caused in the course of certain construction and blasting operations. The 1990 suit was dismissed. Plaintiffs filed a suit against Thomas M. Madden Co., Atlas Utility Co., Dykon, Inc., and Clayton Harold Collingsworth in Tulsa County District Court on January 30, 1995. The 1995 suit, presided over by Deborah Shallcross, District Judge of the Fourteenth Judicial District of the State of Oklahoma, ended in mistrial. Plaintiffs have now brought suit in United States District Court, alleging various violations of “federal and state constitutional laws.” Plaintiff’s Petition and Request for Emergency Trial (Docket #1), at 2.

REVIEW

On April 1, 1998, the Attorney General for the State of Oklahoma, on behalf of Judge Shallcross, filed Defendant Shallcross’ Motion to Dismiss and Brief in Support (Docket #2). Also on April 1, 1998, defendants Thomas M. Madden Co., American International Companies, National Union Fire Insurance Co., and Rhodes, Hieronymus, Jones, Tucker & Gable, P.L.L.C. jointly filed Defendants’ Motion to Dismiss and Brief in Support (Docket #3). Pursuant to N.D. Local Rule 7.1(C) and Fed. R. Civ. P. 6, plaintiffs had 18 days to respond. Plaintiffs did not respond. After the deadline for response had passed, the Motion to Deem Confessed was filed.

Local Rule 7.1(C) provides that “[r]esponse briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.” N.D. Local Rule 7.1(C). The Tenth Circuit, where called upon to review the discretion of underlying district courts faced with similar rules

regarding failure to file responsive pleadings, has asked whether the district court considered the following factors: (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance;¹ and (5) the efficacy of lesser sanctions. Mobley v. McCormick, 40 F.3d 337, 340 (10th Cir. 1994). See also Ehrenhaus v. Reynolds, 965 F.2d 916, 921 (10th Cir. 1992); Miller v. Dept. of the Treasury, 934 F.2d 1161, 1162 (10th Cir. 1991), cert. denied, 502 U.S. 1111, 112 S. Ct. 1215, 117 L. Ed. 2d 453 (1992). The Tenth Circuit has stated that dismissal with prejudice based on a motion to deem confessed is proper only where the aforementioned “aggravating factors outweigh[] the judicial system’s strong predisposition to resolve cases on their merits.” Hancock v. City of Oklahoma City, 857 F.2d 1394, 1396 (10th Cir. 1988).

The undersigned, in her discretion, declines to recommend that Defendants’ Motion to Dismiss be deemed confessed. First, the dismissal with prejudice requested by defendants is a drastic measure which would terminate plaintiffs’ right to access to the courts. “[A] dismissal with prejudice is clearly a severe sanction reserved for extreme circumstances.” Meade v. Grubbs, 841 F.2d 1512, 1520 (10th Cir. 1988). Further, the culpability of plaintiffs for their failure to timely respond is lessened by their *pro se* representation. Plaintiffs were not warned of the consequences of failing to timely respond. To the extent that a warning is implicit in Local Rule 7.1(C), the efficacy of that warning is called into question by plaintiffs’ *pro se* status. Finally, the failure of plaintiffs to respond at this early stage of the litigation has not caused a significant delay in the

¹ Plaintiffs are hereby warned that continued failure to comply with filing deadlines can lead to dismissal with prejudice of the action.

judicial process. The sanction requested is not warranted by the circumstances before the undersigned.

CONCLUSION

IT IS THEREFORE RECOMMENDED that the Motion to Deem Confessed be **DENIED** and that plaintiffs be given fifteen days from the date of this order to respond to Defendant Shallcross' Motion to Dismiss and Brief in Support (Docket #2) and Defendants' Motion to Dismiss and Brief in Support (Docket #3). At the expiration of that deadline, the undersigned will address the motions to dismiss on their merits, regardless of whether plaintiffs file a response.

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.² 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

² For clarification in light of plaintiffs' *pro se* status, the undersigned notes that following the issuance of these Proposed Findings and Recommendations, plaintiffs have the following options available to them: (1) file an objection to these Proposed Findings and Recommendations within ten days, which will toll plaintiffs' opportunity to file a response pending consideration of the objection by the District Court; (2) file a response to the motions to dismiss within fifteen days; or (3) file neither a response nor an objection within the specified deadlines, at which time the undersigned will address the merits of the motions to dismiss. Plaintiffs should be aware that defendants may also, within ten days, object to these Proposed Findings and Recommendations.

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 May, 1998.



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

14 Day of May, 1998.

L. Schwelke

Jim

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 DENNIS M. BUCKLEY,)
)
 Defendant.)

No. 98CV0166BU(J)

ENTERED ON DOCKET

DATE MAY 14 1998

DEFAULT JUDGMENT

This matter comes on for consideration this 13th day of May, 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, Dennis M. Buckley, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Dennis M. Buckley, was served with Summons and Complaint on April 9, 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, Dennis M. Buckley, for the principal amounts of \$3,895.73 and \$1,858.74, plus accrued interest of \$1,376.60 and \$872.17, plus administrative charges in the amount of \$20.00, plus interest thereafter at the

(6)

rates of 7.51 percent and 8 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 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/11f

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RANDT BUCK COUNTRYMAN,
SSN: 486-64-9777

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE MAY 14 1998

No. 97-CV-1084-J ✓

FILED

MAY 13 1998

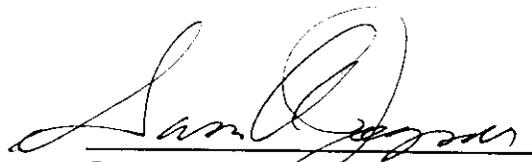
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court is Plaintiff's motion to dismiss without prejudice. [Doc. No. 7]. Defendant has filed no objection to the motion. Plaintiff's motion is granted. This case is hereby dismissed without prejudice.

IT IS SO ORDERED.

Dated this 13 day of May 1998.



Sam A. Joyner
United States Magistrate Judge

Jan

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

FILED

MAY 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICK and TERESA BROWN,)
)
 Plaintiffs,)
)
 vs.)
)
 STATE FARM INSURANCE)
 COMPANY, STATE FARM FIRE AND)
 CASUALTY COMPANY and)
 JOHN ROBERT GATEWOOD,)
 individually as an agent for)
 STATE FARM INSURANCE AGENCY)
 and STATE FARM FIRE AND)
 CASUALTY COMPANY,)
)
 Defendants.)

Case No. 98-CV-110-H ✓

ENTERED ON DOCKET

DATE 5-13-98

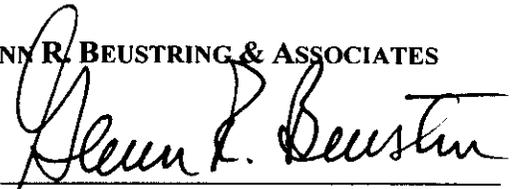
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Come now the parties, plaintiff Rick Brown, plaintiff Teresa Brown, defendant State Farm Fire and Casualty Company (incorrectly referred to and named herein as State Farm Insurance Company and State Farm Insurance Agency), and defendant John Robert Gatewood, and pursuant to FED. R. CIV. P. 41(a)(1)(ii) hereby stipulate to dismiss the above-entitled action, and any and all causes of action arising therefrom, **with prejudice** to refiling, and with each party to bear their own costs and attorney fees.

17

015

GLENN R. BEUSTRING & ASSOCIATES

BY: 

GLENN R. BEUSTRING, OBA #768

2624 East 21st, Suite 1
Tulsa, Oklahoma 74114
(918) 747-1341

Attorney for Plaintiffs Rick Brown and Teresa Brown.

STAUFFER, RAINEY, GUDGEL & HATHCOAT, P.C.

BY: 

NEAL E. STAUFFER, OBA #13168

KENT B. RAINEY, OBA #14619

ADAM S. DENTON, OBA #17015

1100 Petroleum Club Building
601 S. Boulder
Tulsa, Oklahoma 74119
(918) 592-7070

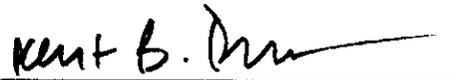
Attorneys for Defendants, State Farm Fire and
Casualty Company and John Robert Gatewood.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 12th day of May, 1998, a true and correct copy of the above and foregoing instrument was mailed with postage prepaid thereon, to the following:

Glenn R. Beustring, Esq.
2624 East 21st, Suite 1
Tulsa, Oklahoma 74114
(918) 747-1341

Attorney for Plaintiffs,
Rick Brown and Teresa Brown.



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

FILED

MAY 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LLOYD DEAN HARJO,

Petitioner,

vs.

STEPHEN KAISER,

Respondent.

Case No. 96-CV-1012-BU (J)

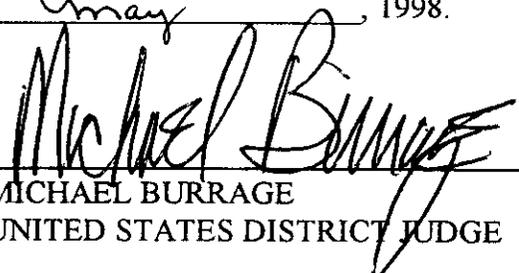
ENTERED ON DOCKET
DATE MAY 13 1998

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 13th day of May, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

(13)

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

F I L E D

MAY 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT WOODARD,)
)
 Plaintiff,)
)
 vs.)
)
 BOEING NORTH AMERICAN, INC.)
)
 Defendant.)

No. 97-C-817-E ✓

ENTERED ON DOCKET
DATE MAY 13 1998

JUDGMENT

In keeping with the Order sustaining the motion for summary judgment of the Defendant Boeing North American, Inc., judgment is hereby entered in favor of Defendant Boeing North American, Inc. and against the Plaintiff, Robert Woodard. The Plaintiff recovers nothing of his claim against said Defendant. Costs of this action are awarded in favor of Boeing North American, Inc. and against Robert Woodard, upon timely application pursuant to Local Rule 54.1. The parties are to pay their own attorneys' fees.

ORDERED this 8th day of ~~April~~ ^{May} 1998.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

17

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

FILED

MAY 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT WOODARD,)
)
Plaintiff,)
)
vs.)
)
BOEING NORTH AMERICAN, INC.)
)
Defendant.)

No. 97-C-817-E

ENTERED ON DOCKET

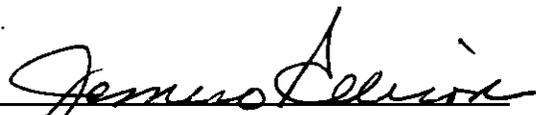
DATE MAY 13 1998

ORDER

Before the Court is the Motion for Summary Judgment filed by Defendant Boeing North American, Inc. ("Boeing"). (Docket No. 11). In its Order of March 23, 1998, the Court directed Plaintiff Robert Woodard ("Woodard") to respond to Boeing's motion for summary judgment by March 30, 1998 or the motion would be deemed confessed. (Docket No. 15). Woodard has not filed a response.

Based on the uncontroverted facts set forth in Boeing's motion for summary judgment, the Court concludes that Woodard's racial discrimination claim under Title VII, 42 U.S.C. §2000e *et seq.*, is barred for failure to file a charge with the Equal Employment Opportunity Commission or Oklahoma Human Rights Commission within 300 days of the alleged discriminatory act. *Smith v. Oral Roberts Evangelistic Assoc., Inc.*, 731 F.2d 684, 686-87 (10th Cir. 1984); 42 U.S.C. §2000e-5(e). Accordingly, the Court grants summary judgment to Defendant Boeing.

ORDERED this 8th day of ~~April~~ ^{May}, 1998.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

16

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

MAY 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL FRANK BRIGAN,)
)
Plaintiff,)
)
vs.)
)
CITY OF CLAREMORE, OKLAHOMA,)
a Municipal Corporation, BRYAN)
BAKER, LEE McQUEEN, JERRY)
PRATHER, AND RICK JONES,)
)
Defendants.)

Case No. 97-CV-125-BU

ENTERED ON DOCKET

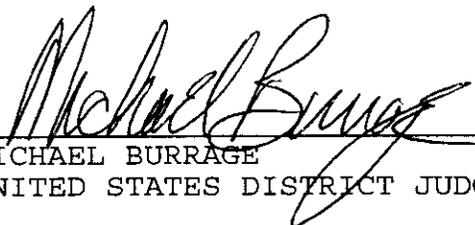
DATE MAY 13 1998

JUDGMENT

This matter came before the Court upon the Motion for Summary Judgment filed by Defendants, Bryan Baker, Lee McQueen and Jerry Prather, and the issues having been duly considered and a decision having been duly rendered and the claims against Defendants, City of Claremore and Rick Jones, having been previously dismissed,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendants, Bryan Baker, Lee McQueen and Jerry Prather, and against Plaintiff, Michael Frank Brigán, and that Defendants, Bryan Baker, Lee McQueen and Jerry Prather, are entitled to recover of Plaintiff, Michael Frank Brigán, their costs of action.

DATED at Tulsa, Oklahoma, this 13th day of May, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAY 13 1998

Lawrence Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL FRANK BRIGAN,)
)
Plaintiff,)
)
vs.) Case No. 97-CV-125-BU
)
CITY OF CLAREMORE, OKLAHOMA,)
a Municipal Corporation,)
BRYAN BAKER, LEE McQUEEN,)
JERRY PRATHER, AND RICK)
JONES,)
)
Defendants.)

ORDER

This matter comes before the Court upon the Motion for Summary Judgment filed by Defendants, Bryan Baker, Lee McQueen, and Jerry Prather.¹ Plaintiff, Michael Frank Brigán, has responded to the motion and Defendant has replied thereto. Upon due consideration, the Court makes its determination.

The relevant undisputed facts are as follows. On the evening of February 9, 1995, Plaintiff, Michael Frank Brigán ("Brigán"), and a friend drank a pint of whiskey between 6:00 p.m. and 8:30 p.m. Brigán and his friend then purchased a second pint of whiskey, which they consumed with a third friend before 10:00 p.m. At approximately 11:00 p.m., Brigán took his step-father's car without permission and went to visit his stepson. Thereafter, he tried to find some friends near Pryor. Brigán was depressed and was contemplating suicide. Brigán drove around for a few hours but

¹ By Order entered on March 24, 1998, the Court, upon Plaintiff's motion, dismissed Defendants, City of Claremore and Rick Jones, from this action with prejudice.

could not find his friends' house.

At approximately 2:46 a.m., on February 10, 1995, Brigan saw a Rogers County Sheriff's Department car turn on its emergency lights behind him. Brigan immediately accelerated and tried to get away from the deputy sheriffs. Brigan was traveling west on State Highway 20 into Claremore. Brigan and the Rogers County deputy sheriffs engaged in a high speed chase through Claremore. At one point, Brigan drove his car into a ditch. By going from drive to reverse and back, Brigan was able to rock the car and get out of the ditch. At this point, the Rogers County deputy sheriffs shot out two of the tires on Brigan's automobile. Brigan did not stop, however, and the pursuit continued.

The Rogers County deputy sheriffs reported over their police radio that shots had been fired and that Brigan had tried to run a deputy down. McQueen, Prather, and Rick Jones, officers with the Claremore Police Department, heard these reports and joined in the pursuit.

Brigan was intoxicated. He ran off of the road several times and lost control of his car several times during the pursuit. Brigan ultimately crashed into a ditch again and was unable to get the car out. At this point a deputy sheriff jumped on the hood of the car with his gun drawn and ordered Brigan to surrender.

Baker, an officer with the Claremore Police Department, arrived at the scene after the chase had ended. Baker helped McQueen and Deputy Sheriff Shannon Cook pull Brigan from his vehicle.

In his deposition, Brigán testified that he voluntarily got out of the car.² The next thing he remembered was being on the ground and being hit with a billy club. Brigán does not know who took him to the ground or who struck him. Brigán also testified that he was kicked once in the ribs after complaining about being hit with the club. Brigán did not see who allegedly kicked him and does not know whether it was a Claremore police officer or a Rogers County deputy sheriff.

The Claremore police officers on the scene had heard the radio report of "shots fired" and believed that Brigán might be armed. They did not know until the incident was over that the only shots fired had been fired by the two deputy sheriffs.

Brigán was lying face down on the ground with his hands under his body. McQueen sat on top of Brigán on Brigán's buttocks. McQueen struck Brigán on the arm above the elbow with his fist, also in the effort to get Brigán to release his hands.

Neither Baker nor McQueen nor Prather hit Brigán in the head with a billy club or a flashlight or any other object or kicked him in the ribs. Prather did not participate in subduing Brigán.

After Brigán was handcuffed, he was walked over to a police car and bent over the trunk of the car. McQueen searched Brigán and removed a lock blade knife with a blade three or four inches long. Brigán had a small amount of blood on his forehead. He was

² The police officers involved testified that Brigán refused to get out of the car and had to be pulled from the car. Brigán, however, does not allege that he was injured until after he had exited the car. Thus, the factual disagreement is not material.

alert and he walked to the ambulance to be transported to the hospital in Claremore.

Brigan was later transported from the Claremore hospital to a hospital in Tulsa. He was released from the Tulsa hospital on the afternoon of Saturday, February 11, 1995, and was transported to jail. Brigan's head was not bandaged when he left the hospital.

Brigan contacted the FBI after his arrest and complained that his civil rights had been violated. Brigan was interviewed by the FBI and by Justice Department lawyers concerning his allegations. FBI agents or Justice Department lawyers also interviewed McQueen and Prather. The Justice Department ultimately issued a report finding that Brigan's civil rights were not violated.

As a result of the February 10, 1995 incident, Brigan pleaded no contest to two felony charges, assault and battery with a dangerous weapon, an automobile, and assault with a dangerous weapon, an automobile, and was convicted and sentenced to ten (10) years imprisonment. Both felony convictions were for Brigan's actions toward the two Rogers County sheriff deputies.

On February 10, 1997, Brigan brought this action, pursuant to 42 U.S.C. § 1983, claiming in part that Baker, McQueen and Prather used excessive force to effectuate his arrest in violation of the Fourth and Fourteenth Amendments.

The standards relating to the disposition of a case on a motion for summary judgment are well established.

Summary judgment should be granted where, taking the facts in the light most favorable to the non-moving party, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of

law. Upon a motion for summary judgment, the moving party bears the burden of showing the absence of a genuine issue of material fact. The burden then shifts to the non-moving party to produce evidence creating a genuine issue of material fact to be resolved at trial. To avoid summary judgment, the non-moving party must present more than "a mere scintilla of evidence." There must be enough evidence to allow a reasonable jury to find for the non-moving party. The non-movant "may not rest upon mere allegations or denials" of the pleadings, but must "set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof."

Wilson v. Meeks, 52 F.3d 1547, 1551-52 (10th Cir. 1995).

Excessive force claims must be analyzed under the Fourth Amendment. Graham v. Connor, 490 U.S. 386, 395 (1989). "[T]he right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Id. at 396. "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interest'" against the countervailing governmental interests at stake." Id. As the Supreme Court explained,

the "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . With respect to a claim of excessive force . . . [n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers . . . violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.

Id. at 396-397 (internal citations and quotations omitted).

Relevant factors in determining whether the force used by an

arresting officer was objectively reasonable include: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. Id. at 396.

The uncontroverted facts establish that Brigian initiated a high speed car chase and failed to stop his vehicle until it crashed into a ditch. Baker and McQueen had heard the "shots fired" report broadcast on the police radio. They did not know until after the incident was over that the shots had been fired by the deputy sheriffs. Believing Brigian may have been armed, Baker and McQueen attempted to get Brigian to release his hands from under his body. Brigian, however, failed to release his hands. Baker hit Brigian once in the shoulder with the flashlight and McQueen hit Brigian above the elbow with his fist in an effort to get Brigian to bring his hands out from under his body. The Court finds that the force used by Baker and McQueen was objectively reasonable under the totality of the circumstances.

In his deposition, Brigian testified that he was hit with a billy club and was kicked in the ribs. Brigian, however, has no admissible evidence to show that either Baker or McQueen took such action against him. Nor is there any admissible evidence that Prather took such action against Brigian. Brigian notified the Court that the affidavits of Rogers County deputy sheriffs, Dewey A. Johnson, Jr. and Shannon Cook, would raise a genuine issue of fact as to the reasonableness of the force used by Defendants in this

case. However, Brigan has not produced these affidavits within the time granted by the Court. Brigan submitted the affidavit of Roy G. Clugston, Jr., an investigator for the Rogers County Sheriff's Department. Mr. Clugston's affidavit, however, constitutes hearsay evidence, and is not proper evidence to defeat a summary judgment motion. Thomas v. International Business Machines, 48 F.3d 478, 485 (10th Cir. 1995).³ Therefore, Brigan has failed to raise a genuine issue of fact that Baker and McQueen's use of force to effectuate his lawful arrest was unreasonable.

As to Prather, the undisputed evidence shows that he was not involved in subduing Brigan. To the extent that Brigan is asserting a claim against Prather for "failure to intervene," the Court finds that Prather is entitled to summary judgment on such a claim. Having failed to establish a case of excessive force against Baker and McQueen, Plaintiff has no claim against Prather for failure to intervene to prevent excessive force. See generally, Mick v. Brewer, 76 F.3d 1127, 1136 (10th Cir. 1996) (defining scope of failure to intervene).

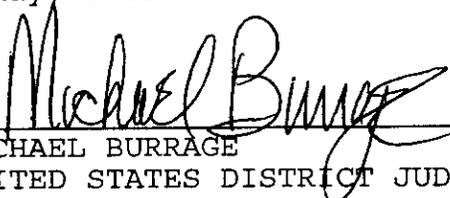
Because the Court has determined Brigan was not deprived of

³ The Court notes that statements in Clugston's affidavit contradict Brigan's own sworn testimony about what happened after he was handcuffed by the Claremore police officers. Clugston's affidavit states that he was told by Dewey A. Johnson, Jr. that Baker slammed Brigan's head on a vehicle after Brigan had been handcuffed. Brigan, however, testified that there was nothing that happened on the trunk that harmed him and he did not remember his face being slammed into the back window of a law enforcement vehicle. Deposition of Michael Frank Brigan, pp. 56 & 88, attached to Defendant's Reply. The Court need not address whether a third party, not present at the alleged incident, can dispute a party's account of what happened. As stated, Clugston's affidavit is inadmissible hearsay.

his rights under the Fourth Amendment, the Court need not address the issue of qualified immunity.

Based upon the foregoing, the Motion for Summary Judgment filed by Defendants, Bryan Baker, Lee McQueen and Jerry Prather (Docket Entry #18) is GRANTED. Judgment shall issue forthwith.

ENTERED this 13th day of May, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAY 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROSIE P. ADAMS,Plaintiff,)
)
 v.)
)
 OAK CREEK HOMES, INC.)
 and NATIONWIDE HOUSING)
 SYSTEMS, INC., formerly)
 NATIONWIDE OF MESQUITE.)
 INC., d/b/a NATIONWIDE)
 MOBILE HOMES,Defendants.)

No. 97-CV-1102-BU(J)

ENTERED ON DOCKET
DATE MAY 13 1998

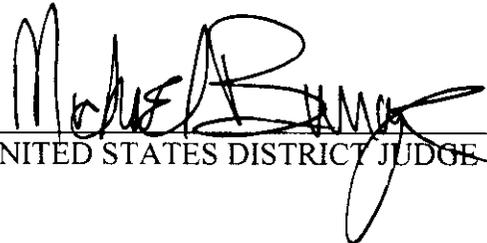
ORDER ALLOWING DISMISSAL OF PLAINTIFF'S CLAIMS
AGAINST DEFENDANT NATIONWIDE HOUSING SYSTEMS, INC.,
FORMERLY NATIONWIDE OF MESQUITE, INC., d/b/a
NATIONWIDE MOBILE HOMES, WITHOUT PREJUDICE

NOW, on this 12th day of ~~February~~ ^{May}, 1998, the Court, being fully advised and having reviewed Plaintiff's MOTION FOR ORDER ALLOWING DISMISSAL OF ACTION WITHOUT PREJUDICE AS TO DEFENDANT NATIONWIDE HOUSING SYSTEMS, INC., FORMERLY NATIONWIDE OF MESQUITE, INC., D/B/A NATIONWIDE MOBILE HOMES ONLY, and Defendants' response to said Motion, hereby grants Plaintiff's Motion and dismisses without prejudice all of the Plaintiff's claims against the said Defendant Nationwide. It is further directed that Plaintiff not recommence any action against the said Defendant Nationwide in any State Court, wherein such action contains any of the causes of action plead by Plaintiff against Defendant Nationwide in the case at bar.

If Plaintiff does recommence any action in Federal Court against the said Defendant Nationwide and realleges causes of action plead in the case at bar which are being dismissed, then

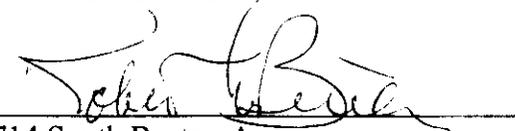
20

Defendant Nationwide shall have available to it such remedies as provided by law concerning costs and fees.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

ROBERT M. BUTLER, OBA#1380
Counsel for Plaintiff


1714 South Boston Avenue
Tulsa, Oklahoma 74119
Telephone (918) 585-2797
Facsimile (918) 585-2798

CROWE & DUNLEVY, P.C.
Counsel for Defendants

By: 
MICHAEL J. GIBBENS, OBA#3339
500 Kennedy Building
321 South Boston Avenue
Tulsa, Oklahoma 74103-3313
Telephone (918) 592-9800
Facsimile (918) 592-9801

and
CAMI D. BOYD, ESQ.
JACKSON WALKER, L.L.P.
901 Main Street, Suite 8000
Dallas, Texas 75202
Telephone (214) 953-5000
Facsimile (214) 953-5822
Co-Counsel for Defendants

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

UNITED STATES CELLULAR)
TELEPHONE OF GREATER TULSA,)
L.L.C., an Oklahoma Limited Liability)
Company,)
)
Plaintiff,)
)
v.)
)
BOARD OF ADJUSTMENT OF THE CITY)
OF TULSA, OKLAHOMA,)
)
Defendant.)

FILED

MAY 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-68BU(J)

ENTERED ON DOCKET
DATE MAY 13 1998

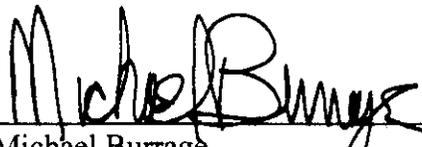
JUDGMENT

In accordance with the Order entered by this Court on May 12, 1998, this Court finds that Plaintiff's Motion for Summary Judgment should be granted, and that the application for special exception sought by Plaintiff to place a 120 foot cellular transmission tower on certain property located near East 111th Street and South Yale Avenue in Tulsa, Oklahoma (which application is appended to Plaintiff's Motion for Summary Judgment as Exhibit A, HR3, and more fully describes the property) should be granted per the site plan attached to the application (Exhibit A, HR2 of Plaintiff's Motion for Summary Judgment).

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment be entered in favor of Plaintiff and against Defendant for the relief sought by Plaintiff in its Complaint, and that the application for special exception appended to Plaintiff's Motion for Summary Judgment at Exhibit A, HR3 be granted, per the site plan attached

to that application at Exhibit A, HR2.

IT IS SO ORDERED this 12th day of May, 1998.



Michael Burrage
UNITED STATES DISTRICT JUDGE

Judgment should be granted, and judgment in Plaintiff's favor granting the relief sought by Plaintiff should be entered.

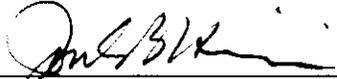
IT IS THEREFORE ORDERED that the Joint Application to Enter Judgment be granted, Plaintiff's Motion for Summary Judgment be granted, and judgment be entered in favor of Plaintiff for the relief sought by Plaintiff in its Complaint.

Dated the 12th day of May, 1998.



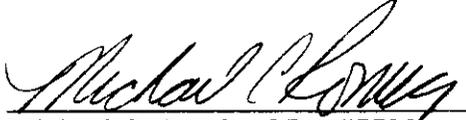
Michael Burrage
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:



Kevin C. Coutant, OBA No. 1953
Jon E. Brightmire, OBA No. 11623
Shelly L. Dalrymple, OBA No. 15212
DOERNER, SAUNDERS, DANIEL
& ANDERSON, L.L.P.
320 South Boston, Suite 500
Tulsa, OK 74103-7325
(918) 582-1211

Attorneys for Plaintiff



Michael C. Romig, OBA #7738
John E. Dorman, OBA #11289
Mark D. Swiney, OBA #11540
Office of the City Attorney
200 Civic Center, Room 316
Tulsa, OK 74103
(918) 596-7717

Attorneys for Defendant

Am. fayed

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

MAY 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT L. WARD,)
)
Plaintiff,)
)
vs.)
)
DOLLAR RENT-A-CAR SYSTEMS,)
INC.,)
)
Defendant.)

Case No. 97-CV-655-BU

ENTERED ON DOCKET
DATE MAY 13 1998

ORDER

This matter comes before the Court upon the Motion for Summary Judgment filed by Defendant, Dollar Rent-A-Car Systems, Inc. Plaintiff, Robert L. Ward, has responded to the motion and Defendant has replied thereto. Upon due consideration, the Court makes its determination.

In his Complaint filed on July 16, 1997, Plaintiff alleges that Defendant discriminated against him during his employment in violation of the Americans With Disability Act of 1990 ("ADA"), 42 U.S.C. § 12101, et seq. Specifically, Plaintiff claims that Defendant failed to accommodate his disability and terminated his employment because of the disability.

Defendant, in the instant motion, contends that it is entitled to summary judgment because Plaintiff cannot establish a prima facie case under the ADA. Defendant contends that there is no evidence that Plaintiff was disabled as defined by the ADA. Defendant, in particular, asserts that there is no evidence that Plaintiff's alleged impairment substantially limited the major life activity of working. According to Defendant, there is no evidence

27

fayed

that Plaintiff suffered a significant restriction in his ability to perform either 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. Defendant argues that Plaintiff's own testimony reveals that he has sought and obtained jobs similar to the one he had with Defendant. Defendant contends that Plaintiff's inability to perform one aspect of his job, i.e. lifting boxes, while retaining the ability to work in general is not a substantial limitation on the major life activity of working.

In addition, Defendant asserts that Plaintiff cannot establish a prima facie case because he cannot show his termination was related to any physical limitations which he may have had. Defendant asserts that when Plaintiff received the less than satisfactory appraisals from his supervisors, which ultimately led to his dismissal, he was not subject to any working restrictions. Furthermore, Defendant contends that there is no evidence that any of Plaintiff's supervisors demonstrated any animosity toward him during his employment because of the alleged physical condition.

In response, Plaintiff asserts that he was disabled as defined by the ADA. Plaintiff contends that the evidence shows he suffered a physical impairment of his musculoskeletal and neurological systems. Plaintiff asserts that due to his impairment, he was placed under 10-pound lifting and sitting work only restrictions. Plaintiff contends that these restrictions substantially limited the major life activities of performing manual tasks, lifting, reaching and working. In regard to the

major life activity of working, Plaintiff asserts that his impairment only permitted him to be eligible for jobs in the Sedentary Work category defined by the Dictionary of Occupational Titles. Because his impairment excluded him from any jobs in the Light Work and Medium Work categories defined by the Dictionary of Occupational Titles, Plaintiff argues that his impairment significantly restricted his ability to perform a class of jobs or a broad range of jobs.

Plaintiff additionally contends that the record establishes that Defendant discriminated against him because of his physical impairment. Plaintiff states that while he may not have been under the 10-pound lifting and sitting work only restrictions at the time of his less than satisfactory appraisals, he was indeed experiencing back and neck problems of which Defendant was aware. Plaintiff asserts that he received one poor performance appraisal after he had provided Defendant with a statement of his medical condition. In addition, Plaintiff contends that his supervisors demonstrated animosity toward him. Plaintiff asserts that one of his supervisors, Dondi Click, made comments requiring Plaintiff to move boxes or lose his job. Plaintiff also asserts that he was given deductions in his appraisals for absenteeism even though the absences were due to medically necessary reasons. Furthermore, Plaintiff contends that Defendant showed animosity toward him by failing to comply with its own Anti-Harassment/Non-Discrimination policy when he forwarded a letter to the Human Resources Department and failing to provide an accommodation chair which he continually

requested.

In reply, Defendant argues that Plaintiff has failed to offer any admissible evidence that he was disabled. According to Defendant, Plaintiff has only offered various notes from doctors and his own self-serving testimony to support his physical impairment. Defendant contends that the doctors' notes are not sworn testimony. Moreover, Defendant asserts that the notes do not address the nature and severity of his impairment, the duration of his impairment or the permanent long term impact or the expected permanent or long term impact of the impairment. Additionally, Defendant contends that Plaintiff's testimony concerning his impairment is conclusory. Defendant further contends that Plaintiff has failed to present evidence that he was unable to perform a broad range or class of jobs.

Summary judgment is appropriate when there is no genuine issue of material fact and, as a matter of law, the moving party is entitled to judgment. Fed. R. Civ. P. 56(c). In considering a summary judgment motion, the Court views the evidence in the light most favorable to the nonmoving party. Phelps v. Hamilton, 122 F.3d 1309, 1318 (10th Cir. 1997). If a reasonable trier of fact could not return a verdict for the nonmoving party, summary judgment is proper. White v. York Int'l Corp., 45 F.3d 357, 360 (10th Cir. 1995).

"Under the ADA, it is illegal for an employer to `discriminate against a qualified individual with a disability because of the disability of such individual.'" Siemon v. AT&T Corporation, 117

F.3d 1173, 1175 (10th Cir. 1997) (quoting 42 U.S.C. § 12112(a)). "A 'qualified individual with a disability' means a person with (1) a 'disability' who (2) can perform the essential functions of the employment position, with or without 'reasonable accommodation.'" Id. (quoting 42 U.S.C. § 12111(8)). Thus, to establish a prima facie case of disability discrimination under the ADA, Plaintiff must demonstrate that: (1) he is a disabled person within the meaning of the ADA; (2) he is qualified, i.e., able to perform the essential functions of the job, with or without reasonable accommodation, and (3) Defendant terminated him because of his alleged disability. White, 45 F.3d at 360-361. As previously stated, Defendant contends that Plaintiff cannot prove that he was a disabled person or that he was terminated because of his alleged disability.

For purposes of the ADA, the term "disability" means "a physical or mental impairment that substantially limits one or more of the major life activities of [the] individual." 42 U.S.C. § 12102(2)(A). Working is a major life activity. Bolton v. Scrivener, Inc. 36 F.3d 939, 942 (10th Cir. 1994), cert. denied, 513 U.S. 1152, 115 S.Ct. 1004, 130 L.Ed.2d 1071 (1995). Reaching and lifting are also considered major life activities. Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170, 1173 (10th Cir. 1996).

With respect to the major life activity of working, the ADA regulations provide that:

The term substantially limits means significantly restricted in the ability to perform either 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. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i). see also, Bolton, 36 F.3d at 942.

To defeat summary judgment, Plaintiff must present evidence from which a reasonable jury could find that his impairment restricts his ability to perform either a class of jobs or a broad range of jobs in various classes.

The ADA regulations specify three factors relevant in considering whether an impairment substantially limits a major life activity: (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment; and (3) the permanent long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. § 1630.2(j)(2); Sutton v. United Air Lines, Inc., 130 F.3d 893, 900 (10th Cir. 1997). When the issue is whether the impairment substantially limits the individual's life activity of work, three additional factors become relevant: (1) the geographical area to which the individual has reasonable access; (2) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or (3) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual

is also disqualified because of the impairment (broad range of jobs in various classes). 29 C.F.R. § 1630.(2)(j)(3)(ii); see also, Bolton, 36 F.3d at 943.

Upon review, the Court finds that summary judgment is appropriate. Plaintiff has failed to present sufficient evidence to raise a genuine issue that he was a disabled person as defined by the ADA. Clearly, Plaintiff's proof that his physical impairment substantially limited the major life activity of working is deficient. Plaintiff has failed to present adequate evidence to show that his impairment prevented him from doing an entire class of jobs or a broad range of jobs in various classes. Plaintiff has submitted no evidence of his vocational training, the geographical area accessible to him, or the number and type of jobs with similar training or skill requirements from which Plaintiff would also be disqualified by reason of his impairment. Bolton, 36 F.3d at 944. Plaintiff has offered nothing to demonstrate his level of skills, training or abilities for purposes of determining comparable work. Plaintiff has further failed to submit evidence of other available jobs that his impairment disqualified him from performing.

In addition, Plaintiff has not submitted any evidence for the Court to conduct an analysis of the nature, duration and impact of his impairment. While the record contains various notes of his doctors, these notes do not in any way address the duration or expected duration of the impairment or the long term impact of or resulting from the impairment. The Court finds these notes, alone, are insufficient to prove an impairment that substantially limits

the major life activity of working. Dotson v. Electro-Wire Products, Inc., 890 F.Supp. 982, 990 (D. Kan. 1995).

At best, the evidence in the record shows that Plaintiff's impairment prevented him from doing only one aspect of his job--the lifting of boxes. The inability to perform one aspect of a job while retaining the ability to perform the work in general does not amount to substantial limitation of the activity of working." Burgard v. Super Valu Holdings, Inc., 1997 WL 278974 (10th Cir. 1997)¹(citing Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 727 (5th Cir. 1995)). Plaintiff never argues that his impairment prevented him from doing his regular work as an accounting clerk. As pointed out by Defendant, the evidence reveals that Plaintiff has sought and has obtained jobs similar to the his former job. See, Plaintiff's Deposition, pp. 176-177, Exhibit to Defendant's Motion. Without any proof that Plaintiff's impairment significantly restricted his ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person with comparable training, skills, and abilities, the Court finds that Plaintiff has failed to meet his burden of demonstrating an impairment that substantially limits the major life activity of work.

Plaintiff has stated in his response that his impairments substantially limit the major life activities of performing manual

¹ The Court has not attached this unpublished decision to this Order as it was attached as an exhibit to Defendant's Motion.

tasks,² lifting and reaching. The Court, however, finds that Plaintiff has failed to offer sufficient evidence to demonstrate that he had a substantial limitation on these activities.

In light of Plaintiff's failure to present sufficient evidence to establish that he was a disabled person within the meaning of the ADA, the Court finds that Defendant is entitled to summary judgment on Plaintiff's ADA claim. The Court need not address Defendant's alternative argument that Plaintiff cannot establish that he was terminated because of the physical limitations he may have had.

Based upon the foregoing, the Motion for Summary Judgment filed by Defendant, Dollar Rent-A-Car (Docket Entry #20) is GRANTED. Judgment shall issue forthwith.

ENTERED this 12th day of May, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

² Performing manual tasks is also considered a major life activity. 29 C.F.R. § 1630.2(i).

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

FILED

MAY 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT L. WARD,)
)
Plaintiff,)
)
vs.)
)
DOLLAR RENT-A-CAR SYSTEMS,)
INC.,)
)
Defendant.)

Case No. 97-CV-655-BU ✓

ENTERED ON DOCKET
DATE MAY 13 1998

JUDGMENT

This matter came before the Court upon Defendant, Dollar Rent-A-Car Systems, Inc.'s Motion for Summary Judgment, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendant, Dollar Rent-A-Car Systems, Inc., and against Plaintiff, Robert L. Ward, and that Defendant, Dollar Rent-A-Car Systems, Inc., is entitled to recover of Plaintiff, Robert L. Ward, its costs of action.

DATED at Tulsa, Oklahoma, this 12th day of May, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

28

faxed

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 5-13-98

UNITED STATES OF AMERICA,

Plaintiff,

v.

KYLE A. ARMSTRONG,

Defendant.

)
)
)
) No. 98CV0077K(M)
)
)
)
)

F I L E D

MAY 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of May 12, 1998 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendant, **Kyle A. Armstrong**, against whom judgment for affirmative relief is sought in this action has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendant.

Dated at Tulsa, Oklahoma, this 12 day of May, 1998.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By A. Schweerke
Deputy Court Clerk for Phil Lombardi

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

F I L E D
MAY 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DENNIS C. DVORAK, an individual,)
)
Plaintiff,)
)
vs.)
)
ROBERTSHAW CONTROLS COMPANY,)
a foreign corporation, et al.)
)
Defendant,)

Case No. 98-CV-0036B (M)

ENTERED ON DOCKET

DATE MAY 13 1998

ORDER

Now on this 11th day of May, 1998, comes on for hearing Plaintiff Dvorak's Motion to Remand (Docket #3) and the Court, being fully advised finds the same shall be granted.

Plaintiff asserts failure of Defendant to comply with the requirements of 28 U.S.C.A. § 1446(a) mandating that the party seeking removal recite in its Notice of Removal specific facts vesting the Court with original jurisdiction, in this instance jurisdictional amount. Defendant counters that it has complied with the statutory requirements as interpreted by applicable case law. Specifically, Defendant attached to its Notice of Removal a final demand letter to Defendant from the Senior Claims Representative for State Farm Insurance Company stating damages sustained in a fire to Plaintiff's property, the event which triggered the litigation, to be in the amount of \$51,275.14. Additionally, Defendant attached an affidavit from counsel stating attorney fees, to which Plaintiff would be entitled pursuant to Okla. Stat., tit. 12 § 940 A

6

(1998), will exceed \$24,000, thereby meeting the jurisdictional requirement for removal. Plaintiff did not reply to Defendant's opposition brief, however, in the case management plan submitted to the Court, Plaintiff asserted his estimated attorney's fees through trial would be \$25,000.00, thereby initially appearing to concede the remand issue. However, Plaintiff also included a statement for the first time that the amount in controversy is \$36,942.00 plus prevailing party legal [attorney's fees].

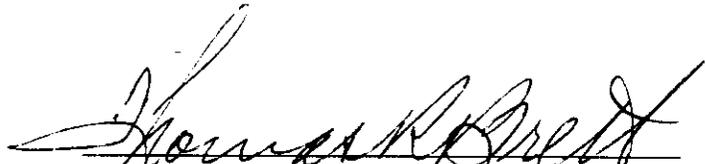
Upon inquiry by the Court at case management conference, Plaintiff stated that the \$51,275.14 demand in the letter attached by Defendant to the Notice of Removal included an amount representing replacement costs which are not recoverable under the subrogation law of the state of Oklahoma, thereby reducing Plaintiff's claim for actual damages to \$36,942.00. Plaintiff represented to the Court that he could not and would not seek actual damages above that amount. When added to the conceded attorney's fees of \$25,000.00, this falls well below the jurisdictional amount required for removal.

The burden is upon the party seeking removal to set forth, in the notice of removal itself, the underlying facts supporting the assertion that the amount in controversy exceeds the jurisdictional amount. Laughlin v. Kmart Corp., 50 F.3d 871 (10th Cir. 1995). Further, there is a presumption against removal jurisdiction. This must be considered with the need for the Court to be vigilant in preventing plaintiffs from manipulating the process in order to void an otherwise valid removal. See discussion of Shaw v. Dow Brands, Inc., 994 F.2d 364 (7th Cir. 1993) in Laughlin.

The Court finds Defendant failed to establish, by the required burden of proof, the amount in controversy through the demand letter submitted along with the Notice of Removal.

The demand letter does not include an economic analysis and/or breakdown of the basis for the amount sought sufficient to overcome the legal presumptions which must be weighted toward Plaintiff's choice of forum. Plaintiff's Motion to Remand is therefore granted and the case is remanded to the District Court of Tulsa County, Oklahoma. Each party is to bear its own costs and attorney's fees. The Clerk of Court is directed to take the necessary action to remand this case without delay.

IT IS SO ORDERED.



THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

MAY 11 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

ROYCE EARL OLSON, JR.,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

)
)
)
)
)
)
)
)
)
)

Case No. 96-CV-637-B (J)

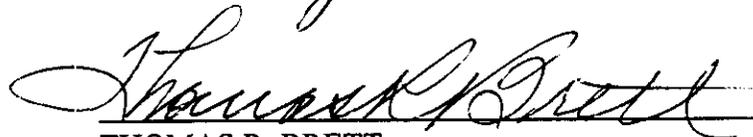
ENTERED ON DOCKET
DATE MAY 12 1998

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 11th day of May, 1998.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

16

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

FILED

MAY 11 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES KENT MITCHELL,)
)
 Petitioner,)
)
 vs.)
)
 RITA MAXWELL,)
)
 Respondent.)

Case No. 96-CV-705-C

ENTERED ON DOCKET

DATE MAY 12 1998

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 11 day of May, 1998.



H. DALE COOK
UNITED STATES DISTRICT JUDGE

9

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

FILED

MAY 11 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KEN CUNNINGHAM,)

Plaintiff,)

vs.)

21st CENTURY TECHNOLOGIES,)
INC., a corporation; KEN WILSON,)
an individual, et al.,)

Defendants.)

No. 97-CV-004-H

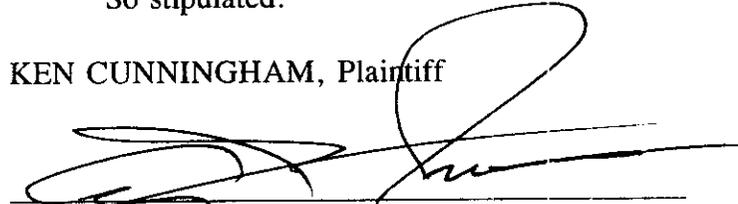
ENTERED ON DOCKET
MAY 12 1998
DATE

STIPULATION AND NOTICE OF DISMISSAL

All parties who have appeared in this action hereby submit this Stipulation and Notice of Dismissal pursuant to Rule 41(a)(1), Fed. R. Civ. P.

So stipulated.

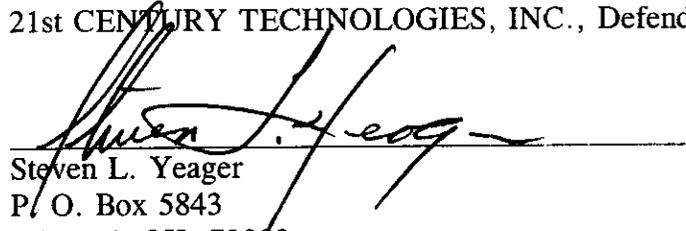
KEN CUNNINGHAM, Plaintiff


Anthony P. Sutton, OBA #8781
Herrold Herrold Sutton & Davis, P.A.
2250 East 76rd Street, Suite 600
Tulsa, OK 74136-6835
918/491-9559
Attorney for Plaintiff

Date

5-11-98

21st CENTURY TECHNOLOGIES, INC., Defendant


Steven L. Yeager
P. O. Box 5843
Edmond, OK 73083
405/341-4046
Attorney for 21st Century Technologies, Inc.

Date

4-18-98

Ken Wilson

KEN WILSON, Defendant
2513 East Loop 820 North
Fort Worth, TX 76118

5-4-98

Date

Patricia Wilson

PATRICIA WILSON, Defendant
2513 East Loop 820 North
Fort Worth, TX 76118

5-4-98

Date

Dave Gregor

DAVE GREGOR, Defendant
2513 East Loop 820 North
Fort Worth, TX 76118

5-4-98

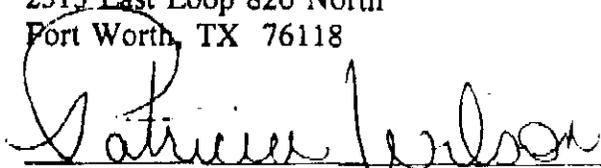
Date

FRED W. RAUSCH JR., Defendant
220 S.W. 33rd Street, Suite 201
Topeka, KS 66611

Date

aps\85

KEN WILSON, Defendant
2513 East Loop 820 North
Fort Worth, TX 76118



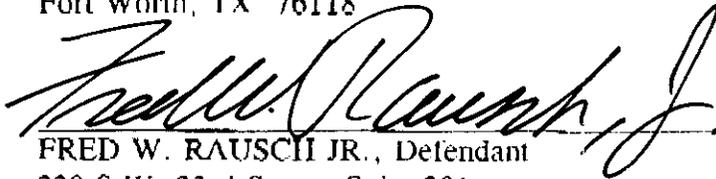
PATRICIA WILSON, Defendant
2513 East Loop 820 North
Fort Worth, TX 76118

Date

5-4-98

Date

DAVE GREGOR, Defendant
2513 East Loop 820 North
Fort Worth, TX 76118



FRED W. RAUSCH JR., Defendant
220 S.W. 33rd Street, Suite 201
Topeka, KS 66611

Date

May 8, 1998

Date

ups:85

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

INDUSTRIAL POWER, BUSINESS SERVICES)
and VELMA ROSE GAY, trustee,)
)
Plaintiffs,)
v.)
UNITED STATES of AMERICA, INTERNAL)
REVENUE SERVICE)
)
Defendants.)

ENTERED ON DOCKET

DATE 5-12-98

Case No. 97-C-483-H ✓

FILED

MAY 11 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on a motion to dismiss by Defendant United States of America (Docket # 22). Defendant contends that a trustee -- in this case, Velma Rose Gay -- may not bring a lawsuit on behalf of a trust. As a result, Defendant further contends that this action cannot proceed until the plaintiff trusts are represented by counsel.

Ms. Gay initially brought this action against the United States, Arkansas Valley State Bank, and Boatmen's First National Bank. The Internal Revenue Service (the "Service") had issued notices of levy to the defendant banks, maintaining that the funds held in accounts in those banks were in fact the personal property of taxpayer Bill Joe Loghry who allegedly had unpaid federal tax liability. Pursuant to such notices, the defendant banks were required by law to deliver the funds in the subject accounts to the Service. 26 U.S.C. § 6332(a), (c). Ms. Gay claimed that the bank accounts in question were not owned by Mr. Loghry, but instead were owned by two trusts, Industrial Power and Business Services. At the hearing held on May 21, 1997, the parties agreed that, rather than delivering the funds in the subject accounts to the Service as required by the notice of levy, such funds would be remitted to the registry of the Court until the instant case was resolved. See Order of June

11, 1997 (Docket # 5). Defendant banks were dismissed from this case once the funds were deposited with the Court.

The Court held a status conference in this case on March 4, 1998. Ms. Gay was unable to attend as she was recovering from surgery. The Court informed Ms. Gay's representative, Richard Maynor Blackstock, that it intended to continue the status conference and that it further desired to allow Ms. Gay a period of time within which to secure counsel to represent the interest of the trusts in this lawsuit. See Minute Order of March 4, 1998.

A second status conference was held in this matter on March 20, 1998. Ms. Gay appeared at this conference by telephone. The Court found that as a matter of law a non-lawyer trustee may not represent its trust in a legal action; instead, the trust must be represented by counsel. C.E. Pope Equity Trust v. United States, 818 F.2d 696 (9th Cir. 1987). Accordingly, the Court ordered Ms. Gay to cause counsel to file an entry of appearance in this case no later than April 10, 1998. Ms. Gay stated that she was seeking counsel to represent the trusts. The Court expressly warned Ms. Gay that Defendant's motion would be granted and this lawsuit would be dismissed if she did not cause an attorney to enter an appearance on behalf of the trusts on or before April 10, 1998.

Ms. Gay has failed to cause an attorney to file an entry of appearance on behalf of the trusts in this case within the period ordered by the Court. In fact, to date no attorney has entered an appearance in this case on behalf of the plaintiff trusts. Ms. Gay cannot represent the trusts in this litigation; this action may not proceed because the trusts are not represented by counsel. The trusts here have failed to prosecute this action because they are not represented by counsel in the manner required by law.

For the above stated reasons, Defendant's motion to dismiss is hereby granted. The Court notes that it has not considered the merits of the claims asserted by the plaintiff trusts. The Court

orders that the funds deposited with the Court hereby be released to the Service because as required by applicable federal law, the defendant banks would have paid such funds to the Service pursuant to the initial notices of levy but for the initiation of the instant lawsuit.

The Court directs the Court Clerk to withdraw the funds from the interest-bearing account in the principal amount of \$13,089.57 plus accrued interest, and to disburse principal and interest amounts, less the appropriate registry fee, to the Service.

IT IS SO ORDERED.

This 8TH day of May, 1998.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 PATRICK J. DOWNES,)
)
 Defendant.)

ENTERED ON DOCKET

DATE 5-12-98

Civil Action No. 98CV0015H

FILED

MAY 11 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**AMENDED
DEFAULT JUDGMENT**

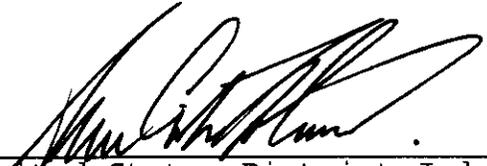
This matter comes on for consideration this 8TH day of May, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Patrick J. Downes, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Patrick J. Downes, acknowledged receipt of Summons and Complaint on February 1, 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, Patrick J. Downes, for the principal amount of \$5,831.08 and \$7,993.58, plus accrued interest of \$2,998.61 and \$3,631.87, plus interest thereafter at the rate of 8 and 7.51% percent per annum until

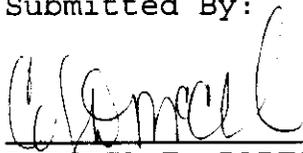
7

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:



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

LFR/jmo

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 5-12-98

MICHAEL DOWN; DAVID DOWN,
individually and on behalf of
JONATHAN DOWN, a minor;
JULIE DOWN, individually and on
behalf of JONATHAN DOWN, a minor,

Plaintiffs,

vs.

BAXTER HEALTHCARE CORPORATION,
a Delaware corporation,
individually and d/b/a BAXTER
HYLAND; and BAXTER INTERNATIONAL,
INC., a Delaware Corporation,
individually and d/b/a BAXTER
HYLAND; and BAXTER HYLAND,

Defendants.

F I L E D

MAY 11 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 95 C 1253K /

STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED that the above-entitled action be
dismissed with prejudice, each party to bear their own costs.

**SHERMAN, DAN, PETOYAN,
SALKOW & WEBER**

DATED: 4-22-, 1998

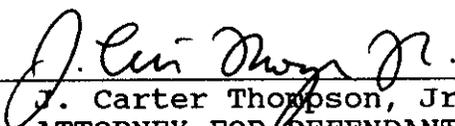
By:


Arthur Sherman
ATTORNEY FOR PLAINTIFFS

**BUTLER, SNOW, O'MARA, STEVENS &
CANNADA, PLLC**

DATED: May 8, 1998

By:


J. Carter Thompson, Jr. (MSB #8195)
ATTORNEY FOR DEFENDANT
BAXTER HEALTHCARE CORPORATION

Re

198

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

MAY 8 1998

TIMOTHY W. CLARK,)
)
 Plaintiff,)
)
 v.)
)
 ERLANGER TUBULAR CORPORATION,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-1062-H

ENTERED ON DOCKET

DATE 5-11-98

AMENDED JUDGMENT

This matter comes before the Court on a motion for the addition of prejudgment interest to the judgment (Docket # 32) by Plaintiff Timothy Clark. Plaintiff requests that the Court amend its judgment in this case to reflect the addition of prejudgment interest.

Entitlement to prejudgment interest is governed by state law. Key v. Liquid Energy Corp., 906 F.2d 500, 506 (10th Cir. 1990). Under Oklahoma law,

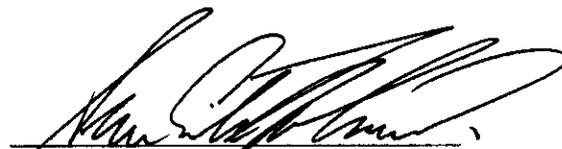
[w]hen a verdict for damages by reason of personal injuries or injury to personal rights including, but not limited to, injury resulting from bodily restraint, personal insult, defamation, invasion of privacy, injury to personal relations, or detriment due to an act or omission of another is accepted by the trial court, the court in rendering judgment shall add interest on said verdict at a rate prescribed pursuant to subsection B of this section from the date the suit was commenced to the date of verdict

Okla. Stat. tit. 12, § 727(A). Subsection B, which governs the rate of such interest, is calculated "at an annual rate equal to the average United States Treasury Bill rate of the preceding calendar year as certified to the Administrative Director of the Courts by the State Treasurer on the first regular business day in January of each year, plus four percentage points." Okla. Stat. tit. 12, § 727(B).

Accordingly, the judgment entered on the docket in this case on March 5, 1998 is hereby amended to include prejudgment interest in the amount of \$14,120.87. This interest is added to the principal award of \$119,000. Judgment is therefore entered in favor of Plaintiff and against Defendant in the amount of \$133,120.87. Plaintiff's motion for the addition of prejudgment interest (Docket # 32) is hereby granted.

IT IS SO ORDERED.

This 6TH day of May, 1998.



Sven Erik Holmes
United States District Judge

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

THAO DINH LE,

Defendant.

ENTERED ON DOCKET

DATE 5-11-98

Case No. 97-CR-84-H ✓

FILED

MAY 11 1998

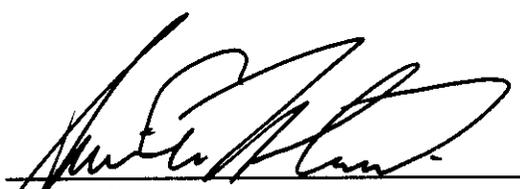
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Plaintiff's motion to dismiss certain counts of the Second Superseding Indictment without prejudice. For good cause shown, Plaintiff's motion is hereby granted. Counts One, Two, Four, Seven, Eight, and Nine of the Second Superseding Indictment against Defendant Thao Dinh Le are hereby dismissed without prejudice.

IT IS SO ORDERED.

This 8TH day of May, 1998.


Sven Erik Holmes
United States District Judge

30