

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MINNIE P. JONES,
SSN: 465-76-8120,

Plaintiff,

v.

KENNETH S. APFEL,¹
Commissioner of Social Security,

Defendant.

JUN - 8 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-802-EA

ENTERED ON DOCKET

DATE JUN 10 1998

ORDER

Claimant, Minnie P. Jones, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of Social Security ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.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 be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

² On October 28, 1991, claimant applied for disability benefits under Title II (42 U.S.C. § 401 *et seq.*), with a protective filing date of September 30, 1991. Claimant's application for benefits was denied in its entirety initially (December 11, 1991) and on reconsideration (February 7, 1992). A hearing before Administrative Law Judge Glen E. Michael ("ALJ") was held October 22, 1992 in Tulsa, Oklahoma. By decision dated April 23, 1993, the ALJ found that claimant was not disabled within the meaning of the Social Security Act on or before December 31, 1991 (the date claimant was last insured for disability insurance benefits under Title II). By decision dated September 21, 1993, the Appeals Council vacated the April 23, 1993 decision of the ALJ and remanded the case for further proceedings. A second hearing before the ALJ was held April 15, 1994 in Tulsa, Oklahoma. On January 10, 1995, the ALJ found that claimant was not disabled within the meaning of the Social Security Act. On August 1, 1996, the Appeals Council denied review of the ALJ's findings. Thus, the January 10, 1995 decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981.

Claimant appeals the decision of the Commissioner, alleging that the ALJ failed to properly evaluate claimant's severe mental impairment, failed to follow the treating physician rule, failed to properly evaluate claimant's hearing impairment, improperly applied the Medical-Vocational guidelines, and failed to properly question the vocational expert. For the reasons discussed below, the Court **REVERSES** the Commissioner's decision and **REMANDS** for further proceedings.

I. CLAIMANT'S BACKGROUND

Claimant was born on April 27, 1948 and lived in Collinsville, Oklahoma at the time of filing her Complaint. Claimant finished the eighth grade and has not obtained a GED high school equivalency certificate. She has worked as a cook, with some management responsibilities, and a waitress. Claimant says that she has not been able to work since June 17, 1991 as a result of pain, blackouts, seizures, dizziness, poor balance, nausea, loss of control of legs and arms, muscle pain and spasms in the neck and back, and hearing problems.

II. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

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

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

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991).

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

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 RFC to perform sedentary work, with a further limitation of chronic pain, for which medication could be taken. The ALJ determined that claimant could not perform her past relevant work. However, applying the Medical-Vocational Guidelines, or "grids," as a framework and relying on the testimony of a vocational expert, the ALJ found that there were other jobs existing in significant numbers in the national economy which claimant 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 determined that claimant was not disabled within the meaning of the Social Security Act on or before December 31, 1991.

IV. MEDICAL HISTORY OF CLAIMANT

Medical records indicate that claimant was seen by a doctor on June 19, 1991, complaining of episodes of passing out.⁴ (R. 158) On June 19, 1991, claimant was given an ECG at Claremore Regional Hospital. (R. 157) The result was normal. Id.

On June 20, 1991, claimant was admitted to Claremore Regional Hospital, where she was treated until released on June 22, 1991. (R. 160-167) The discharge summary notes that "[t]he

⁴ The List of Exhibits provided by the Social Security Administration indicates that this medical report is from a "source unknown." (R. 2) Because the medical report states that the case should be referred to Dr. Jay Johnson (R. 158), and also of record is a subsequent letter from Dr. Johnson thanking Dr. Wesley Ingram of Oologah, Oklahoma for referring claimant (R. 170-172), the Court deems it likely that Dr. Ingram is the source of this medical report. Regardless, this report would be given the same weight whether the source is known or unknown.

patient was brought to the emergency room after she was observed to be having a typical seizure, convulsions in her home, in the ambulance and in the emergency room." (R. 160) An EEG performed June 20, 1991 was considered mildly abnormal by the examining doctor because of infrequent left temporal irregularity with occasional sharp morphology. Clearly defined epileptiform patterns were not seen, according to the accompanying report, but the examining doctor noted that "the activity identified is somewhat irritable, and clinical correlation is indicated." (R. 163) The discharge summary listed three possible diagnoses: (1) seizure disorder, (2) myoclonus, or (3) pseudoseizure. (R. 160) Hospital records also noted that claimant admitted to smoking up to two packs of cigarettes per day since age 18 and drinking four pots of coffee per day. (R. 166)

On June 27, 1991, claimant was examined by Dr. Jay K. Johnson of the Tulsa Neurological Clinic. (R. 170-172) Dr. Johnson described his impression of claimant's "seizures" or "spells," stating:

At this point, [claimant] has what sounds like two or three different kinds of spells. She has very unusual spells characterized by the total body shaking without loss of consciousness. She is able to talk through these spells; and these certainly do not sound like seizures and may represent pseudoseizure. . . . It does appear that she has some symptoms of orthostatic hypertension; at least when she stands up, she passed out. . . . There does appear to at least be one spell that sounds like a generalized tonic clonic seizure to me; and, indeed, the spells as described above may be seizures, but are very unusual.

(R. 172) An MRI ordered by Dr. Johnson and performed on July 3, 1991 revealed no remarkable pathology of the brain. (R. 169) In a letter of July 5, 1991 to Dr. Wesley M. Ingram, Dr. Johnson stated that he did not believe that claimant's "spells" were true epileptic seizures. (R. 168) Dr. Johnson said that the spells could possibly be "epileptogenic-type" spells, but noted that the normal

MRI and the only mildly abnormal EEG indicated the contrary. Id. Dr. Johnson raised the possibility that the cause of the spells was psychological, writing:

All in all, . . . I certainly feel that there is an anxiety component to these spells; and in reviewing [claimant's] history, she has had episodes where she shakes and trembles some years past. When I spoke with [Michelle Cloke, claimant's daughter], I recommended a psychological evaluation in order to help control some of these spells. I reassured them that from your medical workup she was cleared medically from a neurologic standpoint. I find no clear neurologic cause for such spells.

(R. 168)

On July 22, 1991, claimant was examined by Dr. Joe Haines upon complaining of a tingling in her leg. Dr. Haines found decreased sensation to pinprick in claimant's right upper arm and both lower extremities. (R. 188) Dr. Haines also noted a possible ear infection at the location of a tympanic membrane perforation previously sustained by claimant. Id.

Dr. Jack R. Wolfe examined claimant on July 28, 1991 and noted impressions of (1) osteoporosis; (2) somatic dysfunction of cervical spine, lumbar spine, and sacrum; and (3) chronic otitis media. (R. 180)

On July 29, 1991, claimant underwent a "structural exam" at the Oklahoma State University College of Osteopathic Medicine Clinic. The examining doctor reported that claimant's gait was asymmetrical and involved a shuffling, side-to-side movement. (R. 182)

On August 26, 1991, Dr. Barbara A. Hastings performed a neurological exam on claimant.

(R. 184-185) Dr. Hastings reported:

[The exam] revealed tenderness and some degree of spasm in the para-cervical muscles and trapezei and the para-lumbar muscles. There were no radicular objective findings of deficit. There were no cranial nerve, motion, sensory, reflex or coordination deficits.

I think that [claimant] has fibrositis and is in pain. I think that this is a stubborn problem which is difficult to treat. It is reassuring to know that her CT

brain scan was normal and her EEG was only mildly abnormal with some infrequent left temporal irregularities at the time she was symptomatic for the . . . blackouts. I would venture to say that she at least does not have any discernible seizure disorder at this time.

Id.

Claimant was seen on September 16, 1991 at the Skiatook Family Medical Center, complaining of problems during a period of discontinuance of Dilantin, which claimant had previously been taking to control the seizure-like episodes. The examining doctor recorded his impression as fibrositis and wrote that if claimant wasn't better within a month, he would advise that claimant be referred to a psychiatrist. (R. 187) Claimant soon resumed Dilantin.

On October 28, 1991, claimant applied for disability benefits, alleging an onset date of June 17, 1991.

On December 2, 1991, claimant was seen at the Adult Medicine Clinic of the University of Oklahoma Tulsa Medical Center. The examining doctor wrote that "[claimant] relates multiple, multiple somatic complaints." (R. 249) An anxiety test was given in which claimant scored 55, with 30 or over representing a positive result. Id. Impressions were noted as anxiety disorder and pseudoseizures. Id. The examining doctor also recorded that claimant "refuses to accept or treat any anxiety [disorder] at this time." Id.

Claimant's last insured date for purposes of Social Security benefits was December 31, 1991.

Dr. David DeJarnett, in a letter of February 28, 1992, reported that claimant had been treated at his office "for multiple system complaints. She has been evaluated by a Tulsa neurosurgeon for progressive left leg numbness, neck, and back pain. No etiology has been found to date. She has

a perforated right tympanic membrane with four previous ear surgeries; and is considered deaf in that ear.” (R. 215)

Claimant was treated by Dr. Jerry D. Patton in Collinsville, Oklahoma for at least the period of September 1992 through February 1995. (R. 255-257, 334-340) Dr. Patton prescribed the Dilantin taken by claimant during much of this time period. Id. On September 18, 1992, Dr. Patton recorded that claimant said she had a rapid heart beat. (R. 257, 340)

Dr. Michael Karathanos was requested to perform a consultative examination of claimant, which he did on December 4, 1992. (R. 216-220) He recorded his impressions as (1) blackout spells, probably pseudoseizures, and (2) chronic dizziness, probably related to chronic otitis. (R. 217) Dr. Karathanos recommended further evaluations by ear, nose and throat, cardiac, and psychiatric specialists. Id. Dr. Karathanos stated that he did not detect any gait imbalance. As to claimant’s work capacity, Dr. Karathanos determined that claimant could sit for eight hours in an eight hour day, including three hours at a time; stand for three hours in a day, including one hour at a time; and walk for 10-30 minutes in a day, including 10-30 minutes at a time. (R. 218) Dr. Karathanos determined that claimant could lift 20 pounds frequently and 25 pounds occasionally and carry 25 pounds frequently and 50 pounds occasionally. Id.

On April 20, 1993, claimant was seen by Dr. Patton after complaining of pain. (R. 257, 340) On June 3, 1993, Dr. Patton recorded that he saw claimant, who complained of swelling in the left side of her abdomen and her legs. (R. 257, 340)

On April 23, 1993, the ALJ found claimant to not be disabled within the meaning of the Social Security Act. This decision was vacated by the Appeals Council on September 21, 1993.

On May 11, 1993, claimant was seen at the Adult Medicine Clinic of the University of Oklahoma Tulsa Medical Center, complaining of pain in her occipital region and stating that she felt like she was going to pass out. Claimant was diagnosed with fibromyositis. (R. 246)

On June 22, 1993, claimant was seen by Dr. Patton, complaining of pain and stating that she had an earache in her right ear, backache, pain in her left upper quadrant, pain in her low spine, and numbness in her arms and legs which caused her legs to "give out." (R. 256, 339) On July 2, 1993, claimant was rechecked by Dr. Patton. (R. 256, 339) Claimant stated that she did not feel any better and complained of pain and swelling in her knees. Id. Claimant's husband reported that claimant on occasion lapses into a stuporous state. Id. On August 6, 1993, claimant was treated by Dr. Patton for backache and pain in her side. (R. 255) Claimant also complained of pain in her arms, hands, and feet. Id. On August 19, 1993, claimant was seen by Dr. Patton, complaining of passing out, being off-balance, and having pain in her legs, feet, and back. Id. Claimant stated that she had passed out three times since her last visit on August 6, 1993. Id. Claimant stated that she can hear when she has an episode, but cannot communicate. Id.

Dr. Patton saw claimant on September 28, 1993, recording that claimant said that she had experienced neurologic episodes three times in the past week. (R. 337) Dr. Patton recorded that claimant stated it took her two to three days to recover from an episode. Id.

Dr. Minor Gordon, a psychologist, was requested to perform a consultative examination of claimant, which he did on December 17, 1993. (R. 260-265) Dr. Gordon listed his diagnoses as (1) major depression secondary to the diagnosis of fibrositis which was made by Dr. Hastings by history, and (2) chronic pain syndrome, moderate, secondary to the diagnosis of fibrositis. (R. 262) In a Medical Assessment of Ability to Do Work-Related Activities (Mental), Dr. Gordon ranked

claimant's ability as poor/none in every listed aspect of the categories of making occupational adjustments, making performance adjustments, and making personal-social adjustments. (R. 263-265)

On January 3, 1994, Dr. Thomas A. Goodman, a psychiatrist, performed a consultative examination of claimant. (R. 267-273) Dr. Goodman concluded:

This claimant has had multiple past evaluations for what appeared to be pseudoseizures, fibromyositis and other psychogenic type physiological complaints. I would not be surprised if she has not also received a diagnosis of a chronic fatigue syndrome and some other vague, poorly defined physical illness. At any rate, she currently presents an array of symptoms and a mental status examination that at one end of the spectrum would certainly qualify for a somatoform disorder with somatization and even possible conversion symptoms and on the other side of the spectrum possible malingering or embellishment of her symptoms because of her desperate feelings that and in need for [sic] Social Security benefits. I have no way of really distinguishing between the two extremes and I suspect her problems may lay some place in between. The other notable factor in this individual, as far as psychiatric illness is concerned, is her lack of any attempt to seek psychiatric care, or as far as I know the lack of any referral to a psychiatrist. This is a psychological illness and I think she should be referred for a psychiatric evaluation and treatment before any determination of long term impairment can be made.

My final psychiatric diagnoses:

- AXIS I: Somatoform disorder, severe, manifested by somatization and conversion features, provisional.
Factitious disease or malingering, degree unclear based on this clinical evaluation, provisional.
- AXIS II: Personality disorder, not otherwise specified, with marked cluster B and histrionic features.

The claimant otherwise has retained her basic intellectual abilities. She has a good memory, can concentrate, is oriented and can use abstract thinking and judgment. Psychologically her symptoms are principally on a psychological basis and she should receive the proper treatment and be re-evaluated in a period of six to 12 months.

(R. 269) In a Medical Assessment of Ability to Do Work-Related Activities (Mental), Dr. Goodman ranked claimant as follows: (1) making occupational adjustments: good or very good at the various listed aspects; (2) making performance adjustments: fair where given complex job instructions, good where given detailed, but not complex, job instructions, and very good where given simple job instructions; (3) making personal-social adjustments: good at the various listed aspects; (4) other work-related activities: no additional work-related activities affected. (R. 270-272)

Claimant was seen by Dr. Patton on February 17, 1994, stating that she had a seizure the day before. (R. 281) Dr. Patton recorded that claimant said that her hands and legs started jerking and that she remained aware during the episode Id. Claimant was seen by Dr. Patton on November 21, 1994, stating that she hurt all over, her legs were numb, she experienced dizziness, and was forgetful.

Id.

Dr. Donald R. Inbody, a psychiatrist, was requested to perform a psychological consultative evaluation, which he did on June 1, 1994. (R. 305-310) Dr. Inbody recorded that claimant stated that she currently had one or two seizure-type episodes per month. (R. 305) He noted his impressions to be: (1) Axis I: possible somatoform disorder, severe, manifested by somatization and conversion features (pseudoseizures); (2) Axis II: no diagnosis; (3) Axis III: historically, diagnosis of fibromyositis, currently being treated with anti-inflammatory medication; (4) Axis IV: moderate psychosocial stressors; and (5) Axis V: global assessment of functioning of 55 with 60 being the highest in the past year. (R. 306-307) In a Medical Assessment of Ability to Do Work-Related Activities (Mental), Dr. Inbody ranked claimant as follows: (1) making occupational adjustments: good at all listed aspects, except dealing with work stresses, functioning independently, and maintaining attention/concentration, for each of which claimant was ranked as fair; (2) making

performance adjustments: fair where given complex job instructions, good where given detailed, but not complex, job instructions, and good where given simple job instructions; (3) making personal-social adjustments: good at maintaining personal appearance, fair at relating predictably in social situations, and poor/none at behaving in an emotionally stable manner and demonstrating reliability; (4) other work-related activities: no additional work-related activities affected. (R. 308-310)

On January 10, 1995, the ALJ found claimant not disabled within the meaning of the Social Security Act. The Appeals Council subsequently denied review of this decision and, thus, it represents the final decision of the Commissioner for purposes of this appeal.

On January 11, 1995, claimant phoned Dr. Patton to report a "seizure" the previous evening. (R. 336)

After the ALJ issued his decision, claimant submitted further evidence to the Appeals Council, including progress notes from Star Community Mental Health Center ("Star MHC") and a Medical Assessment of Ability to Do Work-Related Activities (Mental). The progress notes record the impressions of claimant's counselor at various counseling sessions from June 27, 1994 to October 17, 1994. (R. 330-333(c)). On June 1, 1995, Dr. Richard Luc, of the Star MHC, evaluated claimant in a Medical Assessment of Ability to Do Work-Related Activities (Mental). (R. 341-343) Dr. Luc ranked claimant as follows: (1) making occupational adjustments: fair at the ability to follow work rules, relate to co-workers, deal with the public, use judgment, interact with supervisors, and deal with work stresses; and poor/none at the ability to function independently and maintain attention/concentration; (2) making performance adjustments: fair to poor/none for all levels of job instructions; (3) making personal-social adjustments: good at the ability to maintain personal appearance; fair at the ability to behave in an emotionally stable manner, relate predictably in social

situation, and demonstrate reliability; (4) other work-related activities: no additional work-related activities affected. Id.

V. REVIEW

Claimant alleges that the decision of the Commissioner is not supported by substantial evidence. Specifically, claimant alleges that the ALJ erred by failing to properly evaluate claimant's severe mental impairment, failing to follow the treating physician rule, failing to properly evaluate claimant's hearing impairment, improperly applying the Medical-Vocational guidelines, and failing to properly question the vocational expert. For the reasons discussed below, this Court finds that substantial evidence does not support the findings of the ALJ in regard to his assessment and explanation of claimant's somatoform disorder and hearing impairment. These failures tainted the ALJ's analysis at the third and fifth steps of the sequential evaluation process.

A. Step Three

At the third step of the sequential evaluation process, claimant's impairments are compared with those impairments listed in 20 C.F.R. § 404, Subpt. P, App. 1. Impairments which meet a listed impairment or are "medically equivalent" to a listed impairment are disabling and end the Commissioner's inquiry. Here, the ALJ's failure to properly explain his evaluation of the evidence of claimant's somatoform disorder taints his Step Three analysis.

Listing 12.07 sets forth the criteria for somatoform disorders. Individual listings for mental impairments are divided into two sets of criteria: Part A, which requires the presence of certain medical findings documenting the pertinent mental impairment; and Part B, which measures the degree of functional loss resulting from the impairment. Part B of Listing 12.07 requires that three of four criteria be present: (1) *marked* restriction of activities of daily living; (2) *marked* difficulties

in maintaining social functioning; (3) deficiencies of concentration, persistence, or pace resulting in *frequent* failure to complete tasks in a timely manner (in work settings or elsewhere); and (4) *repeated* [three or more] episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behavior). 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.07 (emphases added).

The ALJ found claimant met Part A for Listing 12.07. (R. 26) As to Part B, the ALJ found that claimant had "slight" restrictions of activities of daily living; had "slight" difficulties in maintaining social functioning; experienced deficiencies of concentration, persistence, or pace resulting in "seldom" failure to complete tasks in a timely manner (in work settings or elsewhere); and experienced episodes of deterioration or decompensation in work or work-like settings which "never" cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms. (R. 21)

During the period of June 17, 1991 (claimant's alleged onset date) to December 31, 1991 (claimant's last insured date), claimant was treated by a variety of doctors for the seizure-like episodes which were later diagnosed to be pseudoseizures. During that relevant time period, an examining doctor at Claremore Regional Hospital, Dr. Johnson of the Tulsa Neurological Clinic, and an examining doctor at the Adult Medicine Clinic of the University of Oklahoma Tulsa Medical Center suggested that claimant suffered from pseudoseizures. (R. 160, 172, 249)

Medical evidence from after the last-insured date also indicates that claimant suffered from somatoform disorder, giving rise to pseudoseizures.⁵ The record details four psychiatric evaluations of claimant, including that made by Dr. Luc and submitted by claimant to the Appeals Council after the ALJ made his decision.⁶ Dr. Gordon, who examined claimant on December 17, 1993, listed his diagnoses as (1) major depression secondary to the diagnosis of fibrositis which was made by Dr. Hastings by history, and (2) chronic pain syndrome, moderate, secondary to the diagnosis of fibrositis. (R. 262) On January 3, 1994, Dr. Goodman diagnosed claimant as having severe somatoform disorder, manifested by somatization and conversion features, or, alternatively, some degree of factitious disease or malingering. He further diagnosed claimant as having a personality disorder, with marked cluster B and histrionic features. (R. 269) Dr. Inbody, on June 1, 1994, diagnosed claimant as possibly having severe somatoform disorder, manifested by somatization and conversion features (pseudoseizures). (R. 306-307)

⁵ Noncontemporaneous medical evidence is relevant insofar as it tends to prove whether a claimant was disabled during the insured time period. "In determining whether plaintiff is disabled, evidence of plaintiff's impairments after [her] insured status expired is relevant to whether [she] was disabled prior to its expiration." Davis v. Secretary of Health and Human Servs., 1993 WL 742658, at *13 (W.D. Mich. Sept. 21, 1993) (citing Ellis v. Secretary of Health and Human Servs., 739 F.2d 245 (6th Cir.1984)); see also Potter v. Secretary of Health & Human Servs., 905 F.2d 1346 (10th Cir. 1990); Ott v. Chater, 899 F. Supp. 550 (D. Kan. 1995). The ALJ may, of course, vary the weight to be given to such evidence in accord with its distance from the relevant time period.

⁶ Despite the fact that the ALJ did not have the opportunity to review the evidence submitted to the Appeals Council, such evidence must be included in the review by this Court as to whether the ALJ's determination of disability is supported by substantial evidence. "[N]ew evidence becomes part of the administrative record to be considered when evaluating the [Commissioner's] decision for substantial evidence." O'Dell v. Shalala, 44 F.3d 855, 859 (10th Cir. 1994).

Each psychiatric evaluation included a Medical Assessment of Ability to Do Work-Related Activities (Mental) form.⁷ Dr. Gordon, on December 17, 1993, ranked claimant's ability as:

- I. Making Occupational Adjustments: poor/none in every listed aspect
- II. Making Performance Adjustments: poor/none in every listed aspect
- III. Making Personal-Social Adjustments: poor/none in every listed aspect

(R. 263-265) Dr. Goodman, on January 3, 1994, ranked claimant's ability as:

- I. Making Occupational Adjustments: good or very good in every listed aspect
- II. Making Performance Adjustments: fair when given complex job instructions; good when given detailed, but not complex, job instructions; very good when given simple job instructions
- III. Making Personal-Social Adjustments: good in every listed aspect

(R. 270-272) Dr. Inbody, on June 1, 1994, ranked claimant's ability as:

- I. Making Occupational Adjustments: fair in dealing with work stresses; fair in functioning independently; fair in maintaining attention/concentration; good in every other listed aspect
- II. Making Performance Adjustments: fair when given complex job instructions; good when given detailed, but not complex, job instructions; good when given simple job instructions
- III. Making Personal-Social Adjustments: good at maintaining personal appearance; fair at relating predictably in social situations; poor/none at behaving in an emotionally stable manner; poor/none at demonstrating reliability

(R. 308-310) Dr. Richard Luc, on June 1, 1995, ranked claimant's ability as:

⁷ The Medical Assessment of Ability to Do Work-Related Activities (Mental) form divides work-related activities into three categories and asks the examining doctor to rank a claimant's expected performance as "unlimited/very good," "good," "fair," "poor/none" in various listed aspects of each category. The categories and their listed aspects are: I. Making Occupational Adjustments: (1) follow work rules, (2) relate to co-workers, (3) deal with public, (4) use judgment/the public, (5) interact with supervisors, (6) deal with work stresses, (7) function independently, (8) maintain attention/concentration; II. Making Performance Adjustments: understand, remember, and carry out (1) complex job instruction, (2) detailed, but not complex, job instructions, (3) simple job instructions; III. Making Personal-Social Adjustments: (1) maintain personal appearance, (2) behave in an emotionally stable manner, (3) relate predictably in social situations, (4) demonstrate reliability. The examining doctor is also asked to list any other work-related activities which are affected by the impairment.

- I. Making Occupational Adjustments: fair at following work rules; fair at relating to co-workers; fair at dealing with the public; fair at using judgment; fair at interacting with supervisors; fair at dealing with work stresses; poor/none at functioning independently; poor/none at maintaining attention/concentration
- II. Making Performance Adjustments: fair to poor/none for all levels of job instructions
- III. Making Personal-Social Adjustments: good at maintaining personal appearance; fair at relating predictably in social situations; fair at behaving in an emotionally stable manner; fair at demonstrating reliability

(R. 341-343)

The Tenth Circuit has criticized the use of the Medical Assessment of Ability to Do Work-Related Activities (Mental) form, stating that it actually hampers the ALJ's review, as well as the Court's, because it does not correspond to the Listings of Impairments, 20 C.F.R. § 404, Subpt. P, App. 1. See Cruse v. Dept. of Health & Human Servs., 49 F.3d 614, 618 (10th Cir. 1995); Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir 1991). The Tenth Circuit has held that a rank of "fair" on the Medical Assessment of Ability to Do Work-Related Activities (Mental) form is equivalent to the listings' definition of the term "marked," as pertains to the first two criteria of Part B, and--while not as easily correlatable--evidence of severe limitation as pertains to the final two criteria. Cruse, 49 F.3d at 618, 619 n. 3.

This Court reviews the ALJ's decision to determine whether his findings are supported by substantial evidence. "[T]he record must contain substantial competent evidence to support the conclusions recorded on the PRT form." Id. at 617. An ALJ is required by 20 C.F.R. § 404.1520a(c)(4) to detail, in his report, his basis for determining whether a mental impairment is or is not disabling. See Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994). The ALJ has not provided the required explanation of the basis of his decision.

In his report, the ALJ stated: "[p]sychiatric evaluations of the claimant demonstrate that the claimant has a diagnosis of somatoform disorder with somatization and conversion features (pseudoseizures) and the assessments of the claimant's ability to perform mental work-related activities show that the claimant is able to function in a work place environment." (R. 20) In support of his findings, the ALJ merely cites to the opinions of Drs. Goodman and Inbody. Id. However, the ALJ fails to explain why he discounts the opinion of Dr. Gordon, whose examination of claimant was most recent to her relevant time period.⁸ Moreover, Dr. Inbody ranked claimant as fair or poor/none in a variety of aspects of functional loss. The ALJ does not explain this contradiction. Finally, the evaluation made by Dr. Luc, who claimant now argues is her treating doctor,⁹ directly contradicts the findings of the ALJ. Drs. Gordon, Inbody, and Luc all ranked claimant as fair or poor/none in a variety of aspects of functional loss. In accordance with Cruse, such rankings are evidence of marked limitation when determining whether a claimant has met Part B of a listing for mental impairment. It is difficult to reconcile the ALJ's determinations of functional loss of *slight*, *seldom*, and *never* with the evidence of *marked* limitation which the ALJ cites in support of his findings. If there is an explanation for this distinction, it was not provided by the ALJ as required by Section 404.1520a(c)(4).

⁸ The Court, for purposes of instruction upon remand, notes that it is possible to infer from the ALJ's statements during the April 15, 1994 hearing that the ALJ discounted Dr. Gordon's evaluation because Dr. Gordon is a psychologist rather than a psychiatrist. Such reasoning would run contrary to 20 C.F.R. § 404.1513(a), 20 C.F.R. § 404.1529, and 20 C.F.R., Pt. 404, Subpt. P, App. 1, § 12.00B.

⁹ Because this case is remanded for further proceedings, the Court need not address this issue. The Court notes that although it may appear that Dr. Luc's opinion, in accord with the treating physician rule, requires greater weight than those of the other medical professionals discussed *supra*, it also appears that Dr. Luc first evaluated claimant at least three years after her last insured date. Upon remand, the ALJ must determine the proper weight to be given to the evaluation by Dr. Luc.

B. Step Five

The ALJ's failure to properly evaluate the evidence of claimant's somatoform disorder also taints his Step Five analysis, specifically in regard to the effect of the pseudoseizures experienced by claimant on her ability to work. In addition, the ALJ failed to properly evaluate claimant's hearing impairment, which taints the Step Five analysis.

At Step Five, the ALJ found that claimant had "the ability to perform a residual functional capacity of sedentary limited by suffering from chronic pain for which medication is taken, there are no seizures." (R. 22) "When the listing requirements for mental disorders are not met, but the impairment is nonetheless severe, '[t]he determination of mental [residual functional capacity] is crucial to evaluation of an individual's capacity to engage in substantial gainful work activity.'" Cruse, 49 F.3d at 619 (quoting 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00). The pseudoseizures experienced by claimant are certainly of such severity that the ALJ should have considered their effect on claimant's ability to perform alternative work. See 20 C.F.R. §§ 404.1520a(c)(1), 404.1521. The ALJ states, in regard to the pseudoseizures, that "the evidence does not demonstrate a frequency which would impact with the performance of work-related activities, the claimant was on Dilantin which was noted by various physicians as providing reasonably good control." (R. 21) It is unclear how often claimant's pseudoseizures occurred during the relevant time period, but substantial evidence does not support a finding that they were of such infrequency that they had no effect on claimant's ability to work. On July 29, 1991, Dr. Wolfe recorded that claimant stated that she had lost consciousness twice in the previous six weeks. (R. 179) On August 26, 1991, Dr. Hastings recorded that claimant said that she had had four such episodes. Although there is evidence to support a finding that the use of Dilantin provides claimant some level of control of her

pseudoseizures, there is no indication in the record that Dilantin completely precludes the episodes of pseudoseizure. Claimant, in June 1994, stated to Dr. Inbody that she had one or two episodes per month, despite taking Dilantin. (R. 305)

With regard to claimant's hearing impairment, the record demonstrates that a surgical procedure on claimant's left ear--aural lavage with debridement--was performed in September 1981. (R. 146-150) Dr. Haines, on July 22, 1991, noted a possible ear infection at the location of a tympanic membrane perforation previously sustained by claimant. R. 188. Dr. Wolfe on July 28, 1991 noted an impression of chronic otitis media. (R. 180) Dr. David DeJarnett, in a letter of February 28, 1992, stated that claimant has a perforated right tympanic membrane, has undergone four previous ear surgeries, and is considered deaf in the right ear. (R. 215) On December 4, 1992, Dr. Karathanos diagnosed claimant as having chronic dizziness, which he stated was probably related to chronic otitis. (R. 217) The ALJ, in his report, stated "[t]here is no objective medical evidence indicating that the claimant has a documented hearing loss, no problems were described in the medical notes and the claimant was able to hear normally during the hearing." (R. 20) Substantial evidence does not support the ALJ's finding.

The hypothetical question asked of the vocational expert profiled a person who is "age 45, 8th grade education, limited ability to read and write with the ability to perform a residual functional capacity of sedentary limited by suffering from chronic pain for which medicine is taken, there are no seizures." (R. 22) "[T]estimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the [Commissioner's] decision." The ALJ's Step Five analysis, including his hypothetical question to the vocational expert, should have considered claimant's hearing impairment and occasional

pseudoseizure--to the frequency the ALJ determines claimant experienced such pseudoseizures during her relevant time period.

Upon remand, the Commissioner should reconsider (1) whether claimant's somatoform disorder meets Part B of Listing 12.07; and (2) whether claimant's age, education, work experience, and RFC--including and in light of her hearing impairment and pseudoseizures--are such that claimant can perform work that exists in significant numbers in the national economy. Because of the findings made above, the Court need not address the remainder of claimant's arguments.

VI. CONCLUSION

The decision of the Commissioner is *not* supported by substantial evidence. For the foregoing reasons, this case is **REVERSED** and **REMANDED** to the Commissioner for further proceedings consistent with this opinion.

DATED this 8th day of June, 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MINNIE P. JONES,)
SSN: 465-76-8120,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner of Social Security,)
)
Defendant.)

Case No. 96-CV-802-EA

F I L E D

JUN - 8 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE JUN 10 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 8th day of June 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

Jan

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 08 1998

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 MARGORIE L. MIZER,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98CV0258H(J)

ENTERED ON DOCKET

DATE 6-9-98

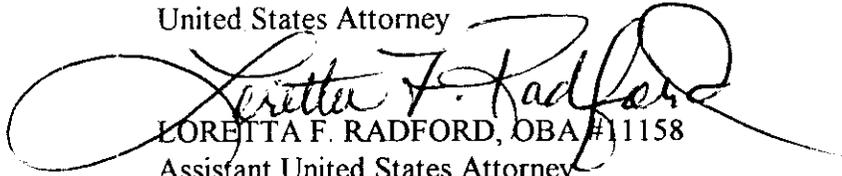
NOTICE OF DISMISSAL

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

Dated this 8th day of June, 1998.

UNITED STATES OF AMERICA

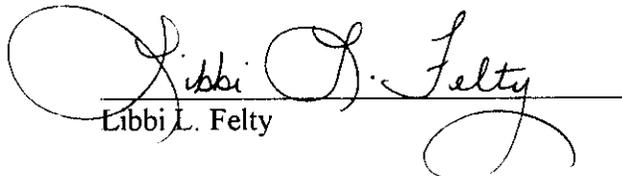
Stephen C. Lewis
United States Attorney



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

CERTIFICATE OF SERVICE

This is to certify that on the 8th day of June, 1998, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Margorie L. Mizer, 14995 Peoria St., , Skiatook, OK 74070.


Libbi L. Felty

28

clj

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

F I L E D

JUN 08 1998 *cl*

ANDREW GRABOW,)
)
Plaintiff,)
)
vs.)
)
WILLIAMS NATURAL GAS COMPANY,)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-C-498-K /

ENTERED ON DOCKET

DATE 6-9-98

JUDGMENT

This matter came before the Court for consideration of the Motion by Defendant Williams Natural Gas Company for Summary Judgment against Plaintiff Andrew Grabow.

The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously,

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

ORDERED THIS 8 DAY OF JUNE, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

ANDREW GRABOW,

Plaintiff,

vs.

WILLIAMS NATURAL GAS COMPANY,

Defendant.

FILED

JUN 03 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-C-498-K

ENTERED ON DOCKET

DATE 6-9-98

ORDER

Before the Court is the motion of the defendant for summary judgment. Plaintiff brought this action in state court in April, 1997, alleging age discrimination. Defendant removed the action to this Court in May, 1997.

Plaintiff was employed by defendant from February 19, 1985 to June 19, 1995. At the time of his discharge, plaintiff was fifty years old. Defendant contends that the decision to terminate plaintiff was made in April, 1995 and that the basis was plaintiff's attendance at a conference (at defendant's expense) without approval, at a time when plaintiff was subject to progressive discipline for performance problems.¹ However, defendant contends, because of plaintiff's tenure and the fact that an early retirement program was imminent, plaintiff was offered the

¹Plaintiff has since paid the fee for the conference.

opportunity to participate in an enhanced early retirement program ("ERP"). Defendant kept plaintiff on the payroll until June, 1995, in order to permit him to become eligible for the ERP and give him time to decide whether to accept the ERP and resign rather than be discharged. Plaintiff declined the ERP because he did not want to give up his right to sue defendant, apparently a prerequisite to acceptance.

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).

To establish the elements of a prima facie case of age discrimination, plaintiff must prove (1) he was within the protected age group; (2) he was doing satisfactory work; (3) he was discharged despite the adequacy of this work; and (4) he was replaced by a younger person. See *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 327 (10th Cir.1996). The fourth element is not an absolute requirement. In a case of reduction in force, or when a

position is eliminated in its entirety, the fourth element has been modified to require the plaintiff to "produc[e] evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." Ingels v. Thiokol Corp., 42 F.3d 616, 621 (10th Cir.1994).

Defendant contends that plaintiff has failed to establish the second and fourth element of a prima facie case. Regarding whether plaintiff was performing his job satisfactorily, defendant asserts that the Court is governed by the employer's view of the employee's performance. The Tenth Circuit ruled to the contrary in MacDonald v. Eastern Wyoming Mental Health Ctr., 941 F.2d 1115, 1118-22 (10th Cir.1991). Particularly in dealing with such subjective criteria as, in this case, plaintiff's ability to get along with others and communication skills, the Court is persuaded that plaintiff's own testimony regarding his job performance is sufficient to establish this element of the prima facie case. See also Williams v. Williams Elecs. Inc., 856 F.2d 920, 923 n.6 (7th Cir.1988).

Regarding the fourth element, plaintiff argues that his job duties were assumed by other employees of defendant who were "significantly younger" than plaintiff. The record reflects, in plaintiff's Exhibit 4, that Phillip Barker, age 43, assumed the majority of plaintiff's duties. Other employees who assisted or provided support in this area were Alan McDowell, age 32, Kary Cummins, age 32, Terry Minnick, age 41, and Keith Jones, age 34. In O'Connor v. Consolidated Coin Caterers Corp., 116 S.Ct. 1307

(1996), the Supreme Court held that, regarding a prima facie age discrimination case, plaintiff's replacement need not be under forty years of age. Viewing the record in the light most favorable to plaintiff, the Court finds the fourth element satisfied, and a prima facie case established.

The burden then rests on defendant to articulate a legitimate nondiscriminatory reason for the discharge. Defendant has done so in its description and documentation of plaintiff's previous discipline problems and the unauthorized trip to the conference. If the employer offers evidence of a legitimate nondiscriminatory reason for the challenged decision, "the presumption of discrimination established by the prima facie showing simply drops out of the picture." Ingels, 42 F.3d at 621 (quotation omitted).

At the summary judgment stage, the plaintiff must then show direct evidence of age discrimination or that the defendant's legitimate nondiscriminatory reason is a pretext for discrimination. Id. At 621-22. "A plaintiff demonstrates pretext by showing either that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." Marx, 76 F.3d at 327-28.

In its initial brief, defendant argued that plaintiff at this stage must show that the reason given by defendant is false and that the real reason for the decision was age animus. (Defendant's Brief at 16). This is incorrect. The Tenth Circuit has not adopted a "pretext-plus" requirement to survive summary judgment. See Randle v. City of Aurora, 69 F.3d 441, 451-53 (10th Cir.1995).

Applying the correct standard, the Court reviews the evidence.

Plaintiff has offered no direct evidence of age discrimination. He argues for the first time that the offer of an early retirement package was a pretext for a "youth movement" within the defendant. First, the offer of an early retirement package is not per se a fact showing discriminatory age-related animus because "an offer of incentives to retire early is a benefit to the recipient, not a sign of discrimination." Henn v. National Geographic, 819 F.2d 824, 828 (7th Cir.), cert. denied, 489 U.S. 964 (1987). While, as distinguished from the usual case, plaintiff was not given the option of remaining employed, he has not disputed the assertion that defendant kept him employed until he was eligible for the early retirement program, when it could have discharged him earlier. Plaintiff has likewise not disputed the assertion that all other individuals who were offered early retirement but rejected it, retained their jobs. Further, plaintiff has not disputed that all offerees of the early retirement package were over fifty years of age.²

Likewise, plaintiff has failed to present evidence that the reason given for the discharge itself is pretextual. While plaintiff makes plain that he disagrees with the employer's evaluation of his work abilities, the discipline which he received

²Some of these assertions are contained in defendant's statement of undisputed facts accompanying its motion for summary judgment. Plaintiff has failed to dispute these as required by Local Rule 56.1(B). Others were found by the Court to be uncontradicted in the Order filed April 28, 1998, in which the Court denied plaintiff's appeal of a Magistrate's discovery order.

in the past, and the investigation of his attending the conference at company expense, his disagreement does not raise a genuine issue of material fact as to the credence to be given the proffered reason. Similarly, a plaintiff's subjective belief of discrimination is insufficient to show a genuine issue of material fact remaining for trial. See Aramburu v. Boeing Co., 112 F.3d 1398, 1408 n.7 (10th Cir.1997).

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

IT IS SO ORDERED THIS 8 DAY OF JUNE, 1998


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

FILED

JUN - 8 1998

RON ANDERSON, et al.,

Plaintiffs

vs.

MONSANTO COMPANY, et al.

Defendants

Phil Lombardi, Clerk
U.S. DISTRICT COURT

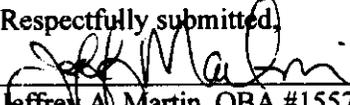
Case No. 98-CV-0260BU(M)

**ENTERED ON DOCKET
DATE JUN 09 1998**

DISMISSAL WITHOUT PREJUDICE

COMES NOW Plaintiff, Ron Anderson, by and through his attorney of record, Jeff Martin, and dismisses this action without prejudice to the bringing of a subsequent action against both Defendants.

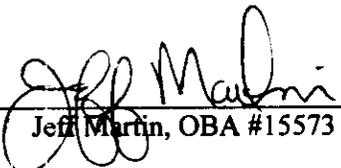
This voluntary dismissal without an order of the Court and without Defendants' agreement is authorized under Rule 41 of The Federal Rules of Civil Procedure because Defendants have not filed an Answer or a Motion for Summary Judgment herein and Rules 23(e) & 66 do not apply.

Respectfully submitted,

Jeffrey A. Martin, OBA #15573
624 S. Denver
Tulsa, Oklahoma 74119
(918) 583.4165

Certificate of Mailing

I, Jeff Martin, do hereby certify that on the 8 day of June, 1998, I mailed or hand delivered a true and correct copy of the foregoing instrument, with postage fully prepaid thereon, to:

J. Patrick Cremin, Esq.
Hall, Estill
320 S. Boston, #400
Tulsa, Oklahoma 74103


Jeff Martin, OBA #15573

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

FILED

JUN 8 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ALLEN RAY LIVINGSTON,)
)
Petitioner,)
)
vs.)
)
RON WARD,)
)
Respondent.)

Case No. 96-CV-459-BU (J)

ENTERED ON DOCKET

DATE JUN 09 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 8th day of June, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

JUN 8 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ALLEN RAY LIVINGSTON,)
)
Petitioner,)
)
vs.)
)
RON WARD, Warden,)
)
Respondent.)

Case No. 96-CV-459-BU (J)

ENTERED ON DOCKET
DATE JUN 09 1998

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #13) entered on April 30, 1998, in this 28 U.S.C. § 2254 habeas corpus action. The Magistrate Judge recommends that the petition for writ of habeas corpus be denied. On May 12, 1998, Petitioner filed his objection to the Report (#14).

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo that portion of the Report to which the Petitioner has objected, and concludes that, for the reasons discussed below, the Report should be adopted and affirmed and the petition for writ of habeas corpus denied.

BACKGROUND

The Magistrate Judge has succinctly summarized the facts underlying Petitioner's criminal conviction in the Report and the Court will only briefly repeat those facts here. During a jury trial held on January 25, 1973, in Tulsa County District Court, Case No. CRF-72-886, Petitioner was found guilty of Robbery With Firearms. The jury recommended a sentence of 100 years imprisonment. On February 15, 1973, the trial court entered the sentence recommended by the jury.

Petitioner appealed to the Oklahoma Court of Criminal Appeals, where he raised two issues:

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(1) that he received ineffective assistance of counsel, and (2) that the sentence imposed was excessive.

On February 4, 1974, the Court of Criminal Appeals affirmed the conviction and sentence.

Petitioner filed an application for post-conviction relief in Tulsa County District Court on March 22, 1974. Petitioner failed to list any specific grounds for relief in the application but in an attached affidavit expressed that he had filled out the form to the best of his ability and that he "pray the court will review Petitioners conviction and allegations raised of direct appeal." (Docket #8, Supplement). The trial court filed its order denying post-conviction relief on April 16, 1974. (#8). Petitioner did not appeal the denial of post-conviction relief to the Court of Criminal Appeals.

Petitioner filed the instant petition for writ of habeas corpus on May 22, 1996, identifying the following six (6) grounds for relief:

(1) defendant was not provided competent counsel during trial; (2) excessive punishment appears to have been given under the influence of prejudice; (3) appellate counsel failed to provide a copy of the appellate brief; (4) ineffective assistance of trial counsel; (5) misconduct of the prosecutor denied defendant a fair trial and a fair sentencing hearing; and (6) the sentence of 100 years is excessive.

(#1). On December 5, 1996, this Court entered its Order finding that Petitioner's claims numbered (1), (2), (4) and (6) had been fairly presented to the state courts and were exhausted for purposes of federal habeas review. In addition, the Court found that claims numbered (3) and (5) were unexhausted but that it would be futile to require Petitioner to return to state court to exhaust the claims since his failure to raise the claims on direct appeal or in his first application for post-conviction relief would result in the imposition of a procedural bar by the Oklahoma courts. (#9). Therefore, Respondent's motion to dismiss was denied and Petitioner was afforded the opportunity to show cause and prejudice or that a fundamental miscarriage of justice would result if his unexhausted claims were not considered. On December 16, 1996, Petitioner filed his brief (#10) but

completely failed to address the issues as directed by the Court. Instead, he presented only the two issues he raised on direct appeal: his claims of ineffective assistance of trial counsel and imposition of excessive sentence. On December 26, 1996, Respondent filed his response (#11) addressing the two claims discussed by Petitioner in his December 16, 1996 brief. Petitioner filed a reply to Respondent's response on April 20, 1998 (#12).

DISCUSSION

In his Report, the Magistrate Judge concluded that under the standard announced in Strickland v. Washington, 466 U.S. 668, 687 (1984), Petitioner was not denied effective assistance of counsel during his trial. The Magistrate Judge found that Petitioner cannot satisfy the "second prong" of the Strickland test requiring that deficient performance by counsel prejudiced the defense, to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also Lockhart v. Fretwell, 506 U.S. 364 (1993). In addition, after thoroughly reviewing the applicable law, the Magistrate Judge found that Petitioner's sentence is within the statutory guidelines and therefore presumed constitutional. Finally, the Magistrate Judge determined that Petitioner failed to demonstrate cause and prejudice or that a fundamental miscarriage of justice will result if his unexhausted claims concerning appellate counsel's failure to provide to him a copy of the appellate brief and prosecutorial misconduct at trial are not considered. Therefore, these claims are procedurally barred from federal habeas corpus review.

In his objection to the Report (#14), Petitioner objects only to the conclusion that he was not denied effective assistance of counsel. Petitioner argues that he has established ineffective assistance of counsel pursuant to the standard discussed in United States v. Cronin, 466 U.S. 648 (1984). After

reviewing Petitioner's objection and the relevant law, the Court find the objection to be meritless. The Magistrate Judge applied the correct legal standard to the facts of this case and correctly determined that Petitioner had not been denied effective assistance of counsel. As stated by the Supreme Court in Cronic, 466 U.S. at 659, the decision relied upon by Petitioner, "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." The Court finds Petitioner has failed to make this showing and agrees with the Magistrate Judge's conclusion that Petitioner was not denied effective assistance of counsel.

CONCLUSION

The Court has reviewed de novo that portion of the Report to which the Petitioner has objected, see Fed. R. Civ. P. 72(b) and 28 U.S.C. § 636(b)(1)(C), and concludes that the Report and Recommendation of the United States Magistrate Judge should be adopted and affirmed, and Petitioner's petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the United States Magistrate Judge (#13) is **adopted and affirmed.**
2. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **denied.**

SO ORDERED THIS 8th day of JUNE 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

Jeffery A. Jordan, #12574
FOULSTON & SIEFKIN L.L.P.
700 NationsBank Financial Center
Wichita, Kansas 67202
(316) 267-6371

ATTORNEYS FOR PLAINTIFFS

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON



Stephen W. Ray, OBA #7436
Michael T. Keester, OBA #10869
320 S. Boston Ave., Suite 400
Tulsa, OK 74103-3708
(918) 594-0400

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF MAILING

I hereby certify that, on the 5th day of June, 1998, a true and correct copy of the foregoing instrument was mailed, first class mail, with proper postage thereon fully prepaid, to:

Jeffery A. Jordan, Esq.
FOULSTON & SIEFKIN L.L.P.
700 NationsBank Financial Center
Wichita, Kansas 67202

James L. Kincaid, Esq.
Jeffrey T. Hills, Esq.
CROWE & DUNLEVY
500 Kennedy Building
321 South Boston
Tulsa, OK 74103-3313


Michael T. Keester

DATE 6-8-98

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

F I L E D

JUN -5 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHARON E. CALVIN,)
SSN: 441-74-0360,)

Plaintiff,)

v.)

KENNETH S. APFEL,)
Commissioner of Social Security,)

Defendant.)

Case No. 96-CV-0900-K(E) ✓

REPORT AND RECOMMENDATION

On April 2, 1998, the Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded the case to the Commissioner for further fact-finding. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on May 21, 1998, and the defendant's response filed on June 5, 1998, the parties have stipulated that an award in the amount of \$2,040 for attorney fees and \$163.20 costs for all work done before the district court is appropriate.

IT IS RECOMMENDED that plaintiff's counsel be awarded attorney fees under the Equal Access To Justice Act in the amount of \$2,040 and \$163.20 costs for a total award of \$2,203.20. If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986).

DATED this 5th day of June, 1998.

Claire V Eagan
CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

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

8 Day of June, 1998.
L. Schwelke

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

FILED

JUN 4 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DANNY WEST,)
)
 Petitioner,)
)
 vs.)
)
 HOWARD RAY,)
)
 Respondent.)

Case No. 97-CV-1002-E

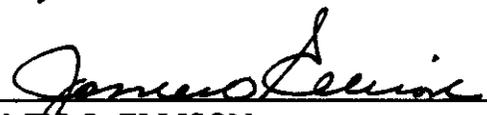
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JUN 06 1998
DATE _____

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 3rd day of June, 1998.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED
JUN 4 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DANNY WEST,)
)
 Petitioner,)
)
 vs.)
)
 HOWARD RAY,)
)
 Respondent.)

Case No. 97-CV-1002-E (J)

ENTERED ON DOCKET
DATE JUN 06 1998

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his sentence entered in Tulsa County District Court, Case No. CRF-91-1074. Respondent has filed a Rule 5 response (Docket #6) to which Petitioner has replied (#7). As more fully set out below the Court concludes that this petition should be dismissed with prejudice as barred by the statute of limitations. See 28 U.S.C. § 2244(d).

BACKGROUND

On April 8, 1991, Petitioner, while represented by counsel, pled guilty to Larceny of Merchandise From a Retailer, After Former Conviction of a Felony, in Tulsa County District Court, Case No. CF-91-1074. Petitioner did not file a direct appeal to the Oklahoma Court of Criminal Appeals ("OCCA").

The record before the Court indicates that on or about December 6, 1995, Petitioner filed a petition for writ of habeas corpus in Muskogee County District Court (#7, Ex. L) wherein he stated

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that "Petitioner was in fact sentence to only ten (10) years but someone marked out the ten (10) years and wrote in pen over the ten (10) the number 20. The Petitioner has waited until now to protest the erroneous sentence because he has now served the maximum ten (10) year sentence." The district court denied the petition for habeas corpus relief on January 22, 1996. Petitioner appealed to the OCCA which affirmed the district court's denial of habeas corpus relief on March 14, 1996, based on Petitioner's failure to challenge his sentence on direct appeal resulting in the imposition of a procedural bar. (#7, Ex. N).

On April 11, 1997, Petitioner filed an Application for Post-Conviction Relief in Tulsa County District Court, requesting that his Judgment and Sentence be modified to reflect the imposition of a ten (10) year sentence rather than a twenty (20) year sentence. (#1, Ex. A). On June 13, 1997, the district court denied post-conviction relief finding that the record "accurately reflects the sentence imposed by the trial court and is not in need of amendment" and further noting Petitioner's failure to raise his claim on direct appeal. (#1, Ex. E). On August 5, 1997, the district court entered its "Nunc Pro Tunc" order, apparently amending the June 13, 1997 order denying post-conviction relief. (#1, Ex. F). Following entry of the June 13, 1997 order, Petitioner appealed to the OCCA where the denial of post-conviction relief was affirmed on September 12, 1997. The OCCA stated that Petitioner failed to overcome the "presumption of regularity" which attaches in court proceedings. (#1, Ex. H).

Petitioner filed the instant petition for writ of habeas corpus on November 10, 1997. As grounds for relief, Petitioner claims that (1) he was denied due process by the state courts, and (2) his continued imprisonment constitutes cruel and unusual punishment in violation of the 8th and 14th Amendments to the United States Constitution. (#1 at 5 and 7).

On November 21, 1997, the Court directed Respondent to show cause, by December 22, 1997, why the writ should not issue. On December 30, 1997, Respondent filed his motion for extension of time to file response out of time. (#3). Petitioner moved for default judgment on December 31, 1997 (#4), based on Respondent's failure to file a timely response. On January 6, 1998, the Court granted Respondent's motion for extension of time out of time and Respondent filed his response to the petition for writ of habeas corpus on January 7, 1998.

In his response to the petition for writ of habeas corpus, Respondent states that Petitioner claims are unexhausted but urges that this petition must be dismissed as time barred pursuant to 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). (#6). In his reply, Petitioner argues that his claims are exhausted and that the AEDPA does not apply to this case. (#7).

DISCUSSION

A. Petitioner is not entitled to default judgment

Although Respondent's response to the petition for writ of habeas corpus was not filed by the deadline originally imposed by the Court's Order of November 21, 1997, the Court, in its discretion, determined that Respondent was entitled to an extension of time out of time. (#5). Because Respondent filed his Response well within the time period allowed by the Court's Order granting an extension of time, the Court finds Petitioner's motion for default judgment should be denied.

B. Applicability of the AEDPA

On April 24, 1996, President Clinton signed the AEDPA into law. Because Petitioner filed the instant federal petition for writ of habeas corpus on November 10, 1997, more than eighteen

months after enactment of the AEDPA, the Court concludes that the provisions of the Act apply to this case.¹

C. Petitioner's claims are time barred

28 U.S.C. 2244(d), as amended by the AEDPA, provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Respondent contends that because Petitioner's conviction became final "by the expiration of time for seeking appellate review, or on April 18, 1991," the petition is clearly time barred. However, acknowledging the 1-year grace period recognized by the Tenth Circuit, see United States v. Simmonds, 111 F.3d 737, 746 (10th Cir. 1997), Respondent states that "at the very latest, assuming without conceding the most liberal application of the statute, the limitations period would have

¹ Although no effective date is specified for those provisions of the AEDPA applicable to non-capital cases, rules of general construction provide that new statutory law applies to cases filed on or after the date of enactment. See Lindh v. Murphy, 117 S.Ct. 2059 (1997); Landgraf v. USI Film Products, 511 U.S. 244 (1994).

expired for this petition on April 23, 1997." (#6 at 3). As a result, Respondent alleges that the instant petition, filed on November 10, 1997, is time-barred.

By amending the habeas corpus statutes to add a one-year limitations period, Congress has required that prisoners act expeditiously to take advantage of federal review -- within one year of the time when the right to petition for habeas corpus relief accrues. As noted by Respondent, the Tenth Circuit Court of Appeals has held that in this circuit, prisoners, such as the petitioner in this case, whose convictions became final on or before the enactment of the AEDPA on April 24, 1996, had to file their habeas corpus actions before April 24, 1997 to avoid the time bar imposed by the AEDPA's one-year statute of limitations codified at 28 U.S.C. § 2244(d). Simmonds, 111 F.3d at 746 (citing Lindh, 96 F.3d at 866, for the proposition that the time period imposed by the Antiterrorism and Effective Death Penalty Act is "short enough that the 'reasonable time' after April 24, 1996, and the one-year statutory period coalesce; reliance interests lead us to conclude that no collateral attack filed by April 23, 1997, may be dismissed under 28 U.S.C. § 2244(d) and . . . 28 U.S.C. § 2255.").

Petitioner in this case filed his petition for writ of habeas corpus on November 10, 1997, more than 6 months after expiration of the one-year grace period announced in Simmonds. Although Petitioner filed his application for post-conviction relief in the state district court on April 11, 1997, twelve (12) days prior to expiration of the grace period, this act alone does not make the petition timely filed. Subsection (d)(2) of 28 U.S.C. § 2244, as cited supra, provides that the limitations period is tolled during the pendency of a post-conviction proceeding in state court. In this case, the limitations period was tolled or suspended during the pendency of Petitioner's application for post-conviction relief in the Oklahoma courts. However, the limitations period began to run once more

on September 12, 1997, when the OCCA entered its Order affirming the denial of post-conviction relief. Since Petitioner filed his application for post-conviction relief twelve days prior to the expiration of the grace period, he would have had to file his federal petition for writ of habeas corpus within twelve days of the entry of the OCCA's order, or by September 24, 1997, to be timely. However, Petitioner did not file his petition in this Court until November 10, 1997. Petitioner offers no explanation for the delay, either in filing his application for post-conviction relief,² or in filing the instant federal petition. As a result, the Court concludes that, pursuant to 28 U.S.C. § 2244(d), the petition for writ of habeas corpus is untimely and must be dismissed.

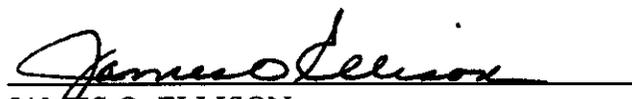
CONCLUSION

Petitioner's motion for default judgment should be denied and his petition for writ of habeas corpus should be dismissed as time-barred pursuant to 28 U.S.C. § 2244(d).

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Petitioner's motion for default judgment (#4) is **denied**.
- (2) The petition for a writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED THIS 3rd day of June, 1998.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

²Although Petitioner states that he "has waited till now to protest the erroneous sentence, because he has served the maximum ten (10) year sentence," this excuse does not fall within one of the statutory exceptions identified in 28 U.S.C. § 2244(d). Furthermore, it is clear from Petitioner's state court filings that he was aware of the alleged sentencing error in 1995 when he sought habeas corpus relief in state court seeking modification of his sentence.

additionally argues that the presumption is that the sentences were constitutional, that the sentences which Petitioner received were within the statutorily permitted boundaries, and that Petitioner's sentences do not constitute cruel and unusual punishment.

I. BACKGROUND AND PROCEDURAL HISTORY

On August 10, 1983, Petitioner, then thirteen years old,³ climbed through the window of a home in his neighborhood, sexually assaulted the woman who lived in the home while threatening her with a kitchen knife, and took seven dollars from her purse. On April 19, 1985, after being certified to stand trial as an adult, a Tulsa County jury found Petitioner guilty of first degree burglary, robbery with a dangerous weapon, forcible sodomy, and second degree rape. In accordance with the jury verdict, the trial court sentenced Petitioner to twenty years for burglary (the maximum), forty-five years for robbery with a dangerous weapon (the maximum is life), twenty years for forcible sodomy (the maximum), and fifteen years (the maximum) for rape. The trial judge ordered that the sentences be served consecutively, resulting in a total term of 100 years. The Oklahoma Court of Criminal Appeals affirmed Petitioner's convictions and sentences. Hawkins v. State, 742 P.2d 33 (Okla. Crim. App. 1987).

In January 1991, Petitioner filed a federal habeas action in the U.S. District Court for the Northern District of Oklahoma. See Hawkins v. Champion, 91-C-97-E. The district court denied relief, but the Court of Appeals for the Tenth Circuit reversed because some issues raised by Petitioner had not been exhausted in the state courts. In addition, the Circuit Court noted as follows:

The district court did not undertake a full Eighth Amendment proportionality review of Hawkins' sentence, taking into account his age, developmental age, lack of a prior record, gravity of the offense, harshness of the penalty, comparative sentences (if deemed appropriate), and so on. See Harmelin v. Michigan, 111 S. Ct. 2680 (1991); Solem v. Helm, 463 U.S. 277 (1983); Rummel v. Estelle,

^{2/} (...continued)

and Recommendation. Following the decision of the United States Supreme Court on June 23, 1997, in Lindh v. Murphy, 117 S. Ct. 2059 (1997), and based on that decision, the Magistrate Judge entered a Report and Recommendation on July 1, 1997, concluding that the Act did not apply to this proceeding. The District Court adopted the Report and Recommendation by Order dated October 10, 1997. The parties were permitted additional briefing time with regard to the applicable case law.

^{3/} Petitioner's date of birth is September 2, 1969. At the time of the commission of the crimes, Petitioner was 13 years, 11 months old.

445 U.S. 263 (1980); United States v. Easter, slip op. no. 91-6103, at 13-14 (10th Cir. Dec. 10, 1992) (discussing Harmelin v. Michigan, 111 S. Ct. 2680 (1991), and Solem v. Helm, 463 U.S. 277 (1983)). Cf. Thompson v. Oklahoma, 487 U.S. 815 (1988); Stanford v. Kentucky, 492 U.S. 361 (1989). The necessity of an adequate record for review on this issue is sufficiently great that if we had not remanded for dismissal on nonexhaustion grounds, we would have remanded for further development of the proportionality issue. In that regard we would have suggested the appointment of an attorney for Hawkins.

Hawkins v. Champion, Slip op. No. 92-5072, at 9 (10th Cir. Dec. 18, 1992).

On February 11, 1993, in state court, Petitioner filed an application for post-conviction relief requesting, among other issues, a proportionality review of his sentence under the Eighth Amendment. The district court denied relief and the Court of Criminal Appeals affirmed. On May 8, 1995, Petitioner filed a Petition for Writ of Habeas Corpus in this Court. [Doc. No. 1].

The State initially argued that Petitioner's Petition was a mixed petition and should therefore be dismissed. [Doc. No. 3-1]. In response to the State's contention, Petitioner amended his Petition to allege only his Eighth Amendment claim. The District Court granted Petitioner's motion for leave to amend on July 17, 1995. [Doc. No. 5-1]. On January 10, 1996, the District Court appointed the Federal Public Defender as counsel for Petitioner. [Doc. No. 16-1]. By minute order dated March 22, 1996, the District Court referred the Petition to the undersigned Magistrate Judge for Report and Recommendation. The only issue before the Court relates to the proportionality of the sentences imposed on Petitioner.

II. FINDINGS OF FACT

1. Referee Gordon D. McAllister conducted a hearing which began August 30, 1983, and concluded September 2, 1983.⁴ Based on the evidence presented at the hearing, the Referee concluded that Petitioner should be certified to stand trial as an adult. [*Exhibit A, filed August 12, 1996, at 382-83*]. The decision of the Referee was upheld by the Tulsa County District Court, Judge B.R. Beasley presiding. [*Exhibit B, filed August 12, 1996, at 137*].

⁴/ The hearing was held on August 30, and September 2, 19, 20, 21, 22, 1983. [Exhibit A, filed August 12, 1996].

2. The certification process involved numerous psychiatric assessments. Petitioner submitted several exhibits to this Court (Petitioner's Exhibit Nos. 1-4) detailing the results of the psychiatric assessments.
3. A psychological evaluation was prepared by Noble L. Proctor, Ph.D., in September of 1983. Petitioner was 14 years old at the time the report was prepared. Dr. Proctor noted that Petitioner was "rather oppositional" during the evaluation, and that he "believed that the scores obtained represent a slight underestimate of Trent's [Petitioner's] level of intellectual functioning." *[Petitioner's Exhibit No. 1, at 1]*. The examiner noted that Petitioner's verbal, performance, and full scale IQ scores were all within the "borderline intellectual functioning range." Dr. Proctor concluded that based upon Petitioner's responses to a Rorschach test, that he "is likely to act irresponsibly without carefully considering the consequences; as it appears that he is ruled by immediate needs for gratification rather than by long-range goals." *[Petitioner's Exhibit No. 1, at 2]*. The doctor concluded that "in terms of his emotional functioning, Trent may be characterized as an immature, angry, sad youngster. In some areas he functions at a 14 year-old level, but in others he is below this." *[Petitioner's Exhibit No. 1, at 3]*. The examiner additionally noted that the Petitioner "does appear to be able to distinguish right from wrong. There does not seem to be any area of Trent's functioning that could be seen as adult; in fact, he is rather immature for a 14 year old." *[Petitioner's Exhibit No. 1, at 3]*. Dr. Proctor concluded that Petitioner should be treated as a juvenile and that he should have long-term therapy. *[Petitioner's Exhibit No. 1, at 3]*.
4. Petitioner was evaluated by L.A. Macaraeg, M.D., a Staff Psychiatrist at Central State Hospital on February 22, 1984. *[Petitioner's Exhibit No. 2]*. Dr. Macaraeg described Petitioner as 6'2" tall and weighing 157 pounds, but looking his given age. The doctor noted that Petitioner's affect and mood appeared appropriate to the situation, and that his concentration and attention span appeared good. In addition, Petitioner's intellectual ability appeared borderline, and "[h]is insight [was] very limited and judgment [was] impaired." *[Petitioner's Exhibit No. 2, at 1]*. Dr. Macaraeg concluded that Petitioner "exhibits immaturity in several areas of functioning. If under stress, he is very likely to act in an inappropriate and immature way." *[Petitioner's Exhibit No. 2 at 2]*.
5. Archie Hood, M.D., completed a "Diagnostic Staffing Note" on Petitioner on December 2, 1983. *[Petitioner's Exhibit No. 3]*. He noted that Petitioner completed first through the eighth grade, but was forced to repeat the eighth grade. Petitioner's attention span is reported as being approximately two minutes "when he concentrates to a high degree." *[Petitioner's Exhibit No. 3, at 2]*. Petitioner's cognitive development was "characteristic of an individual

9 years of age and possibly younger, a significant discrepancy exists between Trent's chronological age and actual level of cognitive development. Therefore, he may lack sufficient insight concerning his behavior and possess a limited understanding of cause and effect relationships." *[Petitioner's Exhibit No. 3, at 5]*. Petitioner's grade level scores were 4.0 in reading, 5.4 in written language, 6.2 in mathematics, and 5.4 in combined knowledge of science, social studies, and humanities. "Developmental age of 11.0 years and months is provided by a measure of receptive vocabulary." *[Petitioner's Exhibit No. 3, at 5]*. Petitioner had difficulty in the "visual-motor utilization" and his developmental age was reported as ranging from 7 years 6 months to 7 years 11 months. *[Petitioner's Exhibit No. 3, at 6]*. Dr. Hood noted that Petitioner was incapable of understanding the consequences of the charges against him and would be unable to effectively assist his lawyer. *[Petitioner's Exhibit No. 3, at 7]*. Dr. Hood concluded that "[i]n the overall age of the patient his: 1. Cognitive function [was] age 6-9 or less. He is preoperational in cognitive development. 2. Academic skill development average of approximately 11-2 [sic] years of age. 3. Visual motor skill utilization 7.3 years of age. 4. Overall emotional development 6-9 years of age. 5. Psychosexual development, 5-8 years of age. This patient is functioning in an overall mental status at approximately the age of 8.0 years." *[Petitioner's Exhibit No. 3, at 8]*.

6. At a January 20, 1984, hearing in the District Court of Tulsa County, Leon Thompson, the Intake Counselor for the Juvenile Bureau in Tulsa County testified that information from Central State indicated that Petitioner was functioning "at the age level of eight years old. It also indicated that he was very immature. That he possible [sic] needed to be put on medication." *[Exhibit B, filed August 12, 1996, at 14]*. Dr. Hood, the acting Medical Director of the Adolescent Program at Central State Hospital testified that Petitioner had a short attention span. *[Exhibit B, filed August 12, 1996, at 90]*. Dr. Hood also testified that due to Petitioner's short attention span, he would not have been able to participate in a rape that lasted approximately two hours. *[Exhibit B, filed August 12, 1996, at 93]*. Dr. Hood noted that Petitioner was in the low average range of intelligence. *[Exhibit B, filed August 12, 1996 at 95]*. According to Dr. Hood, Petitioner was unable to understand the nature of the charges against him, and was unable to assist his attorney in his defense. *[Exhibit B, filed August 12, 1996 at 103, 107]*. Dr. Hood concluded that Petitioner's overall "intellectual mental cognitive function" was in the range of eight to nine years old. *[Exhibit B, filed August 12, 1996 at 122]*.
7. At an August 30, 1984, hearing in the District Court of Tulsa County, Noble Lee Proctor, a psychiatrist at the Tulsa Child Development and Regional Guidance Center testified that Petitioner was below age level "in terms of his intellectual and emotional functioning overall. In terms of his social functioning,

that is the ability to carry on a conversation with other people, he's about age appropriate." *[Exhibit A, filed August 12, 1996, at 118]*. According to Dr. Proctor, Petitioner's "maturity level" ranged from 4 to 14 depending on the test administered to Petitioner. *[Exhibit A, filed August 12, 1996, at 127, 136]*. Dr. Proctor noted that from a psychological standpoint, Petitioner should be able to assist in his defense. *[Exhibit A, filed August 12, 1996, at 137]*.

8. At the certification hearings, testimony indicated that when the Petitioner was apprehended by the police, he initially gave them a false name. *[Exhibit I at 379; Exhibit A at 94, 108]*. In addition, Petitioner informed the police that the next time he was arrested the police would have to put him in the electric chair because there would not be a witness. *[Exhibit I at 383; Exhibit A at 100]*.
9. Petitioner stood trial as an adult, and was convicted of Second Degree Rape (sentence 15 years), Forcible Sodomy (sentence 20 years), First Degree Burglary (sentence 20 years), and Robbery with a Dangerous Weapon (sentence 45 years). At the time of his sentencing, Petitioner had no prior convictions.
10. Petitioner appealed the convictions to the Oklahoma Court of Criminal Appeals. In affirming Petitioner's convictions, the Oklahoma Court of Criminal Appeals summarized the factual basis underlying the convictions.

In the early morning hours of August 11, 1983, the victim entered her bedroom, whereupon she discovered the appellant, Trent Lynn Hawkins, crouched at the foot of her bed with one of her kitchen knives in his hand. He straightened from his crouched position, raised the knife and told her not to move. Although the appellant's face was masked with blemish creme, the victim recognized him as the thirteen-year old neighborhood boy who had on occasion played with her children. The appellant then blindfolded and bound the victim and led her to the bathroom down the hall and raped her. After raping her, he forced her to orally sodomize him. appellant then led the victim back into her bedroom, forced her to do gyrations on the bed and raped her again. After raping her a second time, the appellant retrieved some ice cubes from the kitchen, placed them in her vagina, and forced her to once again orally sodomize him.

The appellant afterwards began to rummage through the victim's belongings attempting to find money. Subsequently, he found seven dollars in her purse and against her permission, took the money into his possession. Shortly thereafter, the appellant left the house through the back gate. After loosening herself from the

ropes and blindfold, the victim surveyed her house, discovered that the appellant had entered her house through a window, and then proceeded to notify the authorities.

Hawkins v. State, 742 P.2d 33, 34 (Okla. 1987).

11. At an evidentiary hearing in this Court on August 19, 1996, two witnesses testified on behalf of the Petitioner. Respondent called no witnesses. Petitioner also offered six exhibits which were admitted and received into evidence. The record was additionally supplemented by Respondent with the transcripts of Mr. Hawkins' state court trial, adult certification hearing, and other hearings.
12. Denise Johnson represented Petitioner during his certification proceedings in state court. She testified at the August 19, 1996 evidentiary hearing that Petitioner

was very immature. When you're talking about somebody that was sixteen, thirteen, ten, he was very immature at any of those levels. He had no ability to communicate; he had no ability to stay focused or concentrate; his responses to the serious nature of the offenses and the proceedings that were going on around him were totally inappropriate at any given time. Perhaps the best example I can give you of that is that I recall sitting through the jury trial in front of twelve people in Judge Jennings' Court and feeding him lifesavers just to try to keep him quiet and keep him focused. His behavior was just constantly inappropriate, and I never seemed to impact that to any degree. . . . I could never keep him focused long enough to get him to understand what I was saying, let alone having input, so I don't know at what age you would tag that. I don't know the chronological age, I just know that it was never an appropriate age functioning level for me in my opinion.

Transcript of Evidentiary Proceeding, filed October 8, 1996 at 12. Ms. Johnson additionally testified that Petitioner had no record prior to his arrest and conviction on the charges for which he is currently challenging his sentencing.
Transcript of Evidentiary Proceeding, filed October 8, 1996 at 12.

13. Ms. Johnson testified that she believed that Petitioner's sentences were disproportionate.

I don't doubt that I could sit here and cite for you other defendants, perhaps fifteen or sixteen years old, that have committed rapes by breaking into buildings. The problem with

that is I don't know of any other thirteen year old that was even facing adult sentencing. So, it's very difficult to make a comparison. . . . There is a policy, Judge, that perhaps this Court should be made aware of, that in Tulsa County if you have a jury trial, all sentences are run consecutively. You'll notice that in the State pleadings there is a motion requesting that the court deviate from that policy and run these concurrently. That has never been done in Tulsa County in my fifteen years of experience, unless the defendant chooses to plea bargain. So when we look at the cold, hard facts in terms of someone charged with rape and the amount of years that they receive, it is very difficult to make any kind of accurate comparison from the raw data on the statistics because of all those number of factors that have played into it. So, the fundamental basis of my opinion goes back to the fact that I think that when you certify a thirteen year old child to stand trial as an adult, you have certified the entire juvenile system. Obviously, there are a number of thirteen year olds receiving treatment in the juvenile system for offenses that are certainly as horrendous as the offenses that occurred in this case.

Transcript of Evidentiary Proceeding, filed October 8, 1996 at 30-31. Ms. Johnson stated that the basis for her opinion was Petitioner's age, and his lack of prior offenses. Ms. Johnson noted that "[a]lmost all of those sentences [which Petitioner received] are on the high end of the maximum punishment available for these offenses with having no enhanceable prior contact with the system." *Transcript of Evidentiary Proceeding, filed October 8, 1996 at 31.* Ms. Johnson concluded by testifying that she believed that the 20 year sentence for burglary, the 20 year sentence for sodomy, and the 45 year sentence for robbery with a dangerous weapon were excessive. *Transcript of Evidentiary Proceeding, filed October 8, 1996 at 32.*

14. Petitioner testified, at the evidentiary hearing before this Court on August 19, 1996, that he had "completed" the fifteen year sentence for Second Degree Rape, and would complete the twenty year sentence for Forcible Sodomy in September of 1996. *Transcript of Evidentiary Hearing, filed October 8, 1996, at 34-35.* Petitioner testified that he could "complete" his sentence for Second Degree Burglary in five years, and would have to serve fifteen years of the forty-five year sentence for robbery before being eligible for parole. Petitioner stated that the 45 year sentence was the equivalent of a "life sentence" and he would have to serve 15 years of it. Petitioner testified that his earliest parole eligibility would be in approximately twenty-four years. *Transcript of Evidentiary Hearing, filed October 8, 1996, at 34-35.*

15. The Petitioner is currently incarcerated by the Oklahoma Department of Corrections at the Joseph Harp Correctional Center in Lexington, Oklahoma. *Transcript of Evidentiary Hearing, filed October 8, 1996, at 33.*
16. Petitioner's Exhibit No. 6 is a summary of sentencing statistics of the Oklahoma Department of Corrections, dated October 31, 1995. The document does not indicate the time period from which the statistics were gathered. For the crime of first degree burglary, of 825 individuals who were sentenced, the average number of years of the sentence given was 17.8, with the median sentence being 10 years. The minimum number of years was one, and the maximum 1007.5. Twelve individuals were sentenced to life. For the crime of forcible sodomy, of 481 sentences given, the average sentence was 49.4 years, with the median being 20.0. The minimum number of years was one and the maximum 1,500. Seventeen individuals were given life sentences. For the crime of rape in the second degree, of 184 individuals sentenced, the average sentence was 11.1 years, with the median being 8.0. One individual was sentenced to life. For the crime of robbery with a dangerous weapon, the number of individuals sentenced was 3,008, with 22.5 years the average sentence, and 15.0 the median. Ninety-one individuals were sentenced to life. Petitioner provides no information as to the date or time period of these statistics. In addition, no factual information concerning the crimes for which the particular sentences were imposed was provided to the Court.

III. LEGAL ANALYSIS

A. PETITIONER'S ARGUMENT: CONSIDERATION OF AGE

Petitioner, in his brief addressing the applicable standard of review filed July 18, 1997, states,

Petitioner concedes that the sentences imposed in this case would not have been "grossly disproportionate" to these grave offenses *if*, at the time of the offenses, the Petitioner had been an adult. At the time he committed these crimes, however, Mr. Hawkins' chronological age was thirteen. Mr. Hawkins' mental status at the time of the crimes, according to a report prepared by the acting medical director of the Adolescent Unit at Central State Hospital, was that of an 8-year old. In short, at the time he committed these crimes, Mr. Hawkins may have had the body of a young man, but mentally and emotionally, he was still a child. In assessing the gravity of the offenses and the proportionality of the punishment, the Court must consider the defendant's

personal culpability, and ". . . less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."

See Petitioner's Brief, [Doc. No. 55-1] at 2-3 *citing* Thompson v. Oklahoma, 487 U.S. 815, 835 (1988).

Petitioner essentially identifies the appropriate tests for the proportionality standard and acknowledges that application of the test in this case to the sentences received by Petitioner would generally result in a finding that the sentences were not disproportionate. Petitioner focuses on the age of Petitioner, and asserts that due to his age, the sentences were disproportionate.

The Supreme Court has acknowledged that sentences that are imposed within the sentencing guidelines of the sentencing state are generally not considered disproportionate and that sentences that are "less" than death are generally not considered disproportionate. Solem v. Helm, 463 U.S. 277, 290 (1983) (a court should "grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals."). See also United States v. Youngpeter, 986 F.2d 349, 355-56 (10th Cir. 1993) (when sentence falls within statutory limits, as was defendant's in this case, the appellate court "generally will not regard it as cruel and unusual"). The Court agrees that, absent consideration of Petitioner's age, the 100 year sentence for the crimes of which Petitioner have been convicted does not violate the Eighth Amendment prohibition against cruel and unusual punishment. Therefore, the Court is confronted with the issue of whether an aggregate sentence of 100 years, or individual sentences of 45 years for robbery with a dangerous weapon, 20 years for burglary, 20 years for forcible sodomy, and 15 years for rape, imposed on a 13-year-old, is disproportionate and violative of the Eighth Amendment to the Constitution.

B. PROPORTIONALITY REVIEW: SOLEM AND HARMELIN

Petitioner was sentenced in April of 1985. See [Doc. No. 1-1] at 1. At the time Petitioner was sentenced, the Supreme Court had clearly recognized the right to a proportionality review in non-capital cases. In Solem v. Helm, 463 U.S. 277, 284 (1983), in considering the constitutionality of a mandatory life sentence imposed pursuant to a South Dakota recidivist statute,⁵ the Supreme Court recognized that the

^{5/} In Solem, the petitioner was convicted of seven non-violent felonies. Petitioner's seventh conviction was for "uttering a no account check for \$100." Solem at 280. A recidivist statute provided that prior conviction of at least three offenses, in addition to the current offense required sentencing based on a

(continued...)

Eighth Amendment requires that a sentence not be disproportionate to the severity of the crime or involve unnecessary infliction of pain. The Court listed three factors for consideration in conducting a proportionality review: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions. *Id.* at 292. The Court noted, however, that in reviewing the proportionality of a sentence, a court should "grant substantial deference" to the discretion of legislatures and the trial courts in determining the limits and punishments for crimes. *Solem*, 463 U.S. at 290. Furthermore, "outside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare." *Id.* at 289-90 (citations omitted). Under the *Solem* three-factor test, the *Solem* Court found that the mandatory life sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment.

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

The *Harmelin* Court upheld the sentence by a 5-4 vote. However, the majority split on the appropriateness of the "proportionality" principle in non-capital cases. Justice Scalia, joined by Chief Justice Rehnquist, argued that "*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee." *Harmelin*, 111 S. Ct. at 2686. In support of this conclusion, Justice Scalia conducted an extensive historical survey of the Cruel and Unusual Punishment Clause, and found, "The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered . . . conditions." *Id.* at 990. Justice Scalia found, therefore, that although proportionality review would still remain important for death penalty cases, we "see no basis for extending it further." *Id.* at 995. Justice Kennedy, joined by Justices O'Connor and Souter, noted that the Eighth Amendment proportionality analysis applies to noncapital sentence, but concluded that "our proportionality decisions . . . require us to uphold petitioner's sentence." *Id.* at 997. Justice Kennedy wrote that "though our decisions recognize a proportionality principle, its precise contours are unclear." *Id.* at 998. Justice Kennedy concluded that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the

^{5/} (...continued)

"class A" felony. The sentence for a class A felony was life imprisonment with no possibility of parole, which was the sentence which *Solem* received.

crime." Id. at 1001. Three justices, Justices White, Blackmun and Stevens, concluded that the standards of Solem should continue to apply. Their conclusion was that "the punishment [at issue here] fails muster under Solem and, consequently, under the Eighth Amendment to the Constitution." Id. at 2716. Justice Marshall wrote that he agreed with Justice White's opinion with the exception that, in Justice Marshall's opinion, "capital punishment is in all instances unconstitutional." Id. at 1027. Justice Marshall agreed, however, "that the Eighth Amendment also imposes a general proportionality requirement." Id. at 1028.

Solem was clear--the right to proportionality review exists in non-capital cases. By a 5-4 vote in Harmelin, the Justices agreed to modify or overrule Solem. Two Justices wrote that no right to a proportionality review exists in a non-capital case. The remaining seven Justices agree that the right to a proportionality review exists. The confusion caused by Harmelin concerns the applicable standard that a court should apply when conducting the review. Four Justices (White, Blackmun, Stevens, and Marshall) would continue to apply the factors outlined by Solem. Justices Kennedy, O'Connor, and Souter suggest that a more stringent standard than Solem is required.

Noting and discussing the Solem and Harmelin differences, both the Fifth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals have concluded that only if a sentence is grossly disproportionate (after a comparison of the sentence to the offense is made) should a sentence be analyzed under the remaining factors in Solem. See McCullough v. Singletary, 967 F.2d 530 (11th Cir. 1992); McGruder v. Puckett, 954 F.2d 313 (5th Cir. 1992). See also Neal v. Grammar, 975 F.2d 463 (8th Cir. 1992). Some Circuits have continued to apply the factors in Solem, noting that a majority of the Harmelin court declined to expressly overrule Solem. United States v. Kratsas, 45 F.3d 63 (4th Cir. 1995). The Tenth Circuit Court of Appeals has thus far declined to decide whether or not Harmelin overruled Solem. In at least one case the Tenth Circuit has analyzed the challenged sentence under the factors outlined in Solem, and if the sentence was not so disproportionate as to violate the Eighth Amendment in accordance with Solem, the Court has concluded that further analysis was not necessary. See, e.g., United States v. Angulo-Lopez, 7 F.3d 1506 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1563 (1994). See also United States v. Montoya, 85 F.3d 641, 1996 WL 229188 (10th Cir. May 7, 1996). This Court chooses to proceed in that manner.

The Magistrate Judge concludes that first, the factors outlined by the Court in Solem should be applied to analyze Petitioner's sentence. If Petitioner's sentence is not disproportionate under Solem, certainly it is not disproportionate under Harmelin. If Petitioner's sentence is disproportionate under Solem, then the Magistrate Judge will address whether or not a harsher proportionality test is required due to Harmelin.

An additional difficulty, in this case, in analyzing Petitioner's sentence is imposed due to Petitioner's age. Outside of capital cases, few courts have addressed the proportionality of a sentence imposed on an individual under the age of 16. In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Supreme Court recognized that the chronological and developmental age of a minor is a relevant mitigating factor in the Eighth Amendment scrutiny of capital cases. See Eddings v. Oklahoma, 455 U.S. at 116 ("In addition, there was testimony that Eddings' mental and emotional development were at a level several years below his chronological age. All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing."). In Stanford v. Kentucky, 492 U.S. 361 (1989), Justice O'Connor (in a concurring opinion in which she was the deciding vote), stated that in Thompson v. Oklahoma, 487 U.S. 815 (1988), her opinion "specifically identified age-based statutory classifications as 'relevant to Eighth Amendment proportionality analysis.'" Based on these references, and primarily due to the instruction contained in the prior Tenth Circuit Court of Appeals order in this case (see this Order, at 3), the Court considers Petitioner's age as a factor in the Eighth Amendment proportionality review.

C. CAPITAL PUNISHMENT FOR 16 AND UNDER PROHIBITED BY THE CONSTITUTION

In Thompson v. Oklahoma, 487 U.S. 815 (1988), the Supreme Court held that the Eighth and Fourteenth Amendments prohibited the execution of a defendant who was under the age of 16 at the time of the commission of the crime for which he had been sentenced. In Thompson, the defendant was 15-years-old when he was charged with first degree murder. He was subsequently convicted and sentenced to death. Justice Stevens wrote the opinion of the Court. He was joined by three other Justices. Justice O'Connor wrote a concurring opinion. Justice Scalia dissented, and was joined by two of the Justices. Justice Kennedy took no part in the consideration or decision of the case.

The Supreme Court noted that the practice in Oklahoma is that "once a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult." Id. at 820, *citing Eddings v. State*, 616 P.2d 1159 (Okla. Crim. Appeals 1980).

The Supreme Court observed that the Eighth Amendment prohibits the infliction of cruel and unusual punishment, and that the determination of what constitutes cruel and unusual punishment is based on the "evolving standards of decency that mark the progress of a maturing society." Id. at 821 *citing Trop v. Dulles*, 356 U.S. 86 (1958). The Court summarized its analysis.

Thus, in confronting the question whether the youth of the defendant -- more specifically, the fact that he was less than 16 years old at the time of his offense -- is a sufficient reason for denying the State the power to sentence him to death, we first review relevant legislative enactments, then refer to jury determinations, and finally explain why these indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty.

Id. at 822. The Court noted that among the 50 states almost complete unanimity existed in treating an individual under the age of 16 as a minor for numerous purposes including jury service, driving, marrying without parental consent, purchasing pornographic materials, and gambling. Id. at 824.

The Court observed that "the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community." Id. at 832. The Court noted that adolescents are generally less mature and responsible than adults, and due to a lack of experience, education, and intelligence, are less capable of evaluating the consequences of their actions. Id. at 834, 835.

[T]he Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. . . . The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.

Id. at 835.

The Court referred to statistics on the death penalty, noting that approximately 98% of the arrests for homicide involved individuals who were older than 16 at the time the offense was committed. The Court therefore concluded that prohibiting the death penalty for individuals under 16 would not diminish the deterrent value of capital punishment. The Court additionally discounted the potential deterrent value of capital punishment for those individuals under 16 years of age, noting the youth of such individuals. The Court concluded that the imposition of the death penalty for offenses committed by an individual under the age of 16 was "nothing more than the purposeless and needless imposition of pain and suffering" and was therefore unconstitutional. Id. at 838, *citing Coker v. Georgia*, 433 U.S. at 592. These conclusions are the conclusions of four Supreme Court Justices.

Justice O'Connor concurred, but wrote separately. She explained

Although I believe that a national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist, I am reluctant to adopt this conclusion as a matter of constitutional law without better evidence than we now possess. Because I conclude that the sentence in this case can and should be set aside on narrower grounds than those adopted by the plurality, and because the grounds on which I rest should allow us to face the more general question when better evidence is available, I concur only in the judgment of the Court.

Id. at 848-49. Justice O'Connor noted that both the plurality and dissent initially examined the decisions of the state legislatures to determine the national consensus as to the minimum age for capital punishment. Eighteen states have set a minimum age for capital punishment, with the age set at 16 or above. Fourteen states have rejected capital punishment. Of the remaining states which permit capital punishment but do not set an age limit, Justice O'Connor notes that nothing indicates that these state legislatures considered and decided that individuals under the age of 16 should be eligible for capital punishment.

Thus, there is no indication that any legislative body in this country has rendered a considered judgment approving the imposition of capital punishment on juveniles who were below the age of 16 at the time of the offense. It nonetheless is true, although I think the dissent has overstated its significance, that the Federal Government and 19 States have adopted statutes that appear to have the legal effect of rendering some of these juveniles death eligible. That fact is a real obstacle in the way of concluding that a national consensus forbids this practice. It is appropriate, therefore, to examine other evidence that might indicate whether or not these statutes are inconsistent with settled notions of decency in our society.

Id. at 852. Justice O'Connor determined that the death sentence should be vacated.

In this unique situation, I am prepared to conclude that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no

minimum age at which the commission of a capital crime can lead to the offender's execution.

Id. at 857.

However, the Supreme Court has consistently held that the death penalty is unique in comparison to sentences for a term of years or life imprisonment. See, e.g., California v. Ramos, 463 U.S. 992, 998-999 (1983). Therefore the applicability of Thompson to the case presently before this Court is limited.

D. SENTENCES IMPOSED ON MINORS: COURT DISCUSSIONS OF PROPORTIONALITY

In Harris v. Wright, 93 F.3d 581 (9th Cir. 1995), a fifteen-year-old was sentenced to mandatory life imprisonment for murder. He petitioned the court for a writ of habeas corpus. The Ninth Circuit Court of Appeals concluded that the sentence of life imprisonment without the possibility of parole was not disproportionate and did not violate the Eighth Amendment.

Michael Harris, a 15-year-old, and Barry Massey, a 13-year-old, went to a store with the intention of committing robbery. Michael Harris brought a pistol with him, and gave the pistol to Barry Massey. Massey and Harris entered the store and Massey shot and stabbed an individual to death. The juvenile court declined jurisdiction and Harris was convicted of aggravated first degree murder. Harris was sentenced to life imprisonment without the possibility of parole.⁶

The Ninth Circuit articulated that the Eighth Amendment challenge had two possible applications. "A punishment is unconstitutional if the 'evolving standards of decency that mark the progress of a maturing society' soundly reject it. The Eighth

^{6/} Barry Massey, who was 13-years-old at the time of the commission of the crime, was also sentenced to life without possibility of parole. State v. Massey, 803 P.2d 340 (Wash. Ct. App. 1990). Two psychologists testified at the juvenile court declination hearing that Massey had the mental age of 9.9 years old, had a borderline I.Q. of 77, and was a slow learner. Id. at 343. On appeal, Massey argued that his sentence of life without possibility of parole constituted cruel and unusual punishment. The court concluded that the test for cruel and unusual punishment did not require the consideration of the individual's age. "The test is whether in view of contemporary standards of elemental decency, the punishment is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness. That test does not embody an element or consideration of the defendant's age, only a balance between the crime and the sentence imposed. Therefore, there is no cause to create a distinction between a juvenile and an adult who are sentenced to life without parole for first degree aggravated murder. Furthermore, the juvenile court's consideration at declination accounts for the disparity between juvenile and adult sentencing, and in this case the court elected for adult sentencing because the juvenile penalties were insufficient." Id. at 348 (citations omitted). The court upheld the sentence of life without parole. The Supreme Court denied certiorari. Massey v. Washington, 499 U.S. 960 (1991).

Amendment also bars, under certain circumstances, punishments that are grossly disproportionate to the crime being committed." Id. at 582 (citations omitted).

The Court initially considered whether Harris had established that the evolving standards of decency precluded his punishment. The Court noted that Harris bore the burden of "showing that our culture and laws emphatically and well nigh universally reject it." Id.

Harris bears the burden of proving a strong legislative consensus against imposing mandatory life without parole on offenders who commit their crimes before the age of sixteen. Harris manages to cite two states whose laws explicitly preclude mandatory adult sentences in general or life without parole in particular for crimes committed below sixteen, two high courts that prohibit mandatory life terms for such crimes, and twenty-six states that don't punish any crime with mandatory life without parole. On the other side, Harris admits that there are at least twenty-one states that do impose mandatory life without parole on fifteen-year-old offenders. Whatever degree of consensus might be necessary before we could overturn the considered judgment of a state legislature, this doesn't come close.

Id. at 583-84 (footnotes omitted). The Ninth Circuit concluded that the sentence imposed on Harris was not prohibited by "devolving standards of decency."

The Court additionally analyzed whether the sentence was unconstitutional because it was disproportionate. The Court noted that "[d]isproportion analysis, however, is strictly circumscribed; we conduct a detailed analysis only in the 'rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'" Id. at 584 (citations omitted).

Relying on the plurality opinion in Thompson v. Oklahoma, Harris argues that his tender age made him constitutionally less culpable and that his crime is, thus, less weighty than it would be otherwise. In essence, he invites us to decide that his sentence would be grossly disproportionate to a fifteen-year-old's limited culpability for any crime. Justice O'Connor's concurrence in Thompson rejected that notion, refusing to "substitute our inevitably subjective judgment about the best age at which to draw a line . . . for the judgments of the Nation's legislatures." Under Marks v. United States, Justice O'Connor's concurrence is the

holding of Thompson, since it was the "position taken by those Members who concurred in the judgment[] on the narrowest grounds." Washington's legislature has decided that the appropriate punishment for anyone tried and convicted as an adult for aggravated murder is life in prison. The Constitution gives us no power to reverse its judgment.

Id. (citations omitted).

Harris additionally argued that punishment of life without parole for a crime committed at fifteen was grossly disproportionate. The Court declined to draw a line.

As the Supreme Court noted in Harmelin, if we put mandatory life imprisonment without parole into a unique constitutional category, we'll be hard pressed to distinguish mandatory life with parole; the latter is nearly indistinguishable from a very long, mandatory term of years; and that, in turn is hard to distinguish from shorter terms. Youth has no obvious bearing on this problem: If we can discern no clear line for adults, neither can we for youths. Accordingly, while capital punishment is unique and must be treated specially, mandatory life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences. Like any other prison sentence, it raises no inference of disproportionality when imposed on a murderer.

Id. at 585.

In Rodriguez v. Peters, 63 F.3d 546 (7th Cir. 1995), a fifteen-year-old was sentenced to life without parole for two counts of murder. Rodriguez challenged the life without parole sentence as cruel and unusual punishment. Rodriguez was sentenced in Illinois which requires the imposition of life without parole for the commission of more than one murder, permitting no mitigating factors. The Seventh Circuit concluded that Rodriguez's sentence was not "cruel and unusual." Id. at 567. The Seventh Circuit referred to Justice Kennedy's concurring opinion in Harmelin, recognizing that the determination of criminal penalties should be left with the states and the Eighth Amendment contained only a narrow proportionality review. Id.

Rodriguez has provided us with no case law, statutory language, or legislative history, to suggest, much less mandate, that we conclude that the Illinois legislature intended to exempt juveniles from natural life sentences.

Moreover, we live in a world where juvenile offenders are committing violent crimes with increasing frequency. It has often been said that a bullet fired from a gun of a juvenile, at the head of another, is just as fatal as one fired from a weapon of an adult. Society is overwhelmed and angry with the consequences of such violence and the Illinois legislature took an affirmative step toward deterring violent juvenile offenders in its state; it provided for natural life sentences for all who are found guilty of committing more than one murder, including juvenile offenders, tried as adults. We refuse to substitute our judgment for that of the Illinois legislature.

States are free to make their own determinations about punishment, subject only to the Eighth Amendment's requirement that they be based on objective factors. The State of Illinois has adopted legislation mandating that a person found guilty of committing two or more murders must be incarcerated for the rest of his or her natural life. This penalty is based on sufficiently objective criteria, *i.e.*, the commission of more than one murder, and it can be rationally applied to juvenile offenders who are tried as adults without offending the Eighth Amendment's prohibition against cruel and unusual punishment.

Id. at 568.

E. CONSIDERATION OF THE SOLEM FACTORS

The Court begins with the premise that substantial deference is given to the state legislature and the trial court in determining the types and limits of punishments. Solem at 290. In addition, absent the imposition of the death penalty, successful challenges based on the proportionality of a sentence is "exceedingly rare." Solem at 289. And, in a challenge to the constitutionality of a sentence, the Petitioner bears the burden of proof to establish by a preponderance of the evidence that he or she is entitled to relief. See, e.g., Beeler v. Crouse, 332 F.2d 783 (10th Cir. 1964). Beginning with these premises in mind, the Court examines the sentence imposed on the Petitioner in this case under the three factors outlined in Solem.

1. **Solem Factor One: Gravity of the Offense and Harshness of the Penalty**

Arguments by the Parties

In Solem, the Court noted that in analyzing the gravity of the offense compared to the harshness of the penalty in previous cases, the Court had focused on the circumstances of the crime, had compared the seriousness of the crime to other crimes, had examined the nature of the crime, and had considered the severity of the penalty. Solem, 463 U.S. at 291.

Petitioner acknowledges that the crimes committed by Petitioner, with the exception of burglary, are "grave offenses." Petitioner additionally submits that in analyzing the "gravity" of the offense committed by the Petitioner, the Court must consider Petitioner's age. Petitioner notes that he was 13-years-old at the time the offenses were committed and that his developmental age was as young as eight. Petitioner observes that Oklahoma imposed a sentence of 100 years on an individual who was developmentally eight years old when he committed the offenses. Petitioner asserts that his earliest possible date of parole will require that he serve 35 years. Petitioner urges that consideration of these factors dictates a finding that the sentence imposed was disproportionate.

Respondent notes that Petitioner admits that three of the crimes were violent crimes. Respondent additionally argues that burglary is a violent crime. Respondent asserts that one of the elements of burglary requires that an individual enter a residence with the intent to commit a crime. In this case, Petitioner visited the home of the victim earlier in the day to determine if the victim's son was at home. Respondent argues that Petitioner entered the house later in the day with the intent to rape and sodomize the victim, and after committing these crimes, Petitioner robbed the victim. Respondent therefore asserts that this was a violent crime committed by Petitioner against a person and the Petitioner therefore committed four violent crimes.

Respondent additionally observes that with respect to the sentence of 45 years for burglary, although Petitioner received a lengthy sentence, he did not receive the maximum which is life. Furthermore, Respondent notes that Petitioner will be eligible for parole in 15 years with respect to the burglary sentence and therefore the sentence was not disproportionate.

Respondent additionally addresses Petitioner's age and argues that consideration of Petitioner's age does not require a different conclusion. Respondent also asserts that Petitioner's developmental age was not as low as Petitioner suggests. Respondent notes that Petitioner initially inquired if the victim was alone prior to the burglary, that Petitioner attempted to disguise himself, that Petitioner gave the police

a false name when arrested, that some test results indicated Petitioner's mental intelligence was average, and that a short attention span is inconsistent with the crime committed by Petitioner. Respondent additionally points out that although Petitioner did not have a prior record, Petitioner had been previously suspended for fighting, was "room confined" for 41 days, and had discussed escaping from the detention center.

Respondent also notes that the state court, after a lengthy hearing, certified Petitioner to stand trial as an adult.

Factor One: Petitioner's Sentence Was Not Disproportionate to the Gravity of the Crimes Committed

As Petitioner acknowledges, the crimes committed by Petitioner are grave offenses. Petitioner asserts that the burglary was not "grave," but as Respondent points out, the facts suggest that Petitioner broke into and entered the victim's house with the intent of committing a crime. The facts suggest that Petitioner was charged and convicted of "grave offenses."

Petitioner was sentenced to a total of 100 years. Petitioner will be eligible for parole after serving 35 years. The Magistrate Judge concludes that the overall sentence, considering the crimes committed, is not disproportionate to the crimes committed. Of some concern is the 45 year sentence imposed on Petitioner for stealing seven dollars. At first blush, this sentence appears rather severe when compared to the offense committed. However, the length of the sentence is, in part, due to the finding by the lower court Petitioner was guilty of "robbery with a dangerous weapon." The Magistrate Judge concludes that the sentence was not disproportionate.

2. Solem Factor Two: Sentences Imposed in the Same Jurisdiction

Arguments by the Parties

The Solem Court additionally noted that a comparison of sentences imposed on other criminals in the same jurisdiction could be helpful. Id. at 291. "If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. Thus in Enmund, the Court noted that all of the other felony murderers on death row in Florida were more culpable than the petitioner there. The Weems Court identified an impressive list of more serious crimes that were subject to less serious penalties." Id. (citations omitted).

Petitioner asserts that based on the statistics provided by Petitioner (from the Department of Corrections), that Petitioner's sentence for robbery with a dangerous weapon is disproportionate. Petitioner notes that the average sentence imposed by

Oklahoma courts is 22.5 years, and that Petitioner received a sentence that was twice the average sentence. Petitioner also asserts that the sentence imposed on Petitioner was longer than the average sentence imposed for murder, which Petitioner observes is 35.4 and 30.3 years. Petitioner does not provide statistics with respect to sentences imposed on minors.

Petitioner additionally argues that Oklahoma passed a "Truth in Sentencing Act," effective July 1, 1998. Under the new statute, robbery with a weapon other than a firearm is a "schedule D" offense, and an individual without a prior criminal record is a "level 1 offender." The sentencing range for a level 1 offender is 12 - 60 months. Petitioner asserts that the 45 year sentence (540 months) is therefore grossly disproportionate.

Respondent notes that Petitioner argues only that the sentence received by Petitioner was more severe than the average sentence given by Oklahoma courts. Respondent points out that if this was the "standard" used to determine if the sentence was unconstitutional, one-half of all sentences would be invalidated.⁷ Respondent further references two Oklahoma cases as indicating that 45 years and 199 years for burglary were not excessive. See, e.g., Calhoun v. State, 820 P.2d 819, 822-23 (Okla. Cr. 1991); Moore v. State 672 P.2d 1175, 1179 (Okla. Cr. 1983). Respondent further argues that the documents provided by the Petitioner indicate that of 837 individuals sentenced for first degree burglary, twelve were sentenced to life, and one was sentenced to 1007 years. Of the individuals sentenced for sodomy, 17 of 498 were sentenced to life. The average sentence for robbery with a dangerous weapon was 22.5 years, with 91 of 3,099 serving life sentences and at least one individual sentenced to over 1,000 years.

Respondent additionally argues that Petitioner is applying incorrect tests when Petitioner compares the average sentence for murder to the sentence which Petitioner received. First, Respondent asserts that comparisons between punishments for different crimes is improper because differences between punishments is not an indication of whether the punishment is or is not constitutional. Second, Respondent argues that the appropriate comparison is not between the average sentences given for murder and the sentence given to Petitioner for a "lesser crime." The appropriate comparison, according to Respondent, is whether more serious crimes are subject to the same penalty. Respondent notes that an individual convicted of first degree murder, in Oklahoma, can be sentenced to life imprisonment, life without parole, or death. The sentences available for second degree murder range from ten to life. An

^{7/} Respondent has a point. If the Court were to invalidate a sentence merely because it is in excess of the average sentence imposed, the invalidated sentences would be excluded from the equation (in which the average was determined) and consequently, the "average" sentence would decrease. As the average decreased, more and more sentences would be in violation of the "average" and invalidated.

individual convicted of robbery with a dangerous weapon can be sentenced from five years to life. Respondent claims that when the appropriate comparisons are made the sentence Petitioner received is obviously not disproportionate.⁸

Sentences Imposed in Oklahoma: Age Not a Factor

Petitioner provides some statistics from the Department of Corrections to the Court for review. However, Petitioner provides no information to the Court with respect to the imposed sentences and the age of the individual.

In Lynn v. State, 752 P.2d 823 (Okla. Ct. Crim. App. 1988), the defendant was convicted of burglary in the second degree after former conviction of two or more felonies,⁹ robbery with a firearm after former conviction of two or more felonies, and unauthorized use of a motor vehicle after former conviction of two or more felonies. The defendant was sentenced to twenty years, fifty years, and twenty years. In Smallwood v. State, 763 P.2d 142 (Okla. Ct. Crim. App. 1988), the defendant was convicted of robbery with a firearm after former conviction of two or more felonies. He was sentenced to thirty-five years. In Johnson v. State, 761 P.2d 484 (Okla. Ct. Crim. App. 1988), defendant was sentenced to 37 years for conviction of robbery with a firearm. The court concluded that the range of sentencing for such a crime was from five years to life and 37 years did not shock the conscience of the court. In Kelley v. State, 748 P.2d 43 (Okla. Ct. Crim. App. 1988), the defendant was convicted of robbery with a firearm after former conviction of two or more felonies, shooting with intent to kill after former conviction of two or more felonies, escape from lawful custody after former conviction of two or more felonies. Defendant was sentenced to 150 years, 50 years, and 50 years, all sentences to run consecutively. In Glass v. State, 701 P.2d 765 (Okla. Ct. Crim. App. 1985), the defendant was convicted of two counts of first degree rape, two counts of crime against nature, two counts of robbery with a dangerous weapon and one count of assault with intent to rape and sentenced to 109 years. In King v. State, 640 P.2d 983 (Okla. Ct. Crim. App. 1992), the defendant was sentenced to 500 years for rape, 350 years for arson,

^{8/} Respondent observes that of 632 individuals convicted of second degree murder, 221 (33%) received a sentence of life. The remaining 411 who received a term of years, the average sentence was 30.3 years, with at least one sentence of 400 years. All of the individuals convicted of first degree murder received life, life without parole, or death sentences.

^{9/} Several sentencing courts imposed lengthy sentences for individuals who had prior felony records. In this case, the Petitioner had no prior felony convictions. Courts and legislatures generally recognize that lengthier sentences are appropriate for additional felony convictions.

350 years for robbery, and 500 years for assault and battery with intent to kill. All sentences were to be served consecutively.¹⁰

Factor Two: Petitioner's Sentence Was Not Disproportionate To Other Sentences Imposed in Oklahoma

The second "Solem" factor requires a comparison of sentences imposed in the same jurisdiction. Petitioner submits some sentencing statistics from Oklahoma.¹¹ Petitioner focuses predominantly on the sentence that Petitioner received for robbery with a dangerous weapon. As pointed out by Respondent, the available sentence for robbery with a dangerous weapon is from five years to life. The available sentences for the crime of first degree murder is life, life without parole, or death, and for second degree murder is from ten years to life. These sentences are harsher than the available sentences for robbery with a dangerous weapon. The sentencing statistics also indicate that 91 of 3,099 individuals sentenced for robbery with a dangerous weapon are serving life sentences.

Several Oklahoma court cases reflect similar or lengthier sentences for convictions based on robbery with a dangerous weapon or rape.¹² The Magistrate Judge concludes that the sentence imposed on Petitioner is not disproportionate when compared to other sentences imposed in Oklahoma.

3. Solem Factor Three: Sentences Imposed in Other Jurisdictions

Arguments by the Parties

The Solem Court observed that a comparison of sentences imposed for the same crime in other jurisdictions could be helpful. Solem 463 U.S. at 292.

Petitioner asserts that under a comparable federal statute the maximum sentence for the offense of robbery is 20 years. Under the federal sentencing guidelines, Petitioner notes that if a knife is used, the base offense level is increased by three. According to Petitioner, if he had been sentenced under federal guidelines his sentence would have been 46-57 months. Petitioner notes that even if he serves

^{10/} In King, the individual stole \$4.00 from a Sister. King entered the Sister's residence under the pretense of using her phone, demanded money and did not believe her when she said she had no money. He beat her, raped her, set her place of fire and threw her into the fire. She was severely burned. The facts as related by the court are more heinous than the crime committed by Petitioner.

^{11/} As previously noted, the statistics do not indicate the dates from which they are compiled, and Petitioner provides no statistics related to the age of the individual(s) sentenced.

^{12/} The Magistrate Judge discounts the sentences imposed based on "former conviction" of a felony.

only 15 years of the 45 year sentence, that is 180 months, or three times the federal guideline.

In Kansas, Petitioner asserts that he could have been sentenced to 46-51 months (with no prior convictions).¹³ In Arkansas, Petitioner asserts that he could have been sentenced to at least 10 years but not more than 40 years, or life.¹⁴ In Missouri, Petitioner asserts that an individual may be sentenced to not less than 10 years nor more than 30 years, or life.¹⁵ In Oklahoma the crime of robbery with a dangerous weapon is punishable by a term of five years to life.

Petitioner references only the sentences which could be imposed on adults sentenced for the crimes with which Petitioner has been charged. Petitioner does not provide any information with respect to individuals who were sentenced at the age of 13. Petitioner also provides no information with respect to whether the states which Petitioner references would permit a 13-year-old to be tried as an adult.

Respondent argues that the comparisons provided by Petitioner establish that Petitioner's sentence was not disproportionate if compared to other jurisdictions. Respondent notes that the Arkansas and Missouri sentencing range is from ten years to life for robbery with a dangerous weapon. Respondent further asserts that Texas¹⁶ and Florida¹⁷ have similar punishments for robbery with a dangerous weapon.

^{13/} Petitioner does not reference any statutes in Kansas relating to juveniles. Kansas appears to permit certification of juveniles to adult status for certain felony offenses only if the juvenile is age 14 or older. See Kan. Stat. Ann. 38-1636(a). Petitioner was 13 years 11 months at the time of the commission of the offense.

^{14/} Petitioner references only Arkansas penal statutes. Petitioner does not consider the available sentences for an individual who was 13-years-old at the time of the commission of the underlying offense. Pursuant to Arkansas law, the juvenile court has exclusive jurisdiction over a juvenile who is less than fourteen years old at the time of the commission of the offense. Ark. Code Ann. 9-27-318.

^{15/} Missouri statutes provide that an individual between the ages of twelve and seventeen who has committed an offense that would be classified as a felony if the individual was an adult may, after a hearing, be prosecuted in the "court of general jurisdiction." Mo. Ann. Stat. 211.071.

^{16/} Texas permits the juvenile court to waive exclusive jurisdiction over an individual, 14 years or older at the time of the commission of the offense, if the offense is a felony. Tex. Code Ann. Family Code § 54.02.

^{17/} In Florida, an individual 14 or 15 years old at the time of the commission of the offense (including robbery and sexual battery) may be tried as an adult. Fla. Stat. Ann. § 985.227. In addition, in Postell v. State, 383 So.2d 1159 (Fla. App. Ct. 1980), the Florida court upheld two 99 year sentences for murder and burglary finding that the Defendant "was, in fact, ineligible for classification as a youthful offender because she did not meet the separate requirement of subsection (a) of Section 958.04(1), that is, she was not a person . . . who has been transferred for prosecution to the criminal division of the circuit court pursuant

(continued...)

With respect to the comparison to the federal sentencing guidelines, Respondent asserts different pardon and parole procedures. Because these factors vary greatly between jurisdictions, Respondent notes that differences in sentencing guidelines will occur. Furthermore, Respondent argues that the Supreme Court has recognized that the federal statute does not establish a "national consensus." Respondent cites to Stanford v. Kentucky, 492 U.S. 361 (1989). Respondent additionally argues that the "national consensus," if any, is not in Petitioner's favor because Arkansas, Missouri, Texas, Florida, Louisiana, Michigan,¹⁸ Rhode Island,¹⁹ West Virginia,²⁰ Georgia,²¹ Maryland,²² and Oklahoma all currently have maximum sentences of life for robbery with a dangerous weapon. Respondent also asserts that Petitioner's "promise" to kill his future victims compounds the gravity of Petitioner's actions.

Sentences Imposed on Minors in Other Jurisdictions

Petitioner has the burden of proof to establish that the sentence imposed on Petitioner is not in accord with the Eighth Amendment. Petitioner submits some statistics from Oklahoma indicating the sentences given for various felonies. Petitioner does not submit any specific statistics related to the "age" of the individuals sentenced. Petitioner merely argues in his brief that Respondent cannot prove that any other individuals the same age as Petitioner received similar sentences. Petitioner additionally states that Respondent has not been able to refer to even one case in which an individual 13 years of age, with the "mental status" of an eight-year-old was sentenced to 100 years. Initially, however, Petitioner has the burden to prove that the sentence that he received was disproportionate. Petitioner has submitted no evidence

^{17/} (...continued)
to chapter 39" (emphasis supplied). A child who is indicted by a grand jury for an offense punishable by death or life imprisonment is not a child who is transferred within the purview of Chapter 39, Florida Statutes."

^{18/} An individual in Michigan, age 14 to 17, who is charged with a certain crime can be tried as an adult. Mich. Comp. Laws § 600.606.

^{19/} Rhode Island permits certification of individuals 16 years of age and older. R.I. Gen. Laws § 14-1-7.2.

^{20/} Adult certification is permitted for individuals 14 years of age or older at the time of the commission of the offense. W. Va. Code § 49-5-10.

^{21/} In Georgia, the "superior court" has exclusive jurisdiction over the trial of any child, age 13 to 17 who is alleged to have committed rape, aggravated sodomy, aggravated sexual battery, armed robbery with a firearm, murder, or manslaughter. Ga. Code Ann. 15-11-5.

^{22/} Maryland permits the juvenile court to waive jurisdiction over a child who is 15 years old or a child who is under the age of 15 but is charged with an act which if committed by an adult would be punishable by death or life imprisonment. Md. Code. Ann. § 3-817.

from any jurisdiction indicating sentences generally given to individuals of Petitioner's age or Petitioner's "proportional age."

Petitioner's case is not entirely isolated. A brief search of case law indicates several instances in which individuals under the age of sixteen have been sentenced to lengthy term of years sentences or sentences of life without parole.

In State v. Green, 477 S.E.2d 182 (N.C. Ct. App. 1996), the defendant was convicted of first-degree sexual offense, attempted first-degree rape, and first-degree burglary. At the time the offenses were committed, the defendant was 13-years-old. Id. at 274. The defendant was sentenced to mandatory life imprisonment for first degree sexual offense, a concurrent sentence of six years for attempted first-degree rape, and a consecutive fifteen year sentence for first-degree burglary. Id. at 275. The court concluded that a sentence of life imprisonment for first degree sexual offense did not violate the Eighth Amendment to the United States Constitution and that the defendant's "age, mental capacity, and lack of a prior criminal record do not change this result." Id. at 190.

In People v. Beck, 546 N.E.2d 1127 (Ill. Ct. App. 1989), the defendant was 14-years-old at the time of the commission of the crimes. He pled guilty to six counts of armed violence and aggravated battery in return for the dismissal of charges of attempted murder and home invasion. The defendant was sentenced, in 1987, to six consecutive terms of 20 years for the six armed violence convictions, or a total sentence of 120 years. The defendant was not sentenced on the aggravated battery charges. The Illinois appellate court affirmed the six convictions for armed violence and the 120 year sentence, but vacated the convictions for aggravated battery. Id. at 84.

In Postell v. State, 383 So.2d 1159 (Fla. App. Ct. 1980), a 13-year-old was convicted of second-degree murder, burglary, and robbery. The trial court imposed two concurrent 99 year sentences for murder and burglary and a consecutive 15 year sentence for robbery.²³

In State v. Foley, 456 So.2d 979 (La. 1984), the court determined that a life sentence without the benefit of parole imposed on a 15 and one-half year old juvenile convicted of aggravated rape was not disproportionate to his crime and did not constitute excessive or cruel and unusual punishment.

^{23/} The Florida statute provided a maximum custody of six years for a "youthful offender" unless certain exceptions to the youthful offender statute were met. One exception provided that if the individual was found guilty of a capital or life felony the individual was not eligible for the application of the youthful offender act.

In State v. Hills, 377 So.2d 1218 (La. 1979), the court upheld a life sentence for a sixteen-year-old aggravated rapist. In State v. Pilcher, 655 So. 2d 636 (La. 1995), the court concluded that a life sentence without benefit of parole for a fifteen-year-old convicted of second degree murder was not grossly disproportionate. In State v. Rogers, 168 S.E.2d 345, (N.C. 1969), the court upheld a life sentence imposed on a fourteen year and eleven-month-old rapist.

In Naovarath v. State of Nevada, 779 P.2d 944 (Nev. 1989), the Nevada Supreme Court held that a sentence of life imprisonment without the possibility of parole²⁴ that was imposed upon a 13-year-old defendant was cruel and unusual punishment. The majority opinion noted that the 13-year-old killed a man who had been sexually molesting him, that the pre-sentence report recommended life with possibility of parole, and that the trial judge sentenced the defendant to life without the possibility of parole. The court concluded that a sentence of life without the possibility of parole for a 13-year-old was cruel and unusual punishment under the state and Federal Constitutions, and the sentence was modified to life.

In State v. Telsee, 425 So.2d 1251 (La. 1983), the defendant, a 17-year-old, challenged a sentence of forty years at hard labor for forcible rape as excessive and in violation of the Louisiana Constitution. The court noted that a "survey of sentences for forcible rape which have been reviewed . . . reflect a range of sentences from ten years at hard labor to twenty-five years at hard labor, with parole excluded for periods of two to eight years." The court located only two other cases in which a sentence of 40 years hard labor was imposed, and in each of those cases, the sentence was vacated and the case was remanded for resentencing. The court additionally noted that at the time of the commission of the crime the defendant was 17, that he had no prior criminal record, that he had been steadily employed for three and one-half years, that he had taken PCP and marijuana prior to the commission of the crime, and that he expressed remorse. The court concluded that the 40 year sentence was disproportionate to the crime, and that defendant should be sentenced to twenty-five years at hard labor, with two years of that without benefit of parole, probation or suspension of the sentence. Id. at 1259.

Sentences Imposed on Minors: Court Discussions of Proportionality

As discussed above, the Ninth Circuit in Harris v. Wright, 93 F.3d 581 (9th Cir. 1995), and the Seventh Circuit in Rodriguez v. Peters, 63 F.3d 546 (7th Cir. 1995), discussed proportionality of sentences imposed on minors.

^{24/} Petitioner testified that he received the equivalent of a "life sentence" for robbery with a dangerous weapon. However, Petitioner is serving this sentence with the possibility of parole. At trial, Petitioner testified that, with good time credits, he would be eligible for parole on all of his sentences after serving a total of 35 years.

In Harris, a fifteen-year-old was sentenced to mandatory life imprisonment for murder, and he petitioned the court for a writ of habeas corpus. The Ninth Circuit Court of Appeals concluded that the sentence of life imprisonment without the possibility of parole was not disproportionate and did not violate the Eighth Amendment.

In Rodriguez, 63 F.3d 546 (7th Cir. 1995), a fifteen-year-old was sentenced to life without parole for two counts of murder. The Seventh Circuit concluded that Rodriguez's sentence was not "cruel and unusual." 63 F.3d at 567.

Factor Three: Petitioner's Sentence Was Not Disproportionate to the Sentences Imposed in Other Jurisdictions

Under common law, individuals under the age of seven were presumed incapable of committing a crime. Individuals between the age of seven and fourteen were rebuttably presumed to be incapable of committing a crime. Individuals age fourteen and older were presumptively capable of committing a crime. See, e.g., 21 Am. Jur. 2d Criminal Law § 38 (1981).

Petitioner and Respondent have referred the Court to numerous cases in which the available sentences for robbery with a dangerous weapon were comparable to the sentence received in this case by Petitioner. Neither Petitioner nor Respondent have provided information regarding whether those states certify individuals to stand trial as adults at the age of 13.

Of the states referenced by the parties, Missouri, Georgia, Maryland and Oklahoma all permit 13-year-olds to be tried as adults. In addition, Florida has permitted a lengthy sentence of a 13-year-old. Arkansas, Kansas, Texas, Michigan, Rhode Island, and West Virginia permit adult certification for minors at ages varying from fourteen to sixteen. In addition, of the cases referenced by the Court (above), 13-year-olds received sentences of up to life in prison in North Carolina, Washington, and Nevada.

Based on the information provided by the parties and the statutes and case law reviewed by the Court, the Court cannot find that a national consensus against the certification and trial of 13-year-olds as adults exists. Common law, and the law of several states, recognize that individuals who are 13-years-old at the time of the commission of an offense may, in some circumstances be tried and sentenced as an adult.

The Magistrate Judge concludes that this sentence was not excessive in comparison to sentences available and imposed in other jurisdictions

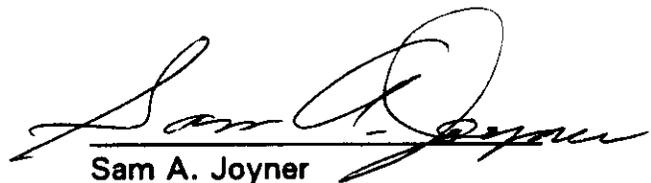
CONCLUSION

The United States Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be **DENIED**. This Court has authority to grant Petitioner's petition only if the sentence imposed on Petitioner was violative of the United States Constitution. The Magistrate Judge concludes, after a lengthy review of the case law and the record submitted in this case, that the imposed sentence was not unconstitutional. The Magistrate Judge notes that the sentence is lengthy, and the sentence, if this Court was the sentencing Court, might have been different. However, the federal courts have authority to grant such petitions only if violations of the United States Constitution have occurred. The Magistrate Judge recommends that the District Court deny Petitioner's Petition because the sentence imposed was not unconstitutional.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). **THE FAILURE TO FILE WRITTEN OBJECTIONS TO THIS REPORT AND RECOMMENDATION MAY BAR THE PARTY FAILING TO OBJECT FROM APPEALING ANY OF THE FACTUAL OR LEGAL FINDINGS IN THIS REPORT AND RECOMMENDATION THAT ARE ULTIMATELY ACCEPTED OR ADOPTED BY THE DISTRICT COURT.** See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 5 day of June 1998.



Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JIMMY L. SHARBUTT,)
SSN: 440-70-5965)

Plaintiff,)

v.)

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

Defendant.)

JUN - 3 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-C-298-J

ENTERED ON DOCKET

DATE JUN 05 1998

ORDER^{1/}

Plaintiff, Jimmy L. Sharbutt, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because (1) Plaintiff is unable to perform light work although the ALJ concluded that he could perform light work, (2) that the ALJ improperly evaluated the opinions of Plaintiff's treating physicians, and (3) that because Plaintiff has Hepatitis C he would be unable to maintain a job. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

^{1/} 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.

^{2/} Administrative Law Judge Larry C. Marcy (hereafter "ALJ") concluded that Plaintiff was not disabled on January 8, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on July 29, 1996. [R. at 6].

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I. PLAINTIFF'S BACKGROUND

Plaintiff was born June 12, 1961, and was 34 years old at the time of his hearing before the ALJ. [R. at 26]. Plaintiff completed the eighth grade and obtained his GED. [R. at 29].

Plaintiff has two children who live with him. Their ages are eight and eleven. Plaintiff testified that he generally gets them ready for school in the mornings. [R. at 34]. Plaintiff additionally testified that he drives approximately one and one-half miles each day to pick up his mail. [R. at 33].

Plaintiff injured his back while he was working on July 21, 1993. [R. at 139]. Plaintiff testified that he experienced constant pain and that his pain at the time of the hearing was a nine on a scale of one to ten. [R. at 40]. According to Plaintiff his pain was predominantly in his lower back, and it extended to his legs. [R. at 118].

A lumbar myelogram on December 13, 1993 indicated that Plaintiff had a bulging intervertebral disc at C4-5. On February 2, 1994, his doctor noted that Plaintiff could heel/toe walk without difficulty. Due to Plaintiff's lack of improvement from conservative treatment, Plaintiff's doctor decided to perform a lumbar laminectomy and microdisketomy. [R. at 153]. Plaintiff had surgery on March 28, 1994. [R. at 181]. Plaintiff's doctor's notes indicate that Plaintiff's post-operative course was uneventful, that Plaintiff's leg improved after surgery, and that Plaintiff was able to ambulate without difficulty. Plaintiff was dismissed on March 30, 1994. [R. at 165].

The notes from Plaintiff's rehabilitation center on July 11, 1994, indicate that Plaintiff attended a physical therapy session on June 29, 1994, that Plaintiff was told

to take a 15 minute break before beginning another session, and that Plaintiff left the center and did not return. [R. at 195].

On September 28, 1994, an MRI of Plaintiff's lumbar spine showed marked narrowing of the L5-S1 space. [R. at 202]. A letter from Jack V. Rhoads, M.D., dated December 7, 1994, noted that Plaintiff was, at the time of the letter, unable to work due to his herniated disc, for which he needed an operation. In addition, due to his Hepatitis C, Plaintiff was considered not stable enough to undergo surgery. The doctor additionally noted that Plaintiff would be disabled from food industry work. [R. at 209].

Plaintiff's medical notes additionally indicate that he drank up to one twelve pack and one-fifth of alcohol each day. [R. at 210].

On November 29, 1994, Plaintiff's wife contacted Plaintiff's doctor inquiring whether Plaintiff could take anything for his pain. The doctor's office informed her that he should not take anything because he needed to keep his liver enzymes down in order to qualify for surgery. [R. at 213]. Plaintiff commented that it was difficult to refrain from drinking if he was unable to take pain medication. [R. at 213].

On June 7, 1994, Plaintiff's doctor noted that Plaintiff was doing better, that he had some pain when he coughed, but that other than that, standing and walking were not causing him pain. [R. at 226]. On July 25, 1994, Plaintiff's doctor wrote that Plaintiff would probably have to consider a different line of work because Plaintiff would be unable to continue lifting. [R. at 224]. On November 21, 1994, Plaintiff's doctor noted that Plaintiff had a recurrent herniated disc and would have to remain away from work for some time. [R. at 219].

An RFC Assessment completed on February 15, 1995, indicated that Plaintiff could lift 50 pounds occasionally, 25 pounds frequently, stand or walk for six out of eight hours, and sit for six out of eight hours. [R. at 59]. An RFC Assessment completed on May 30, 1995, indicated that Plaintiff could lift 20 pounds occasionally, 10 pounds frequently, stand or walk for six out of eight hours, and sit for six out of eight hours. [R. at 79].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{3/} 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

^{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 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^{4/} 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

^{4/} 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."

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

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

III. THE ALJ'S DECISION

The ALJ noted that although Plaintiff complained of pain, the ALJ discounted Plaintiff's credibility due to the lack of objective findings, the lack of medication for severe pain,^{5/} the lack of discomfort shown by Plaintiff at the hearing, and the frequency of visits to the physician. The ALJ concluded that Plaintiff was capable of lifting 30 - 35 pounds, sitting two hours and driving one hour. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff could do light park aid or self-service attendant.

^{5/} As noted above, although Plaintiff requested pain medications, Plaintiff's doctors informed Plaintiff that such medications were not advised because they would interfere with Plaintiff's liver enzyme level and inhibit Plaintiff's ability to have corrective surgery.

IV. REVIEW

Light Work

Plaintiff notes that the ALJ concluded that Plaintiff was capable of performing light work. Plaintiff asserts, however, that he has back pain and has had difficulty obtaining the surgery he needs due to his elevated liver enzymes which are a result of Hepatitis C. Plaintiff claims he is unable to perform the physical requirements of light work.

The record contains two RFC Assessments. The earlier RFC Assessments indicated that Plaintiff has the physical capability to lift up to 50 pounds occasionally. The second RFC Assessment indicates that Plaintiff could occasionally lift 20 pounds. Plaintiff's doctors did not indicate the amount of weight that Plaintiff could lift, although the doctors did indicate that Plaintiff had a back problem and would be unable to return to his previous work. The Court concludes that the ALJ did not adequately address the opinions of Plaintiff's treating physicians and therefore the decision of the Commissioner must be reversed. On remand, the ALJ should more thoroughly explore Plaintiff's physical RFC. In addition, the record indicates that Plaintiff has now had the back surgery which he sought to alleviate his condition. The ALJ should determine, on remand, if the second surgery renders Plaintiff physically capable of performing the physical requirements of work.

Treating Physician

Plaintiff asserts that the ALJ erred by not giving substantial weight to the opinions of Plaintiff's treating physicians. Plaintiff notes that both of Plaintiff's treating

physicians stated that Plaintiff was unable to work due to the herniated disk in his back, but that the ALJ ignored the opinions of the treating physicians. Plaintiff requests that the Court reverse the opinion of the ALJ because the ALJ did not give specific and legitimate reasons for rejecting the opinions.

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.

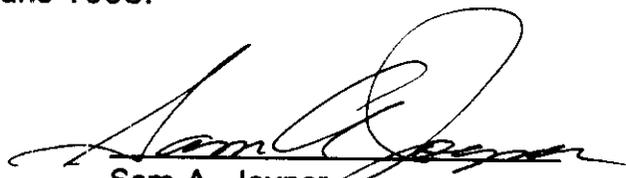
(1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed; (3) the degree to which the physician's opinion is supported by relevant evidence; (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).

The ALJ does not discuss any of the opinion letters of the treating physicians. One treating physician states that Plaintiff needs surgery, that Plaintiff cannot work until he has the surgery, and that Plaintiff is prohibited from obtaining the surgery until Plaintiff's Hepatitis C is under control. [R. at 209]. The treating physician does not explain whether Plaintiff is incapable of performing any work. The treating physician does not specifically discuss Plaintiff's limitations. However, the ALJ does not discuss the treating physician's opinion. Although the treating physician's opinion could be interpreted consistently with a finding that Plaintiff is not disabled, this Court cannot make those interpretations. The ALJ has the responsibility of explaining and discussing the opinions of the treating physician, and on review this Court determines whether the ALJ's conclusions are supported by substantial evidence. In this case, the ALJ did not provide any discussion of the opinions of the treating physicians. On remand, the ALJ should discuss the opinions of the treating physicians.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED**.

Dated this 2 day of June 1998.


Sam A. Joyner
United States Magistrate Judge

SM

ENTERED ON DOCKET

DATE 6-5-98

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

MEGADYNE PRODUCTS, INC.,
an Oklahoma corporation,

Plaintiff,

vs.

MICHAEL C. PERRY, MICHIKO
PERRY, DERIVATIVE ARTS CORP.,
AND MEDIA SOURCE, INC.,

Defendants.

FILED

JUN 4 1998

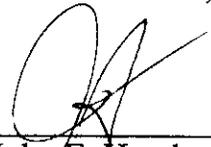
Case No. 98 CV 0006K Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Rule 41(a)(1)(ii), FED.R.CIV.P., the plaintiff and defendants jointly stipulate that this action be dismissed without prejudice. The parties will bear their own costs and attorneys' fees.

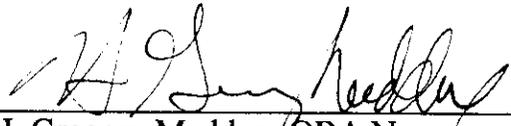
Dated: June 4, 1998.

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN - 5 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BETTY L. NEWMAN,
SSN: 444-42-6619

Plaintiff,

v.

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

Defendant.

No. 97-96-C-184-H(J)

ENTERED ON DOCKET

DATE 6-5-98

REPORT & RECOMMENDATION: ATTORNEYS FEES

On April 29, 1988, Plaintiff filed an application for attorneys fees pursuant to Equal Access to Justice Act ("EAJA"). [Doc. No. 12-1]. Defendant challenges Plaintiff's application asserting that Defendant's position was substantially justified, that the issues raised by Plaintiff in Plaintiff's brief were decided in favor of Defendant, and that the issue upon which the Court reversed was a technical issue which was not asserted by Plaintiff.

EAJA requires the United States to pay attorney fees and costs to a "prevailing party" unless the position of the United States was substantially justified, or special circumstances make an award unjust. 28 U.S.C. § 2412(d). The United States has

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

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the burden of proof to establish that its position was substantially justified. Kemp v. Bowen, 822 F.2d 966, 967 (10th Cir. 1987).

In Pierce v. Underwood, 487 U.S. 552, 565 (1988), the Supreme Court defined "substantially justified" as "justified in substance or in the main--that is, justified to a degree that could satisfy a reasonable person." "That phrase does not mean a large or considerable evidence, but such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. at 564.

[A] position can be justified even though it is not correct, and . . . it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact. Id. at 565.

Less stringent proof requirements were considered and rejected by the Pierce court. "Substantially justified" is more than "merely undeserving of sanctions for frivolousness." A burden of proof higher than reasonableness, as suggested in the Brennan dissent, was rejected, as well.

Between the test of reasonableness, and a test such as "clearly and convincingly justified"--which no one, not even respondents, suggests is applicable--there is simply no accepted stopping place, no ledge that can hold the anchor for steady and consistent judicial behavior. Id. at 567.

Subsequent Tenth Circuit Court of Appeals rulings have further described this "ledge that can hold the anchor of consistent judicial behavior". In Hadden V. Bowen, 851 F.2d 1266, 1269 (10th Cir. 1988), the Tenth Circuit found that a reversal based upon a lack of substantial evidence in the record does not automatically translate into an award of attorney fees. The Court noted that the circuits which have addressed

the issue "have all concluded that a lack of substantial evidence indicates, but does not conclusively establish, that the government's position concerning a claim was not substantially justified." Hadden, 851 F.2d 1266, 1269 (10th Cir. 1988). The Tenth Circuit adopted the majority rule and held that "a lack of substantial evidence on the merits does not necessarily mean that the government's position was not substantially justified." Id. The Court has also found the mere fact that the district court below affirmed the ALJ's decision does not automatically mean that the governments's position was reasonable and therefore substantially justified. Weakley v. Bowen, 803 F.2d 575, 578 (10th Cir. 1986).

Defendant's main argument is that attorneys fees should not be awarded under EAJA to Plaintiff because Plaintiff did not adequately raise and address the argument upon which this case was reversed. However, this is not the test upon which a court determines whether or not the government's position was substantially justified. In addition, although Plaintiff did not adequately develop the issue upon which this case was reversed, Plaintiff did assert that the decision of the ALJ at Step Four was not supported by substantial evidence. A review of the record indicated that the ALJ's Step Four decision was based on the testimony of a vocational expert.^{2/} In this case, the vocational expert referenced only one job which Plaintiff was capable of performing at the RFC identified by the ALJ. The record did not indicate that the job identified

^{2/} The Tenth Circuit Court of Appeals has previously noted that this practice of delegating the Step Four analysis to the vocational expert should be discouraged. See Winfrey v. Chater, 92 F.3d 1017,1025 (10th Cir. 1996).

had been performed by Plaintiff within the 15 years prior to the decision of the ALJ. Therefore the ALJ's decision and the decision of the Commissioner were not supported by substantial evidence. The Magistrate Judge finds that the position of the Defendant was not substantially justified and recommends that the District Court award attorneys fees under EAJA. Both parties agree that the amount of attorneys fees, if awarded, should be reduced to \$2,631.73.

RECOMMENDATION

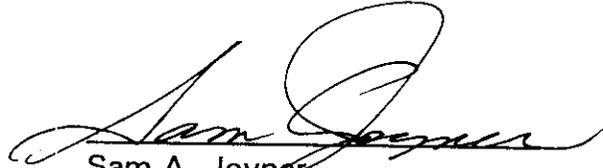
The Magistrate Judge recommends that the District Court grant Plaintiff's Application for an Award of Attorneys Fees under the Equal Access to Justice Act. [doc. no. 12-1], and award to Plaintiff \$2,631.73 in attorneys fees.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and 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 that party from appealing any of the factual or legal findings in this Report and Recommendation that are ultimately accepted or adopted by the District Court. See

Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 5 day of June 1998.


Sam A. Joyner
United States Magistrate Judge

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

FILED

JUN 4 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRENT B. GOLDEN,

Plaintiff,

vs.

DON WATERS, Carter County
Detention Center, Ardmore OK 73401,

Defendant.

No. 98-CV-390-BU (M)

ENTERED ON DOCKET

DATE JUN 07 1998

ORDER

Before the Court is Plaintiff's pro se civil rights complaint pursuant to 42 U.S.C. § 1983. Upon review of the complaint, the Court finds the complaint is deficient as follows: (1) the complaint is missing Plaintiff's original signature; (2) Plaintiff has failed to either pay the \$150.00 filing fee or submit a motion for leave to proceed in forma pauperis; (3) Plaintiff has failed to provide a copy of the complaint for service on Defendant.

Furthermore, for the reasons set forth below, the Court finds that venue is not proper in this district court, and therefore, this action should be dismissed without prejudice. See Costlow v. Weeks, 790 F.2d 1486 (9th Cir. 1986) (court has the authority to raise venue issue sua sponte).

The applicable venue provision for this action is found under 28 U.S.C. §1391(b) which provides as follows:

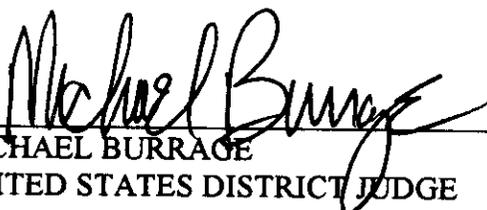
A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

There is no applicable law with regard to venue under 42 U.S.C. §1983 which would exempt this case from the general provisions of 28 U.S.C. §1391(b). Coleman v. Crisp, 444 F. Supp. 31 (W.D. Okla. 1977); D'Amico v Treat, 379 F. Supp. 1004 (N.D. Ill. 1974).

Plaintiff, an inmate at John Lilley Correctional Center, Boley, Oklahoma, identifies the defendant in this action as Don Waters, the Sheriff of Carter County. He bases his complaint on allegations that while he was a pretrial detainee at the Carter County Detention Center, he was "violently assaulted" by another inmate. According to the complaint, Defendant is a resident of Ardmore, Carter County, Oklahoma, and the events giving rise to Plaintiff's claim arose in Carter County, Oklahoma. Carter County is located within the territorial jurisdiction of the United States District Court for the Eastern District of Oklahoma. 28 U.S.C. § 116(b). Thus, it is clear that venue is not proper before this Court and this case should be dismissed without prejudice. 28 U.S.C. § 1406(a).

ACCORDINGLY, IT IS HEREBY ORDERED that this action is **dismissed without prejudice** for improper venue.

SO ORDERED this 4th day of JUNE, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

DATE 6-4-98

CHARITABLE ESTATE COUNSELORS,)
INC., an Oklahoma Corporation,)
)
Plaintiff,)
)
vs.)
)
CONSECO AND PHILADELPHIA LIFE)
INSURANCE CO., a foreign Corporation,)
)
Defendant.)

Case No. 98-CV-0262K(E)

F I L E D

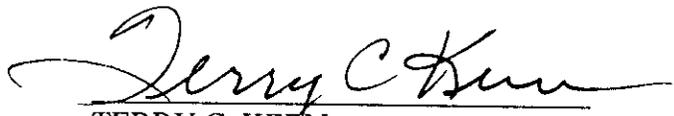
JUN 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER REMANDING CASE

Upon the Amended Motion to Remand filed herein by Plaintiff, Charitable Estate Counselors, Inc. ("Plaintiff"), and based upon and subject to the Plaintiff's stipulation that the total relief requested in the captioned case, including actual damages, punitive damages, attorneys' fees and costs, does not exceed \$75,000.00, the Court hereby remands this case to the District Court in and for Tulsa County, Oklahoma.

ORDERED this 3 day of June, 1998.

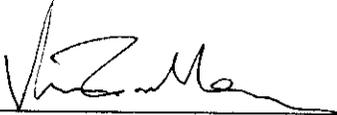

TERRY C. KEEN,
UNITED STATES DISTRICT JUDGE

9

APPROVED:

Jimmy Goodman, OBA # 3451
Crowe & Dunlevy, a Professional Corporation
1800 Mid-America Tower
Oklahoma City, OK 73102
(405) 235-7700
FAX (405) 239-6651

-and-



Victor E. Morgan, OBA # 12419
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500 Kennedy Building
321 South Boston
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(918) 592-0900

Attorneys for Defendant
Philadelphia Life Insurance Company



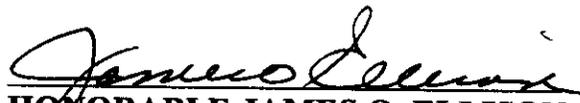
Randall A. Gill, OBA #10309
Gill & Keeley, P.A.
1400 South Boston Bldg. #680
Tulsa, OK 74119-3629
(918) 587-1988

Attorneys for Plaintiff
Charitable Estate Counselors, Inc.

The contested time and expenses will be heard at the hearing scheduled to be held on

June 15, 1998, at 10:30 A.m.

ORDERED this 2^d day of June, 1998.

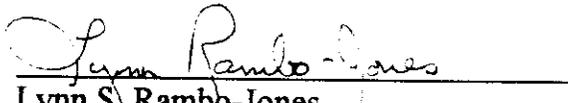

HONORABLE JAMES O. ELLISON
United States District Court


Louis W. Bullock
Patricia W. Bullock
BULLOCK & BULLOCK
320 South Boston, Suite 718
Tulsa, Oklahoma 74103-3783
(918) 584-2001


Mark Lawton Jones
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- and -

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PUBLIC INTEREST LAW CENTER
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125 South Ninth Street, Suite 700
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(215) 627-7100


Lynn S. Rambo-Jones
Deputy General Counsel
OKLAHOMA HEALTH CARE
AUTHORITY
4545 North Lincoln, Suite 124
Oklahoma City, OK 73105
(405) 530-3439

ATTORNEYS FOR PLAINTIFFS

ATTORNEYS FOR DEFENDANTS

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 3 1993
Phil Lombardi, Clerk
U.S. DISTRICT COURT

B. WILLIS, C.P.A., INC., and BUCK)
WILLIS,)
)
Plaintiffs,)
)
v.)
)
THE HONORABLE JAMES D. GOODPASTER,)
PUBLIC SERVICE COMPANY OF)
OKLAHOMA, and JOHN DOES 1-100,)
)
Defendants.)

CASE NO. 97-1083-E

ENTERED ON DOCKET

DATE JUN 04 1993

O R D E R

Now before the Court is the Motion to Dismiss, or, In the Alternative, Motion for Summary Judgment (Docket #11) of the Defendants The Honorable James D. Goodpaster and Public Service Company of Oklahoma ("PSO").

Plaintiffs B. Willis C.P.A., Inc. and Buck Willis have brought this action, claiming that defendants have violated Willis's federally-protected rights to equal protection and freedom of speech, that PSO is being unjustly enriched, and that PSO's bringing of contempt charges in state court constitutes both malicious prosecution and abuse of process. This case arises out of a condemnation action which is taking place in state court, in Rogers county. On October 28, 1992, PSO initiated a condemnation action seeking to take a perpetual easement and right of way for a single track industrial railroad spur tract which would cover property owned by Plaintiff in this action, B. Willis, C.P.A., Inc. (Willis). Commissioners were appointed, and a Report of the Commissioners was filed on December 28, 1992. Willis objected to the Report of the Commissioners, claiming that the taking by PSO

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was not necessary for a public use or purpose, and contesting the value placed on the property. Subsequently, a hearing was held in state court. Willis denies that the hearing afforded him a meaningful opportunity to litigate the right to take, and argues that the hearing was instead for the purpose of arguing a motion to compel he had filed attempting to secure certain documents from PSO. After that hearing, on March 8, 1994 the court overruled the pending discovery motions as well as Willis' exceptions to the Report. Willis perfected an appeal to the Court of Appeals, which held, on March 21, 1995, that the act of filing the petition raised a rebuttable presumption that the condemnation was necessary for a public use, but that the landowner was entitled to rebut that presumption. The Court of Appeals, on March 21, 1995, held that Willis was not given a proper opportunity to rebut the presumption, and remanded in order to give Willis an opportunity to do so. Both parties filed Petitions for Certiorari with the Oklahoma Supreme Court.

Shortly after the trial court overruled Willis' exceptions, PSO began construction on the railroad spur, and construction was completed on March 1, 1995. During the construction of the spur, Willis sought extraordinary relief, and a stay of the district court' decision, from the Supreme Court, which was denied on June 21, 1994. After the spur was completed, and the Court of Appeals had ruled, Willis demanded that PSO cease use of the railroad line. PSO sought an injunction and temporary restraining order in district court. On May 2, 1995, after a hearing, an injunction

was entered, restraining Willis from "directly or indirectly interfering in any manner with the construction, maintenance and operation of [PSO's] railroad spur. . . . "

Willis responded by filing an action in federal court for trespass against Burlington Northern (BN), due to BN running a coal train over the 1069 feet of standard railroad track that lies on his property, and an action against PSO and BN for trespass and violation of civil rights. This Court concluded that all of plaintiff's claims hinged on the constitutionality of Okla.Stat.tit. 66, §53(c)^{1/}, and found that the statute was constitutional, and that use of the track pending the outcome of the condemnation proceeding was proper.

The issues presented in this case arose when the Oklahoma² Supreme Court ruled in the state court condemnation case that PSO had not submitted sufficient evidence for the district court to conclude that the proposed taking was for a public use and was reasonably necessary. The Supreme Court then remanded for further proceedings consistent with its Opinion. Willis once more sent a letter requesting that PSO refrain from using the track across its property, and PSO, after pointing out that this request was in violation of the restraining order, filed an Application for Contempt Citation. Willis responded to the Application for

^{1/} Okla.Stat.tit. 66, §53(c) provides: And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.

Contempt Citation by filing an Application to Assume Original Jurisdiction and Petition for Writ of Prohibition with the Oklahoma Supreme Court. That Application was denied, and shortly thereafter Willis filed this action for violation of his constitutional rights, unjust enrichment, malicious prosecution, and abuse of process. Along with his Complaint, Willis filed a Motion for Preliminary Injunction enjoining defendants from prosecuting the Contempt Application and using the property which was the subject of condemnation proceedings in Rogers County. Both the issue of the preliminary injunction and the Motion to Dismiss/Motion for Summary Judgment on plaintiffs' claims have been fully briefed, as has plaintiffs' Counter Motion for Summary Judgment. Because the issues of the preliminary injunction will be moot if the motion to dismiss is granted, the Court will first consider the motion to dismiss.

Willis' Equal Protection Claim

PSO first argues that Willis cannot establish a violation of his rights by PSO's use of the property because PSO's statutory right to possession has been established by the state district court and by this court. PSO asserts that the issue in this case has already been determined in the previous federal lawsuit, and that Willis is collaterally estopped from raising that same issue again. Willis argues that Okla.Stat.tit.66, §53(c) is irrelevant to his claim and that the decision of this court in the related cases does not in any way preclude his current claim.

The key question is whether this court's ruling in the previous case necessarily precludes Willis' present claim that his right to equal protection of the laws has been violated by appropriation of his property prior to a meaningful hearing. This Court must conclude, that, in light of its previous ruling, that Okla.Stat.tit.66, §53(c), which allows possession of the property in certain instances, is constitutional, and that he does not have a right to a hearing prior to taking a possessory interest in his land, Willis does not have an equal protection claim. Because of the Court's conclusion regarding the equal protection claim and the effect of its previous ruling, the unjust enrichment claim must also be dismissed.

Malicious Prosecution and Abuse of Process

Willis brings a claim for malicious prosecution, asserting in his complaint, that "the acts of PSO . . . in bringing a contempt of court proceeding against Willis constitute the tort of malicious prosecution." Willis apparently abandons that claim in his response to PSO's Motion to Dismiss, arguing instead that the malicious prosecution comes from the pursuit of injunctive relief on April 3, 1995. In either event Willis' malicious prosecution claim is, at best, premature.

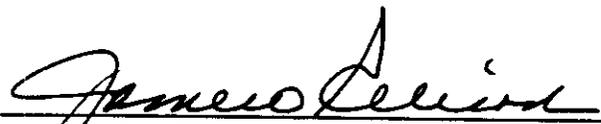
The parties essentially agree on the elements necessary to prove an action for malicious prosecution: 1) the bringing of an action by defendant; 2) a successful conclusion in favor of plaintiff; 3) lack of probable cause; 4) malice; and 5) damages. Parker v. City of Midwest City, 850 P.2d 1065, 1067 (Okla. 1993).

Regardless of whether plaintiff's claim is based on the action for injunctive relief or the contempt proceeding, it is inescapable that there has been no "successful conclusion in favor of plaintiff." Plaintiff's claim for malicious prosecution is dismissed.

Likewise, the claim for Abuse of Process must be dismissed. Again the parties agree on the elements of the claim: 1) improper use of process; 2) primarily for an ulterior purpose; and 3) damages to plaintiff. Greenburg v. Wolfburg, 890 P. 2d 895, 905 (Okla. 1994). Abuse of process does not lie even if an action was motivated by a bad intention if the "court's process is used legitimately to its authorized conclusion." Id. The gravamen of an abuse of process claim is "perversion of the process after it is issued." Greenburg, 890 P.2d at 906. The intention of PSO therefore in obtaining the contempt citation, as alleged in the petition, is not sufficient to support an abuse of process claim.

Defendant's Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment (Docket # 11) is granted.

Dated this 3rd day of June, 1998.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 3 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
NANCY J. SINOR,)
)
Defendant.)

No. 98CV0171B (n) ✓

ENTERED ON DOCKET

DATE JUN 04 1998

DEFAULT JUDGMENT

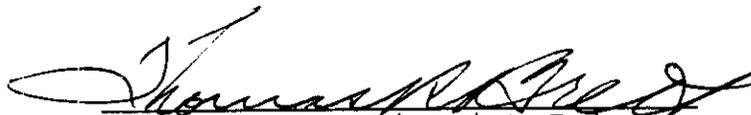
This matter comes on for consideration this 2nd day of June, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Nancy J. Sinor, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Nancy J. Sinor, acknowledged receipt of Summons and Complaint on April 22, 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.

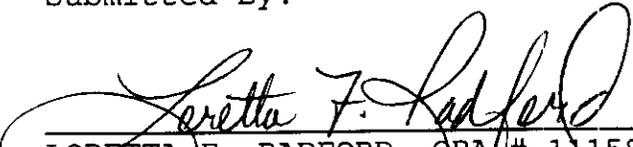
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Nancy J. Sinor, for the principal amount of \$2,731.49, plus accrued interest of \$1,471.16, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of \$150.00 as

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provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.4349 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 74103-3809
(918) 581-7463

LFR/JMO

DATE 6-4-98

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MAZZIO'S CORPORATION)	
a corporation)	
)	
Plaintiff,)	
)	
VS.)	
)	
LLOYD INDUSTRIES, INC.)	
a corporation)	
)	
Defendant.)	

Civil Action No. 98CV0341K(E)

FILED

JUN 4 1998
Phil Lombardi, Clerk

CONSENT JUDGMENT

Plaintiff, MAZZIO'S CORPORATION ("MAZZIO'S") having filed and served a Complaint in the United States District Court demanding a permanent injunction and other relief, and Defendant, LLOYD INDUSTRIES, INC. ("LLOYD"), having agreed to the entry of a Consent Judgment herein, agree that it is:

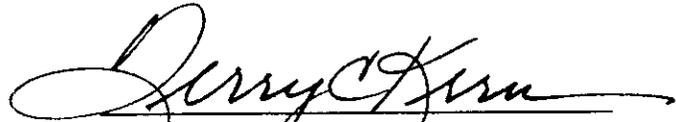
ORDERED, ADJUDGED AND DECREED that final judgment in favor of MAZZIO'S and against LLOYD is hereby granted and entered in this action as follows:

1. That LLOYD, its officers, agents, servants, employees, attorneys and all those persons in active concert or participation with them, are hereby permanently enjoined and restrained from:
 - (a) Using the name or trademark CALZONE RING or any other colorable imitation thereof, such as "Ring-shaped Calzone";

- (b) Selling or offering for sale any donut shaped calzone crimper, which makes a calzone pastry product as shown in MAZZIO'S U.S. Trademark Registration No. 2,045,196, such as Item No. CZR-11X3 from LLOYD'S catalog.
2. LLOYD shall remove and destroy, from wherever located, any all signs, tags, labels or displays that bear the designation **CALZONE RING** or any mark confusingly similar, including Ring-Shaped Calzone.
 3. By January 1999, LLOYD shall have terminated all use of and shall have destroyed all advertisements, advertising brochures and the like that bear the designation **CALZONE RING** or any mark confusingly similar such as Ring-Shaped Calzone.
 4. Prior to January 1999, LLOYD shall alter any existing catalogs or advertisements of the donut shaped calzone crimper to indicate "Not Available", "No Longer Available" or "Discontinued".
 5. LLOYD represents that it has sold less than 50 of the offending calzone crimpers and has one calzone crimper in inventory at this time, which it will either destroy or forward to MAZZIO'S counsel.
 6. LLOYD acknowledges the ownership by MAZZIO'S and the validity of U.S. Trademark Registration No. 2,039,779 for the trademark **CALZONE RING** and U.S. Trademark Registration No. 2,045,196 for the circular calzone product, as issued by the U.S. Trademark Office.

7. The Court shall retain jurisdiction over this cause of action and the parties hereto for the purpose of enforcing the provisions of this Judgment.

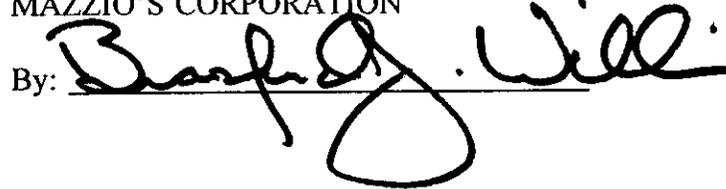
Dated: June 3, 1998

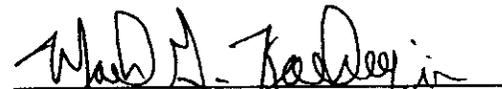

UNITED STATES DISTRICT JUDGE

APPROVED:

DATED: May 21, 1998

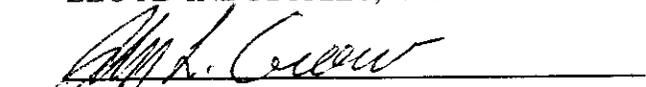
MAZZIO'S CORPORATION

By: 


HEAD, JOHNSON & KACHIGIAN
228 West 17th Place
Tulsa, Oklahoma 74119
(918) 587-2000
Attorneys For Plaintiff

DATED: May 27, 1998

LLOYD INDUSTRIES, INC.


Defendant

ENTERED ON DOCKET

DATE 6-4-98

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

DERYL WAYNE COOK,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION, et al.,)
)
 Respondents.)

No. 96-CV-757-K (J)

F I L E D

JUN 24 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On January 20, 1998, the Court filed its Order adopting the Report and Recommendation (the Report) of the United States Magistrate Judge and denying Petitioner's petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. That Order was premised on the absence of objections to the Report by the parties. However, on January 26, 1998, Petitioner, by and through his attorney of record, filed a motion to reconsider and an objection to the Magistrate's Report (Docket #11).

In his motion to reconsider, Petitioner's counsel states that he did not receive a copy of the Report, filed on December 2, 1997, until January 14, 1998. Counsel also provides his own Affidavit to support his factual contentions concerning service of the Report. Citing Rule 8(b)(3), *Rules Governing Section 2254 Cases*, Petitioner's counsel contends that because his objection was filed January 26, 1998, within ten (10) days of being served with a copy of the Report, the objection should be considered timely filed. Having reviewed counsel's affidavit, the Court finds Petitioner's objection to the Report to be timely. Therefore, the motion to reconsider should be granted and the Order of January 20, 1998 withdrawn.

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has now reviewed de novo those portions of the Report to which the Petitioner has objected, and concludes that, for the reasons discussed below, the Report should be adopted and affirmed and the petition for writ of habeas corpus denied.

BACKGROUND

In his Report, the Magistrate Judge provides a succinct account of the facts and procedural history of this case, and those facts need not be repeated here. In brief, Petitioner was convicted by a jury in Tulsa County District Court on May 22, 1992 on two counts of indecent exposure after prior conviction of a felony. He was sentenced to 25 years on the first count and to 30 years on the second count. Petitioner filed a direct appeal in the Oklahoma Court of Criminal Appeals. His conviction was affirmed. He also sought and was denied post-conviction relief.

Petitioner filed the instant habeas corpus petition on August 16, 1996, alleging five (5) grounds of error: (1) the trial court erred by allowing the admission of hearsay testimony concerning the identification of a license tag number, (2) the trial court erred in allowing the admission of hearsay testimony concerning the identification of the perpetrator of the crime and the vehicle used, the photo-lineup, and a description of the felonies, (3) the trial court erred by giving a presumed "not guilty" instruction rather than instructing that Petitioner was presumed innocent, (4) trial counsel provided ineffective assistance in failing to object to the erroneous jury instruction, and (5) appellate counsel provided ineffective assistance in failing to raise the issue of the erroneous jury instruction on appeal.

DISCUSSION

As an initial matter, the Court agrees with the Magistrate Judge's conclusion that Petitioner has exhausted his available state remedies as to the claims he now raises for federal habeas corpus review.

As to Petitioner's claims of error by the trial court, the Magistrate Judge evaluated whether the admission of the evidence about which Petitioner complains "so influenced the jury that [the court] cannot conclude that it did not substantially affect the verdict, or whether we have grave doubt as to the harmlessness of the error alleged." Tuttle v. State of Utah, 57 F.3d 879, 884 (10th Cir. 1995); see also O'Neal v. McAninch, 513 U.S. 432, 437 (1995); Brecht v. Abrahamson, 507 U.S. 619 (1992); Kotteakos v. United States, 328 U.S. 750 (1946). After reviewing the entire record, the Magistrate Judge concluded that the admission of the evidence about which Petitioner complains did not have "substantial and injurious effect or influence in determining the jury's verdict." In his objection, Petitioner disagrees with this conclusion stating that the admission of the license tag number was "[s]ubstantial and significant error -- certainly!" In light of Petitioner's objection, this Court has reviewed the entire record and agrees with the Magistrate Judge's conclusion that the admission of the evidence complained of did not have a "substantial and injurious effect or influence in determining the jury's verdict."

The Magistrate Judge also concluded that Petitioner's claim concerning the "presumed not guilty" jury instruction is procedurally barred from federal habeas corpus review. In an effort to establish "cause and prejudice" to overcome the bar, Petitioner argues ineffective assistance of counsel as cause for the default. As stated in the Report, to establish ineffective assistance of counsel, Petitioner must show that his counsel's performance was deficient and that the deficient

performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). In this case, counsel's failure to object at trial to the erroneous jury instruction and to raise the issue on appeal does not satisfy either the performance or the prejudice prong of the Strickland test. Therefore, the Magistrate Judge concluded that Petitioner failed to establish cause for his procedural default.

Petitioner objects to this conclusion, stating that "it then becomes difficult at best to then hide the failure of a constitutional proportion under the rug of 'procedural default.'" (#11 at 3). However, the law in this area is clear. Where a habeas corpus petitioner has procedurally defaulted a claim in state court, he must demonstrate both cause and prejudice in order for a federal habeas corpus court to consider the merits of the defaulted claim. See Coleman v. Thompson, 501 U.S. 722 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). Although Petitioner believes he was clearly prejudiced by the erroneous jury instruction, he has nonetheless failed to demonstrate cause for his procedural default. Therefore, this Court is precluded from considering this claim.

Petitioner's only other means of gaining federal habeas review of his procedurally defaulted claim is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). The "fundamental miscarriage of justice" exception to the procedural bar doctrine is narrow and applies only in "extraordinary" cases where an individual is "actually innocent" of the crime for which he has been convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991). This case is not one of those "extraordinary" cases. Petitioner never claims that he is "actually innocent" of the crime of which he was convicted.

Having failed to demonstrate cause and prejudice or that a fundamental miscarriage of justice will result if his claim is not considered, the Court agrees with the Magistrate Judge's conclusion that Petitioner is unable to overcome the procedural default of his claim challenging the jury instruction. Therefore, this Court is precluded from considering that claim on the merits.

CONCLUSION

The Report and Recommendation of the United States Magistrate Judge should be adopted and affirmed. The petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's motion to reconsider (#11) is **granted**.
2. The Court's Order of January 20, 1998 (#10) is **withdrawn**.
3. The Report and Recommendation of the Magistrate Judge (Docket #9) is **adopted and affirmed**.
4. Petitioner's petition for a writ of habeas corpus is **denied**.

SO ORDERED THIS 3 day of June, 1998.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 6-4-98

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

CITY OF CLAREMORE, OKLAHOMA,)
a municipal corporation,)

Plaintiff,)

vs.)

FRATERNAL ORDER OF POLICE,)
LODGE 112, an unincorporated)
association,)

Defendant.)

Case No. 97-CV-1040K(M)

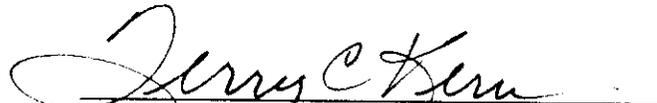
FILED

JUN 4 1998

Phil Lombardi, Clerk
U.S. District Court

ORDER

Now on this 3 day of June, 1998, Plaintiff's Motion to Dismiss comes on for consideration. This Court, being fully advised in the premises, grants same and dismisses all causes of action in this matter.


JUDGE OF THE DISTRICT COURT

DATE 6-4-98

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

JERRI BLANCHETT
SSN: 446-48-2983,

Plaintiff,

vs.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

Case No. 97-CV-809-K(M) ✓

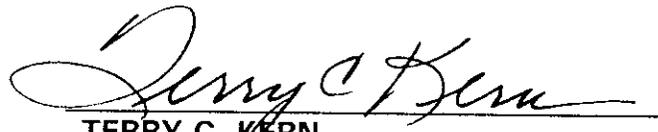
FILED

PHIL LOMBARDI, Clerk
U.S. DISTRICT COURT

ORDER

There being no objection, the Court adopts the Magistrate's Report and Recommendation filed May 5, 1998. [Dkt. 3]. **THE COURT ORDERS THAT THIS CASE BE DISMISSED** without prejudice for failure to prosecute as outlined in the Magistrate Judge's Report and Recommendation.

Dated this 3 day of June, 1998.



TERRY C. KERN
U.S. DISTRICT COURT CHIEF JUDGE

DATE 6-4-98

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

AMERICAN BUILDERS, etc.,
Plaintiff,
vs.
CHARLES BURNS, et al.,
Defendants.

No. 94-C-1058-K

FILED

JUN 4 1998

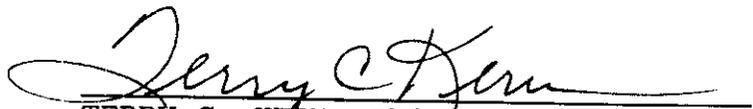
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has been resolved through the sale of property in the bankruptcy court. Therefore it is not necessary that the action remain upon the calendar of the Court.

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

ORDERED this 3 day of June, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 6-4-98

FILED

JUN 04 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

TERRENCE LEWIS, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 DAVID CARRUTHERS, et al.)
)
 Defendants.)

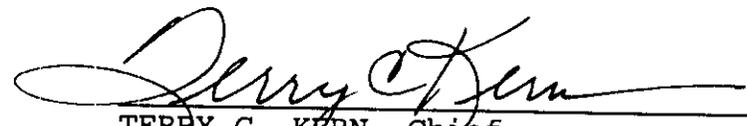
No. 96-C-1163-K

ADMINISTRATIVE CLOSING ORDER

The status report filed June 1, 1998, indicates that this case is presently being submitted to arbitration, but that it is early in that process. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown that further litigation is necessary.

ORDERED this 3 day of June, 1998.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

FILED

JUN 01 1998

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

KAREN I. BAUGH,
SSN: 217-60-4346,

Plaintiff,

v.

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

Defendant.

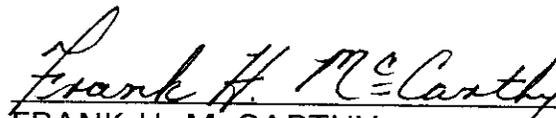
CASE NO. 97-CV-335-H

ENTERED ON DOCKET

DATE JUN 03 1998

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 1ST day of JUNE, 1998.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

THOMAS R. GLOVER,)
)
Plaintiff,)
vs.)
)
GARY ALRED, et al.,)
)
Defendants,)
)
and)
)
JOE SODERSTROM AND SARAH)
SODERSTROM,)
)
Defendants & Third-Party Plaintiffs,)
)
vs.)
)
MID-ARK CATTLE COMPANY, INC.,)
BARRETT-CROFOOT, INC.,)
BARRETT-CROFOOT CATTLE, INC., and)
JAMES F. LOWDER,)
)
Third-Party Defendants.)

FILED

JUN 2 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96CV 886B

ENTERED ON DOCKET

DATE JUN 03 1998

**STIPULATION AND JOINT APPLICATION
FOR DISMISSAL WITHOUT PREJUDICE OF SODERSTROM
CROSS-CLAIMS AGAINST DEFENDANT GARY ALRED,
PURSUANT TO FED.R.CIV. P. 41**

COME NOW Defendants Joe Soderstrom and Sarah Soderstrom ("Soderstroms"), and Defendant Gary Alred ("Alred"), by and through their counsel of record, and stipulate and agree and jointly request that the Court enter an order dismissing without prejudice the Soderstroms' cross-claims against Alred herein, with each party to bear his or their own costs and fees.

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CT

WHEREFORE, the parties hereto have tendered herewith a proposed form of order.

Respectfully submitted:



David L. Bryant, OBA # 1262

BRYANT LAW FIRM

400 Beacon Building

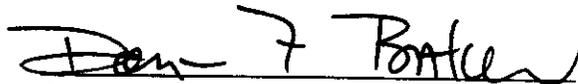
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Attorneys for Defendants and Cross-Claimants
Joe and Sarah Soderstrom



Donn F. Baker, Esq.

Baker & Baker

303 W. Keetowah

Tahlequah, Oklahoma 74464

Attorneys for Defendant Gary Alred

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 1998, a correct copy of the foregoing instrument was mailed by first class United States mail, to the following:

Richard W. Lowry, Esq.
Robert Alan Rush, Esq.
Logan & Lowry
P.O. Box 558
Vinita, OK 74301-0558

David D. Wilson, Esq.
Bruce A. Robertson, Esq.
Wilson, Cain & Acquaviva
300 N.W. 13th Street, Suite 100
Oklahoma City, OK 73103

Nathan H. Young, III, Esq.
Attorney at Law
239 West Keetoowah
Tahlequah, OK 74464

Weldon Stout, Esq.
Wright, Stout & Fite
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H. Grady Terrill III, Esq.
Craig, Terrill & Hale, L.L.P.
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1500 Broadway
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Lubbock, Texas 79408-1979

David Bryant

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

I. CLAIMANT'S BACKGROUND

Claimant was born on November 1, 1945, and was 49 years old at the time of the ALJ hearing and decision. She completed the eleventh grade, and has a GED high school equivalency certificate. Claimant's past relevant work includes telemarketer, laborer, home health provider, and bakery aide. Claimant testified that she has not been able to work since December 27, 1993 due to neck, shoulder, arm, leg, knee and chest pain, and carpal tunnel syndrome.

II. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

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

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

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991).

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

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 fourth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform her past relevant work as a telemarketer (sedentary work). Having concluded that claimant could perform her past relevant work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

IV. MEDICAL HISTORY OF CLAIMANT

In June and July 1991, claimant had carpal tunnel release operations on her right and left hands performed by Dr. David Bell. (R. 136) On August 26, 1991, she was certified to return to work with no limitations except no lifting over ten pounds with her left hand for one month. (R. 135) In September 1991, claimant complained of pain and weakness in both hands. However, she continued to work as a home health provider until December 27, 1993 (R. 29, 99), the same date claimant began living at a Kansas City address. (R. 73) During the time claimant worked as a home health provider, she assisted in lifting a patient weighing almost 300 pounds. (R. 103, 137)

Claimant was seen by Dr. Ramon Nichols in February 1994 for a consultative examination in connection with her application for benefits. (R. 137-140) The medical history was given by claimant. She reported right shoulder, right wrist, and right knee pain, periodic swelling of the right knee, painful gripping of objects (but not dropping), and an ability to stand only four hours because of swelling of the right knee. (R. 137) Claimant stated she was no longer having neck pain. (R. 138) Chest pain was occasional (6-7 times per year), and only lasted a few seconds. (Id.) Dr.

Nichols noted tenderness in the right trapezius muscle as well as the right suprascapular region. (R. 139) Tinel's test was positive for pain of the right wrist, but no radiation of discomfort to the hand. (Id.) Knee squatting "[gave] her difficulty," and there was decreased strength of the right arm against resistance. Swelling was noted in the right forearm. (Id.) Dr. Nichols diagnosed chronic right shoulder pain, chronic knee pain, peptic ulcer disease, and tendinitis of the right wrist and forearm. He found no evidence of carpal tunnel syndrome. (R. 140)

On March 9, 1994, a Residual Physical Functional Capacity Assessment was performed. (R. 127-134) Claimant was found to have the capacity to lift and/or carry twenty pounds occasionally, ten pounds frequently, to stand and/or walk about six hours in an eight-hour workday, and to sit about six hours in an eight-hour workday. (R. 128) Taking into account Dr. Nichols' consultative examination, and with pain factored in, claimant was found to have an RFC of "moderate strength" or less. (R. 134)

Claimant was treated at Truman Medical Center in Kansas City ("Truman") between March and August 1994, for neck and shoulder pain. (R. 147-182) She was diagnosed with supraspinatous tendinitis and prescribed Relafen for pain. (R. 158, 164, 175) X-rays revealed degenerative joint disease of the knees, and right shoulder degenerative joint disease with impingement. (R. 161) She was prescribed a cane and Voltaren, and referred for physical therapy. Conservative treatment was recommended, but the possibility of operative intervention was noted. (R. 161)

In August 1994, claimant was seen at Truman for a follow-up visit. (R. 159-160) Dr. Timothy Lehman noted that claimant's x-rays of the right shoulder showed no arthritis and no degenerative changes. She had a negative pinpoint tenderness over the right shoulder joint, negative impingement sign, and negative supraspinatous sign of her right shoulder. Her right shoulder muscle

strain had improved minimally with nonsteroidals (which she took sporadically, not consistently), and rest. Her right knee improved somewhat with nonsteroidals and a cane. The claimant was to continue using the cane and to take her nonsteroidals (Voltaren) on a regular basis. She was encouraged to do exercises, including swimming, bicycling, and range of motion exercises for her right shoulder. (R. 159) Her work status was described as "full." (R. 160)

V. REVIEW

Claimant alleges the following errors by the ALJ:

- A. Failure to properly consider claimant's documented shoulder impairment and to properly perform a pain and credibility analysis; and
- B. Failure to perform a proper Step Four analysis.

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). At Step Four, claimant bears the burden of proving an inability to perform her past relevant work. Andrade v. Secretary of Health & Human Servs., 985 F.2d 1045, 1050 (10th Cir. 1993).

A. Shoulder Impairment, Pain, and Credibility

Claimant contends that the ALJ failed to properly consider claimant's shoulder impairment and the pain caused by motion of the shoulder and use of the arm. The ALJ did refer to and make a specific finding of shoulder impairment:

On physical examination of February 1, 1994, . . . [t]he doctor's impressions were:
(1) Chronic right shoulder pain,

* * *

The medical evidence establishes that claimant has severe impairments of the . . . right shoulder. . . .

(R. 16, 18)

Having noted the chronic right shoulder pain and severe impairment caused by it, the ALJ performed the following pain and credibility analysis:

Based on Regulations 20 CFR 404.1529, 416.929, and Social Security Ruling 88-13, the Administrative Law Judge has carefully evaluated the claimant's subjective complaints of pain, alleged to render her incapable of working. Pain, as such, cannot be measured qualitatively or quantitatively by objective medical standards, and the nature and degree are, in each case, to be gauged to a large extent by the claimant's subjective complaints and credibility. In a disability report (Exhibit 13), dated January 18, 1994, the claimant describes her daily activities as doing the shopping, cleaning, going to church on Sundays, visiting with friends weekly, and borrowing a car once in a while. She stated she just couldn't lift anything too heavy. The claimant doubtlessly experiences some pain and discomfort. However, after considering all relevant evidence, including but not limited to the claimant's complaints as stated and as referenced in the medical records, current medications, daily activities, medical opinions, reports, and the claimant's appearance and actions, the Administrative Law Judge concludes that at no time relevant to this decision has such pain been of such intensity, frequency, and duration as to be disabling within the meaning of such term as used in the Act. The undersigned further concludes the claimant's assertions of disabling pain are not deemed sufficiently credible to support a finding that pain prevents her from engaging in substantial gainful activity.

* * *

The claimant has a combination of impairments which have resulted in some limitations. However, these limitations have not been of the degree to prevent her from performing substantial gainful activity. The evidence does not show any significant limitations resulting from the claimant's complaints of problems with chest pain, neck pain, stomach, and carpal tunnel syndrome. There are no other impairments which would prevent the claimant from working.

(R. 16, 17)

In assessing claimant's subjective complaints of pain, the ALJ is to consider numerous factors, including treatment, daily activities, and medication. Luna v. Bowen, 834 F.2d 161, 165-166 (10th Cir. 1987). The ALJ is entitled to examine the medical records and evaluate a claimant's credibility. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Talley v. Sullivan, 908 F.2d

585 (10th Cir. 1990). The ALJ can discount subjective pain testimony when it is inconsistent with the medical evidence and claimant's daily activities. Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992).

Claimant's challenge is that the ALJ failed to take the nonexertional impairment of pain into consideration, and failed to set forth the factors he considered. Although the ALJ's opinion is not a model of clarity on this point, the Court disagrees. See Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1500 (10th Cir. 1992). The ALJ considered claimant's allegations of disabling pain, and found them credible only to the extent of his finding that claimant had the RFC to perform the exertional and nonexertional requirements of sedentary work. (R. 18) The ALJ analyzed claimant's pain allegations under 20 C.F.R. §§ 404.1529, 416.929, and Social Security Ruling 88-13 (now Social Security Ruling 96-7p), and considered the factors contained therein. (R. 16) The ALJ noted that claimant performed activities which were inconsistent with the level of pain alleged by her--i.e., shopping, cleaning, church-going, visiting with friends, borrowing a car occasionally. (Id.) The regulations and Luna permit an ALJ to rely on medical records and daily activities to determine whether a person is entitled to disability benefits. Luna, 834 F.2d at 165-166. In so doing, the ALJ found claimant's complaints regarding pain severity not entirely credible.

Claimant reported that she was taking medication for relief of pain. (R. 145) She testified she had no side effects from the medication. (R. 44) Claimant was asked sufficient questions at the hearing to afford her an opportunity to convince the ALJ that claimant suffered disabling pain. (R. 33-36)

This Court generally gives great deference to the credibility determinations made by an ALJ. Hamilton, 961 F.2d at 1499. "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). Considering all the evidence, both objective and subjective, including a treating physician’s recommendation that claimant swim, bicycle, and do shoulder range of motion exercises (R. 159), and the same physician’s opinion of her work status as “full” (R. 160), this Court finds that the ALJ did not err in concluding--and demonstrating by specific and substantial evidence--that the claimant’s complaints were disproportionate to the objective findings and not credible beyond her ability to perform sedentary work.

B. Step Four Analysis

The ALJ found at Step Four that claimant could perform her past relevant work as telemarketer. Claimant alleges that the ALJ failed to perform a proper Step Four analysis by failing to set forth the appropriate findings, by determining that telemarketer qualified as past relevant work even though it was only for three hours a day, and by failing to include documented impairments in his hypothetical.

The ALJ’s Step Four analysis was as follows:

The vocational expert has classified one of her past relevant jobs, telemarketer (newspaper) as sedentary work. The other jobs he classified as medium. The claimant has also described her telemarketer’s job as sedentary as she performed it. (Exhibit 12)

Based on the total evidence, the Administrative Law Judge finds that the claimant retains the residual functional capacity (RFC) to perform sedentary work.

In Step Four of the process, a judge must decide whether a claimant is able to do past relevant work (PRW). This means not only work which a claimant has actually done, but also the same type of work as it is customarily done in the national economy. The evidence in this case shows that the claimant previously worked as a telemarketer (newspaper), laborer (factory), home health provider, and bakery aide.

The evidence also indicates in this instance that the claimant is currently able to perform the job of telemarketer (newspaper), as she actually performed it in the past. She is thus not considered disabled within the meaning of the Act.

(R. 17)

The ALJ's findings at Step Four were:

5. The claimant has the residual functional capacity to perform the physical exertion and nonexertional requirements of sedentary work (20 CFR 404.1545 and 416.945).
6. The claimant's past relevant work as telemarketer (newspaper) did not require the performance of work-related activities precluded by the above limitation(s) (20 CFR 404.1565 and 416.965).
7. The claimant's impairments do not prevent the claimant from performing her past relevant work as telemarketer.

(R. 18)

A finding that claimant is able to perform past relevant work (telemarketer) as she actually performed it in the past is sufficient to support a determination that claimant can perform her past relevant work. Social Security Ruling 82-61 provides that:

[A] claimant will be found to be "not disabled" when it is determined that he or she retains the RFC to perform:

1. The actual functional demands and job duties of a particular past relevant job; or
2. The functional demands and job duties of the occupation as generally required by employers throughout the national economy.

Soc. Sec. Rul. 82-61. Although Social Security Rulings do not, in and of themselves, bear the force of law, the Tenth Circuit, in Andrade v. Secretary of Health & Human Servs., 985 F.2d 1045, 1050-1051 (10th Cir. 1993), adopted the interpretation of "past relevant work" contained in Social Security Ruling 82-61. That court stated:

Several other circuits have concluded that the phrase past relevant work includes a claimant's particular past relevant job, as well as the *type* of work claimant performed in the past, as that work is generally performed in the national economy. See Martin v. Sullivan, 901 F.2d 650, 653 (8th Cir.1990) (following the test stated in S.S.R. 82-61 and noting that the First, Second, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits have all rejected the argument that "a claimant who cannot perform a particular past relevant job cannot perform his past relevant work"); see also Villa v. Heckler, 797 F.2d 794, 798 (9th Cir.1986) (claimant must prove inability to return to former type of job, not just to specific prior job); DeLoatch v. Heckler, 715 F.2d 148, 151 (4th Cir.1983) (same); Orlando v. Heckler, 776 F.2d 209, 215-16 (7th Cir.1985) (adopting S.S.R. 82-61). We find no basis upon which to reject S.S.R. 82-61's interpretation of the phrase past relevant work. Therefore, claimant bears the burden of proving his inability to return to his particular former job and to his former occupation as that occupation is generally performed throughout the national economy.

Andrade, 985 F.2d at 1051. Here, claimant has not proved that she was unable to return to her former job as she actually performed it.

Substantial evidence supports the ALJ finding that claimant's RFC is such that she can perform her past relevant work. The RFC assessment determined that claimant could lift and/or carry ten pounds frequently and twenty pounds occasionally, with no limitations on push and/or pull, other than as shown for lift and/or carry, and no manipulative, visual, or communicative limitations. (R. 127-134) Thus, the ALJ concluded based on the total evidence that claimant retained the RFC to perform sedentary work, which her telemarketing job was. (R. 17)

Social Security Ruling 82-62 requires that an ALJ at Step Four to make findings regarding:

1. the claimant's RFC;
2. the physical and mental demands of prior jobs or occupations; and
3. the ability of the claimant to return to the past occupation given her RFC.

Soc. Sec. Rul. 82-62; Henrie v. U.S. Dep't of Health & Human Servs., 13 F.3d 359, 361 (10th Cir. 1993).

At the hearing before the ALJ, the vocational expert testified that newspaper subscription telemarketer was DOT number 299.357-014, sedentary with an SVP of three. (R. 52) Claimant described her duties as a telemarketer in her Vocational Report (Exhibit 12). (R. 93-98) The ALJ specifically referred to claimant's description of the demands of that job in Exhibit 12 as part of his Step Four analysis. (R. 17) The ALJ made specific findings of claimant's RFC (to perform sedentary work), of the physical demands of the prior work (did not require the performance of work-related activities precluded by the above limitation), and of the ability of claimant to return to the past occupation given her RFC. (R. 18)

Once again, the ALJ decision is not a model of clarity on this point. However, it is not the ALJ's duty to be claimant's advocate. Henrie, 13 F.3d at 361. The claimant bore the burden of proving disability under the regulations, which she did not do. Claimant points to no job function of or qualification for her past job as telemarketer which varies from the job as customarily performed in the national economy or which she can not perform. The Court finds that the ALJ made sufficient findings to support his Step Four analysis.

Claimant's next asserted error is that the former job of telemarketer did not qualify as past relevant work because it was only for three hours a day. The three requirements for a job to qualify as past relevant work are: done within the last fifteen years; lasted long enough for claimant to learn to do it; and was substantial gainful activity. 20 C.F.R. §§ 404.1565, 416.965. Claimant's job as telemarketer was within the last fifteen years (R. 31, 93), and lasted either three years (R. 93), or five years. (R. 31-32, 99) There is no allegation that the job did not last long enough for claimant to learn to do it.

The only issue is whether the job was substantial gainful activity. Claimant worked at the job three hours per day, five days per week (R. 32, 93), at the same time she worked five hours per day, five days per week at two home health aide jobs. (R. 99, 93) Claimant earned \$140 per week (R. 32), or \$540 per month as a telemarketer. Under the regulations, substantial gainful activity is work that involves “significant [and productive] physical or mental duties,” and is done “for pay or profit.” 20 C.F.R. §§ 404.1572, 416.910. Earnings guidelines in the regulations suggest that income above \$300 per month after 1979 and before 1990, and above \$500 per month after 1989, generally is to be considered substantial. 20 C.F.R. §§ 404.1574(b)(2), 416.974(b)(2). The Court finds that claimant’s earnings level supports a finding that her former job as telemarketer was substantially gainful.

Finally, claimant alleges as error that the ALJ failed to include all of claimant’s impairments in his hypothetical to the expert. Due to the ALJ’s determination that claimant could perform her past relevant work, he was under no obligation to seek information from a vocational expert. A case decided at Step Four does not require support with a vocational expert’s testimony. Glenn v. Shalala, 21 F.3d 983, 988 (10th Cir. 1994); Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992). The ALJ decision at Step Four was supported by substantial evidence.

VI. CONCLUSION

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

DATED this 2nd day of June, 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RAYMOND L. WOFFORD and
MILDRED E. WOFFORD,

Plaintiffs,

vs.

AMERICAN RED CROSS, *et al.*,

Defendants.

ENTERED ON DOCKET

DATE 6-2-98

Case No. 96-CV-468-H

FILED

JUN - 11 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

The Court has reviewed the arguments of the parties pertaining to the payment of attorneys fees for the court-appointed attorney for the non-party blood donor. The Magistrate Judge finds as follows:

1. The deposition of the non-party blood donor was vigorously opposed by the American Red Cross by Motion for Protective Order filed February 18, 1997. By Order dated April 2, 1997, the Court denied the motion for protective order, allowed the deposition of the non-party to be taken and held that "the court will appoint counsel to assist the donor in preparing for the deposition and to protect the non-party blood donor's interests at the deposition." [Doc. No. 34-1]. The Order provided that "[t]he cost of the donor's attorney's reasonable fees and expenses in connection with the taking of the donor's deposition by Plaintiffs will be paid by Plaintiffs." [Doc. No. 34-1]. On April 28, 1997, the Court entered a second order appointing Nancy Siegel as counsel for the non-party blood donor. Ms Siegel was authorized "to incur any necessary and reasonable

expenses during her representation of the donor." [Doc. No. 37-1]. That order further provided:

Mrs. Siegel will submit a monthly bill of fees and expenses to Plaintiffs attorney, with a copy provided to the Court. Ms. Siegel's bill shall be paid by Plaintiffs within 10 days after receipt. Those fees and expenses paid by Plaintiffs to Ms. Siegel will be taxed as costs at the conclusion of this action and they will be paid by the non-prevailing party or parties.

2. Attorneys fees for the non-party blood donor were billed in the following amounts, and Plaintiffs have agreed to pay for portions of the fees incurred:

<u>Date of Billing</u>	<u>Amount Billed</u>	<u>Plaintiffs agree</u>
August 14, 1997	\$ 526.97	Paid \$ 526.97
December 23, 1997	\$ 528.07	Will pay \$ 240.57
February 25, 1998	\$6,664.74	Will pay \$ 326.39
May 18, 1998	<u>\$1,978.89</u>	<u>Will pay \$1,046.39</u>
TOTAL	\$9,698.64	\$2,140.83

3. Pursuant to prior Court orders of April 2, 1997, and April 28, 1997, Plaintiffs agree to pay \$2,140.83 of the attorneys fees incurred by the court-appointed non-party blood donor. Of that amount, Plaintiffs have already paid \$526.94. Plaintiff asks that any fees awarded in excess of that amount be paid as costs at the conclusion of the litigation with interest.
4. Donor's attorney accepted this appointment at the request of the Court and agreed to charge an hourly rate less than her regular rate out of consideration for the special circumstances of the situation. She accepted the appointment

and began work assuming that her statements would be paid within 10 days of receipt as specified in the April 28th order by which she was appointed. She has represented the donor with the highest level of diligence and competence. The Court appreciates Ms. Siegel's acceptance of the appointment and therefore modifies the payments terms of the April 28, 1997 order with great reluctance.

5. It is not fair to ask Plaintiffs to pay for the attorneys fees for the non-party blood donor for issues previously litigated or for issues that go beyond the scope of the appointment. The Court is obligated to review the services rendered to insure that does not happen. Unfortunately the April 28, 1997 order does not have the more restrictive language in regard to the scope of the appointment contained in the April 2, 1997 order although it does provide, "All other requirements of the Court's April 2, 1997 order with regard to the deposition of the donor are still in effect." The April 28, 1997 order requested a copy of each bill to the Court so that the Court could monitor the situation closely and insure the bills were promptly paid. Unfortunately the greatest part of the disputed fees fall within one month's billing.
6. The Magistrate Judge has reviewed the billings submitted by the attorneys for the non-party blood donor and concludes that \$1,500 of the submitted fees were either duplicative or beyond the scope of the appointment. The Court notes that certain arguments and case authority had been previously urged by the American Red Cross and rejected by the Court. The Magistrate Judge therefore recommends a reduction in the total attorneys fees by \$1,500.

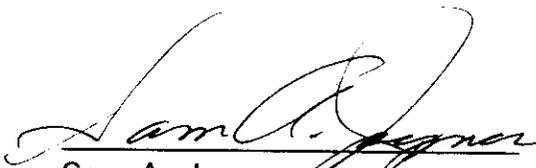
7. Of the remaining \$8,198.64, the Magistrate Judge recommends that Plaintiffs pay \$3000.00, of which \$526.94 has been paid, leaving a balance of \$2473.06 to be paid from Plaintiffs to donor's counsel within 10 days of any Order adopting this Report and Recommendation. The balance of \$5,198.64 shall be taxed as costs to be paid by the non-prevailing party at the conclusion of the litigation, in addition to interest on said amount from the date of any order adopting this report and recommendation, until paid, at the rate set forth in 28 U.S.C.A. §1961. In the event this litigation should conclude without final order or judgment in Court it is the responsibility of the Plaintiffs to insure that said balance be paid.
8. In accordance with the April 2, 1997 order any fees or expenses paid by Plaintiffs hereunder shall be taxed as costs to be paid by the non-prevailing party at the conclusion of the litigation.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation: See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b).

The failure to file written objections to this report and recommendation may bar the party failing to object from appealing any of the factual or legal findings in this report and recommendation that are ultimately accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this / day of June 1998.


Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

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

 Day of , 19 .
 Deputy Clerk.

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

F I L E D

JUN - 1 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MELVIN WAYNE LUNSFORD, JR.,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION,)
)
 Respondent.)

Case No. 96-CV-694-B ✓

ENTERED ON DOCKET

DATE JUN 02 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 1st day of June, 1998.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

17

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

JUN 1 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MELVIN WAYNE LUNSFORD, JR.,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION,)
)
 Respondent.)

Case No. 96-CV-694-B ✓

ENTERED ON DOCKET
DATE JUN 02 1998

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #14) filed on April 15, 1998, in this 28 U.S.C. § 2254 habeas corpus action. The Magistrate Judge concludes that Petitioner's claim is procedurally barred and recommends that the petition for writ of habeas corpus be dismissed with prejudice. On April 24, 1998, Petitioner filed his objection to the Report (#15).

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which the Petitioner has objected, and concludes that, for the reasons discussed below, the Magistrate's recommendation that this petition be dismissed should be adopted and affirmed.

BACKGROUND

In March, 1988, Petitioner, while represented by counsel, pled guilty in Tulsa County Case No. CF-88-375 to two counts of Second Degree Burglary and one count of Unauthorized Use of a Motor Vehicle. Petitioner received a suspended sentence of five years on each count, to be served

concurrently. Petitioner did not file a motion to withdraw his guilty plea or otherwise perfect a direct appeal of this conviction. In 1992, after Petitioner had "an altercation with the police" (#2 at 4), the State filed an application to revoke suspended sentence. On October 26, 1992, Petitioner, while represented by counsel, waived his right to a revocation hearing and confessed the allegations contained in the State's application. Petitioner did not appeal the revocation of his suspended sentence.

In September, 1993, Petitioner, again while represented by counsel, pled guilty in Osage County Case No. CF-92-150 to Burglary, Unauthorized Use of a Motor Vehicle, and Feloniously Pointing a Weapon. The district court enhanced Petitioner's sentence on the basis of the 1988 Tulsa County convictions. (#2, Ex. 4 "Judgment and Sentence on Plea of Guilty, entered in Case No. CRF-92-150, Osage County District Court). Petitioner received a sentence of twenty-five years imprisonment on each count, to be served consecutively. Petitioner did not move to withdraw his guilty plea or otherwise perfect a direct appeal from these Osage County convictions.

As to the 1988 Tulsa County convictions, Petitioner filed a "motion for summary judgment and motion to set aside judgment void on its face/application for post-conviction relief" on November 30, 1994. Petitioner alleged his convictions were invalid on the bases that (1) his counsel provided ineffective assistance by failing to contact him during the ten days following his sentencing to determine if he wanted to appeal, and (2) the trial court failed to properly advise him of his appeal rights. The district court treated the petition as an application for post-conviction relief, and on January 13, 1995, entered its Order denying the relief requested. In so doing, the court found each of Petitioner's claims to be without merit. (#2, Ex. 7). Petitioner appealed the denial of post-conviction relief to the Oklahoma Court of Criminal Appeals ("OCCA"). On April 28, 1995, that

court affirmed the state district court's denial of relief, finding that Petitioner had not provided a sufficient reason for his failure to comply with the procedural prerequisites to appeal, and thus had failed to show that he was entitled to any relief in a post-conviction proceeding.

As to his Osage County convictions, Petitioner filed an application for post-conviction relief challenging the constitutional finality of the Tulsa County convictions used to enhance the Osage County convictions. On January 12, 1995, the district court denied relief, stating that "Petitioner's remedy lies in the county(s) where the prior convictions he complains of originated. No other trial court has jurisdiction to take any action." (#2, Ex. 5). On February 3, 1995, Petitioner filed a form pleading in the OCCA. Petitioner indicated he was seeking relief under a "writ of habeas corpus/mandamus/other: appeal denial of post conviction relief." (#13, Ex. 2). Although Petitioner indicated he desired to appeal the denial of post-conviction relief entered by Osage County District Court, the Court of Appeals treated the pleading as a petition for mandamus. On February 15, 1995, that court entered its order denying the application for extraordinary relief, stating that "[t]he proper and most efficient method of attacking a former conviction is in the court imposing the judgment and sentence for that former conviction." (#13, Ex. 3).

Petitioner has previously sought federal habeas corpus relief in this Court. On September 14, 1995, Petitioner filed his petition for writ of habeas corpus, Case No. 95-C-923-C, challenging his Osage County conviction on its own merits and to the extent it was enhanced on the basis of an invalid prior conviction. On April 24, 1996, that habeas corpus action was dismissed without prejudice as a mixed petition because it contained both exhausted and unexhausted claims.

Petitioner filed the instant habeas corpus petition on August 1, 1996.¹ He challenges his Osage County sentences, raising one ground allegedly justifying habeas corpus relief: "Petitioner was denied due process and equal protection of the law where the trial court was without subject matter jurisdiction to enhance petitioner's sentences under Oklahoma Statute 21 O.S. 51(B) because the prior convictions relied on were constitutionally invalid for the purpose of enhancement. See 21 O.S. 51; U.S. v. Tucker, 92 S.Ct. 589." (#1 at 5).

In his Report, the Magistrate Judge determined that because Petitioner failed to appeal the Osage County District Court's denial of post-conviction relief, Petitioner's claim is technically unexhausted but that it would be futile to require Petitioner to return to the state courts since the claim would now be procedurally barred. The Magistrate Judge also found that Petitioner failed to demonstrate either cause and prejudice for his procedural default or that a fundamental miscarriage of justice would result if his claim were not considered. Therefore, the Magistrate Judge found Petitioner's claim to be procedurally barred from federal habeas review and recommended that the petition be dismissed with prejudice. Petitioner objects to the conclusion that his claim is procedurally barred from federal habeas review, arguing that he has in fact exhausted all available state remedies.

DISCUSSION

After reviewing the record and facts of this case, the Court finds that, under either of two approaches, both discussed below, Petitioner's claim is procedurally barred and must be dismissed.

¹Because Petitioner filed his habeas petition on August 1, 1996, his petition is reviewed under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996) (effective April 24, 1996). See Lindh v. Murphy, --- U.S. ---, ---, 117 S.Ct. 2059, 2068 (1997).

A. Exhaustion

As indicated by the Magistrate Judge in his Report, a state prisoner bringing a federal habeas corpus action bears the burden of showing he has exhausted all available state remedies. Miranda v. Cooper, 967 F.2d 392 (10th Cir. 1992). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the highest state court, in this case, the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (*per curiam*).

1. *Petitioner's submission of his improper enhancement claim to the Oklahoma Court of Criminal Appeals on petition for writ of mandamus was not "fair presentation" of that claim for purposes of exhaustion of available state remedies.*

As discussed by the Magistrate Judge in his Report, Petitioner failed to appeal the Osage County District Court's denial of post-conviction relief. However, Petitioner did present his claim to the OCCA on a form pleading indicating he was seeking mandamus relief, habeas relief, and relief on appeal from the Osage County District Court's denial of post-conviction relief. The OCCA construed the pleading as a petition for writ of mandamus and denied relief, stating that Petitioner had failed to demonstrate that he was entitled to extraordinary relief.

It is well-established that where a claim has been presented for the first and only time in a procedural context in which its merits will not be considered, the claim has not been "fairly presented" for purposes of exhaustion of state remedies. Castille v. Peoples, 489 U.S. 346, 351 (1988). Because

Petitioner presented his claim in the form of a petition for writ of mandamus, the OCCA found that Petitioner had "the burden of establishing (1) he/she has a clear legal right to the relief sought; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief." (#13, Ex. B). The OCCA concluded Petitioner was not entitled to extraordinary relief and did not consider the merits of Petitioner's claims. In other words, because of the procedural context in which Petitioner presented his claims to the OCCA, the merits of the claims were not considered. Thus, Petitioner has not "fairly presented" the issue of improper enhancement to the OCCA and the claim is unexhausted. See id.

However, the Court agrees with the Magistrate Judge that it would be futile to require Petitioner to return to state court to present his claim because the OCCA routinely imposes a procedural bar on claims which could have been but were not raised on direct appeal or in a first application for post-conviction relief. See Okla. Stat. tit. 22, § 1086. Petitioner in this case neither perfected a direct appeal nor properly appealed the denial of post-conviction relief by Osage County District Court. As a result of his failure to follow state procedural rules, Petitioner's claim is procedurally barred.

2. *The essence of Petitioner's claim, i.e., the alleged unconstitutionality of his Tulsa County convictions, has been presented to the Oklahoma Court of Criminal Appeals, which imposed a procedural bar on the claims.*

Petitioner's claim presently before this Court attacks his Osage County sentences to the extent they were improperly enhanced based on the allegedly invalid Tulsa County convictions. Petitioner maintains the Tulsa County convictions were unconstitutional because "the trial court did not fulfil [sic] its duty in regards to informing the Petitioner of all his appeal rights . . . The record before this

Court is silent as to any notification from the sentencing court concerning Petitioner's right to counsel for appeal, his right to court-appointed counsel on appeal, and his right to a case made at public expense" (#2 at 7-8). Basically, Petitioner complains that the trial court failed to inform him of "his right to a free appeal." (#2 at 10). This failure led to the denial of an appeal "through no fault of his own" because he did not have the assistance of counsel.

The substance of these claims was presented by Petitioner in his application for post-conviction relief filed in Tulsa County District Court prior to the discharge of his sentence. (#15 at 3). The Tulsa County District Court Order denying Petitioner's application for post-conviction relief indicates Petitioner also claimed that he had been provided ineffective assistance of counsel since his counsel did not contact him during the ten day period following his sentencing to determine if he wanted to appeal. After considering Petitioner's claims, the Tulsa County court concluded that his counsel had provided effective assistance and that the court had twice informed him of his right to appeal. The court noted that nonetheless Petitioner failed to appeal either his 1988 convictions or the 1992 revocation of his suspended sentence. Therefore, the court found that Petitioner was not entitled to post-conviction relief. The OCCA affirmed the trial court's denial of post-conviction relief, stating that:

Petitioner has not asserted sufficient reasons for his failure to comply with the procedural prerequisites to appeal, and thus has failed to show that he is entitled to any relief in a post-conviction proceeding. The provisions of 22 O.S. 1991, § 1080, are not a substitute for a direct appeal. Maines v. State, 597 P.2d 774 (Okl.Cr.1979). Permitting one to by-pass or waive a timely and direct appeal and proceed under 22 O.S.1991, § 1080, without supplying sufficient reason erodes the limitations and undermines the purpose of the statutory direct appeal. See Webb v. State, 661 P.2d 904 (Okl.Cr.1983), cert. denied 461 U.S. 969, 103 S.Ct. 2434, 77 L.Ed.2d 1319 (1983); 22 O.S.1991, § 1086.

(#2, Ex. 8). In other words, the OCCA imposed a procedural bar on Petitioner's claims.

B. Procedural Bar

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

Applying these principles to the instant case, the Court concludes Petitioner's claim is barred by the procedural default doctrine under either approach discussed above. The procedural bar in both situations results from Petitioner's failure to follow state procedural rules when challenging his sentences in Osage and Tulsa Counties. In each instance, the bar is an "independent" state ground because it would be "the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar is an "adequate" state ground because the OCCA has consistently declined to review claims which could have been but were not raised on direct appeal or in a first application for post-conviction relief. Okla. Stat. tit. 22, § 1086; Robinson v. State, 818 P.2d 1250 (Okla. Crim. App. 1991).

Because of Petitioner's procedural default in state court, this Court may not consider his claim

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

As to Petitioner's default of his claim in Osage County, the Court agrees with the Magistrate Judge's conclusion that Petitioner has shown neither cause for his state default nor that a fundamental miscarriage of justice would result if his claim is not considered. As to his default of his challenge in Tulsa County, Petitioner attempts to show cause by alleging only that the trial court failed to inform him of his full appeal rights. However, a federal habeas corpus court may only consider whether a federal right was violated and will not consider state law arguments. See 28 U.S.C. § 2254(a). Nonetheless, this Court must read a *pro se* petition liberally. Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). Therefore, the Court liberally construes Petitioner's pleadings as asserting a claim of ineffective assistance of counsel as cause for his procedural default as to the challenge of his Tulsa County convictions.

Constitutionally ineffective assistance of counsel constitutes cause. See Coleman, 501 U.S. at 753-54; McCleskey, 499 U.S. at 493-94. To prevail on an ineffective assistance of counsel claim,

Petitioner must first show that his counsel's performance was deficient. See Strickland v. Washington, 466 U.S. 668, 687 (1984). Petitioner must allege facts that indicate counsel's representation "fell below an objective standard of reasonableness." Id. at 688. This Court presumes that Petitioner's counsel provided him reasonable professional assistance, and Petitioner must overcome the presumption. Id. Petitioner must also establish prejudice by showing "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. If Petitioner fails to establish either the performance or prejudice prong of the Strickland test, the ineffective assistance claim fails. See id.

In this case, the transcripts from the Tulsa County District Court proceedings indicate that Petitioner entered his guilty pleas knowingly and voluntarily. Petitioner does not allege nor does the record indicate that his guilty pleas were coerced. As to counsel's duty after entry of a guilty plea, it is well-established that, in general, "an attorney has no absolute duty in every case to advise a defendant of his limited right to appeal after a guilty plea." Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir. 1989). However, there are two important exceptions to this general rule: "If a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right, counsel has a duty to inform [the defendant of his right to appeal]." Id. at 1188 (citation omitted). This duty arises when "counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim." See Marrow v. United States, 772 F.2d 525, 529 (9th Cir. 1985) (cited by Laycock, 880 F.2d at 1188). Here, Petitioner indicates only that his counsel failed to contact him during the ten day period to determine if he wanted to withdraw his guilty plea. Petitioner never indicates what claim of error he intended to raise on appeal nor is there evidence in the record before the Court of a constitutional error which

could have resulted in setting aside the plea. Similarly, Petitioner does not allege nor does the record indicate that he informed his counsel of his desire to appeal during the ten day period. In fact, the record indicates that Petitioner desired immediate transportation to the Department of Corrections after he pled guilty to the state's application to revoke suspended sentence (#2, Ex. 3 at 9), suggesting that Petitioner did not contemplate an appeal and did not inform his counsel that he wished to appeal. Therefore, the Court concludes that Petitioner is unable to satisfy the performance prong of Strickland and his claim of ineffective assistance of counsel fails. Petitioner has failed to demonstrate cause for his procedural default of his challenge to the Tulsa County convictions.

The only other means by which Petitioner can gain federal habeas corpus review of the constitutionality of the Tulsa County convictions in light of the procedural bar imposed by the state appellate court is to make a colorable showing of actual innocence under the fundamental miscarriage of justice exception. McCleskey, 499 U.S. at 494. Petitioner in this case does not claim that he is actually innocent of the crimes to which he pleaded guilty and of which he was convicted.

Petitioner has failed to overcome the procedural bar imposed as the result of his default of his claims in the state courts of Osage and Tulsa Counties. This Court concludes that it is precluded from considering Petitioner's claim on the merits.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that Petitioner's claim is procedurally barred. As a result, this Court is precluded from considering the claim on the merits and the petition for writ of habeas corpus should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation (#14) of the United States Magistrate Judge is **adopted and affirmed.**
2. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **dismissed with prejudice.**

SO ORDERED THIS 29 day of May, 1998.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

JUN - 1 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THOMAS R. GLOVER,

Plaintiff,

vs.

GARY ALRED, et al.,

Defendants.

Case No. 96CV 886B ✓

ENTERED ON DOCKET

DATE JUN 02 1998

**ORDER FOR DISMISSALS WITH PREJUDICE AND
PAYMENT OF DEPOSITED FUNDS**

Pursuant to the Stipulation and Joint Application filed by Plaintiff Thomas R. Glover ("Glover"), Third-Party Plaintiffs Joe Soderstrom and Sarah Soderstrom ("Soderstroms"), and Third-Party Defendants Mid-Ark Cattle Company, Inc. ("Mid-Ark"), James F. Lowder ("Lowder"), Barrett-Crofoot, Inc. ("BCI") and Barrett-Crofoot Cattle, Inc. ("BCCI"), and for good cause shown, the Court HEREBY ORDERS:

1. The Soderstroms' counterclaims against Glover, and the Soderstroms' third-party claims against Mid-Ark, Lowder, BCI and BCCI, as alleged in this action, are hereby dismissed with prejudice, with each party to bear his, its or their own costs and fees.
2. The Court Clerk is directed to release and pay over to Joe Soderstrom and Sarah Soderstrom, c/o David L. Bryant, 400 Beacon Building, 406 S. Boulder Ave., Tulsa, Oklahoma 74103, the previously deposited sum of Twenty-Four Thousand Nine Hundred Ninety-Nine Dollars (\$24,999.00), together with interest accrued thereon, less the appropriate registry fee. The Court Clerk is directed to distribute such funds as soon as is practicable after the next renewal date of the certificate of deposit in which these funds are invested.

DATED this 29th day of May, 1998.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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CD Renewed 6/16/98
✓

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

FILED
MAY 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOSHUA SCHMEISSER,)
)
 Plaintiff,)
)
 v.)
)
 NORRIS SUCKER RODS,)
)
 Defendant.)

Case No. 98-C-225-H

ENTERED ON DOCKET

DATE 6-1-98

ORDER

This matter comes before the Court on consideration of Defendant's Motion to Dismiss Plaintiff's complaint (Docket # 4). Plaintiff Joshua Schmeisser filed this action on March 23, 1998, on behalf of himself and a class of those similarly situated (Docket # 1). Plaintiff filed his amended complaint on May 1, 1998 (Docket # 3).¹ Defendant Norris Sucker Rods ("Norris") filed its motion to dismiss on April 13, 1998 (Docket # 2). Plaintiff filed a response on May 1, 1998 (Docket # 4), and Defendant filed its reply on May 15, 1998 (Docket # 6)

I

To prevail on a motion to dismiss, the movant must establish that there is no set of

¹ Defendant filed a motion to strike Plaintiff's First Amended Complaint (Docket # 5) because Plaintiff failed to seek leave of Court before filing his amended pleading. Defendant contended that his motion to dismiss filed before Plaintiff amended his complaint constituted a "responsive pleading" under Fed. R. Civ. P. 15(a) which thereby triggered Plaintiff's duty to apply to the court for permission to amend. The Court hereby denies Defendant's motion to strike (Docket # 5). A motion to dismiss is not a "responsive pleading" as that term is used in Fed. R. Civ. P. 15(a). Charles Alan Wright, Federal Practice and Procedure Civil 2d § 1483, at 582-85 (2d ed. 1990)(explaining that the term "responsive pleading" as used in Rule 15(a) must be interpreted in relation to the description of pleadings set forth in Rule 7(a)). Therefore, Plaintiff did not require permission from the Court to amend his complaint. For the purposes of its consideration of Defendant's motion to dismiss, the Court has analyzed Plaintiff's amended complaint.

circumstances upon which the plaintiff would be entitled to relief. Jenkins v. McKeithen, 395 U.S. 411 (1969); Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992). For the purposes of this analysis, the court must accept as true all material allegations in the complaint. Ash Creek Mining, 969 F.2d at 870.

II

Defendant operates a plant in Tulsa, Oklahoma in which it operates machines known as automatic forges. Defendant uses Thermex 450, a lubricant, in the operation of these machines. Plaintiff claims that Thermex 450 creates smoke when used in the forges, and its residue is carried throughout the plant with this smoke. Plaintiff asserts that the material safety data sheet for Thermex 450 requires that a NIOSH-approved respirator should be worn if ventilation equipment in a plant is not sufficient to keep airborne concentrations of Thermex 450 below specified exposure limits. In his complaint, Plaintiff asserts two causes of action. In the first, Plaintiff contends that Defendant intentionally ignored the manufacturer's warnings on the material data safety sheet. Plaintiff asserts that the plant's ventilation was inadequate and that Plaintiff was not given a respirator. Plaintiff also alleges that Defendant, immediately prior to a Occupational Safety and Health Administration ("OSHA") inspection, ordered that the Thermex 450 be diluted with water in order to assure Defendant's compliance with the exposure limits for the substance. In his second cause of action, Plaintiff contends that Defendant "allowed the Thermex 450 to be released within the building due to improper ventilation and insufficient exhaust equipment on the automatic forges" and that Defendant was "negligent in not properly repairing and seeing that the automatic forge was in proper working condition so as to not release Thermex 450 into the plant at dangerous levels." Compl. at ¶¶ 23, 24.

III

Defendant contends that Plaintiff's action must be dismissed because this Court lacks subject matter jurisdiction over Plaintiff's causes of action. Defendant asserts that Plaintiff's exclusive remedy for his alleged injuries is under the Oklahoma workers' compensation statute. Okla. Stat. tit. 85, § 1 et seq. Defendant further contends that Plaintiff's reliance on Okla. Stat. tit. 40, § 178 is misplaced because that statute has been preempted by the Workers' Compensation Act.

Plaintiff, in his response, claims that his action may proceed in this court because his injuries are not within the purview of the workers' compensation statute. Plaintiff, relying on the language of the Act, argues that it covers only accidental injuries arising out of employment and occupational diseases that are due to causes and conditions characteristic of or peculiar to a particular trade. Okla. Stat. tit. 85, § 3. Plaintiff claims that his injuries, by contrast, were "brought about by the intentional act of his employer . . . in not following the manufacturer's warnings contained on the manufacturer's material data [safety] sheets" and its intentional disregard of the sheet's warning to provide either adequate ventilation or proper ventilation. Pl. Resp. Br. at 3-4. Plaintiff relies on Thompson v. Madison Machinery Co., Inc., 684 P.2d 565 (Okla. App. 1984) for the proposition that the Act was not meant to preclude an employee's action for damages to recover when that employee has been willfully injured by his employer. As to Okla. Stat. tit. 40, § 178, Plaintiff contests Defendant's contention that the statute has been preempted, noting that the state legislature has not repealed it. Plaintiff continues to maintain that the section 178 is viable for any action which falls outside the coverage of the workers' compensation statutes.

Defendant, in its reply, contends that Plaintiff's allegations do not rise to the level of intentional misconduct sufficient to remove this matter from the jurisdiction of the Workers' Compensation Act. Instead, Defendant asserts that Plaintiff's use of the words "intentional" and "willful" is not enough to avoid dismissal of this action for lack of jurisdiction.

In Love v. Flour Mills of America, 647 F.2d 1058 (10th Cir. 1981), the Tenth Circuit distinguished those actions in which an employer's conduct, though perhaps grossly negligent, does not rise to the level of genuine intentional injury. Id. at 1060. Such genuine intentional injury is what is required to take a case from the workers' compensation exclusive system of remedy.

"The intentional removal of a safety device or toleration of a dangerous condition may or may not set the stage for an accidental injury later. But in any normal use of the words, it cannot be said, if such injury does happen, that this was deliberate infliction of harm comparable to an intentional left jab to the chin."

Id. at 1060 (quoting 2A Larson, Workmen's Compensation Law ¶ 68.13 (1976)).

Further, mere allegations of intentional injury are insufficient to trigger the right to an action for damages outside the operation of the Act. Love, 647 F.2d at 1060; Roberts v. Barclay, 369 P.2d 808, 810 (Okla. 1962); Arrington v. Michigan-Wisconsin Pipeline Co., 632 F.2d 867, 871 (10th Cir.1980).

The Court finds that Plaintiff fails to allege facts sufficient to bring his action outside the intended parameters of the Act. Plaintiff asserts that Defendant "intentionally ignored" the manufacturer's safety warnings, failed to provide Plaintiff with a respirator, diluted Thermex 450 to pass an OSHA inspection, and was negligent in not properly repairing the automatic forge to prevent the Thermex 450 from smoking. The only claims that even allege intent therefore are the

“intentional” disregard of the warnings and the dilution of the chemical prior to inspection. The Court concludes even these allegations are insufficient under the authorities cited herein. Plaintiff has alleged no facts to suggest that Defendant intended to injure him. Love, 647 F.2d at 1060. The Court concludes that it lacks jurisdiction over this case because the state workers’ compensation act provides Plaintiff’s exclusive remedy here.²

For the above stated reasons, Defendant’s motion to dismiss (Docket # 2) is hereby granted.

IT IS SO ORDERED.

This 29TH day of May, 1998.



Sven Erik Holmes
United States District Judge

² Plaintiff concedes that Okla. Stat. tit. 45, § 178 is applicable only when an employee’s claim is not covered by the Workers’ Compensation Act. Because the Court concludes that Plaintiff’s claim is covered by the Act, section 178 provides no cause of action for Plaintiff.

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

FILED
MAY 29 1998
F. M. Lombardi, Clerk
U.S. DISTRICT COURT

ALL STATE TANK CO., INC.,
Plaintiff,
v.
COLUMBIAN STEEL TANK CO.,
Defendant.

Case No. 97-CV-188-H ✓

ENTERED ON DOCKET

DATE 6-1-98

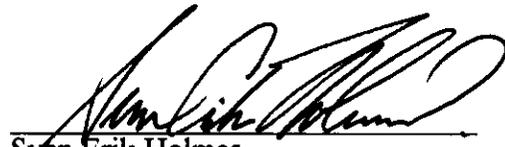
JUDGMENT

This matter came before the Court for a trial by jury on May 18-29, 1998. On May 29, 1998, the jury returned its verdict finding Defendant Columbian Steel Tank Co. liable on Plaintiff All State Tank Co., Inc.'s breach of contract claim on the Billings, Montana project. The jury awarded Plaintiff \$8,125.00 in damages. The jury also returned a verdict finding Defendant liable to Plaintiff on Plaintiff's breach of contract claim on the Terre Hill, Pennsylvania project. On this claim, the jury awarded Plaintiff \$27,840.00 in damages. Pursuant to stipulation of the parties, Plaintiff's claim for damages on the Brooklyn, New York project in the amount of \$12,960.00 is to be added to the amount of damages awarded Plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Plaintiff and against Defendant in the amount of \$48,925.00, plus an amount of attorneys' fees to be determined later by the Court upon appropriate submission by the parties.

IT IS SO ORDERED.

This 29TH day of May, 1998.


Sven Erik Holmes
United States District Judge

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

FILED
MAY 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JACQUELINE CHRISTIAN,

Plaintiff,

v.

AMERICAN AIRLINES,

Defendant.

Case No. 96-cv-1041-H ✓

ENTERED ON DOCKET

DATE 6-1-98

ORDER

This matter comes before the Court on a motion for summary judgment by Defendant American Airlines ("American") (Docket # 13). A hearing was held in this matter on March 13, 1998. The Court ordered the parties to file supplemental briefs in light of the Tenth Circuit's recent decision in Smith v. Midland Brake, 138 F.3d 1304 (10th Cir. 1998). For the reasons set forth below, Defendant's motion is hereby granted.

I

The following facts are not disputed.¹

1. Plaintiff Jacqueline Christian began working at American as a part-time airport agent on February 11, 1989 and has held that position throughout her employment with American.
2. Airport agents work in different locations throughout the airport, serving at either the gate, baggage areas, or ticket counter areas.
3. The airport agents participated in a seniority-based bid system to create the schedules for each upcoming three month period. Both the agents' shift and location (gates, baggage area, or ticket counter) are determined by this seniority-based system.

¹ Local Rule 56.1.B requires a nonmoving party to specifically include a statement of contested facts in its response to a motion for summary judgment. Plaintiff failed to do so. The rule further provides that "all material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party." At the hearing, Plaintiff conceded she had failed to follow this rule and that, as a result, the statement of facts by Defendant was uncontroverted. Therefore, Defendant's facts as stated in its motion are deemed admitted.

4. The gate locations are the most sought after positions and thus regularly go to the most senior airport agents.
5. Plaintiff alleged that on March 10, 1994 she was injured on duty while lifting a passenger's bag. She filed a worker's compensation suit for injuries to her back.
6. Due to her injuries, Plaintiff's doctors have imposed permanent lifting restrictions against lifting objects weighing more than fifty (50) pounds.
7. On March 23, 1994, Plaintiff returned to work on light duty.
8. No permanent light duty position exists for airport agents. Any light duty work is available only on a temporary basis.
9. On September 16, 1994, Plaintiff met with two of her supervisors to determine if any reasonable accommodation existed to allow Plaintiff to perform the essential functions of the airport agent position.
10. An essential function of the position of airport agent is lifting luggage weighing at least seventy (70) pounds.
11. Ticket agents are required to handle bags weighing over fifty (50) pounds on a regular basis.
12. Plaintiff is unable to lift objects weighting over fifty (50) pounds.
13. The essential functions of the job or airport agent include: . . . lifts and turns with bag weighing up to [at least 70] lbs., places bag on moving bag-belt.
14. Plaintiff cannot perform the essential functions of airport agent as listed in Paragraph 13.
15. The essential functions of the job of airport agent include: Checks over-sized baggage and parcels at the departure gate reading customers' destination from ticket which involves bending, lifting, and carrying bags or parcels weighing up to [70] lbs. on a bag conveyor or to another location for pick-up and loading.
16. Plaintiff is unable to perform the essential functions listed in Paragraph 15.
17. Plaintiff identifies only three accommodations she believes would be reasonable: (1) having other employees assist in lifting heavy bags; (2) placing Plaintiff on permanent light duty at the gates (and provide any necessary training) and (3) transferring Plaintiff to another position at American (and provide any necessary training).

18. Plaintiff's supervisors, Gordon Christopher and Dennis Hazell determined that no reasonable accommodation would allow Plaintiff to perform the essential functions of her job.
19. American's Accommodation Review Board concurred with the decision that no reasonable accommodation would allow Plaintiff to perform the essential functions of her job.
20. After receiving the Accommodation Review Board's decision, Plaintiff was placed on injury on duty leave of absence on October 28, 1994, because no reasonable accommodation would allow Plaintiff to perform the essential functions of her job as an airport agent.
21. By July of 1995, Plaintiff had exhausted her sixteen (16) weeks of paid injury on duty leave and all of her accumulated paid sick time.
22. In July of 1995, Plaintiff was placed on unpaid sick leave of absence.
23. This change to unpaid sick leave of absence was pursuant to American's rules and regulations and was not discretionary.
24. Plaintiff currently remains on unpaid sick leave of absence.
25. Plaintiff identified four airport agents that she alleges suffered back injuries and were allowed to work at the gates: Marie Griffith, Stacy Meeker, Sharon Davidson, and Jim Freeman.
26. Marie Griffith, Sharon Davidson, and Jim Freeman are all over forty years old.
27. All four of the employees identified have more job seniority than Plaintiff.
28. None of the employees identified by Plaintiff were allowed to work light duty on a permanent basis.
29. Plaintiff admits she was hired at a relatively low rate of pay because of the glut of unemployed airline workers after Braniff Airlines filed for bankruptcy.
30. Performance is an important consideration when determining pay rates.
31. Plaintiff had performance problems throughout her tenure at American.
32. Plaintiff filed her charge of discrimination on October 30, 1995.

II

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

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

477 U.S. at 322.

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

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

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

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

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

III

Plaintiff contends that Defendant has discriminated against her on the basis of her disability by failing to provide her with a different job which she could perform. Plaintiff asserts that Defendant provided other employees with light duty positions to accommodate their injuries. Further, Plaintiff contends that Defendant has discriminated against her on the basis of her age by failing to pay her on an equal basis with her younger counterparts. Plaintiff also contends that she was terminated in July of 1995 due to her age and her disability.² Defendant contends that summary judgment is appropriate here because Plaintiff's claims are untimely, because she cannot prove a prima facie case of either age or disability discrimination, and because Plaintiff has not come forward with any evidence to support the claim that Defendant's stated legitimate business reasons for its actions are pretextual.

IV

Under 42 U.S.C. § 2000e-5(e)(1), a person claiming age or disability discrimination must timely file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and/or the Oklahoma Human Rights Commission ("OHRC") before she can bring an action in district court under the ADEA or the ADA. Plaintiff must file her charge within 300 days from the date of the alleged discrimination. Aronson v. Gressly, 961 F.2d 907, 911 (10th Cir. 1992). In the instant case, Plaintiff filed her charge on October 23, 1995. Under limited

² Plaintiff contends that she was discharged as of the date Defendant placed her on unpaid leave. For the purposes of this motion, Defendant concedes that this action was tantamount to termination. Def.'s Br. at 11.

circumstances, the Court may consider discriminatory acts that occur outside the 300-day window if the such acts are part of a "continuing violation." Purrington v. University of Utah, 996 F.2d 1025, 1028 (10th Cir. 1993). In order to recover under this theory, Plaintiff must show a series of related acts against her, at least one of which falls within the limitations period. Id.

Defendant contends that any alleged discriminatory conduct happened not later than October 28, 1994, the date Plaintiff ceased working at American and went on paid leave. Under Defendant's calculations, Plaintiff's charge filed on October 23, 1995 is therefore untimely as to all Plaintiff's claims. In contrast, Plaintiff contends that her charge is timely because the discrimination by American did not cease when she stopped reporting for work but continued until she was terminated in July, 1995. Therefore, the charge regarding her termination made on October 23, 1995 is timely. Further, Plaintiff contends that her averments regarding accommodation and pay are timely because these acts are "integrally connected" to the timely filed discharge. As such, Plaintiff avers that the continuing nature of the discrimination allows the Court to consider the alleged discriminatory conduct outside the limitations period.

The Court finds that the 300-day period should run from July 12, 1995, the date Plaintiff was placed on unpaid leave. Further, the Court finds that Plaintiff has alleged a scenario of discrimination that culminated in her "termination" at that time. Plaintiff claims she was paid less than younger employees from October 28, 1994 until July 12, 1995. Plaintiff also alleges that she was not provided reasonable accommodation for her alleged disability, resulting in her termination on July 12, 1995. Accordingly, the Court will consider Plaintiff's claims of accommodation, pay, and termination.³

³ Plaintiff also alleges in her complaint that she was not trained as were her younger, non-disabled counterparts and that she was denied a promotion due to discrimination. The Court hereby dismisses these claims because they were not raised in Plaintiff's EEOC charge and they are not related to the other claims set forth in her EEOC charge. See Seymore v. Shawyer & Sons, 111 F.3d 794, 799 (10th Cir. 1997), cert. denied, 118 S. Ct. 342 (1997).

The ADA prohibits an employer from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees" and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). To establish a prima facie case under the Act, a plaintiff must show: (1) that she is a disabled person within the meaning of the ADA; (2) that she is qualified, that is, she can perform the essential functions of the job, with or without reasonable accommodation; and (3) that the employer took an adverse employment action under circumstances which give rise to an inference that the action was based on his disability. Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997); White v. York Int'l Corp., 45 F.3d 357, 360-61 (10th Cir. 1995). "The plaintiff must present evidence that, if the trier of fact finds it credible, and the employer remains silent, she would be entitled to judgment as a matter of law." Morgan, 108 F.3d at 1324.

The term "disability" under the ADA means (1) having a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) having a record of such impairment; or (3) being regarded as having such an impairment. 29 C.F.R. § 1630.2(g). The term "substantially limits" means "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(ii). The three factors to be considered when determining whether an impairment substantially limits a major life activity are "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or 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). A "major life activity" means functions such as walking, seeing, hearing, speaking, breathing, learning, and working. Bolton v. Scrivner, Inc., 36 F.3d 939, 942 (10th Cir. 1994). Lifting is

considered a major life activity. Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170, 1174 (10th Cir. 1996). In Lowe, the plaintiff, a former waitress, brought an action under the ADA after her employer fired her when she presented it a letter from her physician describing her pain and weakness in her leg. The letter also stated that the plaintiff could not carry items weighing over fifteen pounds and could carry items less than fifteen pounds only occasionally. The plaintiff was later diagnosed with multiple sclerosis. The district court granted summary judgment in favor of the employer because the plaintiff had failed to demonstrate how these restrictions substantially limited her ability to lift, how the restrictions affected her outside of work, and how her ability to lift compared to the abilities of the average person. The Tenth Circuit held that plaintiff's evidence created a genuine issue of material fact with respect to whether plaintiff's impairment substantially limited her ability to lift. Id.

Courts have held lifting restrictions alone are insufficient as a matter of law to constitute a disability under the ADA. Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346, 349 (4th Cir. 1996) (holding that a 25-pound lifting restriction "does not constitute a significant restriction on one's ability to lift, work or perform any other major life activity."), cited with approval in Gibbs v. St. Anthony Hospital, 107 F.3d 20, 1997 WL 57156 (10th Cir. February 12, 1997) (unpublished opinion); Aucutt v. Six Flags over Mid-America, Inc., 85 F.3d 1311, 1319 (8th Cir. 1996) (holding that 25-pound lifting restriction did not amount to a significant restriction on a major life activity)

In Gibbs, the plaintiff, a registered nurse, was injured when she lifted a patient. She returned to work with lifting restrictions of fifteen pounds on a repetitive basis and twenty-five pounds at any time. The hospital refused to allow her to return to her job which required lifting but offered her an administrative position, which plaintiff worked for only a few days before attempting suicide and leaving work permanently. The district court granted summary judgment in favor of the employer because plaintiff had not provided any evidence comparing her abilities to

those in the general population to show that she was substantially limited in the major life activity of lifting. The court concluded plaintiff had failed to demonstrate that she was disabled within the meaning of the ADA. The Tenth Circuit affirmed the district court's decision on the basis that plaintiff "ha[d] pointed out no facts comparing her lifting restrictions to the capabilities of an average person in the general population." *Id.* at *2. See also Whitfield v. Pathmark Stores, Inc., 971 F. Supp. 851, 858 (D. Del. 1997) (citing Lowe and holding that a plaintiff was not substantially limited in the activity of lifting based upon a twenty-pound lifting restriction due to lack of comparative evidence); but see Stevens v. Hy-Vee Food Stores, Inc., 1997 WL 159050 (D. Kan. March 20, 1997) (unpublished decision) (citing Lowe and finding plaintiff's light-duty restriction including a lifting restriction of twenty pounds sufficient to survive summary judgment despite a lack of comparative evidence; citing Gibbs and noting that plaintiff would need to demonstrate at trial how his lifting capabilities compare to those of an average person).

In the instant case, Plaintiff claims that she has a substantial limitation in the major life activity of lifting.⁴ The two restrictions Plaintiff asserts are her inability to lift bags over 50 pounds and her inability to work longer than eight hours at a time. Plaintiff claims that her lifting restrictions are not job-specific, but instead would prevent her from performing other manual jobs such as stocker, materials handler, and ticket agent.

The Court finds that Plaintiff has failed to show that she is disabled within the meaning of the ADA. Plaintiff offers no evidence that her fifty-pound lifting restriction and inability to work longer than an eight-hour period substantially limits her ability to lift. Plaintiff offers no evidence

⁴ At the hearing held in this matter, Plaintiff stated that she does not claim that she is substantially limited in the major life activity of working. While working is considered a major life activity, a person is not disabled in the ability to work merely because she is unable to perform one particular job. Instead, to meet the statutory definition of disabled, a person must be restricted from performing 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. Sutton v. United Airlines, 130 F.3d 893 (10th Cir. 1997). Consistent with Plaintiff's statement at the hearing, the Court finds that there is no evidence to support a claim that she is substantially limited in the major life activity of working.

comparing her lifting abilities to persons in the general population but merely alleges that she could not function as a warehouse worker or a stocker. The Court notes that this case is distinguishable from Lowe, in which the plaintiff suffered from a progressive, severe, long-term disease with no cure which resulted in weakness, numbness, the complete inability to lift more than fifteen pounds, and the inability to lift less than fifteen pounds more than only occasionally. The Court finds that the inability to lift fifty pounds, without a comparison to the abilities of an average person, is insufficient to constitute as a matter of law a substantial restriction on the major life activity of lifting. See Williams, 101 F.3d at 349; Gibbs, 1997 WL 57156, *2.

Even were the Court to conclude that Plaintiff met the ADA's definition of disabled, Plaintiff must establish that she is "qualified," or that she can perform the essential functions of the job with or without reasonable accommodation. According to the undisputed facts in this case, airport agents are required to lift at least seventy (70) pounds. The parties do not contest that lifting seventy (70) pounds is an essential function of the job of airport agent. Plaintiff's lifting restrictions preclude her from lifting more than fifty (50) pounds. Thus, Plaintiff cannot perform the essential functions of the job of airport agent without accommodation.

Plaintiff contends that Defendant should accommodate her disability by allowing her to transfer to a light duty position as a gate agent; allow her to remain an agent at the counter but require passengers or skycaps to lift heavy bags; or, transfer Plaintiff to another position. Plaintiff asserts that Defendant allowed other employees -- Marie Griffith, Stacy Meeker, Sharon Davidson, and Jim Meeker -- to work at permanent, light-duty, gate positions. Defendant claims that it does not have permanent light-duty positions. Moreover, Defendant asserts that airport gate agents are placed in those positions by a seniority system. All employees identified by Plaintiff have more seniority than does Plaintiff.

In response to a motion for summary judgment, Plaintiff must demonstrate the existence of a genuine issue of material fact regarding her ability to perform the essential functions of the

job with reasonable accommodation. Milton v. Scrivner, 53 F.3d 1118, 1124 (10th Cir. 1995). Plaintiff bears the initial burden of showing that an accommodation is reasonable. Id. Once that showing is made, Defendant must produce evidence of its inability to accommodate. Id.

The Court finds that Plaintiff's contention that Defendant should accommodate her disability by requiring the passengers or skycaps lift heavy bags is not a legally mandated accommodation. Under the ADA, an employer is not obligated to make other employees work harder to accommodate a disabled employee. Milton, 53 F.3d at 1124-25. An employer is not obligated to reallocate job duties among employees in order to change the essential functions of a position. Id. Such a reallocation would not allow Plaintiff to perform the essential functions of airline agent but merely allow some other employee or member of the public to assume part of the essential functions. The ADA does not compel such a result. Id.; see Martin v. Kansas, ___ F. Supp. ___, 1998 WL 97840 (D. Kan. February 3, 1998) (assigning corrections officer to light duty station, even if available, would not allow him to perform essential functions of patrol job including running, standing for long periods, or physically restraining inmates).

The Court further finds that Plaintiff's claim that Defendant should accommodate her disability by transferring her to a gate position, or to another undesignated job, also is not mandated. Under the ADA, an employer is not obligated to promote an employee to make accommodation, Milton, 54 F.3d at 1125, or to allow an employee reassignment to another unrelated job. Otis v. Canadian Valley-Reeves Meat, Co., 884 F. Supp. 446, 449 (W.D. Okla. 1994). Further, the Tenth Circuit has recently held that "under the ADA, when a plaintiff is not qualified, even with reasonable accommodation, for the job which he currently holds (or, as here, from which he was terminated), the employing entity has no obligation to consider reassigning him to another position." Smith v. Midland Brake, Inc., 138 F.3d 1304, 1309 (10th Cir. 1998). Instead,

"reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship [to the employer]." 29

C.F.R. Pt. 1630, App. § 1630.2(o), see also id. at Pt. 1630, App. § 1630.2(p) (defining undue hardship as “significant difficulty or expense in, or resulting from, the provision of accommodation”). In other words, reassignment can be used as a means of accommodating a disabled employee when accommodating him in his current position is possible, but difficult for his employer. It follows that when it is not at all possible to accommodate an employee in his current position, there is not obligation to reassign.

Smith v. Midland Brake, Inc., 138 F.3d at 1308. In the instant case, the Court concludes that Smith does not compel Defendant to transfer Plaintiff to the gate or to another unspecified job since accommodation in Plaintiff’s original job was not possible. Plaintiff’s contention that Defendant placed other employees in light-duty positions does not change this result. In Smith, the Tenth Circuit stated that the mere fact that an employer had accommodated other disabled employees, going beyond what was required under the ADA, does not create an affirmative obligation on an employer to do so in every case.

To hold otherwise would discourage employers from developing their own plans for going beyond what federal law requires. “Employers should not be discouraged from doing more than the ADA requires even if the extra effort that perhaps raises an applicant’s expectations does not work out.”

Id. at 1310 (quoting Sieberns v. Wal-Mart Stores, Inc., 125 F.3d 1019, 1023 (7th Cir. 1997)).

Further, an allegation that an employer had reassigned other disabled employees does not demonstrate discrimination based on disability. Id. Therefore, even accepting as true Plaintiff’s contention that Defendant placed four other injured employees in permanent, light-duty jobs, Smith would not require that Defendant reassign Plaintiff.⁵

⁵ The Court observes that Plaintiff has the burden of establishing a genuine issue of material fact on the issue of reasonable accommodation in order to defeat summary judgment. Plaintiff has failed to meet her burden with respect to her contention that Defendant should transfer her to another unspecified job. It is Plaintiff’s responsibility to first identify a reasonable accommodation. See Milton, 53 F.3d at 1125. Further, Plaintiff has produced no evidence to refute Defendant’s contention that no permanent light-duty positions exist at its workplace. Moreover, Plaintiff has offered no evidence whatsoever to respond to Defendant’s contentions that the employees identified by Plaintiff had more seniority than she did, and were eligible for gate positions when she was not. In any event, Defendant is not required to create a permanent light-duty position where none exists. Nguyen v. IBP, Inc., 905 F. Supp. 1471, 1486 (D. Kan. 1995).

Finally, even were the Court to conclude that Plaintiff met the definition of "disabled" under the ADA, and Plaintiff was a "qualified individual" within the meaning of the ADA, the Court finds that Plaintiff has presented no evidence that Defendant's stated reason for terminating her was pretextual or "unworthy of belief." Morgan, 108 F.3d at 1323. Defendant's job of airport agent requires lifting which Plaintiff cannot do. Defendant sought to find an accommodation for Plaintiff, but eventually was forced to place her on unpaid leave when none could be found. Even if Plaintiff had met her prima facie case, summary judgment would be entered for Defendant because Plaintiff has offered no evidence to rebut Defendant's stated reason for discharging Plaintiff.

Based on the above, Defendant's motion for summary judgment as to Plaintiff's ADA claim is hereby granted.

VI

In the absence of direct evidence, a plaintiff claiming age discrimination under the ADEA should proceed in accordance with the rules announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). To set forth a prima facie case, Plaintiff must establish that: (1) she was within the protected age group; (2) she was doing satisfactory work; (3) she was discharged despite the adequacy of her work; and (4) she was treated less favorably than a younger person. Gonzagowski v. Widnall, 115 F.3d 744, 749 (10th Cir. 1997).

Once a plaintiff establishes the elements of a prima facie case, the employer bears the burden of production to show a legitimate, nondiscriminatory reason for the challenged action. Id. If the employer articulates such a reason, the burden shifts back to the plaintiff to demonstrate that the employer's proffered justification was pretextual and that the age of the employee was a determining factor in the employer's decision. Id.

In the instant case, Plaintiff initially alleged she was terminated because of age discrimination in violation of the ADEA. At the hearing, however, Plaintiff agreed that the reason

for her discharge was her inability to lift objects weighing more than fifty pounds. Thus, Plaintiff conceded that Defendant's stated reason for discharging her was not pretextual. Based on this agreement that the reason she was discharged was this alleged disability, Plaintiff withdrew her claim that she was discharged because of her age. Therefore, Defendant's motion for summary judgment on this claim under the ADEA is moot.

In her complaint, Plaintiff also alleges that she was paid less than similarly-situated younger employees. However, the Court notes that beyond her bare allegations, Plaintiff has presented no evidence whatsoever that she was paid less than other employees. Nor has Plaintiff identified which younger employees received higher wages. Accordingly, Plaintiff has failed to establish a prima facie case of age discrimination under the ADEA on this basis. Assuming that Plaintiff has established a prima facie case, Defendant claims that Plaintiff's rate of pay was determined when she initially began working at American during a time when there were many airline employees seeking jobs when a competing airline entered bankruptcy. As a result, Plaintiff's wages were lower from the outset due to the economic climate at the time. Plaintiff has offered no evidence whatsoever to rebut Defendant's evidence. As a result, the Court grants Defendant's motion for summary judgment as to this issue under the ADEA.

For the reasons set forth above, Defendant's motion for summary judgment is hereby granted.

IT IS SO ORDERED.

This 29TH day of May, 1998.


Sven Erik Holmes
United States District Judge

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

RIVER OAKS DEVELOPMENT
CORPORATION, an Oklahoma corporation;
Lorice T. Wallace, trustee of the LORICE T.
WALLACE REVOCABLE TRUST, and the
LORICE T. WALLACE FAMILY LIMITED
PARTNERSHIP, an Oklahoma limited partnership,

Plaintiffs,

v.

MNA, INC., a Colorado corporation; NAIM
G. NASSAR, an individual; and MACE L.
PEMBERTON, an individual,

Defendants.

FILED

MAY 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-C-68-H ✓

ENTERED ON DOCKET

DATE 6-1-98

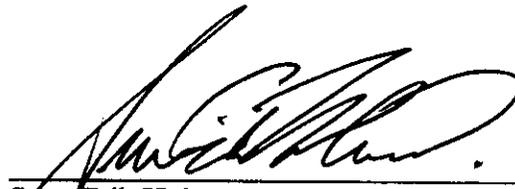
JUDGMENT

This matter came before the Court on a motion to dismiss the claims of Plaintiffs by Defendants Nassar and Pemberton. The Court duly considered the issues and rendered a decision in accordance with the order filed on April 3, 1998.

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

IT IS SO ORDERED.

This 29TH day of May, 1998.


Sven Erik Holmes
United States District Judge

172

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

FILED
MAY 29 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
THE SUM OF ONE HUNDRED THIRTY-)
EIGHT THOUSAND ONE HUNDRED)
FIFTY DOLLARS (\$138,150) IN UNITED)
STATES CURRENCY)
)
Defendant.)

Case No. 97-CV-689-H ✓

ENTERED ON DOCKET
DATE 6-1-98

ORDER

This matter comes before the Court Plaintiff's motion to strike the claim of Emad Aldada in this forfeiture proceeding (Docket # 24). The United States initiated this forfeiture proceeding on July 28, 1997 (Docket # 1). Counsel for Mr. Aldada entered his appearance in this case on August 20, 1997 (Docket # 7). Mr. Aldada was indicted on December 8, 1997 on another matter. United States v. Aldada, No. 97-cr-147 (N.D. Okla. Dec. 9, 1997). Mr. Aldada has not yet been arrested, and Plaintiff asserts that Mr. Aldada is a fugitive from justice. On separate occasions, Mr. Aldada has failed to appear for depositions noticed by Plaintiff in the instant case. On March 10, 1998, the Court entered an order rejecting Mr. Aldada's refusal to participate in discovery based on a blanket assertion of Fifth Amendment privilege. The Court arranged for Mr. Aldada to submit himself for deposition under the guidance of United States Magistrate Judge Frank M. McCarthy in the event that self-incrimination issues arose. The Court warned Mr. Aldada that he risked dismissal of his claim should he fail to participate in the discovery process. Nonetheless, Mr. Aldada failed to appear at the April 1, 1998 deposition as scheduled.

The United States has now moved that Mr. Aldada's claim be stricken. Mr. Aldada has filed a response to the motion by the United States, urging that the Court should rule on Mr. Aldada's pending motion for summary judgment, which alleges that Plaintiff's seizure of the

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money at issue here is in violation of the United States Constitution. Further, Mr. Aldada contends that the Court's order that Mr. Aldada participate in the discovery process was tantamount to a requirement that Mr. Aldada submit to arrest in order to demand return of the res at issue here. In fact, Mr. Aldada claims that he is entitled to an entry of judgment in his favor, and that the Court, "however, has chosen to withhold the entry of judgment, despite Claimant's clear entitlement thereto, in order to permit the Government to wield its discovery rights as a bludgeon to force the Claimant to submit to arrest on an indictment which is wholly unrelated to this seizure." Claimant's Resp. at 3.

The Court finds that Mr. Aldada's claim must be stricken because he has failed to participate in the discovery process as contemplated by the federal rules and because he has failed to comply with express orders of this Court.

The Court has reviewed Claimant's motion for summary judgment, and his allegation that the search at issue here violated his rights under the Constitution. In his motion, Claimant states that Plaintiff has the burden of showing that the warrantless search here complies with the Constitution. Plaintiff contends that the search was consensual, proper, and has submitted an affidavit in support of its view. Claimant has not replied to Plaintiff's response, despite an order from the Court setting a deadline of March 13, 1998 for such a reply. Instead, Claimant claims that Plaintiff's failure to respond timely to certain requests for admissions establishes certain facts, including that Plaintiff did not acquire the currency at issue here through the sale of controlled dangerous substances, that Plaintiff had no intention of utilizing such funds to acquire or facilitate any transaction involving any controlled substances, and that the sale of pseudo-ephedrine is lawful. However, Plaintiff contends that Claimant never served admissions on it but instead attached copies of interrogatories in a related case, Case No. 97-cv-365, that also never were served on Government. Therefore, Plaintiff requested an extension of time within which to respond to these requests for admissions, should the Court conclude Plaintiff was obligated to

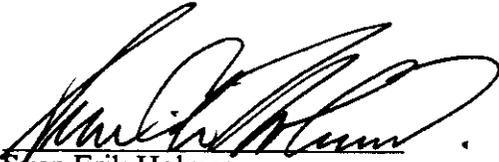
respond. In any event, in a letter to Claimant's counsel, Plaintiff specifically denied the requests for admissions at issue here. Under the circumstances of this case, the Court concludes that the facts that were the subject of these requests have not been established as Claimant contends.

The Court concludes, even if Claimant had participated in the discovery process as the Court ordered, that summary judgment is inappropriate here because Plaintiff has established that genuine issues of material fact exist as to whether the forfeiture in this case was proper.

For the above stated reasons, Mr. Aldada's claim in this proceeding is hereby stricken.

IT IS SO ORDERED.

This 29TH day of May, 1998.


Sven Erik Holmes
United States District Judge

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

Plaintiff was born April 23, 1953 and was 42 years old at the time of the hearing. [R. 32]. She claims to have been unable to work since November 1991 due to back pain, [R. 35, 82, 90], and a left knee that "gives out." [R. 37].

The ALJ determined that Plaintiff has severe impairments consisting of subjective back pain but that she retains the residual functional capacity (RFC) to perform a full range of light work. [R.18]. He determined that Plaintiff has no past relevant work (PRW) and, using the Medical-Vocational Guidelines, Appendix 2, Subpart P, Regulations No. 4, found that a significant number of occupations exist in the regional or national economy that Plaintiff can perform. He found, therefore, that Plaintiff is not disabled as defined by the Social Security Act. [R. 19]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is

disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the ALJ, by not ordering a consultative medical examination, failed to fully and fairly develop the record. [Plaintiff's Brief, p. 4]. Plaintiff also asserts the ALJ applied an improper legal framework in evaluating the claim by shifting the burden of proof after reaching his determination of Plaintiff's residual functional capacity (RFC) rather than before, which, she claims, is grounds for reversal. [Plaintiff's Brief, p. 5].

For the reasons discussed below, the Court affirms the decision of the Commissioner.

Plaintiff's First Statement of Error

Plaintiff claims the Appeals Council remanded the first denial decision for a de novo hearing "because the record as it stood was incomplete for review." She asserts the ALJ was compelled to order a consultative examination to update the record because there was no medical evidence in the record for the time period after May 1994. Plaintiff contends the ALJ's March 20, 1996 step five determination was not supported by substantial evidence for this reason.

At the outset, the Court notes the sole reason stated by the Appeals Council for remanding the November 18, 1994 denial decision was that the hearing tape had been certified as lost, rendering the record incomplete. [R. 158-159]. Upon remand, the Appeals Council directed the ALJ to conduct a de novo hearing and issue a new decision. There is nothing in the Appeals Council's decision to indicate the Appeals

Council considered the record otherwise incomplete, lacking medical evidence or that a consultative examination was required before a new decision could be entered.

Nonetheless, Plaintiff contends the record is insufficient to support the ALJ's findings regarding the nature and severity of Plaintiff's impairments as they existed in March 1996 because there is no medical evidence in the record for the period after May 1994. She asserts "the ALJ's duty to order a consultative examination was triggered under the *Hawkins* rule." [Plaintiff's brief, p. 4-5].

Contrary to Plaintiff's assertion, *Hawkins v. Chater*, 113 F.3d 1162, 1166 (10th Cir. 1997) provides the ALJ with broad latitude in ordering consultative examinations.

A consultative examination is required where there is a direct conflict in the medical evidence requiring resolution, where the medical evidence in the record is inconclusive, or where additional tests are required to explain a diagnosis already contained in the record. *Id.*

In this case, the medical record consists of treatment notes from the OSU College of Osteopathic Medicine Health Care Center, January through April 1992, for back pain. [R. 121-126]. The assessment at that time was right paravertebral muscle spasm with decreased motion in forward flexion. [R. 123]. In March 1993, a chiropractor wrote that Plaintiff could lift no more than 10-15 lbs. but was able to work light duty positions. [R. 114]. On November 24, 1993 a DDU physician diagnosed "back pain, possible strain" and noted that Plaintiff "was able to get on an off the exam table without a great deal of difficulty, although there was some hesitation due to allegations of back pain." [R. 103-104]. S.Y. Andelman, M.D. wrote on February 15,

1994 that Plaintiff "is to be removed from the work program until her low back strain improves." [R. 115]. On April 9, 1994, Plaintiff was involved in a motor vehicle accident for which she was seen at St. John Medical Center's emergency room. [R. 168-169]. A history of previous back problems was noted by the emergency room care provider. Plaintiff was treated for elbow and knee contusions, left lumbar area strain and given Ibuprofen for pain. *Id.* Plaintiff then sought treatment from Life Chiropractic on April 14, 1994 for headaches, stiffness in the neck and low back pain which she claimed were caused by the car accident. [R. 133-134]. In the questionnaire regarding symptoms that date, Plaintiff stated she had not had this problem or similar problems before the accident. *Id.* The chiropractic treatment notes from April 1994 through May 3, 1994 indicate Plaintiff's back pain decreased and overall she was "doing better" and improving with treatment. [R. 127-128]. At the hearing on February 10, 1996, Plaintiff testified that she was taking Tylenol and Advil for the pain that she rated as a ten on a 0-10 pain scale. [R. 36]. She testified she has not received any medical treatment since 1994. [R. 37].

The Court rejects Plaintiff's assertion that the ALJ should have ordered an additional examination. The medical evidence in the record is not inconclusive or incomplete. See *Thompson v. Sullivan*, 987 F.2d 1482, 1492 (10th Cir. 1993); 20 C.F.R. § 416.919a(b) (1994). Plaintiff's chiropractor assessed Plaintiff as able to do light work in 1992. Dr. Andelman wrote in 1994 that Plaintiff should be "removed from the work program until her low back strain improves." [R. 115]. While it is not clear what work program he was referring to as Plaintiff had not returned to work even

after her chiropractor's release in 1992, it is clear from the language in the note that Dr. Andelman meant the restriction to be temporary. Plaintiff did not continue treatment with Dr. Andelman. Nor did she seek or receive any medical treatment during the time period for which she complains the ALJ failed to develop the record. She implies she did not seek medical treatment because of money problems, having lived in a homeless shelter for four months shortly before the second hearing in 1996. [R. 42]. Yet, there is no indication in the record, other than Plaintiff's testimony that "they hang up on you", that she was rejected by medical care providers due to inability to pay for treatment. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ discussed the medical evidence regarding Plaintiff's back pain and assessed Plaintiff's RFC in accordance with his evaluation of that evidence and Plaintiff's credibility. A consultative examination would not necessarily have been of material assistance in resolving the issue of disability in this case. *Hawkins*, p. 1169.

Furthermore, at no time prior to, during or after the second hearing, did Plaintiff request that a consultative evaluation be performed or indicate she believed the record was incomplete. [R. 31]. The *Hawkins* court stated that "when the claimant is represented by counsel at the hearing, the ALJ should ordinarily be entitled to rely on the claimant's counsel to structure and present claimant's case in a way that the

claimant's claims are adequately explored." *Id.* at 1167-68. It is appropriate for the ALJ to require counsel to identify issues requiring further development. Although the ALJ has a basic obligation to ensure that an adequate record is developed during the disability hearing consistent with the issues raised, it is not the ALJ's duty to become the claimant's advocate. *Henrie v. United States Dept. of Health and Human Servs.*, 13 F.3d 359, 360-61 (10th Cir. 1993). If Plaintiff believed that it was necessary to order a consultative examination, it was the obligation of Plaintiff and her counsel to bring that information to the attention of the ALJ. In the absence of such a request by counsel, this Court will not impose a duty on the ALJ to order a consultative examination unless the need for one is clearly established in the record. See *Hawkins*, at 1168.

The Court finds Plaintiff's First Statement of Error without merit.

Plaintiff's Second Statement of Error

Plaintiff next contends the ALJ misidentified the party with the burden of proof at step five. She asserts the burden of proof must be shifted to the Commissioner before making a final RFC determination at step five and that, in this case, the ALJ expressly stated he did not shift the burden until after making his final RFC determination, resulting in failure to use the correct legal framework for evaluating evidence at step five.

The Social Security Administration has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920, 416.920; see *Williams v. Bowen*, 844 F.2d 748 (10th Cir. 1988).

If a determination can be made at any of the steps that a claimant is or is not disabled, evaluation under a subsequent step is not necessary. *Id.*

Step one determines whether the claimant is presently engaged in substantial gainful activity. If he is, disability benefits are denied. If not, the decision maker proceeds to step two, determining whether the claimant has a medically severe impairment or combination of impairments." *Id.* at 750. This determination is governed by the Commissioner's severity regulations, 20 C.F.R. §§ 404.1520(c), 416.920(c) 1986, is based on medical factors alone and, consequently, does not include consideration of such vocational factors as age, education and work experience. Pursuant to the severity regulations, the claimant must make a threshold showing that his medically determinable impairment or combination of impairments significantly limits his ability to do basic work activities, i.e., "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§ 404.1521(b), 416.921(b) (1986); accord *Bowen v. Yuckert*, 107 S.Ct. at 2287, 2291, 96 L.Ed. 2d 119 (1987); *Williams* at 751.

Step three determines whether the impairment is equivalent to one of a number of listed impairments that the Commissioner acknowledges are so severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d), 416.920(d) (1986); *Williams*, p. 751.

At step four, the ALJ engages in a comparative assessment of the claimant's residual functional capacity (RFC) and the demands of the work the claimant has done in the past to determine whether the claimant can do his past relevant work (PRW). 20 C.F.R. § 1520(e); *Hinkle v. Apfel*, 1997 WL 787158 (10th Cir. (Okla.)); see also *Henrie*

v. United States Dept. of Health & Human Servs., 13 F.3d 359, 361 (10th Cir. 1993).

Under the sequential evaluation process, the claimant bears the burden of showing that he is not presently engaged in substantial gainful activity, that he has a medically severe impairment or combination of impairments, and that the impairment or combination of impairments prevents him from performing his past work. *Bowen v. Yuckert*, 107 S.Ct. at 2294 n. 5.

Because the ALJ found that Ms. Baugh had no past relevant work, he proceeded to step five of the standard five-step evaluation process. At this step, the Commissioner bears the burden of proving that, despite the existence of severe impairments precluding a return to past relevant work, a claimant can perform a significant number of jobs existing in the national economy. *Williams v. Bowen*, 844 F.2d 748, 751 (10th Cir.1988). To meet this burden, the Commissioner may rely on the Medical-Vocational Guidelines (grids), 20 C.F.R., pt. 404, Subpt. P, App. 2 (1986). The grids consider a claimant's RFC in relation to his age, education, and work experience. *Channel v. Heckler*, 747 F.2d at 578. A claimant's RFC to do work is what the claimant is still functionally capable of doing on a regular and continuing basis, despite his impairments: the claimant's maximum sustained work capability.

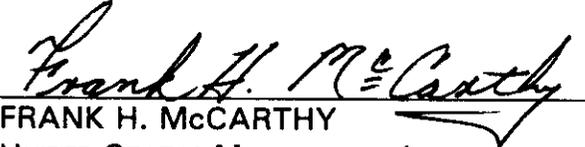
An RFC assessment is done at step four in the sequential evaluation process. It follows that an RFC would be determined before shifting the burden at step five. In this case, because the ALJ found Ms. Baugh had no past relevant work he proceeded to step five without conducting a comparative assessment of her RFC with her PRW. However, it is clear from a careful reading of the "Findings" in the ALJ's decision that

he first assessed Plaintiff's RFC, found her capable of performing a full range of light work, found that she had no past relevant work and then determined that occupations exist in the regional or national economy in significant numbers that she is capable of performing. The Court finds the ALJ applied the correct legal framework in evaluating Plaintiff's claim.

Conclusion

The Court finds the ALJ evaluated the record in accordance with the correct legal standards established by the Commissioner and the courts. The record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 29th day of MAY, 1998.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

OHIO NATIONAL LIFE ASSURANCE)
CORPORATION/CINCINNATI,)

Plaintiff,)

vs.)

RUTH McDONALD, LIMITED)
GUARDIAN FOR DONALD E. BROOKS)
and DEBRA SUE BROOKS,)

Defendants.)

MAY 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

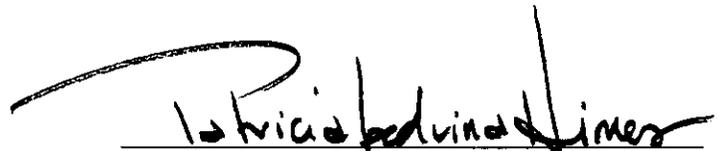
Case No. 97-CV-671-BU(M)

ENTERED ON DOCKET

DATE JUN 01 1998

**STIPULATION OF DISMISSAL OF
DEBRA SUE BROOKS WITH PREJUDICE**

Plaintiff, Ohio National Life Assurance Corporation, and Defendants, Ruth McDonald, Limited Guardian for Donald E. Brooks, and Debra Sue Brooks, pursuant to F.R.Civ.P. 41(a), hereby stipulate to dismissal of Debra Sue Brooks from this litigation with prejudice.



Timothy A. Carney, OBA #11784

Elsie Draper, OBA #2482

Patricia Ledvina Himes, OBA #5331

GABLE GOTWALS MOCK SCHWABE

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ATTORNEYS FOR DEFENDANT,
DEBRA SUE BROOKS

It is so ordered this 28 day of May, 1998.

s/ MICHAEL BURRAGE

MICHAEL BURRAGE
U.S. DISTRICT JUDGE

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

FILED

MAY 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHERYL BRYANT,

Plaintiff,

§
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§
§
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v.

CASE NO. 97-CV-1054BU (M) ✓

KIMBERLY-CLARK CORPORATION,
a Delaware corporation; and WILLIAM
KAISER, an individual

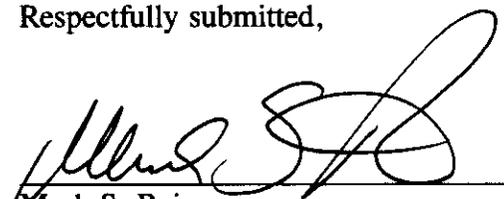
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Defendants.

STIPULATION FOR DISMISSAL WITH PREJUDICE

Sheryl Bryant, Plaintiff herein, and Kimberly-Clark Corporation, Defendant herein, hereby stipulate to the dismissal of this action with prejudice to the refiling thereof.

Respectfully submitted,

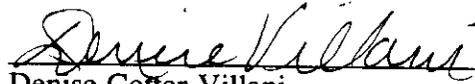


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