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

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
THE SUM OF ONE THOUSAND)
FOUR HUNDRED FORTY AND No/100)
DOLLARS (\$1,440.00) IN UNITED)
STATES CURRENCY; et al.)
)
Defendant(s).)

CIVIL ACTION NO. 96-CV-934-B ✓

ENTERED ON DOCKET
DATE JUL 20 1998

JUDGMENT OF FORFEITURE

This matter having come before this Court on the 15th day of June, 1998, for trial before the Court for the forfeiture of the defendant vehicle and determination of the claim of Cheryl K. Ceasar. The plaintiff appearing by Catherine J. Depew, Assistant United States Attorney, and Claimant Cheryl K. Ceasar appearing and represented by Cornelius R. Johnson.

WHEREAS, the verified Complaint for Forfeiture In Rem was filed in this action on the 11th day of October, 1996, alleging that the defendant vehicle is subject to forfeiture pursuant to 21 U.S.C. § 881(a)(4), because it was a conveyance which was used or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment of illegal drugs, a violation of Title 21 of the United States Code and subject to seizure and forfeiture to the United States of America;

AND WHEREAS, Warrant of Arrest and Notice In Rem was issued on the 17th day of October, 1996, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant vehicle and for publication in the Northern

District of Oklahoma;

AND WHEREAS, the United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on the defendant vehicle on December 9, 1996;

AND WHEREAS, Dendra Ceasar, Cheryl K. Ceasar and Liberty Bank, now BankOne have been determined to be the only parties with possible standing to file a claim to the defendant vehicle, and, therefore the only parties to be served with process in this action;

AND WHEREAS All persons and/or entities interested in the defendant vehicle were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s);

AND WHEREAS, Cheryl K. Ceasar waived service of summons, and filed her Claim to the defendant vehicle on the 19th day of December, 1996, and her Answer on the 19th day of December, 1996. Liberty Bank, now BankOne filed their claim to the defendant vehicle on the 19th day of November, 1996;

AND WHEREAS, no other claims or answers have been filed of record in this action with the Clerk of the Court, in respect to the defendant vehicle, and no other persons or entities have plead or otherwise defended in this suit as to said defendant vehicle, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, upon information and belief, default exists as to the defendant vehicle and all persons and/or entities interested therein, save and except the claims of Cheryl K. Ceasar and Liberty Bank, now BankOne;

AND WHEREAS, the United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant vehicle was located, on February 27, March 6 and 13, 1997. Proof of Publication was filed June 16, 1997;

AND WHEREAS, the United States of America recognizes the innocent secured interest of Liberty Bank, now BankOne, in the defendant vehicle.

AND WHEREAS, on the 15th day of June, 1997, the court found that there is sufficient probable cause that the defendant vehicle is subject to forfeiture. Thereafter, the claim of Cheryl K. Ceasar as to the defendant vehicle was presented to the Court on June 15, 1998, for determination;

AND WHEREAS, the Court returned its Findings of Fact and Conclusions of Law on the 6th day of July, 1997, finding that the defendant vehicle is subject to forfeiture and that Claimant Cheryl K. Ceasar failed to establish a defense to the forfeiture.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that, in accordance with the Court's Findings of Fact and Conclusions of Law that the following-described defendant vehicle:

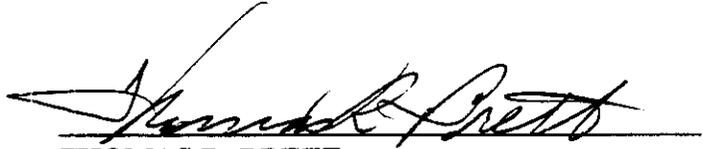
1994 Ford Thunderbird, VIN 1FALP6241RH220862

be, and it hereby is, forfeited to the United States of America for disposition according to law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States Marshal is ordered to pay the security interest held by Liberty Bank, now BankOne, in the amount of \$6,103.02 (representing principal and contractual interest as of June 10, 1998) plus contractual interest lawfully accruing from June 10, 1998 until the date of payment. Upon payment as directed herein, the United States Marshal shall obtain from said Liberty Bank, now BankOne, an appropriate

release, cancellation and satisfaction evidencing payment of said interest.

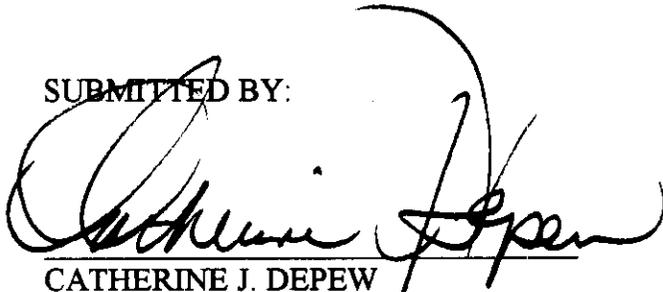
Entered this 17th day of July, 1998.



THOMAS R. BRETT

Judge of the United States District Court for the
Northern District of Oklahoma

SUBMITTED BY:



CATHERINE J. DEPEW

Assistant United States Attorney

NAUDD\FJOHNSON\FORFEIT\USA\FEHOMENCEASARJUDGMENT

FILED
JUL 17 1998

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 TIMOTHY S. O'HALLORAN,)
)
 Defendant.)

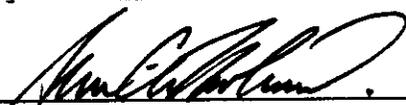
CASE NO. 97CV421 H (J) ✓

ENTERED ON DOCKET
DATE JUL 20 1998

ORDER

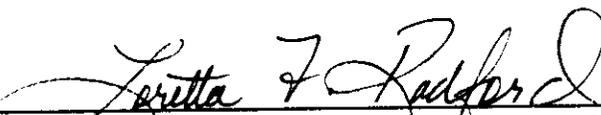
Upon the motion of the plaintiff, United States of America, to which there is no objection, it is hereby ORDERED that all claims against defendant **Timothy S. O'Halloran**, be dismissed with prejudice, the parties to bear their own costs and attorneys' fees.

Dated this 16TH day of July, 1998.


UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

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

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Clark

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

ROBIN RAY,

Plaintiff,

vs.

FARMERS INSURANCE COMPANY INC.,

Defendant.

DATE JUL 20 1998

Case No: 97-CV-709K-(M)

FILED
JUL 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

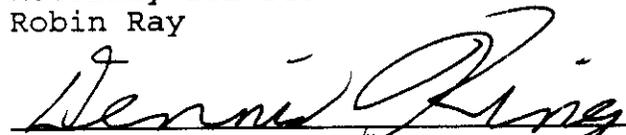
On this 17 of July, 1998, the Joint Application of the parties for an Order of Dismissal with Prejudice came on before the Court for hearing. The Court finds that the parties have settled all issues in the case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, the above captioned matter is Dismissed with Prejudice to refiling.


JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:


RICHARD GIBBON - OBA #3340
Attorney for Plaintiff
Robin Ray


DENNIS KING - OBA #5026
Attorney for Defendant
Farmers Insurance Company, Inc.

rgb

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Chmb

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

IN RE:)
)
DORIS JEAN BROOM,)
)
Debtor.)
)
FIDELITY FINANCIAL SERVICES,)
)
Appellant,)
)
v.)
)
DORIS JEAN BROOM,)
)
Appellee.)

FILED

JUL 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-C-589-H ✓

ENTERED ON DOCKET

DATE JUL 20 1998

ORDER

This matter comes before the Court on consideration of the suggestion of mootness filed by Debtor/Appellee Doris Jean Broom (Docket # 3). Appellee has advised the Court that this bankruptcy appeal has been rendered moot due to the Notice of Conversion to Chapter 7 filed on October 20, 1997, by Debtor/Appellee. Furthermore, Debtor/Appellee has indicated that she intends to surrender the property that is the focus of this appeal. Appellant has filed no response to Appellee's suggestion of mootness. Accordingly, the Court finds that this matter is moot and hereby dismisses this action.

IT IS SO ORDERED.

This 16th day of July, 1998.


Sven Erik Holmes
United States District Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA,

FILED
JUL 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JACQUITA WORKMAN,)
SSN: 507-78-0428)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner of)
Social Security Administration^{1/},)
)
Defendant.)

No. 96-C-36-E ✓

ENTERED ON DOCKET
DATE JUL 20 1998

ORDER

Plaintiff, Jacquita Workman, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts error because 1) the ALJ misconstrued and ignored pertinent medical evidence; 2) the ALJ ignored evidence which supported plaintiff's credibility and subjective testimony regarding non-exertional impairments; 3) the ALJ relied exclusively on the "Grids" to support his determination; and 4) the ALJ failed to solicit testimony from a vocational expert. For the reasons discussed below, the Court remands this matter for the testimony of a vocational expert.

I. PLAINTIFF'S BACKGROUND

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

^{2/} Plaintiff filed an application for disability benefits on June 3, 1993. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Leslie S. Hauger, Jr. (hereafter, "ALJ") was held August 15, 1994. [R. at 8]. By order dated November 22, 1994, the ALJ held that Plaintiff was not disabled. [R. at 8]. Plaintiff appealed the ALJ's decision to the Appeals Council. On December 13, 1995 the Appeals Council denied Plaintiff's request for review. [R. at 3].

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Jacquita Workman was born on June 16, 1960. She has an eighth grade education, but can read, write, and perform math. She does not have a drivers license. She suffers from multiple sclerosis, has poor eyesight, and incontinence. She does not have a significant work history.

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

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. . . .

^{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).

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 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

^{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."

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

In this case, the ALJ determined that Plaintiff had not engaged in any substantial gainful activity since June 3, 1993, that she is impaired by "possible multiple sclerosis-like symptoms" which are severe enough to impair her ability to work, that her impairment does not meet or equal the criteria of any impairment in the listings, that she has the residual functional capacity to perform a full range of sedentary work, that there are no nonexertional impairments to reduce the sedentary work base, that she has no past relevant work, and that because there is work she can perform regardless of her impairments, she is not disabled.

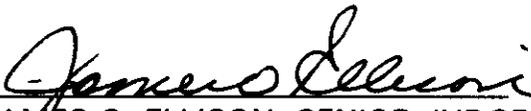
IV. REVIEW

With respect to her allegations of error, Plaintiff asserts that the ALJ ignored objective evidence which supported a nonexertional impairment, and that in light of the evidence, the ALJ was obligated to get the testimony of a vocational expert and not simply rely on the "grids." The records of Workman's vocational rehabilitation counselor and Dr. Cross , as well as Workman's inability to obtain a drivers license

support her complaints of nonexertional impairments. It is unquestionable that plaintiff's testimony of nonexertional impairments is consistent with her medical records. See Talley v. Sullivan, 908 F.2d 585, 587 (10th Cir. 1990). Moreover, in light of the nonexertional impairments, which would limit the range of jobs available to plaintiff, the ALJ erred in not using the testimony of a vocational expert. Channel v. Heckler, 747 F.2d 577 (10th Cir. 1984).

Accordingly, this matter is REMANDED for development of the testimony of a vocational expert.

Dated this 17th day of JULY, 1998.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

TIMOTHY D. ATKINS,)
Plaintiff,)
vs.)
JIM EARP, Sheriff; and STEVE ODLE,)
Jay Police Department,)
Defendants)

ENTERED ON DOCKET
DATE JUL 20 1998
No. 97-CV-1087 H (M) ✓
FILED
JUL 17 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On December 9, 1997, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983. By order entered January 6, 1998, the Court informed Plaintiff of deficiencies in his papers. Specifically, Plaintiff was advised that this action could not proceed unless he paid the \$150.00 filing fee or submitted a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. §1915(a). Plaintiff was also ordered to submit copies of the complaint, additional summons and USM forms for service upon the named Defendants. In addition, the Clerk of Court was directed to mail Plaintiff the forms and information necessary for preparing the documents ordered by the Court. Plaintiff was also advised that these deficiencies were to be cured by February 7, 1998, and "failure to comply . . . will result in dismissal without prejudice of Plaintiff's *Complaint*."

On February 9, 1998, and on March 19, 1998, Plaintiff provided a copy of this trust fund accounting and requested additional time to secure the money. The Court granted an additional thirty days, or until May 28, 1998, to submit the filing fee or a properly completed motion for leave to proceed in forma pauperis. To date, Plaintiff has not submitted the required documents or payment, nor has any correspondence to Plaintiff been returned to the Court.

Because Plaintiff has failed to comply with the Court's Order of April 27, 1998, and has failed to pay the filing fee or file a properly supported motion for leave to proceed in forma pauperis, the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's civil rights *Complaint* is **dismissed without prejudice** for lack of prosecution.

IT IS SO ORDERED.

This 16TH day of July, 1998.



Sven Erik Holmes
United States District Judge

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

FILED

JUL 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES JAAMIL SHORTER,)
)
 Plaintiff,)
)
 vs.)
)
 TULSA COUNTY JAIL SHERIFF)
 STANLEY GLANZ,)
)
 Defendant.)

No. 98-CV-106-BU (M)

ENTERED ON DOCKET
DATE JUL 20 1998

ORDER

Plaintiff, an inmate at the Tulsa County Jail appearing *pro se* and *in forma pauperis*, has filed an amended civil rights complaint pursuant to 42 U.S.C. § 1983 against Stanley Glanz, Sheriff of Tulsa County (Docket #4). Plaintiff, a "diabetic insulin dependant," contends he has requested an "ADA caloric diabetic diet" from the medical staff, Dr. Osea and RN Stevens, and from the administration, "namely via chain of command 'sensitive nature' request to Level III senior staff... via Lt. Fitzgibbon to designated respondent (sic) Sheriff Glantz (sic)" of the Tulsa County Jail. Plaintiff alleges that Defendant Glanz, while acting under color of state law, refused to "facilitate me a diabetic diet as requested." He further contends all administrative remedies have been exhausted in that he has submitted grievances to which jail officials have been unresponsive. Plaintiff seeks \$100,000 in compensatory damages, \$100,000 in punitive damages, and \$100,000 for mental anguish and also seeks to bring criminal charges against "officials who have committed illegal actions of tampering with my legal communication with the courts" as well as injunctive relief. (Docket #4, p. 8). For the reasons discussed herein, the Court finds Plaintiff's complaint should be dismissed for failure to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915A.

ANALYSIS

The “Screening” provision of the in forma pauperis statute, 28 U.S.C. § 1915A, requires the Court to review a complaint brought by a prisoner seeking redress from a governmental entity or officer to determine if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted; or seeks monetary relief from a defendant who is immune from such relief. In addition, a district court may dismiss an action filed in forma pauperis “at any time” if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted; or seeks relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915(e)(2)(B).

To state a § 1983 claim for a violation of a convicted prisoner’s Eighth Amendment rights due to inadequate medical care, the prisoner must allege facts evidencing a deliberate indifference to his serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976). Although Plaintiff states that he was being held at the Tulsa County Jail “on extradition charge of ‘fugitive from justice’ from state of KY” and that the treatment he received violated his Fourteenth Amendment rights, the same level of constitutional violation is required -- “deliberate indifference to serious medical needs.” Meade v. Grubbs, 841 F.2d 1512, 1530 (10th Cir. 1988); see also Garcia v. Salt Lake County, 768 F.2d 303, 307 (10th Cir. 1985). “Deliberate indifference” is defined as knowing and disregarding an excessive risk to an inmate’s health or safety. Farmer v. Brennan, 511 U.S. 825, 827, 114 S.Ct. 1970 (1994). In Wilson v. Seiter, 501 U.S. 294, 111 S.Ct. 2321 (1991), the Supreme Court clarified that the deliberate indifference standard under Estelle has two components: (1) an objective requirement that the pain or deprivation be sufficiently serious; and (2) a subjective requirement that

the offending officials act with a sufficiently culpable state of mind. Id. At 298-99. Negligence does not state a claim under § 1983 for deliberate indifference to medical needs. Hicks v. Frey, 992 F.2d 1450, 1455 (6th Cir. 1993). In addition differences in judgment between an inmate and prison medical personnel regarding appropriate medical diagnosis or treatment are not enough to state a deliberate indifference claim. Westlake v. Lucas, 537 F.2d 857, 860 n.5 (6th Cir. 1976).

The administering of an appropriate diet to a prisoner with diabetes is a matter of medical judgment. Plaintiff's claim that his prison diet is inadequate indicates a mere difference in judgment, which as noted above, does not support a claim of deliberate indifference. Here, where the record provided by Plaintiff, and discussed below, indicates he has been treated for diabetes but he disagrees with the efficacy of the treatment, he has, at best, alleged a claim for medical negligence. See Estelle, 429 U.S. at 107.

Furthermore, after liberally construing the amended complaint filed in this case, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court finds that Plaintiff's allegations of inadequate medical treatment are conclusory. Plaintiff does not provide any detail for the alleged denial of special diabetic diet. For instance, he alleges the medical staff has refused to provide an "ADA caloric diabetic diet" as reflected in his grievance submitted 1/4/98. However, the response to the grievance, signed by an RN, MAN#P7900 on 1/6/98,¹ indicates Plaintiff has been offered medical treatment but he has refused:

We are offering you medical treatment; records show that you refuse medical treatment prescribed by and offered by our medical staff. Regarding the special diet

¹Grievances, dated 1/4/98 and 1/13/98, are attached as exhibits to the original civil rights complaint (doc. #1). Plaintiff indicates in the amended civil rights complaint (doc. #4), "I did not received (sic) any of my original 1983 42 U.S.C. submitted & filed 2/9/98, thus I ask that the enclosed 'amended compliances to cure deficiencies' (sic) be incorporated into the original 42 U.S.C. 1983." Therefore, the Court allows reference to the original exhibits attached to the original civil rights complaint.

you request, you need to write a request to the sargent at your facility.

Plaintiff next states he notified the jail administration by grievance, dated 1/13/98, but the administration also refused to provide the diabetic foodtray. However, the officer's response, dated 1/21/98, indicates Plaintiff's medical concerns were conveyed by Lt. Turley on 1/21/98 to the medical staff. The response, signed by Troy DeSonis on 1/21/98, states, "Inmate is being treated for his diabetes." Neither of these incidents support Plaintiff's contention that he was denied medical treatment. In fact, to the contrary, these responses indicate that Plaintiff has received medical treatment.

In addition, Plaintiff does not identify the physical injury, if any, he suffered while at Tulsa County Jail. He does not provide dates or describe specific incidents in support of his allegations, nor does he indicate who may have denied him "crucial diabetic diet." Even with amendment, Plaintiff's complaint fails to put Defendant on notice of the claims against him and, therefore, should be dismissed for failure to state a claim.

Moreover, Plaintiff requests damages (\$100,000) for mental anguish. The Prison Litigation Reform Act imposes the following limitation on recovery in prisoner civil actions:

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

42 U.S.C. § 1997e. As stated above, Plaintiff has not specifically identified a physical injury. Even with amendment, Plaintiff has failed to overcome this defect in his claim for damages due to mental anguish, and therefore, it should be dismissed.

Even assuming arguendo that Plaintiff could somehow overcome these deficiencies in his diabetic diet claim, the Court finds that Plaintiff has failed to state a claim against the only named

defendant in this case, Stanley Glanz, Sheriff of Tulsa County, in either his individual or his official capacity. This failure applies not only to Plaintiff's diabetic diet claim but also to his claim that jail official "tampered" with his legal communication with the court. It is well established that for a supervisor to be liable in a civil rights suit for the actions of others there must be an affirmative link between the supervisor and the constitutional deprivation. Meade v. Grubbs, 841 F.2d 1512, 1527. That link can take the form of personal participation, an exercise of control or discretion, or a failure to supervise. Id. Plaintiff must show that the defendant expressly or otherwise authorized, supervised, or participated in the conduct which caused the deprivation. Snell v. Tunnell, 920 F.2d 673, 700 (10th Cir. 1990), cert. denied, 499 U.S. 976 (1991). Absent such a link, a supervisor is not liable for the actions of his employees. Id. As to any claim against Sheriff Glanz in his individual capacity, Plaintiff has failed to allege an affirmative link sufficient to establish liability as to Sheriff Glanz.

Plaintiff has also failed to state a claim against Sheriff Glanz in his official capacity as Sheriff of Tulsa County. In order to state a claim against a municipality under section 1983, a plaintiff must show that the municipality itself, through custom or policy, caused the alleged constitutional violation. Monell v. Dept. of Social Servs., 436 U.S. 658 (1978). There are two requirements for liability based on custom: (1) the custom must be attributable to the county through actual or constructive knowledge on the part of the policy-making officials; and (2) the custom must have been the cause of and the moving force behind the constitutional deprivation. *Respondeat superior* does not give rise to a section 1983 claim. Monell, 436 U.S. at 692-94; see also Jenkins v. Wood, 81 F.3d 988, 993-94 (10th Cir. 1996) (citing City of Canton v. Harris, 489 U.S. 378, 385 (1989)). Plaintiff's claims fail to establish either of these elements.

CONCLUSION

The Court concludes that Plaintiff has failed to state a claim upon which relief can be granted and that this action must be dismissed pursuant to 28 U.S.C. § 1915A.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's amended 42 U.S.C. § 1983 complaint is **dismissed with prejudice**, pursuant to 28 U.S.C. § 1915A, for failure to state a claim upon which relief can be granted.
2. The Clerk is directed to **flag** this as a dismissal pursuant to 28 U.S.C. § 1915A for failure to state a claim upon which relief can be granted. As a result, this dismissal counts as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).

SO ORDERED THIS 17th day of July, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BARBARA A. CLARK,
SSN: 444-40-4290,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security,

Defendant.

Case No. 96-CV-0665-EA

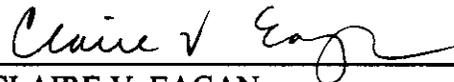
ENTERED ON DOCKET

DATE 7-16-98

JUDGMENT

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

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



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

FILED

JUL 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TRENTON L. HAWKINS,)
)
Petitioner,)
)
vs.)
)
STEVE HARGETT, et al.,)
)
Respondents.)

Case No. 95-C-413-BU (J)

ENTERED ON DOCKET
DATE JUL 16 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 15th day of July, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TRENTON L. HAWKINS,)
)
Petitioner,)
)
vs.)
)
STEVE HARGETT, et al.,)
)
Respondents.)

Case No. 95-C-413-BU (J)

ENTERED ON DOCKET

DATE JUL 16 1998

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #68) entered on June 5, 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 July 6, 1998, after receiving an extension of time, Petitioner filed his timely objection to the Report (#72).

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 Report should be adopted and affirmed.

BACKGROUND

In his Report, the Magistrate Judge summarized the facts underlying Petitioner's criminal convictions and Petitioner states he has no objection to the Magistrate's Findings of Fact. In brief, the evidence demonstrated that during the early morning hours of August 11, 1983, Petitioner, then thirteen years old, gained access to a neighbor's house by cutting a screen and climbing through a

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— window. With his face covered with blemish creme and armed with a kitchen butcher knife, Petitioner blindfolded and bound the woman who lived in the house, repeatedly raped her, twice forced her to orally sodomize him, and sodomized her with ice cubes. Petitioner also repeatedly threatened to kill the victim and her children. After the repeated sexual assaults, Petitioner rummaged through the victim's belongings attempting to find money. He found seven dollars in the victim's purse and, without the victim's permission, took the money.

On April 19, 1985, after Petitioner was certified to stand trial as an adult,¹ 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 for rape (the maximum). 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).

The only issue considered by the Magistrate Judge and presently before the Court is whether Petitioner's sentences constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. In the Report, the Magistrate Judge carefully reviewed the proportionality of Petitioner's sentences and, after considering the law and facts of this case, concluded that the sentences imposed on Petitioner were not violative of the United States

¹The certification hearing was held August 30 and September 2, 19, 20, 21, and 22, 1983. Based on the evidence presented at the hearing, the Referee concluded that Petitioner should be certified to stand trial as an adult. The decision of the Referee was upheld on appeal by the Tulsa County District Court and the Oklahoma Court of Criminal Appeals.

Constitution. The Magistrate Judge recommended that the petition for writ of habeas corpus be denied. Petitioner objects to the Magistrate Judge's conclusions that Petitioner's sentences were not disproportionate to (1) the gravity of the crimes committed, (2) other sentences imposed in Oklahoma, and (3) the sentences imposed in other jurisdictions. Petitioner also objects to the recommendation that the petition for writ of habeas corpus be denied.

DISCUSSION

The Eighth Amendment requires that a sentence not be disproportionate to the severity of the crime or involve unnecessary infliction of pain. Solem v. Helm, 463 U.S. 277 (1983). As stated by former United States Supreme Court Justice Frank Murphy,

[m]ore than any other provision in the Constitution the prohibition of cruel and unusual punishment depends largely, if not entirely, upon the humanitarian instincts of the judiciary. We have nothing to guide us in defining what is cruel and unusual apart from our consciences. A punishment which is considered fair today may be considered cruel tomorrow. And so we are not dealing here with a set of absolutes. Our decision must necessarily spring from the mosaic of our beliefs, our backgrounds and the degree of our faith in the dignity of the human personality.

Naovarath v. State, 779 P.2d 944, 947 (Nev. 1989) (citation omitted). "What constitutes cruel and unusual punishment for a child presents an especially difficult question." Id. The instant case is no exception.

The determination of proper penalties for crimes is a matter for the legislature and courts must resist subjective involvement and grant substantial deference to the legislature's broad authority to determine the types and limits of punishment. See Harmelin v. Michigan, 501 U.S. 957 (1991) (discussing Solem v. Helm, 463 U.S. 277 (1983)); United States v. Gourley, 835 F.2d 249 (10th Cir. 1987); United States v. Youngpeter, 986 F.2d 349, 355-56 (10th Cir. 1993) (when sentence falls

within statutory limits, the appellate court “generally will not regard it as cruel and unusual”). In Solem, the Supreme Court identified three objective factors to guide courts when conducting a proportionality review. First, as a threshold inquiry, a court must “look to the gravity of the offense and the harshness of the penalty.” Solem, 463 U.S. at 290-91. Then, if there is a lack of proportion between gravity and harshness, the court may find it “helpful” or “useful” to compare the sentence to those imposed on other criminals in the same or other jurisdictions. Id. at 291-92; see also Harmelin, 501 U.S. at 1004-05 (Kennedy, J., concurring) (courts should engage in Solem comparative analysis only when court does not find the sentence proportionate under the threshold inquiry). In his Report, the Magistrate Judge discussed the confusion resulting from the Supreme Court’s fractured Harmelin opinion and its effect on the proportionality review advocated by Solem. Because the Tenth Circuit Court of Appeals has expressly declined to decide whether Harmelin overruled Solem, the Magistrate Judge concluded that the factors outlined by the Court in Solem should be applied initially to analyze Petitioner’s sentence. The more stringent proportionality test of Harmelin would then be applied only if Petitioner’s sentence were found to be disproportionate under Solem.

Although Petitioner did not object to the Magistrate’s decision to apply the Solem factors, he does object to the conclusions resulting from the Magistrate Judge’s analysis. Therefore, the Court reviews de novo the application of the Solem factors to determine the proportionality of Petitioner’s sentences.

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

The Magistrate Judge concluded that Petitioner's sentences were not disproportionately excessive in light of the seriousness of the offenses committed. Petitioner objects to that conclusion, arguing that the Magistrate Judge failed to consider Petitioner's age as a mitigating factor.

In its decisions analyzing the proportionality of sentences, the Supreme Court considers the seriousness of the crime committed and the circumstances surrounding the crime. See Solem, 463 U.S. 277 (1983); Enmund v. Florida, 458 U.S. 782 (1982); Coker v. Georgia, 433 U.S. 584 (1977); Robinson v. California, 370 U.S. 660 (1962); Weems v. United States, 217 U.S. 349 (1910). Also, a comparison between the harm caused or threatened to the victim or to society, and the culpability of the offender can assist the court with a proportionality analysis. Solem, 463 U.S. at 292-93.

In the instant case, Petitioner was convicted of harsh, violent crimes against the person. His crimes were not petty offenses. Compare Harmelin, 501 U.S. 957 (finding constitutional a sentence of life in prison without possibility of parole for the crime of possession of more than 650 grams of cocaine) with Solem, 463 U.S. at 296-97 (finding a sentence of life imprisonment without possibility of parole disproportionate to crime of uttering a "no account" check even though the petitioner was a recidivist). Evidence presented at Petitioner's trial demonstrated that his acts were intentional, malicious and that he had no remorse for the pain and trauma inflicted on the victim.

As to a comparison between the harm caused or threatened and Petitioner's culpability, the Court finds that the harm caused or threatened outweighs the factors tending to mitigate culpability in this case, including Petitioner's chronological age at the time he committed the offenses,² his

²At the time he committed the offenses, Petitioner's chronological age was 13 years, 11 months.

developmental or emotional age,³ and his lack of an arrest record.⁴ Although the Supreme Court has stated that “. . . less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult,” Thompson v. Oklahoma 487 U.S. 815, 835 (1988) (holding that to impose the death penalty on a sixteen-year-old convicted of first degree murder violated the Eighth Amendment), other facts concerning Petitioner’s culpability support the conclusion that his sentences are not disproportionate to the harshness of the crimes committed. Petitioner’s efforts to disguise himself with blemish creme prior to the assault and to lay in wait for the victim, indicate some degree of planning and premeditation by Petitioner. Furthermore, during approximately 2 ½ hours of trauma imposed on the victim, Petitioner repeatedly threatened to kill her and her children. At one point during the assault, Petitioner applied pressure with the butcher knife to the victim’s vagina and again threatened to kill her and her children if she told anyone or if she called the police. When apprehended by the police, Petitioner gave a false name and voluntarily told the police that the next time he was arrested, they would have to kill him because he would have killed somebody. These circumstances surrounding the commission of the crimes combined with the violent nature of the crimes weigh more heavily against Petitioner than the factors tending to mitigate his culpability. As a result, the Court concludes that the sentences imposed were not grossly disproportionate to the gravity of the offenses committed.

Having made the threshold determination that Petitioner’s sentences are not disproportionate, the Court need not proceed further with the second and third parts of the Solem test. Harmelin, 501

³Various mental health experts testified that Petitioner’s developmental age ranged from 4 years to 14 years depending on the specific characteristic tested.

⁴Although Petitioner had no arrest record prior to these offenses, he did have a history of fighting and truancy at school.

U.S. at 1004-05. However, because the Magistrate Judge included an intra- and inter-jurisdictional comparative analysis in his Report to which Petitioner objected, the Court will review de novo the comparative analyses.

B. Solem Factor Two: Sentences Imposed in the State of Oklahoma

The Magistrate Judge concluded that the sentences imposed on Petitioner were not disproportionate when compared to other sentences imposed for similar crimes committed in Oklahoma. The Magistrate Judge noted that although Petitioner provided some sentencing statistics from the Oklahoma Department of Corrections for the Court's review, he provided no information concerning the ages of the individuals sentenced as reported in the statistics. In his objection, Petitioner now complains that the statistics he provided "were faulty in that they attempted to compare a thirteen-year old's sentence with those of adult offenders." Petitioner went on to request additional time to "investigate, gather, and present additional evidence on this factor."

After reviewing the available statistics and the arguments of the parties, the Court agrees with the Magistrate Judge's conclusion that Petitioner's sentences were not disproportionate to other sentences imposed in Oklahoma. Furthermore, because a comparative analysis is not essential to this proportionality review, the Court is not inclined to allow Petitioner additional time⁵ to "investigate, gather and present additional evidence on this factor."

⁵The Court notes that more twenty-one (21) months passed between the August 19, 1996 evidentiary hearing conducted by the Magistrate Judge and the June 3, 1998 issuance of the Report and Recommendation. Thus, Petitioner's counsel had more than ample time to compile the relevant statistics.

C. Solem Factor Three: Sentences Imposed in Other Jurisdictions

The Magistrate Judge concluded that the sentences imposed on Petitioner were not disproportionate to sentences imposed in other jurisdictions. Petitioner objects to that conclusion, arguing that the Magistrate Judge failed to compare Petitioner's sentence for robbery in the first degree to the sentence he would have received under the United States Sentencing Guidelines or the proposed Oklahoma Truth in Sentencing Act. According to Petitioner, under the proposed Oklahoma Act, Petitioner's sentence for robbery in the first degree would have been between 12 and 60 months. Under the federal sentencing guidelines, his sentence for the same offense would have been 46 to 57 months. Petitioner maintains his 45-years sentence is "obviously disproportionate" to the sentences available under those sentencing schemes. However, the comparisons urged by Petitioner, are based on the erroneous assumption that sentences under the U.S. Sentencing Guidelines and the proposed Truth in Sentencing Act are at all comparable to the form of sentence received by Petitioner. Significantly, the Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) abolished parole, and substantially reduced and restructured good behavior adjustments. Similarly, should the State of Oklahoma enact the Truth in Sentencing Act, it is anticipated that eligibility for parole consideration and application of earned credits will be limited and/or modified and that certain inmates will not be reconsidered for parole within a certain time, with certain exceptions. Furthermore, as of this date, the future of the Truth in Sentencing Act remains uncertain as it has not been signed into law by the Governor and remains stalled in the Oklahoma Legislature. In Petitioner's case, the possibility of parole as understood at the time of sentencing was undoubtedly a significant factor affecting the sentences imposed. As a result, any comparison between Petitioner's sentences and the Sentencing Guidelines or the Truth

in Sentencing Act is misleading and, as to the Truth in Sentencing Act, speculative. In contrast, the Court finds that the comparative analysis conducted by the Magistrate Judge relied on valid comparisons from comparable cases decided in other jurisdictions. The Court therefore agrees with the conclusion that Petitioner's sentences are not disproportionate to those entered in other jurisdictions.

CONCLUSION

The Court has reviewed de novo those portions 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 (#68) is **adopted and affirmed.**
2. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **denied.**

SO ORDERED THIS 15th day of July, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TIMOTHY D. ATKINS,)
Plaintiff,)
vs.)
BEN LORING, JUDGE LITTLEFIELD,)
Defendants.)

No. 97-CV-1088 B (E)

ENTERED ON DOCKET

DATE JUL 16 1998

ORDER

On December 9, 1997, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983. By order entered January 14, 1998, the Court informed Plaintiff of deficiencies in his papers. Specifically, Plaintiff was advised that this action could not proceed unless he paid the \$150.00 filing fee or submitted a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. §1915(a). Plaintiff was also ordered to submit sufficient copies of the complaint for service upon the named Defendants. In addition, the Clerk of Court was directed to mail Plaintiff the forms and information necessary for preparing the documents ordered by the Court. Plaintiff was advised that these deficiencies were to be cured by February 13, 1998, and "failure to comply . . . will result in dismissal without prejudice of Plaintiff's *Complaint*."

On February 9, 1998, and on March 19, 1998, Plaintiff provided a copy of this trust fund accounting and requested additional time to secure the money. The Court granted an additional thirty days, or until May 26, 1998, to submit the filing fee or a properly completed motion for leave to proceed in forma pauperis. To date, Plaintiff has not submitted the required documents or payment, nor has any correspondence to Plaintiff been returned to the Court.

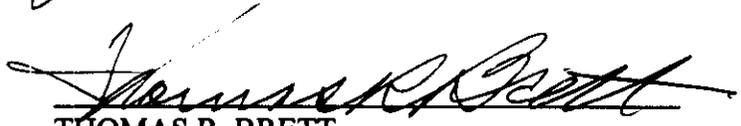
(6)

Because Plaintiff has failed to comply with the Court's Order of April 22, 1998, and has failed to pay the filing fee or file a properly supported motion for leave to proceed in forma pauperis, the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's civil rights *Complaint* is **dismissed without prejudice** for lack of prosecution.

IT IS SO ORDERED.

This 15 day of July, 1998.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TIM D. ATKINS,)
Plaintiff,)
vs.)
TYRELL CROSSION,)
Defendant.)

No. 97-CV-1089 BU (M)

ENTERED ON DOCKET
DATE JUL 16 1998

ORDER

On December 9, 1997, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983. By order entered January 6, 1998, the Court informed Plaintiff of deficiencies in his papers. Specifically, Plaintiff was advised that this action could not proceed unless he paid the \$150.00 filing fee or submitted a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. §1915(a). Plaintiff was also ordered to submit a copy of the complaint for service upon the named Defendant. In addition, the Clerk of Court was directed to mail Plaintiff the forms and information necessary for preparing the documents ordered by the Court. Plaintiff was advised that these deficiencies were to be cured by February 6, 1998, and "failure to comply . . . will result in dismissal without prejudice of Plaintiff's *Complaint*."

On February 9, 1998, and on March 19, 1998, Plaintiff provided a copy of this trust fund accounting and requested additional time to secure the money. The Court granted an additional thirty days, or until May 22, 1998, to submit the filing fee or a properly completed motion for leave to proceed in forma pauperis. To date, Plaintiff has not submitted the required documents, nor has any correspondence to Plaintiff been returned to the Court.

(6)

Because Plaintiff has failed to comply with the Court's Order of April 23, 1998, and has failed to pay the filing fee or file a properly supported motion for leave to proceed in forma pauperis, the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's civil rights *Complaint* is **dismissed without prejudice** for lack of prosecution.

IT IS SO ORDERED.

This 15th day of JULY, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

DAVID WAYNE CRAWFORD,)

Defendant.)

No. 93-CR-153-E
(97-CV-302-E)

ENTERED ON DOCKET

DATE JUL 16 1998

JUDGMENT

This matter came before the Court upon Defendant's motion to vacate set aside or correct sentence pursuant to 28 U.S.C. § 2255. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 15TH day of July, 1998.

James O. Ellison
JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

F I L E D

JUL 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
DAVID WAYNE CRAWFORD,)
)
Defendant.)

No. 93-CR-153-E
(97-CV-302-E)

ENTERED ON DOCKET
DATE JUL 16 1998

ORDER

Before the Court is the Defendant David Wayne Crawford's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Docket #41). The Plaintiff United States of America has filed its response brief (#42) to which Defendant has filed his reply (#44). After reviewing the entire record in this case, the Court has determined that an evidentiary hearing is not necessary and that the motion lacks merit and should be denied.

Defendant also has filed a "motion to strike government's response or, in the alternative, to enlarge time for movant's answer" (#43). Defendant alleges that, although the government filed its response to his § 2255 motion on July 3, 1997, it did not mail a copy of the response to him until July 31, 1997, contrary to the July 3, 1997 mailing date provided on the incomplete certificate of service appended to the government's response. However, even assuming that these assertions are true, Defendant does not allege that he was prejudiced by the government's delay, and he has since filed his reply brief. Accordingly, the Court concludes that Defendant's motion should be denied insofar as it seeks to strike the government's response and should be denied as moot as to Defendant's request for additional time to file his answer.

BACKGROUND

Defendant was convicted of possessing firearms after previously being convicted of a felony, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). The government sought imposition of the enhanced penalty provisions of § 924(e)(1), which mandates a minimum sentence of 15 years for persons with at least three prior convictions for violent felony or serious drug offenses. One of the convictions relied upon for enhancement was a May 3, 1974 juvenile conviction for armed robbery in New Mexico. The Probation Officer stated in the Presentence Report (“PSR”) that most of the records relating to this offense had been destroyed but that Defendant had admitted to the offense in a pretrial services interview. At the sentencing hearing, the Court held that under the enhancement statute it could take into consideration the juvenile conviction that had been expunged pursuant to New Mexico statute. The Court overruled Defendant’s other objections to the PSR and denied the government’s motion for an upward departure from the Sentencing Guidelines. The Court found that an enhanced penalty under § 924(e)(1) should apply and sentenced Defendant to 270 months imprisonment, to be followed by five years of supervised release, and a \$5,000 fine.

Defendant appealed, raising three issues:

1. The court was without subject matter jurisdiction because his acts did not involve interstate commerce as required by § 922(g);
2. The government abused the district court’s subpoena power; and
3. The sentence was improper.

The Court of Appeals for the Tenth Circuit affirmed Defendant’s conviction and sentence. United States v. Crawford, 1995 WL 238324, No. 94-5077 (10th Cir. Apr. 21, 1995).

On April 2, 1997, Defendant filed the instant motion pursuant to § 2255 raising as the sole issue the propriety of using the New Mexico juvenile conviction as one of the three offenses upon which his enhanced sentence was based. Defendant breaks his argument into two parts:

- A. The district and appellate courts breached their judicial discretion and denied Crawford due process of law by improperly relying on information that lacked sufficient indicia or [sic] reliability. (#41 at 4) [and]
- B. Crawford was improperly sentenced due to consideration of a prior proceeding which was expunged (#41 at 6).

Defendant alleges that he recently obtained copies of the court records relating to this juvenile offense, which had been sealed. This “newly discovered evidence,” which Defendant attaches to his motion, shows that the matter was dismissed after Defendant’s eighteenth birthday pursuant to § 32-1-38, N.M.S.A. Thus, Defendant contends, because this evidence conflicts with the PSR’s statement that the records were destroyed, his sentence was based on unreliable information. Further, Defendant again asserts that this offense, having been dismissed, cannot be used as a prior conviction for enhancement purposes.

The government responds that because Defendant raised this claim relating to the use of the New Mexico juvenile proceedings on direct appeal, he is barred from presenting it now. Moreover, the government argues that § 924(e)(2) defines “conviction” as including a finding that a person has committed an act of juvenile delinquency involving a violent felony. Further, the government continues, Defendant’s additional documentation shows only that the case was dismissed by operation of statutory authority dealing with juvenile convictions and does not demonstrate that it cannot be used for enhancement.

ANALYSIS

Section 924(e)(1), known as the Armed Career Criminal Act, provides for a mandatory fifteen year (180 month) sentence for persons who violate 18 U.S.C. § 922(g) and who have "three previous convictions ... for a violent felony ... committed on occasions different from one another." Defendant claims that the Court improperly used a juvenile offense as one of the "three previous convictions" supporting the enhancement of his sentence. As such, his motion turns on the interpretation of the enhancement statute's definitions, which provide:

- (2) As used in this subsection—
 - (A) ...
 - (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
 - (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
 - (ii) is burglary, arson, or extortion ...; and
 - (C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

18 U.S.C. § 924(e)(2) (1994). By its plain wording, the statute makes it clear that enhancement may be based upon certain "acts of juvenile delinquency" even if they do not result in traditional "convictions" under the applicable juvenile procedure.

On direct appeal, Defendant challenged his enhanced sentence on several grounds, including his claim that "New Mexico law provides a juvenile conviction is expunged after the offender reaches majority and, therefore, that conviction cannot be used for enhancement purposes." Crawford, 1995

WL 238324, at *2. The Tenth Circuit rejected this challenge, holding that “[s]imply put, the federal statute merely permits a sentencing federal court to take the fact of juvenile criminal conduct into consideration, if it meets certain criteria, when sentencing for a federal offense. In substance, the sentencing court is permitted to consider conduct never recognized as criminal by the state.” *Id.* at *3.

Absent an intervening change in law, a defendant may not raise in a § 2255 motion issues that have already been adjudicated on direct appeal. *United States v. Cox*, 83 F.3d 336, 342 (10th Cir. 1996); *United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994). Accordingly, Defendant is barred from now relitigating this issue.

Defendant attempts to skirt this result by pointing out that the record of his juvenile proceeding was sealed, rather than destroyed as assumed by this Court and the Tenth Circuit. The documents provided by Defendant include a copy of the judgment entered May 9, 1974, in the Children’s Court of the Second Judicial District of New Mexico. There, the judge found after an evidentiary hearing that Defendant had unlawfully entered a residence and robbed the occupants at gunpoint, and that such actions constituted aggravated burglary and armed robbery. (#41, Ex. A). Defendant was committed to reform school, and, after Defendant’s eighteenth birthday, the matter was dismissed. (#41, Ex. B).

These documents only bolster the determination of this Court and the Tenth Circuit that Defendant committed a violent crime as a juvenile justifying the sentence enhancement. Ironically, at trial and on appeal Defendant argued unsuccessfully that there was insufficient proof of the juvenile offense, because the records erroneously were presumed destroyed. That argument was rejected because of other reliable evidencing establishing the offense, including Defendant’s own testimony

during a pretrial interview. His inclusion of the sealed records with the instant § 2255 motion does not justify reopening this issue, which the Tenth Circuit previously determined to be without merit.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Docket #41) is **denied**. Defendant's motion to strike government's response or, in the alternative, to enlarge time for movant's answer (#43) is **denied**.

SO ORDERED THIS 15TH day of July, 1998.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

BRADLEY ALLEN ANDERSON,)

Defendant.)

No. 93-CR-84-E ✓
(97-CV-877-E)

F I L E D

JUL 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

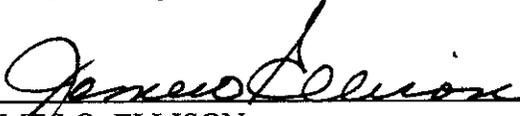
DATE JUL 16 1998

JUDGMENT

This matter came before the Court upon Defendant's motion to vacate set aside or correct sentence pursuant to 28 U.S.C. § 2255. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 15th day of July, 1998.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

F I L E D

JUL 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
BRADLEY ALLEN ANDERSON,)
)
Defendant.)

No. 93-CR-84-E ✓
(97-CV-877-E)

ENTERED ON DOCKET

DATE JUL 16 1998

ORDER

Before the Court is the *pro se* Defendant Bradley Allen Anderson's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Docket #9). The Plaintiff United States of America has filed its response (#10). As discussed below, events occurring after Defendant filed his motion have mooted his request for relief; thus, the Court concludes that an evidentiary hearing is not necessary in this case and that Defendant's motion pursuant to § 2255 should be denied as moot.

This case has an uncomplicated history. Defendant pled guilty to a charge of attempted bank extortion and was sentenced on July 12, 1993 to four years of probation and a \$1,000 fine. Defendant did not appeal. On May 25, 1995, the U.S. Probation Officer filed a Petition on Probation and Supervised Release (#8) alleging that Defendant had violated the conditions of probation by committing the crimes of Grand and Petit Larceny and Indecent Exposure, to which Defendant pled guilty and was sentenced to concurrent seven year terms in state court on February 10, 1995. A warrant for Defendant's arrest was issued in this Court on June 13, 1995.

Defendant filed this instant motion pursuant to § 2255 on September 25, 1997, alleging that he was denied a "fast and speedy trial" on the government's motion to revoke probation, in violation of Rule 32.1, Federal Rules of Criminal Procedure. Defendant stated that he expected to discharge his state sentences in December of 1997 and that he wanted to get his life settled instead of having the detainer against him remain "in limbo."

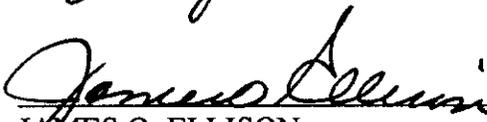
In its response, the government requested that the § 2255 motion be dismissed for lack of subject matter jurisdiction on the ground that Defendant was not currently in federal custody.

On January 13, 1998, subsequent to the government's response to the § 2255 motion, a Revocation Hearing was held on the allegations contained in the Petition on Probation. Defendant, represented by counsel, stipulated to the state criminal violations. The Court accordingly revoked probation and sentenced Defendant to a term of twelve months and one day, to be followed by three years of supervised release. (#16). Defendant was directed to report to federal prison on March 13, 1998 to begin serving his sentence. (#17).

It is clear that Defendant has been afforded the relief sought in his motion, i.e., a hearing and disposition on the federal warrant and petition on probation. Therefore, Defendant's motion is now moot.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Docket #9) is **denied**.

SO ORDERED THIS 15th day of July, 1998.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HOUSING AUTHORITY OF THE)
CITY OF TULSA,)
)
Plaintiff,)
)
vs.)
)
SAMUEL J. WILDER,)
)
Defendant.)

Case No. 98-CV-409-BU

ENTERED ON DOCKET

DATE JUL 15 1998

ORDER

On June 9, 1998, Defendant, Samuel J. Wilder, removed the above-captioned matter to this Court from the District Court for Tulsa County, State of Oklahoma. In the Notice of Removal, Defendant asserted that this Court had original jurisdiction over this action pursuant to certain federal statutes.

This matter now comes before the Court upon the objection of Plaintiff, Housing Authority of the City of Tulsa, to the removal of this action. The Court construes the objection as a motion to remand pursuant to 28 U.S.C. § 1447(c). In the motion, Plaintiff contends that this action does not come within the parameters of the federal statutes. It contends that this action is a simple eviction proceeding that originated in the Small Claims Court for Tulsa County. Plaintiff contends that it seeks an eviction for unpaid rent in the amount of \$342.66. It asserts that Defendant's counterclaim does not raise a legitimate federal question that would place the matter within the parameters of the federal

statutes.

Defendant, in response, contends that this action is a civil action alleging violation of his constitutional right to due process of law and violation of his constitutional right to be secure in his person, house, papers and effects against unreasonable searches and seizures. Defendant also contends that the controversy of this action exceeds \$10,000.00 and therefore is within the Court's jurisdiction under 28 U.S.C. § 1332. Defendant additionally contends that the controversy involves quiet title to property over which this Court has jurisdiction. Further, Defendant asserts that his allegations against Plaintiff involve more than a simple eviction proceeding.

A defendant may remove an action to federal court only if the district court has "original jurisdiction" over the action. 28 U.S.C. § 1441(a). Original jurisdiction is generally set forth in 28 U.S.C. §§ 1331 and 1332. Under these statutes, original jurisdiction exists only when an action "arises under" the Constitution, laws, or treaties of the United States (28 U.S.C. § 1331) or when the plaintiff and defendant are of diverse citizenship and the amount in controversy exceeds the sum of \$75,000.00 (28 U.S.C. § 1332).

In deciding whether a suit arises under federal law, the court is guided by the "well-pleaded complaint" rule, under which a suit arises under federal law "only when the plaintiff's statement of

[its] own cause of action shows that it is based" on federal law. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908). The plaintiff's anticipation of a defense based on federal law is not enough to make the case "arise under" federal law. Id. Moreover, neither a defendant's assertion of a federal defense nor a defendant's assertion of a federal counterclaim is a proper basis for removal. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (federal defense); 14A Wright, Miller, & Cooper, Federal Practice and Procedure, § 3731 (2d ed. 1985); 16 Moore's Federal Practice, § 107.14(3)(a)(vi) (3d ed. 1998) (federal counterclaim). In other words, the plaintiff is master of the complaint and may avoid federal jurisdiction by relying exclusively on state law. Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987).

In the instant case, Plaintiff's petition, on its face, only alleges a state law claim. No claim arising under the Constitution, laws, or treaties of the United States is alleged in the petition. Based upon the face of Plaintiff's petition, the Court lacks original jurisdiction over this action under 28 U.S.C. § 1331.

In order for a court to have "original jurisdiction" under 28 U.S.C. § 1332, the citizenship of the parties must be diverse and the amount in controversy must exceed the sum of \$75,000.00. In the instant case, the citizenship of the parties is not diverse. Moreover, the amount in controversy as established by Plaintiff's

petition is not in excess of the sum of \$75,000.00. Therefore, the Court lacks original jurisdiction over this action under 28 U.S.C. § 1332.

As original jurisdiction does not exist under §§ 1331 and 1332, the Court finds that it lacks subject matter jurisdiction over this action. Consequently, the Court finds that remand of this action to the District Court of Tulsa County, State of Oklahoma, is required.

Accordingly, Plaintiff's Objection to Removal of State Civil Action to Federal Court which the Court construes as a Motion to Remand (Docket Entry #14) is GRANTED. The Clerk of the Court is DIRECTED to effect the remand of this action to the District Court for Tulsa County, State of Oklahoma.

Entered this 14th day of July, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

F I L E D

JUL 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KENNETH DEE SHANNON,)
)
 Plaintiff,)
)
 vs.)
)
 OKLAHOMA CITY COUNCIL, et al.,)
)
 Defendants.)

No. 98-CV-471 E (J)

ENTERED ON DOCKET
DATE JUL 15 1998

ORDER

Plaintiff, a state inmate appearing *pro se*, has filed in this Court a civil rights complaint pursuant to 42 U.S.C. § 1983 (Docket #1). In addition, Plaintiff has submitted a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 (#2), a “motion for the court’s order for replacement of funds” (#3), a “motion for hearing in section 1983 action” (#4), and a “motion for allowance of additional pages to pro se §1983 civil action application” (#5).

Upon review of the complaint and for the reasons set forth below, the Court finds that venue is not proper in this district and that the action should be transferred to the proper district.

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.

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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 bases his Complaint on allegations that Defendants held Plaintiff for over thirteen days on the authority of the Oklahoma City Police without “promptly charging him, arraigning him, or having a probable cause determination” in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. According to the Complaint, all Defendants are residents of Oklahoma City, Oklahoma and are employed in Oklahoma City. Furthermore, all of the events or omissions giving rise to the claims occurred in Oklahoma City. The Court takes judicial notice that Oklahoma City is not located within the Northern District of Oklahoma. 28 U.S.C. §116. Thus, it is clear that venue does not lie in this Court.

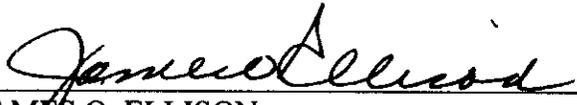
The Court may raise sua sponte the issue of venue in the setting of a section 1915 case. See Yellen v. Cooper, 828 F.2d 1471, 1474-76 (10th Cir. 1987) (allowing for dismissal, under 1915(d) on grounds that would be the basis of an affirmative defense); Kelly v. Martin, 78 F.3d 597, 1996 WL 88457, n. 2 (10th Cir. 1996) (unpublished opinion); see also Costlow v. Weeks, 790 F.2d 1486, 1487-88 (9th Cir. 1986) (allowing dismissal sua sponte for lack of venue before responsive pleading had been filed; issue had not been waived). When venue is not proper, the Court may either dismiss the action, or if it be in the interest of justice, transfer the case to the district in which it should have been brought. See 28 U.S.C. §1406(a). Because many of Plaintiff's documents are lengthy with numerous attachments and Plaintiff raises the issue of the statute of limitations, the undersigned finds that it would be in the best interest of justice and judicial efficiency to transfer the case to the proper district, the United States District Court for the Western District of Oklahoma, rather than

entering an order of dismissal for improper venue. In light of the decision to transfer this matter, the Court defers ruling on Plaintiff's motions for leave to proceed in forma pauperis (#2), for the Court's order for replacement of funds (#3), for hearing in section 1983 action (#4), and for allowance of additional pages to pro se §1983 civil action application (#5) to the United States District Court for the Western District of Oklahoma.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) This matter is **transferred** to the United States District Court for the Western District of Oklahoma.
- (2) Ruling on all other motions is deferred to the United States District Court for the Western District of Oklahoma.

SO ORDERED THIS 13th day of July, 1998.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

COUNCIL OAKS LEARNING CAMPUS,)
INC.)
Plaintiff,)
vs.)
AETNA CASUALTY & SURETY)
COMPANY OF AMERICA; THE)
STANDARD FIRE INSURANCE)
COMPANY; FEDERAL INSURANCE)
COMPANY; CAPITOL INDEMNITY)
CORPORATION)
Defendants.)
and)
FARMINGTON CASUALTY COMPANY)
Additional Defendant)

DATE JUL 15 1998

Case No. 98-CV-0003C (M)

FILED

JUL 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED, pursuant to FED.R.Civ.P.41(a)(1), by and between Aetna Casualty & Surety Company of America and Council Oaks Learning Campus, Inc., by and through their undersigned attorneys, that the above-styled action shall be dismissed with prejudice and on the merits as to Aetna Casualty & Surety Company of America, but without costs or attorney fees to either of the parties to this Dismissal, and that judgment of dismissal with prejudice and on the merits may be entered hereon without further notice.

Date: 7/13/98

MARC F. CONLEY, P.C.
By: Marc F. Conley
MARC F. CONLEY, OBA #1845
Attorney for Plaintiff

RICHARDS & ASSOCIATES
By: Phil Richards
PHIL RICHARDS, OBA #10457
Attorney for Aetna Casualty & Surety Company
of America

SO ORDERED, this 15th day of July, 1998.

H. Dale Cook
The Honorable H. Dale Cook

629



Phil Richards, Esq.

Richards & Associates

9 East 4th Street

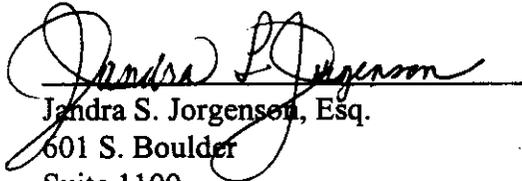
Suite 910

Tulsa, OK 74103

ATTORNEYS FOR DEFENDANTS

Aetna Casualty & Surety Company of America,

Standard Fire Insurance Company, and Farmington Casualty Company



Jandra S. Jorgensen, Esq.

601 S. Boulder

Suite 1100

Tulsa, OK 74119

ATTORNEY FOR DEFENDANT

Federal Insurance Company



Roger Butler, Jr., Esq.

7134 S. Yale

Suite 900

Tulsa, OK 74136

ATTORNEY FOR DEFENDANT

Capitol Indemnity Corporation

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

COUNCIL OAKS LEARNING CAMPUS,)
INC.)
Plaintiff,)
vs.)
AETNA CASUALTY & SURETY)
COMPANY OF AMERICA; THE)
STANDARD FIRE INSURANCE)
COMPANY; FEDERAL INSURANCE)
COMPANY; CAPITOL INDEMNITY)
CORPORATION)
Defendants.)
and)
FARMINGTON CASUALTY COMPANY)
Additional Defendant)

Case No. 98-CV-0003C (M)

FILED

JUL 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JUL 15 1998

ORDER

There comes on before the Court the Stipulation of Dismissal of Defendant, The Standard Fire and Insurance Company with prejudice, and the Court having considered the premises, agreement of counsel, and for good cause shown hereby orders that The Standard Fire Insurance Company is dismissed from this action with prejudice pursuant to the terms of the Stipulation of Dismissal.


The Honorable H. Dale Cook

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SA
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES D. PITTMAN,
Plaintiff,

vs.

CITY OF LANGLEY, OKLAHOMA,
and GARY HITCHCOCK,

Defendants.

Case No. 98-CV-0083-K(E)

ENTERED ON DOCKET

DATE JUL 15 1998

STIPULATION OF DISMISSAL WITH PREJUDICE

All the parties to this action hereby stipulate that any and all causes of action and claims against the Defendants, City of Langley and Gary Hitchcock, are hereby dismissed with prejudice.

James Pittman
JAMES D. PITTMAN, PLAINTIFF

NICKS, JOHNSON AND BATES

By: John B. Nicks

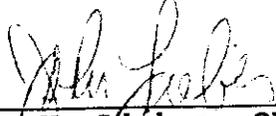
John B. Nicks, OBA #6678
1448 S. Carson
Tulsa, OK 74119

ATTORNEY FOR PLAINTIFF,
JAMES D. PITTMAN

6
C/J

**ELLER AND DETRICH
A Professional Corporation**

By: _____


John H. Lieber, OBA #5421
2727 East 21st Street
Suite 200, Midway Building
Tulsa, Oklahoma 74114
(918) 747-8900

**Attorney for Defendant,
City of Langley**

3.MAG\Pittman\Stipulat

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

FILED

JUL 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLOTTE CLARK,

PLAINTIFF,

VS.

LANCE NEWMAN AND ALLSTATE
INSURANCE COMPANY,

DEFENDANTS.

CASE NO. 98-CV-271-H(J)

ENTERED ON DOCKET

DATE JUL 15 1998

DISMISSAL WITH PREJUDICE

COMES NOW the Defendant, Allstate Insurance Company, and hereby dismisses the above-entitled cause with prejudice to their right of filing any further action against the Defendant, Lance Newman.

DATED this 13th day of July 1998.



A. Laurie Koller, OBA #16857
Attorney for Defendant,
Allstate Insurance Company

I hereby certify that a copy of the foregoing was sent postage prepaid, by U.S. Mail on this the 13th day of July, 1998, to:

Michael S. Loeffler
P. O. Box 567
Bristow, OK 74010
Attorney for Plaintiff

Tom Phillips
P.O. Box 228
Mt. Pleasant, TX 75456
For Defendant,
Lance Newman



ATTORNEY FOR DEFENDANT
Allstate Insurance Company

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

FILED

JUL 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STEPHANIE MARTIN, KENNETH
MARTIN, and KELLY MARTIN,
a minor,

Plaintiffs,

v.

JAY JACKSON, UNIVERSITY
CHEVROLET-GEO, INC., an
Oklahoma corporation, and
LUCKY MOTOR, INC., a
Texas corporation,

Defendants.

Case No. 97CV800 H (J)

ENTERED ON DOCKET

DATE JUL 15 1998

STIPULATION OF DISMISSAL

Plaintiffs, Stephanie Martin, Kenneth Martin, and Kelley Martin, and Defendant, University Chevrolet-Geo, Inc., through their respective attorneys, hereby stipulate to the dismissal with prejudice of this action against University Chevrolet-Geo, Inc.

DATED at Tulsa, Oklahoma, this 14th day of July, 1998.

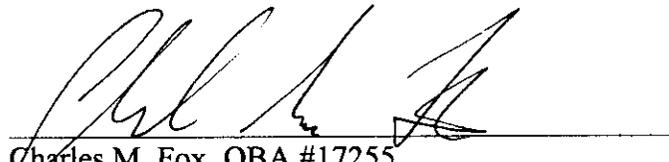


Sidney K. Swinson, OBA #8804
Gable & Gotwals
15 W. 6th St., Ste. 2000
Tulsa, OK 74119-5447
918-582-9201
918-586-8383 (fax)

Attorney for University Chevrolet-Geo, Inc.

13

clg



Charles M. Fox, OBA #17255
Martin & Associates, P.C.
403 S. Cheyenne Ave.
Tulsa, OK 74103-3807
918-587-9000
918-587-8711 (fax)

Attorney for Plaintiffs

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

F I L E D

JUL 13 1998

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

TRACY ALAN BAKER,)
a.k.a., "TRACY ALLEN BAKER,")
Defendant.)

No.96-CR-18-C

No.96-CR-154-C

Phil Lombardi, Clerk
U.S. DISTRICT COURT

) 98-C-443-C(ε)
) 98-C-445-C(ε)

ENTERED ON DOCKET
DATE JUL 15 1998

ORDER

Currently pending before the Court is defendant Tracy Alan Baker's motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255.

On May 2, 1995, Baker was named in a one-Count indictment, issued in the Northern District of Georgia, for possession of a firearm after former conviction of a felony, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e)(1). On February 8, 1996, a one-Count Indictment was issued in this District charging Baker with same (96-CR-18-C), which he pleaded guilty to on July 8, 1996. The Northern District of Georgia case (96-CR-154-C) was transferred to this Court on October 21, 1996, and Baker pleaded guilty to the one-Count on November 5, 1996. On January 7, 1997, Baker was sentenced to 180 months imprisonment, on each Count, to run concurrently, four years supervised release, \$2,000 fine, and ordered to pay two \$50 special assessments. Baker appealed to the Tenth Circuit, and this Court was affirmed in an unpublished opinion issued on January 28, 1998. U.S. v. Baker, 134 F.d 383 (10th Cir. 1998). On April 3, 1998, Baker filed his initial section 2255 motion which this Court subsequently denied on April 29, 1998, without prejudice on the ground that it was premature; a Petition for Writ of Certiorari was pending at the United States Supreme Court

Court which was denied on June 4, 1998. On June 15, 1998, this Court granted Baker leave to refile his section 2255 motion which was filed on June 24, 1998.¹

Baker seeks to have his sentence vacated, set aside, or corrected on the grounds that he received ineffective assistance of counsel in both his sentencing and appellate proceedings. At sentencing, the Court found that Baker had requisite state convictions for purposes of sentencing under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e),² and that Baker may have committed the indicted crimes in order to avoid a greater perceived threat; the Court thereby, departed downward, pursuant to U.S.S.G. § 5K2.11, to the 180 month minimum sentence statutorily mandated by section 924(e). Subsequently, on direct appeal, Baker challenged whether his predicate state conviction, for unlawful cultivation of marijuana, satisfied the requirements of section 924(e); to which, the Circuit answered in the affirmative. Baker, at *2. Baker now argues, in his section 2255 motion, that there is no factual basis to support said guilty pleas and that his counsel was

¹ The Court notes that section 2255, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, requires that a "second or successive motion . . . be certified as provided in section 2244 by a panel of the appropriate court of appeals . . ." However, the Court concluded, in granting Baker leave to refile this motion, that the "second or successive" requirements of section 2255 did not apply to Baker's initial section 2255 motion. Since Baker's initial section 2255 was dismissed without prejudice, this Court never considered it on the merits, and as such, the Court will treat baker's present motion as his first pursuant to section 2255. Esposito v. U.S., 135 F.3d 111, 113 (2nd Cir. 1997); U.S. v. Diaz, 1997 WL 180334, at *2 (E.D. Pa.1997)(because defendant's initial section 2255 motion was dismissed without prejudice, the court will treat defendant's present motion as his first pursuant to section 2255). See Farmer v. McDaniel, 98 F.3d 1548, 1558 (9th Cir.1996), cert. denied, 117 S.Ct. 1474 (1997); In re Turner, 101 F.3d 1323 (9th Cir.1997).

² The state convictions underlying Baker's ACCA sentence are as follows: Case No. CRF-80-4199, Burglary II; Case No. CRF-81-39, Shooting with Intent to Kill; and, Case No. CRF-81-81, Unlawful Cultivation of Marijuana. In all three cases, Baker pled guilty, was adjudicated guilty, and was sentenced to three years imprisonment.

remiss in that she should have inquired into and discovered this alleged factual inadequacy; and, argued accordingly at his sentencing and on direct appeal.

Typically, “§ 2255 is not available to test the legality of matters which should have been raised on appeal.” U.S. v. Walling, 982 F.2d 447, 448 (10th Cir. 1992). A failure to raise an issue on direct appeal acts as a bar to raising the issue in a § 2255 motion, unless Baker can show cause and actual prejudice, or can show that a fundamental miscarriage of justice will result if his claim is not addressed. U.S. v. Allen, 16 F.3d 377, 378 (10th Cir. 1994). This procedural bar applies to collateral attacks on a defendant’s sentence, as well as his conviction. Id.

However, “while ordinarily the procedural bar rule . . . applies to section 2255 proceedings . . . it does not apply to ineffective assistance of counsel claims.” U.S. v. Galloway, 56 F.3d 1239, 1241 (10th Cir. 1995)(citations omitted). Thus, in order to overcome the procedural bar, Baker relies upon the well-established exception, and now the universal claim, of ineffective assistance of counsel. A claim of ineffective assistance of counsel requires that Baker satisfy the rigid standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984). The Supreme Court in Strickland held that a claim of ineffective assistance of counsel has two components. First, Baker must show that his attorney “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed . . . by the Sixth Amendment.” Id. at 687. “The proper standard for attorney performance is that of reasonably effective assistance.” Id. Therefore, to succeed, Baker must show that his counsel’s performance fell below an objective standard of reasonableness. Furthermore, Baker must also show that “the deficient performance prejudiced the defense.” Id. However, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance . . .” Id. at 689.

As an initial matter, the Court notes that Rule 4(b) of the Rules Governing Section 2255 Proceedings provides that “[i]f it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified.” Id. In short, “[t]his rule empowers the court to dismiss meritless [section 2255] petitions on its own . . .” Hines v. U.S., 971 F.2d 506, 509 (10th Cir. 1992).

With that in mind and after engaging in a full review and consideration of Baker’s present motion, the Court finds it without merit, and as such, the Court summarily dismisses the instant motion. Baker asserts that two of his state convictions are unconstitutional as there was no factual basis for the guilty pleas: CRF-81-39, shooting with intent to kill; and, CRF-81-81, unlawful cultivation of marijuana. Baker maintains that he received deficient counsel in that his “attorney could have discovered these state court convictions were unconstitutional, but failed to. [That is,] Petitioner alleges that ineffective assistance of counsel was the reason for not raising these issues [at sentencing or] on appeal.” Be that as it may, Baker simply cannot articulate a colorable ineffective assistance of counsel claim.

As previously discussed, Baker must show that his attorney acted unreasonably and that because of this unreasonable conduct he was unfairly prejudiced. Strickland, at 687. Baker’s assertion that counsel was unreasonable in not discovering the alleged factual inadequacies underlying his state plea bargains, and subsequent adjudications of guilt, simply misses the point. The Supreme Court has expressly held that “§ 924(e) does not permit [a defendant] to use the federal sentencing forum to gain review of his state conviction[,]” save for exceptional circumstances where the defendant was completely denied representation in the state

proceedings. Custis v. U.S., 511 U.S. 485, 495-97 (1994); U.S. v. Garcia, 42 F.3d 573, 581 (10th Cir. 1994). Instead, the Court must evaluate whether the relevant criminal statutes meet the requirements of section 924(e) which focuses on the type of crime committed and the penalty imposed. U.S. v. McMahon, 91 F.3d 1394, 1398 (10th Cir. 1996), cert. denied, 117 S.Ct. 533 (1996). Indeed, section 924(e) prescribes a penalty of “not less than 15 years” imprisonment for anyone “who violated section 922(g) of [Title 18] and has three previous convictions . . . for a violent felony or a serious drug offense, or both . . .”³ 18 U.S.C. § 924(e). That is, section 924(e) does not authorize the Court to inquire into the merits of a state conviction for sentencing purposes.

As such, Baker’s attorney could not have proceeded in an unreasonable manner by failing to investigate matters and raise arguments which would have no bearing on the proceedings. Simply put, had counsel discovered these alleged factual inadequacies, Baker’s sentencing would not have been the proper forum in which to address the issue. Rather, Baker must challenge his state convictions by petitioning the state through a Writ of Habeas Corpus. Garcia, at 581-82. And if he prevails, only then may he attack his federal sentence which was enhanced as a result of his state convictions. Id.

³ As an ancillary matter, the Court notes that both the convictions challenged by Baker, unlawful cultivation of marijuana and shooting with intent to kill, satisfy the requirements of section 924(e). The Tenth Circuit has already held that Baker’s Oklahoma drug conviction satisfied the statutory definition of “a serious drug offense,” as set forth in § 924(e)(2)(A)(ii).” Baker, at *2. Further, shooting with intent to kill by its very definition is a crime of violence. Moreover, the statute states that a “violent felony” means any crime punishable by imprisonment for a term exceeding one year . . .” 18 U.S.C. § 924(e)(2)(B). And, the Judgement and Sentence entered by the Tulsa County District Court, in connection with Baker’s guilty plea for shooting with intent to kill, adjudicates him guilty of said charge and sentences him to three years imprisonment which clearly meets the statutory requirements.

In sum, Baker's claim of ineffective assistance of counsel must be summarily dismissed as there is no ground upon which he may prevail. Even taking all of Baker's allegations as true, section 924(e) simply does not allow the Court to inquire into the merits of his state convictions. Once it is determined that the predicate offenses satisfy the requirements of section 924(e), the Court's inquiry is complete. Hence, the Court finds Baker's section 2255 motion meritless and without substance.

Accordingly, Baker's motion seeking to set aside, or correct sentence, pursuant to 18 U.S.C. § 2255, is hereby DENIED.

IT IS SO ORDERED this 13th day of July, 1998.



H. DALE COOK
Senior United States District Judge

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

DEANGELO MARTIN,
Plaintiff,

vs.

LT. J. RODEN; JOE DOE #1;
JOHN DOE #2; and DICK CONNER
CORRECTIONAL CENTER,
Defendants.

ENTERED ON DOCKET
DATE JUL 15 1998

No. 98-CV-314E (M) ✓

F I L E D

JUL 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This civil rights action was transferred to this Court from the Western District of Oklahoma on April 24, 1998. Plaintiff DeAngelo Martin ("Martin"), a state inmate appearing pro se and in forma pauperis, has paid the initial partial filing fee as required by 28 U.S.C. § 1915(b). He alleges that his due process rights were violated in a prison disciplinary proceeding resulting in the loss of 365 earned credits, 30 days of disciplinary segregation, and a \$50 fine. Plaintiff complains the evidence relied upon by the disciplinary hearing officer was unreliable, unverified, and insufficient for "a finding of guilt." Plaintiff seeks a "declaratory judgment that my rights to procedural due process have been violated; compensatory damages in the amount of \$10,000.00; [and] punitive damages in the amount of \$10,000.00." Service of process upon defendants has not been issued.

For the reasons discussed below, the Court finds that this case should be dismissed without prejudice.

BACKGROUND

On July 20, 1997, at approximately 9:15 p.m., a misconduct report was filed, charging "that i/m D'Angelo Martin #190758 conspired with other I/ms to attack and harm other I/ms in retaliation for an earlier incident." (Misconduct/Offense Report, dated 8/6/97.) Martin contends he was not involved in the referenced "earlier incident" of July 19, 1997, but was merely following orders to clear the compound. Plaintiff relates that as he walked to his unit (A&C) at "approximately 10:13 a.m., he received a "direct order from Sgt. Robin Hansen," and "also Sgt. Robert Carter," to take I/m Howard #214625 to medical. He, along with "Batson #158163 and Smith #208646," picked up the inmate and took him to medical as instructed. Martin was escorted back to his unit (A&C), which had been placed on "lock down" status along with several other units. He remained in his locked cell until escorted to lunch around 2:40 p.m. and then returned to his locked cell. The same lock down procedures were followed on the next day, July 20. Around 8:50 p.m. on July 20, 1997, Martin and his "cellie," Smith #208646, were allowed to use the telephone to phone their girlfriends who happened to live at the same address. Martin says he stayed on the telephone with his girlfriend until Sgt. K. Baker called lock down around 9:11 p.m. At that point, Martin returned to his locked cell and remained there until breakfast the next morning. Following breakfast on July 21, 1997, Martin and his cellie Smith were allowed to make another telephone call to their girlfriends. During Martin's phone call to his girlfriend, "the officers came and arrested" him, charging him with conspiring with other inmates ("I'm assuming that I/ms Latrey Muse #200431, David Bloomer #193919, Batson #158163, Roydale Walker #162672, Elisha Smith 208646, and Dewayne Jackson are the I/ms I'm accused of conspiring w/to attack and harm other I/ms in retaliation for Howard getting stabbed because they all received a group disruption as well as I.") (See handwritten notes

attached to Offender's Misconduct Appeal Form, stamped "received Aug 29 1997 Administrative Review").

A disciplinary hearing was held on August 7, 1997, at which Plaintiff was found guilty of Group Disruption, Oklahoma Department of Corrections (ODOC) Violation Code 01-3, based upon confidential witness statements and the statement of reporting employee, Bill McKenzie, Special Investigator. Punishment of 30 days in segregation, loss of 365 days earned credits and a \$50.00 fine were imposed. Plaintiff exhausted his administrative remedies by appealing the disciplinary hearing decision to Warden Champion, who affirmed the findings on August 8, 1997. (See Offender's Misconduct Appeal Form, stamped received Aug. 29, 1997.)

Plaintiff initially filed this civil rights action on January 21, 1998, seeking a declaratory judgment that his due process rights were violated and requesting monetary damages.

ANALYSIS

"A state prisoner's claim for damages is not cognizable under § 1983 if a judgment in favor of the prisoner would necessarily imply the invalidity of his conviction or sentence, unless the prisoner can demonstrate that the conviction or sentence has previously been invalidated." Edwards v. Balisok, 520 U.S. 641, 117 S.Ct. 1584, 1588 (1997) (quoting Heck v. Humphrey, 512 U.S. 477, 486-489 (1994)); see also Sheldon v. Hundley, 83 F.3d 231, 233 (8th Cir. 1996) (inmate could not bring § 1983 action until he had disciplinary action invalidated).

Applying the Balisok standard to this case, in order for Plaintiff to bring his § 1983 claim, which would necessarily "imply the invalidity of the punishment imposed," Martin must first

demonstrate that the disciplinary hearing decision has previously been invalidated. Balisok, 117 S.Ct. at 1588. In other words, Martin "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." Id. Martin has presented no evidence of such a determination to this Court.

In a similar unpublished Tenth Circuit Court of Appeals case, Truitt v. Ramsey, 131 F.3d 152, 1997 WL 713256 (10th Cir. November 17, 1997), plaintiff Shelby Truitt, an Oklahoma state prisoner, filed a § 1983 civil rights action claiming Defendant Ramsey violated his constitutional rights by failing to "conduct at least a minimal investigation to determine whether there was any merit" to his allegations. He sought declaratory relief, expungement of the charge, and damages in the amount of \$30,000. The heart of the complaint was that "the procedures utilized during the disciplinary proceeding were improper." Id. The Tenth Circuit, in dismissing the appeal, emphasized that Truitt had no cognizable § 1983 claim against any member of the 1983 disciplinary committee (or anyone else personally involved in the 1983 disciplinary proceedings), and thus, could not simply refile the action against a different defendant. "The underlying basis for Truitt's claim is his assertion that the disciplinary committee failed to comply with disciplinary policy OP-060401, which required determination of the reliability of the confidential informant prior to consideration of his testimony. If established, the procedural defect alleged by Truitt would 'necessarily imply the invalidity of the deprivation of his [earned] credits.'" Id. at *2 (quoting Edwards v. Balisok, 117 S.Ct. 1584, 1588 (1997) (additional citations omitted)).

Conclusively, in situations such as the one presented by Plaintiff in this matter, the § 1983 complaint fails to state a cause of action because the § 1983 claim does not accrue until the plaintiff

has somehow invalidated the conviction of the misconduct. See Heck, 512 U.S. at 489-90. Plaintiff has not demonstrated that the punishment imposed has previously been invalidated through an appropriate *mandamus* or *habeas corpus* state action. Id.; Balisok, 117 S.Ct. 15 1587-88 (1997); see also Canady v. Reynolds, 880 P.2d 391, 397 (Okla. Crim. App. 1994) (holding that "an inmate has the writ of mandamus to force prison officials to insure due process within the Department of Corrections' disciplinary system and to force prison officials to provide for procedural due process . . . before revoking credits after they have been previously earned").

The Prison Litigation Reform Act of 1996 (the Act), Pub.L. No. 104-134, § 805, 110 Stat. 1321 (April 26, 1996) added a new section (codified at 28 U.S.C. § 1915A) to the in forma pauperis statute entitled "Screening." That section requires the Court to review a complaint brought by a prisoner seeking redress from a governmental entity or officer to determine if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted. In addition, the Act provides that a district court may dismiss an action filed in forma pauperis "at any time" if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. See 28 U.S.C. § 1915(e)(2)(B).

Even liberally construing the *Complaint* in this case, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991), the Court concludes Plaintiff's allegations fail to state a claim upon which relief can be granted and the complaint must be dismissed pursuant to 28 U.S.C. § 1915A.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's action filed under 42 U.S.C. § 1983 is **dismissed without prejudice** for failure to state a claim upon which relief may be granted. The Clerk is directed to **"flag"** this as a dismissal pursuant to 28 U.S.C. § 1915A to be counted as a "prior occasion" under 28 U.S.C. § 1915(g).

SO ORDERED THIS 13th day of July, 1998.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MDI ENTERTAINMENT, INC.,)
)
Plaintiff,)
)
v.)
)
INTERNATIONAL BUYING)
POWER CORP.,)
)
Defendant.)

Case No. 97-CV-996-H

ENTERED ON DOCKET

DATE JUL 14 1998

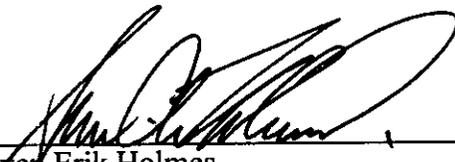
ADMINISTRATIVE CLOSING ORDER

The parties in this matter have been ordered to arbitration and further proceedings have been stayed. It is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

The parties are ordered to notify the Court within thirty days of a final adjudication of the arbitration proceedings as to whether this matter should be reopened or dismissed with prejudice. If the parties have not by appropriate motion reopened this matter at the conclusion of that thirty-day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 13TH day of July, 1998.



Sven Erik Holmes
United States District Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RAY A. LARGE,
SSN: 370-48-1239

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

ENTERED ON DOCKET
JUL 14 1998
DATE _____

No. 97-C-325-J ✓

FILED

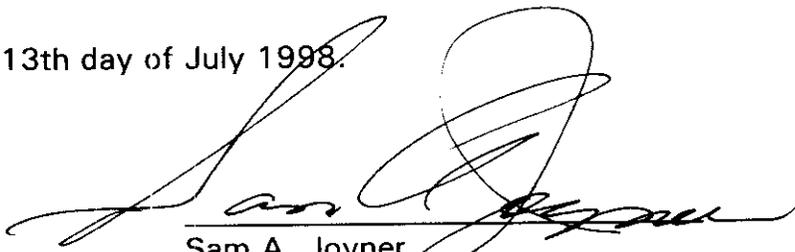
JUL 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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 13th day of July 1998.



Sam A. Joyner
United States Magistrate Judge

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

RAY A. LARGE,
SSN: 370-48-1239

Plaintiff,

v.

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

Defendant.

ENTERED ON DOCKET

DATE JUL 14 1998

No. 97-C-325-J ✓

FILED

JUL 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER^{2/}

Plaintiff, Ray A. Large, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{3/} Plaintiff asserts that the Commissioner erred because (1) the ALJ's determination that Plaintiff could perform light work is not supported by substantial evidence, (2) the ALJ did not obtain sufficient vocational expert testimony and the "absence of evidence is not evidence," and (3) the ALJ's findings regarding Plaintiff's credibility were not supported by

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

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

^{3/} Administrative Law Judge Larry C. Marcy (hereafter "ALJ") concluded that Plaintiff was not disabled on October 20, 1995. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review. [R. at 5].

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

I. PLAINTIFF'S BACKGROUND

Plaintiff was born June 11, 1948 and was 47 years old at the time of the hearing before the ALJ. [R. at 32]. Plaintiff completed the tenth grade but did not obtain his GED. [R. at 32]. Plaintiff's previous work experience includes work as a carpenter.

Plaintiff testified that he had surgery on his back in 1986 and was required to take eight to ten months off from work at that time. [R. at 34]. According to Plaintiff he could lift a 20 pound sack of potatoes but it would hurt. Plaintiff additionally testified that he could stand one to two hours and sit for three to four hours but that he would experience pain. [R. at 42]. Plaintiff testified that he has high blood pressure, dizzy spells, diabetes, severe headaches, and pain. [R. at 45-52, 62]. Plaintiff testified that he preferred not to drive due to his dizzy spells, and that he has difficulty sitting in a chair that does not have arm supports. [R. at 52-55].

An RFC completed by Paul Woodcock, M.D., on December 29, 1994 indicated that Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, and stand or walk six out of eight hours and sit six out of eight hours. [R. at 90].

Plaintiff noted, in a form that he completed for the Social Security Administration, that his back pain interfered with his ability to sleep, and that he was no longer able to have intercourse. [R. at 127]. According to Plaintiff he watched television approximately ten to twelve hours each day. [R. at 127].

Chest x-rays taken April 18, 1992 were normal. [R. at 141].

An examination by Beau Jennings, D.O. was conducted on September 6, 1994. The examiner noted that Plaintiff smoked three packages of cigarettes each day. He recorded Plaintiff's spine range-of-motion as normal and Plaintiff's upper extremities as having a full range-of-motion and grip strength. [R. at 146-148]. He concluded dyspnea^{4/} on exertion, undetermined etiology, chronic lumbar pain and chronic chest pain. [R. at 148].

Plaintiff was examined by Ronald Inbody, M.D., on September 15, 1994. He informed Dr. Inbody that he was able to ride his riding lawn mower, and that he could walk up to one-half of a mile. In addition, Plaintiff reported that he was able to drive but drove only short distances due to his pain. Dr. Inbody noted that Plaintiff reported taking Elavil to help his sleep, Advil, thyroid medication, gout medication, blood pressure medication, and Tagamet for his stomach. According to Plaintiff, his diabetes was controlled by his diet.

Plaintiff complained of chest pain on several occasions. [R. at 157-161, 173, 182]. X-rays taken of Plaintiff were interpreted as indicating no evidence of active cardiopulmonary disease. [R. at 162].

^{4/} Taber's Cyclopedic Medical Dictionary 593 (17th ed. 1993), defines dyspnea as "air hunger resulting in labored or difficult breathing, sometimes accompanied by pain. Normal when due to vigorous work or athletic activity."

Plaintiff has complained of breathing difficulties. Plaintiff had a Pulmonary^{5/} Function Report on June 26, 1994. [R. at 205, 342]. It was interpreted as being "within normal limits." [R. at 205, 342].

A December 20, 1994 letter by Benjamin G. Benner, M.D., indicated that an MRI scan showed a right central disk bulge but that the doctor did not feel that the bulge was the cause of Plaintiff's spinal stenosis. The doctor additionally noted that diffuse degenerative changes existed at 4-5 (sic), which were probably related to postoperative scarring. The doctor recommended an epidural steroid injection.

Plaintiff visited the doctor on February 23, 1995. The doctor noted that Plaintiff requested permission to smoke while at the doctor's office and that he encouraged Plaintiff to stop smoking. [R. at 330]. In April of 1995 Plaintiff saw a doctor with complaints of breathing problems. The doctor noted that he recommended an inhaler but that Plaintiff left without filling the prescription. [R. at 320]. The doctor additionally noted that he recommended psychiatric help but the patient refused.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

Disability under the Social Security Act is defined as the

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

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

^{5/} Taber's Cyclopedic Medical Dictionary 1635 (17th ed. 1993), defines pulmonary as "concerning or involving the lungs."

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

42 U.S.C. § 423(d)(2)(A). The Commissioner has established a five-step process for the evaluation of social security claims.^{6/} See 20 C.F.R. § 404.1520.

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

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the

^{6/} 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).

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^{7/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

III. THE ALJ'S DECISION

The ALJ initially noted that the record contained no objective evidence to support Plaintiff's complaints of numbness in his hands or shoulder problems and that Plaintiff has normal ranges of motions with respect to his back and legs. [R. at 21].

^{7/} 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."

The ALJ evaluated Plaintiff's credibility with regard to his complaints of pain. The ALJ noted that Plaintiff testified he could lift 15-25 pounds and could stand for a few hours. [R. at 21]. The ALJ additionally noted that Plaintiff's statements and the medical and documentary evidence indicated several discrepancies. The ALJ concluded that Plaintiff could perform light work. [R. at 46]. Based on the physical requirements of Plaintiff's past relevant work as a carpenter, the ALJ determined that Plaintiff could not return to that work. The ALJ relied on the testimony of a vocational expert and concluded that Plaintiff could perform other substantial gainful activity and therefore was not disabled.

IV. REVIEW

SUBSTANTIAL EVIDENCE: STEP FOUR

Plaintiff initially asserts that the record lacks substantial evidence to support the ALJ's findings that Plaintiff could perform light work. Plaintiff states that the ALJ is required to point to specific evidence to establish that Plaintiff can perform light work. Plaintiff refers to Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995).

In Kepler v. Chater, 68 F.3d 387, (10th Cir. 1995), the Tenth Circuit determined that an ALJ must discuss a Plaintiff's complaints of pain, in accordance with Luna, and provide the reasoning which supports the decision as opposed to mere conclusions. Id. at 390-91.

Though the ALJ listed some of these [Luna] factors, he did not explain why the specific evidence relevant to each factor led him to conclude claimant's subjective complaints were not credible.

Id. at 391. The Court specifically noted that the ALJ should consider such factors as:

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

Id. at 391. The Tenth Circuit remanded the case, requiring the Secretary to make "express findings in accordance with Luna, with reference to relevant evidence as appropriate, concerning claimant's claim of disabling pain." Id. at 10.

An ALJ's determination of credibility is given great deference by the reviewing court. See Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). On appeal, the court's role is to verify whether substantial evidence in the record supports the ALJ's decision, and not to substitute the court's judgment for that of the ALJ. Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995) ("Credibility determinations are peculiarly within the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence."); Musgrave v. Sullivan, 966 F.2d 1371, 1374 (10th Cir. 1992). The Court has reviewed the ALJ's findings with respect to Plaintiff's credibility and complaints of pain and finds it supported by substantial evidence.

Plaintiff additionally asserts that there is no evidence to support the ALJ's conclusion that Plaintiff can stand or walk for six of eight hours in a workday or lift 20 pounds. Plaintiff suggests that the consulting examination by Beau Jennings, D.O.

performed September 6, 1994 indicates Plaintiff was short of breath and had chronic back and chest pain.

The record contains an RFC Assessment completed by Paul Woodcock, M.D., on December 29, 1994. He indicated that Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, and stand or walk six out of eight hours and sit six out of eight hours. [R. at 90]. The Pulmonary Function Studies which were completed June 26, 1994, indicated that Plaintiff's results were within normal limits. [R. at 342]. Although Plaintiff's asserted chest pains have been investigated by his doctors, the results have indicated that Plaintiff has no active disease. [R. at 162]. In addition, Plaintiff testified that he could lift up to 20 pounds and could stand between one and four hours (although he would experience pain). [R. at 41, 42].

Plaintiff additionally refers to Dr. Economidis' RFC. According to Dr. Economidis, Plaintiff can sit for only four hours of an eight hour day, stand for two hours, and walk for one hour. [R. at 351]. Dr. Economidis' RFC was completed November 16, 1995. It was therefore not submitted to the ALJ prior to the ALJ's issuance of his decision on October 20, 1995. The Appeals Council reviewed the RFC and concluded that it provided no basis for changing the decision of the ALJ. [R. at 5-6]. Defendant points out, that the ALJ is not required to accept a conclusion by a physician if the conclusion is conclusory or not supported by evidence. The Court has reviewed the record and the RFC by Dr. Economidis and concludes that the Appeals Council did not err in declining to reverse based on the later submitted RFC. The treating physician's opinion does not explain the reason for his limitations, and it is not

supported by the medical evidence submitted. See Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987) (a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence."). See also Stephens v. Callahan, 971 F. Supp. 1388 (N.D. Okla. 1997) (identifying awkward role of reviewing court in evaluating evidence submitted to Appeals Council for the first time.).

VOCATIONAL EXPERT AND SUBSTANTIAL EVIDENCE

Plaintiff asserts that Defendant has the burden to establish Plaintiff's RFC and the burden to obtain supporting vocational testimony that Plaintiff can perform substantial gainful activity.

An ALJ need include only those limitations in the question to the vocational expert which he properly finds are established by the evidence. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). Considering Plaintiff's medical record and the ALJ's determinations, the hypothetical posed by the ALJ adequately included Plaintiff's restrictions.^{B/}

Plaintiff additionally refers to Miller v. Chater, 99 F.3d 972 (10th Cir. 1996), and asserts that the "absence of evidence is not evidence." However, in this case, the ALJ did not rely on the "absence of evidence." The medical record, the RFC Assessment, and the testimony of the Plaintiff contain substantial evidence to support the conclusion of the ALJ as to Plaintiff's RFC.

^{B/} In one of his hypothetical questions to the vocational expert, the ALJ included a limitation requiring the individual to shift positions due to pain. [R. at 60].

CREDIBILITY DETERMINATION

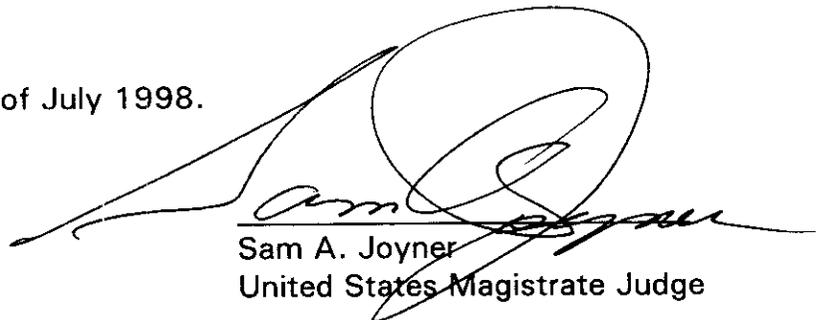
Plaintiff observes that the ALJ found Plaintiff's testimony not fully credible. Plaintiff asserts that the ALJ's finding is not supported by substantial evidence. According to Plaintiff the ALJ did not consider all of the factors necessary to review Plaintiff's credibility. In addition, Plaintiff notes that Plaintiff has persistently sought relief for his problems, that his daily activities are not equivalent to substantial gainful activity, and that Plaintiff previously earned over \$25,000 and would not leave that income for Social Security income.

As noted above, the Court concludes that the ALJ adequately evaluated Plaintiff's credibility. Plaintiff testified that he could lift 20 pounds and stand for a period of time (although he would experience pain). [R. at 41, 42]. The ALJ included a limitation based on some degree of pain in the hypothetical question presented to the vocational expert. [R. at 60]. The Court concludes that the decision by the ALJ is supported by substantial evidence.

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

IT IS SO ORDERED.

Dated this 13 day of July 1998.



Sam A. Joyner
United States Magistrate Judge

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

JUL 10 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN RE:
MERRILL SIMPSON BARTLETT,
Debtor,
HAL FREEMAN,
Appellant,
vs.
GERALD R. MILLER, Trustee of the
Estate of Merrill Simpson Bartlett, M.D.,
Appellee.

Case No. 97-CV-961-K (M) ✓

ENTERED ON DOCKET
DATE JUL 14 1998

REPORT AND RECOMMENDATION

The instant appeal from the United States Bankruptcy Court for the Northern District of Oklahoma is before the undersigned United States Magistrate Judge for report and recommendation. The appeal has been fully briefed, at the request of appellant, no hearing was held. Appellant, Hal Freeman, appeals from a decision of the Bankruptcy Court denying his motion to set aside the entry of default and default judgment entered March 6, 1997.

JURISDICTION AND STANDARD OF REVIEW

The District Court has jurisdiction over this appeal under 28 U.S.C. § 158. Denial of a motion to set aside default judgment under Fed.R.Civ.P. Rules 55(c) and 60(b) is reviewed applying an abuse of discretion standard. *United States v. Timbers Preserve, Routt County, Colorado*, 999 F.2d 452, 454 (10th Cir. 1993).

PROCEDURAL HISTORY AND FACTS

Debtor in this bankruptcy action allegedly loaned Mr. Freeman \$5,000. An amended complaint filed by the trustee for the debtor's estate alleged that the loan constituted a fraudulent transfer pursuant to 11 U.S.C. § 548. The trustee sought judgment against Mr. Freeman for the amount of the loan and an award of costs. [R. 14].¹ Second alias summons was served by first class mail on January 31, 1997. [R. 41]. Under the applicable rules, B.R. 7012 and 9006(f), Mr. Freeman's answer was due on or before March 5, 1997. (30 days plus additional 3 days for service by mail).

The bankruptcy docket does not reflect that Mr. Freeman filed anything by March 5. However, on February 27, 1997, the trustee filed a document entitled "Brief In Opposition To Hal Freeman's Motion To Dismiss." [R. 48]. On March 3, 1997, the Bankruptcy Court entered an order entitled: "Order to Proceed Notwithstanding '... Hal Freeman's Motion To Dismiss.'" [R. 51]. The court acknowledged that the trustee had responded to a motion to dismiss which the trustee had received on or about February 14, 1997. The order stated that counsel for the trustee had been contacted and stated that his copy of the motion was not file-stamped. The Court obtained the telephone number for appellant's counsel, attempted to contact him, but only obtained a recorded message. The Court found that the motion had not been filed and that "[n]o action need be taken on a motion which has not been filed." The

¹ References to the Record on appeal are designated [R.] followed by the Bankruptcy Court docket number and page number.

Trustee was directed "to go forward in this adversary proceeding as if the motion had not been made." [R. 51].

On March 6, 1997, pursuant to B.R. 7055, Fed.R.Civ.P. 55(a) and 55(b), the trustee filed an application for entry of default by the clerk against Mr. Freeman, and an application for default judgment. [R. 56, 57]. Both applications were granted on March 6, 1997. [R. 58, 59].

On March 10, 1997, Mr. Freeman filed his answer to the complaint. [R. 61]. According to Mr. Freeman, after reading the trustee's response to his motion to dismiss, he determined that he would be better off to abandon his motion to dismiss and file an answer. As an affirmative defense, Mr. Freeman asserted that his debts were discharged in July 1995, pursuant to his petition for bankruptcy in the Northern District of California. Case No. 95-3-1344WDM. [Dkt. 61]. On March 18, 1997, Mr. Freeman filed a Motion to Set Aside Default pursuant to Fed.R.Civ.P. 55(c). In his motion he asked that a hearing not be set because traveling from California to a hearing in Oklahoma would be a hardship. That motion was stricken at the trustee's request because Mr. Freeman's attorney is not admitted to practice in the Northern District of Oklahoma and had not requested leave to appear *pro haec vice*. [R. 71]. Mr. Freeman re-filed his motion pro se, again he advised the court that he did not desire a hearing. [R. 75].

A hearing was scheduled, Mr. Freeman failed to appear, and the court entered an order denying the motion to set aside default. [R. 79]. At the hearing the Bankruptcy Court provided the following explanation for denying the motion:

The Court has reviewed the motion and does not find it well-taken, especially in light of—quite frankly, the Court does not know what Mr. Freeman wants to do. Apparently, he wants to not have a default entered against him, but he does not want to come here and appear and defend himself. That situation is simply unworkable. [R. 86, p. 3].

On appeal Mr. Freeman contends default judgment should have been set aside because he had demonstrated an intention to defend sufficient to invoke the requirement of Fed.R.Civ.P. 55(b)(2) that he be served with written notice of the application for default judgment at least 3 days prior to the hearing on the application.

DISCUSSION

This Court has determined that on the record before it, the Bankruptcy Court's denial of the motion to set aside default was an abuse of discretion. The Court begins its analysis with the recognition that default judgments are generally disfavored. *Pelican Production Corporation v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990). The Courts have a strong preference for resolving claims on their merits. This preference is weighed against considerations of societal goals, justice and expedience. *Id.* (quoting *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970)).

This preference is also embodied in Fed.R.Civ.P. 55(a) which provides:

When a party against whom a judgment for affirmative relief is sought has failed to plead *or otherwise defend* as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default. [emphasis supplied].

Rule 55(b)(1) permits entry of default judgment by the clerk if the plaintiff's claim is for a sum certain. However, in other cases, including those cases where "the party

against whom judgment by default is sought has *appeared* in the action," additional protection is provided to the party in default. Rule 55(b)(2) requires that when a party has *appeared* in the action, the party or its representative must be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. In the present case Rule 55(b)(2) was not followed. Mr. Freeman was not given the requisite 3 days notice of the application to enter judgment. In fact, the record reflects that default judgment was entered the same day the application for default judgment was filed. [R. 57, 59]. This raises the obvious question of whether Mr. Freeman's motion to dismiss served on the trustee, but not filed, constitutes an "appearance" sufficient to trigger the Rule 55(b)(2) obligation to provide notice.

There are no reported Tenth Circuit cases which directly address the question. However, in *Gomes v. Williams*, 420 F.2d 1364, 1367 (10th Cir. 1970), the Tenth Circuit's discussion of the extent of the plaintiff's burden under Rule 55(c)(2) to provide the attorney of a defaulting party written notice of an application for default judgment *presumed* that a duty to provide notice could arise absent a formal appearance by the attorney. Under the facts of that case no duty arose. Other courts have determined that for purposes of applying Rule 55(b)(2) an appearance is any action evincing an intention to defend.

In *Key Bank of Maine v. Tablecloth Textile Co*, 74 F.3d 349 (1st Cir. 1996), the First Circuit reversed the trial court's denial of a motion to set aside default judgment finding that although the defendants did not make any presentations or submissions to the district court, plaintiff's counsel's receipt of correspondence from defendants'

attorney concerning the case plainly indicated defendants' desire to defend the suit so as to obligate plaintiff to provide advance notice of default proceedings under rule 55(b)(2). *Id.* at 355. In the present case, the trustee received Mr. Freeman's motion to dismiss and filed a response to the motion. There is indisputable evidence that the trustee was apprised of Mr. Freeman's intention to defend. Regardless of whether the motion to dismiss had actually been filed, and regardless of whether the motion had merit, since the trustee was apprised of Mr. Freeman's intention to defend the suit, the trustee was obligated by Rule 55(b)(2) to provide notice to Mr. Freeman. Since the Bankruptcy Court's order directed the trustee "to go forward in this adversary proceeding as if the motion had not been made," the trustee is not to blame for the failure to provide notice.

Nonetheless, the Court finds that the failure to give notice was clearly prejudicial to Mr. Freeman as default judgment was entered 4 days before the filing of his answer which raised a potentially meritorious defense. The failure to give notice could be characterized as one of several applicable criteria available under Fed.R.Civ.P. 60(b) for relief from judgment: 60(b)(1) mistake inadvertence, or excusable neglect on the part of the trustee to provide notice to Mr. Freeman; 60(b)(3) misconduct of a party, for the failure of the trustee to provide notice to Mr. Freeman; or 60(b)(6) any other reason justifying relief from the operation of the judgment. The Court finds the failure to give notice constitutes justification for relief from default judgment under Rule 60(b) criteria.

— To prevent frivolous litigation over default judgments, the Tenth Circuit has established a further requirement that a movant demonstrate the existence of a meritorious defense. *In re Stone*, 588 F.2d 1316, 1318 (10th Cir. 1978). The court is required to examine the allegations contained in the moving papers and determine whether the movant's version of the circumstances surrounding the dispute, if true, would constitute a defense to the action. For the purposes of this analysis, the movant's version of the facts and circumstances supporting his motion will be deemed to be true. Thus, it is not necessary for the parties to litigate the truth of the claimed defense. Instead, the court focuses on the sufficiency of the defense. *Id.* at 1319.

The trustee argues that the Bankruptcy Court's decision should be affirmed because Mr. Freeman failed to show the existence of a meritorious defense. Mr. Freeman alleged that his debts had been discharged in October 1995, in the Bankruptcy Court for the Northern District of California, Case No. 95-3-1344 WDM. He argues that because his bankruptcy was a no-asset case, his admitted failure to give notice to the debtor in the present case is of no consequence. On appeal the trustee agrees that under some circumstances an unsecured creditor's claim is deemed to be discharged even though the creditor was not given notice of the pendency of the case. See 11 U.S.C. § 523(a)(3). However, the trustee argues that "it is likely grounds would exist" to assert that the claim in question is non-dischargeable under that section. [Dkt. 3, p. 15]. Again, the court is not required to determine the truth of the factual assertions concerning the asserted defense, but the legal sufficiency of the defense. Assuming, for the purposes of testing the legal

sufficiency of the defense, that Mr. Freeman's factual assertions are true, the court finds that he has asserted a meritorious defense.

Since Mr. Freeman did not receive notice of the default judgment proceedings in accordance with Rule 55(b)(2), and since he asserted a meritorious defense, the Court finds that the Bankruptcy Court abused its discretion in refusing to set aside the default judgment.

CONCLUSION

The undersigned United States Magistrate Judge RECOMMENDS that the decision of the Bankruptcy Court denying Mr. Freeman's motion to set aside default judgment be REVERSED and REMANDED.

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

DATED this 10th Day of July, 1998.

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

10th Day of July, 1998.
Anda M. Collins

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

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

DELMER AND BARBARA ENGLER,)
)
Plaintiffs,)
)
vs.)
)
THOMAS M. MADDEN CO., et al.,)
)
)
)
Defendants.)

No. 98-C-179-K ✓

ENTERED ON DOCKET
DATE JULY 13 1998

F I L E D

JUL 10 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

On June 16, 1998 Magistrate Judge Eagan entered her Report and Recommendation, The Magistrate Judge recommended that the motions of the defendants to dismiss be granted. No objection has been filed to the Report and Recommendation and the ten-day time limit of Federal Rule of Civil Procedure 72(b) has passed. The Court has also independently reviewed the Report and Recommendation and sees no reason to modify it.

The pro se plaintiffs brought this action, apparently pursuant to 42 U.S.C. §1983, against Judge Deborah Shallcross of the Tulsa County District Court and various other defendants. The other defendants include parties whom the plaintiffs sued in a 1995 state court action and the law firm of Rhodes Hieronymus, Jones, Tucker and Gable, which represented some of those parties in the state court suit. Judge Shallcross presided over the lawsuit and declared a mistrial on unspecified grounds. Plaintiffs assert that their constitutional rights were violated by the delay caused by the mistrial. They allege a conspiracy among the present

defendants.

Magistrate Judge Eagan ruled that Judge Shallcross should be dismissed from this action upon the well-settled doctrine of judicial immunity. Magistrate Judge Eagan ruled that the remaining defendants should be dismissed on the equally well-settled doctrine that conduct by defendants "under color of state law" is required to maintain an action of this sort. As the Report and Recommendation indicates, participation in state court litigation is not conduct "under color of state law" for purposes of §1983.

As stated, plaintiffs have not filed an objection to the Report and Recommendation. They have filed two "motions", one asking that defendants be required to pay all costs and fees in this case, and the other asking for a 30-90 day continuance, so that plaintiffs may advertise for an out-of-state attorney or so that the Court may appoint them counsel.

There is no constitutional right to appointed counsel in a civil case. United States v. Gosnell, 961 F.2d 1518, 1521 (10th Cir.1992). When determining whether to appoint counsel for an indigent civil litigant, the district court considers relevant factors such as the complexity of the case, the ability of the indigent litigant to investigate the facts, the existence of conflicting testimony, and the ability of the indigent to present his claim. See Johnson v. Williams, 788 F.2d 1319, 1322-23 (8th Cir.1986). First, the plaintiffs have not filed an affidavit demonstrating indigence, but the Court will assume it for present purposes based upon statements in pleadings. Second, presumably a

transcript exists, or could be easily prepared, of the state court trial, which is the principal basis for this action. Therefore, the Court does not believe the relevant factors argue for delay or appointment of counsel. Plaintiffs have cited no authority for an award of all costs against the defendants, and the Court denies the request.

It is the Order of the Court that the Report and Recommendation of the Magistrate Judge (#11) is hereby AFFIRMED. The motion to dismiss of defendant Shallcross (#2) and the motion to dismiss of the remaining defendants (#3) are hereby GRANTED. This action is dismissed in its entirety.

The Court further orders that the motion of the plaintiffs to award costs (#10) and the motion of the plaintiffs for continuance and appointment of counsel (#12) are hereby DENIED.

ORDERED this 10 day of July, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

JUDY HOLLOWAY,

Plaintiff,

vs.

MULTIMEDIA GAMES, INC.,

Defendant.

ENTERED ON DOCKET

DATE JUL 13 1998

Case No. 97-CV-572-K ✓

FILED

JUL 10 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER ALLOWING DISMISSAL WITH PREJUDICE

This matter came before the Court this 10 day of ~~June~~ ^{July}, 1998, upon the parties' Joint Stipulation of Dismissal With Prejudice, and for good cause shown, it is therefore

ORDERED, ADJUDGED AND DECREED, that Plaintiff's action against this Defendant is hereby dismissed with prejudice with each of those parties to bear their own costs and attorneys' fees.


UNITED STATES DISTRICT JUDGE

24

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

JUL 10 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

THAD ASHCRAFT and)
DEBORAH LANE ASHCRAFT,)
)
Plaintiffs,)
)
vs.)
)
JACK UDELL ATKINS,)
)
Defendant.)

Case No. 97-CV-832-K (M) ✓

ENTERED ON DOCKET
JUL 13 1998
DATE _____

DISMISSAL WITH PREJUDICE

This matter having come before the Court upon the Stipulation for Dismissal With Prejudice by and between Plaintiffs Thad Ashcraft and Deborah Lane Ashcraft, and Defendant, Jack Udell Atkins, and the Court having read the Joint Stipulation of Dismissal With Prejudice and being fully advised in the premises, finds that this Joint Stipulation of Dismissal With Prejudice should be and is hereby approved by the Court.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the above captioned action and all causes arising therefrom are dismissed with prejudice, each party to bear their own costs.

IT IS SO ORDERED this 10 day of July, 1998.

Terry Kern
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 10 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBIN RAY,)
)
Plaintiff,)
)
vs.)
)
FARMERS INSURANCE COMPANY, INC))
)
Defendant.)

No. 97-C-709-K

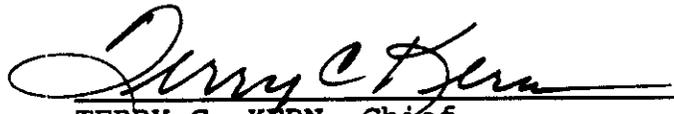
ENTERED ON DOCKET
DATE JUL 13 1998

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 9 day of July, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

CLIFFORD A. EATON,
SSN: 444-42-9752

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

JUL 9 - 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-340-J ✓

ENTERED ON DOCKET

DATE JUL 13 1998

JUDGEMENT

This matter came on for review of the Commissioner of Social Security's decision to deny benefits to Plaintiff. The Court has entered an order affirming the Commissioner's decision to deny benefits. Judgment is, therefore, entered in favor of Defendant and against Plaintiff.

IT IS SO ORDERED.

Dated this 9 day of July 1998.



Sam A. Joyner
United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

CLIFFORD A. EATON,
SSN: 444-42-9752

Plaintiff,

v.

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

Defendant.

JUL 9 - 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-340-J

ENTERED ON DOCKET

DATE JUL 13 1998

ORDER^{2/}

Now before the Court is Plaintiff's appeal of a decision by the Commissioner of the Social Security Administration ("Commissioner") denying him supplemental security income benefits under Title XVI of the Social Security Act. The Administrative Law Judge ("ALJ"), Stephen C. Calvarese, denied benefits at step four of the sequential evaluation process used by the Commissioner to evaluate disability claims.

The ALJ determined that Plaintiff retained the residual functional capacity ("RFC") to perform a limited range of light work and found that Plaintiff could return to his past work as a night club manager. On appeal, Plaintiff argues (1) that the ALJ improperly evaluated or failed to evaluate Plaintiff's subjective complaints of pain, and

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

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

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(2) that the ALJ failed to adequately determine the demands of Plaintiff's night club manager job as that job was actually performed by Plaintiff. The Court has reviewed the entire record and for the reasons discussed below the Commissioner's decision is **AFFIRMED**.

I. STANDARD OF REVIEW

A disability under the Social Security Act is defined as the

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

42 U.S.C. § 423(d)(1)(A). A claimant will be found disabled

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

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

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

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

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

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

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

II. DISCUSSION

The Court has meticulously reviewed the medical evidence and the ALJ's opinion. Based on this review, the Court finds (1) that the ALJ's RFC determination is supported by substantial evidence, and (2) that the ALJ properly evaluated Plaintiff's subjective complaints of pain. Thus, the Court affirms the ALJ's opinion on these issues.

Plaintiff argues that, at Step Four of the sequential evaluation process, the ALJ failed to develop the record regarding the demands of Plaintiff's night club manager job as that job was performed by Plaintiff. Plaintiff fails to recognize that an ALJ is justified in finding that a claimant can perform his past relevant work as long as the claimant can perform the job as he actually performed it when he was working or if the claimant can perform the job as it is normally performed in the national economy. See S.S.R. 82-61; and Andrade v. DHHS, 985 F.2d 1045, 1050 (10th Cir. 1993). An ALJ may also use the Dictionary of Occupational Titles ("DOT") and the testimony of a vocational expert to help him flesh out the demands of jobs as they are performed in the national economy. In this case, the ALJ considered Plaintiff's testimony, the DOT and the testimony of a vocational expert. *R. at 59-63*. Thus, the ALJ adequately developed the demands of Plaintiff's past relevant work as that work is generally performed in the national economy.

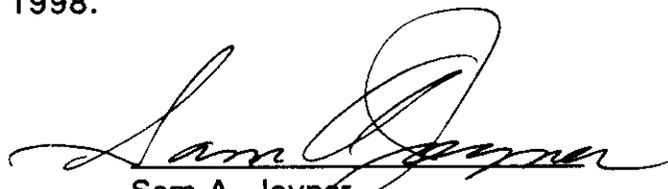
The Court notes for counsel that it disapproves of the practice of incorporating by reference portions of papers filed with the appeals council into briefs filed with this Court. If material in the papers filed with the appeals council is important, that material should be included in the brief filed with this court. If additional pages are needed, a request should be made to the court. See, e.g., Schrag v. Dinges, Nos. 94-3005, 94-3093, 943102, 1995 WL 675475, at *9 n.11 (10th Cir. Nov. 14, 1995) (disapproving of the practice of incorporating by reference portions of district court pleadings in briefs filed with the courts of appeal) (citing cases).

CONCLUSION

The decision of the Commissioner to deny Plaintiff supplemental security income benefits under Title XVI of the Social Security Act is **AFFIRMED**.

IT IS SO ORDERED.

Dated this 9 day of July 1998.


Sam A. Joyner
United States Magistrate Judge