

ENTERED ON DOCKET
DATE 7-31-98

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

MARTIN MORRIS MOSES, SR.,)
)
Plaintiff,)
vs.)
)
STANLEY GLANZ, et al.,)
)
Defendants.)

No. 98-CV-126-K (M)

F I L E D

JUL 31 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, proceeding *pro se* and *in forma pauperis*, is currently incarcerated at the Tulsa County Jail, Tulsa, Oklahoma. He has paid the initial partial filing fee to commence this § 1983 action against the following Defendants: Sheriff Stanley Glanz, Captain Wakefield, Lt. Turley, Cpl. Geiger, Cpl. Palmer, Cpl. Spurlock, Det. Ofc. Petitt, Det. Ofc. Pierce, Det. Ofc. Wheeler, Det. Ofc. Ingram, Cpl. Gall, Det. Ofc. Griffith, Det. Ofc. Spears, and Det. Ofc. Taylor.

Now before the Court are Plaintiff's motions to amend his first amended civil rights complaint, seeking to add various supplemental exhibits and two defendants – Mark England, law clerk, and Officer Cannon (#11); and for service of process upon the named defendants (#7). For good cause shown, the Court finds Plaintiff should be granted leave to file his "second amended complaint." The Clerk shall be directed to file the original "second amended complaint" which is attached to Plaintiff's motion.

In his Second Amended Complaint, comprised of 69 pages, Plaintiff alleges the following claims: (1) denial of access to the courts; (2) physical, verbal and psychological abuse; (3) retaliation and denial of due process of grievance procedures and rules and policies set forth; (4) denial of right to attend religious services, and (5) conduct unbecoming of numerous jail officials

acting under the color of state law, in violation of the First, the Eighth, and the Fourteenth Amendments of the United States Constitution.

As more fully explained below and after liberally construing Plaintiff's *pro se* pleadings, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's claims of denial of access to courts, denial of due process in the grievance procedures, psychological and verbal abuse, and conduct unbecoming of jail officials should be dismissed for failure to state a claim. Service of process shall issue against Defendants Stanley Glanz, C. Petitt, E. Pierce, J. Wheeler and D. Ingram, only as to Plaintiff's claim that he has not been allowed to attend religious services.

ANALYSIS

The Prison Litigation Reform Act (PLRA):

The Prison Litigation Reform Act of 1995, ("PLRA"), added a new section to the *in forma pauperis* statute, entitled "Screening." See 28 U.S.C. § 1915A. That section requires the Court to review prisoner complaints before docketing, or as soon as practicable after docketing, and "dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted." Id. This screening must occur "before service of process is made on the opposing parties" and "courts have no discretion in permitting a plaintiff to amend a complaint to avoid a sua sponte dismissal." See McGore v. Wigglesworth, 114 F.3d 601, 604-05, 612 (6th Cir.1997) (referring to 28 U.S.C. §§ 1915(e)(2) and 1915A).

A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke v.

Williams, 490 U.S. 319, 325 (1989); Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist." Denton v. Hernandez, 504 U.S. 25, 32 (1992) (quoting Neitzke, 490 U.S. at 327). A suit is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

Additionally, when Congress enacted the PLRA, it specifically amended Title 28 U.S.C. section 1915(e) to provide that a complaint filed by a prisoner could be dismissed as frivolous regardless of whether any filing fee or portion thereof had been paid. Therefore, Plaintiff's claims are subject to review under Section 1915(e) and dismissal as frivolous regardless of whether he paid any portion of the filing fee in this case. See McGore, 114 F.3d at 604. Furthermore, when reviewing a complaint under § 1915(e), a court is not bound to accept without question the truth of the plaintiff's allegations. Denton, 504 U.S. at 32. A federal court may consider *sua sponte* affirmative defenses that are apparent from the record even where they have not been addressed or raised in the pleadings on file. Schultea v. Wood, 47 F.3d 1427, 1434 (5th Cir. 1995).

Plaintiff's claims

A. Access to courts.

Although an inmate's right of access to the courts has long been recognized as a constitutional right, the United States Supreme Court first outlined the general requirements of that right in Bounds v. Smith, 430 U.S. 817, 828 (1977). According to the Supreme Court, that right "requires prison authorities to assist inmates in the preparation and filing of meaningful

legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.” Id. at 828 (emphasis added). Such assistance is necessary only to file “meaningful legal papers”; that phrase has been interpreted to mean only those legal filings that present constitutional claims challenging the inmate’s conviction or the conditions of confinement. Lewis v. Casey, 116 S.Ct. 2174, 2181 (1996) (“In other words, [the right of access to the courts] does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder-derivative actions to slip-and-fall claims.”); see also Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985).

In addition, the Supreme Court has stated that an inmate does not have standing or the right to sue simply because he was not provided access to the courts. Lewis v. Casey, 116 S.Ct. 2174, 2180 (1996). An inmate “must go one step further and demonstrate that the [denial of access to the courts] hindered his efforts to pursue a legal claim.” Id. That is, an inmate like Plaintiff must demonstrate an “actual injury” resulting from the denial of his right of access to the courts. See also Twyman v. Crisp, 584 F.2d 352, 357 (10th Cir. 1978). And while prison officials may not retaliate against an inmate for exercising his constitutional rights of access to the courts, a plaintiff must allege specific facts showing retaliation because of the exercise of his constitutional rights. See Frazier v. Dubois, 922 F.2d 560, 561-62 (10th Cir. 1990).

In this case, Plaintiff alleges that Defendants have denied access to courts in retaliation for his filing of several civil right complaints in the following ways: (1) defendants “have intentionally take[n] out clearly marked and numbered pages” of the *file-stamped copy* of his first amended complaint because pages “9 thru 22” were missing; (2) he “has been forced to proceed” in state court with court-appointed counsel who is “more foe than friend”; (3) his original *pro se*

mal malpractice complaint has been returned to him for process of service rather than the state court clerk "assuming the responsibility of forwarding the complaint to the appropriate judge for review"; and (4) defendants "intentionally came up with the new rule" to leave property bags in the units during a shakedown "that way they have access to all legal papers, documents, affidavits, etc. etc.!" (See Second Amended Complaint, #10 at 2-I, 2-M).

First, even a cursory review of Plaintiff's filings in this Court would negate any inference that Plaintiff has been denied access to the courts. Nor has Plaintiff shown that any delay of access to the courts has prejudiced him in pursuing litigation. Treff v. Galetka, 74 F.3d 191, 194 (10th. Cir. 1996). To the contrary, Plaintiff has filed five civil rights complaints, including numerous motions and letters, as indicated below:

98CV-112-B

Moses v. Stanley Glanz and Mark England

2/11/98 Civil rights complaint filed
2/11/98 Motion to proceed "ifp"
2/13/98 Letter
2/18/98 Letter
2/18/98 Letter
2/19/98 Letter
2/27/98 Letter
2/27/98 Amended motion to proceed "ifp"
3/23/98 Letter
5/7/98 Amended complaint filed.
5/20/98 Motion to proceed with service of process

98CV-119-C

Moses v. City of Tulsa; Tulsa County Sheriff's Department; J.R. Powell; and B. Bengé

2/13/98 Civil rights complaint filed.
2/13/98 Motion to proceed "ifp"
3/9/98 Motion for partial filing fee to be accepted
4/9/98 Letter
4/13/98 Amended complaint filed.
6/12/98 Motion to extend ddl to file motion to dispell
7/6/98 Motion to dispell
7/6/98 Reply
7/21/98 Supplemental Brief
7/23/98 Motion to Complete the Record

98CV-125-H

Moses v. Stanley Glanz and Det. Officer Laurence
2/17/98 Civil rights complaint filed.

2/17/98 Motion to proceed "ifp"
4/16/98 Motion for extension to pay partial filing fee
5/20/98 Motion to proceed with service of process
6/17/98 Motion for leave to file First Amended Complaint
6/17/98 First Amended Complaint filed

98CV-126-K

Moses v. Stanley Glanz, et al.
2/17/98 Civil rights complaint filed.
2/17/98 Motion to proceed "ifp"
4/16/98 Motion for extension to pay partial filing fee
5/20/98 Motion to proceed with service of process
5/20/98 First amended complaint filed.
6/4/98 Motion to grand second amended complaint
6/4/98 Second amended complaint filed.

98CV-216-H

Moses v. Tulsa County; Stanley Glanz; and Larry's Jail Commissary
3/18/98 Civil rights complaint filed.
3/18/98 Motion to proceed "ifp"
5/20/98 Motion to proceed with service of process
7/20/98 Letter

The Court also takes notices that Plaintiff has filed two applications for writs of habeas corpus with the Oklahoma Court of Criminal Appeals and at least one malpractice action in Tulsa County District Court.¹ The Court finds that Plaintiff has failed to allege any specific facts establishing that he was actually prejudiced in connection with any pending or contemplated legal proceeding by any alleged act or omission by any of the named Defendants. Thus, Plaintiff has alleged no "actual injury" related to his denial of access to courts claim and the Court finds that Plaintiff fails to state a claim upon which relief can be granted. Therefore, his claim that he has been denied access to the courts should be dismissed.

¹See Case No. 98-CV-119-C, docket #14, Defendant City of Tulsa's Supplemental Special Report: "Plaintiff has apparently filed two applications for writs of habeas corpus with the Oklahoma Court of Criminal Appeals, and has tried to disqualify the District Court Judge assigned to said case." See also Second Amended Complaint (#10) at ¶ 60-C (p. 24) and 2-L(C)-2-L(D) (pp. 21-22).

B. Due Process Claim

Plaintiff alleges that defendants violated his procedural due process rights when they failed to answer his December 30, 1997 grievance, entitled "Caught in the middle." Plaintiff further alleges defendants failed to properly "sign for" receipt of a grievance on at least one occasion, gave a "naive response," clearly "marked over" a grievance record number, and did not include the employee ID number and time of response on at least one grievance. (See Second Amended Complaint, #10 at 2-M). The Court has reviewed the record of grievances submitted by Plaintiff and finds that while Plaintiff has filed numerous grievances and requests with jail officials, all but two have been answered. It seems Plaintiff simply disapproves of how the grievances are answered. Furthermore, as evident by the following list prepared from copies of grievances attached by Plaintiff to the Second Amended Complaint, it appears Plaintiff has submitted a steady stream of generally frivolous, extraordinarily rambling grievances, consisting in large measure of sometimes unintelligible, often disjointed, allegations.

<u>Date</u>	<u>Grievance/Request</u>	<u>Date</u>	<u>Response</u>
12/27/97	Verbally requested grievance form	12/28/97	Received form.
12/30/97	"Caught in the Middle" "I have completely submitted myself to all of the governing personnel and their various positions. And levels of authority. Irregardless [sic] of their Level of Professionalism or the Lack thereof. I have overlooked but yet taken very copious Mental Notes. Of all the Minor Violations of my Rights as the Inmate here at T.C.S.O. Subversive tactics, Mass Punishment Interrogative reasoning, psychological warfare and physical acts of Intimidation. Very simply Awakes, Arouses, stimulates and becomes the very catalyst yet the Nucleus. In the Resurrection of A Very Worthy Adversary on "Any" field of Battle, within "Myself." Let's		No Response.

By-Pass all Generic and Very Naive Reasons, Better Yet "Excuses!" "I" Respectfully Request that "I" be Allowed to Attend church services on A regular Basis.

Because through one's Heart Sincere Actions can some Younge [sic] Men, only be touched and their Hearts Be Moved to change the ways of their Lives!

I truly Do not Mind my position (In the Middle). For all things happen for A Reason. But I do mind Being stereotyped or considered A part of the Whole.

Simply Because "I'm" one Dog who can not only sleep with fleas. But "I" can also Live with them And Not Be Bitten!

12/30/97	"Position Requested"	01/01/98	"It is OK to attend most of the services if the chaplin requests your services. There will be some that you may not attend - depending on who is going to church."
01/13/97	Legal mail handling grievance	01/20/98	"If it was written that it was damaged in mail, then it happened at the post office not in the inmate mailroom. You will need to take it up with the post office.
01/30/97	Request for response to "Caught in Middle" 12/30/97	01/31/97	"I talked to you on Jan 24 th about your grievance - Dec 30 th . I then found where your grievance was assigned to Cpl. Palmer to answer on Dec. 30 th ."
02/02/98	Request for Information Name, title of every sheriff's deputy and detention officer, who worked the 1500 hrs to 2300 hr shift on Saturday, 12/27/97. Also another request for response to 12/30/97 grievance.	02/02/98	"8 th Floor: Supervisor Cpl. Spurlock; Detention Officers: Wheeler, Pierce, Ingram and Petitt. 9 th Floor: Supervisor Cpl. Gall; control desk: Detention Officer Kerpon; Deputy O'Keefe; D.O. Hashbrouck, Griffith, Spears."
2/11/98	Request for Legal Info. "First initials" of several jail officials		No Response.

4/19/98	Request re: lost grievances	04/19/98	"We are checking into this, will be contacting you soon with the answer."
4/23/98	Grievance "Not to be Trusted" Shakedown - legal bag ramsacked and missing several cases, legal papers, shampoo..."	4/28/98	"Officers are following orders given to them from Mr. J. Wakefield on how to conduct a shakedown. Officers will remove the items from your green property bags during shakedowns of your housing units and examine the items. As far as the shaving cream and shampoo, ask for more when hygiene is passed out on Wed. and Sat. The reason the officers removed the shampoo and shaving cream is because they are told to remove all excess indigent materials. If you are asked to leave your green bags on your bunk, please do so."
5/9/98	Grievance "Denial of Due Process" Did not waive "my rights" to 24 hour notice, but Cpl. Gall held his "Hang trial" Hearing Anyway. Only after I was placed in the hole At or around 1900 hrs. Therefore that tells me that I was already made guilty of a violation. Plus the facts are completely misconstrued which further sustains that Cpl. Gall clearly and deliberately was not gonna treat me fairly."	5/9/98	"The initial hearing is conducted immediately. The 24 hour period is for when you wish an appeal. Your appeal was conducted four days later, due to the problems You and I discussed, I found you not guilty and returned to your cell."
5/20/98	Grievance "Stall Tactics" re: complaint for legal malpractice, Tulsa Co. D.C.	5/22/98	"Submit your legal papers To the law clerk - we meet or exceed all requirements by providing a legal assistant in the law library."

In Sandin v. Conner, 115 S.Ct. 2293 (1995), the Supreme Court held that prisoners have liberty interests protected by the Due Process Clause only where the contemplated restraint "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.*, 115 S.Ct. at 2300. Defendants' conduct reflected in the grievances simply does not rise to the level of a Due Process violation under Sandin. Certainly, the bulk of Plaintiff's claims deal with day-to-day annoyances and inconveniences of prison life and do not belong

Before any federal court. Even Plaintiff's complaint concerning being placed in "the hole" overnight (see 5/9/98 entry above) fails because, assuming Plaintiff was punished for kicking the "beanhole" and without sufficient notice, Plaintiff has not presented any evidence of "atypical and significant hardship" as a result. According to the jail official's response to Plaintiff's "Denial of Due Process" grievance, filed after this incident, Plaintiff was found "not guilty" and returned to his cell.

As to a response to Plaintiff's December 30, 1997 grievance, "Caught in the Middle," after liberally construing his complaint, the Court concludes that Plaintiff cannot establish any facts in support of his claim that Defendants' inaction deprived him of any constitutional or federal statutory rights. A prison official's failure, if any, to respond adequately to a prisoner's grievance does not implicate a constitutional right. See Buckley v. Barlow, 997 F.2d 494, 495 (7th Cir. 1993) (*per curiam*) (official's failure to process inmates' grievances, without more, is not actionable under section 1983); Greer v. DeRobertis, 568 F.Supp. 1370, 1375 (N.D. Ill. 1983) (prison officials' failure to respond to grievance letter violates no constitutional or federal statutory right); see also Shango v. Jurich, 681 F.2d 1091 (7th Cir. 1982) (a prison grievance procedure does not require the procedural protections envisioned by the Fourteenth Amendment). Therefore, the Court concludes that Plaintiff may not base a section 1983 claim solely on allegations that Defendants failed to respond to an inmate grievance and failed to investigate the facts set forth in that correspondence.

In the alternative, the Court notes that Plaintiff's allegations assert, at most, negligent conduct which does not implicate the Due Process Clause. See Williams v. Meese, 926 F.2d 994, 998 (10th Cir. 1991) (negligent conduct by prison officials with respect to grievance

procedure does not implicate Due Process Clause). Accordingly, the Court concludes that Plaintiff's due process claim fails to state claim upon which relief can be granted and should be dismissed.

C. Verbal and Psychological Abuse

Basically, Plaintiff alleges that defendants' "verbal and psychological abuse along with their physical acts of intimidation" constitute cruel and unusual punishment, and that defendants' failure to implement or adhere to certain rules, policies and procedures exposed Plaintiff to cruel and unusual punishment.² (See Second Amended Complaint, #10 at H-H). Plaintiff alleges "direct acts of intimidation and/or harassment and other acts/actions of flagrant violations of [] rules and policies." He alleges defendants have "toyed with" his mind, physically and psychologically "harassed" and "lied" about him.

Even assuming Plaintiff's allegations are true, verbal harassment or vulgar language generally do not violate the Eighth Amendment. Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996) Further, 42 U.S.C. § 1997e(e) prohibits any prisoner from bringing an action for "mental or emotional injury suffered while in custody without a prior showing of physical injury." See Zehner v. Trigg, 133 F.3d 459 (7th Cir. 1997); Siglar v. Hightower, 112 F.3d 191 (5th Cir. 1997). Plaintiff in this case has neither alleged nor presented any evidence of a physical injury. The

²The Supreme Court has instructed that claims involving conditions of confinement brought by pretrial detainees should be analyzed under the Due Process Clause of the Fourteenth Amendment rather than under the Eighth Amendment. Bell v. Wolfish, 441 U.S. 520, 535 and n.16 (1979). The due process standard is used because the Eighth Amendment is concerned with punishment, and a pretrial detainee may not be punished prior to an adjudication of guilt. Id. The central inquiry then becomes whether the challenged condition of confinement amounts to a "punishment." Id. at 535.

Court finds that Plaintiff claim of verbal and psychological abuse fails to state a claim upon which relief can be granted and should be dismissed.

D. Denial of Religious Services

Prisoners continue to be protected by the First Amendment even while incarcerated, including the right of free exercise of religion, O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987), abrogated on other grounds by statute; Allah v. Menci, 844 F.Supp. 1056 (E.D. Penn 1994), and prison authorities must afford prisoners "reasonable opportunities . . . to exercise the [religious freedom guaranteed by the First . . . Amendment]." Cruz v. Beto, 405 U.S. 319, 321 n.2 (1972). Nevertheless, lawful incarceration necessarily brings about restrictions on certain constitutional rights, including the right of free exercise of religion. Thornburgh v. Abbott, 490 U.S. 401, 405 (1989). Such limitations on free exercise derive both from the fact of incarceration as well as valid penological objectives, such as security within the institution, deterrence of crime and rehabilitation of prisoners. O'Lone, 482 U.S. at 348.

In his Second Amended Complaint, Plaintiff alleges that he has been denied the right to attend church services. Liberally construing Plaintiff's complaint, the Court finds Plaintiff has made a colorable claim, and therefore finds that the Clerk should issue summons and direct service of process against the Defendants named below in regard to Plaintiff's denial of religious services claim. Plaintiff identifies Defendants C. Petitt, E. Pierce, J. Wheeler, and D. Ingram as being involved in denying his request to attend church services (see ¶¶ 41 and 71 of Second Amended Complaint) as well as Defendant Glanz, as being "ultimately [] responsible to ensure that all prisoners constitutional rights are upheld."

The Court believes that an investigation and special report are necessary to develop a record sufficient to ascertain whether there are any factual or legal bases for Plaintiff's claim that he has been denied his requests to attend church services. See Hall v. Bellmon, 935 F.2d 1106 (10th Cir. 1991); Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978). Therefore, upon service, officials responsible for the institution involved in the alleged civil rights violation(s) shall undertake a review of the subject matter of the complaint:

- (a) to ascertain the facts and circumstances;
- (b) to consider whether any action can and should be taken by the institution or other appropriate officials to resolve the subject matter of the complaint; and
- (c) to determine whether other like complaints, whether pending in this Court or elsewhere, are related to this complaint and should be taken up and considered together.

In the conduct of the review, a written report shall be compiled and filed with the court. Authorization is granted to interview all witnesses including Plaintiff and appropriate officers of the institution. Wherever appropriate, medical or psychiatric examinations shall be made and included in the written report. Any rules and regulations pertinent to the subject matter of the complaint shall be included in the written report.

The written report, along with Defendants' answer(s) and/or dispositive motion(s), shall be filed within sixty (60) days of service.

E. Conduct Unbecoming to Jail Officials

Plaintiff alleges that defendants exhibit a "lackadasical [sic] attitude," that through the use of "subtle evasive tactics and techniques" defendants have attempted to "deter [plaintiff's] efforts to tactfully and professionally track, follow, and pursue each of his questions and or

Governing officials in setting the standards of adherence to and abiding in or by all rules, policies and s.o.p.s for all subordinates to follow” is “shock[ing]!” (See Second Amended Complaint, #10 at 2-G).

Plaintiff’s allegations are conclusory in that they are not supported with any allegations of specific facts. As such, they are legally insufficient to avoid the dismissal of plaintiff’s claims as frivolous. Furthermore, the Court notes that Plaintiff frequently references his military background and training in his pleadings. Apparently, Plaintiff believes jail officials’ conduct should be assessed according to the standards imposed on military officers in the United States Armed Forces. However, the Court refuses to find that situations faced by jail officials and military officers are in any way comparable. Plaintiff’s claim concerning “conduct unbecoming to jail officials” fails to identify a constitutional violation and should be dismissed as frivolous.

CONCLUSION

The Clerk shall be directed to issue summons and direct service of process as to Defendants Glanz, Petitt, Pierce, Wheeler and Ingram based only on Plaintiff’s claim that these Defendants denied his requests to attend religious services. All other claims and all other defendants are dismissed from this action.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Plaintiff's motion for leave to file second amended complaint (#11) is **granted**. The Clerk is directed to file the original second amended complaint attached to Plaintiff's motion.
- (2) Plaintiff's claims for denial of access to the courts, denial of due process of grievance procedures, and verbal abuse are **dismissed for failure to state a claim**, and his claim for conduct unbecoming a jail official is **dismissed as frivolous**.
- (3) Plaintiff's motion for issuance of service against defendants (#7) is **granted** as to defendants Stanley Glanz, C. Petitt, E. Pierce, J. Wheeler and D. Ingram, and **denied** as to all other defendants.
- (4) The Clerk of the Court is directed to issue summons and direct service as to Defendants Stanley Glanz, C. Petitt, E. Pierce, J. Wheeler and D. Ingram, only as to Plaintiff's First Amendment claim based on alleged denial of requests to attend religious services. The Clerk shall provide a copy of this Order and the Second Amended Complaint to the U.S. Marshal for service on the above-named Defendants.
- (5) **A special report, to be prepared as described herein, and Defendants' answer(s) and/or dispositive motion(s), shall be filed no later than sixty days from the date of service.** It is desired that the report made in the course of this investigation be attached to and filed with Defendants' answer(s) and/or dispositive motion(s).
- (6) No applications, motions, or discovery should be filed or considered until the steps set forth in this order have been completed, and an order entered, except as the court further orders. The Clerk is directed to return any pleading, motion or other paper submitted by

the parties without leave of Court prior to submission of the special report.

- (7) Should Defendants file a dispositive motion along with the special report, Plaintiff shall file a **response** within fifteen (15) days after the filing of Defendants' motion. Failure to file a response could result in the entry of relief requested in the motion. See N. D. LR 7.1(C).
- (8) Defendants R. Wakefield, G. Turley, K. Gall, S. Geiger, M. Palmer, T. Spurlock, M Griffith, C. Spears, Z. Taylor, M. England and Cannon, are dismissed from this action.

SO ORDERED this 30 day of July, 1998.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 7-31-98

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DWAYNE BUFORD REED,)
)
 Defendant.)

No. 93-CR-88-B ✓
(No. 98-CV-70-B)

F I L E D

JUL 30 1998

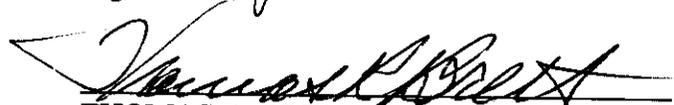
Phil Lombardi, Clerk
U.S. DISTRICT COURT

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 30th day of July, 1998.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED
JUL 30 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DWAYNE BUFORD REED,)
)
 Defendant.)

No. 93-CR-88-B
(No. 98-CV-70-B)

ORDER

Before the Court is the Defendant Dwayne Buford Reed's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Docket #96) together with his accompanying memorandum (#97). The Plaintiff United States of America has filed its response brief (#104), to which Defendant has filed his reply (#105). After careful review of the motion papers and the record, the Court concludes that Defendant's motion pursuant to § 2255 is time-barred and should be dismissed.

BACKGROUND

This case arose out of an attempted armed robbery of the McDonnell-Douglas Federal Credit Union in Tulsa, Oklahoma on May 13, 1993. Two men, wearing hoods over their heads, entered the credit union; one of the men was armed and fired a handgun at the security guard. The bullet hit the guard's desk, and the security guard returned fire, wounding one man in the chest and the other man in the buttocks. The men fled the scene in a stolen car. The police later recovered the car and bloodstained clothing, which was tied to Defendant and co-defendant Demareo Lamont Davis

through DNA testing. Defendant and co-defendant Davis were convicted by a jury of: conspiracy to commit armed robbery of a credit union, in violation of 18 U.S.C. §§ 371, 2113(a) and (d) (count one); entering a federally insured credit union with the intent to commit armed robbery, and aiding and abetting in this offense, in violation of 18 U.S.C. §§ 2 and 2113(a) and (d) (count two); and use or carrying of a firearm during the commission of a crime of violence, and aiding and abetting in this offense, in violation of 18 U.S.C. §§ 2 and 924(c)(1) (count three).

Defendant was sentenced to 48 months on each of counts one and two, to run concurrently, and 60 months on count three, to run consecutively, for a total of 108 months, to be followed by five years of supervised release. Restitution in the amount of \$1,097 was also imposed jointly and severally with co-defendant's similar obligation.

Defendant appealed, raising nine grounds of error including the admission of DNA evidence, the exclusion of an alibi witness, and the denial of Defendant's motion to suppress certain evidence. The Court of Appeals for the Tenth Circuit affirmed Defendant's conviction on November 15, 1994. United States v. Davis, 40 F.3d 1069 (10th Cir. 1994). The United States Supreme Court denied Defendant's petition for writ of certiorari on March 20, 1995.

On January 26, 1998, Defendant proceeding *pro se* filed this § 2255 motion raising two issues: (1) sufficiency of the evidence to support his conviction under § 924(c)(1) under an aiding and abetting and conspiracy theory; and (2) the jury instructions were erroneous in light of the Supreme Court's decision in Bailey v. United States, 516 U.S. 137 (1995) (#96 at 4-5). The government responded that the motion was untimely because it was filed outside the one-year time limitation established by § 2255, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"). Defendant replied that the one year time limitation should not run from the date his

conviction became final, but from the later of the dates on which the Supreme Court decided Bailey and Muscarello v. United States, 118 S.Ct. 1911 (1998), both cases having to do with the definitions of “use” and “carrying” of firearms under § 924(c)(1).

ANALYSIS

The government has raised the issue that Defendant’s motion is time-barred because it was not filed until January 26, 1998, some nine months after the statute of limitations had elapsed. Prior to the enactment of the AEDPA on April 24, 1996, § 2255 contained no statute of limitations. The AEDPA amended 28 U.S.C. § 2255 by adding a time-limit provision. Specifically, 28 U.S.C. § 2255 now provides:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the fact supporting the claim or claims presented could have been discovered through the exercise of due diligence.

In United States v. Simmonds, 111 F.3d 737, 746 (10th Cir. 1997), the Tenth Circuit held that “prisoners whose convictions became final on or before April 24, 1996 must file their § 2255 motions before April 24, 1997.” In so doing the Tenth Circuit allowed these prisoners a grace period of one year after the AEDPA’s enactment within which to file their § 2255 motions.

Defendant's conviction and sentence were affirmed on appeal on November 15, 1994, and certiorari was denied on March 20, 1995. Therefore, Defendant's conviction became final on March 20, 1995. See Griffeth v. Kentucky, 479 U.S. 314, 321 n. 6 (1987). Pursuant to Simmonds, Defendant had until April 23, 1997 to file his motion under the limitations period set forth in § 2255(1). However, Defendant's § 2255 motion was not filed with the Court until January 26, 1998. The certificate of mailing indicates that Defendant mailed the § 2255 motion on January 20, 1998 (#96 at 7). Thus, Defendant's motion is clearly untimely if the statute of limitations is measured from the date his conviction became final.

The only evidence indicating that Defendant may have intended to file his § 2255 motion earlier is a letter from Defendant dated September 17, 1997 and received by the Clerk of the Court on September 22, 1997 (#95). In this letter Defendant advises of a change of address and also states:

I have filed a motion pursuant to 28 U.S.C. 2255 in this court. As of the date of this correspondence I have not received any information from the court as to the status of this motion. Thus, I ask this court to forward to me (at the above address). Any and all info regarding the disposition of cause action #93-CR-88-02B.

A thorough search of the record reveals no earlier § 2255 motion filed or sent to the Court by Defendant. Indeed, in his reply to the government's response raising the statute of limitations, Defendant does not claim that he filed the instant § 2255 motion or any other § 2255 motion before April 24, 1997. Accordingly, the Court finds that Defendant's § 2255 motion filed January 26, 1998 is outside the one-year statute of limitations if measured from the date his conviction became final.

Defendant argues that his § 2255 motion is not time-barred for two reasons. First, Defendant asserts that the limitations period is properly measured from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme

Court and made retroactively applicable to cases on collateral review.” 28 U.S.C. § 2255(3). Defendant claims he is asserting rights recognized in the Bailey and Muscarello decisions interpreting the “use or carry” prongs of § 924(c)(1); thus, he argues, the limitations period should be measured from June 8, 1998, when Muscarello was decided. Second, Defendant contends that under Rule 9, Rules Governing 2255 Proceedings, his motion is not a “delayed motion” because the government has not alleged it is prejudiced in its ability to respond.

Defendant’s second argument may be dispatched quickly. Rule 9(a) has historically provided a laches defense which the government may assert with respect to certain delayed post-conviction motions. This defense is entirely separate from the one-year limitations period enacted as part of the AEDPA in 1996. While the laches defense under Rule 9(a) requires the government to establish prejudice, no such showing is required to enforce the statute of limitations now contained in § 2255. Accordingly, Defendant’s reliance on Rule 9(a) is misplaced.

Defendant’s first argument — that the statute of limitations should be measured under § 2255(3) — requires that the right he asserts in his § 2255 motion be newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review no later than January 27, 1997, one year prior to the filing of his § 2255 motion. In Bailey, the Supreme Court narrowly interpreted “use” of a firearm for purposes of § 924(c) as requiring evidence that a defendant “actively employed,” rather than merely possessed, the firearm. This decision arguably recognized a new right for purposes of calculating the limitations period of § 2255(3); however, because Bailey was decided on December 6, 1995, the limitations period for motions raising Bailey claims expired under § 2255(3) on December 5, 1996, long before Defendant filed his § 2255 motion. Even measuring the limitations period from August 20, 1996, the date of the Tenth Circuit decision holding that Bailey

applies retroactively, United States v. Barnhardt, 93 F.3d 706, 708 (10th Cir. 1996), does not render timely Defendant's motion filed in January, 1998.

Defendant, however, makes the additional argument that the limitations period should run from the date of the Supreme Court's June 8, 1998 Muscarello decision. In that case, the Court addressed the question of whether § 924(c)(1)'s phrase "carries a firearm" is limited to the carrying of firearms on the person. The Court decided it was not so limited, but that it also applies to a person who "knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies." Muscarello, 118 S.Ct. 1911, 1913-14. Defendant argues that this decision, by finally defining the "carry element," initially recognized his right not to be convicted of carrying a firearm during and in relation to a crime of violence (#105 at 3). Defendant's argument is undercut by the fact that he filed his § 2255 motion over four months before Muscarello was decided; thus, the Muscarello decision could have had no bearing on Defendant's assertion of rights in his motion. In any event, however, contrary to Defendant's argument this decision did not recognize any new right of criminal defendants, but merely upheld the broad reading of the "carries" prong which had been unanimously adopted by the Federal Circuit Courts of Appeals. See id. at 1916. Accordingly, notwithstanding Defendant's creative attempts to avoid the application of the statute of limitations, the Court concludes that the limitations period is properly determined under § 2255(1) to have expired no later than April 24, 1997.

Therefore, because Defendant's § 2255 motion was not filed before the expiration of the statute of limitations, Defendant's motion must be dismissed as untimely pursuant to the authority of § 2255, as amended by the AEDPA.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (docket #96) is **dismissed with prejudice** as time-barred.

SO ORDERED THIS 30th day of July, 1998.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

DATE 7-31-98

CARNEAL ANTHONY PENN,)
)
 Petitioner,)
)
 vs.)
)
 RITA MAXWELL,)
)
 Respondent.)

Case No. 97-CV-151-K (J)

FILED

JUL 31 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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 30 day of July, 1998.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 7-31-98

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

CARNEAL ANTHONY PENN,)
)
 Petitioner,)
)
 vs.)
)
 RITA MAXWELL,)
)
 Respondent.)

No. 97-CV-151-K (J) /

F I L E D
JUL 31 1998

Phil Lombard, Clerk
U.S. DISTRICT COURT

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge entered on July 8, 1998, in this habeas corpus action brought pursuant to 28 U.S.C. § 2254. The Magistrate Judge recommends that the petition for a writ of habeas corpus be denied because this Court is precluded from considering Petitioner's claim by the procedural default doctrine. None of the parties has filed an objection to the Report.

Having reviewed the Report and the facts of this case, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed.

IT IS THEREFORE ORDERED that the Report and Recommendation of the Magistrate Judge (Docket #10) is **adopted and affirmed**. The petition for a writ of habeas corpus is **denied** as procedurally barred.

SO ORDERED THIS 30 day of July, 1998.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 7-31-98

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

FILED

JUL 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FLORA MAE MILLS,)
)
Petitioner,)
)
vs.)
)
JAMES SAFFLE,)
)
Respondent.)

Case No. 96-CV-919-K (J)

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 30 day of July, 1998.


 TERRY C. KERN, Chief Judge
 UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 7-31-98

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

FLORA MAE MILLS,)
)
Petitioner,)
)
vs.)
)
RON CHAMPION,)
)
Respondent.)

Case No. 96-C-919-K (D)

FILED

JUL 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #11) entered on June 23, 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, Petitioner filed her timely objection to the Report (#12).

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

Petitioner was convicted of First Degree Murder by a jury in Tulsa County District Court, Case No. CRF-86-4375. She received a sentence of life imprisonment. On direct appeal, the Oklahoma Court of Criminal Appeals affirmed the conviction, but remanded for a hearing on the issue of Petitioner's sanity at the time of sentencing. At the remand hearing, Petitioner was found to be insane and she was committed to Eastern State Hospital. After receiving treatment at Eastern

State Hospital, she regained her competency and was subsequently resentenced to life imprisonment. Thereafter, in an application for post-conviction relief filed in the state trial court, Petitioner, while represented by counsel, argued that her trial counsel provided ineffective assistance by failing to offer evidence for the defense of insanity despite having filed, prior to trial, a notice of an insanity defense. Petitioner further alleged that there was a doctor willing to testify that she was insane at the time of the commission of the crime. The trial court denied the application, concluding that Petitioner failed to overcome the first prong of the two-pronged test for ineffective assistance of counsel defined in Strickland v. Washington, 466 U.S. 668, 687 (1984). The Oklahoma Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief, stating that "[t]he trial court found that the decision made by trial counsel was to present the defense of self-defense, rather than a defense of insanity; that this was a tactical decision made by trial counsel and the trial court would not use twenty-twenty hindsight to review the decision. After a thorough consideration of the record before us, we find no disagreement with the Trial Court's findings and conclusions." See #6, Ex. E, Order of the Oklahoma Court of Criminal Appeals, dated December 19, 1995, at 3-4.

In the instant habeas corpus action, filed October 7, 1996, Petitioner, represented by counsel, presents the same ineffective assistance of counsel issue raised in her state application for post-conviction relief. In support of her claim, Petitioner states that her counsel's ineffective assistance is evidenced as follows:

Petitioner's counsel not using the insanity defense that was available at the time of trial; after trial, and in the sentencing phase, the insanity defense was raised and evidence presented for the first time, resulting in a finding that a new trial was required in regard to sentencing. However, the conviction has been upheld despite the fact that the Oklahoma Court of Criminal appeals did find that the sentence should be remanded back to the Trial Court for a jury trial on a question of sanity. The defense of insanity was well known to defense counsel at the time of trial on the

merits and was not presented at that time.

(#1 at 3-4). In his Report, the Magistrate Judge concluded that Petitioner was not deprived of her constitutional right to effective assistance of counsel and recommended that the petition for writ of habeas corpus be denied. Petitioner objects to the Magistrate Judge's conclusion on two bases: "1. Petitioner has established an ineffective assistance of counsel claim based upon the failure of trial counsel to raise the insanity defense; 2. The record supports a finding that the Petitioner was insane at the time of her jury trial and, therefore, could not have consented to a waiver of that defense."

(#12 at 1).

DISCUSSION

Pursuant to 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), this Court may not grant habeas corpus relief with respect to a claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

As discussed supra, Petitioner raised the instant claim of ineffective assistance of trial counsel in her application for post-conviction relief. The Oklahoma Court of Criminal Appeals considered the record and agreed with the trial court's conclusion that the record did not support Petitioner's claim of ineffective assistance of counsel. As a result, the state appellate court affirmed the trial court's denial of post-conviction relief. After reviewing the record provided by the parties in light of

Petitioner's objections to the Magistrate Judge's Report, the Court concludes that, for the reasons discussed below, Petitioner has not demonstrated that the writ of habeas corpus should issue under the standards of § 2254(d).

A. Petitioner fails to satisfy the Strickland ineffective assistance of counsel standard.

As explained by the Magistrate Judge in his Report, to establish ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). A petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 466 U.S. at 687-88. "The proper standard for measuring attorney performance is reasonably effective assistance." Gillette v. Tansy, 17 F.3d 308, 310-11 (10th Cir. 1994) (quoting Laycock v. New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989)). In doing so, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, at 690. There is a "strong presumption [however,] that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 695. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must

indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Gillette, 17 F.3d at 311.

To establish the second prong, the petitioner must show that this deficient performance prejudiced the defense, to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also Lockhart v. Fretwell, 113 S. Ct. 838, 842-44 (1993) (holding counsel's unprofessional errors must cause a trial to be "fundamentally unfair or unreliable"). There is no reason to address both components of the Strickland inquiry if the petitioner makes an insufficient showing on one. Strickland, 466 U.S. at 697.

The Court has reviewed the transcript from Petitioner's trial as well as the opinions issued by the state courts in Petitioner's direct appeal and post-conviction proceedings. The Court finds that, as stated by the Oklahoma Court of Criminal Appeals in its Order affirming the trial court's denial of post-conviction relief, it is clear defense counsel's decision to defend on the basis of self-defense was a tactical decision. Like the state court, this Court will not use twenty-twenty hindsight to review the decision made by trial counsel. Petitioner has failed to overcome the strong presumption that her trial counsel's conduct falls within the wide range of reasonable professional assistance as required to satisfy the first prong of Strickland. Because there is no reason to address both components of the Strickland inquiry if the petitioner makes an insufficient showing on one, Strickland, 466 U.S. at 697, the Court will not address the prejudice component of the Strickland test.

The Court finds that the state court's ruling on this issue is not contrary to, or does not involve an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d). Therefore, the Magistrate Judge's Report should be adopted and affirmed and Petitioner's application for writ of habeas corpus should be denied.

B. Petitioner has waived her claim that she was insane at the time of her jury trial and, therefore, could not have consented to a waiver of the insanity defense.

As to Petitioner's objection to the Report based on the argument that the record supports a finding that Petitioner was insane at the time of her jury trial and could not have consented to a waiver of that defense, the Court construes the objection as asserting that based on the record Petitioner was incompetent to stand trial. However, the Court finds that that issue was not properly before the Magistrate Judge. Petitioner's only claim before the Magistrate Judge was that trial counsel's failure to assert the insanity defense constituted ineffective assistance of counsel. Clearly, the question of an accused's present competency to stand trial is a separate matter from a defense of insanity, that is, the inability to distinguish right from wrong at the time of the offense. Competency is defined as "the present ability of a person arrested for or charged with a crime to understand the nature of the charges and proceedings brought against him, and is able to effectively and rationally assist in his defense." Miller v. State, 751 P.2d 733, 736-37 (Okla. Crim. App.1988) (quoting Okla. Stat. tit. 22, § 1175.1(1)); see also Frederick v. State, 811 P.2d 601, 603 (Okla. Crim. App.1991) (the determination of whether an accused is competent at the time the crime was committed has no application when measuring the validity of a guilty plea). As the issue was not

properly before the Court, the Magistrate Judge did not consider in his Report whether Petitioner's competency to stand trial impacted the analysis of trial counsel's performance.

As a result of her failure to present this issue to the Magistrate Judge prior to the issuance of the Report, Petitioner may not now object to the Report on that basis. See Marshall v. Chater, 75 F.3d 1421, 1426-27(10th Cir. 1996) (holding that issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived); see also Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co., 840 F.2d 985, 990-91 (1st Cir.1988) (holding that "an unsuccessful party is not entitled as of right to de novo review ... of an argument never seasonably raised before the magistrate"); Borden v. Secretary of Health & Human Servs., 836 F.2d 4, 6 (1st Cir.1987) (holding that issues raised for the first time in objections to magistrate's recommendation were waived); Greenhow v. Secretary of Health & Human Servs., 863 F.2d 633, 638-39 (9th Cir.1988) ("[A]llowing parties to litigate fully their case before the magistrate and, if unsuccessful, to change their strategy and present a different theory to the district court would frustrate the purpose of the Magistrates Act."), *overruled on other grounds by United States v. Hardesty*, 977 F.2d 1347 (9th Cir.1992).

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 (#11) is **adopted and affirmed.**
2. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **denied.**

SO ORDERED THIS 30 day of July, 1998.



JERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 7-31-98

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

In Re:)
)
R.E. HUTTON, INC.,) No. 98-C-99-K /
)
Debtor/Appellant,)

FILED
JUL 31 1998 *AP*

ORDER

Phil Lombardi, Clerk
U.S. District Court

Before the Court is the objection of the debtor/appellant to a Report and Recommendation of the United States Magistrate Judge. On May 27, 1998, Magistrate Judge McCarthy entered his Report and Recommendation, recommending that the appellee's motion to dismiss be granted, and debtor's appeal from the bankruptcy court be dismissed. The basis for the recommended dismissal was that appellant had never filed a designation of record or a statement of the issues to be raised as required by Bankruptcy Rule 8006. The Magistrate noted there was no dispute that, as of May 27, 1998, appellant had failed to comply with the Rule, despite the filing of the appeal in October, 1997.

The Magistrate Judge also noted that appellant's counsel had failed to appear at a "show cause" hearing before the Magistrate Judge regarding the issues raised by appellee's motion to dismiss. Most of the appellant's objection is concerned with explaining why counsel did not appear at the hearing, including assertions that appellee's counsel was contacted or at least attempts were made to contact her regarding a continuance, which appellee's counsel

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denies.

The Court need not delve into these mutual accusations and denials, because it is now July, 1998, and appellant has still not complied with Bankruptcy Rule 8006. Upon failure to so comply, it is within the district court's discretion to dismiss the appeal. Nielsen v. Price, 17 F.3d 1276, 1277 (10th Cir.1994). Appellant's other argument, that a motion for sanctions pending in the bankruptcy court served to toll the time for appeal, is without merit. Cf. White v. New Hampshire Dept. of Employment Sec., 455 U.S. 445 (1982). Under the present record, the Court sees no reason to depart from the Magistrate Judge's recommendation.

It is the Order of the Court that the Report and Recommendation of the Magistrate Judge (#8) is hereby adopted and approved. The appellant's objections (#9) are overruled. The motion of the appellee to dismiss (#2) is granted. The appeal, assigned case number 98-C-99-K in this Court, is hereby dismissed.

ORDERED this 30 day of July, 1998.



TERRY C. KEEN, Chief
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 7-31-98

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

KENNETH D. SANDERS,

)

)

Petitioner,

)

vs.

)

Case No. 97-CV-94-K

)

RON CHAMPION,

)

FILED

JUL 31 1998

Respondent.

)

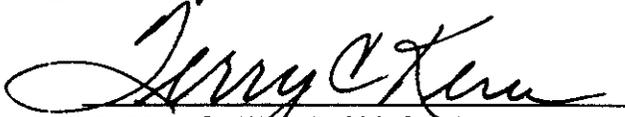
Phil Lombard, Clerk
U.S. DISTRICT COURT

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 30 day of July, 1998.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

KENNETH D. SANDERS,)
)
Petitioner,)
)
vs.)
)
RON CHAMPION,)
)
Respondent.)

Case No. 97-CV-94-K (J)

F I L E D

JUL 31 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #8) entered on June 15, 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 June 24, 1998, Petitioner filed his timely objection to the Report (#9).

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

On November 17, 1995, Petitioner was convicted of robbery with a dangerous weapon, after former conviction of a felony, in Tulsa County District Court, Case No. CRF-94-5143, and sentenced to 20 years imprisonment. On direct appeal, the Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction and sentence. However, one of the appellate court judges filed a separate opinion, concurring in part and dissenting in part. He noted that he concurred in the affirmance of

the judgment, but that he dissented with respect to the approval of the sentencing on the basis that testimony of the arresting police officer concerning three outstanding warrants for Petitioner could have affected the verdict and that the prosecutor's comments concerning parole could have impacted the jury's recommended sentence. The dissenting judge concluded that he would have modified Petitioner's sentence to ten years imprisonment. Petitioner did not apply for post-conviction relief in the state courts.

In the instant habeas corpus action, filed January 31, 1997, Petitioner raises the same issues raised on direct appeal. He claims that (1) "evidentiary harpoon by police detective regarding outstanding warrants for the defendant requires reversal," and (2) "the prosecutor's explicit introduction of parole considerations in the punishment stage requires reversal for a new sentencing hearing." In his Report, the Magistrate Judge concluded that Petitioner's claims lack merit and recommended that the petition for writ of habeas corpus be denied. Petitioner objects to the Magistrate Judge's conclusions concerning admission of an alleged "evidentiary harpoon" and improper remarks concerning parole made by the prosecutor during sentencing stage.

DISCUSSION

After carefully reviewing the record provided by the parties in this case, the Court agrees with the Magistrate Judge's conclusion that Petitioner's claims are without merit and the petition for writ of habeas corpus should be denied.

Pursuant to 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), this Court may not grant habeas corpus relief with respect to a claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

As discussed supra, Petitioner raised both of the instant claims in his direct appeal. The Oklahoma Court of Criminal Appeals considered Petitioner's claims and found them to be without merit. As a result, the state appellate court affirmed Petitioner's conviction and sentence. After reviewing the record provided by the parties and Petitioner's objection to the Magistrate Judge's Report, the Court concludes that, for the reasons discussed below, Petitioner has not demonstrated that the writ of habeas corpus should issue under the standards of § 2254(d).

A. Reference by witness to outstanding warrants did not render trial fundamentally unfair

Evidentiary rulings made by state courts can be reviewed by a federal habeas corpus court only if the petitioner demonstrates that the contested statements were so prejudicial that his trial was rendered fundamentally unfair in violation of the Due Process Clause. Nichols v. Sullivan, 867 F.2d 1250, 1253 (10th Cir. 1989) (citing Brinlee v. Crisp, 608 F.2d 839, 850 (10th Cir. 1979)). The Court finds that the testimony of Detective Cook concerning his discovery that the "vehicle had three outstanding warrants listed on it and that the driver of that vehicle wanted in connection with those warrants was a Kenneth Sanders" (#6 at 38) was not a wilful jab designed to prejudice Petitioner. In addition, nothing in the record supports Petitioner's allegation that the prosecutor intentionally elicited this testimony or that it was "rehearsed." The Court concludes that the isolated statement by Detective Cook did not render Petitioner's trial fundamentally unfair and that the disposition of this claim by the Oklahoma Court of Criminal Appeals was consistent with clearly established

Federal law as determined by the Supreme Court of the United States. As a result, the Court agrees with the Magistrate Judge's conclusion that habeas corpus relief should be denied as to this claim.

B. The Prosecutor's comments did not render Petitioner's trial fundamentally unfair

According to the Supreme Court, claims of prosecutorial misconduct should be analyzed by considering (1) whether the prosecutor's arguments manipulated or misstated the evidence, (2) whether the remarks implicated specific rights of the accused, (3) whether the defense invited the response, (4) the instructions given by the trial court, (5) the weight of the evidence against the petitioner, and (6) whether the defense was given the opportunity to rebut the remarks. Darden v. Wainright, 477 U.S. 168 (1986). Furthermore, the relevant question remains whether the comment complained of so infected the trial with unfairness as to make the resulting conviction a violation of due process. Id. at 181. Application of the relevant Darden factors to this case, where the prosecutor's comment inferring parole considerations occurred during the sentencing stage of the trial after the jury had returned a verdict of guilty, results in the conclusion that the comment complained of did not render Petitioner's trial fundamentally unfair. Clearly, the disposition of this claim by the Oklahoma Court of Criminal Appeals was consistent with clearly established Federal law as determined by the Supreme Court of the United States. As a result, the Court agrees with the Magistrate Judge's conclusion that habeas corpus relief should be denied as to this claim.

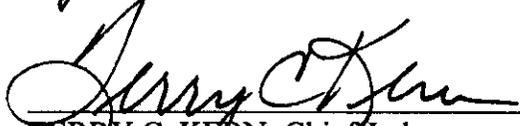
CONCLUSION

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 (#8) is **adopted and affirmed.**
2. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **denied.**

SO ORDERED THIS 30 day of July, 1998.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

violated the due process clause of the fourteenth amendment to the United States Constitution. Respondent argues that Petitioner's action is barred by the statute of limitations and/or that Petitioner's claim is barred by the new standards of review made applicable to habeas actions by the Antiterrorism and Effective Death Penalty Act of 1996. See 28 U.S.C. § 2254(d). Based on a review of the entire record and the parties' briefs, the undersigned finds Respondent's statute of limitations argument to be without merit. However, the undersigned does find that Petitioner's arguments are without merit and that Petitioner's claims are barred by § 2254(d). Therefore, the undersigned recommends that Petitioner's Petition for a writ of habeas corpus be **DENIED**.

I. STATUE OF LIMITATIONS

Habeas corpus actions requiring the review of state court judgments and sentences are governed by 28 U.S.C. § 2254. Section 2254 was amended by Title I of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). The AEDPA's amendments to § 2254 became effective on April 24, 1996. Petitioner filed his Petition for Writ of Habeas Corpus 8½ months later on January 8, 1997. The undersigned is required, therefore, to apply 28 U.S.C. § 2254, as amended by the AEDPA, to this case. See Lindh v. Murphy, 117 S. Ct. 2059, 2068 (1997); White v. Scott, No. 97-6258, 1998 WL 165162, at *1 n.1 (10th Cir. Apr. 9, 1998); Neelley v. Nagle, 138 F.3d 917, 921 (11th Cir. 1998); and O'Brien v. DuBois, — F.3d —, No. 97-1979, 1998 WL 257206, at *3 (1st Cir. May 26, 1998).

Respondent's statute of limitations argument is precluded by the Tenth Circuit's holdings in Hoggro v. Boone, No. 97-6383, 1998 WL 340005, at *2 (10th Cir. June 24, 1998) and United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997).

The Tenth Circuit explained as follows in Hoggro:

In 1996, Congress amended the long-standing prior practice in habeas corpus litigation that gave a prisoner virtually unlimited amounts of time to file a habeas petition in federal court. In the Antiterrorism and Effective Death Penalty Act (AEDPA), Congress established a one-year period of limitations for habeas petitions. See 28 U.S.C.A. § 2244(d)(1). This limitation period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final. See id. The implication of this language could mean that a prisoner whose conviction became final more than a year before the AEDPA went into effect would have no avenue to bring a habeas petition because his petition would always be out of time under the new language. However, recognizing that such a result raises retroactivity problems, the circuits have held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996.

Hoggro, 1998 WL 340005, at *2 (citations and footnote omitted).^{1/}

^{1/} The new habeas statute of limitations provides as follows:

- (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(continued...)

Petitioner's conviction became final sometime in late 1995, which is before April 24, 1996. Consequently, Section 2244(d)'s statute of limitations did not begin to run until April 24, 1996, giving Petitioner until April 24, 1997 to file a habeas action. Petitioner filed this habeas action on January 8, 1997, more than four months prior to the expiration of § 2244(d)'s statute of limitation. This action is, therefore, timely.

II. STANDARDS OF REVIEW IN HABEAS ACTIONS^{2/}

A. WHAT STANDARD APPLIES IN THIS CASE?

Most significantly for purposes of this case, the AEDPA establishes a more deferential standard of review for state court decisions. Prior to the AEDPA's passage, federal courts reviewing habeas petitions were not required to pay any special deference to the underlying state court decision. See, e.g., Brown v. Allen, 344 U.S.

^{1/} (...continued)

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

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

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

28 U.S.C.A. § 2244(d).

^{2/} Referring to standards of review in a habeas action filed in district court is somewhat of a misnomer. A habeas petition is considered to be an original proceeding, not an appeal of a state court judgment. See Fay v. Noia, 372 U.S. 391, 423-24 (1963). Nevertheless, 28 U.S.C. § 2254(d) serves the same purpose as traditional standards of review. The undersigned, as did the First Circuit, will, therefore, exercise literary license and refer to the standards articulated in § 2254(d) as standards of review. See O'Brien v. DuBois, — F.3d —, No. 97-1979, 1998 WL 257206, at *1 n.1 (1st Cir. May 26, 1998).

443, 458 (1953) (remarking that the state court decision was nothing other than "the conclusion of a court of last resort of another jurisdiction"). In sharp contrast, the AEDPA's amendments to § 2254 elevate the role that a state court's decision is to play in a habeas proceeding. The AEDPA's amendments specifically direct courts reviewing habeas petitions to make the state court decision the focal point of review. Habeas relief can now only be granted if the state court decision deviates from the standard articulated in 28 U.S.C. § 2254(d). See DuBois, 1998 WL 257206, at *3.

Section 2254(d) provides as follows:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). This new standard of review has recently been interpreted by four courts of appeal. See Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996); Gomez v. Acevedo, 106 F.3d 192 (7th Cir. 1997); Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996) (*en banc*) (Easterbrook, J.); Neelley v. Nagle, 138 F.3d 917 (11th Cir. 1998); O'Brien v. DuBois, — F.3d —, No. 97-1979, 1998 WL 257206 (1st Cir. May 26, 1998).

The Seventh Circuit's decision in Lindh was reversed by the Supreme Court in Lindh v. Murphy, 117 S. Ct. 2059 (1997). The Fifth Circuit's decision in Drinkard was indirectly overruled by the Supreme Court's decision in Lindh. See Williams v. Cain, 125 F.3d 269, 273 (5th Cir. 1997). The Seventh Circuit's decision in Gomez was vacated by the Supreme Court and remanded for consideration in light of the Supreme Court's Lindh decision. See Gomez v. DeTella, 118 S. Ct. 37 (1997). The Drinkard, Gomez and Lindh habeas actions had been filed before the AEDPA became effective. Nevertheless, the courts in Drinkard, Gomez and Lindh applied § 2254, as amended by the AEDPA, determining that the AEDPA's amendments could be applied retroactively. The Supreme Court in Lindh disagreed, holding that Congress did not intend for the amended version of § 2254 to apply to cases pending when the AEDPA became effective. The Supreme Court's overruling of Drinkard, Gomez and Lindh does not, therefore, affect the holdings in those cases regarding the meaning of the new standard of review articulated in amended § 2254(d). Drinkard, Gomez and Lindh were overruled because the courts in those cases should not have been applying the new standard in the first instance, not because the courts' interpretation of the new standard was erroneous. The undersigned will, therefore, review the holdings in Drinkard, Gomez and Lindh as persuasive authority regarding the meaning of the new standard articulated in amended § 2254(d).

In White v. Scott, No. 97-6258, 1998 WL 165162, at *2 (10th Cir. Apr. 9, 1998), the Tenth Circuit quoted from the Fifth Circuit's Drinkard opinion with approval. The Tenth Circuit has, therefore, at least impliedly and at this point in time, aligned

itself with the Fifth Circuit. To date, however, the Tenth Circuit has not conducted its own thorough analysis of amended § 2254(d).

The first clause of subsection (d)(1) of § 2254 states that a writ of habeas corpus shall not be granted unless the decision of the state court was "contrary to . . . clearly established Federal law" This clause dictates a *de novo* standard of review for pure questions of law.^{3/} The second clause of subsection (d)(1) of § 2254 states that a writ of habeas corpus shall not be granted unless the decision of the state court "involved an unreasonable application of . . . clearly established Federal law" This clause dictates an "unreasonableness" standard of review for mixed questions of law and fact, which are nothing more than questions of how law should be applied to the facts of the case.^{4/} Subsection (d)(2) of § 2254 states that a writ of habeas corpus shall not be granted unless the decision of the state court is "based on an unreasonable determination of the facts in light of the evidence presented" This subsection dictates that the standard of review for factual findings by a state court is also "unreasonableness." See Evan Tsen Lee, Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual, 51 Vand. L. Rev. 103, 108 (1998)

^{3/} The Eleventh Circuit identified the following two situations as examples of when a state court decision would be "contrary to" clearly established federal law: (1) "when a state court faces a set of facts that is essentially the same as those the Supreme Court has faced earlier, but given these facts the state court reaches a different legal conclusion than that of the Supreme Court"; and (2) where "a state court, in contravention of Supreme Court case law, fails to apply the correct legal principles to decide a case." Neelley, 138 F.3d at 923-24.

^{4/} But see Drinkard, 97 F.3d at 778-779 (Garza, J., dissenting) (finding that a *de novo* standard of review should be applied in "mixed questions of law and fact" or "application of law to fact" cases). Judge Garza was unwilling to depart from an unbroken line of Supreme Court cases on this point, absent language from Congress that explicitly demanded such a departure. Judge Garza felt that the language in § 2254(d)(1) was not explicit enough.

(for a thorough discussion of amended § 2254(d) and the standards of review embodied therein); Drinkard, 97 F.3d at 767-68; Gomez, 106 F.3d at 198-99; Lindh, 96 F.3d at 870; and Neelley, 138 F.3d at 924. But see Larry Yackle, A Primer on the New Habeas Corpus Statute, 44 Buff. L. Rev. 381, 332 n.192 (1996) (disagreeing with the standards of review outlined above).

The "reasonableness" standard of review for state factual determinations articulated in amended § 2254(d)(2) is hard to square with 28 U.S.C. § 2254(e)(1). Section 2254(e)(1) states that "a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." The Court need not, however, decide how sections 2254(d)(2) and 2254(e)(1) are to be harmonized because Petitioner is not attacking a specific factual finding by the state court. Petitioner is also not arguing that the Oklahoma Court of Criminal Appeals' (OCCA) decision was contrary to clearly established federal law. That is, Petitioner is not arguing that the OCCA applied the wrong legal rule to evaluate his double jeopardy and sufficiency of the evidence claims. Rather, Petitioner is arguing that the OCCA's application of the correct legal standards to the facts of his case was unreasonable.

Section 2254(d) makes reference to an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States." What § 2254(d) fails to make clear, however, is the time frame by which the federal law must be clearly established. That is, must the federal law have been clearly established at the time of the state trial, at the time of the state direct appeal, or at

the time a habeas petition is filed.^{5/} Again, the Court need not decide this issue because the federal law regarding double jeopardy and the federal law regarding the constitutional sufficiency of evidence to support conviction of a crime were clearly established years before Petitioner's 1992 trial. See Blockburger v. United States, 284 U.S. 299, 304 (1932); and Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975) (defining double jeopardy standards). See also In re Winship, 397 U.S. 358 (1970); and Jackson v. Virginia, 443 U.S. 307 (1979) (defining what evidence is required to support a conviction).

^{5/} This question will more than likely be answered by reference to the Supreme Court's decision in Teague v. Lane, 489 U.S. 288 (1989) and its progeny. Both Teague and § 2254(d) are designed to ensure that state judgments are not affected by legal rules established or materially expanded after a conviction has become final. See Neelley, 138 F.3d at 922-23; and DuBois, 1998 WL 257206, at *4 n.3.

B. WHEN IS THE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW "UNREASONABLE?"^{6/}

To be an "unreasonable" application of clearly established federal law must mean more than that this Court simply disagrees with the state court decision and would have reached a different conclusion in the first instance. Otherwise, review for unreasonableness would be exactly like *de novo* review.

The use of the word 'unreasonable' in formulating this restrictive standard of review implicitly denotes that federal courts must respect all reasonable decisions of state courts. Thus, given the statutory language, and in the light of legislative history that unequivocally establishes that Congress meant to enact deferential standards, we hold that an application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.

Drinkard, 97 F.3d at 769 (emphasis added). See also, Neelley, 138 F.3d at 924 (adopting the Drinkard definition of "unreasonable").

^{6/} In DuBois, the First Circuit has taken a slightly different approach than the approach described in Drinkard, Gomez and Lindh. The First Circuit applies the "contrary to" language in clause one of § 2254(d)(1) only when a clearly established Supreme Court rule exists. If a clearly established Supreme Court rule does not exist, then the First Circuit asks whether the state court's use of, or failure to use, existing law in deciding petitioner's claim involved an "unreasonable application" of Supreme Court precedent. Thus, the First Circuit would never ask whether there has been an unreasonable application of clearly established federal law. DuBois, 1998 WL at *7.

The First Circuit's decision in DuBois is the most recent pronouncement regarding the interpretation of § 2254(d), having been decided less than two months ago. No other court has yet to analyze or adopt the DuBois test. Again, given the Tenth Circuit's citation of Drinkard with approval in White, the undersigned feels compelled at this embryonic stage of the law to follow the Tenth Circuit's lead in White and apply the Drinkard test.

Drinkard's formulation of the "unreasonableness" standard in § 2254(d) has been criticized as confusing "the reasonableness of judges with the reasonableness of their individual decisions. [The Drinkard] formulation overlooks the fact that reasonable judges sometimes make unreasonable decisions." Evan Tsen Lee, Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual, 51 Vand. L. Rev. 103, 116 (1998) (crafting several other arguments against the Drinkard formulation). Mr. Lee argues that the proper test "is not whether any reasonable jurist could have agreed with the state court decision, or whether reasonable judges would debate the point. [According to Mr. Lee, t]he proper test is whether the decision is the product of due diligence in the decisional process. If the mistake is one that would not ordinarily be made by a judge exercising due diligence, then it is unreasonable." Id. at 117. In reality, Mr. Lee's test sounds very much like a legal malpractice test for state court judges. Again, however, the Court need not decide this issue. The emphasized portion of the above quote from Drinkard was cited with approval by the Tenth Circuit in White v. Scott, No. 97-6528, 1998 WL 165162, at * 2 (10th Cir. April 9, 1998). Absent any other authority from the Tenth Circuit, the undersigned will apply the definition of "unreasonable" quoted from Drinkard by the Tenth Circuit in White.

The Seventh Circuit's language in Lindh also provides some guidance in evaluating when the application of federal law to a particular set of facts may be deemed unreasonable.

None of this answers the question when a departure is so great as to be 'unreasonable,' for that question lacks an abstract answer, just as courts have been unable to give

precise content to phrases such as 'abuse of discretion.' Application of [the reasonable reliance on a search warrant exception to the exclusionary rule] therefore has required careful inquiry one case at a time, and we do not see how application of § 2254(d)(1) can be much different. For current purposes it is enough to say that when the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored. By posing the question whether the state court's treatment was 'unreasonable,' § 2254(d)(1) requires federal courts to take into account the care with which the state court considered the subject.

Questions of degree -- like questions about the proper use of 'discretion' -- lack answers to which the labels 'right' and 'wrong' may be attached. When the subject is painted in shades of grey, rather than in contrasting colors, a responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment. Think of the Speedy Trial Clause of the Sixth Amendment, which after Barker v. Wingo, 407 U.S. 514 (1972), does not prescribe a rule for 'how long is too long' but rather establishes a list of factors to consider. The Supreme Court of the United States sets the bounds of what is 'reasonable'; a state decision within those limits must be respected -- not because it is right, or because federal courts must abandon their independent decisionmaking, but because the grave remedy of upsetting a judgment entered by another judicial system after full litigation is reserved for grave occasions. That is the principal change effected by § 2254(d)(1).

Lindh, 96 F.3d at 871.

III. PETITIONER'S DOUBLE JEOPARDY CLAIM

The double jeopardy clause of the fifth amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy." The double jeopardy clause provides a criminal defendant with three protections -- it protects a defendant from being prosecuted a second time for the same offense after an acquittal; it protects a defendant from being prosecuted a second time for the same offense after a conviction; and it protects against multiple punishments for the same offense. Ohio v. Johnson, 467 U.S. 493, 497-98 (1984). There is no successive prosecution problem in this case. Rather, Petitioner argues that he has been subjected to multiple punishments for the same offense.

Multiplicity of punishment occurs only when more than one count of an indictment covers the same criminal behavior. To support a multiple punishment double jeopardy claim, a defendant must show that two offenses are charged, which in law and in fact are the same. In multiple punishment situations, the double jeopardy clause does no more than prevent the sentencing court from prescribing a punishment greater than what the legislature intended. It is presumed that a legislature does not intend to impose two punishments for two offenses which are in fact and in law the same, regardless of what labels are placed on the offenses. Missouri v. Hunter, 459 U.S. 359, 366 (1983); United States v. Richardson, 86 F.3d 1537, 1551 (10th Cir. 1996).

A state may punish a single criminal transaction under separate statutory provisions so long as conviction under each statutory provision requires proof of a fact

not required for conviction under the other. Blockburger v. United States, 284 U.S. 299, 304 (1932); United States v. Davis, 793 F.2d 246, 248 (10th Cir. 1986). "The double jeopardy test does not focus on the acts charged in the indictment or the evidence at trial, but rather on the elements of the crime." Davis, 793 F.2d at 248.^{7/} So long as each statutory provision "requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975).

The Oklahoma Court of Criminal Appeals has defined the elements of both the possession and the conspiracy offenses.

The elements necessary to convict a person of the crime of Unlawful Possession of Marijuana with Intent to Distribute are: Knowingly and intentionally; possession; of the controlled dangerous substance of marijuana; with an intent to distribute the marijuana. The elements necessary to convict a person of the crime of Conspiracy to Commit Unlawful Delivery of Marijuana are: An agreement by two or more persons; to commit unlawful delivery of marijuana; the defendant was a party to the agreement at the time it was made; an overt act by one or more of the parties performed subsequent to the formation of the agreement.

Blevins v. State of Oklahoma, No. F-93-310, p. 4 (Okla. Crim. App. Aug. 30, 1995), attached as Exhibit C to Doc. No. 5, Respondent's Response to the Petition for Writ of Habeas Corpus. The undersigned finds that the Court is bound by the Oklahoma

^{7/} The Tenth Circuit has consistently refused to substitute either the "same transaction" test or the "totality of the circumstances" test for the Blockburger test announced by the Supreme Court in 1932. See United States v. Genser, 710 F.2d 1426, 1429 n.3 (10th Cir. 1983); and United States v. Lane, 883 F.2d 1484, 1493 (10th Cir. 1989).

Court of Criminal Appeals' definition of both the possession and conspiracy offenses. See Mansfield v. Champion, 992 F.2d 1098, 1100 (10th Cir. 1993) (holding that federal courts will defer to a state court's interpretation of relevant statutory provisions).

The possession offense requires possession of marijuana and an intent to distribute that marijuana. The conspiracy offense requires none of these elements. The conspiracy offense requires an agreement to deliver marijuana. The possession offense does not have an agreement element. Both the possession and the conspiracy offenses require proof of an element which is not required by the other. The Blockburger test is, therefore, satisfied and punishment for both offenses does not violate the double jeopardy clause of the fifth amendment. This is precisely what the Oklahoma Court of Criminal Appeals held on Petitioner's direct appeal. Applying the standards discussed in Part I, *supra*, the undersigned finds that the OCCA's decision is not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. Petitioner's double jeopardy argument should, therefore, be rejected as a ground for habeas relief in this case.

IV. PETITIONER'S SUFFICIENCY OF THE EVIDENCE CLAIM

Petitioner claims that the evidence used to convict him of conspiracy to commit unlawful delivery of marijuana was not sufficient. The Supreme Court has held that a federal court may grant habeas relief on insufficiency of the evidence claims only if its found that upon the record evidence adduced at the trial, viewed in the light most favorable to the prosecution, no rational trier of fact could have found proof of the necessary elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319-326 (1979). This is true even if the evidence might support conflicting reasonable inferences. Under Jackson, "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Jackson, 443 U.S. at 326. See also Stewart v. Coalter, 48 F.3d 610, 613-14 (1st Cir. 1995) (for a good discussion of the history and future of the Jackson standard); and United States v. Woodley, 136 F.3d 1399, 1405 (10th Cir. 1998) (indicating that the Jackson standard is the standard to be applied to insufficiency of the evidence claims).

Jackson's "no rational trier of fact" standard is deferential to the factfinder. The Jackson standard does not, however, accord any deference whatsoever to state appellate courts applying the standard to the factual record before them. "In other words, a federal district court reviewing a sufficiency of the evidence claim on habeas repeats the same constitutional exercise that a state appellate court must undertake. Jackson thus applied a *de novo* standard of review for habeas sufficiency of the

evidence claims, as six justices of the Supreme Court explicitly recognized in a recent leading habeas case. See Wright v. West, 505 U.S. 277, 290 (1992) (opinion of Thomas, J.); id. at 303 (O'Connor, J., concurring in judgment)." Gomez, 106 F.3d at 198.

As discussed above, the AEDPA's amendments to 28 U.S.C. § 2254 have dramatically changed the applicable standards of review in habeas cases. Now, the Court must ask if the state court applied the Jackson standard and if it did, whether the state court's application of Jackson to the facts of record was reasonable. See 28 U.S.C. § 2254(d)(1). Federal review of insufficiency of evidence claims "now turns on whether the state court provided fair process and engaged in reasoned, good-faith decisionmaking when applying Jackson's 'no rational trier of fact' test." Gomez, 106 F.3d at 199. A "responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the [state court] judgment." Id. (quoting from Lindh, 96 F.3d at 871).

The Oklahoma Court of Criminal Appeals examined the elements of the conspiracy offense and for each element, the OCCA discussed the evidence offered at trial to support each element. See Exhibit C, pp. 5-6, to Doc. No. 5, Respondent's Response to the Petition for Writ of Habeas Corpus. The OCCA provided Petitioner with a responsible, thoughtful answer reached after a full review of the record and after a full opportunity to litigate the insufficiency of the evidence issue. The OCCA's decision is neither contrary to nor an unreasonable application of the Jackson standard.

Petitioner's insufficiency of the evidence argument should, therefore, be rejected as a ground for habeas relief in this case.^{8/}

RECOMMENDATION

The undersigned finds Respondent's statute of limitations argument to be without merit. The undersigned also finds that Petitioner's arguments are without merit and that Petitioner's is not entitled to habeas relief under 28 U.S.C. § 2254(d). Therefore, the undersigned recommends that Petitioner's Petition for a writ of habeas corpus be DENIED.

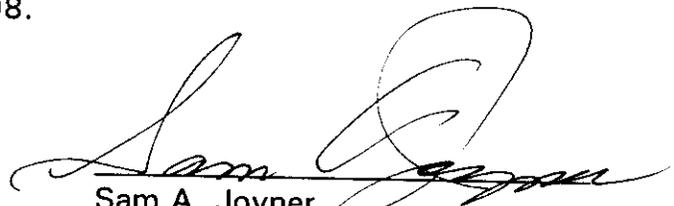
OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1), Rule 8(b) of the Rules Governing Section 2254 Cases, and Fed. R. Civ. P. 72(b). The failure to file written

^{8/} The undersigned has also conducted his own independent review of the record and, applying the Jackson standard, finds that the evidence of record is sufficient to support a conviction on the conspiracy offense. That is, a rational trier of fact, presented with the evidentiary record before the Court could find all the elements of the conspiracy offense beyond a reasonable doubt.

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

Dated this 30 day of July 1998.


Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 31 Day of July, 1998.

J. Schwelke

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

FILED

JUL 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FREDERICK R. BRANDT,)
)
Plaintiff,)
)
vs.)
)
EZ GO FOODS, INC., et al.,)
)
Defendants.)

Case No. 98-CV-498-BU

ENTERED ON DOCKET
DATE JUL 31 1998

ORDER

This matter comes before the Court upon the Motion of Defendant, Joseph F. Gordon, Inc., to Stay Proceedings (Docket Entry #3). Plaintiff, Frederick R. Brandt, has responded to the motion and does not object to the stay. Upon due consideration, the Court declines to stay this action and therefore **DENIES** the motion as presented. Instead, the Court hereby **ORDERS** the Clerk to administratively close this action in his records pending resolution of the state appellate proceedings involving the parties in this case.

The parties are **DIRECTED** to notify the Court when the state appellate proceedings have been resolved so that the Court may reopen this matter, if necessary, to obtain a final determination of this litigation.

ENTERED this 30th day of July, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN MUMEY, M.D.,)
)
 Plaintiff,)
)
 vs.)
)
 NORTHWESTERN PACIFIC INDEMNITY)
 COMPANY, a foreign insurance)
 company,)
)
 Defendant.)

Case No. 98-CV-182-BU ✓

ENTERED ON DOCKET

DATE JUL 30 1998

ORDER

On July 24, 1998, Plaintiff, John Mumey, M.D., filed a pleading entitled Dismissal Without Prejudice. The Court construes the pleading as a motion to dismiss without prejudice pursuant to Rule 41(b), Fed. R. Civ. P. Upon due consideration, the Court finds that the motion should be granted.

Accordingly, Plaintiff's Dismissal Without Prejudice which the Court construes as a motion to dismiss without prejudice pursuant to Rule 41(b), Fed. R. Civ. P., is GRANTED. The above-entitled action is DISMISSED WITHOUT PREJUDICE.

ENTERED this 29th day of July, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

9

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

FILED

JUL 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LAUREL MARKEL, an individual,)
)
Plaintiff,)
)
vs.)
)
OKEY RUSSELL NELSON, an)
individual, MADISON EXPRESS,)
INC., an Indiana Corporation,)
and NORTHLAND INSURANCE)
COMPANY, a Minnesota)
Corporation,)
)
Defendants.)

Case No. 97-CV-1057-BU ✓

ENTERED ON DOCKET
DATE JUL 30 1998

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 29th day of July, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

DATE 7-30-98

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

FILED

JUL 29 1998

Thomas Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT PAT LAPORTE,

Plaintiff,

vs.

Case No. 97CV609 B (J) /

AIG LIFE INSURANCE COMPANY, a
Delaware corporation,

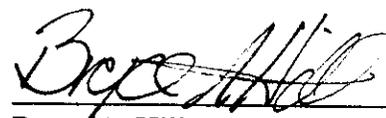
Defendant.

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to FED.R.CIV.P. 41, the parties, and each of them, by and through their respective counsel of record, herewith stipulate and agree to the dismissal with prejudice of said cause, including all complaints, counterclaims, cross complaints and causes of action of any type by any party against any or all of the other parties. Each party shall bear his, its, her or their own costs, expenses, and attorney fees without assessment against any other party.

Executed the respective dates shown adjacent to each signature.

Date: 7-13-98



Bryce A. Hill,
Attorney for Plaintiff

Date: 7/21/98



John H. Tucker
Ann E. Allison
RHODES, HIERONYMUS, JONES,
TUCKER & GABLE
Attorneys for Defendant

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

FILED

JUL 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TENA LEE TROTTER,)
)
Plaintiff,)
)
vs.)
)
PUBLIC SERVICE COMPANY OF)
OKLAHOMA,)
)
Defendant.)

Case No. 97-CV-582-K(J)

ENTERED ON DOCKET

DATE 7-30-98

JOINT STIPULATION TO DISMISS WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a dismissal with prejudice of Plaintiff Tena L. Trotter's causes of action in this case

against Defendant Public Service Company of Oklahoma, *and each party to have bear its own fees and costs*

DATED this 29 day of July, 1998.

FRASIER, FRASIER & HICKMAN

By: [Signature]
Steven R. Hickman
J.L. Franks
1717 SW Blvd., Suite 100
P. O. Box 799
Tulsa, Oklahoma 74101-0799
(918) 584-4724
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Attorneys for Plaintiff

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

By: [Signature]
Charles S. Plumb
Kristen L. Brightmire
320 South Boston, Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211
(918) 591-5360 (FAX)
Attorneys for Defendant

ENTERED ON DOCKET
DATE 7-30-98

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
FILED
JUL 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT PAT LAPORTE,

Plaintiff,

vs.

AIG LIFE INSURANCE COMPANY, a
Delaware corporation,

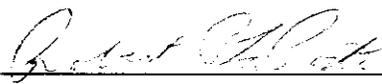
Defendant.

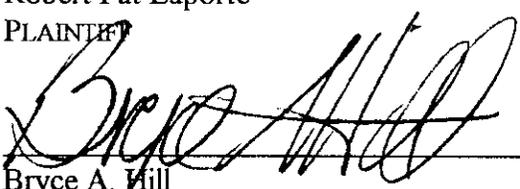
Case No. 97CV609 B (J) /

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Robert Pat Laporte, and hereby dismisses the above captioned case with prejudice as to Defendant, AIG Life Insurance Company, a Delaware Corporation.

Dated this 20 day of July, 1998.



Robert Pat Laporte
PLAINTIFF


Bryce A. Hill
ATTORNEY FOR PLAINTIFF

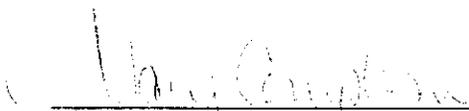
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Washington
STATE OF ~~OKLAHOMA~~)
) ss
COUNTY OF ~~TULSA~~)
Wixatom

Before me, the undersigned, a Notary Public, in and for said County and State, on this 20th day of July, 1998, personally appeared Robert Pat Laporte, Plaintiff, to me known to be the persons named herein and whose names are subscribed to the foregoing Release and Settlement Agreement, and acknowledged that they executed the same as their free voluntary act and deed.

Given under my hand and seal of office this day and year last above written.



NOTARY PUBLIC

[SEAL]

My Commission Expires:

5 30 2000

DATE 7-30-98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DAVID A. BASS,)
 SSN: 566-73-9238,)
)
 PLAINTIFF,)
)
 vs.)
)
 KENNETH S. APFEL,)
 Commissioner of the Social)
 Security Administration,¹)
)
 DEFENDANT.)

JUL 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE No. 97-CV-341-M

ORDER

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

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by

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

² Plaintiff's March 17, 1994 (Protective Filing Date February 23, 1994) application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held July 10, 1995. By decision dated December 15, 1995, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on February 12, 1997. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

B

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

Plaintiff was born August 21, 1953 and has an eleventh grade education. [R. 26-27, 43]. He last worked September 14, 1992 when he was injured while on the job and claims to have been unable to work since then due to pain and inability to lift with the right arm and shoulder due to that injury. [R. 29-31].

The ALJ determined that Plaintiff has an impairment consisting of "severe status post acromioclavicular injury with surgery and allegations of chronic pain" and that he can not return to his past relevant work (PRW) as a construction worker. He concluded that Plaintiff has the residual functional capacity (RFC) to perform the full range of light work. [R. 18]. The case was thus decided at step five of the five-step

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

Plaintiff asserts that the ALJ's RFC determination is not supported by substantial evidence. [Plf's Brief, p. 2]. Plaintiff also challenges the ALJ's use of the Grid Regulations and the propriety of his hypothetical questions to the Vocational Expert (VE). The Court finds that, based upon the medical evidence in the record as further discussed below, the RFC determination can not be said to have been based upon substantial evidence. Because the case must be remanded for further consideration, the outcome of which may affect the determination of Plaintiff's vocational abilities, the remaining allegations of error are not addressed here.

There is no dispute that Plaintiff suffered an acromioclavicular dislocation of the right shoulder in September 1992 and that he underwent surgery for that injury in November 1992. [R. 124-134]. Included in the evidence before the ALJ when he determined Plaintiff's RFC, were records from Plaintiff's 1992 surgery and post-surgical treatment through May 13, 1995. Jack B. Howard, M.D., Plaintiff's treating physician, had released Plaintiff to "return to his regular work duties" on September 28, 1993.³ [R. 134]. An office note by Dr. Howard, dated April 24, 1995, reported that Plaintiff had "on-going A/C joint changes and a lot of problems carrying out day to day activity." [R. 140]. He placed Plaintiff on a home exercise program in an effort

³ The Court notes that Dr. Howard had previously recommended, on May 28, 1993, that Plaintiff be "retrained into a more sedentary type of vocation, one in which use of the arm above the plane of the shoulder on a repetitive basis and lifting to this level should not be accomplished." [R. 134].

to strengthen and improve his day to day function. *Id.* On May 13, 1995, Plaintiff was treated at the Valley View Regional Hospital emergency room in Ada, Oklahoma for pain and "popping" with cramping and decreased range of motion in his right shoulder. [R. 141]. He was given an injection and told to continue his regular daily activity and to keep his office appointments. *Id.*

Based upon this evidence, the ALJ stated:

The claimant did not seek continued medical treatment until sometime after filing his application for disability, and in fact was not found disabled when seen in May of 1995 by his doctor but was merely given physical exercises to perform and was not sent back for physical therapy. [R. 17].

The ALJ's assessment of Plaintiff's RFC was based upon the medical evidence he had before him, which did not include any treatment records after May 1995.

A May 14, 1996 note by Philip G. Hopp, M.D. indicates that Plaintiff was first seen by Dr. Hopp in October 1995 and underwent conservative treatment in the form of steroid injections, medication and exercise. [R. 154]. This treatment gave "temporary relief, at best" and an x-ray revealed some impingement of the lateral end of the clavicle to the acromion which "appears to be the area of his ongoing discomfort and soreness." *Id.*

Dr. Hopp stated on May 14, 1996:

The patient has been advised that further resection of an arbitrary amount of the lateral end of the clavicle is suggested. This resection would be on the order of, perhaps, four or five millimeters and he has been advised that there is certainly no guarantee that this will improve his comfort; however, there is the possibility that by further resection, there may not be the same degree of

impingement of the boney structures, and therefore, pain relief might be forthcoming and use normalized. Typically, with the resected lateral end of the clavicle, people maintain good comfort levels and excellent functional capabilities, and therefore, we will try for this end result.

[R. 156]. Dr. Hopp's postoperative diagnosis was "Pain, right acromio-clavicular joint area of shoulder" and "Post Traumatic Arthritis AC [joint]." [R. 162].

That medical evidence was submitted to the Appeals Council by Plaintiff on September 23, 1996. [R. 3]. The Appeals Council considered the new evidence but concluded, on February 12, 1997, that the additional evidence does not provide "a basis for changing the [ALJ's] decision." [R. 4].

Social Security regulations specify that:

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

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

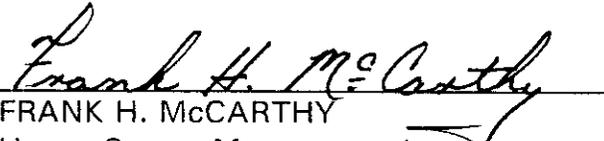
pursuant to 20 C.F.R. § 404.970(b) becomes part of the administrative record to be considered by the court when evaluating the Commissioner's decision for substantial evidence. *O'Dell*, 44 F.3d at 859. The Court must, therefore, include the medical records submitted to the Appeals Council in its review of the ALJ's decision. Pursuant to *O'Dell* this court is required to review the new treatment records and to determine whether, considering even the new evidence, the ALJ's decision is supported by substantial evidence.

This Court has previously voiced its reluctance to speculate as to how the ALJ would have weighed these records had they been available for the original hearing. See *Stephens v. Callahan*, 971 F.Supp. 1388 (N.D. Okla. 1997). Here, as there, the Court is constrained to follow the dictates of *O'Dell*. Because the Appeals Council did not provide any analysis of the new evidence or state reasons for denial of review, the Court is forced into the role of fact finder. This being so, the Court finds the evidence is material to the determination of disability and there is a reasonable possibility the outcome of the claim might be changed in light of the statement of Plaintiff's physician that "there is certainly no guarantee that [further resection] will improve his comfort" and his postoperative diagnosis of "Pain, right acromio-clavicular joint area of shoulder" and "Post Traumatic Arthritis AC [joint]." [R. 156, 162]. Furthermore, the new evidence conflicts with the ALJ's statement that the first surgery had a "good result" and could be viewed as corroboration for Plaintiff's subjective allegations of pain which the ALJ had found not credible.

Therefore, the Court cannot say that the decision is supported by substantial evidence in the record as a whole. Accordingly, the case must be remanded for reconsideration of this evidence. In doing so, the Court does not dictate the result. Rather, remand is ordered to assure that a proper analysis is performed and the correct legal standards are invoked in reaching a decision based on the facts of the case. *Kepler*, at 391.

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

Dated this 29th day of JULY, 1998.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

DATE 7-30-98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CONNIE L. MIETTUNEN,
SSN: 446-68-3409,

PLAINTIFF,

vs.

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

DEFENDANT.

CASE No. 97-CV-591-M

ORDER OF DISMISSAL

This case is dismissed for lack of subject matter jurisdiction. Dated this 29th

day of July, 1998.

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

12

ENTERED ON DOCKET

DATE 7-30-98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

CONNIE L. MIETTUNEN,)
 SSN: 446-68-3409,)
)
 PLAINTIFF,)
)
 vs.)
)
 KENNETH S. APFEL,)
 Commissioner of the Social)
 Security Administration,)
)
 DEFENDANT.)

JUL 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE No. 97-CV-591-M

ORDER

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

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

Plaintiff filed for Title XVI supplemental security income benefits on August 12, 1993, alleging disability since 1984. [R. 105]. The application was denied January 25, 1994. [R. 119-121]. Her April 15, 1994 Request for Reconsideration, [R. 122],

was denied as untimely. [R. 125-126]. Plaintiff filed another Title XVI application for supplemental security income benefits on August 18, 1994, again alleging disability since 1984. [R. 130-131]. This claim was also denied initially and upon reconsideration. [R. 135-137, 148-150]. On September 25, 1995, a hearing before an administrative law judge (ALJ) was conducted. [R. 43-74]. A supplemental hearing was held January 10, 1996. [R. 75-103]. The ALJ entered a favorable decision on January 22, 1996. [R. 22-25]. In that decision, the ALJ determined Plaintiff to be disabled and entitled to a period of disability commencing August 18, 1994. The ALJ denied Plaintiff's request to reopen her 1993 claim, stating:

The Administrative Law Judge can find no basis for reopening this prior application. Accordingly, the previous determination is final and binding.

[R. 22]. The Appeals Council denied review, stating that there was no basis under 20 C.F.R, § 416.1470 for granting review. [R. 7-8]. The Appeals Council acknowledged Plaintiff's request to reopen and revise the final decision made in connection with the prior [1993] application and stated: "However, the Administrative Law Judge addressed this issue. The Council finds no basis to disturb the Administrative Law Judge's conclusion on this issue." [R. 7]. Plaintiff seeks reversal of that portion of the decision which denied her request to reopen the prior application for supplemental security income benefits and the award of benefits based upon the prior application.

Generally, the Court does not have jurisdiction to review the decision of the Commissioner not to reopen a previously adjudicated claim. *Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L.Ed.2d 192 (1977); 42 U.S.C. § 405(g). An exception

to this rule exists when the Commissioner "de facto" reopens the previously adjudicated claim by considering the merits of the prior claim and reappraising the evidence without deciding the administrative res judicata issue. *Taylor for Peck v. Heckler*, 738 F.2d 1112, 1114 (10th Cir. 1984). Plaintiff contends a "de facto" reopening occurred in this case, because the ALJ referred the entire medical file to a medical expert for review and because the ALJ and the medical expert failed to distinguish between Plaintiff's condition in 1993 and her condition in 1994. Plaintiff's contention fails for two reasons.

First, the Commissioner decided the res judicata issue by specifically finding no basis to reopen the prior application. [R. 22]. " Because the [Commissioner] expressly refused to reopen by invoking the doctrine of res judicata, there was no reopening in fact." *Brown v. Sullivan*, 912 F.2d 1194 (10th Cir. 1990). It is beyond this Court's jurisdiction to look behind the explicit exercise of discretion by the Commissioner.¹ *Califano*, 430 U.S. at 109.

Second, even if this court could consider the issue of a "de facto" reopening, despite the Commissioner's explicit statement that no reopening occurred, it is well established that a "de facto" reopening does not occur if the ALJ merely reviews previously submitted evidence as background information and does not reappraise the evidence. *Frustaglia v. Secretary of Health and Human Services*, 824 F.2d 192, 193

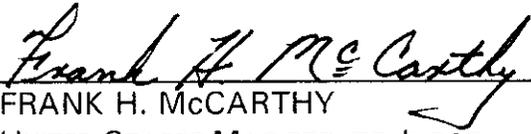
¹This case does not present an alleged constitutional violation as a basis for judicial review. Accordingly, there is no occasion to address the jurisdictional consequences of a constitutional allegation.

(1st Cir. 1987); *Burks-Marshall v. Shalala*, 7 F.3d 1346, 1348 (9th Cir. 1993). The ALJ's decision reflects consideration of the entire record as presented to him in the 1994 claim. There is nothing in the record to suggest that the ALJ reappraised the merits of Plaintiff's earlier application. The ALJ's carefully worded questions of Plaintiff and the witnesses at both hearings demonstrate that he intended to consider only the merits of the August 18, 1994 claim.

Conclusion

The Court does not have jurisdiction to review the decision denying the reopening of the 1993 claim. Accordingly, the case is DISMISSED.

Dated this 29th day of JULY, 1998.


FRANK H. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

DATE 7-30-98

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

FILED

JUL 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES R. FRANCIS,
SSN: 446-44-8485,

Plaintiff,

v.

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

Defendant.

CASE NO. 96-CV-1030-M /

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 29th day of JULY, 1998.

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

ENTERED ON DOCKET

DATE 7-30-98

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

FILED

JUL 29 1998 *ML*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES R. FRANCIS,
446-44-8485

Plaintiff,

vs.

Case No. 96-CV-1030-M ✓

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

ORDER

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

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

¹ Plaintiff's September 24, 1992, protectively filed, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held October 15, 1993. By decision dated January 7, 1994, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on September 18, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Born May 5, 1945, Plaintiff was 48 years old at the time of the hearing. He has a tenth grade education and formerly worked as a truck driver. He claims to have been unable to work since January 1, 1989, as a result of a 1978 neck injury which required neck fusion surgery on May 10, 1990. Plaintiff also claims to have suffered from a nervous stomach, joint swelling, left leg and hip pain, arthritis and vision problems. Plaintiff's insured status expired on June 30, 1989, so disability had to be established on or before that date.² The ALJ determined that although Plaintiff was unable to perform his past relevant work, between January 1, 1989 and June 30, 1989, he was capable of performing light work subject to restrictions on turning the neck and decreased left handed gripping and grasping. [R. 25]. Based on the testimony of the vocational expert, the ALJ determined that there are a significant

² Plaintiff states he received disability benefits from 1978 to 1981 due to his 1978 neck injury. The cessation of benefits is not at issue.

number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

There are no medical records covering the relevant time frame, January 1, 1989, to June 30, 1989. Consequently, the ALJ was required to review the records generated after those dates and draw inferences as to Plaintiff's condition during the relevant period. Plaintiff's appeal primarily expresses his disagreement with the inferences drawn by the ALJ. In particular, Plaintiff is highly critical of the ALJ's credibility analysis and conclusions. Plaintiff also argues that the ALJ erred in failing to order a consultative examination; that the hypothetical question posed to the vocational expert failed to include all of Plaintiff's impairments; and the findings on the psychiatric review technique form are not supported by substantial evidence.

Throughout the medical records, Plaintiff has consistently given a history of having suffered a broken neck in a truck accident in 1978. [R. 127, 149]. However, the record contains no medical records related to that accident or for any related problems until April 20, 1990, when he presented to orthopaedic surgeon, Henry H. Modrak, M.D., complaining of: neck pain extending into the left shoulder blade, shoulder and left arm; a sensation of intermittent numbness and tingling extending into the thumb and index fingers of the left hand; frequent episodes of recurring pain in the left hip and thigh extending down the calf of the leg with a numb feeling in the lower left leg. [R. 148-49]. Myelogram and CT scans of the cervical and lumbar spine were

performed revealing findings suggestive of a herniated disk at C4-5, degenerative spurring at the C5-6 level, and a negative lumbar spine. [R. 122-24]. Nerve conduction studies were essentially normal. [R. 125]. On May 10, 1990, Plaintiff was admitted to the hospital with a diagnosis of radiculitis C5 nerve root on the left secondary to degenerative and ruptured disk disease C4-5. A discectomy and a cervical fusion of C4-5 and C5-6 were performed. The discharge summary reflects a final diagnosis of "ruptured and degenerative disc disease C5-6 as well as ruptured degenerative disc disease C4-5." [R. 128]. Following surgery Plaintiff progressed satisfactorily. [R. 146-47].

The history and physical examination generated for Plaintiff's May, 1990 hospital admission mentions that Plaintiff had stomach ulcers in 1979 which were treated with vagotomy³ with good relief of gastrointestinal symptoms. [R. 132]. Aside from this historical reference, there is no mention of Plaintiff's stomach problems until April 1993 when he presented with a complaint of vomiting after eating and having lost 10-12 pounds over the last 2-3 months. [R. 181]. He was referred to Dr. Simon for gastroscopy and possible esophageal dilatation. Dr. Simon recorded that Plaintiff reported a history of having a previous vagotomy, partial gastrectomy and removal of a benign esophageal tumor in 1980. [R. 178]. A small hiatal hernia and a few erosions present in the duodenal bulb were found on gastroscopy. *Id.* The

³ Vagotomy is a section of the vagus nerve. *Tabors Cyclopedic Medical Dictionary*, 17th Edition, 2106.

gastric mucosa appeared normal but the culture revealed an infection was present. [R. 173].

Based on the absence of any records reflecting treatment for his neck and back problems; based on the physician's pre-surgery observation of only "very mild weakness diffusely in the left arm" [R. 154]; and based on Plaintiff's May, 1990 report to his physician that his arms had become more weak in the past six months, the ALJ concluded that Plaintiff's neck and back problems were "no more than minor at the time of date last insured." [R. 22]. The Court finds the ALJ's conclusion to be a reasonable interpretation of the record.

Plaintiff argues that he was not treated during the relevant time frame because he lacked funds to obtain treatment, not because he was not suffering. However, the Court notes testimony given by both Plaintiff and his wife that he had insurance until August of 1990. [R. 52-53; 58-59]. The Court also notes Plaintiff's testimony that problems with feet swelling, hand numbness, and hip pain began after his 1990 neck fusion surgery, which is after the relevant time-frame for Social Security disability purposes. [R. 49-50, 52].

Plaintiff asserts that the ALJ erred in failing to order a consultative medical examination. "[T]he ALJ should order a consultative exam when evidence in the record establishes the reasonable possibility of the existence of a disability and the result of the consultative exam could reasonably be expected to be of material assistance in resolving the issue of disability." *Hawkins v. Chater*, 113 F.3d 1162, 1169 (10th Cir. 1997) In this case, the record contains no evidence to suggest that

a consultative examination would have produced material information. Since Plaintiff applied for disability benefits in September, 1992, any consultative examination would have been ordered after that date. An examination performed in 1992, or later, would not be likely to produce relevant information about Plaintiff's January 1 to June 30, 1989, condition. Furthermore, there is no direct conflict in the medical evidence requiring resolution and additional tests are not required to explain a diagnosis already contained in the record. *See id. at 1166*. The Court finds that the ALJ did not err in failing to order a consultative examination.

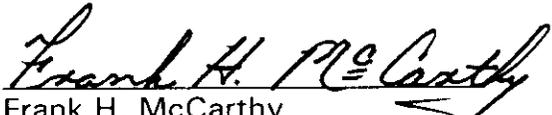
There is no support for Plaintiff's claim that the ALJ failed to apply the appropriate standards in the evaluation of his pain and credibility. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The Tenth Circuit has instructed "[f]indings as to credibility should be closely and affirmatively tied to substantial evidence and not just conclusions in the guise of findings." *Huston v. Bowen*, 838 F.2d 1125, 1133 (10th Cir. 1988). The ALJ did an exemplary job of meeting these requirements. The ALJ made an extensive credibility evaluation, comparing Plaintiff's allegations to the medical record, taking into account the lack of medication for pain and Plaintiff's activities and giving specific reasons for his credibility determinations. [R. 22-23]. The Court finds that the ALJ

evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Commissioner and the courts.

Plaintiff's objection to the ALJ's evaluation of his mental status is an extension of Plaintiff's disagreement with the ALJ's credibility analysis. Plaintiff's alleged psychiatric complaints are entirely subjective. The ALJ noted that Plaintiff has not sought any treatment for his alleged depression and inability to get along with others. The Court finds that the ALJ's conclusion that Plaintiff has no medically determinable mental impairment [R. 27] is supported by substantial evidence.

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

SO ORDERED this 29th Day of July, 1998.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

FILED

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

JUL 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DANIEL O. KLINE,)
)
 Plaintiff,)
)
 v.)
)
 KENNETH S. APFEL,)
 Commissioner,)
 Social Security Administration,)
)
 Defendant.)

CASE NO. 97-CV-571-M ✓

ENTERED ON DOCKET

DATE 7-30-98

ORDER

IT IS ORDERED, ADJUDGED AND DECREED that this case be, and it is hereby remanded to the Defendant for further administrative action pursuant to sentence four (4) of §205(g) of the Social Security Act, 42 U.S.C. §405(g). Melkonyan v. Sullivan, 501 U.S. 89 (1991).

THUS DONE AND SIGNED on this 28th day of JULY 1998.

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

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

F I L E D

JUL 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHARON MILLER,)
)
Plaintiff,)
)
v.)
)
SPRINGER CLINIC, INC., an)
Oklahoma professional corporation,)
)
Defendant.)

Case No. 98-CV-0034-B(M) ✓

ENTERED ON DOCKET
DATE JUL 29 1998

ORDER

Now on this 27th day of July, 1998, comes on for hearing Motion to Dismiss filed by Defendant (Docket #4) and the Court finds the same shall be granted.

Plaintiff filed this pro se action on January 14, 1998. Service was to have been accomplished on or before May 14, 1998. Summons was not issued until May 18, 1998, and not served until May 21, 1998, seven days beyond the 120 day requirement for service. Plaintiff sought no extension for time of service, thus implicating the probable limitations period. Plaintiff attempted to serve Defendant by mail and then through the Marshall's office.

Plaintiff counters by correctly stating that the Court has the authority in this circumstance to extend the 120 day period in which service must be effected pursuant to Fed.R.Civ.P. 4 and that Defendant is not surprised by this litigation having previously been a party to the EEOC complaint filed by Plaintiff. Plaintiff offers several reasons why this Court should find good

cause for an extension of the time within which to serve Defendant. Plaintiff states she relied upon the court clerk's office to serve by mail the day she instructed them to do so. She provides no date for this event in her affidavit and the Court is left with a record in which it appears Plaintiff was already out of time when this request was made.

This Court and others have traditionally been more lenient when a pro se plaintiff has made diligent attempts to comply with service requirements. However, the Court notes the response brief filed by Plaintiff, except for the facts specific to the individual case, is virtually identical to one filed by a different "pro se" plaintiff in Case No. 97-CV-1098, including miscitation of authority. In case management conference held July 9, 1998, the plaintiff in that case admitted the pleading had been prepared by an unnamed attorney. While there is nothing to prevent parties from consulting with attorneys while representing themselves, and in fact this may be the only circumstance in which they can afford and/or obtain representation, such parties are probably not due the deference in seeking leniency from the Court in compliance with court rules as those who are truly pro se.

This Court finds no facts exist in this case to extend the 120 day service requirement. The record does not reflect Plaintiff used diligence in serving Defendant where summons was not even issued until the expiration of the service date deadline. Further, Defendant was not difficult to locate as it is a medical facility open to the public for business during regular hours with a visible presence in the community. Plaintiff was previously employed by Defendant and was aware of the location. Plaintiff resides in Catoosa which is located approximately fifteen (15) miles from the federal courthouse and from Defendant. Service, when made, was not upon a properly authorized representative of the Defendant although the service agent was readily ascertainable. See *National Union Fire Ins. Co. v. Barney Associates*, 130 FRD 291 (SD

N.Y.1990). Accordingly, Defendants Motion to Dismiss is Granted.

IT IS SO ORDERED.



THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 7-29-98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GARY D. SMITH, JR. and)
CAROLYN SULLIVAN,)
)
Plaintiffs,)
)
v.)
)
EAKIN TRUCKING, INC.,)
)
Defendant.)

Case No. 98-CV-0313-K (E)

REPORT AND RECOMMENDATION

The Court has referred to the undersigned for Report and Recommendation the defendants' Motion to Transfer and/or Motion by Dale Eakin to Dismiss for Lack of Personal Jurisdiction (Docket #5) and plaintiffs' Motion to Dismiss Defendants' First Cause of Action (Docket #9). For the reasons discussed below, the undersigned recommends that the Motion to Transfer be **GRANTED**, that the Motion by Dale Eakin to Dismiss for Lack of Personal Jurisdiction be deemed **MOOT** as a result of the transfer, and that the Motion to Dismiss Defendants' First Cause of Action would more appropriately be determined by the transferee court.

I. BACKGROUND

On February 24, 1998, plaintiffs Gary D. Smith, Jr. ("Smith") and Carolyn Sullivan ("Sullivan") brought suit in Tulsa County District Court against Eakin Trucking, Inc. ("Eakin Trucking") for breach of contract and accounting, and wage and hour violations under the Fair Labor Standards Act and the Oklahoma Minimum Wage Act. Plaintiffs asserted that they are residents of Tulsa County, and that Eakin Trucking is an Oklahoma corporation. Plaintiffs claim that they were employees of Eakin Trucking and drove its equipment through Tulsa County. (Docket #1, Ex. A)

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On April 24, 1998, Eakin Trucking removed the action to this Court on the basis of federal question jurisdiction. (Docket #1) Before Eakin Trucking answered or otherwise responded, plaintiffs filed an Amended Complaint on April 29, 1998, adding Dale Eakin individually as a defendant and asserting a third claim against him as a corporate officer of Eakin Trucking for wage and hour violations. (Docket #3)

Defendant Eakin Trucking answered, and counterclaimed for fraud against both plaintiffs, for breach of express or implied contract against Smith, for declaratory judgment and damages against Sullivan, and for negligence against both plaintiffs. (Docket #4) Both defendants moved to transfer this action to the Western District of Arkansas, Fort Smith Division, or to dismiss the claim against Dale Eakin for lack of personal jurisdiction, although he had not yet been served. (Docket #5)

II. REVIEW

Defendants move to transfer this case to the Western District of Arkansas, Fort Smith Division, pursuant to 28 U.S.C. § 1406(a), or, in the alternative, 28 U.S.C. § 1404(a). Dale Eakin moves to dismiss for lack of personal jurisdiction. Plaintiffs move to dismiss the fraud count of Eakin Trucking's counterclaim.

A. Section 1406(a) Transfer

Defendants argue that under the criteria of 28 U.S.C. § 1391¹--the venue provision for actions not founded solely on diversity--this district is the improper venue for this action and that, pursuant to 28 U.S.C. § 1406(a),² the action should be transferred to the Western District of Arkansas, Fort Smith Division. However, Section 1391 does not govern venue in this case. Section 1391 is the general venue statute which prescribes the venue where a case may properly be brought. "The venue of removed actions is governed by 28 U.S.C. § 1441(a). . . ." Polizzi v. Cowles Magazines, Inc., 345 U.S. 663, 665, 73 S. Ct. 900, 902, 97 L. Ed. 1331 (1953).

Section 1441(a) provides:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, *to the district court of the United States for the district and division embracing the place where such action is pending.*

28 U.S.C. § 1441(a) (emphasis added). This action was properly removed to this Court pursuant to Section 1441(a). Thus, venue is proper in this Court regardless of any venue infirmity that may have

¹ Section 1391(b) provides:

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.

28 U.S.C. § 1391(b).

² Section 1406(a) provides:

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C. § 1406(a).

existed had the action been brought here originally. See Hartford Fire Ins. Co. v. Westinghouse Elec. Corp., 725 F. Supp. 317, 320 (S.D. Miss. 1989). “By their voluntary application for removal, the defendants have sanctioned the propriety of venue in this district and division.” Bacik v. Peek, 888 F. Supp. 1405, 1413 (N.D. Ohio 1993). Accordingly, any request for transfer or dismissal of this case premised on Section 1406(a) must fail.

B. Section 1404(a) Transfer

The next issue is whether this Court should transfer the action pursuant to 28 U.S.C. § 1404(a). That section provides:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1404(a).

The facts pertinent to venue and personal jurisdiction presented by the defendants’ motion and brief (Docket #5 and #6), plaintiffs’ response (Docket #7), and defendants’ reply (Docket #10), are as follows:

Plaintiffs claim to be residents of Tulsa County; defendants claim that plaintiffs have no fixed place of residence and are itinerant drivers. Eakin Trucking admits it is a corporation incorporated in the State of Oklahoma. It asserts that its principal place of business is in Van Buren, Arkansas, and that it has a small, leased maildrop office in Muldrow, Oklahoma. Van Buren, Arkansas is located within the Western District of Arkansas, Fort Smith Division; Muldrow, Oklahoma is located within the Eastern District of Oklahoma. Dale Eakin is the founder, president, and sole shareholder of Eakin Trucking; his residence is in Van Buren, Arkansas. Although the independent Contractor Agreement between Eakin Trucking and Smith recites that it was made and entered into at Arkhoma [sic],

LeFlore County, Oklahoma, it was witnessed and notarized in Crawford County, Arkansas, and Dale Eakin stated under oath that it was signed by Smith in Van Buren, Arkansas. Dale Eakin also stated under oath that all of the books, records, employees, and the sole shareholder of Eakin Trucking, as well as witnesses, are located in Van Buren, Arkansas; Smith filed a wage and hour claim against Eakin Trucking in the Fort Smith office of the Department of Labor; the agreement with Smith was signed, performed, and payments made in Arkansas with check drawn on an Arkansas bank; all loads trucked by Smith were referred by and invoiced through Arkansas brokers; insurance on Smith's truck was carried through an Arkansas carrier; and the dispute arose in Arkansas.

Plaintiffs did not file an affidavit contradicting any of these facts other than their legal residence. Both plaintiffs submitted an affidavit that their legal residence at all times since March 1996 has been in Tulsa County, Oklahoma.

The party seeking transfer of an action pursuant to Section 1404(a) has the burden of establishing that the suit should be transferred. Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1515 (10th Cir. 1991). The provision of Section 1404(a) that the transferee district be one where the action "might have been brought" requires that venue have been proper in the transferee district and that the transferee court have had personal jurisdiction over the defendants. See Hoffman v. Blaski, 363 U.S. 335, 343-344, 80 S. Ct. 1084, 1089-1090, 4 L. Ed. 2d 1254 (1960); Chrysler Credit, 928 F.2d at 1515-1516. Transfer of venue should be determined upon an individualized consideration of the circumstances of a particular case. See Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29, 108 S. Ct. 2239, 2243, 101 L. Ed. 2d 22 (1988).

Among the factors [a district court] should consider is the plaintiff's choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the

necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and, all other considerations of a practical nature that make a trial easy, expeditious and economical.

Chrysler Credit, 928 F.2d at 1516 (10th Cir. 1991) (quoting Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145, 147 (10th Cir.1967).

It is clear that the action before this Court might have been brought in the Western District of Arkansas. The individual defendant, Dale Eakin, resides and is domiciled in the Western District of Arkansas, Fort Smith Division. Consequently, Eakin is subject to personal jurisdiction in the Western District of Arkansas.³ The corporate defendant is deemed a citizen of both Oklahoma and Arkansas. Each of these States has more than one judicial district. The corporate defendant resides, pursuant to Section 1391(c)⁴ and based on the limited facts before the undersigned, in the Western District of Arkansas and the Eastern District of Oklahoma, as there are sufficient contacts in those two districts to subject the corporation to personal jurisdiction. In addition, under Section 1391(b)(2), the Western District of Arkansas is the judicial district in which a substantial part of the events giving rise to the claims occurred.

³ Defendant Dale Eakin has filed a motion to dismiss, asserting that this Court lacks personal jurisdiction over him. The recommendation of the undersigned to transfer venue to the Western District of Arkansas obviates this question because the transferee court has jurisdiction over him. Therefore, the undersigned recommends that the portion of the Motion to Transfer and/or Motion by Dale Eakin to Dismiss for Lack of Personal Jurisdiction (Docket #5) relating to lack of personal jurisdiction be deemed moot.

⁴ For purposes of clarity, the undersigned notes that Section 1391 is now relied on in determining whether this action might have been brought in the Western District of Arkansas. The previous inapplicability of Section 1391 was in reference to venue upon to removal under Section 1441(a).

It is also clear that the convenience of the parties and witnesses would be better served by a Western District of Arkansas forum. All relevant agreements were executed in Arkansas. All pertinent records are in Arkansas and under the control of persons in Arkansas. All parties and witnesses--as generally described in the affidavit of Dale Eakin⁵--are located in Arkansas, except plaintiffs, who maintain a legal residence in Oklahoma, but whose business as truck drivers has routinely required them to be in Arkansas. The undersigned recommends that the District Court find that the Western District of Arkansas is a more appropriate venue for this action for the convenience of the parties and witnesses, and in the interest of justice.

C. Motion to Dismiss Fraud Claim of Counterclaim

Plaintiffs have filed a Motion to Dismiss Defendant's First Cause of Action (Docket #9), asserting that defendants' counterclaim for fraud does not comply with the pleading requirements of Fed. R. Civ. P. 9(b). The undersigned recommends that such question would more appropriately be determined by the transferee court.

III. CONCLUSION

For the foregoing reasons, the undersigned recommends that the District Court find that this case should be transferred to the Western District of Arkansas pursuant to 28 U.S.C. § 1404(a), that the Motion by Dale Eakin to Dismiss for Lack of Personal Jurisdiction be deemed moot as a result

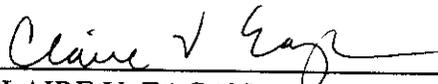
⁵ Plaintiffs assert that defendants have not met their burden of establishing that the Western District of Arkansas would be a more convenient forum, arguing that defendants have failed to produce a witness list which identifies the witnesses defendants expect to be called and their respective places of residence. The general description of witnesses and evidence contained in the affidavit of Dale Eakin is sufficient to allow a Section 1404(a) determination. Further, the undersigned notes that the affidavit of plaintiffs does not rebut the sworn statements of Dale Eakin that all parties, witnesses, and records--excepting plaintiffs and those records in the custody of plaintiffs--are located in Arkansas.

of the transfer, and that the Motion to Dismiss Defendants' First Cause of Action would more appropriately be determined by the transferee court.

IV. OBJECTIONS

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

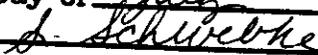
Dated this 28th day of July, 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 29 Day of July, 1998.



CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 28th day of July, 1998, a true and correct copy of the above and foregoing document was mailed, with full and sufficient postage affixed thereon, to the following:

Patricia Ledvina Himes, Esq.
Gable & Gotwals
15 West 6th Street, Suite 2000
Tulsa, OK 74119-5447

Larry E. Cotten, Esq.
Robert D. Martinez, Esq.
Kirkley, Schmidt & Cotten, L.L.P.
301 Commerce Street, Suite 2700
Fort Worth, TX 76102-4127

Attorneys for E.I. Du Pont De Nemours

Robert P. Redemann, Esq.
Rhodes, Hieronymus, et al.
P.O. Box 21100
Tulsa, OK 74121-1100

Attorneys for Sun Refining & Marketing Company



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

FILED

JUL 27 1998

Phil Lombardo, C.
U.S. DISTRICT COURT

JAMIE SMITH,

Plaintiff,

v.

Case No. 97CV-472K (J)

NORTH AMERICAN VAN LINES,

Defendant.

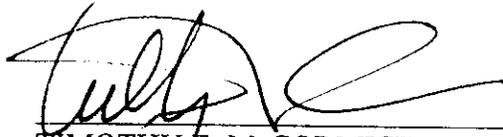
ENTERED ON DOCKET

DATE JUL 28 1998

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed. R. Civ. P. 41, the parties hereto, through their counsel of record, agree and stipulate that all claims in the above-captioned matter are hereby dismissed with prejudice.


DAVID A. CHEEK
KRIS TED LEDFORD
McKINNEY & STRINGER, P.C.
Mid-Continent Tower, Suite 2100
401 South Boston
Tulsa, Oklahoma 74103
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Attorneys for Defendant,
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1441 South Carson Avenue
Tulsa, Oklahoma 74119-3417
(918) 582-3655
Attorney for Plaintiff

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-
**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA**

FILED

JUL 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

COLORADO INTERSTATE GAS COMPANY,)
a Delaware Corporation,)

Plaintiff,)

v.)

CONTINENTAL HYDROCARBONS, INC., an)
Oklahoma corporation, and CONTINENTAL)
HYDROCARBONS, L.L.C., an Oklahoma)
liability company,)

Defendants.)

Case No. 97-CV-422-BU(W)

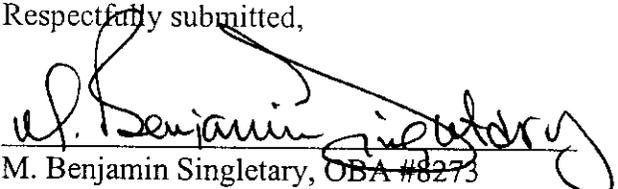
ENTERED ON DOCKET

DATE JUL 28 1998

STIPULATION OF DISMISSAL

Plaintiff, Colorado Interstate Gas Company, and Defendants, Continental Hydrocarbons, Inc. and Continental Hydrocarbons, L.L.C., pursuant to Rule 41(a)(1)(ii), hereby stipulate to the dismissal of this action, with prejudice, without order of the Court, with each party to bear its own costs, including attorneys' fees.

Respectfully submitted,


M. Benjamin Singletary, OBA #8273
Timothy A. Carney, OBA #11784
GABLE & GOTWALS
15 W. 6th St., Suite 2000
Tulsa, OK 74119-5447

ATTORNEYS FOR PLAINTIFF

5

CT

and



James W. Rusher, OBA #11501
Heath E. Hardcastle, OBA #14247
ALBRIGHT & RUSHER
2600 NationsBank Center
15 West Sixth Street
Tulsa, Oklahoma 74119-5434
(918) 583-5800

ATTORNEYS FOR DEFENDANTS

ENTERED ON DOCKET
DATE 7-28-98

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

FILED

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

DONALD ROY ROGERS,)
)
Plaintiff,)
)
vs.)
)
LARRY FUGATE, Sheriff of Creek)
County; CREEK COUNTY,)
)
Defendants.)

No. 98-CV-173-H (M)

**ORDER DIRECTING SERVICE OF PROCESS AND
REQUIRING SPECIAL REPORT**

Plaintiff, a pretrial detainee incarcerated in the Creek County Jail, has been granted leave to proceed in forma pauperis in this civil rights action brought pursuant to 42 U.S.C. § 1983.

Upon review of the complaint, the Court finds that this suit against Larry Fugate, in his official capacity as Sheriff of Creek County, is essentially the same as a suit against Creek County. See Monell v. Department of Soc. Servs., 436 U.S. 658, 690 n.55 (1978); Taylor v. Meacham, 82 F.3d 1556, 1564 (10th Cir. 1996) (when a sheriff is sued in his official capacity, the suit against him is a suit against the county). Therefore, Creek County as a separate defendant may be dismissed.

In addition, the Court believes that an investigation and special report are necessary to develop a record sufficient to ascertain whether there are any factual or legal bases for Plaintiff's claims. See Hall v. Bellmon, 935 F.2d 1106 (10th Cir. 1991); Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978). Therefore, upon service, officials responsible for the institution involved in the alleged civil rights violation(s) shall undertake a review of the subject matter of the complaint:

- (a) to ascertain the facts and circumstances;

- (b) to consider whether any action can and should be taken by the institution or other appropriate officials to resolve the subject matter of the complaint; and
- (c) to determine whether other like complaints, whether pending in this Court or elsewhere, are related to this complaint and should be taken up and considered together.

In the conduct of the review, a written report shall be compiled and filed with the court. Authorization is granted to interview all witnesses including Plaintiff and appropriate officers of the institution. Wherever appropriate, medical or psychiatric examinations shall be made and included in the written report. Any rules and regulations pertinent to the subject matter of the complaint shall be included in the written report.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Creek County, as a separate defendant, is **dismissed** from this action.
- (2) The Clerk shall **issue** summons and deliver them, along with a copy of the amended complaint and a copy of this Order, to the U.S. Marshal for service on Defendant Larry Fugate, in his official capacity as Sheriff of Creek County.
- (3) **The report, and Defendant's answer and/or dispositive motion, shall be filed no later than sixty days from the date of service.** It is desired that the report made in the course of this investigation be attached to and filed with Defendant's answer and/or dispositive motion.
- (4) No applications, motions, or discovery should be filed or considered until the steps set forth in this order have been completed, and an order entered, except as the court further orders.

- (5) Should Defendant file a dispositive motion, Plaintiff shall file a **response** within fifteen (15) days after the filing of Defendant's motion. Failure to file a response could result in the entry of relief requested in the motion. See N. D. LR 7.1(C).

IT IS SO ORDERED.

This 24th day of July, 1998.



Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET

DATE 7-28-98

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

HORSEHEAD INDUSTRIES, INC., d/b/a
ZINC CORPORATION OF AMERICA,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

FILED

JUL 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-0219B(J)

ADMINISTRATIVE CLOSING ORDER

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

IF, by September 30, 1998, the Parties have not reopened this matter for the purpose of obtaining a final determination herein, this action shall be deemed dismissed without prejudice.

IT IS SO ORDERED this 27th day of July, 1998.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED
JUL 27 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANTHONY JOSEPH THANNISCH,)
)
Petitioner,)
)
vs.)
)
STEVEN KAISER,)
)
Respondent.)

Case No. 97-CV-102-H (M) ✓

ENTERED ON DOCKET
DATE 7-28-98

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.

IT IS SO ORDERED.

This 24th day of July, 1998.


Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET

DATE 7-28-98

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

FILED

JUL 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANTHONY JOSEPH THANNISCH,)
)
Petitioner,)
)
vs.)
)
STEVEN KAISER,)
)
Respondent.)

Case No. 97-CV-102-H (M)

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #7) entered on April 27, 1998, in this 28 U.S.C. § 2254 habeas corpus action. The Magistrate Judge recommends that the petition for writ of habeas corpus be dismissed with prejudice as procedurally barred. On May 4, 1998, Petitioner filed his timely objection to the Report (#8).

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

Petitioner was convicted of conspiracy to commit murder and solicitation to commit murder in Tulsa County Case No. CFR-88-3843, and was sentenced to ten (10) years and forty-five (45) years, respectively. On direct appeal, the Oklahoma Court of Criminal Appeals reversed the conspiracy conviction and affirmed the solicitation conviction but remanded for resentencing with

directions to the state trial court to comply with Okla. Stat. tit. 22, § 982 before resentencing. On May 1, 1992, Petitioner was resentenced to forty-five (45) years imprisonment.

Petitioner, through retained counsel Matt Dowling, appealed the resentencing. However, the appeal was dismissed for lack of jurisdiction because the original record was not filed in the appeal as required by the *Rules of the Court of Criminal Appeals*. (#4, Ex. D).

Petitioner again attempted to appeal his resentencing, assisted by different retained counsel Joe Minter, by filing an application for post-conviction relief in Tulsa County District Court. In his first application for post-conviction relief, Petitioner raised two issues: (1) that at the time of resentencing, Petitioner was not advised of his appeal rights, and (2) that the trial court's refusal to provide a record at no cost to Petitioner denied him an appeal of his case. (#4, Ex. F. at 2). The district court denied the relief requested; however, Petitioner's retained counsel failed to timely perfect his appeal from the denial of post-conviction relief and the appeal was dismissed for failure to comply with the *Rules of the Court of Criminal Appeals*. (#4, Ex. H).

Next, Petitioner, represented by attorney Benny Robison, filed a second application for post-conviction relief, alleging that his appellate counsel was ineffective for failing to perfect an appeal after Petitioner's resentencing. The district court found the claim to be procedurally barred and that Petitioner had not stated sufficient reason for failing to raise the claim of ineffective assistance of appellate counsel in his previous application for post-conviction relief. (#4, Ex. I). Petitioner appealed the denial of his second application for post-conviction relief to the Oklahoma Court of Criminal Appeals. In affirming the district court's order, the appellate court stated that:

[a] review of the record provided by Petitioner reveals that the Petitioner could have raised the claim of ineffective assistance of appellate counsel on direct appeal of his resentencing in his first Application for Post-Conviction Relief. Therefore, the issue

is waived. Petitioner has failed to provide this Court with sufficient reasons concerning why the issue was insufficiently raised in prior proceedings. 22 O.S. 1991, § 1086.

(#4, Ex. K at 7).

Petitioner filed the instant habeas corpus action on February 3, 1997. His only claim is that the attorney representing him on the direct appeal of his resentencing hearing provided constitutionally ineffective assistance. As discussed supra, this claim was first presented to the Oklahoma Court of Criminal Appeals in Petitioner's second application for post-conviction relief. Relying on the express provisions of Okla. Stat. tit. 22, § 1086, that Court found that Petitioner had waived the claim since he could have but did not raise the claim in his first application for post-conviction relief. As a result of Petitioner's procedural default, the Oklahoma Court of Criminal Appeals dismissed the post-conviction appeal.

In his Report, the Magistrate Judge concluded that the state appellate court found Petitioner's claim to be procedurally defaulted based on independent and adequate grounds and that this federal habeas court is precluded from considering Petitioner's claim on the merits unless Petitioner demonstrated cause and prejudice for his state default or that a fundamental miscarriage of justice would occur if his claim were not considered. The Magistrate Judge found that Petitioner demonstrated neither cause and prejudice nor a fundamental miscarriage of justice and recommended that the claim should be dismissed with prejudice as procedurally barred. Petitioner objects to the Magistrate Judge's conclusion that consideration of his claim is procedurally barred.

DISCUSSION

After carefully reviewing the record provided by the parties in this case, the Court agrees with the Magistrate Judge's conclusion that Petitioner's claim is procedurally barred. The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Steele v. Young, 11 F.3d 1518 (10th Cir. 1993); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

Applying these principles to the instant case, the Court finds that the state court's procedural bar as applied to Petitioner's claims was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals consistently declines to review claims which were not raised in a first request for post-conviction relief as required by the express provisions of Okla. Stat. tit. 22, § 1086.

Because of his procedural default, this Court may not consider Petitioner's claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage

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

In his objection to the Report, Petitioner relies on Jones v. Cowley, 28 F.3d 1067 (10th Cir. 1994), to support his contention that he has demonstrated cause and prejudice and a fundamental miscarriage of justice, thereby excusing his procedural default. However, the Court finds Petitioner's reliance on Jones to be misplaced. As in the instant case, the petitioner's counsel in Jones failed to perfect a direct appeal on behalf of Petitioner. Significantly, however, in Jones, the petitioner raised the issue of ineffective assistance of appellate counsel, as liberally construed by the Tenth Circuit Court of Appeals, id. at 1069, at his first opportunity, i.e., in his first application for post-conviction relief. In contrast, Petitioner in the instant case failed to raise the issue in his first application for post-conviction relief. As a result, he failed to comply with Oklahoma rules of criminal procedure resulting in waiver of his claim. The Court agrees with the Magistrate Judge's conclusion that Petitioner has failed to demonstrate cause for his procedural default in state court.¹ Absent a

¹In his Report, the Magistrate Judge specifically addressed the significance of the supplemental document provided by Petitioner in his "motion of request by Petitioner to supplement habeas corpus" (#6) as it pertains to a demonstration of cause to excuse Petitioner's procedural default. The inclusion of the document in the analysis conducted by the Magistrate Judge renders Petitioner's motion to supplement moot.

showing of cause, the Court need not assess the "prejudice" component of the test. Klein v. Neal, 45 F.3d 1395, 1400 (10th Cir. 1995).

Alternatively, this court may proceed to the merits of a procedurally defaulted claim if the petitioner establishes that a failure to consider the claim would result in a fundamental miscarriage of justice. See id.; Brecheen v. Reynolds, 41 F.3d 1343, 1353 (10th Cir. 1994). To come within this "very narrow exception," Klein, 45 F.3d at 1400, the petitioner must supplement his habeas claim with a colorable showing of factual innocence. See id. In this context, factual innocence means that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Schlup v. Delo, 513 U.S. 298, 327 (1995); see also Murray, 477 U.S. at 496 ("[W]e think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.").

In this case, the Court concurs with the Magistrate Judge's finding that Petitioner has not made any showing or claim that he is factually innocent. Therefore, he fails to fall within the narrow "fundamental miscarriage of justice" exception and his claim is procedurally barred.

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 dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's "motion of request by Petitioner to supplement habeas corpus" (#6) is **moot.**
2. The Report and Recommendation of the United States Magistrate Judge (#7) is **adopted and affirmed.**
3. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **dismissed with prejudice.**

IT IS SO ORDERED.

This 24TH day of July, 1998.



Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET
DATE 7-28-98

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

FILED

JUL 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MELINDA LeCOUR,
SSN: 462-90-5813,

Plaintiff,

v.

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

Defendant.

CASE NO. 97-CV-517-M

JUDGMENT

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


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

12

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

FILED

JUL 24 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FLOYD L. WALKER and VIRGINIA)
G. WALKER,)
)
Plaintiffs,)
)
vs.)
)
THE UNITED STATES OF AMERICA,)
)
Defendant.)

Case No. 97-CV-672-BU

ENTERED ON DOCKET

DATE JUL 27 1998

JUDGMENT

This action came before the Court upon the parties' cross-motions for summary judgment, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Plaintiffs, Floyd L. Walker and Virginia G. Walker, and against Defendant, The United States of America.

Dated at Tulsa, Oklahoma, this 24th day of July, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

21

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

FILED

JUL 24 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FLOYD L. WALKER and)
VIRGINIA G. WALKER,)
)
Plaintiffs,)
vs.)
)
THE UNITED STATES OF AMERICA,)
)
Defendant.)

Case No. 97-CV-672-BU

ORDER

This matter comes before the Court upon the parties' cross-motions for summary judgment. Upon due consideration of the parties' submissions, the Court makes its determination.

Facts

The relevant facts are undisputed, and indeed, except for the facts set forth below in paragraphs 4, 5, 14, 22, 24, 25, 26 and 27, the relevant facts have been stipulated to by the parties:¹

1. Plaintiff, Floyd L. Walker, was admitted to practice law in the State of Oklahoma on March 15, 1949.

2. Plaintiffs, Floyd L. Walker and Virginia G. Walker, husband and wife, have filed joint income tax returns for each year from 1971 through 1996 as cash basis taxpayers.

3. Plaintiff, Floyd L. Walker ("Walker"), was a self-employed, solo, legal practitioner from 1953 until December 31, 1974.

¹The Court deems the facts in paragraphs 4, 5, 14, 22, 24, 25, 26 and 27 admitted, pursuant to Local Rule 56.1(B), as they are not controverted by Defendant.

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4. From 1975 through 1979, Walker was continuously employed by a series of law firms that, through various mergers, became Pray, Walker, Jackman, Williamson & Marljar ("Pray Walker") on July 1, 1979.

5. From July 1, 1979 until his retirement on June 30, 1987, Walker was continuously employed by Pray Walker in the private practice of law.

6. Walker and The Telex Corporation ("Telex") entered into a 25% contingency fee contract² in January, 1972. Under the terms of such contract, Walker was to represent Telex in a Sherman Act antitrust claim for damages against the IBM Corporation. Walker provided some legal services to Telex in late 1971 in anticipation of being employed.

7. On behalf of Telex, Walker filed two actions in January 1972 in this District. Case No. 72-C-18 was for domestic damages and Case No. 72-C-89 was for Telex's world-wide damages, that is, for damages sustained other than in the United States. IBM filed a counterclaim seeking damages from Telex for alleged misappropriation of IBM's trade secrets.

8. Telex's Sherman Act case for its domestic damages, and IBM's counterclaim for alleged misappropriation of IBM's trade secrets were tried together in a non-jury trial, the Honorable Sherman H. Christianson, presiding. The trial commenced on April

²Walker's contingency fee contract provided that if the litigation should be settled by "something other than the payment of money" Walker's fee would be calculated based upon the "gross benefits" received by Telex from such settlement.

16, 1973 and ended June 30, 1973.

9. The trial court's Findings of Fact and Conclusions of Law were filed on September 16, 1973. In the Sherman Act antitrust case, the trial court found the issues in favor of Telex and fixed Telex's damages at \$354,500,000. The trial court's findings and conclusions found in favor of IBM on its counterclaim for misappropriation of trade secrets and fixed its damages at \$18,500,000.

10. Judgments were entered pursuant to the Court's findings and conclusions. Each judgment was appealed to the Tenth Circuit Court of Appeals. The Telex judgment was reversed and the IBM judgment was affirmed.

11. Walker, on behalf of Telex, filed a Petition for Writ of Certiorari in the United States Supreme Court, seeking to overturn the Tenth Circuit's reversal of the Telex judgment. During the week preceding the first Monday in October, 1975, and, while Telex's petition was still pending and undecided, Telex and IBM settled their respective claims against each other.³ Under the terms of the settlement, Telex dismissed its petition, and released all claims for damages made against IBM. In return, IBM released Telex from its \$18,500,000 judgment.

12. Following the settlement between Telex and IBM, Walker and Telex could not agree upon the amount of compensation Walker was entitled to receive under the contingency fee contract between

³Telex used other lawyers to handle the settlement and Walker was not involved.

the parties.

13. Walker filed suit against his former client, Telex, to determine the amount of the fee he was entitled to receive.

14. Walker and his employer law firms agreed that any fee received by Walker from Telex would remain Walker's separate property, and would not be considered an asset of the law firms.

15. After a jury trial in the District Court of Tulsa County, Oklahoma, a judgment was returned in Walker's favor for more than \$2,200,000. Telex took an appeal to the Oklahoma Supreme Court which resulted in a reversal of Walker's judgment. The proceedings were remanded for a new trial.

16. A second Tulsa County District Court trial was held, non-jury, and a judgment was again rendered in Walker's favor for more than \$2,200,000. Walker's second judgment against Telex was appealed to the Oklahoma Supreme Court.

17. On May 1, 1981, while the second appeal was pending and undecided in the Oklahoma Supreme Court, Walker and Telex entered into a written agreement settling the contingent fee contract litigation.

18. Under the terms of the settlement agreement, Telex became obligated and required to pay Walker, as legal fees for the services performed pursuant to the contingent fee contract, a total of \$2,350,000.

19. Telex's payments to Walker were required to be made over a period of twenty (20) years as follows:

(a) Two payments of \$75,000.00 each on May 1, and August 1,

1981; and

- (b) Eighty quarterly payments of \$27,500.00 the first such payment to be on November 15, 1981 and continuing until eighty (80) such payments had been made.

20. Telex, and its successor in interest, The Memorex-Telex Corporation ("Memorex-Telex"), made the required quarterly payments to Walker until August 15, 1996.⁴

21. All payments to Walker from Telex and its successor in interest, Memorex-Telex, are wholly attributable to the legal services rendered by Walker for and on behalf of Telex pursuant to the contingency fee agreement.

22. Plaintiffs' wages during each year beginning 1975 through 1986 exceeded the maximum amount subject to the Federal Insurance Contributions Act. Plaintiffs were required to pay and did in fact pay the maximum amount of taxes under the Federal Insurance Contributions Act during each such year.

23. From 1990 to 1994, Walker paid self-employment taxes on all payments received pursuant to the settlement agreement.

24. Walker retired from the full time practice of law on June 30, 1987. He notified the Social Security Administration ("SSA") that he had earlier been certified as eligible for social security benefits and requested that such benefits commence on July 1, 1987.

⁴Such payment was the final one because on October 14, 1996, Memorex-Telex, successor in interest to Telex, filed a petition for bankruptcy in the Bankruptcy Court for the District of Delaware. Memorex-Telex's Trustee in bankruptcy has instituted a preferential payments proceeding against Walker seeking refund of the August 15, 1996 payment.

Walker began receiving social security benefits in 1987.

25. As a result of Plaintiffs' reporting of the Telex payments on their 1987 federal income tax return, the SSA Program Service Center located in Kansas City, Missouri concluded that Walker had been "overpaid" social security benefits and commenced a "recovery action" for the alleged overpayment.

26. Walker requested a reconsideration of the SSA decision and submitted information concerning the legal services he performed for Telex from 1971 through October 1975, the litigation with Telex which resulted in the settlement agreement, and that the payments received in 1987 were not for legal services being currently performed.

27. After conducting an investigation and reviewing the information submitted by Walker, the SSA determined that Walker was not overpaid benefits because the Telex payments did not constitute current self-employment income to otherwise reduce the social security benefits.

28. In 1995, Plaintiffs filed amended tax returns for 1992, 1993 and 1994 claiming a refund of the self-employment taxes paid during such years.

29. The Internal Revenue Service ("IRS") audited and denied Plaintiffs' claim for refund of the 1992, 1993 and 1994 self-employment taxes. The IRS also performed an audit of Plaintiffs' 1995 Income Tax Return and has imposed self-employment taxes on the payments received by Plaintiffs pursuant to the Walker/Telex settlement agreement during 1995.

Discussion

In the instant action, Plaintiffs seek a refund of the tax payments made to the IRS for the tax years 1992 through 1995. Plaintiffs contend that the payments received pursuant to the Walker/Telex settlement agreement are not subject to self-employment taxes. Plaintiffs contend that the amounts paid should be attributed to the 1975 tax year when the payments were earned, and therefore, as Plaintiffs paid the maximum amount imposed by the Federal Insurance Contributions Act ("FICA"), 26 U.S.C. §§ 3101-3126, on wages in 1975, no self-employment taxes should have been imposed on the payments when they were received in the 1992 through 1995 tax years. Defendant, on the other hand, contends that the payments from the Walker/Telex settlement are subject to the self-employment taxes because the applicable tax law provides that such payments are to be taxed when received not when earned.

The Self-Employment Contributions Act ("SECA"), 26 U.S.C. §§ 1401-1403, imposes an additional tax on annual self-employment income. SECA was enacted to extend the federal Old Age Survivors and Disability Insurance ("OASDI") and Hospital Insurance ("HI") benefits to self-employed individuals. S.R. No. 1669, 81 Cong., 2d. Sess., 1950-2 Cum.Bull. 302, 307-08; Stephens v. Commissioner, 707 F.2d 478, 480 (11th Cir. 1983). The SECA tax is the counterpart to the FICA tax. Id. FICA imposes a tax on "wages" received by the employee. Wages is defined as "all remuneration for employment." 26 U.S.C. § 3121(a). The SECA tax follows a similar scheme. Stephens, 707 F.2d at 480. Section 1401 imposes taxes on each

individual's self-employment income. 26 U.S.C. § 1401. Self-employment income consists of "net earnings from self-employment." Section 1402(a) defines "net earnings from self-employment income" as "the gross income derived by an individual from any trade or business carried on by such individual," less deductions allowed which are attributable to such trade or business. 26 U.S.C. § 1402(a).

The maximum amount of compensation subject to FICA is limited; any excess compensation is not considered wages for purposes of FICA. 26 U.S.C. § 3121(a)(1). Likewise, the maximum amount of self-employment income subject to SECA is limited; any excess "net earnings from self-employment" is not considered "self-employment income."⁵ Under SECA, self-employment income does not include "that part of the net earnings from self-employment which is in excess of (i) an amount equal to contribution and benefit base (as determined under... [42 U.S.C. § 430]) which is effective for the calendar year in which such taxable year begins, minus (ii) the amount of wages paid to such individual during such taxable year...." If a person is both employed and self-employed during a taxable year, SECA taxes are only due on the net earnings from self-employment for that portion of the difference, if any, between the base and wages earned. 26 C.F.R. § 1.1402(b)-1. An employee who pays the maximum amount of FICA taxes on his or her wages is not also taxed on self-employment income.

⁵For all periods relevant to this action, FICA and SECA provided for a maximum amount of income that was subject to tax.

It is undisputed that in 1975, Walker paid the maximum amount of FICA taxes on his wages. Therefore, if the payments received by Walker from Telex in 1992 through 1995 should be attributed for tax purposes to 1975 when they were earned, then no self-employment taxes would be owed on the payments. Consequently, the issue for the Court to determine is whether the payments received by Walker in 1992 through 1995 should be attributed to 1975 for tax purposes.

In support of their position that the payments should be attributed to 1975, Plaintiffs rely upon the rationale in Bowman v. United States, 824 F.2d 528 (6th Cir. 1987). In that case, the Sixth Circuit held that a back pay settlement for ending a race discrimination suit should be allocated to the years in which the back pay was earned rather than when it was received for taxation under FICA. The Sixth Circuit, in reaching its decision, relied upon the Supreme Court's ruling in Social Security Bd. v. Nierotko, 327 U.S. 358, 66 S.Ct. 637, 90 L.Ed. 718 (1946). In Nierotko, the respondent (plaintiff) received a back pay award under the National Labor Relations Act after being wrongfully discharged for union activity by his employer. The primary question before the Supreme Court was whether the back pay award should be treated under the Social Security Act as "wages" for which the employee would be entitled to credit on his Old Age and Survivors Insurance account. The Supreme Court held that the award constituted wages. Id. at 364; 66 S.Ct. at 639-641. In addition, the Supreme Court further held that the back pay "should be allocated [as wages] to the periods when the regular wages were not paid as usual." Id. at

370; 66 S.Ct. at 644. Although the Sixth Circuit recognized that Nierotko was factually distinguishable, the Court found the reasoning of the case to be "compelling and applicable." Bowman, 824 F.2d at 530. The Sixth Circuit stated that "if the payments are in fact for prior years and if, under Nierotko, they should be attributable to prior years for purposes of eligibility and other incidents of Social Security benefits and administration, we can see no reason for not applying this same principle in allocating the incidents of taxation." Id. The Bowman decision was cited with approval by the Fifth Circuit Court of Appeals in Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1580 (5th Cir. 1989).

In this case, Defendant maintains that Bowman was incorrectly decided and should not be followed by this Court. Defendant asserts that the Bowman Court's reliance on the "allocation principle" is in direct contradiction to the Internal Revenue Code, the Treasury Regulations and accepted principles of tax law. Defendant contends that in Revenue Ruling 89-35, 1989-1 C.B. 280, the IRS specifically rejected Bowman based upon its contradiction with statutory and regulatory provisions governing FICA. Defendant asserts that several courts including the Fourth Circuit and the District Courts of New York have looked at the issue and have concluded that Bowman was incorrectly decided. See, Hemelt v. United States, 122 F.3d 204 (4th Cir. 1997); Mazur v. Commissioner, 986 F.Supp. 752 (W.D.N.Y. 1997); Algie v. RCA Global Communications, Inc., 1995 WL 606096 (S.D.N.Y. 1995).

Upon review of the applicable authority, the Court chooses to follow the Bowman decision. The Court concludes that the Nierotko "allocation principle" should be applied to this case. Like the Sixth Circuit, the Court sees no reason for not applying the allocation principle to incidents of taxation. The payments at issue are undisputedly for wages earned in 1975 and if under Nierotko, they should be attributable to 1975 for purposes of eligibility of social security benefits, then they should also be allocated to 1975 for purposes of self-employment taxes.

The Court notes that the SSA has attributed the Telex payments to prior tax periods so as not to reduce Walker's social security benefits. Since the Telex payments are not considered self-employment income for the purpose of reducing social security benefits, they should also not be current self-employment income for the purpose of paying the old age, survivors, disability and hospital insurance to the IRS.

The Court recognizes that "net earnings from self-employment" is defined as gross income derived by an individual from any trade or business carried on by such individual, see, 26 U.S.C. § 1402, and that "[g]ross income derived by an individual includes gross income received...." See, 26 C.F.R. § 1.1402(a)-1(c). However, the Sixth Circuit in Bowman also recognized for purposes of FICA that the applicable tax attached at the time received by the employee. Nevertheless, the Sixth Circuit concluded that the tax treatment of the back pay settlement was an allocation issue and followed Nierotko.

As stated, Defendant cites to various cases in support of its position that Bowman was incorrectly decided. Although the Fourth Circuit in Hemelt reached the opposite conclusion of Bowman, the Fourth Circuit did not address Bowman or the allocation principle of Nierotko. Moreover, the Fourth Circuit disallowed the allocation of the settlement awards stating that the "taxpayers have no evidence of how they would have us allocate their awards among the years to which they are supposedly attributable (not to mention the awards of the other five thousand class members)." Hemelt, 122 F.3d at 210. No such problem exists in this case. In Algie, the New York District Court did not definitively decide the allocation issue. Therefore, its citation by Defendant is not authoritative. As to the Mazur case, the New York District Court did actually reach the allocation issue and specifically declined to follow Bowman. However, the Court finds the court's reasoning unpersuasive.

It is undisputed that Plaintiffs paid the maximum amount of old age, survivors, disability and hospital insurance during 1975. Because Plaintiffs have satisfied their social security and medicare tax liabilities for that year, the Court finds that the IRS is not entitled to retain and require payment of additional taxes on the Telex payments received in 1992 through 1995.

Conclusion

Based upon the foregoing, Plaintiffs' Motion for Summary Judgment (Docket Entry #12) is **GRANTED**. Defendant, The United States of America's Cross-Motion for Summary Judgment (Docket Entry

#14) is DENIED. Judgment shall issue forthwith.

Entered this 24~~th~~ day of July, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 24 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY SUE MOSS,)
)
 Plaintiff,)
)
 vs.)
)
 CONNECTICUT GENERAL LIFE)
 INSURANCE COMPANY, a)
 Connecticut Corporation,)
 and MERVYN'S, INC., a)
 California Corporation,)
)
 Defendants.)

Case No. 98-CV-129-BU ✓

ENTERED ON DOCKET
DATE JUL 27 1998

JUDGMENT

This matter came on for trial before the Court and a jury, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendants, Connecticut General Life Insurance Company and Mervyn's, Inc., and against Plaintiff, Mary Sue Moss, and that Defendants, Connecticut General Life Insurance Company and Mervyn's, Inc., are entitled to recover of Plaintiff, Mary Sue Moss, their costs of action.

DATED at Tulsa, Oklahoma, this 24th day of July, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 7-27-98

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

FILED

JUL 24 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Case No. 96-C-1042-H

ORDER

This matter comes before the Court for a determination of whether Defendant Home of Hope acted wilfully in connection with an alleged failure to comply with the provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. A hearing was held on this issue on July 20-21, 1998. The parties have consented to having U.S. Magistrate Judge Claire V. Eagan hear evidence on the general household work exemption and issue a Report and Recommendation with respect to whether Defendant is liable to Plaintiffs under the FLSA and, if so, the amount of damages. Based on the testimony and exhibits at the hearing, the Court hereby enters the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. This case arises out of a dispute regarding overtime compensation by approximately 31 Plaintiffs who were employed by Defendant Home of Hope as Habilitation Training Specialists ("HTS") or House Managers in the Supported Living Program.

2. Home of Hope is a not-for-profit corporation, the mission of which is to serve developmentally disabled individuals.

3. Home of Hope's Supported Living Program provides services for adult clients with developmental disabilities in a residential setting.

4. The goal of the Supported Living Program is to enable clients to live independently.

5. From approximately July 1, 1994, to June 30, 1996, Home of Hope utilized the "companionship services exemption" set forth in 29 U.S.C. § 213(a)(15).

6. From July 1, 1994, to June 30, 1996, HTS staff and House Managers were not paid the premium portion for hours worked in excess of forty (40) per week.

7. During the time that the companionship services exemption was utilized, the HTS staff and House Managers were allowed to work up to sixty (60) hours per week, and were paid "straight time."

8. Defendant first learned of the companion exemption in 1993 when Home of Hope's Director, DiAnna Hoover, attended a conference at Western Hills sponsored by the Homeward Bound Review Panel. At that seminar, Ms. Joni Fritz, the Executive Director of the American Network of Community Options and Resources ("ANCOR") advised that the companionship services exemption would apply to circumstances such as the Supported Living Program.

9. Ms. Hoover attended a second conference on about April 15, 1994, in Tulsa, during which Ms. Fritz again discussed the exemption.

10. At both the 1993 and 1994 conferences, Ms. Fritz was accorded the deference of an authority on the companionship services exemption by both conference officials and state officials in attendance who were charged with enforcing the FLSA in Oklahoma. Ms. Fritz stated at both conferences that the companionship services exemption would apply to Defendants' case.

11. Ms. Fritz is not an authority on the FLSA. Further, it is not reasonable to rely on Ms. Fritz's analysis of applicable labor law. She has no personal expertise, and her only source of information is a purported consultation with a now-deceased low-level analyst at the Department of Labor. Therefore, any opinion she may now render, or may have rendered in the past, with respect to the companionship services exemption is entirely without authority. Nonetheless, since the 1993 and 1994 conferences were sponsored by significant industry figures and Ms. Fritz was endorsed as authoritative by state officials involved in both social services and labor law enforcement, any reasonable participant at the conference would believe that Ms. Fritz's views were authoritative.

12. Ms. Hoover brought the information she learned at that seminar to the attention of the Board of Directors of Home of Hope on April 23, 1994.

13. The issue of utilizing the companionship services exemption was brought up again at the next meeting of the Board of Directors on May 27, 1994.

14. Mr. James Taylor, Defendant's public accountant, subsequently wrote a letter that stated in its entirety as follows:

We have discussed the Department of Labor's exemption from wage and hour laws for "companionship services" and how this exemption could apply to Home of Hope's Supported Living program. From a policy standpoint, I have no

reservation about Home of Hope applying the exemption. From the standpoint of administering the Supported Living program, the exemption should have the effect of minimizing Home of Hope's overall cost of service which would maximize the administrative reimbursement rate.

Based on our conversation, it appears you are addressing any nonfinancial considerations. If I can be of any further help, please let me know.

15. Ms. Hoover also discussed the exemption with Defendant's labor attorney when consulting him in connection with an unrelated employment law matter.

16. At the time that Home of Hope was deciding whether to utilize the companionship services exemption, other providers of services to developmentally disabled clients were also using the exemption.

17. On June 24, 1994, the Board of Directors of Home of Hope voted to apply the companionship services exemption beginning on July 1, 1994.

18. The primary reason Defendant applied the companionship services exemption was to further continuity of care in the lives of its clients. Developmentally disabled persons require stability. Because the staff could work more hours, there were fewer employees in the clients' homes.

19. The services that Home of Hope provides to its clients are governed by a series of contracts with the Oklahoma Department of Human Services ("DHS"). Under its contract with the State of Oklahoma, Home of Hope is paid through a "cost settlement" program. Under the cost settlement program, the provider's costs are reimbursed up to a certain amount ("allowable cost"). If the provider exceeds its allowable costs, the provider will not be reimbursed for those costs which exceed the amount of allowable costs. If the provider's expenses are less than the amount of allowable costs, the provider will only be reimbursed up to the amount of its actual

expenses. Under the cost settlement program, providers such as the Hope of Hope are not allowed to make a profit.

20. Since the financial burden of care for clients in the Supported Living Program is borne by the State of Oklahoma, there is no cost savings to Home of Hope by applying the companionship services exemption – only a cost savings to the State.

Conclusions of Law

1. Under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., hourly workers must be compensated at a rate of one and one-half times the regular rate for hours worked in excess of forty (40) per workweek.

2. An exemption to this general rule is found in the provision dealing with "companionship services." 29 U.S.C. § 213(a)(15).

3. The statute of limitations governing FLSA claims provides for a two year statute of limitations, unless the violation is "willful," in which the statute of limitations is extended to three years. 29 U.S.C. § 255(a).

4. Under § 255(a) of the FLSA, a claim accrues when the employer failed to pay the required compensation. 29 U.S.C. § 255(a).

5. An action is deemed to have been "commenced" in collective actions as to individual claimants by the filing of the complaint in which he or she is specifically named.

6. Plaintiff Dale Jean Terwilliger filed her complaint on November 12, 1996.

7. Plaintiffs Waseleus, Turner, and Hadley joined the action on March 28, 1997, with the filing of Plaintiffs' First Amended Complaint.

8. The remaining Plaintiffs joined the action with the filing of Plaintiffs' Second Amended Complaint on June 18, 1997.

9. Under the standard for a "willful" violation under the FLSA, the Plaintiffs must prove that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988). Negligence or an incorrect assumption that a pay plan complies with the FLSA do not meet the criteria for a willful violation of the FLSA. Id. The burden is on the employee to prove that the employer committed a willful FLSA violation. Gilligan v. City of Emporia, Kan., 986 F.2d 410, 413 (10th Cir. 1993).

10. Plaintiffs argue that in a residence where the client is unable to contribute anything to the upkeep, all domestic activities must be considered "general household work," and therefore the twenty percent threshold is clearly exceeded. The corollary to this argument is that Defendant was on notice that in certain of its residences the clients were totally unable to perform any upkeep and therefore, notwithstanding other considerations, Defendant knew or should have known that the companionship services exemption could not apply to Home of Hope. The Court rejects Plaintiffs' argument and expressly declines to find that in such a residence all domestic activities by health care providers are necessarily "general household work." This determination depends entirely on the facts and circumstances of each residence. Accordingly, the existence of such residences did not put Defendant on notice that the companionship services exemption could not apply to Home of Hope.

11. Under the standards established by McLaughlin, the Court finds that the Plaintiffs have failed to meet their burden of proof that Home of Hope knew or showed reckless disregard for the matter of whether its use of the companion services exemption was prohibited by law.

12. Based on the record in this case, Plaintiffs' claims should be measured by reference to a two-year statute of limitations.

13. Application of the two-year statute of limitations reflects the following possible applicable periods of recovery:

<u>Plaintiff</u>	<u>Applicable period of recovery</u>
Dale Jean Terwilliger	November 12, 1994 to November 12, 1996
Deborah Waseleus	March 28, 1995 to March 28, 1997
Patricia Turner	March 28, 1995 to March 28, 1997
Linda Hadley	March 28, 1995 to March 28, 1997
Martina Marie Alexander	June 18, 1995 to June 18, 1997
Trina S. Bowlin	June 18, 1995 to June 18, 1997
Kenneth Cobb	June 18, 1995 to June 18, 1997
Robert Jason Coleman	June 18, 1995 to June 18, 1997
Sherry Lea Cornwell	June 18, 1995 to June 18, 1997
Jodi Arlene Crandlemire	June 18, 1995 to June 18, 1997
Glenda S. Donohue	June 18, 1995 to June 18, 1997
Cora Sue Foreman	June 18, 1995 to June 18, 1997
Rachel Marie George	June 18, 1995 to June 18, 1997
Barry Thomas Heirston	June 18, 1995 to June 18, 1997
Anna Marie Henry	June 18, 1995 to June 18, 1997
Toby Lee Hooten	June 18, 1995 to June 18, 1997
Katherine Ann Brenner Howard	June 18, 1995 to June 18, 1997
Brenda Jean Hulcher	June 18, 1995 to June 18, 1997
Francis Darlyne Kerns	June 18, 1995 to June 18, 1997
Carolyn Louise Lacey	June 18, 1995 to June 18, 1997
Yvonne Lynnette Littlefield	June 18, 1995 to June 18, 1997
Robert Dale Pasley	June 18, 1995 to June 18, 1997
Mary A. Piepmeyer	June 18, 1995 to June 18, 1997
Penny Luann Rice	June 18, 1995 to June 18, 1997
Kassey J. Samples	June 18, 1995 to June 18, 1997

Carol Ursula Smallwood
Dixie Sue Sparks
Tambra Sue Suter
Jody D. Terwilliger
Julie Michell Wandell
Mary Alice Weins

June 18, 1995 to June 18, 1997
June 18, 1995 to June 18, 1997

IT IS SO ORDERED.

This 24TH day of July, 1998.



Sven Erik Holmes
United States District Judge

DATE 7-27-98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 24 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDSEY K. SPRINGER, d/b/a)
 Bondage Breakers Ministries,)
)
 Plaintiff,)
)
 v.)
)
 THE INFINITY GROUP COMPANY and)
 ROBERT F. SANVILLE,)
 individually and as Trustee of The Infinity)
 Group Company)
)
 Defendants.)

Case No. 98-CV-0299-K (E)

REPORT AND RECOMMENDATION

Plaintiff Lindsey K. Springer initiated this action alleging libel and slander pursuant to Oklahoma Stat. tit. 12, §§1441 and 1442 (1998). The Court has referred to the undersigned for Report and Recommendation the Motion of Robert F. Sanville, Court-Appointed Trustee, The Infinity Group Company, to Dismiss Plaintiff's Complaint (Docket #2). Defendant Robert F. Sanville ("Trustee") seeks dismissal under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The undersigned recommends that the motion to dismiss be **GRANTED**.

I. STANDARD OF REVIEW

A motion to dismiss is properly granted when it appears beyond doubt that a plaintiff could prove no set of facts entitling him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-102, 2 L. Ed. 2d 80 (1957); Huxall v. First State Bank, 842 F.2d 249, 251 (10th Cir. 1988). The complaint is construed in favor of plaintiff and all material allegations made therein are accepted as true. Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206, 45 L. Ed. 2d 343 (1975); American

Mining Congress v. Thomas, 772 F.2d 640, 650 (10th Cir. 1985), cert. denied, Kepford v. Thomas, 476 U.S. 1158, 106 S. Ct. 2276, 90 L. Ed. 2d 718 (1986).

II. FACTS

The undersigned accepts the facts as plaintiff has presented them. In addition, the undersigned proposes findings that on August 26, 1997, a civil enforcement action was brought in the United States District Court for the Eastern District of Pennsylvania (hereinafter the "Pennsylvania Eastern District") by the Securities and Exchange Commission ("SEC") against The Infinity Group Company ("TIGC"), Geoffrey Benson, and Geoffrey O'Connor. The action alleged interstate securities violations. Several relief defendants were named, including Lindsey K. Springer. The Pennsylvania Eastern District, in an order dated September 5, 1997, appointed Robert F. Sanville as Trustee, directing that he was "empowered to assume control over TIGC's assets and to conduct an accounting of its assets and investor proceeds." Memorandum of Law in Support of Motion of Robert F. Sanville, Court-Appointed Trustee, The Infinity Group Company, to Dismiss Plaintiff's Complaint (Docket #3), Exhibit A, at 1. On February 6, 1998, the Pennsylvania Eastern District issued an Order for a Final Injunction, Disgorgement, and Other Relief. The court concluded that TIGC, Geoffrey Benson, and Geoffrey O'Connor had violated federal securities laws. Id., Exhibit B.

In an accompanying memorandum, the court ordered Mr. Springer d/b/a Bondage Breakers Ministries to disgorge \$1.265 million which the court had determined originated as funds unlawfully-obtained from TIGC investors by TIGC and which Mr. Springer had received from TIGC without consideration. Id., Exhibit C, at 16. The court, in the February 6, 1998 memorandum, stated

Undoubtedly TIGC's members had faith in TIGC. They certainly had hope that its extravagant guarantees would be fulfilled. But TIGC was no charity -- *investors were defrauded for defendants' and relief defendants' gain*. For that, defendants must answer under the securities laws.

Id., Exhibit C, at 3-4 (emphasis added).

In the February 6, 1998 order, the court directed Mr. Sanville to continue as Trustee and specifically ordered him to, "As soon as practicable, notify all existing TIGC investors of the terms of this Order [and] initiate proof of claim procedures in order to determine the Trust's final obligations to its investors." Id., Exhibit B, at 5-6. Mr. Sanville sent a letter to some 10,000 persons believed to have been TIGC investors. The letter began: "It is my unpleasant duty to inform you that the court has found that you were the victim of a fraud." Id., Exhibit D, at 1. The letter also stated

The Court made the following findings as part of its decision:

2. "Investors were defrauded for defendants' (TIGC, Benson and O'Connor) and relief defendants' (Lindsey K. Springer, d/b/a Bondage Breaker Ministries, Susan L. Benson, JGS Trust, SLB Charitable Trust, and Futures Holding Company) personal gain".

Id. Plaintiff claims that these statements constitute libel and slander.

III. REVIEW

A. Jurisdiction

Trustee challenges this Court's jurisdiction over the subject matter of the claim, arguing that "As a court-appointed trustee, Sanville may not be sued in a court other than that which appointed him except under limited circumstances not present here." Id., at 5. The undersigned agrees.

"It is well settled that leave of the appointing forum must be obtained by any party wishing to institute an action in a non-appointing forum against a trustee, for acts done in the trustee's official

capacity and within the trustee's authority as an officer of the court." In re DeLorean Motor Company v. Weitzman, 991 F.2d 1236, 1240 (6th Cir. 1993); Barton v. Barbour, 104 U.S. 126, 26 L. Ed. 672 (1881). The Trustee's dissemination of a letter to investors was an act done in his official capacity and within his authority as an officer of the court.

There is a statutory limited exception to the Barton and DeLorean holdings:

Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property.

28 U.S.C. § 959. Here, Section 959 does not excuse plaintiff's failure to seek the leave of the Pennsylvania Eastern District because the dissemination of a letter to investors was not an act done in carrying on business connected with the property over which Sanville was appointed Trustee. The undersigned recommends that this Court find and conclude that it lacks jurisdiction over plaintiff's claim and, therefore, it must be dismissed in accord with Fed. R. Civ. P. 12(b)(1).

B. Quasi-Judicial Immunity

In the alternative, plaintiff has failed to state a claim upon which relief may be granted. The Trustee asserts that he is absolutely immune from suit under the doctrine of quasi-judicial immunity. The application of quasi-judicial immunity depends on whether a challenged action was made pursuant to a function integral to the judicial process. "[I]mmunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches." Forrester v. White, 484 U.S. 219, 227, 108 S. Ct. 538, 544, 98 L. Ed. 2d 555 (1988). One of many quasi-judicial functions afforded absolute immunity is the power of court-appointed trustees and receivers to perform those actions necessary to their official duties. See Valdez v. City and County of Denver, 878 F.2d 1285, 1287-1288 (10th Cir. 1989) (collecting cases which hold that quasi-judicial immunity applies to

particular functions); T & W Inv. Co., Inc. v. Kurtz, 588 F.2d 801, 802-803 (10th Cir. 1978) (holding that a receiver who is sued for civil rights violations is a court officer who shares the judge's immunity to the extent he carried out the orders of his appointing judge).

Here, the Trustee was appointed by the Pennsylvania Eastern District and directed by that court to notify investors of the terms of its February 6, 1998 order. In so doing, the Trustee included a quotation from the order that "Investors were defrauded for defendants' and relief defendants' personal gain." Plaintiff complains that the Trustee exceeded his authority when he edited the quote and inserted "(TIGC, Benson and O'Connor)" after "defendants'" and "(Lindsey K. Springer, d/b/a Bondage Breaker Ministries, Susan L. Benson, JGS Trust, SLB Charitable Trust, and Futures Holding Company)" after "relief defendants'." Also, plaintiff complains that his name--given in full--and the name of his ministry were placed first within the parenthetical insert. Contrary to the assertions of plaintiff, what little editing of the quote that was done by the Trustee was (1) accurate, (2) merely for clarification, and (3) did not in any way alter the meaning of the February 6, 1998 order. Nor can anything be made of placing plaintiff's name first within the parenthetical insert. One of the relief defendants' names had to be listed first and the fact that it happened to be plaintiff's does not amount to an overstepping of authority.

The Trustee's letter was properly within his authority as granted pursuant to the order of the Pennsylvania Eastern District. Therefore, the undersigned recommends a finding that the Trustee is absolutely immune from suit for any libel or slander arising from dissemination of the letter.

Moreover, both Pennsylvania and Oklahoma law exempt from their libel and slander statutes certain privileged communications including communications made in any judicial proceeding or other proceeding authorized by law, in discharge of an official duty, or by a fair and true report of a judicial

proceeding.¹ While it is not necessary to reach the issue of privilege, the undersigned notes that it appears that the Trustee's letter was sent in the course of the proper discharge of his official duties and the letter contained a fair and true report of a judicial proceeding. Thus, the letter would be a privileged communication and exempt from Oklahoma's and Pennsylvania's libel and slander laws.

The undersigned recommends, in the alternative, that this Court find and conclude that plaintiff's complaint fails to state a claim upon which relief may be granted and, therefore, must be dismissed in accord with Fed. R. Civ. P. 12(b)(6).

IV. CONCLUSION

Upon careful review of the complaint and the parties' briefs, for the foregoing reasons, the undersigned recommends that the Motion of Robert F. Sanville, Court-Appointed Trustee, The Infinity Group Company, to Dismiss Plaintiff's Complaint (Docket #2) be **GRANTED**.

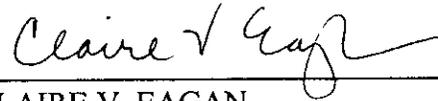
V. OBJECTIONS

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

¹ Although plaintiff sued under Oklahoma law, this Court would have to apply choice of law considerations to a determination of whether Oklahoma or Pennsylvania law applies. However, the undersigned recommends that the Court not reach that issue, as the law of both states recognizes the privileged communications exception. See Okla. Stat. tit. 12, § 1443.1; Joplin v. Southwestern Bell Telephone Co., 753 F.2d 808, 810 (10th Cir. 1983); Kirschstein v. Haynes, 788 P.2d 941 (Okla. 1990); Lindner v. Mollan, 544 Pa. 487, 490, 677 A.2d 1194, 1195 (Pa. 1996); Kemper v. Fort, 219 Pa. 85, 67 A. 991 (Pa. 1907).

party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992); Niehaus v. Kansas Bar Ass'n., 793 F.2d 1159, 1164-65 (10th Cir. 1986) (superseded by rule on grounds not relevant to holding on waiver of right to appeal).

Dated this 24th day of July, 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 27 Day of July, 1998.
A Schwelke

DATE 7-27-98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA,

F I L E D

JUL 24 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 ✓

J U D G M E N T

In accord with the Order entered on the 17th day July, 1998, Judgment is entered in favor of the Plaintiff, Jacquita Workman, and against the Defendant Kenneth S. Apfel. This matter is remanded to the Administrative Law Judge for development of the testimony of a vocational expert.

Dated this 23rd day of JULY, 1998.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

^{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.

DATE 7-27-98

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

FILED

JUL 24 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KELLY ENGLEMAN, as Parent and)
Natural Guardian on behalf of)
MICHELLE ENGLEMAN, a minor child,)
)
Plaintiffs,)

vs.)

Case No. 98-CV-0330-C (M) ✓

INDEPENDENT SCHOOL DISTRICT)
NO. 5 OF DELAWARE COUNTY,)
OKLAHOMA, a political subdivision of)
the State of Oklahoma; CHRISTIAN)
CHILDREN'S FUND; MANUAL HOLLAND,)
LUCINDA TURTLE, JAN BAILEY,)
HERMAN HITCHCOCK, JR., and)
JOEL BONAPARTE, Individually and in)
their official capacities,)
)
Defendants.)

ORDER OF DISMISSAL WITH PREJUDICE

This matter having come before the Court upon the Joint Stipulation for Dismissal With Prejudice by and between Plaintiffs Kelly Engleman, as Parent and Natural Guardian on behalf of Michelle Engleman, a minor child, and Defendant Christian Children's Fund, 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 as to Defendant Christian Children's Fund, each party to bear their own costs.

IT IS SO ORDERED this 24th day of July, 1998.


UNITED STATES DISTRICT JUDGE

DATE 7-27-98IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**FILED**

JUL 24 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURTMELINDA S. LeCOUR,
462-90-5813

Plaintiff,

vs.

Case No. 97-CV-517-M

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

ORDER

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

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

¹ Plaintiff's June 27, 1994, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held October 19, 1995. By decision dated January 24, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 27, 1997. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born July 5, 1946, and was 49 years old at the time of the hearing. She has a bachelor's degree in physical education and formerly worked as an aircraft painter. She claims to be unable to work as a result of knee problems, right eye blindness, carpal tunnel syndrome, osteoarthritis, and limited mobility. The ALJ determined that although Plaintiff is not able to perform her past work, she retains the ability to perform sedentary work reduced by an inability to perform work requiring 20/20 bilateral vision or excellent depth perception, or that would not allow her to change positions at will. [R. 20]. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that: (1) the ALJ performed an inadequate credibility determination; (2) the denial is based on an incomplete hypothetical question; and (3) the ALJ's finding that Plaintiff can sit for 6 hours of an 8 our day and has good bilateral manual dexterity is not based on substantial evidence.

The ALJ applied the appropriate standards in the evaluation of Plaintiff's pain and credibility. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ noted that despite Plaintiff's claims of disabling pain, she takes only ibuprofen and did not report any side effects. He also noted the absence of any record of any physical deficits that often accompany severe disabling pain, such as loss of appetite, muscle atrophy, functional disease, or retarded movements. [R. 16]. In fact, on September 19, 1994, consultative examiner, Beau Jennings, D.O., reported Plaintiff had normal ranges of motion, good pulses, reflexes and no atrophy. [R. 140]. The Court finds that the ALJ sufficiently set forth reasons, supported by evidence in the record, for his credibility determination.

Plaintiff also claims that the hypothetical question posed to the vocational expert was incomplete in that it failed to include all of her limitations. *Hargis v. Sullivan*, 945 F.2d 1482, 1292 (10th Cir. 1991) provides that "testimony elicited by hypothetical

questions that do not relate with precision all the claimants' impairments cannot constitute substantial evidence to support the Secretary's decision." However, in posing a hypothetical question, an ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990).

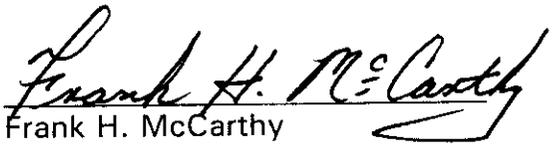
Concerning Plaintiff's alleged hand impairment, the ALJ noted Dr. Jennings' report that Plaintiff had full range of motion in all extremities, good hand grip and good manipulation dexterity. [R. 14, 16, 140].² The ALJ accounted for Plaintiff's limitations in standing, walking, and limited mobility, by finding that she was limited to sedentary work, and was subject to the need to change her position at will. [R. 14]. As to her alleged inability to sit, the ALJ noted Plaintiff's testimony that she spends her day watching television. Based on his credibility determination, the ALJ omitted limitations due to lack of stamina, pain and the need to frequently lay down during the day. The Court finds that the restrictions expressed by the ALJ in the hypothetical posed to the vocational expert and upon which the disability determination is based, are supported by substantial evidence. Accordingly, the Court finds that the ALJ's hypothetical questions to the vocational expert and his reliance upon the vocational expert's testimony in his decision were proper and in accordance with established legal standards.

² Plaintiff submitted a report completed April 25, 1995, by Dr. Gillock to the Appeals Council. Based on his independent medical evaluation, Dr. Gillock reported no pain in Plaintiff's hands, normal sensory examination of the hands, normal motor function of the hand, full range of motion of the fingers, and no atrophy of the thenar muscle. [R. 214-15].

Contrary to Plaintiff's contention, this is not a case in which the ALJ relied upon "the absence of evidence" to reach his decision. See *Thompson v. Sullivan*, 987 F.2d 1482, 1491 (10th Cir. 1993). Nor is it a case where the ALJ substituted his own opinion for medical evidence. The ALJ noted that examination revealed Plaintiff had full range of motion of all extremities; that she watches television all day, but must move from side to side while sitting; and that her physicians progress notes dated July 25, 1995, reflect the opinion that Plaintiff could not have any job standing, only sitting. [R. 16, 18, 183]. The ALJ described the evidence in the record upon which he based his conclusion that Plaintiff could perform work at the sedentary exertional level with the limitations set forth in his findings. Thus, the Court finds that the ALJ's RFC determination is supported by substantial evidence and that the ALJ did not substitute his opinion for the medical evidence.

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

SO ORDERED this 24th Day of July, 1998.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

DATE 7-27-98

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

TAMARA K. WADDELL,)
)
Plaintiff,)
)
v.)
)
JANKI, INC., an Oklahoma corporation,)
)
Defendant.)

Case No. 98-CV-354-H

FILED

JUL 24 1998

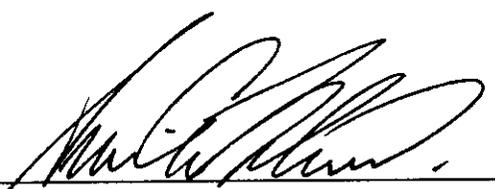
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Plaintiff's motion to dismiss the case without prejudice. Federal Rule of Civil Procedure 41(a)(2) provides that "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2). The Court hereby grants Plaintiff's motion to dismiss this case without prejudice.

IT IS SO ORDERED.

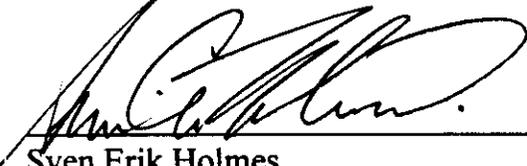
This 24th day of July, 1998.


Sven Erik Holmes
United States District Judge

ACCORDINGLY, IT IS HEREBY ORDERED that the Report and Recommendation of the Magistrate Judge (Docket #7) is **adopted and affirmed**.
Petitioner's petition for a writ of habeas corpus is **denied**.

IT IS SO ORDERED.

This 22nd day of July, 1998.



Sven Erik Holmes
United States District Judge

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

ENTERED ON DOCKET

ROBERT WAGNER,)
)
Petitioner,)
)
vs.)
)
RITA MAXWELL,)
)
Respondent.)

DATE JUL 23 1998

Case No. 97-C-43H (J)

FILED

JUL 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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.

IT IS SO ORDERED.

This 22nd day of July, 1998.



Sven Erik Holmes
United States District Judge

9

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

MULK RAJ DASS,)
)
Plaintiff,)
)
vs.)
)
STEPHEN LEWIS, U.S. ATTORNEY;)
MR. S. HARO, Associate Warden; and)
MR. JOHN PRITCHARD, Captain,)
)
Defendants.)

ENTERED ON DOCKET

DATE JUL 23 1998

No. 98-CV-132 H (M)

FILED

JUL 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On December 12, 1997, Plaintiff, a federal prisoner currently confined in the Metropolitan Detention Center in Brooklyn, New York, filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Western District of Louisiana. That Court determined venue was improper, and pursuant to 28 U.S.C. § 1406, transferred the case to the Northern District of Oklahoma. The court record indicates Plaintiff has paid the \$150.00 filing fee to commence this civil rights action against Defendants.

BACKGROUND

Plaintiff's claims are based on events occurring during his incarceration at F.C.I. Bastrop, located in Bastrop, Texas ("Bastrop"), from August 18, 1994 to October 13, 1994 and from December 7, 1994 to December 19, 1994, and on Defendants' actions prior to and during his criminal trial conducted in this district court during November and December, 1995.¹ Plaintiff

¹In Case No. 95-CR-54-K, Plaintiff was convicted of one count of conspiracy to defraud, in violation of 18 U.S.C. § 371, and four counts of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2(b). Plaintiff's convictions were affirmed on appeal; however, due to the district court's failure to afford Plaintiff an opportunity to allocute before being sentenced, as required by Fed. R. Crim. P. 32(c)(3)(C), his sentence was vacated and the case remanded for resentencing. United States v. Kalyvas, Nos. 96-5176, 96-5144, 1997 WL 651761 (10th Cir. 1997).

2

alleges that while he was incarcerated at Bastrop, Defendants violated his constitutional rights by denying access to a "PIN" code (effectively preventing him from placing long distance telephone calls) thereby causing him to "borrow" a PIN card from "a friendly inmate"; by monitoring and recording his telephone calls in an attempt to add further incriminating evidence to the Government's case against him; and by allowing introduction of the telephone call data at his criminal trial.

In his complaint, Plaintiff summarizes his claims as follows:

1. The Defendants knowingly, intelligently and voluntarily subjected the Plaintiff to abnormal, cruel and harsh conditions of incarceration which have caused permanent damage to the Plaintiff's health and well-being, and have caused the Plaintiff to suffer significant financial losses as a result of his unjust conditions of incarceration.
2. The misleading and erroneous testimony of Mr. John Pritchard and his introduction of the falsified computer print-outs as evidence against the Plaintiff appears to have successfully prejudiced the outcome of the Plaintiff's criminal case.
3. Falsified documentation in the Bureau of Prisons files may adversely affect the Plaintiff's current security status or other considerations or actions by other Government agencies in the Plaintiff's ongoing case. This problem stems from the actions of the Defendant John Pritchard.
4. The United States Attorney in Tulsa, Oklahoma, Mr. Stephen Lewis, has been involved in the orchestration of an extensive scheme using unlawful methods in his quest to seek the Plaintiff's conviction on the indictment. The contrived nature of the documents submitted as evidence, and the use of B.O.P. staff as witnesses against [sic] the Plaintiff, will expose the crime for the fraudulent conspiracy that it is.
5. It appears that the Plaintiff's First, Fifth, Sixth, Eighth, and Fourteenth Amenment [sic] rights to the United States Constitution have been actively and repeatedly violated by the Defendants.

Plaintiff "seeks monetary compensation of an unspecified amount that is to be determined by the Court for the losses he has suffered." He also seeks "appropriate civil and criminal sanctions" against the Defendants and a new trial.

ANALYSIS

A. Claims Under Color of State Law, 42 U.S.C. 1983

Plaintiff brings his claims in this case pursuant to 42 U.S.C. § 1983. That statute provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For a complaint under § 1983 to be sufficient, a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States, and that defendant acted under color of law "of any State or Territory." Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Leatherman v. Tarrant Cty. Narcotics Unit, 113 S.Ct. 1160, 1163 (1993); Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

Defendants in this case, as federal officials or employees, did not act under color of state law as required by section 1983. See Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (the state action test requires: (1) that the deprivation be caused by the exercise of a right or privilege created by the state or by a person for whom the state is responsible, and (2) that the actor must be someone who is a state actor). Plaintiff has not alleged that the federal officials in this case acted under anything other than federal law, and as a result, section 1983 does not apply to his suit. Therefore, Plaintiff's claims against these Defendants could be dismissed on that basis.

However, this Court recognizes the general principle of affording pro se litigants' pleadings liberal construction. See Estelle v. Gamble, 429 U.S. 97, 106 (1976). Therefore, although Plaintiff does not cite Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), as the basis for jurisdiction, the Court liberally construes the complaint as a Bivens action

and finds the invocation of jurisdiction satisfactory.

B. The Prison Litigation Reform Act (“PLRA”)

By enacting the PLRA in 1996, Congress amended § 1997e(a) of the Civil Rights of Institutionalized Persons Act of 1980 (42 U.S.C. §§ 1997-1997j) to provide that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, *or any other Federal law*, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a) (emphasis added). Thus, Congress made clear in its addition of the clause “or any other Federal law” that § 1997e no longer applies only to state prisoners seeking relief under 42 U.S.C. § 1983. See McCarthy v. Madigan, 503 U.S. 140, 150 (1992). Because § 1997e pertains to “any action brought . . . under . . . any [] Federal law, by a prisoner confined in any jail, prison or other correctional facility,” the exhaustion requirements now apply to Bivens suits brought by federal prisoners against federal officials as well. Garrett v. Hawk, 127 F.3d 1263, 1265 (10th Cir. 1997). Thus, if a prisoner has not exhausted all available administrative remedies, the Court must dismiss the complaint for lack of subject matter jurisdiction.

In this case, Plaintiff does not indicate that he has exhausted available administrative remedies, nor does it appear from the fact of the complaint that he has brought an administrative action. Regardless, Plaintiff is still obligated to pursue all levels of the administrative scheme where administrative remedies are available. Compare Tafoya v. Simmons, 116 F.3d 489 (Table), 1997 WL 337513, at *2 (10th Cir. June 19, 1997) (inmate must exhaust administrative remedies regardless of whether or not the administrative action is futile) with Garrett, 127 F.3d at 1266-67 (finding that where no administrative remedies are available to inmate, case cannot be dismissed pursuant to 42

U.S.C. § 1997e(a)).

Notwithstanding the above, pursuant to 42 U.S.C. § 1997e(c)(1), a court shall dismiss "any action brought with respect to prison conditions under section 1983 . . . , or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." In fact, should the court determine a § 1983 or Bivens claim does fall within section 1997e(c)(1), the action may be dismissed without requiring the exhaustion of administrative remedies. See 42 U.S.C. § 1997e(c)(2).

C. Plaintiff's Complaint Fails Under 42 U.S.C. § 1997e(c)(1) and Heck v. Humphrey

1. Claim #1: Conditions of Incarceration, Classification and "PIN" Card Privilege

Plaintiff alleges that the conditions of his confinement at Bastrop constituted "abnormal, cruel and harsh conditions" and caused permanent damage to his health and well-being, as well as significant financial losses. As a result, Plaintiff seeks to recover damages.

Plaintiff indicates that during his incarceration at Bastrop, prior to his conviction on criminal charges in this Court, he was classified as a "holdover." It was this classification which allegedly prevented his use of the alleged "PIN" code telephone cards. However, Plaintiff's dissatisfaction with his classification while at Bastrop does not rise to the level of a constitutional violation. The Supreme Court has traditionally held that a prisoner's classification does not implicate a constitutional right. See Olim v. Wakinekona, 461 U.S. 238, 245 (1983); Meachum v. Fano, 427 U.S. 215, 224 (1976); Moody v. Dagget, 429 U.S. 78, 88 n.9 (1976). Further, changing an inmate's prison classification ordinarily does not deprive him of liberty, because he is not entitled to a

particular degree of liberty in prison. See Meachum, 427 U.S. at 225. Thus, whether Plaintiff's "holdover" status afforded certain telephone privileges or not is insufficient to rise to the level of a due process violation. See Meachum, 427 U.S. at 228; Kincaid v. Duckworth, 689 F.2d 702, 704 (7th Cir. 1982), cert. denied, 461 U.S. 946 (1983); see also Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991).

Additionally, federal courts do not interfere in classification and placement decisions. Such decisions are entrusted to the broad discretion of prison administrators, not to the federal courts. Moody, 429 U.S. at 88 n.9; Meachum, 427 U.S. at 228; Hewitt v. Helms, 459 U.S. 460, 467-68 (1983); Wilkerson v. Maggio, 703 F.2d 909, 911 (5th Cir. 1983); Twyman, 584 F.2d at 356-57. Accordingly, Plaintiff's claim related to Defendants' denial of "PIN" code telephone card due to his classification lacks an arguable basis in law as Defendants' actions do not rise to the level of a constitutional violation.

Giving liberal construction to Plaintiff's *pro se* complaint, see Haines v. Kerner, 404 U.S. 519 (1972), Plaintiff also seems to complain that Defendants Haro and Pritchard violated his civil rights when they "maintain[ed] this extraordinary institutional surveillance of [his] telephonic activities." However, the Court finds that this allegation also fails to rise to the level of a constitutional violation. For obvious security reasons, most prison regulations provide that prison officials may randomly monitor and tape record inmate telephone calls. On direct appeal from his criminal conviction, Plaintiff argued that the district court erred in denying his motion to suppress and admitting into evidence at trial the tape recorded conversations he had while incarcerated at Bastrop. Finding no error in the district court's denial of Plaintiff's motion to suppress, the Tenth Circuit stated that "[t]he penal institution wherein Dass was then confined gave all inmates notice

that personal calls of this sort could be monitored and recorded . . . the initial monitoring of Dass' calls was random, but that, when suspicions were aroused by the frequency and nature of the calls, the monitoring understandably escalated." United States v. Kalyvas, Nos. 96-5176, 96-5144, 1997 WL 651761 (10th Cir. Oct. 21, 1997). Quite simply, because Plaintiff had notice of the fact that his telephone calls could be monitored and recorded, he impliedly consented to the actions taken by Defendants. The Court concludes that Defendants' challenged actions do not rise to the level of a constitutional violation.

Furthermore, absent a showing of physical injury, a prisoner may not bring an action under 42 U.S.C. § 1983 for mental or emotional injury. See 42 U.S.C. 1997e(e). Plaintiff has claimed "permanent damage" but has not shown the Court evidence of any physical injury. Thus, to the extent Plaintiff seeks to recover damages for emotional suffering, his claim must be denied.

Lastly, if Plaintiff is attempting to bring a civil rights action related to the conditions of confinement during his incarceration at the Tulsa County Jail, see Complaint, "Statement of Claim" at 3, the Court finds none of the named defendants had any connection or involvement with that facility and, as a result, any such claim fails.

2. Claim #s 2 and 3: False Trial Testimony and Falsified Prison Files Used as Evidence

Plaintiff alleges that during the month-long trial at the Tulsa federal courthouse, Defendant Pritchard testified "on December 7, 1995, under oath," that Plaintiff had placed "1,159 telephone calls which were recorded" by prison officials at the Bastrop, Texas facility. According to Plaintiff, a computer printout of the telephonic activity was admitted which "allegedly bore the record of the Plaintiff's entire resident activity ... during the autumn of 1994." Plaintiff alleges this evidence was

false because it incorrectly included his time spent in the correctional facilities at Eden, Texas and Oakdale, Louisiana. Therefore, Plaintiff states the introduction of these allegedly falsified computer printouts as evidence against him "appears to have successfully prejudiced the outcome of the Plaintiff's criminal case."

The Court finds that Plaintiff's efforts to challenge in this Bivens action the evidence presented at his criminal trial are inappropriate at this time. In Heck v. Humphrey, 512 U.S. 477 (1994), the Supreme Court addressed whether a state prisoner may challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. § 1983. In Heck, as in the instant case, the plaintiff's allegations called into question the lawfulness of his conviction or confinement. Under those facts, the Supreme Court concluded:

[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed or 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. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

Id. at 486-87. In other words, unless Plaintiff can demonstrate the conviction or sentence has already been invalidated, his § 1983 claim for damages must be dismissed. Id.; Stephenson v. Reno, 28 F.3d 26 (5th Cir. 1994) (per curiam) (applying Heck to a Bivens action pursuant to 28 U.S.C. § 1331 where plaintiff had not yet challenged the validity of his confinement).

In this case, Plaintiff has challenged his conviction and sentence on direct appeal. As noted above, the Tenth Circuit Court of Appeals affirmed his conviction on all five counts of the superceding indictment but vacated his sentence and remanded the case for resentencing. The Court

concludes that Plaintiff has not demonstrated that his conviction has been invalidated and that, as a result, his instant claims related to the evidence presented at his trial have not accrued. Those claims should be dismissed without prejudice.

3. Claim #4: Defendant Lewis Shielded by Absolute Immunity

Finally, Plaintiff's claim against Defendant U.S. Attorney Stephen Lewis must be dismissed. As a U.S. Attorney, Defendant Lewis is shielded by absolute immunity while acting within the course of his duties in initiating prosecution and presenting the government's case. Tripati v. United States Immigration and Naturalization Serv., 784 F.2d 345, 347 (10th Cir. 1986); see also Imbler v. Pachtman, 424 U.S. 409, 427-31 (1976) (42 U.S.C. § 1983 case against prosecutor); Dohaish v. Tooley, 670 F.2d 934, 938 (10th Cir. 1982) (42 U.S.C. § 1983 case against prosecutor); Butz v. Economou, 438 U.S. 478, 498-99 and nn. 25 and 26 (1978) (immunity available to federal defendants equivalent to that available to state defendants). Plaintiff's allegations against Defendant Lewis involve the initiation and presentation of the government's case against Plaintiff. Under these circumstances, and unlike qualified immunity, the *sua sponte* dismissal of a suit is proper where it is obvious from the plaintiff's allegations that the defendant is absolutely immune from suit. See McKinney v. Oklahoma Dept. of Human Services, 925 F.2d 363, 365 (10th Cir. 1991) (upholding *sua sponte* dismissal because it was patently obvious that no claim was stated in the complaint and no amendment could cure the defect); Pugh v. Parish of St. Tammany, 875 F.2d 436, 438 (5th Cir. 1989) (upholding *sua sponte* dismissal of § 1983 claim because defendants were absolutely immune from suit). As a result, the Court concludes that Plaintiff's claim against Defendant Lewis should be dismissed.

4. Claim #5: Plaintiff's Complaint Fails to Allege Constitutional Violations

Plaintiff claims that his "First, Fifth, Sixth, Eighth, and Fourteenth Amenment [sic] rights . . . have been actively and repeatedly violated by the Defendants." However, as discussed supra, none of the actions of Defendants Haro and Pritchard at Bastrop rise to the level of constitutional violations. Therefore, Plaintiff has failed to state a claim upon which relief can be granted. Furthermore, Defendant Lewis is shielded by absolute immunity. As a result, Plaintiff's claims must be dismissed with prejudice pursuant to 42 U.S.C. § 1997e(c)(1).

CONCLUSION

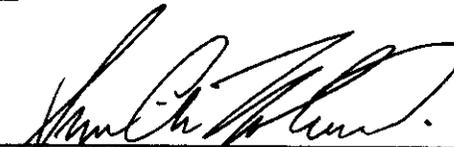
Plaintiff's claims against Defendants Haro and Pritchard concerning the conditions of his confinement fail to state a constitutional violation and should be dismissed with prejudice. Plaintiff's claims against Defendant Pritchard concerning allegedly misleading and erroneous testimony and falsified evidence produced at Plaintiff's criminal trial should be dismissed without prejudice pursuant to Heck v. Humphrey, 512 U.S. 477 (1994). Plaintiff's claim against Defendant Lewis should be dismissed with prejudice based on absolute immunity.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's claims against Defendants Haro and Pritchard concerning the conditions of his confinement fail to state a claim upon which relief can be granted and are **dismissed with prejudice**.
2. Plaintiff's claims against Defendant Pritchard concerning allegedly misleading, erroneous and falsified evidence produced at Plaintiff's criminal trial are **dismissed without prejudice** pursuant to Heck v. Humphrey, 512 U.S. 477 (1994).
3. Plaintiff's claim against Defendant Lewis is **dismissed with prejudice** on the basis of absolute immunity.

IT IS SO ORDERED.

This 22ND day of July, 1998.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HAMILTON HALLMARK, a division of)
AVNET, INC., a New York corporation,)

Plaintiff,)

v.)

NATIONAL COMPUTERS PLUS, INC.,)
an Oklahoma corporation,)

Defendant.)

Case No. 97-CV-824B (J)

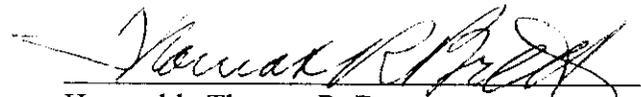
ENTERED ON DOCKET

DATE JUL 24 1998

AGREED JOURNAL ENTRY OF JUDGMENT

Pursuant to the Stipulation for Entry of Journal Entry of Judgment filed herein, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that judgment is hereby granted in favor of Plaintiff, Hamilton Hallmark, a division of Avnet, Inc., and against Defendant, National Computers Plus, Inc., on Count II of Plaintiff's Complaint in the principal amount of \$124,025. Post-judgment entered shall accrue thereon at the rate of 5.232% per annum in accordance with 28 U.S.C. § 1961.

Dated this 27th day of July, 1998.


Honorable Thomas R. Brett
United States District Court Judge

35

Submitted by:



David H. Herrold, OBA # 17053
CONNER & WINTERS
15 E. 5th St., Suite 3700
Tulsa, OK 74103-4344
(918) 586-5711

ATTORNEY FOR PLAINTIFF

and



James W. Rusher, OBA #11501
ALBRIGHT & RUSHER
2600 NationsBank Center
15 West Sixth Street
Tulsa, Oklahoma 74119-5434
(918) 583-5800

ATTORNEY FOR DEFENDANTS

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

MARTHA JO RISELING, as Surviving Widow Spouse
and Personal Representative of STEPHEN M.
RISELING, Deceased; MARTHA JO RISELING,
Individually,

Plaintiffs,

vs.

NATIONAL CAR RENTAL SYSTEM, INC., d/b/a
NATIONAL CAR RENTAL, a Delaware Corporation;
JONES OLDS-GMC-BUICK, INC., GENERAL
MOTORS CORPORATION, Tradename
OLDSMOBILE DIVISION, a Delaware Corporation;
and GERALD JONES, d/b/a NATIONAL CAR
RENTAL,

Defendants.

FILED

JUL 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 90-CV 961 H

ENTERED ON DOCKET

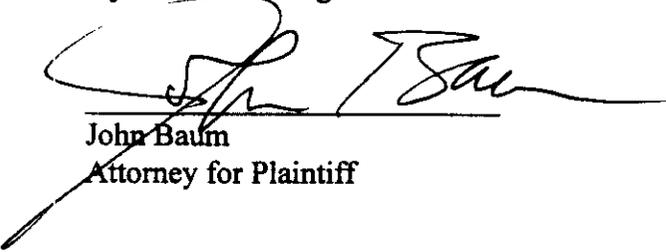
DATE JUL 24 1998

STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.P. 41, the parties, and each of them, by and through their respective counsel of record, herewith stipulate and agree to the dismissal with prejudice of said cause, including all complaints, counterclaims, cross complaints and causes of action of any type by any party against General Motors Corporation. Each party shall bear its or her own costs, expenses, and attorney fees without assessment against any other party.

Executed the respective dates shown adjacent to each signature.

Date: _____


John Baum

Attorney for Plaintiff

327

45

Date: _____



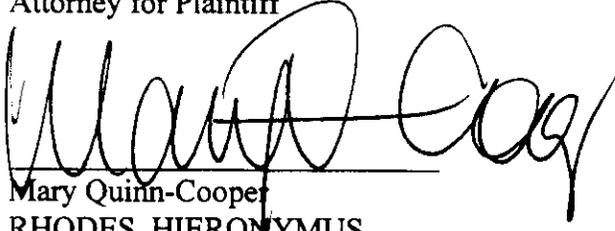
Mark Shortes
Attorney for Plaintiff

Date: _____



Beau Williams
Attorney for Plaintiff

Date: 7/21/98



Mary Quinn-Cooper
RHODES, HIERONYMUS,
JONES, TUCKER & GABLE
Attorney for Defendant
General Motors Corporation

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

THOMAS R. GLOVER,

Plaintiff,

v.

GARY ALRED, JIM ALRED, MIKAEL
ALRED, PAWNEE LIVESTOCK SALES,
INC., GARY STRAHAN, as Personal
Representative of the Estate of J. B. SMITH,
deceased, JOE SODERSTROM, SARAH
SODERSTROM, OSAGE ANIMAL
CLINIC, INC., SAM STRAHM, D.V.M.,
and JOHN DOES I THROUGH XX,

Defendants.

and

JOE SODERSTROM and SARAH
SODERSTROM,

Defendants and Third-Party
Plaintiffs,

v.

MID-ARK CATTLE COMPANY, INC.;
BARRETT-CROFOOT, INC.;
BARRETT-CROFOOT CATTLE, INC.;
and JAMES F. LOWDER,

Third-Party Defendants.

Case No. 96CV 886B ✓

F I L E D

JUL 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JUL 24 1998

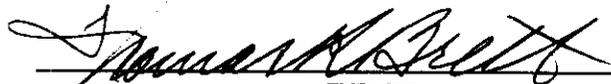
**ORDER GRANTING DISMISSAL WITH PREJUDICE
OF PLAINTIFF'S CLAIMS AGAINST
DEFENDANTS OSAGE ANIMAL CLINIC, INC., SAM
STRAHM, D.V.M., AND JOHN DOES I THROUGH XX**

Came on before the Court on this the 22nd day of July, 1998, Plaintiff's
unopposed Stipulation of Dismissal With Prejudice as to Defendants Osage Animal Clinic, Inc., Sam Strahm,

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D.V.M., and John Does I Through XX. Upon considering the stipulation and the agreement of all parties in this matter, THE COURT FINDS that, pursuant to Fed. R. Civ. P. 41(a), Plaintiff's claims as to Defendants Osage Animal Clinic, Inc., Sam Strahm, D.V.M., and John Does I Through XX should be dismissed with prejudice with each party bearing its own costs, accordingly, it is

ORDERED, ADJUDGED AND DECREED that all of Plaintiff's claims as to Defendants Osage Animal Clinic, Inc., Sam Strahm, D.V.M., and John Does I Through XX are hereby dismissed with prejudice to the refiling of same, with each of those parties bearing their respective costs as to each other, and that this constitutes a final Order with respect to the claims between the Plaintiff, Thomas R. Glover, and the Defendants, Osage Animal Clinic, Inc., Sam Strahm, D.V.M., and John Does I Through XX.



JUDGE

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

F I L E D

JUL 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL D. THOMPSON)
)
Plaintiff,)
)
V.)
)
JOHNSON CONTROL WORLD)
SERVICES INC.,)
)
Defendant.)

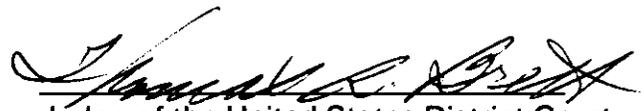
Case No. 97-CV-696 B (J)

ENTERED ON DOCKET
DATE JUL 24 1998

ORDER

Having considered the Motion submitted by the Plaintiff to dismiss the above captioned case with prejudice, this Court, for good cause shown, finds that this Motion should be granted.

IT IS THEREFORE ORDERED that this case is dismissed with prejudice, pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, with each party to bear its own costs and attorney fees.


Judge of the United States District Court

Submitted By:

Eric B. Bolusky OBA #935
Eric B. Bolusky PLLC
406 South Boulder
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Tulsa, Oklahoma 74103
(918) 582-6333

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CLARENCE STANLEY,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner)
of Social Security Administration,^{1/})
)
Defendant.)

No. 97-CV-779-H(J)

FILED
JUL 22 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE JUL 28 1998

ORDER

Plaintiff filed this social security appeal on August 25, 1997. To date, Plaintiff has not served the Defendant in this case. Plaintiff has had almost 11 months to obtain service. On July 6, 1998, the Court ordered Plaintiff to show cause by July 18, 1998 why this case should not be dismissed for failure to serve Defendant within 120 days as required by Fed. R. Civ. P. 4(l) and (m). To date, Plaintiff has not responded to the Court's show cause order. Consequently, this case is dismissed for failure to effect timely service, for failure to prosecute, and for failure to follow the orders of this Court. See Fed. R. Civ. P. 4(m) and 41(b).

IT IS SO ORDERED.

Dated this 22nd day of July 1998.


Sven Erik Holmes
United States District Judge

^{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 Shirley S. Chater as the Defendant in this action.

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

WILLIE & MARILYN GILBERT,)
as parents and next friend of their)
minor daughter, TANYA GILBERT;)
BOYD & DEBRA LOUDERBACK,)
as parents and next friend of their)
minor daughter, APRIL LOUDERBACK;)
DOUGLAS R. & SUSAN G.)
JACOBSEN, as parents and next)
friend of their minor daughter, RACHEL)
JACOBSEN,)

Plaintiffs,)

v.)

INDEPENDENT SCHOOL DISTRICT)
NO. 5 OF ROGERS COUNTY, a/k/a)
INOLA PUBLIC SCHOOLS,)

Defendant.)

Case No. 97-CV-20-H ✓
CLASS ACTION

FILED

JUL 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JUL 23 1998

JOINT STIPULATION OF DISMISSAL

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiffs, Willie and Marilyn Gilbert, as parents and next friend of their minor daughter, Tanya Gilbert; Boyd and Debra Louderback, as parents and next friend of their minor daughter, April Louderback; and Douglas R. and Susan G. Jacobsen, as parents and next friend of their minor daughter, Rachel Jacobsen, hereby stipulate with the Defendant, Independent School District No. 5 of Rogers County, a/k/a Inola Public Schools, that this action shall be dismissed with prejudice to its refiling.

Dated this 21st day of July, 1998.

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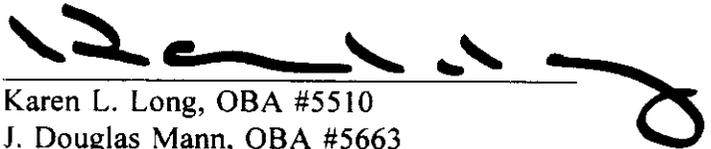
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Respectfully submitted,



Samuel J. Schiller, OBA #016067
Ray Yasser, OBA #009944
SCHILLER LAW FIRM
P.O. Box 159
Haskell, OK 74436

Attorneys for Plaintiffs and Class



Karen L. Long, OBA #5510
J. Douglas Mann, OBA #5663
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 700
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(918) 585-9211

Attorneys for Defendant

1-
Jm

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JIM L. IRVIN,)

)
)
Plaintiff,)

v.)

)
)
UNITED STATES OF AMERICA,)

)
)
Defendant.)

Case No. 97-CV-858-K ✓

ENTERED ON DOCKET
JUL 21 1998
DATE _____

STIPULATION OF DISMISSAL

The plaintiff, Jim L. Irvin, by his attorney of record, Thomas E. Baker, and the defendant, United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, having fully settled all claims asserted by the plaintiff in this litigation, hereby stipulate to, and request entry by the Court of, the order submitted herewith dismissing all such claims with prejudice.

Dated this 21st day of July 1998.

Phil Deibel
for WYN DEE BAKER, OBA #465
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463
Attorney for Defendant

Tom E. Baker
THOMAS E. BAKER, Esq.
2431 East 51st Street, Suite 306
Tulsa, Oklahoma 74105-6036
(918) 749-5988
Attorney for Plaintiff

CERTIFICATE OF SERVICE

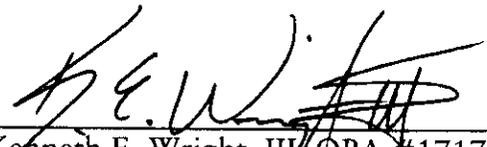
This is to certify that on the 21st day of July 1998, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Thomas E. Baker, Esq., 2431 East 51st Street, Suite 306, Tulsa, Oklahoma 74105-6036.

Santita S. Ogren
Santita S. Ogren
Legal Secretary

WDB:sso

WHEREFORE, for the reasons set forth herein, the parties respectfully pray the Court enter an *Order* dismissing this case with prejudice, and for such other and further relief as the Court deems just and equitable.

Respectfully submitted,



Kenneth E. Wright, III, OBA #17171

ATTORNEY FOR PLAINTIFFS

WRIGHT & WRIGHT
P. O. Box 960
Jay, Oklahoma 74346
(918) 253-4215



Ann C. Fries, OBA #13040

ATTORNEY FOR DEFENDANT
CHRISTIAN CHILDREN'S FUND

LAW OFFICES OF EARL R. DONALDSON
4500 South Garnett Road, Suite 230
Tulsa, Oklahoma 74146-5220
(918) 663-7878

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 1998, I mailed a true and correct copy of the above and foregoing instrument with proper postage thereon fully prepaid to the following:

J. Douglas Mann
Rosenstein, Fist & Ringold
525 South Main, Suite 700
Tulsa, Oklahoma 74103



Ann C. Fries

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

CAROL E. FREDERIC,
SSN: 440-58-1181

Plaintiff,

v.

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

Defendant.

ENTERED ON DOCKET

DATE 7-21-98

No. 97-C-460-J

F I L E D

JUL 17 1998

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

ORDER^{2/}

Plaintiff, Carol E. Frederic, 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) substantial evidence does not support the ALJ's decision that Plaintiff can perform a full range of sedentary work, (2) the ALJ did not give the appropriate weight to the evidence provided by Plaintiff's treating physicians, (3) the ALJ did not give appropriate consideration to Plaintiff's subjective complaints of pain, and (4) the ALJ did not undertake a proper Step Four analysis. For the

^{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 Judge Richard J. Kallsnick (hereafter "ALJ") concluded that Plaintiff was not disabled on March 13, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on March 24, 1997. [R. at 6].

reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born September 16, 1954 and was 41 years old at the time of the hearing before the ALJ. [R. at 36]. Plaintiff testified that she previously worked as a Secretary. [R. at 37]. Plaintiff's final insured status date is September 30, 1994. [R. at 15].

Plaintiff suffers from interstitial cystitis,^{4/} endometriosis,^{5/} and vestibulitis. [R. at 40]. Plaintiff testified that she wakes up around 10:30 a.m., showers, watches television, eats lunch, helps with her husband's lunch, watches television, reads, naps, and goes to bed. [R. at 41]. Plaintiff acknowledged that she had taken some courses at Tulsa Junior College. According to Plaintiff, she took approximately six hours per semester, and was forced to sit near the door because she had to be able to leave to go to the bathroom. [R. at 42]. Plaintiff was also unable to attend classes when she had a "flare-up" and had to strike a deal with her teachers with regard to her absences.

Plaintiff testified that she could lift ten pounds, sit 10 to 45 minutes (depending upon whether her condition was flaring up), stand approximately 30 minutes, and walk

^{4/} Taber's Cyclopedic Medical Dictionary 1006 (17th ed. 1993), defines interstitial cystitis as "inflammation and irritation of the bladder. This disease of unknown etiology is most commonly seen in middle-aged women. Symptoms: Frequent urination due to scar tissue causing contraction of the bladder; dysuria and hematuria." Dysuria is defined as "painful or difficult urination, symptomatic of numerous conditions." Taber's Cyclopedic Medical Dictionary 595 (17th ed. 1993). Hematuria is defined as "blood in the urine." Taber's Cyclopedic Medical Dictionary 870 (17th ed. 1993).

^{5/} Endometriosis is defined as "Ectopic endometrium located in various sites throughout the pelvis or in the abdominal wall. It is estimated this occurs in 1% to 7% of women in the U.S. Symptoms: pelvic pain, adnexal mass, infertility." Taber's Cyclopedic Medical Dictionary 642 (17th ed. 1993).

approximately 20 to 30 minutes. [R. at 43, 52-55]. Plaintiff additionally testified that she has a flare-up of her condition every week or so and that she sometimes has to use ice and has to take pain pills. [R. at 44]. According to Plaintiff the pain feels like a blow torch or as though somebody has rubbed her skin raw. Plaintiff testified that urinary urgency was one of her problems. [R. at 46].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{6/} 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

^{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).

experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

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

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

"The finding of the Secretary^{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

^{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."

than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

III. THE ALJ'S DECISION

The ALJ determined that Plaintiff was not disabled at Step Four of the sequential evaluation. The ALJ concluded that Plaintiff's pain limits her to sedentary work activity involving lifting no more than ten pounds at one time. The ALJ noted that in her vocational report Plaintiff wrote that she previously worked as a secretary and office worker, that she used a typewriter, did light filing, and answered the telephone. The ALJ concluded that Plaintiff could return to her past work and that she was not disabled.

IV. REVIEW

SUBSTANTIAL EVIDENCE TO SUPPORT CONCLUSION PLAINTIFF COULD PERFORM SEDENTARY WORK

Plaintiff notes that the evidence in the record is uncontroverted that Plaintiff suffers from a severe bladder condition and has to urinate frequently (sometimes every 30-45 minutes). Plaintiff asserts that the ALJ failed to include this non-exertional impairment when determining Plaintiff's RFC and that this error is fatal.

The ALJ concluded that Plaintiff could perform sedentary work, lifting no more than ten pounds at one time and occasionally lifting or carrying articles lift files, ledgers and small tools. This Court finds that the ALJ did not address, the evidence in the record that Plaintiff suffers from bladder problems and must urinate frequently. Plaintiffs' doctors have indicated that Plaintiff must make frequent trips to the bathroom. The ALJ should have included this in his analysis of whether or not Plaintiff can return to her past relevant work.

TREATING PHYSICIAN STANDARD

Plaintiff refers to the RFC provided by one of Plaintiff's treating physicians which indicated that Plaintiff could lift only five pounds, sit without interruption for 20 - 30 minutes, and stand or walk for 20 - 30 minutes. The doctor noted that Plaintiff's urinary urgency was the reason for the limitations. [R. at 328]. Plaintiff asserts that the ALJ erred by disregarding Plaintiff's treating physician's opinion without providing any supporting rationale.

A treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so.

Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). In Goatcher v. United States Dep't of Health & Human Services, 52 F.3d 288 (10th Cir. 1995), the Tenth Circuit outlined factors which the ALJ must consider in determining the appropriate weight to give a medical opinion.

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

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

In "evaluating" the opinion of the treating physician, the ALJ noted only that Linda L. Nassif, M.D., who also treated Plaintiff stated that she did not know if Plaintiff's medical problems made Plaintiff totally disabled and that Plaintiff had been able to attend college classes.

Dr. Nassif wrote on November 21, 1994:

I have taken care of the gynecological problems of Carol Frederic since 1983. She has the chronic problems of vulvadynia, interstitial cystitis, recurrent monilial infections/vulvo-vaginitis, and pelvic endometriosis. She also sees Dr. Stanley Prough for endometriosis and Dr. Larrian Gillespie in Beverly Hills, California for interstitial cystitis, as well as Dr. John Forrest in Tulsa for interstitial cystitis. She has seen specialists in vulvar problems (Dr. Kavanaugh at MD Anderson and the Wesley Clinis (sic) for Vulvar Diseases in Wichita, Kansas.

I know that Carol has intermittent and chronic problems with vulvar pain and bladder related pain and problems related to her interstitial cystitis. I do not know whether these are enough of a hindrance to make her totally disabled. I do know that she has been attending college classes this year, but does sometimes have problems being comfortable sitting for long periods when her I.C. or vulvitis is flared-up.

[R. at 189]. Dr. Nassif does note that she does not know whether or not Plaintiff is disabled. Of course, in accordance with the Social Security regulations, the province of determining whether or not an individual is disabled is delegated to the ALJ. Dr. Nassif also notes Plaintiff's difficulties and additionally wrote that Plaintiff was able to attend some college classes. Plaintiff further testified that she did attend some college classes. According to Plaintiff she attended approximately six hours per semester; she sat near the door to permit her to exit quickly to go to the bathroom; she obtained permission from her professors to allow frequent absences due to her difficulties; and she had problems attending during the flare-ups of her condition. Plaintiff additionally testified she was able to make good grades in the classes that she took without attending class.

The ALJ provides no other analysis to support his discounting the opinion of Plaintiff's treating physician. On remand, the ALJ should evaluate the treating physician's opinion in accordance with the Social Security regulations and the case law outlined above.

Plaintiff additionally submits that the Appeals Council erred in disregarding a second opinion by a treating physician. Plaintiff notes that the reason given by the

Appeals Council was that the opinion was outside Plaintiff's insured status time period. Plaintiff asserts that the opinion clearly relates back to the time of Plaintiff's insured status.

On remand, the ALJ should determine what weight, if any to give to this additional treating physician opinion.

CONSIDERATION OF PAIN

Plaintiff additionally notes that the treating physician's opinions support Plaintiff's testimony regarding her complaints of pain. Plaintiff asserts that the ALJ had an obligation to consider the effects of Plaintiff's pain on her ability to perform work and that the ALJ failed to appropriately evaluate Plaintiff's complaints of pain.

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

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

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

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

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

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

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.

In this case, the ALJ determined that Plaintiff met the first and second steps of Luna. The ALJ provided the following analysis with regard to Plaintiff's credibility.

As to the claimant's allegations of totally disabling pain, her testimony was evaluated and compared with prior statements and other evidence. It is the conclusion of the Administrative Law Judge that the pain experienced by the claimant is limiting but, when compared with the total evidence, not severe enough to preclude all types of work. The issue is not the existence of pain but whether the pain is of sufficient severity as to preclude her from engaging in all types of work activity.

[R. at 21]. This analysis is insufficient to comply with Luna or Kepler. On remand, the ALJ should further evaluate Plaintiff's complaints of pain in accord with those decisions.

STEP FOUR ANALYSIS

Plaintiff asserts that at Step Four the ALJ has a duty to develop the record regarding the demands of Plaintiff's past relevant work and determine whether or not Plaintiff can still perform that work given her residual functional capacity. According to Plaintiff, the ALJ did not properly perform this function. Plaintiff additionally asserts that the ALJ should have obtained the testimony of a vocational expert.

Social Security Regulation 82-62 requires an ALJ to develop the record with respect to a claimant's past relevant work.

The decision as to whether the claimant retains the functional capacity to perform past work which has current relevance has far-reaching implications and must be developed and explained fully in the disability decision.

.
[D]etailed information about strength, endurance, manipulative ability, mental demands and other job requirements must be obtained as appropriate. This information will be derived from a detailed description of the work obtained from the claimant, employer, or other informed source. Information concerning job titles, dates work was performed, rate of compensation, tools and machines used, knowledge required, the extent of supervision and independent judgment required, and a description of tasks and responsibilities will permit a judgment as to the skill level and the current relevance of the individual's work experience.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982). The ALJ must make specific factual findings detailing how the requirements of claimant's past relevant work fit the claimant's current limitations. The ALJ's findings must contain:

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

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994); Henrie v. United States Dep't of Health & Human Services, 13 F.3d 359, 361 (10th Cir. 1993).

In this case, the ALJ did not make specific findings with regard to the requirements of Plaintiff's past relevant work. Specifically, the ALJ did not determine whether or not Plaintiff's past relevant work would permit her to go to the bathroom ever 45 minutes and still perform the duties required of her job. On remand, the ALJ should determine evaluate Step Four in accordance with the applicable regulations. If the ALJ concludes that Plaintiff cannot return to her past relevant work, the ALJ should proceed to Step Five.

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

Dated this 17 day of July 1998.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

CAROL E. FREDERIC,
SSN: 440-58-1181

Plaintiff,

v.

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

Defendant.

JUL 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-C-460-J

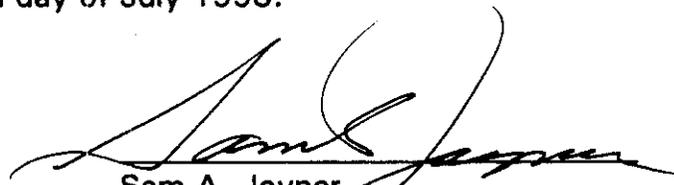
ENTERED ON DOCKET

DATE 7-21-98

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 17th day of July 1998.


Sam A. Joyner
United States Magistrate Judge

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

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

JUL 20 1998

CAROL A. RUTHERFORD,
SSN: 445-44-6800

Plaintiff,

v.

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

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-C-528-J

ENTERED ON DOCKET

DATE 7-21-98

ORDER^{2/}

Plaintiff, Carol A. Rutherford, 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 for numerous reasons. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born January 8, 1944. [Tr. at 25]. Plaintiff testified that she completed the eighth grade, and had difficulty reading and writing. [R. at 26].

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

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

^{3/} Administrative Law Judge Richard J. Kallsnick (hereafter "ALJ") concluded that Plaintiff was not disabled on January 16, 1996. [R. at 9-18]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on March 27, 1997. [R. at 4].

Plaintiff testified that she suffered from pain constantly, and she rated that pain at a nine and one-half on a one to ten scale. [R. at 35]. Plaintiff said she had difficulty walking to her mailbox which was 82 feet from her house, that she could not climb stairs or hills, and that she could not square dance. [R. at 31]. Plaintiff complained of pain in her spine, neck, knees, and ankles. [R. at 35]. Plaintiff said she experienced cramping in her hands, bad headaches, and an inability to sleep. [R. at 35-46].

During a visit to one of her doctors on October 27, 1992, Plaintiff's doctor noted that Plaintiff was currently doing some babysitting and had to lift babies often. [R. at 148]. One of Plaintiff's medical reports (dated January 24, 1994) notes that she injured herself when she caught her heel while running down some stairs. [R. at 181]. On October 21, 1993, Plaintiff was strongly encouraged to exercise. [R. at 182]. A September 7, 1994 report indicated that "her rheumatologic workup has really been pretty unremarkable." [R. at 255]. X-rays have indicated no significant arthritis, spondylylisthesis or significant narrowing of disc space in either Plaintiff's spine or wrists. [R. at 247, 248, 164].

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

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.^{4/} 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

^{4/} 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^{5/} 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 concluded that Plaintiff was not disabled at Step Five of the sequential evaluation. The ALJ noted the lack of medical evidence to support Plaintiff's complaints. The ALJ evaluated Plaintiff's credibility and gave reasons for discounting

^{5/} 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."

Plaintiff's complaints of pain. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff could perform a significant number of jobs in the national economy.

IV. REVIEW

PAIN

Plaintiff initially asserts that Defendant has not met Defendant's burden because "it was established that Plaintiff's condition was disabling due to severe pain in her spine, hands, knees and ankles, hips, ulcers and limited mobility." Plaintiff does not further develop this argument.

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

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

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

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

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

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

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.

In this case, the ALJ considered the factors outlined in Luna and Kepler, and noted reasons for discounting Plaintiff's testimony. The ALJ observed, in part, the lack of objective findings by treating or examining physicians, the lack of medication for severe pain, the frequency of treatment, the lack of complaints to physicians, the lack of medical findings to support Plaintiff's alleged lack of grip strength, the lack of complaints about headaches, the medical record (including x-rays), and contradictions in testimony and medical record. The Court has reviewed the medical record and the conclusions reached by the ALJ regarding Plaintiff's credibility. The Court concludes that the ALJ's findings are supported by substantial evidence. See also Hamilton v.

Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992) (credibility determinations by the trier of fact are given great deference).

SUBSTANTIAL EVIDENCE TO SUPPORT RFC

Plaintiff additionally asserts that the ALJ's finding that Plaintiff had the capacity to perform light work is not supported by substantial evidence.

Initially, the Court notes that the ALJ included alternative findings that Plaintiff could also perform sedentary work. Plaintiff's sole reason that the ALJ's finding is not supported by the evidence is based on the ALJ's analysis of Plaintiff's complaints of pain pursuant to Luna and Kepler. As noted above, the Court concludes that the ALJ's analysis was sufficient.

SUBSTANTIAL EVIDENCE TO SUPPORT LIGHT WORK CONCLUSION

Plaintiff asserts that the ALJ concluded that she could do light work but that the record does not contain support for the ALJ's conclusion that she can lift 20 pounds.

The ALJ included, in his opinion, two sedentary jobs and one light job which the ALJ concluded Plaintiff could perform. Plaintiff does not challenge the ALJ's finding that she can also perform sedentary work, and the Court can therefore affirm on this alternative ground which Plaintiff does not challenge. Sedentary work requires lifting no more than ten pounds, and Plaintiff testified that she was able to lift thirteen pounds. [R. at 48].

TREATING PHYSICIAN

Plaintiff asserts that the ALJ did not properly evaluate the opinion of Plaintiff's treating physician.

Plaintiff's treating physician noted that Plaintiff had degenerative diseases. The ALJ noted this opinion and discounted it because it was inconsistent with the objective medical evidence (including x-ray findings) and the observations of another treating physician. [R. at 14, 15]. However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). The ALJ properly evaluated the opinion of the treating physician.

VOCATIONAL TESTIMONY

Plaintiff additionally asserts that the ALJ's failed to include all of Plaintiff's limitations in the hypothetical question he posed to the vocational expert.

The ALJ posed the following hypothetical question to the vocational expert.

A 51 year old female who has an 8th grade education, a limited or less, possibly even marginal ability to read, write and use numbers. This individual would have the physical capability of performing - I'd like you to consider medium, light or sedentary work activity. She would need the capability of shifting her weight around or seeking comfort, changing positions periodically. If she's sitting, to shift her weight in a chair, or standing, shift her weight. . . . She would be able to sit for up to six hours in an eight hour work day, with normal breaks. And stand and/or walk for up to six hours in an eight hour work day with normal breaks. And as I indicated, shifting weight and changing positions for comfort. This individual is afflicted with symptomatology from a variety of sources to include mild to moderate pain, with infrequent chronic pain that would

be of sufficient severity as to be noticeable to her at all times. But nonetheless she could remain attentive and responsive in a work setting, and carry out normal work assignments satisfactorily. She does take medication for the use of her -- for relief of her symptomatology, but the medication usage would not appear to preclude her from remaining reasonably alert to perform the required functions presented in a work setting.

[R. at 71-72].

The Court concludes that the ALJ question posed to the vocational expert was adequate. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995) (An ALJ need include only those limitations in the question to the vocational expert which he properly finds are established by the evidence.); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

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

Dated this 20 day of July 1998.


Sam A. Joyner
United States Magistrate Judge

