

FILED

AUG 7 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

ANTHONY R. MATHIS,)
)
 . Plaintiff,)
)
 vs.)
)
 SOONER PROCESS AND)
 INVESTIGATION, INC., an)
 Oklahoma corporation, d/b/a)
 S.P.I. SECURITY, INC., et al.,)
)
 Defendants.)

Case No. 97-C-757-BU

ENTERED ON DOCKET

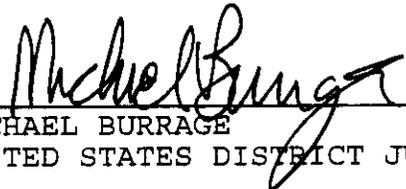
DATE AUG 10 1998

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 6th day of August, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG -6 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANNA L. WILLIAMS,)
SSN: 492-42-9467,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner of Social Security,)
)
Defendant.)

Case No. 96-CV-1146-EA

ENTERED ON DOCKET
AUG 10 1998
DATE _____

JUDGMENT

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

It is so ordered this 6th day of August, 1998.

Claire V Eagan --

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG -6 1998

ANNA L. WILLIAMS,
SSN: 492-42-9467,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security,¹

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-1146-EA

ENTERED ON DOCKET
DATE AUG 10 1998

ORDER

Claimant, Anna L. Williams, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.² In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Circuit Court of Appeals.

¹ Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

² On September 27, 1993, claimant applied for disability benefits under Title II (42 U.S.C. § 401 et seq.). Claimant's application for benefits was denied in its entirety initially (November 2, 1993), and on reconsideration (January 27, 1994). A hearing before Administrative Law Judge Stephen C. Calvarese (ALJ) was held March 13, 1995, in Tulsa, Oklahoma. By decision dated April 27, 1995, the ALJ found that claimant was not disabled on or before the date of the decision. On October 8, 1996, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 404.981.

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

I. CLAIMANT'S BACKGROUND

Claimant was born March 8, 1941, and completed the 12th grade. Claimant resides in Cleveland, Oklahoma. She was 54 years old at the time of her administrative hearing. Her past relevant work includes: assembly worker, machine operator, office cleaner, meat wrapper, saw operator, section leader, and paste-up artist. Claimant asserts she became unable to work on May 18, 1993 due to osteoarthritis, fibromyalgia, constant pain, carpal tunnel syndrome, and night blindness.

II. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

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

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

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

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

³ Step One requires the claimant to establish that she is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510. Step Two requires that the claimant establish that she has a medically severe impairment or combination of impairments that significantly limit her ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with certain impairments listed in Appendix 1 of Subpart P, Part 404, 20 C.F.R. Claimants suffering from a listed impairment or impairments "medically equivalent" to a listed impairment are determined to be disabled without further inquiry. If not, the evaluation proceeds to Step Four, where the claimant must establish that she does not retain the residual functional capacity (RFC) to perform her past relevant work. If the claimant's Step Four burden is met, the burden shifts to the Commissioner to establish at Step Five that work exists in significant numbers in the national economy which the claimant--taking into account her age, education, work experience, and RFC--can perform. See Diaz v. Secretary of Health & Human Servs., 898 F.2d 774 (10th Cir. 1990). Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

and “the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fourth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform a full range of light work of an unskilled, semi-skilled, or skilled nature, as limited by one of the hearing exhibits. The ALJ concluded that claimant’s impairments and RFC did not preclude her from performing her past relevant work as a paste-up artist or section leader. Thus, the ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision.

IV. REVIEW

Claimant contends that the ALJ erred in all three phases of the Step Four analysis. These three phases were outlined in Winfrey v. Chater, 92 F.3d 1017 (10th Cir. 1996).⁴ The ALJ must:

1. assess the nature and extent of claimant’s physical and mental limitations to determine claimant’s RFC for work activity on a regular and continuing basis, supported by substantial evidence from the record;
2. make findings regarding the physical and mental demands of claimant’s past relevant work (either as claimant actually performed that work or as is customarily performed in national economy), based on factual information regarding those work demands which bear on medically established limitations; and

⁴ Although the ALJ issued his decision in 1995, and Winfrey was not decided until 1996, Winfrey was a restatement of existing law, incorporating Social Security regulations and rulings, and the Tenth Circuit decisions in Henrie v. U.S. Dep’t of Health & Human Servs., 13 F.3d 359 (10th Cir. 1993), and Washington v. Shalala, 37 F.3d 1437 (10th Cir. 1994).

3. make findings about claimant's ability to meet the physical and mental demands of that past relevant work.

Id. at 1023-26. The Court agrees that the ALJ erred in all three phases.

1. **Claimant's RFC**

In his decision, the ALJ summarized the claimant's testimony and outlined the medical evidence before addressing claimant's RFC. (R. 10-12) The ALJ found that claimant's testimony was credible to the extent that it was consistent with an RFC of light "as limited in Exhibit 18." Exhibit 18 is eight pages of medical records from Dr. Ellen Zanetakis, dating from July 21, 1993 to August 24, 1993. (R. 147-154) There is no specific discussion of limitations in Exhibit 18 relative to claimant's capacity to do light work. The ALJ focused on statements in the examination reports of Dr. Zanetakis that supported the ALJ's finding of RFC to do light work. (R. 12-13) The ALJ ignored, however, Dr. Zanetakis' diagnoses of osteoarthritis and fibromyalgia. (R. 147, 150) The ALJ cannot selectively rely on the facts in the record that support his conclusion, and ignore the facts that detract from or contradict his conclusion. See Clifton v. Chater, 79 F.3d 1007, 1010 (10th Cir. 1996); Taylor v. Schweiker, 739 F.2d 1240, 1243 (7th Cir. 1984).

The ALJ failed to assess the nature and extent of claimant's physical limitations, including any exertional limitations caused by osteoarthritis and fibromyalgia, in his conclusion of an RFC to perform light work. The claimant has submitted medical evidence that could produce hand pain and loss of dexterity as alleged. Although claimant's "grip is fairly good" (R. 150), this in and of itself does not establish range of motion and dexterity. The ALJ's failure to assess how claimant's hand impairments affect her ability to perform work-related tasks is error.

Further, the non-exertional impairment of pain was not adequately addressed. Although the ALJ recited the appropriate factors to consider in an evaluation of pain (R. 13), the ALJ did not explain why specific evidence relevant to each factor led to the conclusion that claimant's subjective complaints were not credible. See Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995). The ALJ's determination of an RFC to perform light work is flawed by virtue of the failure to make the required assessments in phase one of Step Four. Winfrey, 92 F.3d at 1023-24.

2. Demands of Claimant's Past Relevant Work

"At the second phase of the step four analysis, the ALJ must make findings regarding the physical and mental demands of claimant's past relevant work." Winfrey, 92 F.3d at 1024; Henrie, 13 F.3d at 361. The ALJ must obtain "factual information about those work demands which have a bearing on the medically established limitations." Soc. Sec. Ruling 82-62, Soc. Sec. Rep. Serv., Rulings 1975-1982, at 812. The Commissioner's rule "dictates that the ALJ make the necessary findings at phases two and three of the step four inquiry." Winfrey, 92 F.3d at 1024.

Here, the ALJ's discussion of the demands of claimant's past relevant work was limited to:

The claimant's past relevant work has been as a venetian blind assembler, section leader, meat wrapper, janitor and paste up artist. According to the testimony of Dr. Young, a qualified vocational expert, the claimant's past relevant work was skilled, semi-skilled and unskilled, and was at a light and medium exertional level.

(R. 10)

The error of the ALJ was two-fold: he failed to make findings about the physical demands of claimant's past relevant work, and he delegated to the vocational expert (VE) his own fact-finding responsibilities at Step Four. The ALJ made no factual findings regarding the physical demands of claimant's past relevant work, either as claimant performed the work or as it is customarily performed

in the national economy. Winfrey, 92 F.3d at 1024. He merely concluded, after stating what the past relevant work included, that it was “skilled, semi-skilled and unskilled, and was at a light and medium exertional level.” (R. 10) This conclusory statement is insufficient, and does not comport with the Commissioner’s own rule.

Further, although at Step Four a VE may supply information to the ALJ about the demands of claimant’s past relevant work, Soc. Sec. Rulings 82-61 and 82-62, Soc. Sec. Rep. Serv., Rulings 1975-1982, at 811-12, 836-38, and the ALJ may rely on such information, Winfrey, 92 F.3d at 1025, the ALJ himself must make the required findings. Id.

The ALJ phase two analysis is flawed by virtue of the failure to make the required findings. Id. at 1024.

3. Claimant’s Ability to Perform Her Past Relevant Work

With regard to claimant’s ability to perform her past relevant work, the ALJ analysis was:

The vocational expert’s testimony demonstrates that the claimant can perform her past relevant work as a paste up artist or section leader despite her impairments. Therefore, the Administrative Law Judge finds that the claimant can perform her past relevant work as a paste up artist or section leader and further finds that the claimant is not disabled.

(R. 13)

As noted by the Tenth Circuit, a flawed phase two analysis can lead to a flawed phase three analysis:

Having failed to complete phase two appropriately, the ALJ was unable to make the necessary findings at phase three about [claimant’s] ability to meet the [physical] demands of [her] past relevant work despite [her] [physical] impairments. The [Commissioner] glosses over the absence of the required ALJ findings, by relying on the testimony of the VE that [claimant] could meet the [physical] demands of [her] past relevant work, given the [physical] limitations found by the ALJ. This practice

of delegating to a VE many of the ALJ's fact finding responsibilities at step four appears to be of increasing prevalence and is to be discouraged.

. . .

Requiring the ALJ to make specific findings on the record at each phase of the step four analysis provides for meaningful judicial review. When, as here, the ALJ makes findings only about the claimant's limitations, and the remainder of the step four assessment takes place in the VE's head, we are left with nothing to review.

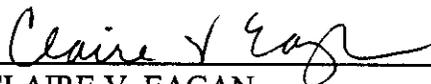
Winfrey, 92 F.3d at 1024-25. The Court finds that the ALJ performed no fact-finding or analysis which lends itself to meaningful judicial review.

The ALJ's failure to perform the three-phase Winfrey analysis is legal error which must be corrected on remand. In remanding this case, 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 upon the facts of the case. Kepler, 68 F.3d at 391-92.

V. CONCLUSION

The decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

DATED this 6th day of August, 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

AUG 06 1998

WARDENE COX,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner, Social)
Security Administration,)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No.97-C-797-K ✓

ENTERED ON DOCKET

DATE AUG 07 1998

ORDER

This case was remanded at Defendant's request. Judgment was entered for Plaintiff.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of \$2,422.05 for attorney fees and \$19.60 for court costs and filing fees for all work done before the district and circuit courts, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of \$2,422.05 and costs of \$19.60 for a total award of \$2,442.65 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir.

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1986). This action is hereby dismissed.

It is so ORDERED THIS 6th day of August 1998.


FRANK H. McCARTHY
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

CATHRYN McCLANAHAN, OBA #14853
Assistant United States Attorney
333 West 4th Street., Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D
AUG 06 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WANDA SUE SWARER,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner, Social)
Security Administration,)
)
Defendant.)

Case No.97-C-495-M

ENTERED ON DOCKET
DATE AUG 07 1998

ORDER

This case was reversed and remanded and judgment was entered for Plaintiff.

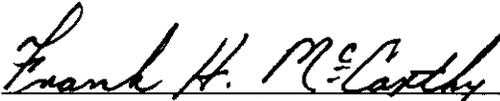
Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of \$3,063.75 for attorney fees and \$150.00 for court costs and filing fees for all work done before the district and circuit courts, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of \$3,063.75 and costs of \$150.00 for a total award of \$3,213.75 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir.

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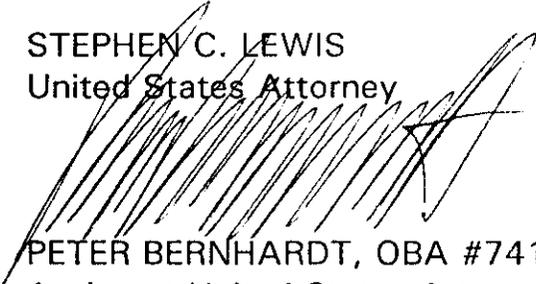
1986). This action is hereby dismissed.

It is so ORDERED THIS 4th day of August 1998.


FRANK H. McCARTHY
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street., Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

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

FILED

AUG 06 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

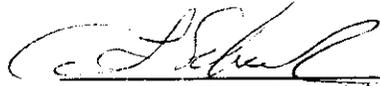
TERRY L. SCHROEDER,)
)
Plaintiff,)
)
v.)
)
BAYS NATIONAL SECURITY, INC.,)
d/b/a BAYS DATA SAFE, d/b/a)
BAYS SECURITY VAULT, d/b/a)
BAYS SECURITY STORAGE, d/b/a)
BAYS ALARMS and JIM KOELLE,)
)
Defendants.)

CASE NO. 97-CV-200H

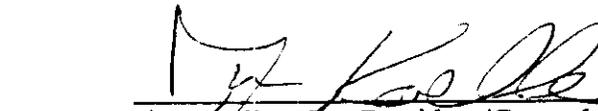
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DATE AUG 07 1998

STIPULATED DISMISSAL

COMES NOW Plaintiff, Terry L. Schroeder, and Defendants, Jim Koelle and Bays National Security, Inc., dba Bays Data Safe, dba Bays Security Vault, dba Bays Security Storage, dba Bays Alarms Defendants, by its Vice President/General Manager Jim Koelle, and hereby agree and stipulate to a dismissal of Plaintiff's claims and causes of action herein variously asserted against the defendants with prejudice and further ask the Court to dismiss this action with prejudice to refileing.


Terry L. Schroeder, Plaintiff


Jim Koelle, Defendant


Jim Koelle, Vice President/General Manager, Bays National Security, Inc., dba Bays Data Safe, dba Bays Security Vault, dba Bays Security Storage, dba Bays Alarms

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ENTERED ON DOCKET
DATE 8-7-98

UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF OKLAHOMA

FILED

AUG - 6 1998

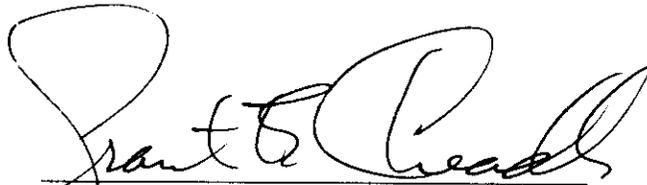
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DENISE A. FORD,)
)
Plaintiff,)
)
v.)
)
SAINT FRANCIS HOSPITAL, INC.,)
)
Defendant.)

Case No. 97-CV-972-B(J)

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate that this action is dismissed with prejudice. Each party shall bear her/its own costs and attorneys' fees.



Grant E. Cheadle, OBA No. 1634
David W. Mills, OBA No. 11678
610 South Main, Suite 212
Tulsa, OK 74119-1257
(918) 585-8500

ATTORNEYS FOR PLAINTIFF



Larry D. Henry, OBA No. 4105
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GABLE & GOTWALS
100 West Fifth Street, Suite 1000
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(918) 585-8141

ATTORNEYS FOR DEFENDANT

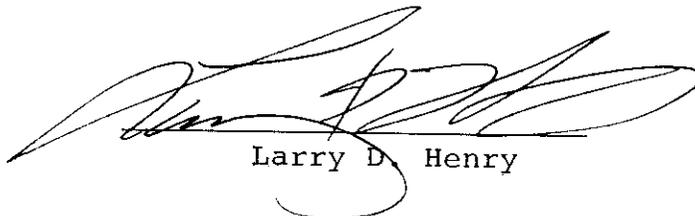
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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August, 1998, a true and exact copy of the above and foregoing instrument was placed in the United States Mail, with proper postage thereon duly prepaid, and addressed to: Grant E. Cheadle, David W. Mills, 610 South Main, Suite 212, Tulsa, Oklahoma 74119-1257.



Larry D. Henry

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

DENNIS R. MAYS,

Plaintiff,

vs.

MCDONNELL DOUGLAS
CORPORATION,
a Delaware corporation,

Defendants.

ENTERED ON DOCKET

DATE AUG 6 1998

No. 96-C-1043-H

FILED

AUG 5 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on a motion for summary judgment by Defendant McDonnell Douglas Corporation ("MDC") (Docket # 20). Plaintiff Dennis R. Mays brought this action against Defendant¹ under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq. (the "ADEA") and the Oklahoma anti-discrimination statute, Okla. Stat. tit. 25, §§ 1301, 1302, alleging that Defendant, his former employer, fired him because of his age.²

I

Plaintiff began working for MDC in January 1966 as a Dispatcher-B in the Production Control Department at Defendant's Tulsa plant. Following a five or six month layoff in 1971, Plaintiff was reemployed at MDC .

Plaintiff, originally an hourly employee and a union member, was promoted in September 1978 to a salaried management position of Assistant Foreman in the Production Control

¹ Plaintiff originally named Tom E. Fultner as a defendant in this action. Mr. Mays and MDC agreed to dismiss Mr. Fultner from this action on April 17, 1998 (Docket # 8).

² Plaintiff, in his original petition, claimed that he was fired because he was disabled. Plaintiff withdrew that claim at the hearing on January 16, 1998. The Court will not address Plaintiff's contentions in that regard.

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Department. Plaintiff was later promoted to Production Control Foreman and promoted again to Production Control General Foreman in November 1986.

From 1990 to the plant closing in 1994, MDC-Tulsa was continually downsizing. In November 1992, the Material Handling Division, which included the Material Handling Department at MDC-Tulsa was re-named Parts Supply Group. At that time, the Production Control Department was moved under Parts Supply as one of approximately 50 departments in that group. At the time of the November 1992 reorganization, Tom Fultner became Manager of Parts Supply and Nikki Hearne was promoted from General Foreman to Manager of Production Control. Ms. Hearne became Plaintiff's immediate supervisor. At the same time, those employees who had held the job of General Foreman or Foreman, as did Plaintiff, became "Group Managers" with no change in salary. As part of the reorganization, MDC-Tulsa determined to reduce its forces. The parties dispute the precise details of the reduction in force ("RIF"). Defendant contends that MDC-Tulsa Plant Manager, Don Bittle, told Mr. Fultner that Ms. Hearne would be allowed four Group Managers, one of which was to be Susie Parker, due to her expertise in handling Work Order Releases. Plaintiff contends that Mr. Bittle played no part in any decisions regarding Plaintiff.

Defendant contends Mr. Fultner asked Ms. Hearne to identify the Group Managers she thought would support her as Manager of Production Control. Ms. Hearne spoke to the persons currently working in Production Control management, Joe White and Russ Logsdon. Defendant contends that Ms. Hearne identified to Mr. Fultner persons who she felt to be high achievers without consideration of age. Pam Anderson was Ms. Hearne's first choice, followed by Dave Anderson and Robert Lavendusky. Ms. Hearne had supervised Mr. Lavendusky and Ms. Anderson in the past, and she had worked with Plaintiff to some extent. Ms. Hearne ranked the current Group Managers, Mr. Anderson, Mr. Lavendusky, and Plaintiff, in that order of preference, although the three were close to one another for purposes of comparison.

According to Plaintiff, Ms. Hearne denies that she made any decision regarding which Group Managers would remain in her division. Defendant contends that the Group Managers were "totem-poled" or ranked according to their job performance. Those at the top remained as Group Managers while the others were selected for lay-off in November 1992. Mr. Lavendusky and Mr. Anderson were selected as Group Managers while Plaintiff was selected to be terminated from his position. Ms. Anderson, too, was selected as a Group Manager but she instead voluntarily left her job to care for her mother. Therefore, in November 1992, three Group Managers were selected to remain at MDC-Tulsa: Susie Parker, 43 years old; Robert Lavendusky, 39 years old, Dave Anderson, 52 years old. The fourth group manager position was not filled. Plaintiff, 49 years old, and John Love, 49 years old, were selected to be laid off. Plaintiff denies that he was selected to be laid off.

Defendant contends that Mr. Fultner and Ms. Hearne "went to bat" for Plaintiff, because of his job performance and seniority, in an attempt to keep them from inclusion in the November 1992 RIF. After consultation with Human Resources, Mr. Fultner and Ms. Hearne identified a position for Plaintiff. However, the only position available for Plaintiff was a non-supervisory position in Production Control. While three Group Managers were laid off in the November 1992 reorganization – Ms. Anderson, 37 years old; Darren Buttram, 33 years old; and Bill Duke, 49 years old – Plaintiff remained a Group Manager, at the same rate of pay, until November 1993 when he was officially reclassified to a "Specialist." Mr. Fultner and Ms. Hearne did not realize at the time of the November 1992 reduction in force that the classification of Specialist entailed a cut in pay from the salary Plaintiff earned as Group Manager. Plaintiff's pay was cut in November 1993.

From 1978, when Plaintiff entered management ranks, until the MDC-Tulsa plant closed in 1994, Plaintiff received both oral and written performance evaluations. Plaintiff received a mid-year performance evaluation on September 13, 1993. This evaluation does not appear in

Plaintiff's file. Plaintiff received no final evaluation for that year. Plaintiff alleges that Mr. Fultner had lowered the mid-year evaluation prepared by Ms. Hearne. Plaintiff contends that he was notified of the downgrade action on November 8, 1993 his evaluation meeting with Ms. Hearne. Defendant asserts that Plaintiff was told that he was being downgraded because of a downsizing in management. Plaintiff associated the downgrade with the evaluation he received. Plaintiff speculates that Mr. Fultner adjusted his evaluation to justify the downgrade. Defendant disputes Plaintiff's contention, stating that the decision to downgrade Plaintiff was made in November or December 1992, well before the September 1993 review and November 1993 salary decrease. At the time of his downgrade, Susie Parker, age 43; Dave Anderson, age 52; and Robert Lavendusky, age 39, functioned as Group Managers. The MDC-Tulsa plant closing was announced December 3, 1993, and Plaintiff was assigned a lay-off date.

Plaintiff has no personal knowledge that Mr. Fultner ever made any remarks regarding Plaintiff's age. However, Mike Henson, a former fellow Group Manager told John Love that Mr. Fultner had advised Mr. Henson sometime in 1993 that Mr. Fultner was "going to get rid of those old bastards." Mr. Henson denies that Mr. Fultner ever made such a statement. Mr. Fultner also denies making the statement.

The MDC-Tulsa plant at which Plaintiff was employed until it closed in May 1994 was a component of McDonnell Douglas Aerospace-East ("MDA-E") headquartered in St. Louis, Missouri. At about the time of the decision to close MDC-Tulsa was announced, management of McDonnell Douglas Aerospace-West ("MDA-West"), a separate business segment of MDC, announced a lease agreement with American Airlines to modify United States Air Force (USAF) planes at American Airlines Hangar No. 5, located on the opposite side of the Tulsa International Airport from the MDC-Tulsa facility. MDA-W is headquartered in Huntington Beach, California, and has business units throughout the United States. MDA-W produces the C-17 military airlift jet in Long Beach, California. The work performed at the MDA-W Tulsa facility

is repair and modification of the USAF C-17 Globemaster aircraft. C-17 management in Tulsa reports to C-17 management in Long Beach, California. Twenty support personnel were either transferred from MDC-Tulsa to the C-17 program or rehired after being laid off by MDC-Tulsa, all to salaried positions.

The individuals who performed work at C-17 similar to that performed by Plaintiff in his MDC-Tulsa production control job are classified as Technical Material Support Analysts ("TMSA"). All C-17 personnel classified as TMSAs did not perform work similar to Plaintiff's MDC-Tulsa Production Control job. TMSA is a broad classification used at C-17 to encompass individuals who were shipping and receiving personnel, equipment mechanics, support equipment maintenance mechanics, tool crib attendants, and welders -- jobs different than those for which Plaintiff was qualified or performed at MDC-Tulsa.

Four or five TMSAs transferred into C-17 from Barksdale, Louisiana Air Force base. None of those TMSA position filled by Barksdale personnel were open to MDC-Tulsa employees. There were no job postings for the C-17 program. Knowledge of the C-17 program's available jobs was spread by word of mouth and in the MDC-Tulsa closing announcement letter of December 3, 1993.

John Adams was the Manager of Operations Control at the time of the Tulsa plant closing announcement in December 1993. In mid-1993, Mr. Adams became involved with the C-17 program, attempting to convince California MDA-W C-17 officials to locate their aircraft modification program in Tulsa. In October/ November 1993, before the MDC-Tulsa closing was known or announced, the initial intent was to furnish MDC-Tulsa employees on an Intercomponent Work Order transfer ("ICWO") basis to begin initial set-up for the C-17 program. An employee transferred on ICWO was required to perform satisfactorily or that employee would be sent back to MDC-Tulsa. If the employee performed satisfactorily, he or she was retained on the C-17 program. The initial employees that were transferred on this basis from

MDC-Tulsa were salaried employees, the first of which were selected directly by Mr. Adams. Mr. Adams claims that age was not a factor in this selection process. Mr. Adams selected Billy Padgett, age 46, for transfer because he had "live aircraft" experience. Defendant contends that Plaintiff did not have such experience although Plaintiff claims that he does, and that he used to supervise Mr. Padgett. Mr. Adams also selected Dennis Jernigan, age 47, because he had "hands on" mechanic experience as well as "live aircraft" experience. Plaintiff was not qualified for the position assumed by Mr. Jernigan because Plaintiff did not have live aircraft experience.

Selection input and recommendations for other MDC-Tulsa employees to be transferred by ICWO was received by both Mr. Padgett and Mr. Jernigan, and approved by Mr. Adams. After December 30, 1993, Tom Hudson approved such transfers because he was to head the C-17 program Material Support Analysts.

Defendant contends that all of the salaried personnel hired or transferred at C-17 from MDC-Tulsa, except for Mr. Adams, were hired or physically transferred by the end of January 1994. Defendant contends there were no C-17 salaried positions open to MDC-Tulsa employees after January 31, 1994. Plaintiff disagrees, contending that there were TMSA openings on the C-17 program through "January/February 1994" and whenever employees left the program throughout 1995 and 1996. Plaintiff states that one employee Larry Griffin, age 49, did not physically transfer from MDC-Tulsa to C-17 until April 1994, however, the decision to hire Mr. Griffin was made in January 1994.

Plaintiff claims that he applied for the C-17 program in February 1994. Defendant claims that it never received Plaintiff's application for a position in the C-17 program. Bill Kannegiesser, age 50, was a MDC-Tulsa employee assigned to an "out-placement group" run by the MDC-Tulsa Human Resource department to assist MDC-Tulsa employees in locating other jobs pending the plant closing. Mr. Kannegiesser himself had no authority to hire for the C-17 program. Mr. Kannegiesser, personally acquainted with Plaintiff, does not recall receiving

Plaintiff's application for any MDC employment, including the C-17 program. However, Mr. Kannegiesser does not recall in general which employees submitted transfer requests. Any documents, including transfer requests and resumes accepted by Mr. Kannegiesser were forwarded to the appropriate business or office, or to the person responsible for hiring. All applications submitted to MDC-Tulsa were sent to Mr. Adams at the C-17 program. Plaintiff disputes this fact, claiming that Mr. Adams did not review any such resumes until March 1994. In any event, Mr. Adams claims he did not know that Plaintiff was interested in a position at C-17. Mr. Adams claims he has known Plaintiff for sixteen or seventeen years. Plaintiff asserts that he never worked directly with Mr. Adams, and Mr. Adams never supervised him. Mr. Adams never saw an application submitted by Plaintiff, although Mr. Adams was not permanently located at the C-17 site until March 7, 1994. Defendant claims that Mr. Adams has possession of all applications the company received for the C-17 program. Plaintiff's resume is not among them.³

Defendant contends Plaintiff, had he applied, would have qualified for only two, or possibly three of the nine salaried TMSA positions open to MDC-Tulsa employees prior to January 31, 1994. Plaintiff contends he would have qualified for any TMSA position. Defendant concedes Plaintiff would have been qualified for the position taken by Dave Anderson, had Plaintiff applied for such a position. Mr. Hudson selected Mr. Anderson, age 52, for ICWO transfer in December 1993 or early January 1994. Defendant claims that age was not a factor in Mr. Hudson's decision. Mr. Anderson was transferred to the C-17 program on January 24, 1994, at age 53.

³ Plaintiff contends that Mr. Adams does not have all the resumes submitted for the C-17 program. Plaintiff offers the affidavit of S.M. Childers, whose resume is not among those held by Mr. Adams, in which Mr. Childers claims he submitted a resume to the C-17 program. However, Defendant has submitted a second affidavit from Mr. Childers in which he admits he is not certain that he ever submitted a resume to the C-17 program.

Had Plaintiff applied to the C-17, he would have been qualified for the position filled by Doris Jernigan. Ms. Jernigan, age 45, was transferred by ICWO to the C-17 program in early January 1994, with her permanent transfer complete on January 24, 1994. Defendant contends that age was not a factor in the decision to transfer Ms. Jernigan.

Had Plaintiff applied to the C-17 program prior to February 1994, Plaintiff may have been qualified for a position filled by Judy Jewart, age 45, who was permanently transferred to the C-17 program in January 1994. Defendant contends that age was not a factor in the decision to transfer Ms. Jewart. Mr. Adams was 59 or 60 years of age at the time of the C-17 transfers.

Defendant contends that any position for which Plaintiff would have been qualified had he applied was filled by an employee in the protected age group -- over forty years old. Plaintiff, contending that he was qualified for any TMSA position, claims that younger persons were hired for positions at the C-17 program.

II

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

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

477 U.S. at 322.

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

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

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

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

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

III

In this case, Plaintiff has presented no direct evidence of discrimination.⁴ In the absence of direct evidence, a plaintiff claiming age discrimination should proceed in accordance with the rules announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). To set forth a prima facie case, Plaintiff must establish that: (1) he was within the protected age group;

⁴ In his deposition, Plaintiff stated that he had heard that a former fellow Group Manager, Mike Henson, told John Love that Mr. Fultner had told Mr. Love that he [Mr. Fultner] was "going to get rid of those old bastards." Plaintiff can claim no personal knowledge of such statements by Mr. Fultner. Further, Plaintiff does not offer the sworn statements of Mr. Love or Mr. Henson. Therefore, the Court concludes that Plaintiff has not presented any credible direct evidence of discrimination.

(2) he was doing satisfactory work; (3) he was discharged or demoted despite the adequacy of his work; and (4) his position was filled by a younger person. Denison v. Swaco Geograph Co., 941 F.2d 1416, 1420 (10th Cir. 1991). These required elements of a prima facie case have been modified to address claims where a plaintiff was fired, but no replacement was hired. In such "reduction-in-force" ("RIF") cases, a plaintiff sets forth a prima facie case when he establishes the first three elements outlined above and produces "circumstantial evidence that the plaintiff was treated less favorably than younger employees," Jones v. Unisys Corp., 54 F.3d 624, 630 (10th Cir. 1995)(citing Rea v. Martin Marietta Corp., 29 F.3d 1450, 1454 (10th Cir. 1994)), or "produc[es] evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." Ingels v. Thiokol Corp., 42 F.3d 616, 621 (10th Cir. 1994) (quoting Branson v. Price River Coal Co., 853 F.2d 768, 771 (10th Cir.1988)).

Once a plaintiff establishes the elements of a prima facie case, the employer bears the burden of production to show a legitimate, nondiscriminatory reason for the challenged action. Denison, 941 F.2d at 1422. If the employer articulates such a reason, the burden shifts back to the plaintiff to demonstrate that the employer's proffered justification was pretextual and that the age of the employee was a determining factor in the employer's decision. Id.

IV

In the instant case, MDC concedes that Plaintiff has established the first three elements of the traditional prima facie case for a claim of discrimination and the prima facie case in a reduction in force case. However, Defendant contends that Plaintiff has presented no evidence to show that Defendant either treated Plaintiff less favorably than younger persons or that MDC intended to discriminate against him in making its employment decision.

With respect to the fourth element of his prima facie case, Plaintiff presents alternative arguments. First, Plaintiff claims that Defendant demoted him to Specialist and cut his pay

because of his age ("the downgrade claim"). Second, Plaintiff alleges that Defendant discriminated against him when it did not select him for employment in the C-17 program ("the C-17 claim"). Defendant claims that Plaintiff has failed to establish a prima facie case on either his downgrade claim or his C-17 claim.

A

Plaintiff asserts that the fact that he was downgraded to the position of Specialist while Mr. Lavendusky, age 39, was retained as a Group Manager establishes the fourth element of a prima facie case. For purposes of this motion, the Court is satisfied that Plaintiff has met his prima facie case with respect to the fourth element of his downgrade claim-- that a younger employee was treated more favorably in a reduction-in-force situation -- by the fact that Mr. Lavendusky was retained while Plaintiff was not. Branson v. Price River Coal Co., 853 F.2d 768, 771 (10th Cir. 1988) (finding the fact that employer fired older employees while retaining younger ones sufficient to establish prima facie case). Accordingly, the burden shifts to Defendant to articulate a legitimate, nondiscriminatory reason for its decision to discharge Plaintiff. McDonnell Douglas Corp., 411 U.S. at 802. "The [defendant] need not persuade the court that it was actually motivated by the proffered reasons, but satisfies its burden merely by raising a genuine issue of fact as to whether it discriminated against the plaintiff." Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1425 (10th Cir. 1993) (internal quotations omitted).

Defendant contends that it decided to reduce the number of employees at its Tulsa plant. In its efforts to accomplish this business goal, members of management, in conjunction with Human Resources, prepared a ranking of the current Group Managers. According to Defendant, Plaintiff was ranked lower than other Group Managers; he was chosen for termination while those ranked higher were selected to remain. The Court finds that this satisfies Defendant's burden to articulate a legitimate, nondiscriminatory cause for its employment decision relating to Plaintiff.

Once Defendant meets its burden of production by offering a legitimate rationale in support of its employment decision, the burden shifts back to Plaintiff to show that Defendant's proffered reasons were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804-05. A plaintiff can carry his burden by "showing either that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." Tomsic v. State Farm Mutual Auto. Ins. Co., 85 F.3d 1472, 1478 (10th Cir. 1996) (quoting Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 530 (10th Cir. 1994)) (internal quotations omitted).

In his attempt to discredit Defendant's articulated nondiscriminatory reason for his discharge, Plaintiff advances several contentions. Plaintiff claims that Defendant did not rank the group managers based upon performance in order to select persons to lay-off. Plaintiff contends, in fact, that he was never selected for lay-off. Plaintiff claims that Ms. Hearne believed he was a high achiever and told him that his downgrade was not based on his performance. Ms. Hearne stated that Plaintiff was "pretty close" to the performance of the two persons ranked higher than he was. Plaintiff contends that Ms. Hearne does not recall ranking the Group Managers. Plaintiff also contends Defendant's inability to identify the person who actually made the decision to downgrade him casts suspicion on its proffered nondiscriminatory reason. Further, Plaintiff denies that his downgrade was due to downsizing, since he was never fired but instead he continued to work at MDC-Tulsa as a Specialist.

Plaintiff believes Defendant's stated reason that it used evaluations from the 1992 work year is evidence of pretext because those evaluations were not available when the downgrade decision was made. Finally, Plaintiff claims that Mr. Fultner lowered his evaluation in order to justify his demotion.

The Court rejects the notion that Ms. Hearne's praise of Plaintiff's abilities represents evidence of pretext. Defendant has never contended that Plaintiff was a poor employee who

deserved to be fired. In fact, just the opposite view is presented under these facts. Ms. Hearne believed Plaintiff to be ranked very close to the Group Managers who were ranked ahead of him. As a result, and based upon his seniority and performance, she and Mr. Fultner approached Human Resources to try to find a job for Plaintiff in those that remained after the downsizing.

Similarly, the fact that Plaintiff was retained as a Specialist after special efforts were made to retain him does not amount to pretext relating to Defendant's explanation that Plaintiff suffered an adverse employment action because of the RIF. Further, the Court does not accept Plaintiff's evidence that Mr. Fultner lowered Plaintiff's evaluation. There simply is no evidence that Mr. Fultner took such action, other than Plaintiff's bare allegations. Such is not sufficient to defeat a motion for summary judgment.

Moreover, deposition transcripts submitted in support of the motion for summary judgment do not support Plaintiff's claim that the performance evaluations did not exist at the time of the ranking. Ms. Hearne testified that she and another employee had reviewed the performance evaluations in November 1992, even though the evaluations were incomplete, because Ms. Hearne had in fact worked on the evaluations. Plaintiff neither contends that Ms. Hearne's testimony is not credible nor does he offer any evidence disputing Ms. Hearne's statement that she reviewed the evaluations.

Plaintiff's assertion that he was just as qualified as retained employees is insufficient. As the Tenth Circuit has stated, "Plaintiff's evidence of [his] satisfactory work performance is not probative because in a reduction in force case, 'someone had to be let go,' including satisfactory employees." Rea v. Martin Marietta Corp., 29 F.3d at 1456 (internal citation omitted). While evidence that an employee is more qualified may cast suspicion upon an employer's articulated nondiscriminatory reason, Rea v. Martin Marietta Corp., 29 F.3d 1450, 1457-58 (10th Cir. 1994) (citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981)), evidence that an employee is as qualified as another employee treated more favorably does not raise a

factual issue as to pretext. Therefore, Plaintiff's claim that he was just as qualified as the employees selected to remain as Group Managers does not raise a factual issue as to pretext. Hook v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793, 798 (10th Cir. 1993), abrogated on other grounds by Buchanan v. Sherrill, 51 F.3d 227, 229 (10th Cir. 1995).

It is settled law that, under circumstances such as these, the Court should neither analyze the business necessity of Defendant's actions nor attempt to gauge Defendant's business acumen. Ingels, 42 F.3d at 623 (quoting Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1426-27 (10th Cir. 1993)). Rather, the Court must examine the adequacy of the evidence Plaintiff has presented to carry its burden to show either that Defendant's proffered reason is pretextual or that age was a factor in its decision. Considering the facts and circumstances of this case, the Court finds that Plaintiff's contentions on the issue of pretext fail to show that Defendant's explanation lacks credence or is unworthy of belief. The Court finds that Plaintiff has failed to raise an issue of fact on the subject of pretext as to Plaintiff's downgrade claim.

B

Plaintiff asserts Defendant failed to transfer him to the C-17 program because of his age. Defendant contends Plaintiff has failed to establish a prima facie case on this claim. In order to establish a prima facie case, Plaintiff must establish the following elements: (1) Plaintiff is a member of a protected class; (2) Plaintiff applied for and was qualified for an available position; (3) Plaintiff was rejected despite being qualified; and (4) the position remained open and the employer continued to search for an employee with Plaintiff's qualifications or the position was filled by someone younger. Randle v. City of Aurora, 69 F.3d 441, 451 n.13 (10th Cir. 1995) (en banc).

Defendant contends that Plaintiff failed to apply for a position on the C-17 program. Defendant also contends that, even assuming that Plaintiff did apply for a position as he claims in February 1994, all positions for which Plaintiff was qualified were filled by February 1994.

Plaintiff disagrees, claiming that persons were hired for the C-17 after February 1994. Of the TMSA positions available, Plaintiff would have been qualified for three positions.⁵ Defendant asserts that those positions were filled by the time Plaintiff claims he applied to the program. Furthermore, Defendant asserts that even assuming that Plaintiff applied for those positions, and applied in a timely fashion, Plaintiff nonetheless fails to establish a prima facie case because none of those persons hired were significantly younger than Plaintiff. The Court agrees with Defendant's contention in this regard. Mr. Anderson was older than Plaintiff when he was transferred to C-17. Ms. Jernigan and Ms. Jewart were 45 years old, only three years younger than Plaintiff, when they were transferred to the C-17 program. Plaintiff cannot establish a prima facie case of age discrimination on the basis of such evidence.⁶

However, Plaintiff contends that employees were hired for the C-17 program at a later date when current employees left. Plaintiff observes that Mr. Childers was transferred to the C-17 program in April 1994 and Jackie Dean White was transferred in May 1994. Mr. Childers was 42 years old at the time of his transfer; Mr. White was 55 years old when transferred. Plaintiff's contentions here do not establish the existence of his prima facie case. First, the record reflects that Mr. Childers was an hourly employee. As Defendant points out, there is simply no evidence in the record that Plaintiff, a supervisor, even had he applied, would have

⁵ According to Defendant, Plaintiff would have been qualified for the position occupied by Dave Anderson, age 52; the position occupied by Doris Jernigan, age 45; and the position occupied by Judy Jewart, age 45. Plaintiff makes a blanket assertion that he would have been qualified for any of the TMSA positions but offers no specific evidence to buttress this contention. Plaintiff, however, does not dispute Defendant's contention that Plaintiff was not qualified for Dennis Jernigan's position, which required mechanic experience. See Def. Supp. Br. at 5, ¶ 22. The Court finds that Plaintiff's bare allegations in this regard cannot raise a question of fact as to whether Plaintiff qualified for all the TMSA positions at the C-17 program.

⁶ O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312-313 (1996) (stating that an inference of age discrimination cannot be drawn when a worker is replaced by another working who is insignificantly younger). In fact, the average age of all workers transferred from MDC-Tulsa to the C-17 program was 46.5 years. The youngest person transferred was forty years old.

applied for an hourly position.⁷ Mr. White's transfer does not support Plaintiff's argument as Mr. White was older than Plaintiff and he was not a TMSA.⁸ The Court concludes that Plaintiff has failed to establish a prima facie case of age discrimination sufficient to withstand summary judgment. However, assuming for purposes of this motion that Plaintiff could establish a prima facie case, the Court concludes that Plaintiff has failed to present any evidence whatsoever that Defendant's reason for not transferring him to the C-17 program was pretextual.

Defendant contends that the reason it did not transfer Plaintiff to the C-17 program was because no hiring authority on that program was ever aware that Plaintiff was interested in a position or ever saw an application or resume submitted by Plaintiff. Plaintiff claims that he submitted a resume in February 1994 to Mr. Kantegiesser. However, Mr. Kantegiesser does not recall ever seeing Plaintiff's resume. Aff. at ¶ 10. Mr. Adams, although he knew Plaintiff, was unaware of his desire to transfer to the C-17 program. Dep. at 61, 62. Mr. Hudson, who interviewed C-17 candidates did not know Plaintiff, and did not interview him. Aff. at ¶ 4, 5, 6, 7, 8. The Court finds that Defendant's explanation establishes a nondiscriminatory business reason for Defendant's failure to hire Plaintiff.

Plaintiff, however, contends that Defendant's reason is a pretext for discrimination. Plaintiff alleges that Mr. Adams did not in fact look at all the resumes submitted for the C-17 program. The Court cannot credit Plaintiff's contention. Mr. Adams' deposition indicates that he received over one thousand resumes or applications for the C-17 program. Mr. Adams, at the time of his deposition had known Plaintiff for at least sixteen years. He testified that he did not receive an application from Plaintiff and that he thought he would recall if he had.

⁷ At the hearing held on May 1, 1998, Plaintiff conceded that he did not seek an hourly position in the C-17 program.

⁸ In fact, at the hearing, Defendant contends that it was not until June 1995 that a person significantly younger than Plaintiff was hired to the C-17 program. Kelly Booth, age 28, was transferred from MDC-Charleston, South Carolina, on June 12, 1995, to replace Dennis Jernigan.

Plaintiff also notes that Mr. Kantigresser does not recall seeing particular resumes, and that the resume of Mr. Childers is not located in those resumes collected and kept by Mr. Adams, although Mr. Childers was eventually hired for the C-17 program. The Court concludes that Plaintiff's allegations do not amount to evidence of pretext.

The Court concludes that Plaintiff has failed to demonstrate that Defendant discriminated against Plaintiff on the basis of age because Plaintiff has not presented either evidence of pretext, or evidence to show that age was a factor in his termination, sufficient to raise a genuine issue of material fact to defeat summary judgment. For the reasons stated above, Defendant's motion for summary judgment as to Plaintiff's ADEA cause of action is hereby granted. Moreover, because the legal paradigm for Plaintiff's state discrimination cause of action in this case is identical to that under the ADEA, see Okla Stat. tit. 25, § 1101 (stating that the general purpose behind the state act was to provide for the execution of the policies embodied in the federal ADEA), Defendant's motion for summary judgment with respect to Plaintiff's state discrimination cause of action also is granted.

V

Plaintiff further asserts that MDC's employee evaluation process, Continuous Performance Improvement Process ("CPIP") gave rise to an implied contract. Plaintiff claims that CPIP altered the at-will basis of his employment, preventing MDC from discharging Plaintiff as long as satisfactory performance evaluations were maintained.

Defendant notes that Plaintiff has offered no authority in support of his position that an employee evaluation can provide the basis for an implied contract. In Gilmore v. Enogex, Inc., 878 P.2d 360 (Okla. 1994), the Oklahoma Supreme Court recognized that provisions in an employee handbook may give rise to an implied contract between an employer and an employee in narrow circumstances. First, Plaintiff must prove that four traditional contract requirements exist: (1) competent parties; (2) consent; (3) a legal object; and, (4) consideration. Gilmore, 878

P.2d at 368. In addition to these essential elements, Gilmore holds that such an implied contract may only alter the at-will employee relationship with respect to accrued benefits. Importantly, Gilmore requires that the promises upon which the Plaintiff relies must be in "definite terms -- not in the form of vague assurances." Id.

In the instant case, Plaintiff has not demonstrated that the four essential elements required by Gilmore are present in this case. More importantly, however, Plaintiff has not demonstrated how the existence of an evaluation process, a feature common to most jobs, transforms at-will employment into guaranteed indefinite employment. Under these circumstances, the Court finds Plaintiff's claim that the existence of an evaluation process has created an implied contract prohibiting the termination of his employment is without merit. Therefore, Defendant's motion for summary judgment as to this claim is granted.

For the reasons stated above, and for the reasons stated on the record in open court, Defendant's motion for summary judgment is hereby granted.

IT IS SO ORDERED.

This 5TH day of August, 1998.


Sven Erik Holmes
United States District Judge

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

RIVER OAKS DEVELOPMENT)
CORPORATION, an Oklahoma corporation;)
LORICE T. WALLACE, Trustee of the Lorice T.)
Wallace Revocable Trust, and the Lorice T.)
Wallace Family Limited Partnership,)
an Oklahoma Limited Partnership;)
STEPHEN P. WALLACE, an individual, and)
WILLIAM E. MADDOX, an individual)
Plaintiffs,)

vs.)

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

FILED
AUG - 5 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98CV0531H (M)

ENTERED ON DOCKET
DATE AUG 06 1998

DISMISSAL WITHOUT PREJUDICE

COMES NOW, the Plaintiffs and Dismiss Without Prejudice.

Respectfully submitted Pro Se,

Stephen P. Wallace
6328 E 101st, D-1 #304
Tulsa, Ok. 74133
(918) 660-1872

[Signature]
River Oaks Development Corp., President

[Signature]
William E. Maddox, an individual

[Signature]
Stephen P. Wallace, an individual

[Signature]
Lorice T. Wallace, Trustee of the Lorice T.
Wallace Revocable Trust, and the Lorice T.
Wallace Family Limited Partnership

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
5 Day of Aug, 1998.

[Signature]

3

25

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

FILED

AUG 4 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HOMEWARD BOUND, INC.)
et al.,)
)
 Plaintiffs,)
)
vs.)
)
THE HISSOM MEMORIAL CENTER,)
et al.,)
)
 Defendants.)

Case No. 85-C-437-E ✓

ENTERED ON DOCKET

DATE AUG 5 1998

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on June 2, 1998, for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the application for fees and the Stipulation of the parties.

The Court hereby awards the firm Bullock & Bullock uncontested attorney fees and expenses in the amount of \$37,834.58.

IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority and the Department of Rehabilitation Services are each jointly and severally liable for the payment to plaintiffs' counsel, Bullock & Bullock, for attorney fees and expenses in the amount of \$37,834.58, and a judgment in the amount of \$37,834.58 is hereby granted on this day.

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The contested time and expenses will be heard at a hearing set upon application.

ORDERED this 4th day of August, 1998.



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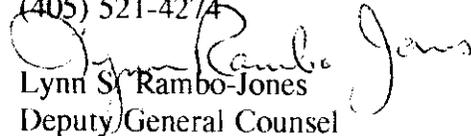


JAMES O. ELLISON, Senior Judge
United States District Court



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ATTORNEYS FOR DEFENDANTS

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

IN RE:

BOBBY G. DAVIS and EUGENIA M.
DAVIS,

Debtors,

BOBBY M. DAVIS and EUGENIA M.
DAVIS,

Appellants,

vs.

SCOTT P. KIRTLEY, Trustee, and WAL-
MART STORES, INC. ASSOCIATES'
HEALTH AND WELFARE PLAN,

Appellees.

FILED
AUG 03 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-246-B(M) ✓

ENTERED ON DOCKET

DATE AUG 04 1998

REPORT AND RECOMMENDATION

This case is an appeal from a decision of the United States Bankruptcy Court for the Northern District of Oklahoma. Appellees AMENDED MOTION TO DISMISS [Dkt. 3] is before the undersigned United States Magistrate Judge for report and recommendation.

Appellants Debtors Bobby G. Davis and Eugenia M. Davis appeal from an order of the Bankruptcy Court sustaining objections to their claims of exemption. The merits of the appeal are not addressed because the Court concludes that the district court lacks jurisdiction to consider the appeal.

The Bankruptcy Court entered a Memorandum Opinion and Judgment on February 11, 1998. Appellants filed a notice of appeal on March 13, 1998, and an amended notice on March 20, 1998. Bankruptcy Rule 8002(a) provides that a notice

of appeal must be filed within ten days of the bankruptcy court's entry of judgment. Appellants' notice was 30 days after the entry of judgment; the amended notice was filed 37 days after the entry of judgment. "[F]ailure to file a timely notice of appeal [is] a jurisdictional defect barring appellate review by the district court." *Herwit v. Rupp*, 970 F.2d 709 (10th Cir. 1992), *see also Weston v. Mann*, 18 F.3d 860 (10th Cir. 1994).

Although the ten-day filing mandate is strictly construed and requires strict compliance, Bankruptcy Rule 8002(c) permits a twenty-day extension of time to file a notice of appeal if a motion is made within the original ten-day time period. However, upon a showing of excusable neglect, a motion for extension may be made within twenty days of the ten-day period. The bankruptcy court may extend the time for appeal only as permitted by Rule 8002(c). Review of the bankruptcy docket sheet reveals that Appellants did not file a motion for extension of time within the initial ten-day period or within the twenty-day period afforded for excusable neglect. Consequently, the district court lacks jurisdiction to consider the merits of this appeal. *Herwit*, 970 F.2d at 710.

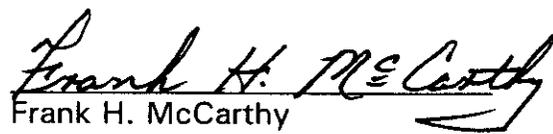
This result is not changed by Appellants' argument that the amended notice of appeal is timely because it was filed within 10 days of the Bankruptcy Court's March 10, 1998, order which Appellants contend "modified and changed the February 11, 1998 order of the Court." [Dkt. 7]. In relevant part, the February 11, 1998, order sustained objections to the Debtors' claim of exemption for \$89,000 in U.S. Treasury Securities and imposed a constructive trust in favor of Wal-Mart Stores, Inc.

Associates' Health and Welfare Plan on the funds up to \$85,254.01. The March 10, 1998, order does not modify or change that holding. Rather it effectuates the Court's ruling by decreeing that the funds be turned over to the trustee, and further authorizes the trustee to "immediately disburse the sum of \$85,254.01 to Wal-Mart in accordance with the [February 11, 1998] Memorandum Opinion and Judgment." [Dkt. 3; Ex. B, p. 2]. In addition, the Court notes that the March 10 order authorizing disbursement of the funds was entered well after the time had elapsed for Appellants' compliance with Bankruptcy Rule 8002 with respect to the February 11, 1998, order.

The undersigned United States Magistrate Judge finds that the district court lacks jurisdiction because Appellant failed to file a timely notice of appeal and therefore RECOMMENDS that the instant appeal be DISMISSED.

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

DATED this 3rd Day of August, 1998.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

DATE 8-3-98

THRESSA G. BOMBA,)
)
 Plaintiff,)
)
 v.)
)
 PHOENIX HOME LIFE MUTUAL)
 INSURANCE COMPANY,)
)
 Defendant/Third)
 Party Plaintiff,)
)
 v.)
)
 JAMES BOMBA, JR., PATRICK)
 BOMBA, DEBRA BOMBA,)
 THE ESTATE OF JAMES)
 BOMBA, SR., AND)
 NATIONSBANK, N.A.,)
)
 Third Party Defendants.)

Case No. 97-CV-1121-K(J)

F I L E
JUL 31 1998

JOINT STIPULATION OF PARTIAL DISMISSAL WITH PREJUDICE

The undersigned, being all of the parties who have appeared in this action, respectfully show that they have compromised and settled all of their claims, counterclaims and crossclaims, except for certain claims against Third-Party Defendant James Bomba, Jr., who has not appeared in this action, and hereby agree to the dismissal with prejudice of the following claims, with each party to bear its own costs and attorney fees:

1. Plaintiff's claims against Defendant Phoenix Home Life Mutual Insurance Company;

2. Defendant and Third-Party Plaintiff Phoenix Home Life Mutual Insurance Company's Third-Party claims against Debra Bomba, Estate of James Bomba, Sr., Patrick Bomba and NationsBank, N.A. but not its claims against Third-Party Defendant, James Bomba, Jr.;

3. Defendant and Third-Party Plaintiff Phoenix Home Life Mutual Insurance Company's Counterclaim against Plaintiff;

4. Third-Party Defendants Debra Bomba's and Patrick Bomba's Counterclaim against Plaintiff;

5. Third-Party Defendants Debra Bomba's and Patrick Bomba's Cross-Claim against NationsBank, N.A., but not their Cross-Claim against Third-Party Defendant James Bomba, Jr.; and

6. Third-Party Defendant Estate of James Bomba, Sr.'s Counterclaim against Plaintiff and Cross-Claim against NationsBank, N.A., but not its Cross-Claim against Third-Party Defendant, James Bomba, Jr.

Respectfully submitted,



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JAMES BOMBA, SR.

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PLAINTIFF PHOENIX HOME LIFE MUTUAL
INSURANCE COMPANY

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Joel W. Harmon, OBA #11332
DAY, EDWARDS, FEDERMAN, PROPSTER &

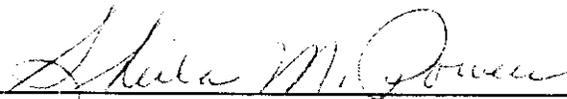
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PLAINTIFF PHOENIX HOME LIFE MUTUAL
INSURANCE COMPANY



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ATTORNEYS FOR THIRD-PARTY DEFENDANT
NATIONSBANK, N.A.

FILED

JUL 31 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

THOMAS R. GLOVER,)
)
 Plaintiff,)

v.)

Case No. 96CV 886B ✓

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,)

ENTERED ON DOCKET

DATE 8-3-98

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.)

JUDGMENT

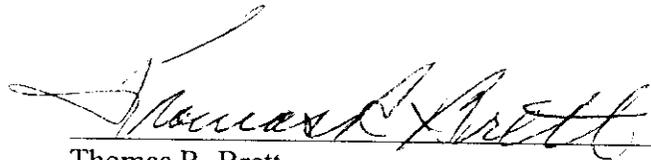
Pursuant to the agreement and stipulation of the parties as reflected by their agreement to the form and content of this Judgment, the Court hereby enters Judgment in favor of

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Plaintiff, Thomas R. Glover, and against Defendant, Gary Alred, in the amount of FIVE HUNDRED NINETY-FIVE THOUSAND AND 00/100 DOLLARS (\$595,000.00).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Judgment is hereby entered for Plaintiff, Thomas R. Glover, and against Defendant, Gary Alred, in the amount of FIVE HUNDRED NINETY-FIVE THOUSAND AND 00/100 DOLLARS (\$595,000.00).

ORDERED this 31st day of July, 1998.

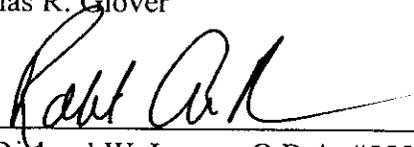
A handwritten signature in cursive script, appearing to read "Thomas R. Brett", written over a horizontal line.

Thomas R. Brett
United States District Court Judge

APPROVED AS TO FORM AND CONTENT:

LOGAN & LOWRY, LLP
P. O. Box 558
Vinita, OK 74301-0558
(918) 256-7511

Attorneys for Plaintiff
Thomas R. Glover

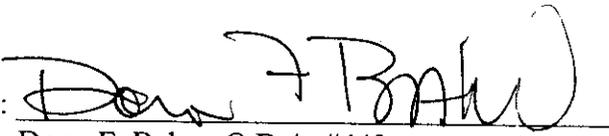
By: 

Richard W. Lowry, O.B.A. #5552
Robert Alan Rush, O.B.A. #13342
Michael S. Linscott, O.B.A. #17266

and

BAKER & BAKER
303 West Keetoowah
Tahlequah, OK 74464

Attorney for Defendants
Gary Alred and Mikael Alred

By: 

Donn F. Baker, O.B.A. #443

FILED

JUL 31 1998

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Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

ENTERED ON DOCKET

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.

DATE

8-3-98

Case No. 96CV 886B

**PLAINTIFF'S STIPULATION OF DISMISSAL AS TO
DEFENDANTS JIM ALRED AND MIKAEL ALRED**

The Plaintiff, Thomas R. Glover, hereby files this, his Stipulation of Dismissal as to Defendants Jim Alred and Mikael Alred (these "Defendants"), pursuant to Fed. R. Civ. P. 41(a), and states as follows:

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mail not
025

1. The Plaintiff desires to dismiss Plaintiff's claims against these Defendants.
2. These Defendants have not asserted a counterclaim or any other claim in this matter.
3. Dismissal with prejudice of Plaintiff's claims against these Defendants will finally resolve all disputes and claims between the Plaintiff and these Defendants.
4. These Defendants and Plaintiff have agreed that each party is to bear its own costs in this matter.

WHEREFORE, premises considered, Plaintiff respectfully requests that this Court recognize this Stipulation of Dismissal and Order and that all of Plaintiff's claims against these Defendants, Jim Alred and Mikael Alred, be dismissed with prejudice to refiling of same and that each of these parties bear their own respective costs.

Dated this 30th day of July, 1998.

Respectfully submitted,
LOGAN & LOWRY, LLP
P. O. Box 558
Vinita, OK 74301-0558
(918) 256-7511

Attorneys for Plaintiff Thomas R. Glover and
Third-Party Defendants Mid-Ark Cattle Company,
Inc. and James F. Lowder

By: 

Richard W. Lowry, O.B.A. #5552
Robert Alan Rush, O.B.A. #13342
Michael S. Linscott, O.B.A. #17266

CERTIFICATE OF MAILING

I, Robert Alan Rush, do hereby certify that on this 30th day of July, 1998, I mailed a true and correct copy of the above and foregoing Plaintiff's Stipulation of Dismissal as to Defendants Joe Alred and Mikael Alred to :

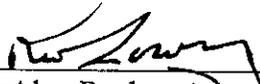
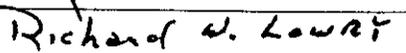
Donn F. Baker, Esquire
Baker & Baker
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Tahlequah, OK 74464
(Attorney for Defendants Gary Alred and Mikael Alred)

Nathan H. Young, III, Esquire
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Tahlequah, OK 74464
(Attorney for Defendant Jim Alred)

David D. Wilson, Esquire
Bruce A. Robertson, Esquire
Wilson, Cain & Acquaviva
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(Attorneys for Defendants Sam Strahm, D.V.M.
and Osage Animal Clinic, Inc.)

CERTIFICATE OF CONFERENCE

Counsel for Plaintiff has contacted counsel for each of the Defendants to this action and informed them of the contents of this Stipulation of Dismissal With Prejudice. Such counsel confirmed that they have no opposition to this Dismissal With Prejudice, therefore, it is submitted for the Court's signature and entry upon the record in this case.


~~Robert Alan Rush~~ 

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

FILED

JUL 31 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THOMAS R. GLOVER,)
)
Plaintiff,)

v.)

Case No. 96CV 886B

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.)

ENTERED ON DOCKET

DATE 8-3-98

**ORDER GRANTING DISMISSAL WITH PREJUDICE
OF PLAINTIFF'S CLAIMS AGAINST
DEFENDANTS JIM ALRED AND MIKAEL ALRED**

Came on before the Court on this the 31st day of July, 1998, Plaintiff's
unopposed Stipulation of Dismissal With Prejudice as to Defendants Jim Alred and Mikael Alred. Upon
considering the stipulation and the agreement of all parties in this matter, THE COURT FINDS that, pursuant

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to Fed. R. Civ. P. 41(a), Plaintiff's claims as to Defendants Jim Alred and Mikael Alred should be dismissed with prejudice with each party bearing its own costs.

ORDERED, ADJUDGED AND DECREED that all of Plaintiff's claims as to Defendants Jim Alred and Mikael Alred 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, Jim Alred and Mikael Alred.



JUDGE OF THE DISTRICT COURT

F I L E D

JUL 31 1998

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

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

STEPHEN S. SMITH,)
SSN: 587-14-4037,)

Plaintiff,)

v.)

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

Defendant.)

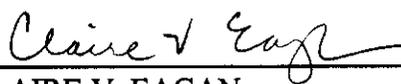
Case No. 96-CV-1185-EA

ENTERED ON DOCKET
DATE AUG 03 1998

JUDGMENT

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

DATED this 31st day of July, 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 31 1998

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

STEPHEN S. SMITH,)
SSN: 587-14-4037,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 96-CV-1185-EA

ENTERED ON DOCKET

DATE AUG 03 1998

ORDER

Claimant, Stephen S. Smith, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.² In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Circuit Court of Appeals.

¹ Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

² On October 6, 1993, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 *et seq.*). Claimant's application for benefits was denied in its entirety initially (March 17, 1994), and on reconsideration (May 25, 1994). A hearing before Administrative Law Judge Dana E. McDonald (ALJ) was held on October 27, 1994, in Tulsa, Oklahoma. By decision dated December 14, 1994, the ALJ found that claimant was not disabled at any time through the date of the decision. On October 28, 1996, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

I. CLAIMANT'S BACKGROUND

Claimant was born on August 27, 1947, and completed the 12th grade. His past relevant work is as a truck driver. He claims he became unable to work on May 31, 1991,³ because of neck, hip and back disorders, heart, lung and kidney problems, personality disorders, and memory problems.

II. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

Disability under the Social Security Act is defined as the "...inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment..." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if 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

³ Claimant protectively filed prior applications under Titles II and XVI on October 30, 1992, alleging inability to work beginning July 31, 1991. (R. 79-81) After the prior applications were denied initially on May 3, 1993, claimant did not further appeal.

substantial gainful work in the national economy....” Id., § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.⁴

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

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

⁴ Step One requires the claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510. Step Two requires that the claimant establish 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 certain impairments listed in Appendix 1 of Subpart P, Part 404, 20 C.F.R. Claimants suffering from a listed impairment or impairments “medically equivalent” to a listed impairment are determined to be disabled without further inquiry. If not, the evaluation proceeds to Step Four, where the claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If the claimant’s Step Four burden is met, the burden shifts to the Commissioner to establish at Step Five that work exists in significant numbers in the national economy which the claimant—taking into account his age, education, work experience, and RFC—can perform. See Diaz v. Secretary of Health & Human Servs., 898 F.2d 774 (10th Cir. 1990). Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

and “the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform a wide range of unskilled sedentary work. The ALJ concluded that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his age, education, work experience, and RFC. Having concluded that there were a significant number of jobs which claimant could perform, the ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision.

IV. MEDICAL HISTORY OF CLAIMANT

The medical history of claimant relevant to the issues raised on appeal is as follows:

In approximately 1977, while driving a tractor/trailer, claimant was struck by a train and sustained low back pain and hip pain. (R. 126, 128) In 1989, claimant was hospitalized with severe chest pain, and an angioplasty was performed. (R. 172-204) Claimant was discharged from Saint Francis Hospital, Tulsa, Oklahoma on May 3, 1989 with a diagnosis of myocardial infarction, pulmonary disease with emphysema, and coronary artery disease. (R. 172) In early 1991, claimant threw his head to avoid a boom, hit his head, and began experiencing severe neck pain. (R. 313) Between June 11 and September 4, 1991, claimant was treated for neck pain by Thomas Ashcraft, M.D., an anesthesiologist and acupuncturist. (R. 206-222) Claimant received cervical epidural steroid injections. Dr. Ashcraft reported that claimant:

- “got fairly good relief of pain” -- 6/18/91 (R. 221)
- “is going to show great improvement after this block” -- 6/25/91 (R. 220)
- “has shown great improvement in the last week” -- 7/2/91 (R. 215)
- “is doing I think a lot better . . . his condition is reasonably good” -- 7/16/91 (R. 214)
- “has developed dizziness and lightheadedness. He has had an excellent relief of pain” -- 7/19/91 (R. 213)
- “has had a 90% improvement of his pain. He has good range of motion of his neck.” -- 7/22/91 (R. 212)
- “is improved” -- 8/1/91 (R. 211)
- “is much improved over the last two weeks” -- 8/15/91 (R. 210)
- “is having occasional headaches”; “is having some problems in his neck” -- 8/12/91 (R. 209)
- “is doing well in my opinion”; “the pain has resolved” -- 8/19/91 (R. 208)
- “lifted a 38-pound kid . . . and began experiencing again severe pain in the neck” -- 8/27/91 (R. 207)
- “is much improved. His pain is much relieved. . . . the orthopedic surgeon recommends putting a cast on the neck. I can see no earthly reason for this. . . .” -- 9/4/91 (R. 206)

Claimant had two consultative examinations in February 1994 in connection with his application for disability benefits -- one with a psychiatrist, Dr. George Blake, and one with Dr. Ashcraft. Dr. Blake diagnosed claimant as malingering and having avoidant personality disorder. (R. 223-225) Claimant presented to Dr. Ashcraft with complaints of chest pain on exertion and severe low back and neck pain. (R. 228) Dr. Ashcraft’s impression after the consultative exam was: “Coronary artery insufficiencies, cervical disk, probably lumbar disk, and bursitis of the right hip.” (R. 229) Dr. Ashcraft added: “He does not appear to be retainable since he has worked only as a truck driver in the past.” (Id.)

Approximately six weeks later, Dr. Ashcraft wrote a letter to an attorney, presumably representing claimant in connection with a workers’ compensation claim (R. 126), expressing an opinion of permanent total disability. (R. 239-245) This opinion was based on the same February 1994 consultative examination (R. 228-233) discussed above, and was not based on ongoing treatment by Dr. Ashcraft. (R. 305-306, 312)

V. REVIEW

Claimant asserts that the ALJ erred by:

- failure to give controlling weight to the treating physician's opinion;
- failure to reopen claimant's prior applications;
- failure to find that claimant's impairment meets Section 1.05C of the Listings; and
- failure to include all of claimant's restrictions in hypothetical questions to the vocational expert.

A. Weight of Treating Physician's Opinion

Claimant argues that, contrary to Goatcher v. U.S. Dep't of Health & Human Services, 52 F.3d 288 (10th Cir. 1995), the ALJ did not give proper weight to the opinion of the treating physician (Dr. Ashcraft). As noted above, Dr. Ashcraft expressed an opinion of claimant's permanent total disability. The ALJ stated reasons for disregarding this opinion:

A treating physician's opinion must be given great weight unless it is determined to be brief, conclusory, and/or unsupported by the medical evidence (Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1988 [sic]) and Bernal v. Heckler, [sic] 851 F.2d 297, 301 (10th Cir. 1989 [sic])). Although claimant's treating physician, Thomas L. Ashcraft, M.D., concluded that claimant had a "100% permanent total disability," the physician based his opinion on claimant's education, past work experience, and the hiring practices of employers (Exhibit 29). While conclusory opinions by physicians on the ultimate issue of disability are entitled to some weight and consideration, they are not necessarily binding unless there is an absence of conflict in the medical evidence and opinions, and all the evidence must point to that conclusion. Such opinions often invade the province of the Secretary and go beyond a physician's medical expertise in passing upon vocational capacity, especially when unsupported by diagnostic testing, laboratory reports or clinical findings, and, as such, are viewed as constituting little probative weight. Moreover, the basis of the physician's opinion was based, in large part, on Workers' Compensation treatises (Exhibit 29). Thus, such opinion, as discussed above, is assessed little probative weight for purposes of Social Security disability. In addition, the hiring practices of employers are not applicable if

claimant's residual functional capacity and vocational factors make it possible for him to perform other work in the national economy (20 CFR 404.1566(c) (3)).

(R. 61)

The record shows that Dr. Ashcraft treated claimant for neck pain from June to September, 1991. Dr. Ashcraft did not treat claimant any further. In February 1994, Dr. Ashcraft was asked to perform a consultative examination at the request of the Social Security Administration (R. 228-233), and concluded that claimant "does not appear to be retainable since he has worked only as a truck driver in the past." (R. 229) Approximately six weeks later, Dr. Ashcraft wrote to claimant's workers' compensation attorney, and expressed an opinion of permanent total disability. (R. 239-245)

It is clear from a review of Dr. Ashcraft's February 1994 consultative examination report that he assumes that inability to do past work constitutes unemployability, and mandates a finding of disability. (R. 229) It is also clear that Dr. Ashcraft's April 1994 letter was an attempt to perform a workers' compensation analysis for a workers' compensation attorney "in substantial accordance with . . . the Oklahoma Workers' Compensation Act." (R. 244) The ALJ found that this assessment has little probative weight for purposes of Social Security disability. (R. 61)

Dr. Ashcraft administered to claimant a series of steroid injections for neck pain over a four month period more than two years prior to the February 1994 consultative examination. A treating physician's opinion may be disregarded where "good cause is shown for rejecting it." Eggleston v. Bowen, 851 F.2d 1244, 1246 (10th Cir. 1988) (quoting Reyes v. Bowen, 845 F.2d 242, 245 (10th Cir. 1988)). In Eggleston, the treating physician's report was made three years after he last saw claimant, and other doctors disagreed with the treating physician. 851 F.2d at 1247. Here, Dr.

Ashcraft's report was made two and one-half years after he last treated claimant, and the ALJ found that the opinion was unsupported by the medical evidence:

The record does not reflect functional restrictions by claimant's treating physicians that would preclude a wide range of unskilled sedentary work activity. The claimant further testified that Dr. Ashcraft advised him that he was not a surgical candidate. The claimant further stated that he could lift a gallon of milk and that his physician limited him to lifting 5 to 10 pounds. Although claimant reported the inability to perform prolonged walking, standing, and sitting, his residual functional capacity for sedentary work allowing alternating sitting and standing resolves these inabilities. The record does not show the duration, frequency, and intensity of claimant's symptomatology that would prevent him from following work rules, relating to coworkers, using judgement, interacting with supervisors, functioning independently, or maintaining the attention and concentration required of a wide range of unskilled sedentary work activity.

(R. 62)

Dr. Ashcraft's opinion was based on a consultative examination and claimant's complaints, and was not based on diagnostic tests. The suggestion of disability due to heart problems is contrary to the evidence. (R. 173) The Court finds that there was good cause for the ALJ not to give substantial weight to the opinion of Dr. Ashcraft, and that the ALJ gave specific, legitimate reasons to disregard it. See Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984).

Although a treating physician may proffer an opinion that claimant is totally disabled, final responsibility for that determination is reserved to the ALJ. Castellano v. Secretary of Health & Human Services, 26 F.3d 1027 (10th Cir. 1994); 20 C.F.R. § 404.1527(e)(1). The finding of impairment under a workers' compensation system is different from a finding of disability under the Social Security Act. The ALJ was required to determine whether the claimant had the RFC for work at lower levels, and the ALJ found that he did. The Court finds that the ALJ gave appropriate consideration to Dr. Ashcraft's opinion.

B. Claimant's Prior Applications

Claimant protectively filed prior applications under Titles II and XVI on October 30, 1992, alleging inability to work beginning July 31, 1991. (R. 79-81) After the prior applications were denied initially on May 3, 1993, claimant did not further appeal.

Claimant requested a rehearing or reopening as to the issue of claimant's disability on or before May 3, 1993. (R. 320) The ALJ, relying on 20 C.F.R. §§ 404.957(c), 404.988, and 404.989, dismissed the request for rehearing because the doctrine of res judicata applied and there was no basis to reopen the prior determination. (R. 57) Claimant argues that this denial of reopening of the prior determination violates the Due Process rights of claimant because reopening within twelve months is a right of claimant, and is not discretionary. This Court disagrees.

The Social Security Administration regulations govern the reopening and revising of prior determinations. The relevant portions provide:

§ 404.987 Reopening and revising determinations and decisions.

(a) *General.* Generally, if you are dissatisfied with a determination or decision made in the administrative review process, but do not request further review within the stated time period, you lose your right to further review and that determination or decision becomes final. However a determination or a decision made in your case which is otherwise final and binding may be reopened and revised by us.

(b) *Procedure for reopening and revision.* We may reopen a final determination or decision on our own initiative, or you may ask that a final determination or a decision to which you were a party be reopened. In either instance, if we reopen the determination or decision, we may revise that determination or decision. The conditions under which we may reopen a previous determination or decision, either on our own initiative or at your request, are explained in § 404.988.

§ 404.988 Conditions for reopening.

A determination, revised determination, decision, or revised decision may be reopened--

(a) Within 12 months of the date of the notice of the initial determination, for any reason;

20 C.F.R. §§ 404.987, 404.988(a) (emphasis added).

The regulations clearly state (“may,” “if”) that reopening is discretionary. The ALJ expressly found no basis to reopen the prior determination. (R. 57) This finding is not reviewable by this Court absent a valid Constitutional claim. Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977); Nelson v. Sec’y of Health & Human Services, 927 F.2d 1109 (10th Cir. 1990). Claimant testified that he did not appeal the prior denials because he “just stopped and started over.” (R. 317) The Court finds that claimant has failed to demonstrate that the ALJ’s exercise of regulatory discretion violated claimant’s Constitutional rights. This finding of the ALJ is, therefore, not reviewable by this Court.

C. Claimant’s Impairment and Section 1.05C of the Listings

Claimant asserts that he meets Section 1.05C of the Listings, and that the ALJ misconstrued Section 1.05C. If the severity of claimant’s impairment meets or exceeds that found in the Listing of Impairments, he will be found disabled without considering his age, education, and work experience. 20 C.F.R. § 404.1520(d); Fulton v. Heckler, 760 F.2d 1052, 1056 (10th Cir. 1985).

Section 1.05C of the Listing of Impairments provides:

C. Other vertebrogenic disorders (e.g., herniated nucleus pulposus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last 12 months. With both 1 and 2:

1. Pain, muscle spasm, and significant limitation of motion in the spine; and
2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

20 C.F.R. Pt. 404, Subpt. P, App. 1, 1.05C.

It is claimant's burden to prove that a Listing has been met. Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988). There is no medical evidence in the record of any impairment which meets Section 1.05C of the Listings, and the ALJ so found:

The claimant's degenerative disc disease has not resulted in arthritis; osteoporosis; muscle spasm, significant motor loss with muscle weakness, and neurologic deficit lasting for any continuous 12-month period despite three months of prescribed therapy as specified in Section 1.05. A physical examination, in February 1994, revealed no loss of sensation of the neck or loss of grip strength in either arm and there was full range of motion of the upper extremities. An examination of the lower extremities showed normal reflexes and no mention was made of muscle spasm in the lumbar spine region.

(R. 58)

A review of the record demonstrates that claimant has not proved that he has a vertebrogenic disorder expected to last 12 months with the following persisting for at least 3 months despite prescribed therapy: pain, muscle spasm, and significant limitation of motion in the spine; and appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss. Claimant cannot demonstrate where in the record there is medical evidence that he meets this section of the Listings. In fact, the evidence is to the contrary. (R. 228-233)

Nor can claimant show that the correct legal standards were not applied. While it is true that Section 1.05C of the Listings requires that the required physical impairments be "expected to last 12

months,” and the ALJ said “lasting for any continuous 12-month period” (R. 58), the mistake in wording does not affect the outcome because the ALJ found that the underlying severity requirement had not been met, not that the duration requirement had not been met. (Id.) The ALJ properly found that claimant did not meet Section 1.05C of the Listings.

D. Hypothetical Questions to the Vocational Expert

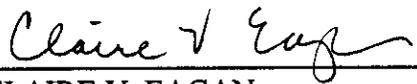
Claimant asserts that the ALJ failed to include all of claimant’s impairments in the hypothetical questions to the vocational expert, specifically: limited range of motion, emphysema, and coronary artery disease. The ALJ hypotheticals to the vocational expert included the assumptions of: claimant’s age, education, and work experience; average ability to read, write, and work with numbers; physical capacity to do sedentary, unskilled work; an option to permit the employee to sit or stand as he chooses; pain and depression associated with multiple injuries; pain which varied in severity from mild to moderate to occasionally chronic that would be of sufficient severity to be noticeable at all times, but which would not prevent him from being attentive to his job, responsive to supervision, or cooperative with co-workers; and medication of the type and strength which would not interfere with ability to be reasonably alert to perform required work responsibilities. (R. 322-326) First, limited range of motion, emphysema, and coronary artery disease as impairments would all be subsumed in the assumptions of physical capacity to do sedentary work, sit/stand option, pain, and medication. Second, the vocational testimony on which the ALJ relied (R. 62-63, 64), was premised on a hypothetical that reflected the ALJ’s findings as detailed in his report. It is true that “testimony elicited by hypothetical questions that do not relate with precision all of a claimant’s impairments cannot constitute substantial evidence to support the [Commissioner’s] decision.” Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719,

722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). This is what the ALJ did. Thus, the hypothetical question was not tainted and the ALJ did not err in relying on the testimony of the vocational expert.

VI. CONCLUSION

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

DATED this 31st day of July, 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

DONALD R. CONNER,
SSN: 441-42-9546,

Plaintiff,

v.

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

Defendant.

ENTERED ON DOCKET
AUG 03 1998
DATE _____

CASE NO. 97-CV-560-M ✓

FILED

JUL 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 31ST day of JULY, 1998.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

JUL 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONALD R. CONNER,
441-42-9546

Plaintiff,

vs.

Case No. 97-CV-560-M ✓

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

ENTERED ON DOCKET
DATE AUG 03 1998

ORDER

Plaintiff, Donald R. Conner, 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 October 13, 1994, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held March 5, 1996. By decision dated April 9, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on April 17, 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 November 9, 1942, and was 53 years old at the time of the hearing. He has a high school education and an associates degree. He has formerly worked as an assistant manager, oilfield pumper, auto detailer, oilfield laborer, laundry worker and foreman. He claims to have been unable to work since September 20, 1994, as a result of hip pain, back pain, and deep vein thrombosis.

The ALJ determined that although Plaintiff is unable to perform his past relevant work, he is capable of performing a full range of light work subject to the additional restrictions of lifting no more than 10 pounds, walking not more than 1/4 a mile at a time, not walking on an incline, no tasks requiring fine fingering with the hands, no more than moderate exposure to noise, and an ability to sit or stand at will. [R. 22].

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 the ALJ: (1) inaccurately reported and failed to properly evaluate the medical evidence; (2) failed to give proper weight to treating physician opinions; (3) relied upon incompetent vocational expert testimony; and (4) failed to apply the medical-vocational guidelines at Appendix 2, Subpart P, Regulations No. 4 Rule 201.14, which mandate a finding of disability. For the reasons expressed below, the Court holds that the record and findings will not support the denial of benefits. Therefore the case must be reversed and remanded.

The Court notes that the record contains letters authored by Plaintiff's treating orthopedic specialist, Dr. Zeiders, wherein he expressed the opinion that Plaintiff is disabled. [R. 13; 213]. In a November 11, 1994, letter addressed to another physician, Dr. Zeiders expressed his opinion that Plaintiff's prognosis is not very good because in addition to his degenerative disease of the joints and spine, he has diabetes and coronary artery disease. Dr. Zeiders wrote that he considered Plaintiff disabled, and that any degree of work activity should be sedentary. [R. 213]. Dr. Zeiders' November 1994 opinion that Plaintiff is limited to sedentary work directly conflicts with the ALJ's finding that Plaintiff is capable of light work. The determination of whether he is limited to just sedentary work, or can do light work as well is outcome determinative because if Plaintiff is limited to sedentary work then the Vocational

Medical Guidelines ("Grids") direct a finding that he is disabled. *Compare* 20 C.F.R., Pt. 404, Subpt. P. App. 2., Rule 201.14 *with* Rule 202.14.

The record also contains a letter dated May 9, 1996, from Dr. Zeiders which was submitted to the Appeals Council. In that letter, Dr. Zeiders stated that Plaintiff is disabled due to a "multitude of degenerative processes" including degenerative disc disease involving his lumbar spine; chronic nerve root irritation into his right and left legs, polyneuropathy of his lower extremities related to his diabetes which interferes with perceived sensation in his legs; chronic phlebitis for which chronic swelling is a problem necessitating frequent elevation of his legs; and an unusual degenerative process involving his shoulders, knees and hips related to pseudogout. [R. 13]. Despite having the opinion of a treating physician before it, the Appeals Council concluded, without discussion, that there was no basis for changing the ALJ's decision. [R. 4]. *Stephens v. Callahan*, 971 F.Supp. 1388 (N.D. Okla. 1997)(court is required to consider new evidence submitted to the Appeals Council).

It is well established that the Secretary must give controlling weight to the opinion of a treating physician if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. However, good cause must be given for rejecting the treating physician's views and, if the opinion of the claimant's physician is to be disregarded, specific, legitimate reasons for rejection of the opinion must be set forth

by the ALJ, *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987); *Byron v. Heckler*, 742 F.2d 1232 (10th Cir. 1984).

The Court notes that on appeal counsel for the Commissioner has listed a number of reasons for disregarding Dr. Zeiders' opinions. Just as this court may not substitute its analysis and weighing of the evidence for that of the Commissioner, on appeal counsel for the Commissioner may not furnish the analysis and weighing of the evidence absent from the Commissioner's decision. Neither the ALJ nor the Appeals Council gave reasons for rejecting Dr. Zeiders' opinions. Consequently, the decision must be reversed and remanded for the ALJ to provide such rationale if the treating physician's opinions are rejected on remand.

Another issue raised by Plaintiff merits discussion. That is the potential application of the Medical Vocational Guidelines ("Grids") to this case. The Commissioner has promulgated the Grids, 20 C.F.R., Pt. 404, Subpt. P, App. 2., to assist in the determination of whether jobs exist in the national economy which a claimant can perform given his exertional capacity for work, his age, education, and work experience. Concerning the Grids, the regulations provide: "Where the findings of fact made with respect to a particular individual's vocational factors [age, education, work experience] and residual functional capacity coincide with all of the criteria of a particular rule, the rule directs a conclusion as to whether the individual is or is not disabled." *Id.* at 200(a). [emphasis supplied]. The Commissioner has determined that the rules expressed in the Grids are not presumptive, but conclusive where it is established that a particular rule is applicable. SSR 83-5a. Therefore, if the

rule's underlying criteria are established, the rule's conclusion cannot be avoided or rebutted by the testimony of a vocational expert. *Id.*

Plaintiff claims that Rule 201.14 is applicable to his case. Rule 201.14 provides that a claimant who is between 50 and 54 years of age, who is a high school graduate or more, but whose education does not provide for direct entry into skilled work, who has previously performed skilled or semiskilled work, but whose skills are not transferable, and who has an RFC limited to sedentary work is disabled. Plaintiff undeniably meets the age, education, and work experience criteria for Rule 201.14. The issue is the RFC determination. The ALJ determined that Plaintiff has the capacity for the "full range of light work"² but then acknowledged the existence of additional exertional limitations which placed Plaintiff's RFC very close to the definition of sedentary work:³

² Light work involves:

lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities.

20 C.F.R. § 404.1567(b).

³ Sedentary work is defined as work which:

involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. § 404.1567(a).

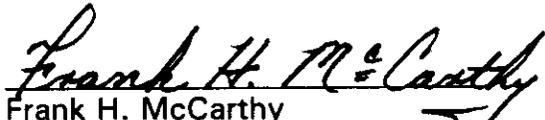
I find that the claimant has a residual functional capacity to perform a full range of **light** work, as defined in 20 CFR Section 404.1567, and of an unskilled nature as defined in 20 CFR Section 404.1568 subject to lifting no more than 10 pounds, walking more than 1/4 mile at one time, not walking on an incline, no tasks requiring fine fingering with the hands, no more than moderate exposure to noise and an ability to sit or stand at will. [emphasis supplied].

[R. 24].

If Plaintiff is effectively limited to sedentary work, Rule 201.14 directs the conclusion that Plaintiff is disabled within the meaning of the Social Security Act. Since the Commissioner has determined that the Grid conclusions are not rebuttable, and since Plaintiff's ability to perform light work is significantly restricted, on remand a finding that Plaintiff is capable of performing light work must be accompanied by a thorough narrative discussing the presence and degree of specific limitations and capabilities as well as an explanation of how the evidence in the file was considered in the assessment.

The Commissioner's denial decision is REVERSED and the case remanded for further proceedings in accordance with this order.

SO ORDERED this 31ST Day of July, 1998.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

EOD: 8-03-98

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

BETTY J. MCMAHON,
SSN: 447-42-4766

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

JUL 31 1998

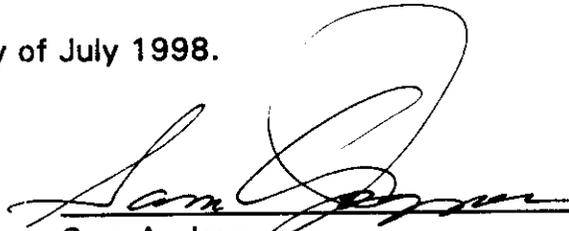
Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-C-598-J

JUDGMENT

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

It is so ordered this 31st day of July 1998.


Sam A. Joyner
United States Magistrate Judge

14

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

BETTY J. MCMAHON,
SSN: 447-42-4766

Plaintiff,

v.

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

Defendant.

JUL 31 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-C-598-J ✓

ENTERED ON DOCKET
DATE AUG 03 1998

ORDER^{2/}

Plaintiff, Betty J. McMahon, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{3/} Plaintiff asserts that the Commissioner erred because (1) the ALJ inappropriately disregarded evidence related to Plaintiff's limitations related to reaching and handling, (2) the ALJ did not properly evaluate Plaintiff's credibility (with regard to Plaintiff's limitations related to her hand impairment), and (3) the ALJ failed to include a limitation for Plaintiff's hand

^{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 Leslie S. Hauger, Jr. (hereafter "ALJ") concluded that Plaintiff was not disabled by decision dated April 9, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on April 18, 1997. [R. at 4].

(13)

impairment in the question he posed to the vocational expert. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born February 7, 1944, and was 52 years old at the time of the hearing before the ALJ. [R. at 33]. Plaintiff testified that she was a high school graduate. [R. at 33].

According to Plaintiff she spends most of her time in constant pain. Plaintiff stated that she has severe headaches, neck pain, back pain, burning in her legs, weak hands, and that she throws up. [R. at 37]. At the hearing, Plaintiff testified that her current level of pain was approximately a seven or eight on a scale from one to ten and that if she got up or moved around her level of pain would rate a ten. [R. at 38]. Plaintiff testified that she used a TENS unit on her neck and was unable to sew, garden, clean, cook, or shop. [R. at 51-52].

An RFC completed on December 2, 1994, indicated that Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand or walk for six hours in an eight hour day, sit for six hours in an eight hour day, and push/pull an unlimited amount. [R. at 95]. In addition, Plaintiff's reaching, handling, fingering, and feeling were listed as having no limitations. [R. at 97].

An MRI of Plaintiff's cervical spine taken August 11, 1993 indicated a small spur at C5-6 which was interpreted as being of "doubtful clinical significance." [R. at 161]. It was reported as otherwise normal.

On August 18, 1993, Garrett Watts, M.D., noted that based on Plaintiff's diagnosis of bilateral carpal tunnel syndrome she had a 4% impairment of the left upper extremity and a 5% impairment of the upper right extremity. [R. at 164].

On July 21, 1993, Dr. Watts noted that he had seen Plaintiff for a recheck of her bilateral carpal tunnel syndrome following her surgery three months prior to the check-up. He recorded that the surgery had resulted in an "excellent relief of symptoms." [R. at 165]. According to Dr. Watts, Plaintiff had had a flare-up of the left carpal tunnel syndrome which responded to steroid injection and Plaintiff currently had minimal symptoms in her left hand. [R. at 165]. Plaintiff was given a release to return to regular duty on May 24, 1993. [R. at 165, 179]. The doctor noted that although Plaintiff returned to work after being given the release she was laid off shortly thereafter and was not currently working. [R. at 165]. He reported Plaintiff's grip strength as 20, 18, and 15 pounds on the right hand and 15, 15, and 20 pounds on the left hand. [R. at 165]. In addition, Plaintiff's range-of-motion was reported as full and painless. [R. at 165]. Plaintiff had been previously been released to return to light duty work on April 23, 1993. [R. at 168].

Due to an unexplained weight loss, Plaintiff underwent an esophagogastroduodenoscopy. It was reported as normal on August 23, 1993. [R. at 192].

After cardiac testing, Plaintiff was reported as exhibiting no sign of cardiac disease, and Plaintiff's EMG was reported as normal. [R. at 257, 264].

Plaintiff's doctor reported that she had back surgery in 1988. [R. at 266]. Plaintiff reported pain in her neck and back on August 9, 1993. [R. at 266]. Plaintiff's doctor interpreted her MRI scan as normal and noted that if Plaintiff continued with significant pain a subsequent study should be conducted to insure Plaintiff has no pathology to cause the pain. [R. at 266].

Plaintiff was examined on November 2, 1994. Her grip strength was reported as 60% of normal. [R. at 268]. Plaintiff's gross and fine manipulative abilities were reported as normal as was her gait. [R. at 269]. The doctor noted that Plaintiff could effectively grasp tools, manipulate objects and oppose her thumb and finger tips. [R. at 273].

Plaintiff was evaluated by a workers' compensation doctor on January 11, 1995. The workers' compensation doctor noted that Plaintiff's first injury in November of 1987 (to her back) resulted in a 26% impairment, that her second injury in August of 1991 (to her hands) resulted in a 20% impairment, that her third injury in October of 1994 (unspecified) resulted in a 7% impairment for a total 53% impairment to Plaintiff's person. In addition, he reported that Plaintiff was injured on May 13, 1993 and sustained an 11% impairment. [R. at 294]. The doctor concluded "based on the patient's educational background of twelfth grade, her employment history of working as a blueprint machine operator and stockroom clerk, as well as her age of 50, it is my opinion she is 100% permanently, economically disabled and unemployable." [R. at 296].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{4/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

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

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

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

^{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).

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^{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.

^{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."

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 did have some back pain which precluded prolonged standing but that Plaintiff did not have back pain to the degree that she alleged. [R. at 20]. The ALJ determined that Plaintiff did not have any problems with her neck and had a full range of motion of her upper extremities. [R. at 20]. The ALJ additionally noted that Plaintiff testified that she could lift one gallon of milk which was 8.8 pounds. [R. at 20]. The ALJ considered Plaintiff's objective complaints of pain and determined that Plaintiff's allegations were not fully credible. [R. at 18-19]. The ALJ noted the physical restrictions place on Plaintiff and concluded that she could perform the requirements of sedentary work. [R. at 20]. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff had transferrable skills and could perform the work of telephone answering and data-entry. [R. at 21].

IV. REVIEW

The focus of the issues raised by Plaintiff concern the medical and testimonial evidence related to Plaintiff's ability to use her hands.

LIMITATIONS RELATED TO REACHING AND HANDLING

Plaintiff initially asserts that the ALJ inappropriately disregarded evidence related to Plaintiff's limitations related to reaching and handling. Plaintiff asserts that the ALJ disregarded any manipulative impairments because Plaintiff's 1993 surgery was successful and because she had only minimal symptoms in her left wrist.

A December 2, 1994 RFC indicated Plaintiff could push/pull an unlimited amount. [R. at 95]. In addition, Plaintiff's reaching, handling, fingering, and feeling abilities were listed as having no limitations. [R. at 97].

Plaintiff's physician, Dr. Watts noted on July 21, 1993, Plaintiff's surgery resulted in an "excellent relief of symptoms." [R. at 165]. Dr. Watts additionally reported that Plaintiff had a flare-up of the left carpal tunnel syndrome which responded to steroid injection and Plaintiff currently had minimal symptoms in her left hand. [R. at 165]. He released Plaintiff to return to regular duty on May 24, 1993. [R. at 165, 179]. He reported that Plaintiff had a full range-of-motion, and that Plaintiff's grip strength was 20, 18, and 15 pounds on the right hand and 15, 15, and 20 pounds on the left hand. [R. at 165].

Plaintiff was examined on November 2, 1994. Her grip strength was reported as 60% of normal. [R. at 268]. Plaintiff's gross and fine manipulative abilities were reported as normal as was her gait. [R. at 269]. The doctor noted that Plaintiff could effectively grasp tools, manipulate objects and oppose her thumb and finger tips. [R. at 273].

The record contains substantial evidence to support the ALJ's conclusion that Plaintiff did not have a hand "manipulation" limitation.^{6/}

EVALUATION OF CREDIBILITY

Plaintiff asserts that the ALJ failed to properly evaluate Plaintiff's testimony and credibility concerning the limitations related to Plaintiff's hand impairment. Plaintiff notes that an ALJ is required to consider numerous factors when evaluating Plaintiff's credibility. Plaintiff asserts that the factors considered by the ALJ were not supported by record. Specifically, Plaintiff states that the ALJ was incorrect in stating that Plaintiff did not complain of her manipulative impairment at the hearing. Plaintiff suggests that she discussed this impairment "at length." In addition, Plaintiff notes that although she had not sought recent treatment for her hand impairment she did obtain a medical opinion with respect to her hands. Plaintiff additionally argues that merely because the consultative examiner noted that her hands were not swollen or red did not contradict findings that she had problems with her hands.

The ALJ commented on Plaintiff's claims of pain, and noted the onset, duration and frequency of her pain. The ALJ noted that Plaintiff had surgery for her carpal tunnel syndrome and took Amoxicillin, Cyclin, Premarin, Sevent and non-prescription pain medicines but no prescription pain medicines. The ALJ additionally noted that Plaintiff used a TENS unit. The ALJ discussed Plaintiff's physical activities and her

^{6/} Plaintiff's main focus is on "reaching handling and fingering" which Plaintiff states is required for both the job of data entry and telephone answering service operator. As noted, the record contains support for the ALJ's conclusion that Plaintiff does not have a limitation based on an inability to reach, handle, or finger.

daily activities. The ALJ gave numerous reasons for discounting Plaintiff's credibility. The ALJ noted a lack of objective findings, the lack of medication, the infrequency of visits, the lack of Plaintiff's discomfort at the hearing, the lack of complaints of wrist problems, and the successful repair of Plaintiff's carpal tunnel syndrome. The ALJ additionally noted Plaintiff's treatment record. The ALJ commented that Plaintiff sat at the hearing for 45 minutes although testifying that she could sit for only ten minutes. [R. at 19-20]. Plaintiff stated she left her job due to an inability to perform its requirements although Plaintiff's doctor indicated Plaintiff was laid off. The Court concludes that the ALJ adequately evaluated and discussed Plaintiff's credibility and gave sufficient reasons for his analysis.

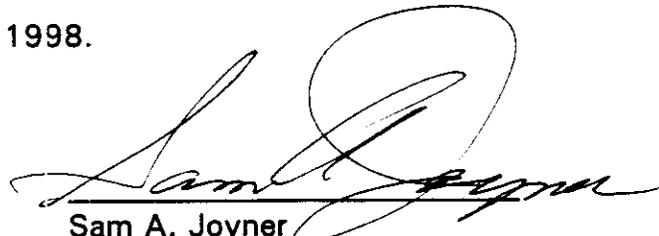
QUESTION POSED TO VOCATIONAL EXPERT

Plaintiff finally alleges that the ALJ erred by failing to include, in the hypothetical question which he posed to the vocational expert, a limitation based on Plaintiff's manipulative abilities.

An ALJ need include only those limitations in the question to the vocational expert which he properly finds are established by the evidence. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). In this case, the ALJ concluded that Plaintiff had a full range-of-motion of her hands and wrists, an acceptable ability to reach, grasp, and pull, and did not otherwise have a limitation based on her asserted "hand" impairment. As noted above, the ALJ's conclusions are supported by "substantial evidence." Therefore the ALJ did not err in failing to present such a limitation to the ALJ.

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

Dated this 31st day of July 1998.

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

Sam A. Joyner
United States Magistrate Judge