

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

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 D  
 8-31-98  
 U.S. DISTRICT COURT  
 NORTHERN DISTRICT OF OKLAHOMA

ORDER OF PARTIAL DISMISSAL WITH PREJUDICE

Upon the stipulation of all parties who have appeared in this action, the Court finds that the following claims should be and are hereby dismissed with prejudice as to the refiling of the same:

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;

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**  
AUG 28 1998

CRAIG OSWALT AND JAN OSWALT,  
Individually and as husband and  
wife,

Plaintiffs,

vs.

NORTHWESTERN PACIFIC INDEMNITY  
COMPANY, a foreign insurance  
company,

Defendant.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 98-C-321-H

ENTERED ON DOCKET

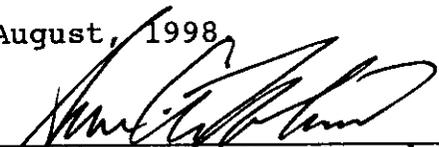
DATE 8-31-98

O R D E R

NOW on this 27<sup>TH</sup> day of August, 1998, the Plaintiffs herein by their attorney Dale Warner, file an Application for an Order of Dismissal Without Prejudice pursuant to Rule 41(a)(2), Fed. R. Civ. P. Upon due consideration, the Court finds that the Motion should be granted.

Accordingly, the Court grants the Plaintiffs' Application for an Order of Dismissal Without Prejudice pursuant to Rule 41(a)(2), Fed. R. Civ. P. The above entitled action is Dismissed Without Prejudice.

ENTERED this 27<sup>TH</sup> day of August, 1998.

  
United States District Court

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM C. SIEG )

Plaintiff, )

v. )

AIRCRAFT FUELING SYSTEMS, INC., )  
an Oklahoma Corporation, )  
JOSEPH WIGNARAJAH, an individual, )  
and ROBERT PILAND, an individual, )

Defendants. )

ENTERED ON DOCKET

DATE 8-31-98

No. 97-CV-726H(J) ✓

**FILED**

AUG 28 1998

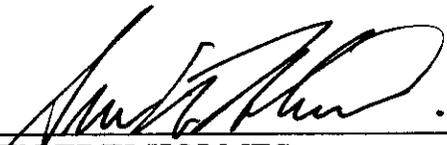
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

The Court, having before it the written Joint Stipulation for Dismissal With Prejudice signed by all parties to this litigation, finds that based upon the agreement of the parties the Stipulation for Dismissal With Prejudice should be granted, and it is hereby

ORDERED, ADJUDGED, AND DECREED that the litigation captioned herein, including all complaints, counterclaims, cross-complaints and causes of action of any type by any party, should be and the same are hereby dismissed with prejudice.

IT IS SO ORDERED this 27<sup>TH</sup> day of August, 1998.

  
SVEN ERIK HOLMES  
UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
v. )  
)  
JOHN M. CANTERO, )  
)  
Defendant. )

ENTERED ON DOCKET

DATE 8-31-98

Case No. 98-C-24-H ✓

**FILED**

AUG 28 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the Government's statement of good cause for failure to timely serve Defendant. The complaint in this matter was filed on January 12, 1998. Service on Defendant was not accomplished until June 22, 1998. The Government did not move for an extension of time to effect service and took no action to attempt to serve Defendant from March 3, 1998 to June 2, 1998.

Rule 4(m) of the Federal Rules of Civil Procedure, which governs the time in which to effect service, states in pertinent part as follows:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice of the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend time for service for an appropriate period.

Fed. R. Civ. P. 4(m). Thus, the Court first must determine whether Plaintiff has shown good cause for the failure to timely effect service. If so, the Court must give Plaintiff a mandatory extension of time. Espinoza v. United States, 52 F.3d 838, 841 (10th Cir. 1995). However, if

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Plaintiffs fail to show good cause, the Court “must still consider whether a permissive extension of time may be warranted. At that point the district court may in its discretion either dismiss the case without prejudice or extend the time for service.” Id.

The legislative history of Rule 4(m) does not define “good cause” and cites a defendant’s evasion of service as the sole example of good cause. Cox v. Sandia Corp., 941 F.2d 1124, 1125 (10th Cir. 1991). The “good cause” provision “should be read narrowly to protect only those plaintiffs who have been meticulous in their efforts to comply with the Rule.” Despain v. Salt Lake Area Metro Gang Unit, 13 F.3d 1436, 1438 (10th Cir. 1994). The Tenth Circuit has enunciated several instances in which good cause was not present. For example, a defendant’s actual notice of the suit is not good cause. Despain, 13 F.3d at 1439. Moreover, the absence of prejudice to defendants, by itself, is not good cause for failure to serve. Id. Inadvertence or negligence alone do not constitute good cause, while mistake of counsel or ignorance of the rules also do not suffice. Kirkland v. Kirkland, 86 F.3d 172, 176 (10th Cir. 1996). Even the running of the statute of limitations does not demonstrate good cause and make dismissal inappropriate. Despain, 13 F.3d at 1349. See also Putnam v. Morris, 833 F.2d 903, 905 (10th Cir. 1987) (holding that since it is “counsel’s responsibility to monitor the activity of the process server and to take reasonable steps to assure that a defendant is timely served,” reliance on a process server who fails to perform is not good cause).

Upon application of these principles, the Court concludes that Plaintiff has not shown good cause for failure to timely effect service upon these Defendant. Plaintiff did not move for an extension of service and simply took no action for a period of three months. This three-month period is the time when the 120-day period for service of process expired. The Government’s

inaction does not meet the stringent "good cause" standard in Rule 4(m).<sup>1</sup>

Since Plaintiff has not met the "good cause" standard, an extension of time for service is not mandatory. Instead, the Court "must still consider whether a permissive extension of time may be warranted." Espinoza, 52 F.3d at 841. For the reasons set forth above, the Court declines to grant a permissive extension of service. Accordingly, this action is hereby dismissed without prejudice for failure to timely effect service on Defendant.

IT IS SO ORDERED

This 27<sup>TH</sup> day of August, 1998.

  
Sven Erik Holmes  
United States District Judge

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<sup>1</sup> As one commentator has stated, "[t]he lesson to the federal plaintiff's lawyer is not to take any chances. Treat the 120 days with the respect reserved for a time bomb." Cox, 941 F.2d at 1126.

**FILED**

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

AUG 28 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

INVESTMENT CORPORATION OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
JOHN M. MAHONEY, SR., BETTE JO MAHONEY, )  
JOHN M. MAHONEY, JR., TIMOTHY P. MAHONEY, )  
and SUNNY PAT REALTY CO., )  
)  
Defendants. )

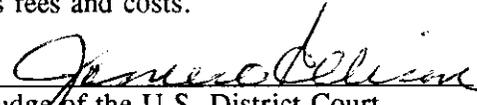
Case No. 98-CV-0517E(J)

ENTERED ON DOCKET

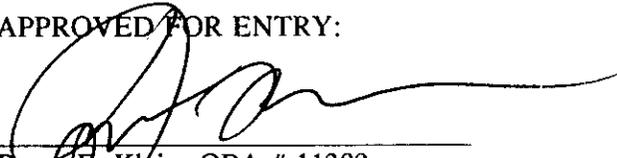
DATE 8-31-98

**ORDER OF DISMISSAL WITH PREJUDICE**

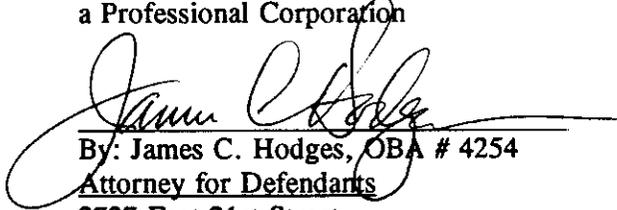
NOW ON THE 28<sup>th</sup> day of August, 1998, pursuant to the Stipulated Dismissal with Prejudice filed herein by the Plaintiff and the Defendants, IT IS ORDERED, ADJUDGED AND DECREED that the cause of action filed herein be dismissed with prejudice to refiling. The parties shall each bear their own attorney's fees and costs.

  
Judge of the U.S. District Court

APPROVED FOR ENTRY:

  
Bruce F. Klein, OBA # 11389  
Bruce F. Klein P.C.  
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ELLER & DIETRICH  
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By: James C. Hodges, OBA # 4254  
Attorney for Defendants  
2727 East 21st Street  
Suite 200, Midway Building  
Tulsa, Oklahoma 74114  
(918) 747-8900

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 27 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

EDITH TUNE,  
SSN: 442-60-6724,  
  
Plaintiff,

v.

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

Case No. 97-CV-0263-EA

ENTERED ON DOCKET  
AUG 31 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 27th day of August 1998.

*Claire V Eagan*  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

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

AUG 27 1998

**EDITH TUNE,** )  
SSN: 442-60-6724, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
**KENNETH S. APFEL,** )  
Commissioner of Social Security,<sup>1</sup> )  
 )  
Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 97-CV-0263-EA

**ENTERED ON DOCKET**  
DATE AUG 31 1998

**ORDER**

Claimant, Edith Tune, 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.<sup>2</sup> 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.

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<sup>1</sup> 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).

<sup>2</sup> On May 26, 1993, claimant protectively 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 (August 26, 1993), and on reconsideration (November 5, 1993). A hearing before Administrative Law Judge Leslie S. Hauger, Jr. ("ALJ") was held February 9, 1995, in Miami, Oklahoma. By decision dated March 31, 1995, the ALJ found that claimant was not disabled. On February 20, 1997, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

### **I. CLAIMANT'S BACKGROUND**

Claimant was born June 26, 1955 and lived in Chelsea, Oklahoma at the time of filing her complaint. She finished the 9th grade and later earned a G.E.D. Claimant alleges that she became unable to work on April 15, 1993 due to arthritis in her right hand and irritable bowel syndrome which caused her to suffer chronic diarrhea.

### **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.<sup>3</sup>

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).

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

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

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

### **III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (“RFC”) to perform a full range of light work and had no nonexertional impairments to further reduce her occupational base. The ALJ concluded that claimant could not perform her past relevant work. However, relying on the Medical-Vocational Guidelines (the “grids”), the ALJ found that there exist occupations in the national economy in significant numbers that claimant could perform, based on her RFC, age, education, and work experience. Having concluded that there were a significant number of occupations 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. REVIEW**

Claimant asserts the following errors:

(A) The ALJ failed to develop the record regarding claimant’s alleged mental impairment;

(B) The ALJ failed to properly consider claimant’s allegation of chronic diarrhea. Specifically, claimant asserts that the ALJ failed to properly consider claimant’s credibility regarding her alleged chronic diarrhea; failed to properly determine claimant’s RFC; and improperly relied on the grids in making his Step Five determination.

#### ***A. The ALJ’s Duty to Develop the Record***

Claimant asserts that the ALJ failed to properly develop the record by not obtaining medical evidence regarding claimant’s alleged mental impairment. Although the record reflects that claimant

had been treated for depression, claimant did not assert in her application for Social Security benefits or in the hearing before the ALJ that she had a mental impairment which diminished her ability to work. In a June 15, 1993 disability report submitted by claimant, claimant listed her disabling conditions as "back condition," "irritable bowel syndrome," and "arthritis in hands." (R. 101) Claimant made no mention of depression or other mental impairment. Id. At the hearing before the ALJ, the ALJ asked claimant's attorney whether there was any additional evidence which should be included in the file. (R. 58) Claimant's counsel, after discussing other concerns, stated:

[Claimant] has been treated for depression. Dr. Steinbeck [sic] has mentioned that two or three times. The reason why it wasn't brought up today is because the notes from Dr. Steinbeck [sic] seems [sic] to indicate that Prozac has helped quite a bit. In pre-hearing conference, [claimant] said that her depression wasn't too bad, and I think that going to Grand Lake [Mental Health Center] is an attempt to try to take care of any other mental conditions that might be affecting her physical problems. And--but as far as the depression, if you [sic] going to read it in the record, we're not making a major issue of that.

(R. 58-59)

Although the ALJ has a basic obligation to ensure that an adequate record is developed during the disability hearing consistent with the issues raised, it is not the ALJ's duty to become the claimant's advocate. Henrie v. United States Dept. of Health and Human Servs., 13 F.3d 359, 360-61 (10th Cir. 1993). The Tenth Circuit has stated that "when the claimant is represented by counsel at the hearing, the ALJ should ordinarily be entitled to rely on the claimant's counsel to structure and present claimant's case in a way that the claimant's claims are adequately explored." Hawkins v. Chater, 113 F.3d 1162, 1167-68 (10th Cir. 1997). It is appropriate for the ALJ to require counsel to identify issues requiring further development. An "ALJ does not have to exhaust every possible line of inquiry in an attempt to pursue every potential line of questioning. The standard is one of

reasonable good judgment." *Id.* at 1168. It cannot be said in this case that the ALJ failed to exercise reasonable good judgment in accepting claimant's counsel's contention that claimant's depression was not significant enough to be considered. No further development of the record was required.

**B. Substantial Evidence**

Claimant asserts that the ALJ's determination that claimant could perform a full range of light work is error, alleging that substantial evidence does not support the ALJ's finding that claimant does not have a nonexertional impairment as a result of chronic diarrhea.

Claimant asserts that she has occurrences of diarrhea as many as 12 times a day. Chronic diarrhea is a nonexertional impairment. *See Houston v. Chater*, 56 F.3d 77, 1995 WL 324503 (10th Cir. 1995) (unpublished); *Haynes v. Heckler*, 716 F.2d 485 (8th Cir. 1983).

A claimant bears the burden of proving disability. *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984). This Court's review of the decision of the Commissioner is limited to whether the decision is supported by substantial evidence. Substantial evidence is more than a scintilla and less than a preponderance. *Richardson*, 91 S. Ct. at 1427.

The ALJ found claimant's allegation of chronic diarrhea not credible. He stated:

Dr. Dean reported that the claimant's irritable bowel syndrome was under good medical control with diet and medication. There were only infrequent references to diarrhea in Dr. Steinbrook's medical notes, most of the medical notes were devoid of any reference to bowel-related problems. The objective medical evidence shows that the claimant makes frequent visits to her treating physician, but she does not complain of the problems alleged during the hearing more than infrequently. The objective medical evidence of Drs. Steinbrook and Dean is consistent. . . . There is no objective evidence to substantiate claimant's allegation of needing to go to the bathroom 12 times per day, and, in fact, she is concerned over a weight gain, which is inconsistent with such an allegation. She is not credible on this point.

(R. 26)

This Court generally gives great deference to the credibility determinations made by an ALJ. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). “Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence.” Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990). However, the ALJ’s credibility determinations must be closely and affirmatively linked and logically connected to substantial evidence. Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995).

Following these standards, the Court concludes that substantial evidence does not support the ALJ’s stated reasons for his credibility determination. On the contrary, the evidence clearly supports a finding that claimant’s chronic diarrhea is a nonexertional impairment. Contrary to the ALJ’s statement, the progress notes recorded by Dr. Steinbrook, claimant’s treating physician, show repeated and persistent complaints of chronic diarrhea. (R. 233, 232, 231, 226, 221, 215) Other medical records also reflect claimant’s complaints of chronic diarrhea. (R. 202, 159, 156, 152) The records reflect that these complaints span the 1991-94 time frame. It is true that the consultative examiner, Dr. Dean, found claimant’s irritable bowel syndrome to be “under good medical control currently, with diet and antispasmodic medication.” (R. 191) However, Dr. Dean’s opinion was not based on any objective tests, but rather his interpretation of claimant’s subjective complaints following a single examination. At the hearing before the ALJ, claimant explained that her weight gain was caused by her medication for depression. (R. 50) The ALJ did not provide any reason for discounting that testimony.

The ALJ should determine if claimant’s nonexertional impairment of chronic diarrhea would interfere with her ability to do work-related activities. If not, then application of the grids is

appropriate. However, “. . . application of the grids is not appropriate if the nonexertional impairment interferes with a claimant’s ability to do work-related activities.” Houston, 1995 WL 324503 at \*3. If the ALJ finds that claimant’s nonexertional impairment interferes with her ability to do work related activities, “. . . the ALJ must resort to testimony from a vocational expert to establish that a significant number of jobs exist in the national economy which the claimant can perform.” Trimiar v. Sullivan, 966 F.2d 1326, 1333 (10th Cir. 1992). Here, the ALJ solicited no testimony from a vocational expert, but relied exclusively on the grids to meet his Step Five burden.

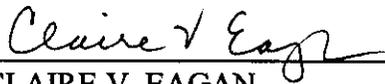
Upon remand, the Commissioner should determine the extent of claimant’s nonexertional impairment of chronic diarrhea and whether it interferes with her ability to do work-related activities.

The Commissioner’s decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. This remand “simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case.” Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988).

#### V. CONCLUSION

The decision of the Commissioner is not supported by substantial evidence. The decision is **REVERSED** and **REMANDED** for proceedings consistent with this opinion.

DATED this 27th day of August, 1998.

  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

AUG 28 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

HOMER R. MURPHY,  
SSN: 486-66-2435,  
  
Plaintiff,  
  
v.  
  
KENNETH S. APFEL,  
Commissioner of the Social Security  
Administration,  
  
Defendant.

CASE NO. 97-CV-629-M

ENTERED ON DOCKET

DATE AUG 31 1998

**JUDGMENT**

Judgment is hereby entered for Plaintiff and against Defendant. Dated  
this 28<sup>th</sup> day of AUG., 1998.

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

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

**F I L E D**

AUG 28 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

HOMER R. MURPHY,  
486-66-2435

Plaintiff,

vs.

KENNETH S. APFEL,  
Commissioner,  
Social Security Administration,

Defendant.

Case No. 97-CV-629-M

ENTERED ON DOCKET  
DATE AUG 31 1998

ORDER

Plaintiff, Homer R. Murphy, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>1</sup> 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

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<sup>1</sup> Plaintiff's August 11, 1994, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held August 22, 1995. By decision dated August 31, 1995, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on May 2, 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 29, 1957, and was 37 years old at the time of the hearing. He has a 10th grade education, but cannot read or write. He claims to be unable to work as a result of back pain and sleepiness caused by medication. The ALJ determined that although Plaintiff is unable to perform his past relevant work as a truck driver, security guard, janitor, welder, dish washer, and pipeline construction worker, he was capable of performing light and sedentary work except for work that requires more than occasional walking and standing. [R. 23]. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that: (1) the ALJ improperly evaluated his residual functional capacity ("RFC"); (2) improperly evaluated his credibility; and (3) posed an improper hypothetical question to the vocational expert.

The ALJ found that the "credible" medical evidence does not establish an underlying medical condition so severe as to preclude all work. He found that Plaintiff's testimony was credible only to the extent that it is consistent with the capacity for a wide range of light and sedentary work and that Plaintiff was capable of doing such work provided he didn't have to stand or walk any more than occasionally. He also found that although Plaintiff suffers from some mild to moderate pain, he could remain attentive and responsive in a work setting. These findings are not even arguably supported by the record.

Once Plaintiff demonstrated, as he did here, that he could not perform his past work because of his impairments, "the burden shifts to the [Commissioner] to show that the claimant retains the residual functional capacity (RFC) to do other work that exists in the national economy." *Thompson v. Sullivan*, 987 F.2d 1482, 1487 (10th Cir. 1993). The record is uncontradicted that Plaintiff injured his back in March, 1993. After a course of conservative treatment and physical therapy he was referred to an orthopedic surgeon because he continued to suffer severe pain. After diagnostic testing, orthopaedic surgeon, Don L. Hawkins, M.D., recommended laminectomy and fusion at the L5-S1 level. On September 15, 1993, Plaintiff underwent the first of five back surgeries performed between September 15, 1993, and November 28, 1994.

On September 15, 1993, Dr. Hawkins performed a decompressive laminectomy with the use of pedicle screws and a Rogozinski spinal rod fixation device. [R. 155]. Following surgery Plaintiff developed an infection at the surgical site. He was re-admitted to the hospital on October 1, 1993, for management of his infection. He was in the hospital for 12 days during which time he underwent 3 surgeries which consisted of extensive irrigation and debridement, excision of necrotic tissue and re-do of lumbar laminectomy on October 1, 4, and 6, 1994. [R. 179-185].

The ALJ noted that the discharge summary from the September admission indicates that Plaintiff did extremely well and, having had immediate resolution of his leg pain, he was discharged with "full activity instructions;" his prognosis was good. [R. 17]. While that information is contained in the discharge summary, the ALJ's reference to it is misleading. The quotation of the term "full activity instructions" suggests that Plaintiff was released to unlimited, unrestricted activity. When read in context, the statement clearly means that the activity instruction were fully outlined to Plaintiff. [R. 167]. Furthermore, the discharge summary also indicates that Plaintiff was given full-time brace wear instructions, wound care instructions, and medications, including Percocet. The statement that prognosis was good merely indicated that Dr. Hawkins did not foresee the complications which in fact occurred.

Following the October, 1993 surgeries Plaintiff continued to have back and hip pain. On February 24, 1994, Dr. Hawkins noted that he hoped to progress Plaintiff to a full exercise program in one month. [R. 209]. On March 29, 1994, Dr. Hawkins found Plaintiff to have some back pain, limitation of motion, and some overall

weakness. He noted that the right side fusion mass showed excellent ossification, but the left side was questionable. *Id.* Plaintiff continued to complain of pain on subsequent visits, and in June, 1994 the medications Vicodin and Flexeril were prescribed. [R. 204]. On August 9, 1994, Dr. Hawkins recorded that Plaintiff seemed to be getting worse instead of better. He expressed concern that the fusion was not solid and that there may be some infectious process involved. [R. 200]. By November 10, 1994, Dr. Hawkins concluded that Plaintiff did not have a solid fusion of his back at the site of his previous surgeries and on November 28, 1994, Dr. Hawkins performed Plaintiff's fifth back surgery which entailed removal of the orthopedic implants, and another decompressive lumbar laminectomy at L5-S1. [R. 276]. He was discharged with IV antibiotics which continued until January 9, 1995. [R. 244].

Subsequent to the November, 1994 surgery, Dr. Hawkins' notes reflect that Plaintiff continued to suffer pain. He was not using his back brace or the bone simulator as recommended, because he could not stand for anything to touch his left hip region. [R. 280]. On March 25, 1995, Dr. Hawkins noted that Plaintiff could be out of his brace and that x-rays showed fusion was becoming solid. He planned to give Plaintiff exercises the next month prior to completion of his therapy program. [R. 281]. On April 25, 1995, Dr. Hawkins recorded that Plaintiff was doing about the same, that is he was having low back pain, and bilateral leg pain. [R. 281]. He also noted Plaintiff was seeing a rheumatologist for fibromyalgia and his exercise was restricted due to that condition. [R. 282]. Nothing in the record before the ALJ

indicated that a solid fusion of the back had occurred, or that Plaintiff had been released from Dr. Hawkins' care.

In a December 19, 1995, record submitted to the Appeals Council, Dr. Hawkins reported that Plaintiff "has a solid fusion now at L5-S1." [R. 303]. He also reported that Plaintiff still has some pain, limitations of motion and radiating leg pain. [R. 303].

The record also contains the records of Dr. Mark H. Grosserode, an infectious disease specialist who helped manage Plaintiff's back surgeries and treatment for infection. Dr. Grosserode's findings do not contradict Dr. Hawkins' records and support Plaintiff's claim of disabling pain. [R. 236-255]. Plaintiff's continued complaints of pain were such that Dr. Grosserode referred him for treatment by a rheumatologist. Dr. Manuel J. Calvin of the Springer Clinic Department of Rheumatology diagnosed Plaintiff with, and treated him for, fibromyalgia. [R. 285-291].

The ALJ does not explain how he arrived at the conclusion that Plaintiff could work after his injury and before his first surgery (3/93-9/93), or after his first surgery when he had an infection raging at the surgery site; he does not explain how Plaintiff could work following his October 1993 surgeries while he was on IV therapy, or how he could work up until his November 1994 surgery when his spine had not fused from the surgery performed 13 months earlier; or how he could work following the November 1994 surgery when he had no evidence as of the August 1995 hearing date that Plaintiff's spine had become stable. Rather than being suggestive of an ability to work, the medical records demonstrate Plaintiff's inability to work.

Further, the Court agrees with Plaintiff that the ALJ failed to properly link his conclusory findings regarding Plaintiff's credibility to the evidence. Although credibility determinations made by an ALJ are generally treated as binding upon review, the ALJ has the duty to make adequate findings concerning his credibility determination. It is not enough to merely recite the relevant factors in his decision followed by a conclusion. See *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir. 1995); *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). He must explain "why the specific evidence relevant to each factor lead him to conclude claimant's subjective complaints were not credible." *Kepler* at 391. Moreover, he may not rely on factors unsupported by the record; he must consider all relevant factors which are supported by the record. See *Winfrey v. Chater*, 92 F.3d 1017, 1010-21 (10th Cir. 1996).

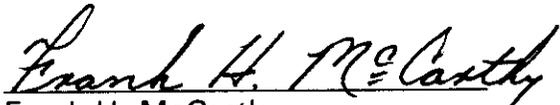
In this case the ALJ stated: "the primary reasons that I find claimant's allegations to not be fully credible are, but are not limited to, the objective findings, or the lack thereof, by treating and examining physicians, the lack of medication for severe pain, the frequency of treatments by physicians and the lack of discomfort shown by claimant at the hearing." [R. 19]. The herniated disk that originally necessitated surgery, the infectious process that necessitated three subsequent surgeries, and the non-union of the lumbar fusion which necessitated the fifth surgery, are all objective findings by treating physicians which substantiate the existence of pain. Rather than a lack of medication for severe pain, the record reflects that numerous medications were prescribed for pain, including narcotic drugs Vicodin, Percocet [R. 198-200, 204, 214, 216, 278-282], and muscle relaxants Soma,

Flexeril, and Parafon [190-200, 204, 209, 214. 278-282]. Further, it is not accurate to say that Plaintiff failed to frequently seek treatment when the record shows that Plaintiff continually sought medical treatment and prescription renewal, attended physical therapy, and underwent 5 operations to get relief. The ALJ's assertion that Plaintiff displayed a lack of discomfort at the hearing in August, 1995, approximately two and a half years after his initial injury, is the only reason cited by the ALJ that is not directly contradicted in the record. In light of the overwhelming support in the record for Plaintiff's complaints of disabling pain, the lack of an obvious display of discomfort at the hearing is not an adequate basis to discount Plaintiff's credibility.

When a decision of the Commissioner is reversed on appeal, it is within the court's discretion to remand either for further administrative proceedings or for an immediate award of benefits. *Ragland v. Shalala*, 992 F.2d 1056, 1060 (10th Cir. 1993), *Frey v. Bowen*, 816 F.2d 503, 518 (10th Cir. 1987). In light of the Commissioner's patent failure to satisfy the burden of proof at step five; the overwhelming evidence of Plaintiff's inability to work from March 1993; the absence of evidence that he ever regained the ability to work; and the long delay that has already occurred as the result of the Commissioner's erroneous disposition of the proceedings; the court exercises its discretionary authority for an immediate award of benefits. *Ragland*, 992 F.2d at 1060.

Accordingly, the Commissioner's denial decision is REVERSED and the cause REMANDED for an immediate award of benefits.

SO ORDERED this 28<sup>th</sup> Day of August, 1998.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

AUG 28 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GENEVA L. COWANS, )  
SSN: 441-44-4504, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
KENNETH S. APFEL, )  
Commissioner of the Social Security )  
Administration, )  
 )  
Defendant. )

CASE NO. 97-CV-727-M ✓

ENTERED ON DOCKET  
DATE AUG 31 1998

**JUDGMENT**

Judgment is hereby entered for Defendant and against Plaintiff. Dated  
this 28<sup>th</sup> day of AUG., 1998.

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

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

AUG 28 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GENEVA L. COWANS, )  
SSN: 441-44-4504, )  
 )  
PLAINTIFF, )  
 )  
vs. )  
 )  
KENNETH S. APFEL, )  
Commissioner of the Social )  
Security Administration, )  
 )  
DEFENDANT. )

CASE No. 97-CV-727-M

ENTERED ON DOCKET

DATE AUG 31 1998

ORDER

Plaintiff, Geneva L. Cowans, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>1</sup> 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

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<sup>1</sup> Plaintiff's February 4, 1994 application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held September 8, 1995. By decision dated September 29, 1995, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on June 12, 1997. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born January 1, 1943 and was 52 years old at the time of the hearing. [R. 33]. She claims to have been unable to work since December 3, 1993 due to severe pain associated with her wrist, left hand, knees, ankles and feet. The ALJ determined that Plaintiff has severe obesity and hypertension but that she retains the residual functional capacity (RFC) to perform light work reduced by occasional bending and stooping in a temperature-controlled environment. [R.19]. He determined that Plaintiff is unable to do her past relevant work (PRW) of food service worker and dishwasher. Based upon the testimony of a vocational expert (VE), the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with the limitations set forth in the RFC determination. The case was thus decided at step five of the five-step evaluative sequence for determining

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

Plaintiff asserts the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that: (1) the ALJ's RFC findings are not supported by the medical evidence; (2) the ALJ's credibility findings were not properly linked to the evidence; and, (3) the ALJ relied upon inaccurate VE testimony. For the reasons discussed below, the Court affirms the decision of the Commissioner.

#### **RFC Determination**

Plaintiff claims the ALJ's finding that she retained the capacity to perform the prolonged standing and exertion of light work is not supported by the evidence and that he failed to point to specific evidence to establish that, despite her nonexertional impairments, Plaintiff could perform the jobs he had designated at step five.

The medical evidence in the record reveals that Plaintiff underwent tendon release surgery of her left "ring" finger in September 1993. [R. 129-130, 137]. On January 7, 1994, Michael B. Clendenin, M.D. assessed Plaintiff with a Workers' Compensation impairment rating of 3% impairment to the left hand and released her to return to work without restrictions. [R. 130]. Robert C. Harris, M.D., an examiner for the Disability Determination Unit, noted slight reduction of grip strength in Plaintiff's non-dominant hand but noted no joint problems or sensory, motor or neurological abnormalities on April 6, 1994. [R. 140-141]. He noted her complaints of continuing pain in the left hand and stated "the pain which she has been treated for

and continues to experience is her most limiting disabling factor for the work she has been suited and trained in." [R. 141].

Arthritis was diagnosed by Plaintiff's treating physicians at Morton Comprehensive Health Services, Inc. in 1994, for which medication was prescribed. [R. 147-156]. In the treatment records, Dr. Larry D. Bowler, Plaintiff's primary treating physician, noted Plaintiff's complaints of pain in her knees but consistently reported no objective evidence of joint problems, heat or effusion. [R. 149, 152, 168-169, 171, 173]. After Plaintiff reported ineffectiveness of medication to relieve her arthritis pain in May 1995, an adjustment was made in the medication prescribed. [R. 168-169]. Plaintiff testified at the hearing that her medications are changed periodically for relief of arthritis pain. [R. 38, 51]. The DDU consultative examiner reported full range of motion in the knees with no joint effusion, no sign of neurovascular, motor or sensory problems and normal heel/toe walking and no pain on sitting. [R. 140-145].

Plaintiff complains the ALJ failed to develop the record as to material issues regarding her ability to sit, stand and lift. She claims "it was established that her condition was disabling due to hand problems, knee problems, foot problems, ankle problems, pain and limited mobility." Yet, she points to no medical evidence in the record to support this contention. The only evidence in the record that Plaintiff's pain is disabling is her testimony. It is well settled that subjective complaints alone are not sufficient to establish disability. *Thompson v. Sullivan*, 987 F.2d 1482, 1488 (10<sup>th</sup> Cir. 1993). While it is correct that, at step five, the Commissioner bears the burden of

proving that Plaintiff retains the RFC to do other work which exists in the national economy, it is not the ALJ's duty to become the claimant's advocate. *Henrie v. United States Dept. of Health and Human Servs.*, 13 F.3d 359, 360-61 (10<sup>th</sup> Cir. 1993). Contrary to Plaintiff's contention, this is not a case in which the ALJ relied upon "the absence of evidence" to reach his decision. See *Thompson v. Sullivan*, 987 F.2d 1482, 1491 (10<sup>th</sup> Cir. 1993). The ALJ discussed Plaintiff's medical treatment and consultative examinations in detail and reported that he had carefully considered the medical evidence in rendering his decision [R. 19]. The Court finds that the ALJ properly evaluated the reports of the examining physicians in reaching his conclusion that Plaintiff's pain is not so severe as to prevent her from engaging in any substantial gainful activity and that Plaintiff is not, therefore, disabled under the Social Security Act.

To the extent Plaintiff argues the weight of the evidence and urges the Court to reweigh the evidence, as set forth above, this is not the proper role of the Court. *Casias v. Secretary of Health & Human Services*, 933 F.2d 799 (10<sup>th</sup> Cir. 1991). The Court finds that the ALJ's determination was based on the record as a whole, including the records and reports of Plaintiff's treating and examining physicians and the testimony of Plaintiff. The ALJ's conclusion that Plaintiff's physical condition could reasonably produce pain, but not to the extent alleged by Plaintiff, is supported by substantial evidence and properly discussed in his decision.

### Credibility Determination

Plaintiff contends the ALJ's credibility findings were not properly linked to the evidence. The Court disagrees. To be accepted as credible, a social security claimant's complaints of disabling pain should be consistent with the degree of pain that could reasonably be expected from claimant's determinable medical abnormality. *Hargis v. Sullivan*, 945 F.2d 1482 (10th Cir. 1991). The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The Tenth Circuit has instructed "[f]indings as to credibility should be closely and affirmatively tied to substantial evidence and not just conclusions in the guise of findings." *Huston v. Bowen*, 838 F.2d 1125, 1133 (10th Cir. 1988). In this case, the ALJ did an exemplary job of meeting these requirements. The ALJ made an extensive credibility evaluation, comparing Plaintiff's allegations to the medical record, taking into account the lack of any limitations placed upon Plaintiff's ability to work by her treating physicians and Plaintiff's own testimony regarding her daily activities which include driving a car as needed, cooking, washing clothes and taking care of her household of 5 children. [R. 16]. While evidence that a claimant engages in limited activities may not establish her ability to work, it may be considered, along with other relevant evidence, in considering entitlement to benefits. *Gossett v. Bowen*, 862 F.2d 802, 807 (10th Cir. 1988). The Court finds that the ALJ evaluated the record,

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

The Vocational Expert's Testimony

Plaintiff contends the ALJ erred in relying upon the testimony of the vocational expert (VE). She asserts the VE's identification of janitor, hand packager, cashier and telephone solicitor jobs as unskilled light and sedentary work available to Plaintiff is inaccurate because the Dictionary of Occupational Titles (DOT) lists the janitor and hand packager jobs as medium work and the SVPs of the cashier and telemarketing jobs as 5, and 3, respectively.

The Tenth Circuit has not addressed the effect of a discrepancy between vocational expert testimony and the DOT in a published opinion. In light of this Court's determination that the VE's testimony regarding the telemarketing job constituted substantial evidence upon which the ALJ was entitled to rely, that issue need not be addressed here.

In the DOT, SVP stands for "specific vocational preparation." Each job contains a number which equates to the amount of vocational preparation time that is necessary for the performance of the job. On the SVP scale, a "3" indicates that a job requires more than one month and up to three months of training. See Dictionary of Occupational Titles, 4th Ed. Vol. II, p. 1009. The Court is not convinced that a direct conflict between the regulations and the DOT exists as to the SVP rating of the telemarketing worker. The regulations define "unskilled work" as "work which needs little or no judgment to do simple duties that can be learned on the job in a short period

of time. The job may or may not require considerable strength...and a person can usually learn to do the job in 30 days, and little specific vocational preparation and judgment are needed." 20 C.F.R. § 404.1569(a). No specific "time guidelines" are provided for semi-skilled work or skilled work. The definition in the regulations for unskilled work, which can include on the job training usually learned within 30 days is not in direct and obvious conflict with an SVP rating of three, which can include on the job training of one month to three months.<sup>2</sup>

In the present case, the vocational expert testified there are jobs "in some representative areas" that would fit the ALJ's hypothetical. [R. 59-60]. One of the jobs identified within the representative areas as unskilled with a level of SVP 2, sedentary exertion, was "telemarketing" with 560 jobs in Oklahoma and 80,000 nationally. [R.60]. This testimony provides substantial evidence to support the finding of the ALJ that a significant number of jobs exist in the national economy that Plaintiff can perform and his conclusion that Plaintiff is not, therefore, disabled. See *Trimiar v. Sullivan*, 966 F.2d 1326, 1330 (10th Cir. 1992)(refusing to draw a bright line, but indicating the criteria for consideration in determining whether a significant number of jobs is present); *Lee v. Sullivan*, 988 F.2d 789, 793 (7th Cir. 1993) summarizing the various positions of the circuits: Sixth Circuit found 1,350 positions significant; Ninth Circuit found 1,266 positions significant; Tenth Circuit found 850-1,000 potential jobs

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<sup>2</sup> The Court notes the Tenth Circuit, in a recent case, concluded there was no conflict between the DOT and the VE's testimony under similar circumstances and noted the imprecise nature of determining whether a job is unskilled, citing SSR 82-41. *Simmons v. Apfel*, 131 F.3d 152, 1997 WL 760707 \*\*1 (10th Cir. (Okla.)).

significant; Eighth Circuit found 500 jobs significant; Eleventh found 174 positions significant). According to the Commissioner's regulations, 20 C.F.R. § 404.1566(b), "Work exists in the national economy when there is a significant number of jobs (*in one or more occupations*) having requirements which you are able to meet with your physical or mental abilities and vocational qualifications." [emphasis supplied]. Consequently, there is no basis upon which to conclude that the vocational expert's testimony is inaccurate as Plaintiff suggests.

The Court finds there was no direct contradiction between the VE's testimony as to at least one of the jobs listed by the ALJ in his decision and the DOT. The Court finds the testimony of the VE constituted substantial evidence to support the Commissioner's decision that Plaintiff is not disabled.

As to Plaintiff's claims that the hypothetical question asked of the vocational expert failed to accurately detail her limitations, the Court finds no merit. Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, in posing a hypothetical question, the ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). The Court finds that the restrictions expressed by the ALJ in the hypothetical posed to the vocational expert and upon which the disability determination is based, are supported by substantial evidence. The Court finds that the ALJ's hypothetical questions to the vocational expert and his reliance upon the

vocational expert's testimony in his decision were proper and in accordance with established legal standards.

**Conclusion**

The Court finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 28<sup>th</sup> day of AUG., 1998.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

AUG 28 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARY ELLEN KIRKLAND, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
BAKER HUGHES OILFIELD OPERATIONS, )  
INC., d/b/a CENTRILIFT, )  
 )  
Defendant. )

Case No. 97-C-142-BU

ENTERED ON DOCKET

DATE AUG 31 1998

**ORDER**

This matter came before the Court on Friday, August 28, 1998, for evidentiary hearing on the amount of reasonable attorney's fees to be awarded Plaintiff, Mary Ellen Kirkland, in this case. After considering the evidence presented and for the specific reasons stated on the record, Plaintiff is hereby **AWARDED** \$67,060.00 as reasonable attorney's fees.

ENTERED this 28<sup>th</sup> day of August, 1998.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE



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

**FILED**

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

Plaintiffs,

vs.

OAKS MISSION PUBLIC SCHOOL, a political  
subdivision of the State of Oklahoma;  
FUND; MANUEL HOLLAND,  
LUCINDA TURTLE, JAN BAILEY,  
HERMAN HITCHCOCK, JR., and JOEL  
BONAPARTE, Individually and in their  
official capacity;

Defendants.

AUG 27 1998

Paul Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 98-CV-330-C /

CJ 98-136

ENTERED ON DOCKET  
DATE AUG 28 1998

ORDER

This action was originally filed on April 7, 1998, in the District Court of Delaware County, Oklahoma asserting claims for negligence and various civil rights claims under 42 U.S.C. § 1983. Defendants removed the case to federal court on May 5, 1998. On June 6, 1998, the Court granted plaintiffs' motion for leave to file an amended complaint. Only state law claims were asserted by plaintiffs in their amended complaint. Concurrent with filing the amended complaint, plaintiffs filed a motion to remand. In response to the motion to remand, defendants acknowledge lack of jurisdiction in this forum but request the Court to dismiss the amended complaint rather than granting remand.

From the face of the amended complaint, it is clear that the claims asserted by plaintiffs have divested this Court of subject matter jurisdiction. Defendants have failed to raise any reasonable basis

for dismissing plaintiffs' action. Defendants' motion filed on May 26, 1998, to dismiss plaintiffs' original state court petition has been rendered moot by the filing of the amended complaint. There is no showing that plaintiffs have acted in any manner other than in good faith in their choice to limit their case to state law claims. Accordingly, plaintiffs' motion to remand is granted. The Clerk of the Court is directed to remand this action to the District Court of Delaware County, Oklahoma.

IT IS SO ORDERED this 27<sup>th</sup> day of August, 1998.



H. DALE COOK  
Senior U.S. District Judge

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

LINDA GIPSON,  
Plaintiff,

)

)

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vs.

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)

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

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ENTERED ON DOCKET

AUG 26 1998

DATE AUG 28 1998

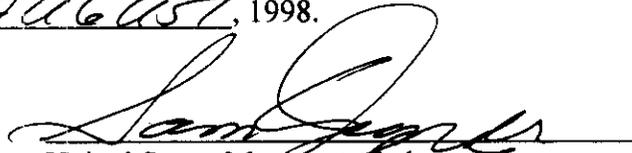
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 97-CV-250-J

**ORDER OF DISMISSAL WITHOUT PREJUDICE**

Having considered the *Stipulation of Dismissal* submitted by the parties herein, IT IS  
HEREBY ORDERED that the *Complaint* of the Plaintiff filed on March 19, 1997, is hereby  
dismissed.

Dated this 26 day of AUGUST, 1998.

  
United States Magistrate Judge

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

AUG 27 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IVA L. STALVEY,  
251-80-5087

Plaintiff,

vs.

Case No. 97-CV-721-M ✓

KENNETH S. APFEL,  
Commissioner,  
Social Security Administration,

ENTERED ON DOCKET  
DATE AUG 28 1998

Defendant.

ORDER

Plaintiff, Iva L. Stalvey, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>1</sup> 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

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<sup>1</sup> Plaintiff's April 18, 1995, applications for disability benefits and supplemental security income were denied. The denials were affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held May 21, 1996. By decision dated June 12, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on June 9, 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 6, 1947, and was 48 years old at the time of the hearing. She has completed high school and attended 2 years of college, although she did not obtain a degree. She claims to have been unable to work since April 16, 1995, as a result of uncontrolled diabetes, foot and hand pain, depression and anxiety. The ALJ determined that Plaintiff is unable to perform her past relevant work as a home care worker, cashier, waitress, ward clerk, fast food product marker, and stocker. However, she was capable of performing the exertional demands of light work which would enable her to shift her weight in a sitting or standing position to maintain comfort. Based on the testimony of a vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with her 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: (1) the ALJ's determination of her residual functional capacity ("RFC") is erroneous because the medical evidence is inconclusive as to Plaintiff's ability to perform light work; (2) the ALJ made unsupported findings concerning her mental impairment; (3) the ALJ posed an inadequate hypothetical to the vocational expert; and (4) the vocational expert's testimony was inconsistent with the Dictionary of Occupational Titles (DOT).

Plaintiff testified she could only sit for an hour, stand for 30 minutes, had difficulty using her hands and had recurring headaches. A fairly comprehensive physical examination was performed on December 25, 1994, before Plaintiff's alleged onset date of April 16, 1995. The examination revealed no clubbing, cyanosis or edema in Plaintiff's extremities. She had full range of motion in all extremities with no evidence of swelling, erythema or tenderness. Her muscle mass was found to be normal and symmetrical bilaterally. Her gait was without abnormality. Her strength was found to be strong and equal bilaterally with no evidence of atrophy, weakness or tremor. The examining physician stated that aside from her diabetes, "[t]here were no significant findings on this patient's past medical history or physical examination." [R. 130]. This exam is consistent with the findings of a structural examination performed on November 30, 1994, which assessed Plaintiff's musculo-skeletal history, gait, posture, and motion. No abnormalities were found in these areas. [R. 164].

On March 31, 1995, Plaintiff presented to the OSU Health Care Center complaining of pain in her right foot following an injury received in karate class. On

examination the physician noted she had good range of motion in all directions, no swelling and only slight bruising and some tenderness consistent with a contusion soft tissue injury of the 1st metatarsal dorsal area of the right foot. [R. 146]. X-rays taken April 5, 1995, revealed mild degenerative changes and a calcaneal (heel) spur. [R. 172]. By April 21, 1995, Plaintiff reported her foot was doing better. [R. 143]. On May 18, 1995, the doctor noted Plaintiff's ankle was painful and swollen following a fall 2 days earlier. [R. 139]. By June 1, 1995, Plaintiff reported her ankle was much better. [R. 138]. Thereafter, no more references to Plaintiff's ankle or foot injury appear in the record.

Headache and joint pain are mentioned in medical records generated on May 25, 1993, before the alleged date of onset. At that time Plaintiff reported having pain in her hands for one week and headaches twice weekly. [R. 123]. Hand pain and swelling were mentioned again in records dated June 7, 1993. [R. 122]. However, despite frequent visits to the doctor for care related to her uncontrolled diabetes, complaints of headaches and hand pain appear infrequently in the record. The ALJ noted that Plaintiff sought treatment for headaches, upper back pain, shoulder and arm pain at Morton comprehensive Health Services from January 1996 to February 1996.

Plaintiff argues that the ALJ relied on the absence of contradictory medical evidence and his credibility finding to conclude that she has the ability to perform light or sedentary work. Because Plaintiff proved she could not perform her past work, the burden of proof shifted to the Commissioner to show that she retains the RFC to do other work that exists in the national economy. *Thompson v. Sullivan*, 987 F.2d

1482, 1487 (10th Cir. 1993). Plaintiff asserts that although the record may not be sufficient to support a finding of disability, neither is it sufficient to prove her ability to work. And, since the medical records are inconclusive, the ALJ should have ordered a consultative physical examination. Having carefully reviewed the ALJ's decision, the Court finds that the ALJ did not rely solely on the absence of contradictory medical records and his credibility finding in determining that Plaintiff has the RFC for light work.

The ALJ took note of the fact that many of Plaintiff's complaints have not resulted in any functional limitations concerning her ability to walk or stand. He noted the extent of her medical treatment and Plaintiff's own description of her activities in reaching the conclusion that her ability to walk and stand were not impaired so as to preclude the performance of light work.

The Court rejects Plaintiff's assertion that the ALJ erred in failing to order a consultative medical examination. "[T]he ALJ should order a consultative exam when evidence in the record establishes the reasonable possibility of the existence of a disability and the result of the consultative exam could reasonably be expected to be of material assistance in resolving the issue of disability." *Hawkins v. Chater*, 113 F.3d 1162, 1169 (10th Cir. 1997) The record contains no evidence to suggest that a consultative examination would have produced material information. There is no direct conflict in the medical evidence requiring resolution; the medical evidence in the record is not inconclusive; and additional tests are not required to explain a diagnosis

already contained in the record. *See id. at* 1166. The Court finds that the ALJ did not err in failing to order a consultative examination.

The Court rejects Plaintiff's claim that the ALJ failed to properly evaluate Plaintiff's mental condition. The ALJ did not disregard Plaintiff's December, 1994 episode of decompensation. He noted that she had been hospitalized but that her condition improved and she was released from care. And, he accurately reported the information in the record that her depression and anxiety are successfully controlled by medication.

Plaintiff argues that the ALJ did not take full account of the findings in the May 1995 psychiatric consultative evaluation which placed Plaintiff's current Global Assessment of Functioning ("GAF") at 55, and her highest GAF in the past year at 60. [R. 135]. According to The American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, p. 12* (3rd Edition, revised, 1987) ("DSM-III-R"), a person with a GAF of between 51 and 60 will exhibit "Moderate symptoms (e.g. flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning (e.g. few friends, conflicts with co-workers)." While the consultative examiner, Dr. Inbody, did assign Plaintiff a GAF, he did not provide any detailed information as to why he placed her GAF at that particular level. Without such information the GAF is not particularly helpful to the ALJ in making a determination of whether Plaintiff retains the ability to work. Moreover, the Court notes that the ALJ recounted Dr. Inbody's observations, including Plaintiff's logical, coherent, and sequential speech without affective disturbances or associational

deficits; that she was of average intelligence; she did not appear to be anxious or show signs of panic; there were no disturbances in attention and concentration; and Plaintiff's judgment was felt to be intact with no impairment in her ability to reason. [R. 20; 134].

Plaintiff also argues that the ALJ's questioning of the vocational expert was flawed in that it did not reflect the true status of her mental condition. *Hargis v. Sullivan*, 945 F.2d 1482, 1292 (10th Cir. 1991) provides that "testimony elicited by hypothetical questions that do not relate with precision all the claimants' impairments cannot constitute substantial evidence to support the Secretary's decision." However, in posing a hypothetical question, an ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990).

The ALJ determined that although Plaintiff was hospitalized once in December 1994 for her mental problems, the record reflects that the medication she takes has been successful in controlling her behavior, and would not cause more than a minimal effect on her ability to engage in work-related activities. This finding is supported by substantial evidence. Consequently, omitting a functional impairment related to the diagnosis of an affective disorder from the hypothetical question posed to the ALJ does not provide a basis for reversal.

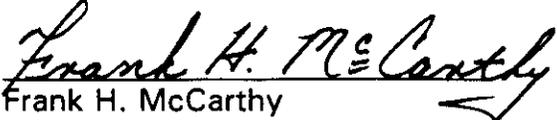
Lastly, Plaintiff argues that the case should be reversed because the vocational expert's testimony was inconsistent with vocational information contained in the Dictionary of Occupational Titles ("DOT"). In response to hypothetical questioning,

the vocational expert identified several jobs that a hypothetical person with the same limitations as Plaintiff could perform including: mail clerk (low semi-skilled/light); stock/inventory clerk (unskilled/light); food/beverage cashier (unskilled/sedentary). [R. 243]. According to Plaintiff, the DOT describes the light stock and inventory clerk job as requiring a specific vocational preparation ("SPV") of 5, which is indicative of skilled, or semi-skilled work. Since the ALJ found that Plaintiff had no transferable skills, Plaintiff argues that job does not qualify as one which she could perform.

The Court finds it unnecessary to consider the effect of a discrepancy between the DOT and the vocational expert's testimony. According to the Commissioner's regulations, 20 C.F.R. § 404.1566(b), "Work exists in the national economy when there is a significant number of jobs (*in one or more occupations*) having requirements which you are able to meet with your physical or mental abilities and vocational qualifications." [emphasis supplied]. Irrespective of any discrepancy between the vocational expert and the DOT, Plaintiff has not posed any objection to the light unskilled food and beverage cashier position. The Commissioner has satisfied his burden to identify at least one occupation with a significant number of jobs having requirements Plaintiff is able to meet within her abilities and qualifications.

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

DATED this 27<sup>th</sup> Day of August, 1998.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

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

**F I L E D**

AUG 27 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IVA L. STALVEY,  
SSN: 251-80-5087,

Plaintiff,

v.

CASE NO. 97-CV-721-M ✓

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

Defendant.

ENTERED ON DOCKET

DATE AUG 28 1998

**JUDGMENT**

Judgment is hereby entered for Defendant and against Plaintiff. Dated  
this 27<sup>th</sup> day of AUG., 1998.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

DEBORAH JOHNSTON and DIANA RUSS,  
individually and on behalf of all others similarly  
situated,

Plaintiffs,

vs.

VOLUNTEERS OF AMERICA OKLAHOMA, INC.,

Defendant.

ENTERED ON DOCKET  
AUG 28 1998  
DATE \_\_\_\_\_

No. 96-CV-1166K ✓  
(Consolidated with  
97-CV-740 K)

FILED

AUG 26 1998

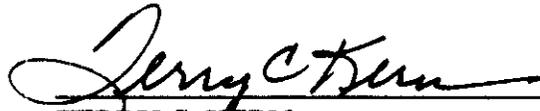
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITHOUT PREJUDICE

The Court, having before it the written Joint Stipulation for Dismissal Without Prejudice signed by counsel of record, finds that based upon the agreement of the parties the Joint Stipulation for Dismissal Without Prejudice should be granted as to the following Plaintiffs only: Casey Alfred, Marion J. Anderson, Jason W. Bates, Evelyn E. Bowman, Huey L. Bowman, Colin Boyd, Stacy Breger, Shelley Burris, Cheryl Chatman, Barbara A. Chiles, Leigh Chisholm, Edward Clark, Alvin Clemons, Eddie Cleveland, Linda Clinton, Norma Cooney, Kimberly Davis, Lemar Davis, Stephanie C. Davis, Kristy K. Dean, Dawn Dockum, Robin L. Dolan, Catina Dorsey, Quinton C. Evans, Kellee Fisher, Katrina Foster, Katrina K. Fox, Charles R. Franklin, Vernon Franklin, Brad Fry, Rebecca Gaines, June E. Givens, Theresa Graham, Trayce Green, Traci Hamilton, Chamesta C. Harris, Glenda S. Haskin, Angela Hayes, Ginger G. Hellyar, Kelley L. Henderson, Walter Hinds, Jennifer Hinson, Susan L. Hobbs, Murva Horbert, Bernard Hubbard, Jeffrey T. Jackson, Kelly Jagers, Linda R. Johnson, Rhonda Jones, Shelby N. Jones, Amber Kenedy, Angela D. Kesse, Deborah J. Kissell,

Deborah A. Lollès, Verlaine D. Lucien, Steve Lynch, Ruby L. McGee, Freddy L. Mewborn, Jr., Bobbie J. Myers, Laura Neal, Brandon L. Nichols, Shelly M. Norwood, Marchea Owens, Rhonda Patterson, Sandra K. Peterson, Cheyenne Pratt, Robert D. Pryor, Angela Pyles, Carolyn V. Pyles, Brent A. Rayl, Cogee Rhodes, Mary K. Richesin, Thea Jo Rippy, Ellsworth L. Roach, Jr., Evonne E. Roach, Cheryl J. Roberson, Kerry T. Russell, Lavada Russell, Evelyn V. Sallis, Medley A. Sapp, Benjamin S. Sherwin, Andy L. Simmons, Jr., Robert Smith, Jawanna L. Staley, Anthony D. Steed, Pamela B. Stelly, Barbara M. Miller-Sublett, Carolyn Switzer, Margaret G. Tate, Genetia R. Thomas, Elsie Thompson, Floratine L. Trent, Cheryl N. Vulgamore, and Artice Y. Walker, with each party to bear his, her or its own costs with regard to this dismissal.

IT IS SO ORDERED this 25 day of August, 1998.

  
TERRY C. KERN  
United States District Judge

Jo Anne Deaton  
P.O. Box 21100  
Tulsa, OK 741212  
MA06730060PLEADINGDISMISS.ORD

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

**FILED**

AUG 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ARLEY LEE DUNCAN,

Petitioner,

vs.

RON CHAMPION, Warden; and  
THE OKLAHOMA DEPARTMENT  
OF CORRECTIONS,

Respondents.

No. 98-CV-621-H (J)

ENTERED ON DOCKET

DATE AUG 27 1998

**ORDER OF TRANSFER**

Petitioner, a state prisoner appearing pro se, has paid the filing fee to commence this habeas corpus action, filed pursuant to 28 U.S.C. § 2254. He has also submitted a Brief in Support of Petition for Writ of Habeas Corpus.

A person in custody pursuant to the judgment and sentence of a State court of a State which has two or more Federal judicial districts may file a petition for writ of habeas corpus in either the district court for the district wherein such person is in custody or in the district court for the district within which the conviction was entered. 28 U.S.C. § 2241(d). Each of such district courts shall have concurrent jurisdiction to entertain the petition and the district court wherein the petition is filed may, in the exercise of its discretion and in furtherance of justice, transfer the petition to the other district court for hearing and determination. Id.

In this case, Petitioner is incarcerated at Dick Conner Correctional Center, Hominy, Oklahoma, located within the jurisdictional territory of the Northern District of Oklahoma. 28 U.S.C. § 116(a). However, Petitioner was convicted in Oklahoma County, Oklahoma, which is

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located within the territorial jurisdiction of the Western District of Oklahoma. 28 U.S.C. § 116(c). The Court finds that the most convenient forum for judicial review of the issues raised in this petition would be the Western District of Oklahoma where any necessary records and witnesses would most likely be available. Therefore, in the furtherance of justice, this matter should be transferred to the Western District of Oklahoma.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

1. Petitioner's petition for a writ of habeas corpus is **transferred** to the United States District Court for the Western District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d).
2. The Clerk is directed to notify the Petitioner of this transfer.

IT IS SO ORDERED.

This 25<sup>TH</sup> day of August, 1998.

  
Sven Erik Holmes  
United States District Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 25 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

WILLIAM C. SIEG )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 AIRCRAFT FUELING SYSTEMS, INC., )  
 an Oklahoma Corporation, )  
 JOSEPH WIGNARAJAH, an individual, )  
 and ROBERT PILAND, an individual )  
 )  
 Defendants. )

No. 97-CV-726H(J) ✓

ENTERED ON DOCKET  
DATE AUG 27 1998

**JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE**

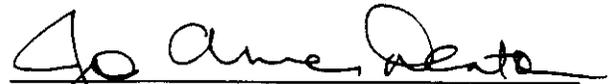
Pursuant to Fed.R.Civ.P. 41, the parties, and each of them, by and through their respective counsel of record, herewith stipulate and agree to the dismissal with prejudice of said cause, including all complaints, counterclaims, cross complaints and causes of action of any type by any party against any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

Executed the respective dates shown adjacent to each signature.

13

05

Date: 8-25-98



Jo Anne Deaton (OBA #5938)  
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TUCKER & GABLE  
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P.O. Box 21100  
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(918) 582-1173

ATTORNEYS FOR PLAINTIFF

Date: August 25, 1998



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Maria F. Manuel (La. Bar #24540)  
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Steven J. Adams (OBA #142)  
Stephen R. Ward (OBA #13610)  
GARDERE & WYNNE, L.L.P.  
100 W. Fifth Street, Suite 200  
Tulsa, OK 74103-4240  
(918) 699-2900

ATTORNEYS FOR DEFENDANTS

## CERTIFICATE OF SERVICE

I hereby certify that on this the 25<sup>th</sup> day of August, 1998, a full, true, and correct copy of the above and foregoing instrument, the "JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE," was deposited in the United States mail, first class, with proper postage fully prepaid thereon, to the following counsel of record:

Jo Anne Deaton  
Rhodes, Hieronymus, Jones, Tucker & Gable  
100 W. Fifth Street, Suite 400  
P.O. Box 21100  
Tulsa, Oklahoma 74121-1100



Stephen R. Ward

*[Handwritten signature]*

**FILED**

AUG 25 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

LEEDE EXPLORATION, a partnership, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 KABALA OIL & GAS, L.L.C. and )  
 NICOR OIL AND GAS CORPORATION, )  
 )  
 Defendants. )

ENTERED ON DOCKET

DATE AUG 27 1998

Case No. 98-CV-415-H(E) /

**JOINT STIPULATION OF DISMISSAL**

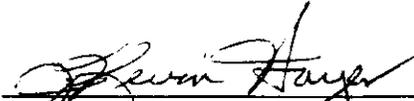
Pursuant to FRCP 41, Plaintiff, Leede Exploration, and Defendants, Kabala Oil & Gas, L.L.C. and NICOR Oil and Gas Corporation, hereby stipulate to the dismissal with prejudice of all claims and counterclaims between them in this litigation. This Joint Stipulation for Dismissal is entered into pursuant to agreement made by and between the parties that constitutes a complete settlement of all matters at issue in this litigation. Each party shall bear its respective costs and attorneys' fees.

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cl5

Respectfully submitted,

**HALL, ESTILL, HARDWICK, GABLE,  
GOLDEN & NELSON, P.C.**

By: 

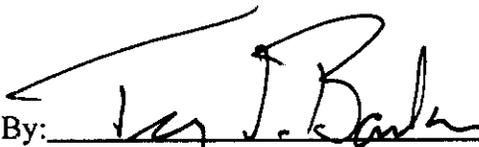
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**ATTORNEYS FOR PLAINTIFF**

-and-

**PEZOLD, CARUSO, BARKER & WOLTZ**

By: 

Terry J. Barker, OBA #12553  
Dennis A. Caruso, OBA #11786  
Joseph C. Woltz, OBA #14341  
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Facsimile: (918) 584-0720

**ATTORNEYS FOR DEFENDANTS**

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

STEPHEN LEE ALLEN,

Petitioner,

vs.

ED EVANS,

Respondent.

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ENTERED ON DOCKET

DATE AUG 27 1998

Case No. 98-CV-037-K (M) ✓

**F I L E D**

AUG 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGMENT**

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

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

SO ORDERED THIS 25 day of August, 1998.



TERRY C. KEEN, Chief Judge  
UNITED STATES DISTRICT COURT

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the state district court (see #4, Ex. C). That court denied the requested relief on September 9, 1997 (#4, Ex. C). On October 8, 1997, Petitioner appealed the denial of post-conviction relief (see #4, Ex. D). The Oklahoma Court of Criminal Appeals entered its order affirming the trial court's denial of relief on November 14, 1997 (#4, Ex. D). Petitioner filed his petition for writ of habeas corpus in the United States District Court for the Western District of Oklahoma on December 4, 1997 (#1). The petition was transferred to this Court on December 31, 1997 (#1).

### ***ANALYSIS***

The AEDPA, enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

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

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

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

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

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

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

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which

a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, have been afforded a one-year grace period within which to file for federal habeas corpus relief.

Recently, the Tenth Circuit Court of Appeals also ruled that the tolling provision of 28 U.S.C. § 2244(d)(2) applies to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, \_\_\_ F.3d \_\_\_, 1998 WL 419727 (10th Cir. June 24, 1998). Therefore, the one-year grace period is tolled during time spent pursuing properly filed state post-conviction relief.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Petitioner's conviction became final on May 2, 1994, when the United States Supreme Court denied the petition for writ of *certiorari*. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994). Therefore, his conviction became final before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Petitioner filed his petition on December 4, 1997, or 589 days after April 24, 1996.

Although the time during the grace period when Petitioner had "a properly filed application for State post-conviction or other collateral review" should be subtracted from this 589 days, the

Court finds that Petitioner did not file his application for post-conviction relief during the grace period. In Simmonds, the Tenth Circuit specified that to be timely, prisoners whose convictions became final before April 24, 1996, had to file their petitions *before* April 24, 1997, implying that the limitations period for those prisoners expired on April 23, 1997. A collateral petition filed in state court after the limitations period has expired no longer serves to toll the statute of limitations. Rashad v. Khulmann, 991 F. Supp. 254, 259 (S.D.N.Y. 1998). Since Petitioner's limitations period expired on April 23, 1997, his post-conviction application filed on April 24, 1997 no longer served to toll the limitations period. Therefore, his petition filed December 4, 1997 is clearly untimely.

Furthermore, even if the post-conviction application filed April 24, 1997 and the subsequent state court proceedings tolled the limitations period, the petition in this case would nonetheless be untimely. Deduction of the 204 days from April 24, 1997 (when Petitioner filed his application for post-conviction relief) to November 14, 1997 (when the Oklahoma Court of Criminal Appeals affirmed the district court's denial of post-conviction relief) results in an elapsed time on Petitioner's limitations period of 385 days, beyond the one-year limit.

Lastly, in his response to Respondent's motion to dismiss, Petitioner asserts that dismissal of his petition for writ of habeas corpus would result in a violation of the Suspension Clause, U.S. Const. art. I, § 9, cl. 2, the Constitution's prohibition on suspending the writ. However, the Tenth Circuit has recently ruled that the limitations period imposed by the AEDPA does not violate the Suspension Clause unless a petitioner can demonstrate inadequacy and ineffectiveness of the habeas remedy as a result of the imposition of the limitations period. Miller v. Marr, 141 F.3d 976, 977-78 (10th Cir. 1998). As pointed out in Miller, "§ 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling." Id. at 978 (citing Calderon v. United States District Court, 128 F.3d

1283, 1287-88 (9th Cir. 1997) (limitation period tolled for extraordinary circumstances over which inmate had no control), *cert. denied*, \_\_ 128 U.S. \_\_, 118 S.Ct. 899, 139 L.Ed.2d 884 (1998)).

In this case, Petitioner waited almost three (3) years, and after expiration of the judicially created grace period, before exhausting his federal claims in state post-conviction proceedings. He offers no explanation for his delay and it is apparent to the Court that he did not diligently pursue habeas corpus relief. Under the facts of this case, imposition of the limitations bar does not violate the Suspension Clause.

### **CONCLUSION**

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period, Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted.

### **ACCORDINGLY, IT IS HEREBY ORDERED that:**

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#8) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED THIS 25 day of August, 1998.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

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

ONDRAE L. WRIGHT, )  
Petitioner, )  
vs. )  
STATE OF OKLAHOMA, )  
Respondent. )

ENTERED ON DOCKET  
DATE AUG 27 1998  
No. 98-CV-347 K (M)

**F I L E D**

AUG 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

On May 11, 1998, Petitioner submitted for filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 along with a motion for leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a). By Order dated May 22, 1998, the Court informed Plaintiff that his motion for *in forma pauperis* status was insufficient in that the "statement of institutional accounts" had not been filled out by an authorized official of the prison where Petitioner was incarcerated. As a result, Plaintiff was directed to submit a properly completed motion for leave to proceed *in forma pauperis*. In addition, the Clerk of Court was directed to mail Plaintiff the forms and information necessary for preparing the motion as ordered by the Court. Plaintiff was advised that this deficiency must be cured by June 11, 1998, and that "failure to comply . . . may result in dismissal of this action without prejudice and without further notice." To date, Plaintiff has not submitted the required document, nor has any correspondence to Plaintiff been returned to the Court.

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

④

**ACCORDINGLY, IT IS HEREBY ORDERED** that Petitioner's petition for writ of habeas corpus is **dismissed without prejudice** for lack of prosecution.

IT IS SO ORDERED.

This 25 day of August, 1998.



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TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**  
AUG 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ONEOK RESOURCES COMPANY, )  
a Delaware corporation, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
LESLIE L. MING, JR., an individual, )  
 )  
Defendant. )

Case No. 95-C-223H ✓  
ENTERED ON DOCKET  
DATE AUG 25 1998

**ORDER DISMISSING CAUSE OF ACTION WITH PREJUDICE**

The above-entitled cause having come on to be heard, and the Parties, ONEOK Resources Company and Leslie L. Ming, Jr., having announced they have settled and compromised all issues of law and fact of and concerning Plaintiff's cause of action contained in its Complaint, including the fact and amount of attorneys' fees, subject to the Court's approval, and the Court having heard the evidence and being satisfied that a Dismissal with Prejudice of all claims relating to the Plaintiff's cause of action is appropriate.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff's cause of action, including any claim to prevailing party attorneys' fees shall be dismissed with prejudice based upon the joint stipulation of the Parties.

IT IS SO ORDERED.

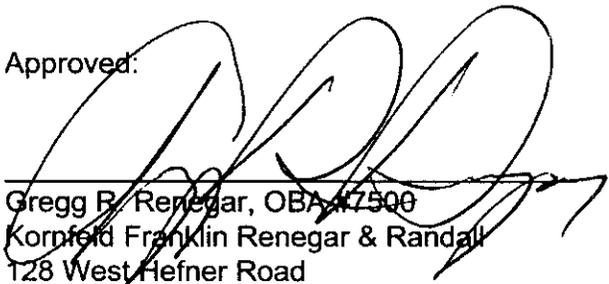
Dated this 25<sup>TH</sup> day of August, 1998.



Sven Erik Holmes  
United States District Judge

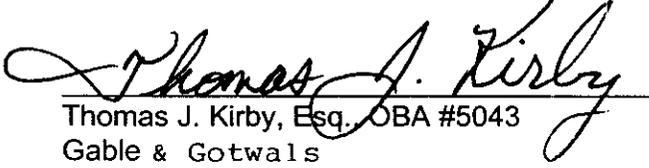
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Approved:



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Attorney for Plaintiff/Appellee,  
ONEOK Resources Company

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

BEVERLY CONTRERAS, Individually, )  
and as mother and next friend of )  
CHRISTINA MARIE BLEVINS, )  
NICOLE REYNE BLEVINS, )  
JAMES EDWARD BLEVINS, and )  
as PERSONAL REPRESENTATIVE )  
OF THE ESTATE OF JAMES BLEVINS, )

Plaintiffs, )

v. )

PAN AMERICAN LIFE )  
INSURANCE COMPANY, PALIC )  
UNIVERSAL BENEFIT TRUST, )  
and MARION DESOBRY, )

Defendants. )

Case No. 97-CV-0074 H

**FILED**  
AUG 26 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

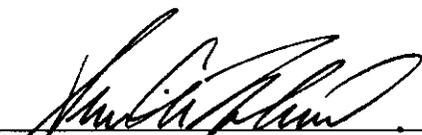
ENTERED ON DOCKET  
AUG 27 1998  
DATE \_\_\_\_\_

**ORDER OF DISMISSAL**

NOW before the Court is the Stipulation of Dismissal With Prejudice of the parties to this action, advising that this matter has been compromised and settled. Upon review of such Stipulation of Dismissal, this court finds that an Order of Dismissal should be entered.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this matter be, and hereby is, dismissed with prejudice pursuant to the Stipulation of Dismissal With Prejudice submitted by all parties to this action.

DONE this 25<sup>TH</sup> day of August, 1998.

  
\_\_\_\_\_  
United States District Judge

Randall J. Snapp  
CROWE & DUNLEVY  
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Tulsa, OK 74103-3313  
(918) 592-9855  
(918) 599-6335 - Fax  
ATTORNEYS FOR DEFENDANT,  
PAN AMERICAN LIFE INSURANCE COMPANY

17

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

TINA L. WHITE, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 HOMELAND, INC., )  
 )  
 Defendant. )

ENTERED ON DOCKET  
DATE AUG 27 1998

No. 98-C-7-K **FILED**

AUG 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 26 day of August, 1998.



TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

ANN GREEN DIGGDON,  
SSN: 448-40-5613,

Plaintiff,

v.

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

Defendant.

AUG 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 97-CV-684-M

ENTERED ON DOCKET

DATE AUG 27 1998

**JUDGMENT**

Judgment is hereby entered for Defendant and against Plaintiff. Dated  
this 26<sup>th</sup> day of AUG., 1998.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE



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

Plaintiff was born November 20, 1941 and was 54 years old at the time of the hearing. [R. 43]. She claims to have been unable to work since February 7, 1994 due to severe back, leg and neck pain, muscle spasm and limited mobility as well as severe headaches and depression. [R. 47, 53, 57, Plaintiff's Brief, p. 1].

The ALJ determined that Plaintiff has severe impairments consisting of severe lumbar and cervical spondylosis but that she retained the residual functional capacity (RFC) "to perform work-related activities except for lifting over 20 pounds occasionally and 10 pounds frequently, that would not allow her to change her position at will (i.e., shift her weight while sitting or standing), and with more than occasional bending, squatting, and climbing." [R.29]. He found that Plaintiff could return to her past relevant work (PRW) as a teacher, administrator and psychometrist and that she was not disabled as defined by the Social Security Act. [R. 29]. The case was thus

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

Plaintiff asserts the ALJ failed to make specific findings as to the physical and mental demands of her past relevant work (PRW) and that he failed to compare the specific job requirements of her PRW with her residual functional capacity (RFC). [Plaintiff's Brief, p. 3]. She also claims the ALJ did not afford proper weight and consideration to the opinions of her treating physicians. [Plaintiff's Brief, p. 4].

As relevant to this case, SSR 82-62 requires that the ALJ fully develop the factual record regarding the claimant's residual functional capacity (RFC) and the claimant's past relevant work (PRW), make specific findings of fact regarding the claimant's RFC and PRW and then compare the two to determine if the claimant's RFC would permit a return to his or her PRW. Thus, SSR 82-62 requires the ALJ to engage in two broad functions: the first being fact finding regarding the claimant's prior work and current residual functional capacity and the second being recording the specific findings of fact in the decision comparing those matters.

With regard to the development of the factual record concerning the claimant's prior relevant work, SSR 82-62, states as follows:

The claimant is the primary source for vocational documentation, and statements by the claimant regarding past work are generally sufficient for determining the skill level, exertional demands and nonexertional demands of such work. Determination of the claimant's ability to do PRW requires a careful appraisal of (1) the individual's statements as to which past work requirements can no

longer be met and the reason(s) for his or her inability to meet those requirements; (2) medical evidence establishing how the impairment limits ability to meet the physical and mental requirements of the work; and (3) in some cases, supplementary or corroborative information from other sources such as employers, the *Dictionary of Occupational Titles*, etc., on the requirements of the work as generally performed in the economy.

SSR 82-62 goes on to state:

Since this is an important and, in some instances, a controlling issue, every effort must be made to secure evidence that resolves the issue as clearly and explicitly as circumstances permit.

Additionally, SSR 82-62 requires:

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

From a review of the above quotations, it is clear that the Social Security ruling anticipates a detailed and factually specific examination of the claimant's past relevant work. This is the evidentiary or factual development aspect of SSR 82-62.

SSR 82-62 also contains a requirement for specific factual findings by the ALJ:

The rationale for a disability decision must be written so that a clear picture of the case can be obtained. The rationale must follow an orderly pattern and show clearly how specific evidence leads to a conclusion.

SSR 82-62 then goes on to require specific findings:

In finding that an individual has the capacity to perform a past relevant job, the determination or decision must contain, among other findings, the following specific findings of fact:

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

Plaintiff cites *Henrie v. U.S. Department of Health and Human Services*, 13 F.3d 359 (10th cir. 1993) in her argument for reversal. Considering *Henrie* in light of the requirements of SSR 82-62, this Court notes that *Henrie* was primarily concerned with the ALJ's failure to develop sufficient facts in the record regarding the claimant's PRW. The *Henrie* court noted that the record was simply devoid of any evidence on these issues and based upon that lack of evidence, found reversal and remand necessary. The *Henrie* Court did note the tension created when the mandate of SSR 82-62 is transposed on the claimant's Step 4 burden of proof. In that regard, the Court was referring to the fact that, at Step 4, the claimant bears the burden of proof that he or she is disabled, thus implying that the claimant needs to come forward with proof of his or her inability to return to past relevant work. However, SSR 82-62, by its terms, imposes an affirmative duty upon the ALJ to develop the factual record regarding claimant's past relevant work, compare it to the claimant's RFC and determine if claimant is capable of returning to past relevant work.

Unlike *Henrie*, this is not a case of insufficient facts in the record regarding the claimant's PRW. The record includes the disability report completed by Plaintiff on

May 18, 1994. [R. 121-126]. The report contains a brief general description of Plaintiff's former job duties:

Report at 7:30 AM, see new pupils - get new books & desks ready for those pupils. Teach all grades and subjects K-12, emotionally disturbed pupils - some below K. level. Discharge pupils daily - grades to secretary, put books & supplies away. Change rooms - take books, ect., every hour. Leave about 3:30. Classes were up to 10 pupils with each needing individual attention.

[R. 125]. Plaintiff appeared at the hearing and testified in her own behalf. She was questioned by the ALJ as to her job titles and the certification needed to perform her job. [R. 45-46, 67-68]. In response to her attorney's question regarding job responsibilities, Plaintiff stated:

The in-patients and sometimes out-patients, but the patients in the hospital in the psychiatric and pediatric programs had school as part of their day and I had a classroom set up very typical of Tulsa public school classroom and I taught those students and through their school part of their day.

[R. 55].

The vocational information regarding Plaintiff's PRW was supplied primarily in the testimony of the vocational expert (VE) at the hearing. [R. 66-78]. Regarding the limitations included in the ALJ's first hypothetical as to the necessity of changing position at will, shifting weight while sitting or standing, only occasional bending, squatting and climbing with mild to moderate to occasional pain, the VE testified that Plaintiff could return to the teaching, the administrative work and the psychiatry that she had done in the past. [R. 70]. This testimony was based upon the understanding the VE had of Plaintiff's past work as she had described it which differed only slightly

from teaching "as it is generally performed in the national economy" because of the type of students, emotionally disturbed, and the setting, in the hospital building, and which included administrative and psychometrist duties. [R. 44-45, 69]. The ALJ presented the VE with a copy of the form Plaintiff's treating physician had completed for disability income benefits from Washington National Insurance Company. [R. 73-76, 186-189]. The VE was asked to incorporate the limitations set forth by Plaintiff's treating physician on the form into the prior hypothetical and testify whether Plaintiff could perform her PRW. [R. 73]. Her response to this second hypothetical question was that Plaintiff's PRW did not require those activities, assuming cramped positions, pushing, pulling twisting, grasping and handling, that Dr. Hicks had checked "avoid completely" and, that "she should be able to adjust her activities" to limit bending, stooping and squatting. She said those activities are generally at the discretion of the individual and that "generally speaking the work station is a desk area." [R. 74]. Thus the VE testified that "in the areas of her work" Plaintiff would be allowed to walk, sit and stand at will which would fit within the limitations imposed by Plaintiff's treating physician. [R. 75-76].

At the second phase of the Step Four analysis, the ALJ must make findings regarding the physical and mental demands of the claimant's past relevant work. *Henrie*, 13 F.3d at 361. Here, while the ALJ recited in his decision only the result of his determination about the demands of Plaintiff's PRW, he referred to the demands of Plaintiff's past relevant work as established through the testimony of the VE. [R. 69].

The *Henrie* Court did not address the second issue set forth in SSR 82-62 regarding the necessity for specific findings of fact. However, the *Winfrey* court held that, although the ALJ must himself make the required findings on the record at step four, he may rely on information supplied by the VE about the demands of the claimant's past relevant work. *Winfrey*, 92 F.3d at 1025. The Court must determine if the record contains "enough information" regarding claimant's PRW and RFC to decide if substantial evidence exists in the record to support the ALJ's decision.<sup>2</sup>

When asked to explain what limitations prevented her from returning to work Plaintiff's only assertion was the limitation occasioned by pain. [R. 47]. The ALJ extensively and appropriately analyzed the pain asserted by Plaintiff and conducted the appropriate legal analysis with regard to that assertion, and found it not credible. Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). Based upon that detailed analysis, the ALJ rejected Plaintiff's assertion of disabling pain and set forth specific reasons for that rejection. Based upon that analysis and the Plaintiff's description of her work as a teacher, administrator and psychometrist, as well as the VE's testimony regarding the physical demands of those jobs, this Court is convinced that there is "enough information" on Plaintiff's PRW and her RFC to conclude the ALJ's decision that Plaintiff could return to that work is supported by substantial

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<sup>2</sup> The Tenth Circuit recently reached the same conclusion under similar circumstances in an unpublished decision: *Hopkins v. Callahan*, 116 F.3d 1489, 1997 WL 355337 (10th Cir. (Okla.)).

evidence. While the ALJ's written decision is perhaps not as precise as Plaintiff would like, the rationale required by SSR 82-62 and *Henrie* is there.

Plaintiff next maintains that the ALJ's "treatment of the Plaintiff's treating physicians was erroneous and presents further grounds for a Reversal of this case." [Plaintiff's Brief, p. 4]. The ALJ rejected the November 2, 1994 "To Whom It May Concern" letter in which David R. Hicks, M.D. stated he thought it "unlikely" that Plaintiff could continue in her current job as a teacher and "doubt[ed]" that she would improve sufficiently enough in the future to return to that work in a productive fashion. [R. 167]. Although the ALJ's statement regarding Plaintiff's "close personal relationship" with Dr. Hicks through her physician husband is not an acceptable reason for rejection of the report of a treating physician, it was not the sole basis given by the ALJ for assigning minimal weight to this particular letter. See *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987)(conclusory statement that physician naturally advocate's his patient's cause not sufficient reason for rejecting opinion). The ALJ considered Dr. Hick's short, single paragraph letter, in which his assessment of Plaintiff's ability to work was tentative, and found it inconsistent with the remainder of Dr. Hick's treatment records, including x-rays that were "essentially normal", MRIs and CAT scans revealing mild to moderate degeneration with no compressive forces on the neurostructures or other clear cause for Plaintiff's radiculopathy. [R. 169, 192, 193, 197, 201-202]. Dr. Hick's records also revealed that he and Plaintiff agreed her condition and symptoms were not severe enough to warrant operative intervention. [R. 168-169]. The report of Lawrence A. Jacobs, M.D. was also rejected as brief,

conclusory and not supported by diagnostic testing, laboratory reports or clinical findings. [R. 27]. Likewise, the report of Anthony Billings, M.D., written for the Worker's Compensation Court, in which he recommended Plaintiff no longer pursue her work as a teacher "for a period of time" was properly considered and rejected.<sup>3</sup>

A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments including the claimant's symptoms, diagnosis and prognosis, and any physical and mental restrictions. See 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). The Commissioner will give controlling weight to that type of opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, §§ 404.1527(d)(2), 416.927(d)(2). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. 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). And, while a physician may proffer an opinion that a claimant is totally disabled, that opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Commissioner. See 20 C.F. R. §§ 404.1527(e)(2), 416.927(e)(2); *Castellano v. Secretary of Health and Human Services*, 26 F.3d 1027, 1028 (10th Cir. 1994), *Eggleston v. Bowen*, 851 F.2d 1244, 1246-7 (10th Cir. 1988) (if treating physician's progress notes contradict his opinion, it may be rejected).

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<sup>3</sup> The Court notes neither Dr. Jacobs nor Dr. Billings were treating physicians but offered their opinions based upon one-time examinations and histories given them by Plaintiff.

At any rate, the Court notes that it was the "Attending Physician's Statement of Functional Capacity" signed by David R. Hicks, M.D., that the ALJ presented to the VE during the hearing and upon which he based his assessment of the Plaintiff's RFC. Moreover, the Court finds no contradiction between the physical "limitations" set forth by Plaintiff's treating physician and the RFC determination reached by the ALJ.<sup>4</sup> The ALJ's opinion indicates that he considered all of the medical reports in the record in making his determination that Plaintiff retains the capacity to do her past relevant work. The ALJ's decision is supported by substantial evidence in the record.<sup>5</sup>

The Court finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Secretary finding Plaintiff not disabled is AFFIRMED.

Dated this 26<sup>th</sup> day of AUG., 1998.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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<sup>4</sup> The Court notes Defendant has conceded that the RFC determination of light work is not supported by the DDU examiner's findings which were indicative of a capacity for sedentary work rather than light. However, the Court finds the ALJ was entitled to rely upon the Plaintiff's own treating physician's assessment in determining Plaintiff's RFC. *Byron v. Heckler*, 742 F.2d 1232 (10th Cir. 1984).

<sup>5</sup> Although Plaintiff asserted depression as impairing her ability to work in her brief, the Court notes she testified that depression hasn't been a problem for her "in the last year or so" and that she hadn't sought treatment for such a condition in over two years. [R. 65-66]. The ALJ's conclusion that Plaintiff's depression is mild and has no effect on her ability to perform work-related activities is supported by the record.

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

**F I L E D**

AUG 26 1998

GREGORY WILLIAMS,  
SSN: 441-50-7714,

Plaintiff,

v.

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

Defendant.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 97-CV-511-M

ENTERED ON DOCKET

DATE AUG 27 1998

**JUDGMENT**

Judgment is hereby entered for Defendant and against Plaintiff. Dated  
this 26<sup>th</sup> day of AUG., 1998.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

**F I L E D**

AUG 25 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GREGORY WILLIAMS,  
441-50-7714

Plaintiff,

vs.

Case No. 97-CV-511-M

KENNETH S. APFEL,  
Commissioner,  
Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE AUG 27 1998

**ORDER**

Plaintiff, Gregory Williams, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>1</sup> 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

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<sup>1</sup> Plaintiff's protectively filed October 12, 1994, applications for disability insurance benefits and Supplemental Security Income were denied; the denials were affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held January 19, 1996. By decision dated March 1, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on April 8, 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 August 30, 1964, and was 31 years old at the time of the hearing. He has a 10th grade education and formerly worked as a mechanic, shop helper, assembler, and stock/counter man. He claims to have been unable to work since December 20, 1989<sup>2</sup>, due to nerve damage to his feet and legs, diabetes, and respiratory problems. The ALJ determined that although Plaintiff is not able to return to his former work, he is capable of performing light work activity in a relatively clean air environment which would allow him to alternate sitting and standing. [R. 18]. 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

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<sup>2</sup> The ALJ acknowledged that Plaintiff's previous application for benefits had been denied. Finding no basis upon which to re-open the earlier application, the ALJ found that the previous determination was binding under the doctrine of *res judicata*. Consequently the period under review in the current application began the date of the last determination, January 16, 1991.

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

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that: (1) the medical evidence does not support the ALJ's finding that he has the residual functional capacity to engage in work; and (2) the ALJ relied upon incompetent vocational expert testimony. The Court finds that the ALJ's decision is supported by substantial evidence.

Plaintiff asserts that he needs to elevate his legs to relieve the pain caused by diabetic neuropathy and that he suffers from constant fatigue caused by his breathing impairment. According to Plaintiff together these impairments eliminate his ability to perform all jobs as evidenced by the vocational expert's testimony. [R. 61-63]. Plaintiff claims that these limitations are supported by the record, but not included in the ALJ's hypothetical question to the vocational expert.

*Hargis v. Sullivan*, 945 F.2d 1482, 1292 (10th Cir. 1991) provides that "testimony elicited by hypothetical questions that do not relate with precision all the claimants' impairments cannot constitute substantial evidence to support the Secretary's decision." However, in posing a hypothetical question, an ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. *See Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). The ALJ did not include Plaintiff's alleged need to elevate his leg and constant fatigue in his hypothetical question because they are not supported by the record.

The medical record reflects that Plaintiff occasionally complained of pain in his lower legs and feet [R. 160, 161, 164, 166], for which Darvocet N was prescribed. An examination was performed May 19, 1994, by Plaintiff's treating physician, Dr. Whitlock. He recorded that Plaintiff takes Darvocet N as needed for foot and leg pain, but that Plaintiff may take 1-2 a day, or go a week without taking any. He found no peripheral edema or discoloration and good pulses. Dr. Whitlock's diagnosis was tentative as to the existence of diabetic neuropathy: "*maybe* early peripheral neuropathy." [R. 186-187] [emphasis supplied].

On July 26, 1995, Dr. Whitlock performed another physical exam. He noted Plaintiff's complaints of leg pain and problems, as follows: "shooting sticking pains in legs, variable, vague. Muscles in back and arms ache at times." [R. 217]. On examination, the doctor found Plaintiff had normal reflexes and moderately good strength with no specific weaknesses and no decreased sensation to touch. He commented that he found no evidence of peripheral neuropathy and that he was unsure of the etiology of Plaintiff's leg complaints. [R. 218].

Another thorough examination was conducted at the Oklahoma State University Health Care Center on October 24, 1995, before treatment of Plaintiff's chronic cough and shortness of breath were undertaken. In the review of systems portion of the examination report, the physician recorded: "He does admit to occasional pains in the left knee for which he has taken Darvocet and has also had low back pain." [R. 206]. On exam, the doctor found that Plaintiff's lower extremities were of normal size, shape, and symmetry, and that there was no edema. [R. 205].

The record does not support Plaintiff's claimed need to constantly elevate his legs. Nor does it support the constant fatigue he claims to suffer. Accordingly, the Court finds that the ALJ's hypothetical questioning of the vocational expert provides no basis for reversal of the denial decision.

Plaintiff argues that the ALJ's decision should be reversed because the ALJ found he had no transferable skills to skilled or semiskilled work, but "nearly all the jobs identified by the ALJ were either skilled or semiskilled work." [Dkt. 7, p. 3]. Relying on SSR 82-41, Plaintiff asserts that the ALJ's failure to specifically identify Plaintiff's transferable work skills requires reversal for the ALJ's failure to follow internal Social Security policies that are binding on him.

The ALJ listed several occupations identified by the vocational expert that an individual with Plaintiff's limitations could perform: semi-skilled light work of store clerk; semi-skilled sedentary work of telephone sales solicitor; unskilled sedentary work of hand packaging; and unskilled light hand packaging. [R. 23]. Although "nearly all" the jobs identified were semi-skilled, unskilled work was included in the vocational expert's testimony and the ALJ's findings. The ALJ found Plaintiff was capable of performing unskilled hand packaging work at either the light or sedentary exertional level. At the light exertional level there are 1050 such jobs in Oklahoma and 81,000 nationally. At the sedentary level there are 480 such jobs in Oklahoma and 46,000 nationally. [R. 23]. According to the Commissioner's regulations, 20 C.F.R. § 404.1566(b), "Work exists in the national economy when there is a significant number of jobs (*in one or more occupations*) having requirements which you are able to meet

with your physical or mental abilities and vocational qualifications." [emphasis supplied]. Irrespective of whether Plaintiff possessed any transferable skills, the hand packaging jobs meet this requirement. Accordingly, the failure to specifically identify transferable skills does not require reversal.

Plaintiff also argues that the ALJ erred in relying on the vocational expert's testimony concerning the hand packaging work because hand packaging is listed in the Dictionary of Occupational Titles ("DOT") as medium work and the ALJ found that Plaintiff was limited to light and sedentary work. See DOT, 4th Ed., Vol. II, p.932, § 920.587-018. Without any citation to authority or analysis of the issue, Plaintiff asserts that "when vocational testimony is contrary to the DOT and SSA regulations, additional testimony from the VE is necessary to explain the discrepancy."<sup>3</sup> [Dkt. 7, p. 4]. Since the vocational expert did not explain why her testimony differed from the DOT, Plaintiff asserts that the ALJ's reliance on her testimony is infirm.

While other Circuit Courts have addressed the effect of a direct contradiction between vocational expert testimony and the DOT,<sup>4</sup> the Tenth Circuit has not done so in a published opinion.

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<sup>3</sup> Unaccountably, the Commissioner's brief failed to address this issue.

<sup>4</sup> Other circuits have addressed this issue and have come to conflicting conclusions. Compare *Porch v. Chater*, 115 F.3d 567, 572 (8th Cir.1997) ("When expert testimony conflicts with the DOT, and the DOT classifications are not rebutted, the DOT controls.") with *Johnson v. Shalala*, 60 F.3d 1428, 1436 (9th Cir.1995) ("It was ... proper for the ALJ to rely on expert testimony to find that the claimant could perform the two types of jobs the expert identified, regardless of their [DOT] classification."), and *Conn v. Secretary of Health & Human Serv.*, 51 F.3d 607, 610 (6th Cir.1995) ("[T]he ALJ was within his rights to rely solely on the VE's testimony. The social security regulations do not require the Secretary or the expert to rely on [DOT] classifications.").

In an unpublished Order and Judgment, *Sanders v. Chater*, 72 F.3d 138 (Table), 1995 WL 749686 (10th Cir.(Utah)), the Court, relying on dicta from *Campbell v. Bowen*, 822 F.2d 1518, 1523, n.3 (10th Cir. 1987), reversed an ALJ's decision stating, "The ALJ is required to take notice of the DOT, 20 C.F.R. 404.1566(d)(1), and the DOT controls when a vocational expert's testimony contradicts it, see *Campbell v. Bowen*, 822 F.2d 1518, 1523 n. 3 (10th Cir. 1987)." *Sanders* at 1995 WL 749686 \* 2. However, in other unpublished opinions, the Court did not reach the question. See *Adams v. Apfel*, 141 F.3d 1184 (Table), 1998 WL 99030 (10th Cir. (Okla.)); *Simmons v. Apfel*, 131 F.3d 152 (Table), 1997 WL 760707 (10th Cir. (Okla.)); and *Queen v. Chater*, 72 F.3d 138 (Table), 1995 WL 747683 (10th Cir. (Okla.)).

Although 20 C.F.R. § 404.1566(d) provides that the Commissioner will take administrative notice of reliable job information available from various governmental and other publications, including the DOT, nothing in that section requires the Commissioner to accept the DOT as a greater source of authority than other publications or vocational expert testimony or to explain any deviation from the DOT. 20 C.F.R. § 404.1567 provides that the physical exertion classifications used, sedentary, light, medium, heavy and very heavy, have the same meaning as they have in the DOT, but again, nothing in that section or elsewhere within the regulations indicates that the DOT classification of a job is conclusive, or even presumptive.

Furthermore, commentary and instructional information accompanying the DOT clearly establishes that DOT does not purport to be a definitive authority. The "Special Notice" found at DOT, Vol. I, p. *xii*, states:

Occupational information contained in the revised fourth edition DOT reflects jobs as they have been found to occur, but they may not coincide in every respect with the content of jobs as performed in particular establishments or at certain localities. DOT users demanding specific job requirements should supplement this data with local information detailing jobs within their community.

The Introduction to the DOT explains that changes in occupational content and job characteristics due to technological advancement continue to occur at a rapid pace requiring study of selected industries to document the jobs that have undergone significant occupational change. The 1991 fourth edition supplement of the DOT has been the result of this ongoing change and study. The 1991 revision is "presented in the hope that it will provide the best 'snapshot' of how jobs continue to be performed in the majority of industries across the country." *Id.* at *xvi*.

At pages *xvii* to *xxiii*, the DOT provides information about how to interpret the information provided for any occupational definition. It is explained that every occupational definition contains a "definition trailer" which provides selected occupational analysis characteristics, including the strength rating for the occupation. The trailer also includes a designation that indicates "Date of Last Update" ("DLU"), which specifies the date of the most recent material gathered in support of that occupation. According to the DOT, the DLU "allows the reader to identify the

currency of each definition." *Id.* at *xxii-xxiii*. The DLU for hand packager is 88, meaning that information was last gathered for that occupation in 1988.

Concerning the strength rating provided for an occupation, the DOT informs: "The Physical Demands Strength Rating reflects the *estimated* overall strength requirement of the job, . . . It represents the strength requirements which are considered to be important for average, successful work performance." *Id.*, Vol. II, p. 1012. [emphasis supplied].

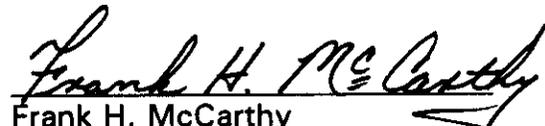
Since the regulations providing for administrative notice of the DOT do not require the ALJ's reliance on the DOT when a vocational expert disagrees with the DOT; since the DOT recognizes that there will be variances between its descriptions and the performance of jobs in the national economy; since it alerts the reader that technological advances are rapidly occurring and changing the way work is performed; since it alerts the reader that the information it contains may not be current; and since it acknowledges that its strength ratings are only estimates, this Court finds that the DOT does not always control when contradicted by the testimony of a vocational expert. Nor does such a contradiction demand an explanation by the vocational expert before the ALJ may rely on the vocational expert's testimony.

In the present case, the vocational expert testified that jobs "in the area of hand packaging and filling" would fit the ALJ's hypothetical. [R. 60]. She testified as to the existence of a number of jobs at the sedentary exertional level nationally and in Oklahoma. She also testified to the number of light hand packing jobs and elaborated that the number of light hand packaging jobs would have to be reduced by 50%

because of the sit/stand option requirement in the hypothetical. [R. 60-61]. Absent any clear regulation, or a published Tenth Circuit opinion to the contrary, the Court finds that the decision whether to credit the vocational expert's testimony is for the ALJ. This Court's function is to review the record and determine whether the ALJ's decision is supported by substantial evidence and whether the ALJ has applied the proper legal standards. *Kepler v. Chater*, 68 F.2d 387, 388 (10th Cir. 1995).

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

SO ORDERED this 25<sup>th</sup> Day of August, 1998.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE



and Sharen M. Kincaid, their costs of action.

DATED at Tulsa, Oklahoma, this 26<sup>th</sup> day of August, 1998.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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**FILED**

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

**AUG 26 1998**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GRANVEL L. TOMLIN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 OKLAHOMA DEPARTMENT OF HUMAN )  
 SERVICES, ET AL., )  
 )  
 Defendants. )

Case No. 97-CV-879-BU

**ENTERED ON DOCKET**

**DATE AUG 27 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 proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

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 26<sup>th</sup> day of August, 1998.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 26 1998

KARON BARTON,

Plaintiff,

MCI TELECOMMUNICATIONS  
CORPORATION,

Defendant.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Action 96-CV917H

ENTERED ON DOCKET  
AUG 27 1998

DATE \_\_\_\_\_

**STIPULATION OF DISMISSAL WITH PREJUDICE**

Plaintiff KaRon Barton ("Barton") and Defendant MCI Telecommunications Corporation ("MCIT") have resolved the above-captioned case. Accordingly, Barton agrees to dismiss the above-captioned case with prejudice against MCIT. Each party shall bear its own costs and attorneys' fees.

Respectfully submitted,

MCI TELECOMMUNICATIONS  
CORPORATION

BY ITS ATTORNEYS

Sylvia A. Bradcom

Date: 8/25/98

KaRon R Barton  
KaRon Barton

Date: \_\_\_\_\_

**EXHIBIT "A"**

*e/m*

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADAM ROSS,  
SSN: 448-90-6865,

Plaintiff,

v.

KENNETH S. APFEL,  
Commissioner of Social Security,<sup>1</sup>

Defendant.

Case No. 96-CV-1107-EA

ENTERED ON DOCKET

DATE AUG 27 1998

**ORDER**

Claimant, Adam Ross, 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.<sup>2</sup> 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.

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<sup>1</sup> 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).

<sup>2</sup> On September 22, 1992, claimant protectively filed a prior application for Social Security Income benefits under Title XVI (42 U.S.C. § 1381 *et seq.*). Claimant's application for benefits was denied in its entirety initially (January 8, 1993). Claimant did not pursue this application. On June 9, 1994, claimant again applied for Supplemental Security Income benefits under Title XVI. Claimant's application for benefits was denied in its entirety initially (September 15, 1994), and on reconsideration (November 2, 1994). A hearing before Administrative Law Judge Dana E. McDonald (ALJ) was held May 22, 1995, in Tulsa, Oklahoma. By decision dated June 16, 1995, the ALJ found that claimant was not disabled at any time through the date of the decision. On October 3, 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. § 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 decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

### **I. CLAIMANT'S BACKGROUND**

Claimant was born December 23, 1973, has completed the twelfth grade, and has some college. He claims he became disabled in 1990 at the age of 16 as a result of a psychotic episode. Claimant suffers from schizoaffective disorder in partial remission with treatment (Clozaril). The claimant has no past relevant work, although he has in the past been employed as a newspaper carrier, grocery stocker, and part-time librarian.

### **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

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.<sup>3</sup>

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,

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<sup>3</sup> 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 the nonexertional requirements of work except for performing work in a high-stress environment, with no exertional limitations. The ALJ concluded that claimant had no past relevant work, but there were jobs existing in significant numbers in the national and regional economies that he could perform, based on his RFC, age, education, and work experience. Having concluded that there were a significant number of jobs which claimant could perform, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

### **IV. REVIEW**

Claimant asserts as error that the ALJ failed to:

- A. reopen his prior application,
- B. fully develop the record when claimant was unrepresented;
- C. properly explain the law to claimant;
- D. properly assess claimant’s non-exertional mental impairment;
- E. pose a proper hypothetical to the vocational expert; and
- F. properly assess claimant’s inability to work full-time.

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

Claimant protectively filed a prior application under Title XVI on September 22, 1992. After the prior application was denied initially on January 8, 1993, claimant did not further appeal.

Claimant requested reopening as to the issue of claimant's disability on or before January 8, 1993. A reapplication that claims disability at a period prior to the earlier denial of benefits implicitly requests a reopening of the earlier denial. Claimant filed such a reapplication. (R. 124-26) The ALJ, relying on 20 C.F.R. §§ 416.1488 and 416.1489, denied the request to reopen because there was no new and material evidence on which to base a reopening.

The Social Security Administration regulations govern the reopening of prior determinations. The relevant portions provide that a decision may be reopened within one year of the date of the notice of the initial determination for any reason, within two years of the date of the notice for good cause, and at any time if the decision was obtained by fraud or similar fault. 20 C.F.R. § 416.1488. Good cause will be found if there is new and material evidence, a clerical error, or a clear showing from the evidence that an error was made. 20 C.F.R. § 416.1489.

The ALJ found no basis to reopen the prior determination. (R. 32) This finding is not reviewable by this Court absent a valid Constitutional claim.<sup>4</sup> Califano v. Sanders, 430 U.S. 99, 97

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<sup>4</sup> Generally, a determination not to reopen a previous decision is discretionary and not, as required by 42 U.S.C. § 405(g), a final decision subject to judicial review. See Califano v. Sanders, 430 U.S. 99, 107-109, 97 S. Ct. 980, 985-986, 51 L. Ed. 2d 192 (1977); Nelson v. Secretary of Health and Human Services, 927 F.2d 1109, 1111 (10th Cir. 1990). However, under Sanders, judicial review is proper "where the [Commissioner's] denial of a petition to reopen is challenged on constitutional grounds." Sanders, 430 U.S. at 109, 97 S. Ct. at 986. The deficiency in due process created where mental illness prevents a claimant from understanding his right to pursue the remedies the law affords him is recognized by many Courts of Appeals to be a colorable constitutional claim. See Evans v. Chater, 110 F.3d 1480 (9th Cir. 1997); Young v. Bowen, 858 F.2d 951, 954-955 (4th Cir. 1988); Elchediak v. Heckler, 750 F.2d 892, 894-895 (11th Cir. 1985); Penner v. Schweiker, 701 F.2d 256, 260-261 (3d Cir. 1983); Parker v. Califano, 644 F.2d 1199, 1203 (6th Cir. 1981). The Tenth Circuit has ruled only that a claimant's unsupported allegation of mental incapacity is not enough to create a colorable constitutional claim, Nelson, 927 F.2d at 1111, but that Court has yet to address the precise issue presented here, where the claim of mental illness is substantiated by extensive medical evidence.

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's mother argued that claimant did not appeal the prior denial because he did not want to live on government money (R. 102), and that she did not push him to pursue it because of "the mental state he was in at the time . . . ." (Id.)

The ALJ concluded that the January 3, 1993 decision denying benefits is final and binding and, under the doctrine of administrative *res judicata*, prevents relitigation of that claim. Claimant, however, citing Social Security Ruling 91-5p, raises the suggestion that the deadline for his opportunity to reopen the January 8, 1993 decision is tolled as a result of mental incapacity.

Social Security Ruling 91-5p provides in pertinent parts:

. . .

When the claimant fails to timely request reconsideration, an ALJ hearing, Appeals Council review, or review by a Federal district court, the Agency applies the criteria in section 404.911 or section 416.1411, as appropriate, in determining whether good cause for missing the deadline exists.

Section 404.911(a) states:

In determining whether you have shown that you had good cause for missing a deadline to request review we consider

- (1) what circumstances kept you from making the request on time;
- (2) whether our action misled you;
- (3) whether you did not understand the requirements of the Act resulting from amendments to the Act, other legislation, or court decisions.

Section 416.1411(a) sets out essentially the same language.<sup>5</sup>

. . .

When a claimant presents evidence that mental incapacity prevented him or her from timely requesting review of an adverse determination, decision, dismissal, or

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<sup>5</sup> Sections 404.911 and 416.1411 have been amended since this ruling to specifically include mental limitations.

review by a Federal district court, and the claimant had no one legally responsible for prosecuting the claim (e.g., a parent of a claimant who is a minor, legal guardian, attorney, or other legal representative) at the time of the prior administrative action, SSA will determine whether or not good cause exists for extending the time to request review. If the claimant satisfies the substantive criteria, the time limits in the reopening regulations do not apply; so that, regardless of how much time has passed since the prior administrative action, the claimant can establish good cause for extending the deadline to request review of that action.

The claimant will have established mental incapacity for the purpose of establishing good cause when the evidence establishes that he or she lacked the mental capacity to understand the procedures for requesting review.

In determining whether a claimant lacked the mental capacity to understand the procedures for requesting review, the adjudicator must consider the following factors as they existed at the time of the prior administrative action:

- inability to read or write;
- lack of facility with the English language;
- limited education;
- any mental or physical condition which limits the claimant's ability to do things for him/herself.

If the claimant is unrepresented and has one of the factors listed above, the adjudicator will assist the claimant in obtaining any relevant evidence. The decision as to what constitutes mental incapacity must be based on all the pertinent facts in a particular case. The adjudicator will resolve any reasonable doubt in favor of the claimant.

• • •

Soc. Sec. Ruling 91-5p. It is true that claimant is an educated person with the ability to read and write. However, claimant was unrepresented by legal counsel in his earlier application and has shown that he suffered from a medically-documented ailment in 1992-93 and years preceding. Further, claimant was not a minor at the time of the earlier determination so his parents were not "legally responsible" for prosecuting his claim.

The ALJ committed two legal errors in his decision not to reopen. First, the ALJ limited his analysis of good cause to new and material evidence, and ignored any other possible showing of good cause. (R. 32)

Second, no mention was made by the ALJ in his decision of June 16, 1995 as to either Social Security Ruling 91-5p or the effect of mental incapacity upon the tolling of the time allowed for requesting a review of a prior denial. The ALJ was required to discuss this ruling because the issue was raised at the hearing. (R. 101-02) "The agency's rulings are binding on the ALJ." Nielson v. Sullivan, 992 F.2d 1118, 1120 (10th Cir. 1993). This omission ignores the requirements of an agency ruling and, quite possibly, due process.

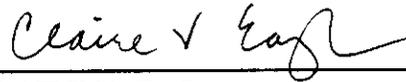
It would be improper for this Court to apply the factors in Social Security Ruling 91-5p because the analysis and fact-finding must be performed by the "adjudicator." When reviewing a decision of the Commissioner denying disability benefits, the Court is not to substitute its judgment for that of the Commissioner. By this remand, this Court in no way implies what the result of the Social Security Ruling 91-5p analysis should be, only that it was error not to perform it. The Commissioner's decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. This remand "simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case." Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988).

The Court finds that this case should be remanded to the Commissioner to properly consider and determine whether claimant's mental impairment extended the time for requesting review of the January 8, 1993 decision and, if so, to take the action which would have been appropriate had the claimant filed a timely request for review. Because of the remand on this issue, the Court need not address the remainder of claimant's assignments of error.

**V. CONCLUSION**

The correct legal standards were not applied in the decision of the Commissioner. The decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

DATED this 26th day of August, 1998.



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CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADAM ROSS,  
SSN: 448-90-6865,

Plaintiff,

v.

KENNETH S. APFEL,  
Commissioner of Social Security,

Defendant.

Case No. 96-CV-1107-EA

ENTERED ON DOCKET

DATE AUG 27 1998

**JUDGMENT**

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

It is so ordered this 26th day of August 1998.

*Claire V Eagan*

\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

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

PHYLLIS CRAWFORD, )  
)  
Plaintiff, )  
)  
v. )  
)  
ATLANTIC RICHFIELD COMPANY, )  
)  
and CHEVRON U.S.A. INC., )  
)  
Defendants. )

ENTERED ON DOCKET  
DATE AUG 27 1998  
Case No. 98-C-617-H

**FILED**

AUG 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

This matter comes before the Court on Defendants' notice of removal (Docket # 1). Plaintiff Phyllis Crawford originally brought this action in the District Court of Creek County. Plaintiff's Petition alleges that Defendants Atlantic Richfield Company ("Atlantic Richfield") and Chevron U.S.A. Inc ("Chevron") caused damage due to oilfield pollution on her real property. In her Petition, Plaintiff seeks damages in excess of \$10,000.<sup>1</sup>

Defendants removed this action to this Court on the basis of diversity jurisdiction. Defendants contend that diversity jurisdiction is properly invoked here because Defendants are foreign corporations and because Plaintiff is a citizen of Oklahoma. Defendants further contend the federal jurisdictional amount in controversy is met, stating:

Defendants believe that the Plaintiffs' request for recovery of damages stated on the face of her Petition exceeds \$75,000.00.

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<sup>1</sup>In Oklahoma, the general rules of pleading require that:

[e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000) shall, without demanding any specific amount of money, set forth only that amount sought as damages is in excess of Ten Thousand Dollars (\$10,000), except in actions sounding in contract.

Okla. Stat. tit. 12, § 2008(2).

Def. Notice of Removal, ¶ 8 (Docket # 1).

Section 1447 requires that a case be remanded to state court if at any time before final judgment it appears the court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c). Initially, the Court notes that federal courts are courts of limited jurisdiction. With respect to diversity jurisdiction, “[d]efendant’s right to remove and plaintiff’s right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand.” Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed \$75,000. 28 U.S.C. § 1332(a). The Tenth Circuit has clarified the analysis which a district court should undertake in determining whether an amount in controversy is greater than \$75,000. The Tenth Circuit stated:

[t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. The burden is on the party requesting removal to set forth, in the notice of removal itself, the “underlying facts supporting [the] assertion that the amount in controversy exceeds [\$75,000].” Moreover, there is a presumption against removal jurisdiction.

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995) (citations omitted) (emphasis in original); e.g., Hughes v. E-Z Serve Petroleum Marketing Co., 932 F. Supp. 266 (N.D. Okla. 1996) (applying Laughlin and remanding case); Barber v. Albertson’s, Inc., 935 F. Supp. 1188 (N.D. Okla. 1996) (same); Martin v. Missouri Pacific R.R. Co. d/b/a Union Pacific R.R. Co., 932 F. Supp. 264 (N.D. Okla. 1996) (same); Herber v. Wal-Mart Stores, 886 F. Supp. 19, 20 (D. Wyo. 1995) (same); Homolka v. Hartford Ins.. Group, Individually and d/b/a Hartford Underwriters Ins.. Co., 953 F. Supp. 350 (N.D. Okla. 1995) (same); Johnson v. Wal-Mart Stores,

Inc., 953 F. Supp. 351 (N.D. Okla. 1995) (same); Maxon v. Texaco Ref. & Marketing Inc., 905 F. Supp. 976 (N.D. Okla. 1995) (same).

Further, “both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice.” Laughlin, 50 F.3d at 873. See Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia (Anpac) v. Dow Quimica de Colombia S.A., 988 F.2d 559, 565 (5th Cir. 1993) (finding defendant’s conclusory statement that “the matter in controversy exceeds [\$75,000] exclusive of interest and costs” did not establish that removal jurisdiction was proper); Gaus v. Miles, Inc., 980 F.2d 564 (9th Cir. 1992) (mere recitation that the amount in controversy exceeds \$75,000 is not sufficient to establish removal jurisdiction).

Where the face of the complaint does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the removal documents, not only the defendant's good faith belief that the amount in controversy exceeds \$75,000, but also facts underlying defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than \$75,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction at the time of removal, and not by supplemental submission. Laughlin, 50 F.3d at 873. See Herber, 886 F. Supp. at 20 (holding that the jurisdictional allegation is determined as of the time of the filing of the Notice of Removal). And the Tenth Circuit has clearly stated what is required to satisfy that burden. As set out in Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995), if the face of the petition does not affirmatively establish that the amount in controversy exceeds \$75,000.00, then the rationale of Laughlin contemplates that the removing party will undertake to perform an economic analysis of the alleged damages with

underlying facts.

In the instant case, in their Petition, Plaintiff has asserted only that her damages exceed \$10,000. Plaintiff also has not alleged that all of her property has been damaged, but has merely claimed that "much of it is not fit for human or animal consumption." Compl. at ¶ 18. Therefore, the amount in controversy is not met by the face of the Petition. In their notice of removal, Defendants failed to set forth any specific facts that demonstrate the federal amount in controversy has been met. Accordingly, the Court finds that Defendants' conclusory assertions do not satisfy the standards set forth by the Tenth Circuit in Laughlin. The Court concludes that removal is improper on the basis of diversity jurisdiction since it has not been established, either in Plaintiff's Petition or in Defendants' notice of removal, that the amount in controversy here exceeds \$75,000.

Based upon a review of the record, the Court holds that Defendants have not met their burden, as defined by the court in Laughlin. Thus, the Court is without subject matter jurisdiction and lacks the power to hear this matter. As a result, the Court must remand this action to the District Court of Creek County. The Court hereby orders the Court Clerk to remand the case to the District Court in and for Creek County.

IT IS SO ORDERED.

This 25<sup>TH</sup> day of August, 1998.

  
Sven Erik Holmes  
United States District Judge

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

LINDSEY K. SPRINGER, d/b/a  
Bondage Breaker Ministries,

Plaintiff,

vs.

THE INFINITY GROUP COMPANY  
and ROBERT F. SANVILLE,

Defendant.

ENTERED ON DOCKET  
AUG 27 1998

DATE \_\_\_\_\_

No. 98-C-299-K ✓

**F I L E D**

AUG 25 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

On July 24, 1998, Magistrate Judge Eagan filed a Report and Recommendation, recommending that this Court grant the motion of the defendants to dismiss this action. The plaintiff has timely filed an objection. The factual background is set forth in the Report and Recommendation. In summary, the plaintiff brings this action for libel and slander under Oklahoma law against the Infinity Group Company ("TIGC") and Robert F. Sanville ("Sanville"), who was appointed TIGC's trustee by the United States District Court for the Eastern District of Pennsylvania.

In that court, a civil enforcement action had been brought by the Securities and Exchange Commission ("SEC") against TIGC and others alleging interstate securities violations. Lindsey K. Springer, the present plaintiff, was named a "relief defendant" in the Pennsylvania action. On February 6, 1998, the Pennsylvania court issued an Order for a Final Injunction, Disgorgement and Other Relief, having found violations of federal securities laws by

TIGC and defendants Geoffrey Benson and Geoffrey O'Connor.

In an accompanying memorandum, the court ordered Mr. Springer to disgorge \$1.265 million which the court had determined originated as funds unlawfully obtained from TIGC investors by TIGC and which Mr. Springer had received from TIGC without consideration. In the February 6, 1988 order, the court directed Mr. Sanville to continue as Trustee and specifically ordered him to "As soon as practicable, notify all existing TIGC investors of the terms of this Order [and] initiate proof of claim procedures in order to determine the Trust's final obligations to its investors." Mr. Sanville sent a letter to some 10,000 persons believed to have been TIGC investors. The letter stated in pertinent part that investors were defrauded for "defendants' (TIGC, Benson and O'Connor) and relief defendants' (Lindsey K. Springer, d/b/a Bondage Breaker Ministries, Susan L. Benson, JGS Trust, SLB Charitable Trust, and Futures Holding Company) personal gain." Plaintiff herein claims this statement constitutes libel and slander.

The Magistrate Judge recommended dismissal of this action on two grounds.<sup>1</sup> First, this Court lacks subject matter jurisdiction because the trustee's dissemination of the letter to investors was an act done in his official capacity and within his authority as an officer of the court; therefore, Mr. Sanville may only be sued for

---

<sup>1</sup>A trust cannot litigate on its own behalf; the trustee is the proper party to litigate issues on behalf of the trust. Trustees of Hotel Employees v. Amvest Corp., 733 F.Supp. 1180, 1184 (N.D.Ill.1990). Therefore, granting of the present motion by the trustee disposes of the case.

those actions in the court which appointed him, unless leave of the appointing forum is granted. The Magistrate Judge noted that the language of the letter accurately reflected the findings of the Pennsylvania court in its Order. The slight editing done by the Trustee, and the placing of Mr. Springer's name first in the list of relief defendants, the Magistrate Judge found insufficient to alter the general principle. This Court agrees.

Second, the Magistrate Judge found that the complaint fails to state a claim for relief because court-appointed trustees are entitled to quasi-judicial immunity. Again, this Court agrees.

It is the Order of the Court that the objection of the plaintiff (#25) to the Report and Recommendation of the Magistrate Judge is hereby overruled. The motion to dismiss of defendant Sanville (#2) is hereby GRANTED. Because this ruling requires the dismissal of the Infinity Group Company as well, this action is dismissed in its entirety.

It is the further Order of the Court that all other pending motions are declared moot, with two exceptions. Each side has moved for sanctions against the other. Defendants seek sanctions against plaintiff for filing a motion for temporary restraining order and plaintiff seeks sanctions against defendants' local counsel, because he signed a motion actually prepared by defendants' Pennsylvania counsel. The Court finds no conduct

meriting Rule 11 sanctions in this case. Accordingly, motions #17 and #19 are hereby DENIED.

ORDERED this 24 day of August, 1998.

  
PERRY C. KEEN, Chief  
UNITED STATES DISTRICT JUDGE

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

**FILED**

AUG 25 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

HILTI, INC., )

Plaintiff, )

v. )

ARROW ABRASIVES LIMITED, )

Defendant. )

Case No. 98-CV-0367-H (E)

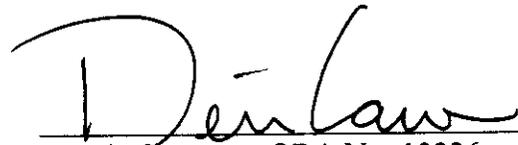
ENTERED ON DOCKET

DATE AUG 27 1998

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties, by and through their counsel of record, and stipulate to the dismissal with prejudice of the above-captioned case pursuant to Federal Rules of Civil Procedure 41.

Respectfully submitted,



Dennis Cameron, OBA No. 12236  
William T. Detamore, Jr., OBA No. 17018  
GABLE & GOTWALS  
2000 NationsBank Center  
15 West 6th Street  
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ATTORNEYS FOR PLAINTIFF,  
HILTI, INC.

(2)

40



Donald L. Kahl, OBA No. 4855

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(918) 594-0400

ATTORNEYS FOR DEFENDANT,  
ARROW ABRASIVES LIMITED

166533

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

**FILED**

AUG 25 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

KENNETH ALEXANDER,

Plaintiff,

vs.

Case No. 98-CV-457-C

TOWN OF KELLYVILLE,  
BRIAN SMITH, individually  
and as Mayor of the Town of  
Kellyville and as Trustee of  
the Town Board, STACY FARRAR,  
KATHY GOODMAN, SEAN STREETER,  
ORVILLE STOUT, all individually and  
as Trustees of the Kellyville Town Board,

Defendants.

**ENTERED ON DOCKET**  
**DATE AUG 26 1998**

**ORDER**

Before the Court is plaintiff's motion to remand for lack of federal court jurisdiction. Defendants object to the motion to remand. Defendants argue that plaintiff has failed to raise any viable state claim in his Amended Petition filed in Creek County, thus the Court should construe the Amended Petition as raising federal claims.

The fact that plaintiff had the option to raise federal claims, but declined to do so, does not confer jurisdiction on this Court. Moreover, the fact that plaintiff's action may be subject to dismissal under state law does not confer jurisdiction on this Court. An action is only removable if the action as framed by the Amended Petition would have been maintainable in federal court.

The Amended Petition raises only state law claims. Thus, this Court is without subject matter jurisdiction. Accordingly, plaintiff's motion to remand is hereby granted. The Clerk is directed to remand this action back to the District Court of Creek County, Oklahoma.

IT IS SO ORDERED this 24<sup>th</sup> day of August, 1998.

  
\_\_\_\_\_  
H. DALE COOK  
Senior, U.S. District Judge

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

AUG 25 1998

TORDUR WALTER SEGURA, and )  
ERLA HARDARDOTTIR SEGURA, )  
 )  
Debtors/Appellants, )  
 )  
vs. )  
 )  
WFS FINANCIAL, INC., )  
 )  
Appellee. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 98-CV-315-K(JW)

Bankruptcy Case:

Chapter 13

Case No. 97-03289-R

ENTERED ON DOCKET

DATE AUG 26 1998

**REPORT AND RECOMMENDATION**

Now before the Court are motions to dismiss this bankruptcy appeal filed by Appellants and Appellee. [Doc. Nos. 5 and 6].

**I. MOOTNESS**

Both Appellants and Appellee agree that this appeal is moot. The appeal is moot because the bankruptcy court dismissed the underlying Chapter 13 bankruptcy case due to Debtors/Appellants' failure to make their Chapter 13 plan payments. The undersigned recommends, therefore, that this bankruptcy appeal be dismissed as moot.

**II. NO PREVAILING PARTY**

Appellee argues that the Court should declare that even though this case is being dismissed as moot, the dismissal is a dismissal on the merits. Appellee also argues that the Court should declare that Appellee is the prevailing party on this appeal. Appellee cites Fed. R. Civ. P. 41(b) as support for its argument.

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Rule 41(b) provides as follows:

Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Fed. R. Civ. P. 41(b).

Rule 41(b) does not apply in this case. This appeal is not being dismissed "[f]or failure of the [Appellant] to prosecute or to comply with [the Federal Rules of Civil Procedure] or any order of court." This case is not being "involuntarily" dismissed over Appellants' objection. Rather, the undersigned is recommending that the Court decline to exercise jurisdiction because this case is moot and a live controversy is a constitutional prerequisite to jurisdiction at all stages of federal litigation. U.S. Const. art. III; McClendon v. City of Albuquerque, 100 F.3d 863, 867 (10th Cir. 1996); Cox v. Phelps Dodge Corporation, 43 F.3d 1345, 1348 (10th Cir. 1994). The merits of this appeal will, therefore, not be reviewed and there will be no judgment on the merits. The undersigned finds, therefore, that there is no prevailing party on this appeal.

### III. VACATUR OF BANKRUPTCY COURT'S CRAMDOWN ORDER

Appellee is a lender that finances used automobiles for high risk borrowers. Appellee's contract rate of interest with Appellants was 21%. Appellants proposed a Chapter 13 plan that would repay Appellee with a 10% rate of interest. After a

hearing, the bankruptcy court entered an order which confirmed a Chapter 13 plan that would repay Appellee with an interest rate of 17.2%. It is this "cramdown" order from which Appellant appeals.

Appellant argues that because this appeal became moot before the Court could review the merits, the bankruptcy court's cramdown order should be vacated. The only authority cited by Appellant for this proposition is Ethredge v. Hail, 996 F.2d 1173 (11th Cir. 1993). Appellant has, however, ignored relevant Supreme Court and Tenth Circuit precedent. See United States v. Munsingwear, 340 U.S. 36 (1950); McClendon v. City of Albuquerque, 100 F.3d 863 (10th Cir. 1996); City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996); and Jones v. Temmer, 57 F.3d 921 (10th Cir. 1995). Based on this precedent, the undersigned recommends that the Court not vacate the bankruptcy court's cramdown order.

The leading case on vacatur is United States v. Munsingwear, 340 U.S. 36 (1950). In Munsingwear, the Supreme Court approved of the procedure of vacating the order below when an appeal of that order becomes moot. This procedure is used to prevent an order from spawning any future legal consequences when appellate review of that order has been prevented through happenstance. The Supreme Court revisited the Munsingwear rule in United States Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994). The Supreme Court reaffirmed Munsingwear in Bonner Mall, holding that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstances, ought not in fairness be forced to acquiesce in the judgment . . . ." Bonner Mall, 513 U.S. at 25. The

Supreme Court further pointed out that the pivotal issue is "whether the party seeking relief from the judgment below caused the mootness by voluntary action." Id. See also, Jones, 57 F.3d at 923.

The Tenth Circuit states the rule as follows:

When causes beyond the appellant's control make a case moot pending appeal, a federal appellate court generally should vacate the judgment below and remand with a direction to dismiss. That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance and prevents the moot judgment from spawning any legal consequences.

McClendon, 100 F.3d at 868 (internal quotations and citations omitted) (relying on the Supreme Court's decision in Munsingwear).

In some cases where a case becomes moot on appeal through happenstance, it is proper for the appellate court to vacate the judgment of the [lower] court. Happenstance does not include cases resolved by action attributable to the parties, such as a negotiated settlement.

Also, we will not apply the Munsingwear rule where the losing party, fearful of having its loss confirmed by the appellate court, abandons the appeal and then moves to have the [lower] court's judgment vacated as moot, thus retiring to lick its wounds, fully intending to come out fighting again.

Browner, 97 F.3d at 421.

Applying the Munsingwear rule, as refined by the Tenth Circuit, the undersigned finds that the bankruptcy court's cramdown order should not be vacated. This case was not mooted by happenstance. Rather, it was mooted by Appellants' conduct. This appeal became moot when Appellants failed to make the payments they were

required to make under the Chapter 13 plan adopted by the bankruptcy court, which plan was based in part on the bankruptcy court's cramdown order. If the Court permitted vacatur in this type of case, any Chapter 13 debtor who disagreed with the plan crafted by the bankruptcy court could simply appeal from the order adopting the plan; refuse to make the plan payments; have the bankruptcy appeal dismissed as moot; wait six months; refile bankruptcy; and relitigate any issues in connection with the plan, including cramdown orders like the one at issue in this case. A Chapter 13 debtor who fails to make payments on the plan adopted by the bankruptcy court should not be permitted to relitigate the same issues resulting in the plan in a future bankruptcy proceeding. The undersigned recommends, therefore, that the bankruptcy court's order not be vacated.

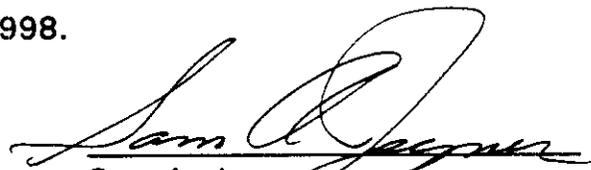
#### **RECOMMENDATION**

Appellee's motion to dismiss should be granted in part and denied in part. This appeal is moot, but there is no decision on the merits and Appellee is not a prevailing party. Appellants' motion to dismiss should be granted in part and denied in part. This appeal is moot, but the bankruptcy court's cramdown order should not be vacated.

**OBJECTIONS**

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

Dated this 25 day of August 1998.

  
Sam A. Joyner  
United States Magistrate Judge

**CERTIFICATE OF SERVICE**

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

26th Day of August, 1998.

C. Portillo, Deputy Clerk

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

THOMAS RAY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 PRUDENTIAL PROPERTY AND )  
 CASUALTY INSURANCE COMPANY )  
 an Indiana corporation, )  
 )  
 Defendants. )

ENTERED ON DOCKET

DATE AUG 26 1998

No. 97-C-600-K ✓

**F I L E D**

AUG 25 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGMENT**

This matter came before the Court for consideration of the Defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously,

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

ORDERED THIS DAY OF 24 AUGUST, 1998

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

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

THOMAS RAY, )  
)  
Plaintiff, )  
)  
vs. )  
)  
PRUDENTIAL PROPERTY AND )  
CASUALTY INSURANCE COMPANY, )  
an Indiana corporation )  
)  
Defendant. )

No. 97-C-600-K ✓

**F I L E D**

AUG 25 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

The Court VACATES its order entered on August 14, 1998 and ORDERS that this order comprise the opinion of the Court on Defendant's Motion for Summary Judgment.

**Introduction**

Before the Court is Defendant's Motion for Summary Judgment. Plaintiff has brought this declaratory judgment action, pursuant to 28 U.S.C. § 2201, seeking a declaration of rights and legal obligations under an insurance contract entered between himself and Defendant.

**Statement of Facts**

Plaintiff Tom Ray applied for automobile insurance from Defendant Prudential Property and Casualty Insurance Company (Prudential) in September of 1996. Plaintiff testified that during the process of obtaining the policy, he asked Prudential's agent, Bruce Chadwick, "Would we be insured driving other vehicles based on our coverage here?" According Plaintiff, Chadwick answered "Sure. That's no problem." Chadwick testified that he could not recall if Plaintiff and his wife specifically asked about non-owned vehicles. Plaintiff testified that he believed, based on Chadwick's statement,

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that all of the insureds would be covered even while operating a vehicle not listed in the policy.

Ultimately, Prudential issued a policy to Plaintiff listing Plaintiff, his wife, Joann Ray, and his daughters, Shelly McCoy and Amanda Bundy, as the insureds. The policy also listed several vehicles which were covered: a Mazda 323, an Eagle Talon, a Ford Aerostar van, a Ford Escort, and a Hyundai. The policy included provisions which set out losses Prudential would not pay, addressed coverage for non-owned cars, and defined terms used throughout the policy. The pertinent policy provisions stated:

**Cars Owned by Household Residents**

We will not pay for bodily injury or property damage caused by anyone using a car not insured under this part, owned by you or a household resident.

**Regularly Used Non-Owned Cars**

We will not pay for bodily injury or property damage caused by you or a household resident using a non-owned car not insured under this part, regularly used by you or a household resident.

**Substitute Cars**

If a car covered under this part breaks down, is being serviced or repaired, or is stolen or destroyed, we will cover a car you borrow temporarily (with the owner's permission) while your car is being repaired or replaced. This car cannot be owned by you or a household resident....

**Other Non-Owned Cars**

In addition to SUBSTITUTE CARS, we will cover a non-owned car. The owner must give permission to use it. The non-owned car must be used in the same way as intended by the owner...the non-owned car has the same coverage as any one of your cars insured with us.

**Household Resident**

A household resident is someone who lives in your household. A household resident includes a resident relative.

**Non-Owned Car**

A non-owned car is a car which is not owned by, registered in the name of or furnished or available for the regular or frequent use of

you or a household resident.

#### Resident Relative

A resident relative is someone who lives in your household and is related to you by blood, marriage, adoption or is a ward or foster child.

At the time Prudential issued the policy, Amanda Bundy and her husband, David Bundy, lived part-time with Ray. Amanda and David Bundy continued to live with Ray until sometime after October 15, 1996. The policy covered neither David Bundy nor his Isuzu pickup truck.

On October 15, 1996, Amanda Bundy was involved in an automobile accident while driving David Bundy's truck. Amanda Bundy struck Mary Greene, a pedestrian, with the truck. David Bundy had no insurance on the truck. Greene sued Amanda Bundy in District Court for Ottawa County for injuries allegedly caused by the accident. Prudential denied a claim, made under Ray's policy, to pay for the injuries to Greene allegedly caused by Amanda Bundy. Plaintiff instituted this suit seeking a declaration that Prudential is obligated to pay for Greene's injuries under Tom Ray's policy.

#### Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P.* 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992). Additionally, although the non-

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

#### Discussion

Defendant argues that summary judgment is appropriate because the policy clearly denies coverage for Amanda Bundy while driving a vehicle not listed on the policy, but owned by a household resident. Plaintiff argues that a question of fact exists as to whether the Court should reform the policy to delete the "Cars Owned By a Household Resident" provision because of constructive fraud by Prudential.

Initially, the Court must determine whether Plaintiff's policy covers Amanda Bundy's accident with Mary Greene. Courts interpret the language of insurance policies in their plain and ordinary sense if the policies are clear and unambiguous. *See e.g. Littlefield v. State Farm Fire and Cas.*, 857 P.2d 65, 69 (Okla. 1993); *Dodson v. St. Paul Ins. Co.*, 812 P.2d 372, 376 (Okla. 1991). Courts interpret insurance contracts and determine whether they are ambiguous as a matter of law. *See e.g. Max True Plastering Co. v. United States Fidelity and Guar. Co.*, 912 P.2d 861, 868 (1996); *Dodson*, 812 P.2d at 376. Insurance contracts are only ambiguous if they are susceptible to two constructions. *See Max True*, 912 P.2d at 869; *Littlefield*, 857 P.2d at 69. The Oklahoma Supreme Court has admonished courts not to indulge in forced or strained constructions to create and then construe ambiguities. *See Max True*, 912 P.2d at 869; *Dodson*, 812 P.2d 376.

Here, the "Cars Owned By Household Residents" provision of the policy denies coverage for "bodily injury caused ...by anyone using a car not insured under the policy which is owned by the insured or a household resident." The policy defined a household resident as someone who lived in

the household. The definition of household resident includes resident relatives, which the policy defined as someone who lives in the insured's household and is related by blood, marriage, adoption, or is a war child or foster child.

The Court finds that the relevant policy provisions are not susceptible to multiple meanings and are not ambiguous. Because the relevant provisions are clear and unambiguous, the Court considers their plain and ordinary meanings. Amanda Bundy was driving David Bundy's pickup truck when the accident with Mary Greene occurred. The pickup truck was not covered under Ray's insurance policy. At the time of the accident, David Bundy lived with Ray and was both a household resident and a resident relative of Ray. This situation clearly falls under the "Cars Owned by Household Residents" provision of the policy. Prudential acted in accord with the policy when it denied the claim arising from Amanda Bundy's accident with Greene.

Plaintiff does not contest that the policy, as written, denies coverage for the accident between Bundy and Greene. Instead, Plaintiff argues that an issue of fact exists as to whether the insurance policy should be reformed to delete the "Cars Owned By Household Residents" provision, upon which Defendant relies, because of constructive fraud. Plaintiff seemingly contends that a fact-finder could find constructive fraud on two grounds. First, Plaintiff argues that Prudential had a duty, which it breached, to inform him of the provision because he sought a policy which would provide coverage for the listed insureds while driving unlisted vehicles. Second, Plaintiff argues that he was misled by Chadwick, Prudential's agent, when Chadwick told him that it would be no problem providing coverage for the listed insureds while driving unlisted cars.

Plaintiff failed to allege fraud in his complaint as required by Federal Rule of Civil Procedure

9(b).<sup>1</sup> Plaintiff first raised constructive fraud in his response brief to Defendant's brief in support of the motion for summary judgment. Because Plaintiff has not properly pled fraud in accordance with Rule 9(b), Plaintiff's constructive fraud claim is not properly before the Court and does not provide a basis to defeat summary judgment.

Plaintiff's constructive fraud claim would fail on the merits if it were properly before the Court. Plaintiff relies on *Gentry v. American Motorist Ins. Co.*, 867 P.2d 468 (Okla. 1994), to support its constructive fraud and reformation argument. The *Gentry* decision revolved around situations where the insurer and the insured mutually agree on coverage, but the insurer subsequently issues a policy which does not conform to the mutual agreement. *Gentry*, 867 P.2d at 471-2 (citing *Pacific Nat'l Fire Ins. Co. v. Smith Bros. Drilling Co.*, 162 P.2d 871 (Okla. 1945); *Ohio Cas. Ins. Co. v. Callaway*, 134 F.2d 788 (10<sup>th</sup> Cir. 1943)). The situation in this case is different. First, there is no evidence that Prudential ever agreed that listed insureds would be covered while driving unlisted cars owned by household residents. Second, Prudential did not mislead or deceive Plaintiff. Plaintiff bases his belief of coverage while driving unlisted cars on Chadwick's "Sure, that's no problem," response to Ray's question on whether the listed insureds would be covered while driving other vehicles. Significantly, Ray testified that he asked whether he and the other listed insureds would be covered while driving other cars. He did not ask whether they would be covered while driving all other cars or while driving unlisted cars owned by household residents. Prudential subsequently issued a policy which did cover the listed insureds while driving cars not listed on the policy. Specifically, the "Substitute Cars" and "Other Non-Owned Cars" provisions provide such

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<sup>1</sup>At the Pretrial Conference, the Court denied Plaintiff's Application to File Second Amended Complaint.

coverage. Plaintiff has offered no evidence establishing a mutual agreement for coverage of the insureds while driving unlisted cars owned by household residents. Prudential did not mislead or deceive Plaintiff because it issued a policy which conformed with Chadwick's response to Ray's only question on the coverage of insureds driving unlisted cars.<sup>2</sup>

#### Conclusion

Summary judgment is appropriate in this case. Prudential complied with the insurance policy when it denied the claim for Amanda Bundy's accident with Mary Greene. Plaintiff's constructive fraud claim is not properly before the Court because of Plaintiff's failure to comply with Federal Rule of Civil Procedure 9(b). The constructive fraud claim would have failed on the merits if it were properly before the Court. The Court GRANTS Defendant's Motion for Summary Judgment.

ORDERED this 24 day of August, 1998.

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

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<sup>2</sup> Additionally, Plaintiff incorrectly asserts that there was general coverage for non-owned cars which was subsequently excluded by the "Cars Owned by Household Resident" provision. While the "Other Non-owned Cars" provision does state that coverage is provided for non-owned cars, the policy clearly defined non-owned cars to exclude cars owned by household residents. The policy defined a non-owned car as "a car which is not owned by, registered in the name of or furnished or available for the regular or frequent use of you or a household resident." Because David Bundy was a household resident and he owned the pickup truck involved in the accident, the pickup truck would not be considered a non-owned vehicle under the policy. Contrary to Plaintiff's assertion, the non-owned car provision would not have provided coverage for Amanda Bundy while driving David Bundy's pickup truck, absent the "Cars Owned By Household Residents" provision.

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

IN RE: BILL F. BLAIR, )  
 )  
 Debtor/Appellant, )  
 )  
 vs. )  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 )  
 Creditor/Appellee. )

ENTERED ON DOCKET

DATE AUG 26 1998

No. 96-C-999-K ✓

**FILED**

AUG 25 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

O R D E R

On July 7, 1998, Magistrate Judge Joyner filed a Report and Recommendation, recommending that this Court affirm the decision of the Bankruptcy Court below. The debtor/appellant has timely filed an objection. The parties proceeded in the Bankruptcy Court under stipulated facts, which are set forth in the Report and Recommendation. In summary, the debtor was notified on or about February 18, 1991 by the Internal Revenue Service ("IRS") of adjustments to his federal income tax returns for certain prior years. Debtor did not notify the Oklahoma Tax Commission ("OTC") of the changes or file an amended Oklahoma income tax return. However, the OTC learned of the adjustments from the IRS and on November 27, 1991, issued debtor a "proposed assessment" which was to become final if not protested within thirty days.

On December 20, 1991, (one week before the assessment would automatically become final), debtor filed for Chapter 7 bankruptcy protection. On April 21, 1992, debtor obtained his final discharge from bankruptcy. The OTC did not issue a new assessment, but on

March 2, 1993, filed a tax lien against the debtor's property.

Debtor argued to the Bankruptcy Court that the OTC assessment became final following thirty days, thereby violating the automatic stay of 11 U.S.C. §362, which serves as a protection to bankruptcy filers. The Bankruptcy Court rejected this argument, relying upon the decision of In re Richards, 994 F.2d 763 (10<sup>th</sup> Cir.1993), which held that an assessment period granted to the IRS by another provision of the Bankruptcy Code was suspended during the pendency of a bankruptcy proceeding. The Bankruptcy Court below found this decision analogous to the present situation, upon which there is little authority. The Bankruptcy Court below further invoked its equitable powers, citing In re Calder, 907 F.2d 953 (10<sup>th</sup> Cir.1990), for the proposition that a debtor's inequitable conduct (here, failure to file an amended state tax return or notify the OTC) could be taken into account in considering alleged violations of the automatic stay.

In his Report and Recommendation, Judge Joyner likewise concluded that §362 "acted as a stay with respect to the assessment becoming final. The stay was then 'lifted' when the Debtor's discharge was granted. After the discharge, Debtor had the remainder of the time (one week) to file an objection to the assessment. Absent the Debtor's filing of an objection, the assessment became final." (Report and Recommendation at 5) (citation omitted).

This Court agrees. The clear purpose of the thirty days granted by the OTC in its preliminary assessment is to serve as a

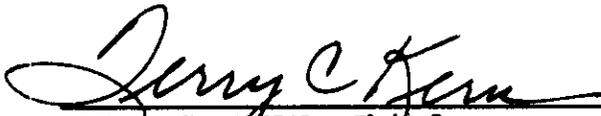
"grace period" whereby objections can be filed by tax payers, and corrections made or misunderstandings resolved. If the filing of bankruptcy during the grace period served to void tax assessments as violations of the automatic stay, as opposed to tolling their perfection, the OTC will cease bestowing the grace period, and its salutary purpose will be lost.

The Bankruptcy Court ruled, and the debtor has not disputed, that the tax assessment sought by the OTC is not subject to discharge in bankruptcy. Congress surely did not intend the timing of a bankruptcy filing to produce avoidance of the tax assessment by what is, at worst, a technical violation of the automatic stay.

The Court finds that the Bankruptcy Court's citation of authority, and invocation of its equitable powers, supports the result reached by both the Bankruptcy Court and the Magistrate Judge.

It is the Order of the Court that the objection of the debtor/appellant (#5) to the Report and Recommendation of the Magistrate Judge is hereby overruled. The decision of the Bankruptcy Court below is AFFIRMED.

ORDERED this 24 day of August, 1998.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE



It is the Order of the Court that the Report and Recommendation of the Magistrate Judge is hereby accepted as entered. The decision of the Bankruptcy Court below, denying appellant's motion to set aside default judgment, is REVERSED and REMANDED for further proceedings. This Order constitutes a final Order in case no. 97-C-961-K.

ORDERED this 24 day of August, 1998.

A handwritten signature in cursive script, reading "Terry C. Kern", written over a horizontal line.

TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

GARY D. SMITH, JR. and  
CAROLYN SULLIVAN,

Plaintiffs,

v.

EAKIN TRUCKING, INC.,

Defendant.

ENTERED ON DOCKET

DATE AUG 26 1998

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

**FILED**

AUG 25 1998

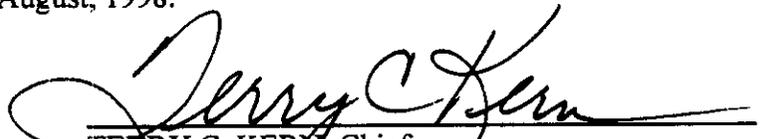
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

On July 28, 1998, Magistrate Judge Eagan entered a Report and Recommendation for this case. No objection has been filed to the Report and Recommendation and the ten-day time limit of Fed. R. Civ. P. 72(b) has run. The Court has also independently reviewed the Report and Recommendation and sees no reason to modify or reject the findings and recommendations therein.

The Report and Recommendation is accepted as entered. It is the Order of the Court that this case be transferred to the Western District of Arkansas pursuant to 28 U.S.C. § 1404(a), the Motion by Dale Eakin to Dismiss for Lack of Personal Jurisdiction be deemed moot as a result of the transfer, and the Motion to Dismiss Defendants' First Cause of Action be determined by the transferee court.

ORDERED this 24 day of August, 1998.

  
FERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

GARY D. SMITH, JR. and  
CAROLYN SULLIVAN,

Plaintiffs,

v.

EAKIN TRUCKING, INC.,

Defendant.

ENTERED ON DOCKET

DATE AUG 26 1998

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

**FILED**

AUG 25 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

On July 28, 1998, Magistrate Judge Eagan entered a Report and Recommendation for this case. No objection has been filed to the Report and Recommendation and the ten-day time limit of Fed. R. Civ. P. 72(b) has run. The Court has also independently reviewed the Report and Recommendation and sees no reason to modify or reject the findings and recommendations therein.

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ORDERED this 24 day of August, 1998.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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claims for nuisance, fraud, and interference with existing business and prospective economic relationships. No amount of actual or punitive damages was alleged.

On June 18, 1998, plaintiff filed the motion to remand. On July 16, 1998, defendant filed a supplemental notice of removal. The supplemental notice contained a three page factual statement to support defendant's claim that the amount in controversy in this action exceeds \$75,000. Defendant contends that it paid in excess of \$75,000 for property which includes the 20 acres here in controversy. Additionally, defendant contends that in order to improve the property, the partnership mortgaged the property to secure a loan for \$172,458.90. Defendant contends that the jurisdictional amount in controversy is satisfied by the potential loss it would suffer if plaintiff prevailed in this action by acquiring the 20 acres in dispute.

From a review of the record, the Court concludes that plaintiff's motion to remand should be granted. There is a presumption against removal jurisdiction. *Laughlin v. Kmart Corporation*, 50 F.3d 871, 873 (10<sup>th</sup> Cir. 1995). "The courts must rigorously enforce Congress' intent to restrict federal jurisdiction in controversies between citizens of different states." *Miera v. Dairyland Ins. Co.*, 143 F.3d 1337, 1339 (10<sup>th</sup> Cir. 1998). The rule governing dismissal for want of jurisdiction in cases brought in federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. *Id.* "Where a plaintiff has not instituted suit in federal court, there is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court." *Id.*

For purposes of diversity jurisdiction, the amount in controversy is ordinarily determined by allegations in the state court petition or, where it is not dispositive, by allegations in the notice of removal to federal court. *Laughlin v. Kmart Corporation*, 50 F.3d at 873. The burden is on the

defendant requesting removal to federal court to set forth, in the notice of removal, the underlying facts supporting the assertion that the amount in controversy exceeds \$75,000 for purposes of diversity jurisdiction. *Id.*

It is the conclusion of the Court, that the defendant did not timely meet the requisites for effective removal to federal court. Additionally, defendant has also failed to meet the burden of establishing the requisite jurisdictional amount in controversy. In order for removal to be effective, the notice of removal must be filed within 30 days from service of the state court petition. 28 U.S.C § 1446. "The time to ascertain if the requisite jurisdictional amount necessary to invoke Federal Court jurisdiction is present is the time the petition for removal is filed." *Nickel v. Jackson*, 380 F. Supp. 1389 (W.D.Okla.1974). The burden is on the party requesting removal to set forth, in the notice of removal itself, the underlying facts supporting the assertion that the amount in controversy is \$75,000. *Laughlin v. Kmart Corporation*, 50 F.3d at 873. Where the petition filed in state court fails to claim an amount in damages, and the removal petition merely states the jurisdictional amount is satisfied without a supporting factual statement, the removal is defective. *Id.* Approximately two months after the notice of removal was filed, defendant filed a supplemental notice of removal. It was in the supplemental notice that the defendant furnished the Court with the factual support for his jurisdictional prerequisites. Supplemental notices to establish jurisdiction are permissible under 28 U.S.C § 1653. However, unless the supplemental notice is filed within the 30 day time limitation, it can only be considered by the Court if the supplement involves only a minor technical correction. *See, e.g. Castle v. Laurel Creek Co., Inc.*, 848 F.Supp. 62 (S.D.Va. 1994), and *Moody v. Commercial Ins. of Newark*, 753 F. Supp. 198 (N.D.Tex 1990). Setting forth the factual statement

supporting the \$75,000 jurisdictional amount is not a "minor technical correction" to the original notice of removal. Thus, the defendant did not timely invoke removal jurisdiction.

Moreover, defendant has failed to meet its burden of establishing an amount in controversy in excess of \$75,000. First, plaintiff is not seeking to quiet title to the entire parcel of property. Even though defendant asserts that the partnership paid in excess of \$75,000 for the property, only a portion of that property is in dispute. That portion is valued at \$20,000. Defendant has offered no proof to the contrary. Further, defendant executed a note and mortgage secured by the entire property. The note and mortgage has already been executed. There is no loss shown to the defendant by plaintiff asserting a claim on a portion of that collateral. It would be the holder of the mortgage rather than defendant which may claim a loss in the value of the collateral in the event plaintiff prevailed. The rights and obligations set forth in the mortgage contract between the defendant and a third party would not support a loss that could satisfy the necessary amount in controversy as required to vest this Court with jurisdiction.

Defendant has not established to a legal certainty that the amount in controversy is in excess of \$75,000. Accordingly, the Court sustains plaintiff's motion to remand. The Clerk of the Court is directed to remand this case back to Ottawa County for want of federal court jurisdiction.

IT IS SO ORDERED this 27<sup>th</sup> day of August, 1998.

  
H. DALE COOK  
Senior, U.S. District Judge

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

**FILED**

AUG 25 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DUANE P. KINCAID and SHAREN )  
M. KINCAID, Husband and )  
Wife, )

Plaintiffs, )

vs. )

Case No. 97-C-913-BU

HAROLD E. STANDRIDGE, DON K. )  
LITTLE, JR.; FARMERS INSURANCE )  
COMPANY, INC., and FARMERS )  
INSURANCE EXCHANGE, )

Defendants. )

ENTERED ON DOCKET

DATE AUG 26 1998

**ORDER**

This matter came before the Court upon the oral motion of Defendant, Don K. Little, Jr., for judgment as a matter of law pursuant to Rule 50(a), Federal Rules of Civil Procedure, on the claims of Plaintiffs, Duane P. Kincaid and Sharen M. Kincaid. For the reasons stated on the record, Defendant, Don K. Little, Jr.'s motion is granted.

As to Defendant, Don K. Little Jr.'s cross-claim against Defendant, Harold E. Standridge, for contribution/indemnity, Defendant, Don K. Little, Jr., has represented on the record that the cross-claim is moot in light of the Court's favorable ruling on his Rule 50(a) motion. Although the Court stated on the record that Defendant, Don K. Little, Jr., should be granted judgment as a matter of law on the cross-claim, the Court, upon further consideration, finds that the cross-claim should instead be dismissed without prejudice. The Court believes that such ruling is appropriate in light of the Court's ruling and Defendant, Don K.

Little, Jr.'s representation that the cross-claim is now moot. Defendant, Don K. Little, Jr.'s cross-claim for contribution/indemnity is dismissed.

IT IS THEREFORE ORDERED that Defendant, Don K. Little, Jr.'s oral motion for judgment as a matter law pursuant to Rule 50(a), Federal Rules of Civil Procedure, is **GRANTED** and that Defendant, Don K. Little, Jr.'s cross-claim against Defendant, Harold E. Standridge, for contribution/indemnity is **DISMISSED WITHOUT PREJUDICE**.

ENTERED this 25<sup>th</sup> day of August, 1998.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

JEFFREY M. WEISER, PAUL E. JORNAYVAZ, )  
and HOWARD W. MARTIN )

Plaintiff(s), )

vs. )

STEPHEN J. HEYMAN, STEPHEN E. )  
JACKSON, individually and as Trustee of the )  
Stephen E. Jackson Trust, )

Defendant(s). )

ENTERED ON DOCKET  
DATE AUG 26 1998

Case No. 95-CV-854-BU(J) ✓

**FILED**  
AUG 25 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**REPORT AND RECOMMENDATION**

Plaintiffs filed a motion for partial summary judgment on February 11, 1998. [Doc. No. 9-1]. Plaintiffs request that the Court grant summary judgment in favor of Plaintiffs on Plaintiffs' first claim for relief (breach of contract) and on elements of Plaintiffs' second claim for relief (fraud). Plaintiffs assert that these causes of action were previously decided in an Oklahoma Court state court action, and request that the Court preclude the re-litigation of those issues. Defendants acknowledge the prior state court action but argue that application of *res judicata* or offensive collateral estoppel by this Court is not appropriate.

The Court has thoroughly reviewed the briefs of the parties, the case law, and has listened to the argument of counsel. The Court concludes that under the facts as presented in this case, *res judicata* and collateral estoppel should not be applied. The

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Magistrate Judge recommends that Plaintiffs motion for partial summary judgment be **DENIED**. [Doc. No. 9-1].

## **I. BACKGROUND FACTS**

In 1983, Defendants Steven Heyman ("Heyman") and Steven Jackson ("Jackson") (the Defendants in this action) and Robert Jackson ("R. Jackson") and Kevin Sullivan ("Sullivan") formed American Central Gas Companies ("American Central Gas Companies"). Each founder originally held 25% of ACGC's stock and each had a position on ACGC's Board of Directors. Plaintiffs Weiser, Jornayvaz, and Martin each were employees of ACGC and each ultimately became minority shareholders.

Defendants represent that at the time of the events which are in dispute by the parties, Heyman, Jackson, and R. Jackson, each owned 17.3% of ACGC's stock, Sullivan owned 15.74% of the stock, the Prudential Insurance Company of America owned 17.999% of the stock and the Plaintiffs, added together, owned less than 8%.

Plaintiffs and Defendants represent that the directors of ACGC began to disagree in 1990 with regard to ACGC's business. Plaintiffs represent that Heyman and Jackson wanted to sell ACGC's assets while R. Jackson and Sullivan opposed such an action. Defendants assert that Sullivan wanted to oust Heyman and Jackson from the company and began a course of unwise investments.

The directors of the company, realizing they could no longer effectively work together, entered a "Standstill Agreement" in May 1991. Plaintiffs represent the Standstill Agreement as placing limitations on ACGC and as requiring a good faith

effort by the parties to sell ACGC. Plaintiffs note that if a minimum bid of \$32 million in cash or cash equivalent was received, the four principal shareholders were required to meet and vote in favor of selling ACGC to the third party. In addition, Plaintiffs represent that the Standstill Agreement required all principal shareholders to use their best efforts. Plaintiffs assert that as minority shareholders Plaintiffs are third party beneficiaries to the Standstill Agreement.

Defendants assert that only the signatories to the Standstill Agreement were the intended beneficiaries of the sale. Defendants note that because all shareholders would directly benefit from the management provided by the Standstill Agreement, the signatories to the agreement determined that legal costs should be paid by ACGC to reimburse for the legal costs incurred in the creation of the Standstill Agreement. Defendants additionally point out that the signatories executed a Buy/Sell Agreement because the signatories realized that a minimum bid might not be received. Absent a sale of the company under the Standstill Agreement, the Buy/Sell Agreement would give Sullivan and R. Jackson (one side) and Heyman and Jackson (one side) the opportunity to bid for the stock held by the other side.

Plaintiffs assert that during the term of the Standstill Agreement, Zapata Corporation ("Zapata") offered to purchase the company for \$30 million cash plus \$20 million in Zapata stock. Plaintiffs assert that a meeting of ACGC was called to vote on the Zapata Offer but that Defendants refused to attend the meeting. The Buy/Sell Agreement went into effect and Defendants acquired ownership and control of ACGC.

Defendants assert that the notice of the meeting (to vote on the Zapata Offer)

was invalid, and Defendants declined to attend the meeting on the advice of counsel. After the Standstill Agreement's term expired, R. Jackson began the bidding under the Buy /Sell Agreement. The sale of Sullivan's and R. Jackson's stock to Defendants was completed March 31, 1992.

R. Jackson sued Defendants in Oklahoma state court. Plaintiffs assert that in this state court action a jury found that Defendants had breached the Standstill Agreement, had fraudulently induced R. Jackson into executing the Standstill Agreement, and that R. Jackson had been damaged.

Plaintiffs request that the Court apply the principles of *res judicata* or collateral estoppel to prevent the re-litigation of those issues which were decided in the state court action between R. Jackson and Defendants.

## **II. RES JUDICATA**

Plaintiffs initially assert that *res judicata* applies and bars the re-litigation of the issues previously decided in the state court action. Plaintiffs note that *res judicata* bars parties and their privies from litigating previously decided issues which were or could have been decided. Plaintiffs assert that as third party beneficiaries to the Standstill Agreement they are in privity with the principal shareholders of ACGC.

Defendants assert that Plaintiffs' *res judicata* argument depends on several factors. One, are Plaintiffs third party beneficiaries to the Standstill Agreement? Two, is a third party beneficiary considered "in privity" for the purposes of *res judicata*? Three, do any factual questions need to be resolved with respect to Plaintiffs asserted third party beneficiary status? Four, what issues would be *res judicata*? Defendant

asserts that Plaintiffs are not third party beneficiaries, that Plaintiffs are not in privity with R. Jackson, and that factual issues exist which must be decided by a jury in this action.

In determining whether to apply principles of *res judicata* or collateral estoppel of a prior state court action, a federal court, hearing a case based on diversity jurisdiction, applies the law of the state rendering the judgment. Federal Insurance Co. v. Gates Learjet Corp., 823 F.2d 383 (10th Cir. 1987).

#### A. THIRD PARTY BENEFICIARY

Plaintiffs assert that Plaintiffs are third party beneficiaries to the Standstill Agreement. Defendants assert that whether or not Plaintiffs are third party beneficiaries is a disputed question of fact and precludes summary judgment. After reviewing the arguments of the parties, the Court concludes that a final decision as to whether or not Plaintiffs are third party beneficiaries to the Standstill Agreement is not necessary to the *res judicata* determination. The Court finds that regardless of whether or not Plaintiffs are third party beneficiaries, *res judicata* is not properly applied under the circumstances presented. However, because of the importance of the third party beneficiary argument,<sup>1/</sup> the Court further examines the positions of the parties.

Defendants note that whether an individual is a third party beneficiary to a contract depends on the intention of the parties. Defendants state that disputed facts

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<sup>1/</sup> If Plaintiffs are not third party beneficiaries to the Standstill Agreement, Plaintiffs have no cause of action for breach.

exist and therefore summary judgment is precluded. Defendants refer to two Oklahoma cases. Each of the Oklahoma cases referred to by Defendants support the proposition that the determination of third party beneficiary status is dependent on the intent of the parties. However, neither case holds that the determination of the intent of the parties must be made by a jury. See Barbero v. Equitable General Insurance Co., 607 P.2d 670, 673 (Okla. 1980); ITT Indus. Credit Co. v. L-P Gas Equipment, Inc., 453 F. Supp. 671, 675 (W.D. Okla. 1978) (both cases relied upon by Defendants). In G.A. Mosites Co. of Fort Worth, Inc. v. Aetna Casualty and Surety Co., 545 P.2d 746 (Okla. 1976), the court observed:

The question presented by the appellant's first proposition is whether or not the contract in this case with its included performance bond constituted a third party beneficiary contract in favor of the appellant. The intention of the parties to the contract as they are reflected in the contract must provide the answer to this question. In this connection, we note a general rule set out in 17 Am. Jur. 2d, Contracts s 304, pp. 727--728 as follows:

'As a general proposition, the determining factor as to the right of a third party beneficiary is the intention of the parties who actually made the contract. The real test is said to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts. Thus, it is often stated that the contract must have been intended for the benefit of the third person in order to entitle him to enforce it.'

This section then makes the further statement that:

'The question whether a contract was intended for the benefit of a third person is generally regarded as one of construction of

the contract. The intention of the parties in this respect is determined by the terms of the contract as a whole, construed in the light of the circumstances under which it was made and the apparent purpose that the parties are trying to accomplish.'

\* \* \* \*

In determining whether a third party beneficiary contract was intended, we look only to the contract and its included performance bond and not to the statutory payment bond, which admittedly covers the appellant, but on which an action is barred by appellant's failure to give the required ninety days notice.

The Court concludes that the issue of intent of the parties to the contract is determined based on contract interpretation. Under the rules of contract interpretation, if the contract is not ambiguous, the court construes it based on the "four corners" of the contract.

Section 8(b), labeled "Miscellaneous," provides that "[t]he parties agree that this Agreement is for the benefit of the Company and all of its stockholders and, therefore, the Company shall pay legal fees and expenses incurred by (1) Messrs. Stephen E. Jackson and Stephen J. Heyman, and (2) Messrs. Kevin J. Sullivan and Robert W. Jackson in negotiating and documenting the agreements contained herein and the Buy/Sell Agreement; provided however, this reimbursement for payment obligation shall not be in excess of \$50,000.00 for either of said groups." See Exhibits to Plaintiffs' Brief in Support of Motion for Partial Summary Judgment, filed February 11, 1998, Exhibit "E."

In interpreting the contract, Defendants urge that the "Standstill Agreement" is divisible. According to Defendants, provisions relating to the day-to-day management of the company were for the benefit of the company and all of the shareholders. Defendants argue that the provisions in the Standstill Agreement relating to the responsibilities of the signatories to the agreement regarding efforts to sell the stock directly bound and were solely for the benefit of the signatories. Defendants additionally point out that because the management provisions of the Standstill Agreement benefitted the company, the signatories to the agreement agreed that the company would bear the legal costs to remedy the management problems. Defendants assert that section 8(b) of the Standstill Agreement was drafted for that purpose. Defendants have filed herein an affidavit to that affect. See Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment, Exhibit 1.

Defendants further point out that the Standstill agreement covered a minimum of 90% of the stock, that Plaintiffs own less than 10% of the stock, and that Plaintiffs did not vote to approve the Zapata sale. Defendants maintain that these arguments all raise factual questions as to whether Plaintiffs are third party beneficiaries. Plaintiffs argue that Defendants' arguments are red herrings since the Zapata offer covered 100% of the stock.

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Widon Third Oil

& Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). To survive a motion for summary judgment, the nonmovant "must establish that there is a genuine issue of material facts. . . ." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 248. The substantive law determines which facts are material. Id. And the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

As noted, Defendants have posed some "facts" which Defendants assert preclude a finding of summary judgment with respect to whether or not Plaintiffs are third party beneficiaries. Plaintiffs assert that these alleged "facts" are red herrings and do not preclude the Court's finding that Plaintiffs are third party beneficiaries to the Standstill Agreement. The Court declines to decide this issue. The Court concludes that even if Plaintiffs are third party beneficiaries, *res judicata* should not be applied in this case. Therefore a decision on the status of Plaintiffs as third party beneficiaries is not yet required. The Court concludes that this issue deserves additional fact finding.

#### B. PRIVACY

As noted by Defendants, the doctrine of *res judicata* applies only between parties and persons in privity to parties to an earlier action. Defendants assert that privity requires a successive relationship or ownership of the same property. Plaintiffs

assert that privity involves the same "interest, character, or capacity" or a person who represents the "same legal right." Plaintiffs contend that they are "in privity" with the plaintiff in the earlier state court action because Plaintiffs are third party beneficiaries to the Standstill Agreement which was at issue in the state court action.

Both parties agree that *res judicata* bars parties and those in privity with parties from relitigating a previously determined action. The parties disagree as to whether or not Plaintiffs are in privity with the party whose rights were adjudicated in the prior state court action. R. Jackson, a signatory to the Standstill Agreement sued Defendants in state court. Plaintiffs assert that they are in privity with R. Jackson.

The Court has struggled with the concept of "privity." In Dierks v. Walsh, 218 P.2d 920 (Okla. 1950), the court noted:

To make a person a "privity" to an action, he must have acquired an interest in the subject-matter of the action either by inheritance, succession, or purchase from a party either after the suit is brought in which the title or right is involved or after the judgment was rendered, or he must hold the property subordinately.

Id. at 923. Plaintiffs do not claim an interest by inheritance, succession, or purchase from R. Jackson. Plaintiffs do not claim an interest "subordinate" to R. Jackson. Plaintiffs claim an interest as the third party beneficiary to the Standstill Agreement. Pursuant to Dierks, Plaintiffs are not "in privity" with R. Jackson.

As noted by Plaintiffs, some Oklahoma courts seem to have a more expansive definition of privity. Plaintiffs refer to Hildebrand v. Gray, 866 P.2d 447, 450-51 (Okla. Ct. App. 1993).

[F]or privity to apply, the party in privity must actually have the same interest, character, or capacity as the party against whom the prior judgment was rendered. However, the scope of who qualifies as "privies" varies according to the circumstances of the particular case. "In general, it may be said that such privity involves a person so identified in interest with another that he represents the same legal right."

Hildebrand at 450-51 (citations omitted).

The differences between these definitions is explained by the changing concept of what constitutes a "privity."

Exceptions to the rule that nonparties cannot be bound were traditionally expressed by statements that a judgment is binding on parties and persons in "privity with them. Older definitions of privity were very narrow. [Privity was limited to a mutual succession or relationship to the same rights of property.] As the preclusive effects of judgments have expanded to include nonparties in more and more situations, however, it has come to be recognized that the privity label simply expresses a conclusion that preclusion is proper.

18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449 (1981).

Some of the factors examined by the courts include: identity of parties; identity of issues, claims and defenses; opportunity to participate in the prior litigation; and adequate representation of interest in the prior litigation. Some areas in which the parties in this litigation are in substantial dispute as to the sameness of the state court issue to the similar issue in this proceeding include: (1) Was the state court verdict impacted by Defendants' exercise of the Buy/Sell agreement (not an issue in this case) or by the failure of Defendants to comply with the Standstill Agreement? (2) Do Plaintiffs' damages in this case derive from Defendants' exercise of the Buy/Sell

agreement, or from Defendants' failure to comply with the Standstill Agreement? The state court litigation involved a "majority" stockholder's lawsuit against Defendants when the majority stockholder was forced to sell under a Buy/Sell agreement. Surely the damages of minority stockholders (this lawsuit) who were forced out by a majority stockholder would be calculated differently and would raise different collateral issues.

Plaintiffs rely on Shewmake v. Badger Oil Corporation, 654 F. Supp. 1184 (D. Colo. 1987). Shewmake is one of very few cases dealing with a third party beneficiary and the *res judicata* issues. The court states "[i]f plaintiffs maintain they were third party beneficiaries to the lease assignment between the corporations, then they must be considered in privity with Fuelex during the state litigation." Shewmake, however, is of limited assistance because it involved Colorado law, and as noted above, in this case, Oklahoma law applies. Regardless, the Shewmake court noted that the determination of whether or not the party was a third party beneficiary was "unnecessary" because "under either analysis of plaintiffs' legal position . . . their arguments for relief are unavailing and the summary judgment motion must be granted." Id. at 1187. The Shewmake court likewise does not provide analysis to support the court's third party beneficiary conclusion. Defendants additionally assert that in Shewmake the litigants in the underlying litigation affirmatively sought to include the claims of the litigants in the subsequent litigation. Defendants note that no such effort was made in the state trial court litigation of this action.

Under the facts and circumstances in this case, the Court concludes that R. Jackson and Plaintiffs do not have sufficient identity of interest to qualify as privies.

The Court is partially convinced of this result by the consideration of the reverse of the situation presented to the Court. If, in the prior state court action Defendants had prevailed, and, in this action Defendants were attempting to argue that Plaintiffs were barred by *res judicata* from adjudicating issues related to the Standstill Agreement because those issues were previously determined, the Court would certainly be reluctant to bind Plaintiffs to that prior state court action. The Court finds that based upon the pleadings and attached affidavits, Plaintiffs have not shown as a matter of law that they are "in privity" with R. Jackson. Thus, the prior state court action is not *res judicata* with respect to this action. See also Restatement (Second) of Judgments, § 56 ("When a contract between two persons creates an obligation in favor of another person as an intended beneficiary: (1) A judgment for or against the promisee in an action between him and the promisor does not preclude an action by the beneficiary on the obligation to him unless at the time the judgment was rendered the promisee had power to discharge the obligation.").

### III. COLLATERAL ESTOPPEL

Plaintiffs assert that absent application of *res judicata*, the Court should apply collateral estoppel and preclude Defendants from relitigating previously decided claims. Plaintiffs argument has appeal. Defendants had a full and fair opportunity to litigate many of the issues which Plaintiffs now raise against Defendants in this lawsuit, and theoretically should not be permitted to relitigate those issues. However, Oklahoma law does not favor the adoption of offensive collateral estoppel under the circumstances outlined by the parties in this action.

Collateral estoppel, like *res judicata*, generally applies to parties and those in privity with parties. The concept of collateral estoppel has evolved to include a distinction between "offensive" and "defensive" collateral estoppel as explained by the Oklahoma Supreme Court in Anco Manufacturing & Supply Co. v. A.R. Swank, Jr., 524 P.2d 7 (Okla. 1974) (*citations omitted*).

[A]s a general proposition, a judgment can operate as collateral estoppel only where all the parties to the proceeding in which the judgment is relied upon were bound by the judgment. The rule abandoning in whole or in part the requirement of mutuality of estoppel is sometimes referred to as the 'nonmutuality rule,' or the doctrine of 'unilateral estoppel.' The phrase 'defensive use' of the doctrine of collateral estoppel means that a stranger to the judgment, ordinarily the defendant in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an element of his defense. On the other hand, the phrase 'offensive use' or 'affirmative use' of the doctrine means that a stranger to the judgment, ordinarily the plaintiff in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an essential element of his cause of action or claim. In other words, defensively a judgment is used as a 'shield,' and offensively as a 'sword.'"

Plaintiffs initially refer to Danner v. Dillard Department Stores, Inc., 949 P.2d 680 (Okla. 1997). In Danner, the Oklahoma court considered whether the defendants in a larceny prosecution had had a full and fair opportunity to litigate the issue of probable cause for their arrest so that relitigation of that issue in a civil malicious prosecution action should be precluded. The Oklahoma court concluded that collateral estoppel should not apply. In making this determination, the court noted that resolution depended upon whether the case fell within an exception to the rule that

"an order at preliminary hearing binding over the defendant for criminal trial precludes relitigation of the issue of probable cause in a subsequent civil suit for false arrest following acquittal." Id. at 682. Oklahoma courts have determined that "the finding of cause at [a] preliminary hearing provides a complete defense to a civil action based on the arrest." Id. This rule is not applicable in the civil context and therefore the cases referenced by Plaintiffs which rely on this rule are of limited assistance.<sup>2/</sup>

Plaintiffs additionally refer to Nixon v. City of Oklahoma City, 46 Okla. Bar J. 1551, No. 47125 (Okla. Ct. App. Aug. 12, 1975). Nixon is an unpublished decision of the Oklahoma Court of Appeals. Oklahoma statutes provide that "[n]o opinion of the Court of Civil Appeals shall be binding or cited as precedent unless it shall have been approved by a majority of the justices of the Supreme Court for publication in the official reporter." 20 O.S. Supp. 1996, § 30.5. Plaintiffs assert that the Oklahoma Supreme Court reviewed Nixon in 1976 and vacated the exemplary damages award but left in place an award of actual damages. Plaintiffs suggest that because the award of actual damages was based on the application of offensive collateral estoppel, and because the Oklahoma Supreme Court could have reversed the decision if it believed fundamental error had been committed, this Court can infer that the Oklahoma Supreme Court agreed with the offensive use of collateral estoppel. However, an inference that the Oklahoma Supreme Court decided not to publish the

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<sup>2/</sup> Plaintiffs additionally cite to Christopher v. Circle K Convenience Stores, Inc., 937 P.2d 77 (Okla. 1997); Lee v. Knight, 771 P.2d 1003 (Okla. 1989); Adamson v. Dayton Hudson Corp., 774 P.2d 478 (Okla. Ct. App. 1989). Each of these cases involves a prior criminal proceeding and a subsequent civil action. In addition, as pointed out by Defendants, Danner, Christopher, and Adamson each involve the defensive use of collateral estoppel.

case because it did not agree with the use of offensive collateral estoppel but declined to change the result could just as easily be reached. In affirming the Nixon decision in part, the Oklahoma Supreme Court expressly stated that the issue of the application of collateral estoppel was not appealed by the parties and that the Court declined to comment on the use of collateral estoppel by the lower appellate court. See Nixon v. Oklahoma City, 555 P.2d 1283, 1286 (Okla. 1976) ("The Court expresses no views with respect to issues resolved by the opinion of the Court of Appeals, such as the application of the doctrine of collateral estoppel, and which are not raised in this Court.").

In Russell v. Atlas Van Lines, Inc., 411 F. Supp. 111 (E.D. Okla. 1976), the Eastern District of Oklahoma addressed the Nixon decision and the interpretation urged by Plaintiffs.

In the recent case of Nixon et ux. v. City of Oklahoma City, 46 O.B.J. 1551 (Ct. of App. Okl. 1975) the Court of Appeals of Oklahoma held that collateral estoppel could be invoked by a plaintiff offensively to establish the liability of the defendant.

\* \* \* \*

The Court of Appeals recognized that the Supreme Court of Oklahoma had permitted only the defensive use of collateral estoppel by a stranger to the prior judgment. But, the Court of Appeals held: "[W]e 'see no legal or logical reason' why estoppel by prior judgment as a litigation-reducing mode should not be just as available to a plaintiff offensively as a 'sword' as it is to a defendant defensively as a 'shield.'"

It is clear, however, that opinions by the Oklahoma Court of Appeals are not precedent and do not announce principles of state law which this Court must follow in diversity cases. 20 Okla. Stat. § 30.5 provides in part: "No opinion of the Court of Appeals shall be binding or cited as precedent unless it shall have been approved by the majority

of the Justices of the Supreme court for publication in the official reporter." The parties herein have stated in their briefs that the Nixon case is presently before the Supreme Court on petition for certiorari but none of the issues relevant to this motion for summary judgment are raised by said petition; the issue which is said to have been raised goes only to the question of punitive damages. The Nixon opinion has not been published in the official reporter.

The most recent case in the Supreme Court of Oklahoma on this question is Anco Mfg. & Supply Co., Inc. v. Swank, 524 P.2d 7 (Okla.1974).

\* \* \* \*

The Supreme Court held that collateral estoppel was available to the defendant Anco as a defensive measure. In this regard the Supreme Court stated: "The only issue presented here is whether or not the doctrine of collateral estoppel may be applied defensively. We can see no legal or logical reason why it should not apply under the facts herein presented." In so holding the Supreme Court clearly recognized the distinction between the defensive use and the offensive use of the doctrine of collateral estoppel and the Court cited Annotation, 31 A.L.R.3d 1044 as stating that "the courts are more inclined to permit the defensive, than the offensive, use of the doctrine of collateral estoppel . . . ." None of the cases relied upon by the Supreme Court in Anco allowed the offensive use of collateral estoppel although there are several courts which have done so. Furthermore, there are persuasive arguments which can be made for refusing to adopt the offensive use of collateral estoppel. See Spettigue v. Mahoney, 8 Ariz. App. 281, 445 P.2d 557 (1969) and authority cited herein. It is clear that the court in Anco did not adopt anything more than the defensive use of collateral estoppel by a stranger to a prior judgment.

\* \* \*

Whether the Supreme Court of Oklahoma may on some future occasion adopt the offensive use of collateral estoppel remains to be seen; clearly it has not done so as of this day. Until a new or different course is taken this Court must apply the law of Oklahoma as it now exists. The Court therefore concludes that under Oklahoma law the

plaintiff herein is not entitled to rely on the prior determination of liability of the defendants because she was neither a party in that suit nor in privity with any party in that suit.

Russell at 113. The Court chooses not to attempt to infer the meaning behind the decision by the Oklahoma Supreme Court not to publish, but instead accepts the Oklahoma statute which addresses unpublished Court of Appeals decisions, and concludes Nixon has no precedential value.

Plaintiffs additionally urge that Oklahoma has adopted the Restatement (Second) of Judgments and has fully embraced the absence of mutuality and accepted both offensive and defensive collateral estoppel. However, this Court was unable to locate a single case in Oklahoma which has applied offensive collateral estoppel.<sup>3/</sup> In Robinson v. Volkswagenwerk AG, 56 F.3d 1268 (10th Cir. 1995), the Tenth Circuit Court of Appeals noted that "some Oklahoma cases indicate there must be 'identity of parties,' or mutuality to apply. The Oklahoma Supreme Court has recognized, however, that in some circumstances collateral estoppel may be asserted defensively by one who was not a party to the first action." Id. at 1273 n.3.

Defendants additionally point out that adoption of offensive collateral estoppel can actually encourage piece-meal litigation because plaintiffs may adopt a "wait-and-see" approach with respect to filing lawsuits.<sup>4/</sup>

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<sup>3/</sup> This does not include the unpublished cases cited by Plaintiffs or the cases in which the preceding action was a criminal action.

<sup>4/</sup> Plaintiffs assert that had the state court action been decided in favor of Defendants, that Defendants could have used the prior state court litigation in this lawsuit to support Defendants position.  
(continued...)

The Oklahoma courts have been reluctant to embrace collateral estoppel. No published Oklahoma cases outside of the criminal context have applied offensive collateral estoppel. This Court concludes that Oklahoma has not yet adopted offensive collateral estoppel, and recommends that the District Court decline to apply it in this case.

### RECOMMENDATION

The Magistrate Judge recommends that the District court **DENY** Plaintiffs' Motion for Partial Summary Judgment.

### OBJECTIONS

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

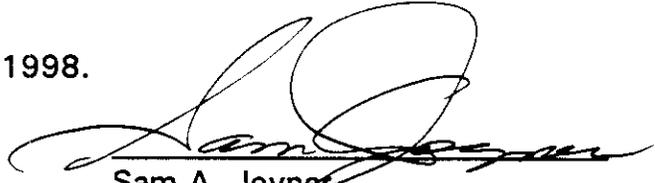
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<sup>4/</sup> (...continued)

Plaintiffs argue that therefore the "equal application of collateral estoppel, both offensively and defensively thus does not encourage a 'wait and see' approach." Plaintiffs misunderstand the labels "offensive" and "defensive" collateral estoppel. See Anco Manufacturing & Supply Co. v. A.R. Swank, Jr., 524 P.2d 7 (Okla. 1974). Plaintiffs, who were strangers to the first action, would not be "bound" under the principles of "defensive collateral estoppel."

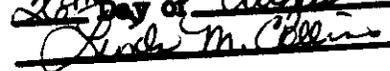
and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 25th day of August 1998.

  
Sam A. Joyner  
United States Magistrate Judge

**CERTIFICATE OF SERVICE**

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

25th day of August, 1998.  


*Jan*

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA GIPSON, )  
Plaintiff, )  
vs. )  
KENNETH S. APEL, Commissioner )  
Social Security Administration, )  
Defendant. )

ENTERED ON DOCKET  
DATE AUG 26 1998

Case No. 97-CV-250-J ✓

RECEIVED  
AUG 25 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FILED  
AUG 25 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

The parties herein, through their respective counsel, have reached an agreement, whereby, upon approval of the Court, the *Complaint* of the Plaintiff filed on March 19, 1997, shall be dismissed.

Approved as to Form & Content:

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fedct/dismisno

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01/MJ

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

CLAUDE LAWSON, et al., )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 B.C.R. CAPITOL CORPORATION, )  
 d/b/a DAY'S INN SOUTH TULSA, )  
 A CORPORATION, MAURICE SALDIYAR, )  
 and JESUS ESPARAZA, INDIVIDUALLY )  
 AND d/b/a DAY'S INN RESTAURANT, )  
 )  
 Defendants. )

ENTERED ON DOCKET  
DATE AUG 26 1998

Case No. 98-CV-247-BU ✓

**FILED**  
IN OPEN COURT  
AUG 25 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

At the case management conference held on May 28, 1998, the Court, pursuant to Rule 4(m), Fed. R. Civ. P., notified Plaintiffs that it would dismiss Defendants, Maurice Saldiyar and Jesus Esparaza, individually and d/b/a Day's Inn Restaurant, if Plaintiffs did not effect service upon Defendants within thirty (30) days. Upon review of the record, it appears that Plaintiffs have not effected service within the time specified by the Court.

Accordingly, the action against Defendants, Maurice Saldiyar and Jesus Esparaza, individually and d/b/a Day's Inn Restaurant, is **DISMISSED WITHOUT PREJUDICE.**

ENTERED this 25<sup>th</sup> day of August, 1998.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

CLAUDE LAWSON, et al., )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
B.C.R. CAPITOL CORPORATION, )  
d/b/a DAY'S INN SOUTH TULSA, )  
A CORPORATION, MAURICE SALDIYAR, )  
and JESUS ESPARAZA, INDIVIDUALLY )  
and d/b/a DAY'S INN RESTAURANT, )  
 )  
Defendants. )

ENTERED ON DOCKET

DATE AUG 26 1998

Case No. 98-CV-247-BU ✓

**FILED**  
IN OPEN COURT

AUG 25 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

This matter comes before the Court upon Defendant B.C.R. Capitol Corporation's Motion for Summary Judgment. Upon review of the record, it appears that Plaintiffs have failed to respond to the motion within the time prescribed by N.D. LR 7.1(C). Pursuant to N.D. LR 7.1(C), the Court, in its discretion, deems the motion confessed.

Upon independent review of the unopposed motion, the Court finds that no genuine issues of material fact exist and that Defendant, B.C.R. Capitol Corporation, is entitled to judgment as a matter of law.

Accordingly, Defendant, B.C.R. Capitol Corporation's Motion for Summary Judgment (Docket Entry #7) is **GRANTED**. Judgment shall issue forthwith.

ENTERED this 25<sup>th</sup> day of August 1998.

Michael Burrage  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

(11)

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

CLAUDE LAWSON, et al., )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 B.C.R. CAPITOL CORPORATION, )  
 d/b/a DAY'S INN SOUTH TULSA, )  
 A CORPORATION, MAURICE SALDIYAR, )  
 and JESUS ESPARAZA, INDIVIDUALLY )  
 and d/b/a DAY'S INN RESTAURANT, )  
 )  
 Defendants. )

ENTERED ON DOCKET  
DATE AUG 26 1998

Case No. 98-CV-247-BU ✓

**FILED**  
IN OPEN COURT  
AUG 25 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGMENT**

This matter came before the Court upon Defendant B.C.R. Capitol Corporation's Motion for Summary Judgment and the issues having been duly considered and a ruling having been duly rendered, and Defendants, Maurice Saldiyar and Jesus Esparaza, individually and d/b/a Day's Inn Restaurant, having been previously dismissed without prejudice,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendant, B.C.R. Capitol Corporation, and against Plaintiffs, Claude Lawson and Genevieve Lawson, and that Defendant, B.C.R. Capitol Corporation, is entitled to recover of Plaintiffs, Claude Lawson and Genevieve Lawson, its costs of action.

DATED this 25<sup>th</sup> 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**

THELMA MORAN (SSN: 441-80-3148) and )  
DEBORAH A. DAVIS, )  
SSN: 447-60-5263 )

AUG 25 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Plaintiff, )

v. )

No. 97-C-657-J ✓

KENNETH S. APFEL, Commissioner )  
of Social Security Administration,<sup>1/</sup> )

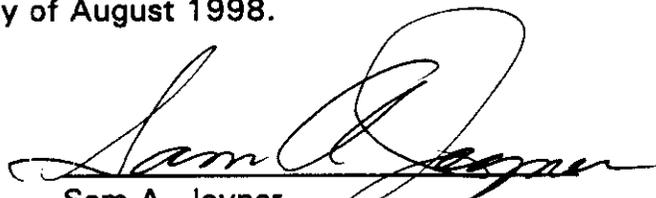
Defendant. )

ENTERED ON DOCKET  
DATE AUG 26 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.

It is so Ordered this 25th day of August 1998.

  
Sam A. Joyner  
United States Magistrate Judge

---

<sup>1/</sup> 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.

(12)

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 25 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

THELMA MORAN (SSN: 441-80-3148) and )  
DEBORAH A. DAVIS, )  
SSN: 447-60-5263 )

Plaintiff, )

v. )

KENNETH S. APFEL, Commissioner )  
of Social Security Administration,<sup>1/</sup> )

Defendant. )

No. 97-C-657-J ✓

ENTERED ON DOCKET  
DATE AUG 26 1998

ORDER<sup>2/</sup>

Plaintiffs appeal the decision of the Commissioner denying Plaintiff's Application for Lump Sum Death Payment filed on behalf of Thelma Moran, and the denial of the Application for Surviving Child's Insurance Benefits filed by Deborah A. Davis.<sup>3/</sup> Plaintiff asserts that the ALJ erred in concluding that Plaintiff Thelma Moran had not established that she was married to the decedent Robert D. Moran. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

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<sup>1/</sup> 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.

<sup>2/</sup> 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.

<sup>3/</sup> Administrative Law Judge R.J. Payne (hereafter "ALJ") concluded that the Plaintiffs had not met their burden of proof by decision dated May 8, 1996. [R. at 9]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on May 12, 1997. [R. at 5].

## I. PLAINTIFF'S BACKGROUND

Plaintiff, Thelma Davis Moran, was married to the deceased Robert Moran on December 31, 1992. Plaintiff and Mr. Moran were divorced April 6, 1994. [R. at 23]. Plaintiff testified that Mr. Moran moved out in February 1994. On April 22, 1994, Mr. Moran was in jail on a DUI charge and called Plaintiff asking that she come and pick him up. [R. at 25]. According to Plaintiff, Mr. Moran left her place and lived with a friend for a period of time and then returned to her place and lived with her until he died on August 7, 1994.

Plaintiff testified that the Judge who granted her divorce from Mr. Moran told Plaintiff that she and Mr. Moran could not remarry for six months. [R. at 28]. Plaintiff additionally stated that she and Mr. Moran believed that if they got back together within that time period that the divorce would be null and void. [R. at 28]. According to Plaintiff, she and Mr. Moran did not tell anyone about the divorce. [R. at 29].

Plaintiff testified that she and Mr. Moran had a joint bank account when they were married and that they continued to keep the joint bank account when they got divorced. [R. at 30]. Plaintiff testified that she and Mr. Moran attended church approximately one time each month, and that after the divorce she and Mr. Moran were introduced as husband and wife. [R. at 32].

Plaintiff stated that she and Mr. Moran believed that they were married when Mr. Moran moved back in with her and that they planned to also remarry on their anniversary date which is in December. [R. at 32-33]. Plaintiff testified that she and Mr. Moran purchased a 1985 Chevy together in June of 1994. [R. at 34].

Margaret Armstrong testified that she never knew that Plaintiff and Mr. Moran were divorced. [R. at 36]. She had heard Mr. Moran refer to Plaintiff as his wife.

Larry Dean Dees, a pastor, knew Plaintiff and Mr. Moran as husband and wife. He never knew that they were divorced until after Mr. Moran's death. [R. at 43]. A visitors card was completed at his church on June 12, 1994 and it stated "Mr. and Mrs. Moran." Mr. Dees additionally introduced Plaintiff and Mr. Moran as "Mr. and Mrs." at church. [R. at 48]. The funeral director informed him about the divorce. According to Mr. Dees, he acted as a "go-between" between the families and an agreement was reached that Mr. Moran's insurance money would pay for the funeral. [R. at 59-60].

In a "statement of marital relationship" completed by Plaintiff, she noted that "[h]e [Mr. Moran] kept saying that we would go on our anniversary date and have our vows renewed. . . . I wanted us together forever. I wanted us to get 'legally married' but he wanted to wait until our anniversary date so we would have one anniversary." [R. at 59].

Mr. Moran's sister, Karen Moran, submitted a "statement of claimant or other person." [R. at 63]. She noted that she was at the courthouse when Plaintiff attempted to have the divorce "undone." According to Ms. Moran, the court clerk informed Plaintiff that the judge could not set aside the divorce unless both of the parties were present and since Mr. Moran was deceased, the divorce could not be set aside. [R. at 63].

Cathy D. Moran Palmer submitted a statement noting that Mr. Moran lived with she and her mother "off and on." [R. at 65]. She wrote that she never heard Mr. Moran refer to Plaintiff and he as husband and wife. [R. at 66].

A "Tulsa County Work Program" form which was completed April 22, 1994, listed Plaintiff as "wife." Two death notices noted Mr. Moran's death and listed Plaintiff as a "surviving spouse." [R. at 98]. A fishing application was listed as "Thelma Moran." [R. at 90].

Checks from the Tulsa Teachers Credit Union dated June 13, 1994 were made out to "Thelma Davis." [R. at 94]. A certificate of title to a 1985 Chevrolet listed Thelma and Robert Moran as the owners. [R. at 95].

Mr. Moran's death certificate listed nobody as a "surviving spouse." Thelma Davis was listed as the "source of information."

## **II. STANDARD OF REVIEW**

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750. See also Young v. Sec. of Health and Human Services, 787 F.2d 1064, 1066 (6th Cir. 1985).

"The finding of the Secretary 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. "A reviewing court does not conduct a de novo examination of the evidence and it is not free to substitute its findings of fact for those of the Secretary if substantial evidence supports those findings and inferences. Young v. Sec. of Health and Human Services, 787 F.2d 1064, 1066 (6th Cir. 1985).

### **III. THE ALJ'S DECISION**

The ALJ noted that Plaintiff testified that she believed that if she and the wage earner resumed living together they would be married. The ALJ referred to earlier statements of Plaintiff and concluded that her earlier statements did not support her testimony. The ALJ noted that the divorce decree indicated Plaintiff wanted to return to using the name "Thelma Davis," and that the death certificate listed "informant" as "Thelma Davis," and Mr. Moran's marital status as "divorced." In addition the "Statement of Death by Funeral Director" dated August 15, 1994 left blank the name and address of any widow. The ALJ also noted that Plaintiff indicated on September 7, 1994 that "we would go on our anniversary date and have our vows renewed," and that Plaintiff stated they were going to "have a ceremony in December on our anniversary, but he died."

The ALJ also observed that Plaintiff stated that a judge informed her that if she and Mr. Moran got back together within six months the divorce would be "null and void." The ALJ noted that "there is no way to verify that the claimant was told this

by the judge, but it is highly unlikely that a judge would make that statement since it is not consistent with the law." [R. at 13].

The ALJ reviewed the copies of checks, the funeral notice, the car titles and doctor statements, but concluded that such items did not establish conclusive evidence. The ALJ additionally noted that some of the evidence submitted indicated that Plaintiff was using the name "Thelma Davis" rather than "Thelma Moran" after the divorce.

The ALJ wrote that Plaintiff and Mr. Moran were divorced. The ALJ concluded that the evidence did not support a finding that Plaintiff and Mr. Moran had a common-law marriage in accordance with the state of Oklahoma after the divorce (April 1994) and prior to Mr. Moran's death (August 1994). The ALJ noted that the actions of Plaintiff (going to the courthouse to attempt to "null and void" the divorce) and the statements of the Plaintiff (that she and Mr. Moran wanted to get "legally married") indicated that Plaintiff did not believe that she and Mr. Moran were legally married. The ALJ observed that the evidence was not conclusive that Plaintiff and Mr. Moran cohabitated, and that the evidence was not persuasive that Plaintiff and Mr. Moran held themselves out as husband and wife. The ALJ did note that some of Plaintiff's and Mr. Moran's friends and families believed Plaintiff and Mr. Moran to be married, but concluded that this was not conclusive because Plaintiff and Mr. Moran had not informed those parties of the divorce. The ALJ concluded that Plaintiff had not established, in accordance with Oklahoma law, that Plaintiff and Mr. Moran were married.

#### IV. REVIEW

Social Security law applies the law of the state where the wage earner was domiciled at death, as interpreted by the courts of that state, in determining whether a claimant and the deceased wage earner were validly married pursuant to the Social Security statutes. See 42 U.S.C. § 416(h)(1)(A). In this case, all parties agree that Mr. Moran (the deceased wage earner) was domiciled in Oklahoma at the time of his death and that the determination of whether Plaintiff and Mr. Moran were married is based on Oklahoma law.

Both parties agree that Plaintiff and Mr. Moran were legally married, and legally divorced. The divorce was final April 6, 1994. Mr. Moran died August 7, 1994. The issue debated by the parties is whether or not Plaintiff and Mr. Moran were "common-law married" sometime between April 6, 1994 and August 7, 1994.

Common-law marriage in Oklahoma requires competent parties:

who enter the relationship by mutual agreement, exclusive of all others, consummating [the] arrangement by cohabitation and open assumption of marital duties, and such relationship must be established by evidence that is clear and convincing evidence.

Sanders v. Sanders, 948 P.2d 710 (Okla. Ct. App. 1997). In Estate of Phifer, 629 P.2d 808, 809 (Okla. Ct. App. 1981), the court noted that a party asserting a common law marriage must prove:

(1) an actual and mutual agreement between the spouses to be husband and wife; (2) a permanent relationship; (3) an exclusive relationship; (4) cohabitation as man and wife; (5) the parties to the marriage must hold themselves out publicly as husband and wife.

The burden of proof is on the party who is attempting to establish the common-law marriage, and the proof must be met by clear and convincing evidence. Id.

The Oklahoma appellate courts will not disturb a finding of the trial court that the party had failed to prove the existence of a common-law marriage where evidence is conflicting, unless the "trial court's judgment that no common law marriage had been effected" was clearly against the weight of the evidence. Id. Of course, in reviewing a decision of the Commissioner, this Court should affirm such decision if "substantial evidence" exists to support the Commissioner's conclusion. As observed above, substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. It is more than a scintilla, but less than a preponderance. Furthermore, a reviewing court does not conduct a de novo examination of the evidence and it is not free to substitute its findings of fact for those of the Secretary if substantial evidence supports those findings and inferences.

The Court has thoroughly reviewed the briefs filed by the party and the record. The evidence as to the existence of a common-law marriage between the parties is conflicting. The ALJ focused predominantly on the death certificate (which stated Mr. Moran was divorced), the statement of the funeral director (a blank was left for "surviving spouse"), and Plaintiff's preliminary statements that she and Mr. Moran planned to be "legally married" in December of 1994. The ALJ additionally observed that Plaintiff used the name "Davis" between April and August of 1994.<sup>4/</sup> Although

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<sup>4/</sup> Plaintiff also used the name "Moran."

the evidence in the record is conflicting, this Court cannot substitute its judgment for the ALJ's, and the ALJ's decision must be affirmed if "substantial evidence" supports his conclusions. The Court concludes that the decision of the ALJ is supported by substantial evidence.

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

Dated this 25th day of August 1998.



Sam A. Joyner  
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 \$189,825.00 IN UNITED STATES CURRENCY, )  
 )  
 Defendant, )  
 )  
 and )  
 )  
 EDUARDO RANGEL VELAZQUEZ, and )  
 IVAN FARON VELAZQUEZ, )  
 )  
 Claimants. )

ENTERED ON DOCKET  
AUG 25 1998  
DATE \_\_\_\_\_

Case No. 96-CV-1084-J

**FILED**

AUG 21 1998

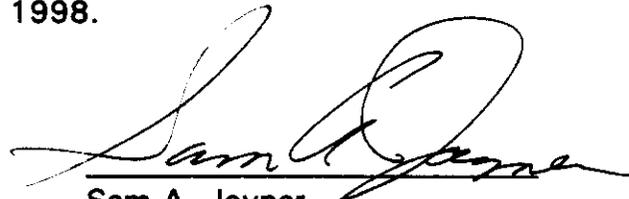
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGEMENT FOR THE UNITED STATES OF AMERICA**

Pursuant to the unanimous verdict of the jury, the Court hereby enters judgment for the Plaintiff. All of the Defendant currency shall be forfeited to the United States of America.

IT IS SO ORDERED.

Dated this 21 day of August 1998.



Sam A. Joyner  
United States Magistrate Judge

United States District Court )  
Northern District of Oklahoma ) SS

I hereby certify that the foregoing  
is a true copy of the original on file  
in this court.

Phil Lombardi, Clerk

By N. Harris  
Deputy

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

MITCHELL COACH )  
MANUFACTURING COMPANY, INC., )  
a Florida corporation, )

Plaintiff, )

vs. )

RONNY STEPHENS, an individual, )  
and TEXSTAR NATIONAL BANK, )  
a national banking association, )

Defendants. )

**FILED**

AUG 21 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 97-CV-429 B (J)

ENTERED ON DOCKET

DATE AUG 24 1998

**JOINT STIPULATION OF DISMISSAL**

The parties, Mitchell Coach Manufacturing Company, Inc., Ronny Stephens, and Texstar National Bank, pursuant to FED.R.CIV.P. 41(a)(2), by and through their respective undersigned counsel, having duly executed a Settlement Agreement and having stipulated as set forth below, show the Court as follows:

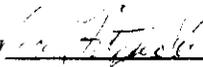
1. This court has jurisdiction of the parties hereto and of the subject matter hereof;
2. The parties have agreed to amicably resolve all issues raised in the litigation and to dismiss with prejudice all claims and counterclaims asserted in this action.
3. The parties have entered into a Settlement Agreement, and agree to the entry of the attached order.

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015

Respectfully submitted,

**TILLY & ASSOCIATES**

By 

**James W. Tilly, OBA #9019  
Craig A. Fitzgerald, OBA #15233  
Two West Second Street, Suite 2220  
P.O. Box 3645  
Tulsa, OK 74101-3645  
(918) 583-8868**

**ATTORNEYS FOR MITCHELL COACH  
MANUFACTURING COMPANY, INC.**

and

**FULBRIGHT & JAWORSKI L.L.P.**

By 

**Jack M. Partain, Jr.  
State Bar No. 15548500  
Michael M. Parker  
State Bar No. 00788163  
300 Convent Street, Suite 2200  
San Antonio, Texas 78205  
(210) 224-5575**

**ATTORNEYS FOR RONNY STEPHENS AND  
TEXSTAR NATIONAL BANK**

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

**MITCHELL COACH** )  
**MANUFACTURING COMPANY, INC.,** )  
a Florida corporation, )

**Plaintiff,** )

vs. )

**RONNY STEPHENS, an individual,** )  
**and TEXSTAR NATIONAL BANK,** )  
a national banking association, )

**Defendants.** )

Case No. 97-CV-429 B (J)

**ORDER OF DISMISSAL**

THIS MATTER, having come before the Court upon the foregoing Stipulation, it is thereupon:

ORDERED AND ADJUDGED as follows:

1. The Stipulation of the parties as set forth above is hereby approved.
2. All claims are dismissed as set forth above.
3. The parties shall bear their own costs and attorney's fees incurred in connection

with this action.

4. The Court shall retain jurisdiction to enforce the terms of the Settlement Agreement.

DONE AND ORDERED in Chambers, United States District Court for the Northern District of Oklahoma, this \_\_\_\_ day of August, 1998.

---

**Hon. Thomas R. Brett**  
**United States District Judge**

Copies Furnished: -

Attorneys for Mitchell

James W. Tilly, OBA #9019  
Craig A. Fitzgerald, OBA #15233  
TILLY & ASSOCIATES  
Two West Second Street, Suite 2220  
P.O. Box 3645  
Tulsa, OK 74101-3645

Attorneys for Stephens and Texstar

Jack M. Partain, Jr.  
Michael M. Parker  
FULBRIGHT & JAWORSKI L.L.P.  
300 Convent Street, Suite 2200  
San Antonio, TX 78205

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 21 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

SALLIE A. ROSS,

Defendant.

No. 98CV0295E

ENTERED ON DOCKET

DATE AUG 24 1998

DEFAULT JUDGMENT

This matter comes on for consideration this 20<sup>th</sup> day of August, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Sallie A. Ross, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Sallie A. Ross, was served with Summons and Complaint on July 21, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Sallie A. Ross, for the principal amount of \$2,264.15, plus accrued interest of \$848.96, plus administrative charges in the amount of \$6.44, plus interest thereafter at the rate of 8 percent per annum

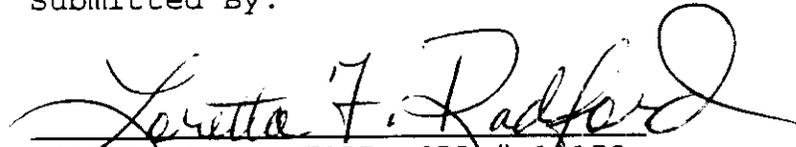
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Claw

until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.271 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

  
LORETTA F. RADFORD, OBA # 11158  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103-3809  
(918)581-7463

LFR/sba

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

AUG 21 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ELEANOR E. BRADFORD, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 KENNETH S. APFEL, )  
 Commissioner, Social )  
 Security Administration, )  
 )  
 Defendant. )

Case No. 97-CV-0071-K ✓

ENTERED ON DOCKET  
AUG 24 1998  
DATE \_\_\_\_\_

**ORDER**

On May 4, 1998, 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 \$2,288.50 for attorney 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 \$2,288.50 for a total award of \$2,288.50 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. 1986). This action is hereby dismissed.

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C/mb

It is so ORDERED THIS 21 day of August 1998.

  
Sam A. Joyner  
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

8-14-98

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

**FILED**  
AUG 20 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

COY WHITE, )  
)  
Plaintiff, )  
)  
vs. )  
)  
STATE FARM FIRE AND )  
CASUALTY COMPANY, )  
)  
Defendant. )

Case No. 98-CV-0261-H (E) ✓

ENTERED ON DOCKET

DATE AUG 21 1998

**ORDER**

On July 31, 1998, this cause came on to be heard upon the defendant, State Farm Fire and Casualty Company's *Motion to Dismiss for Insufficiency of Process and Insufficiency of Service of Process* [Docket #2]. The plaintiff appeared by and through his attorney of record, Marcus S. Wright. The defendant appeared through its attorneys, Neal E. Stauffer, Kent B. Rainey, and Anthony J. Jorgenson. The Court has examined the pleadings, and has heard the arguments of counsel for the respective parties.

On April 21, 1997, the plaintiff filed this suit in the District Court for Mayes County, Oklahoma. No summons was issued or served upon the defendant. On March 12, 1998, the plaintiff, without leave of court, filed his amended petition in the Mayes County action. On March 19, 1998, the plaintiff attempted service the amended petition and summons upon the defendant. On April 6, 1998, the defendant removed the state court action to this Court.

Pursuant to FED. R. CIV. P. 81(c), this Court applies Oklahoma law to determine whether the plaintiff's attempted service upon the defendant, prior to removal, was valid. In Oklahoma, "[a] civil action is commenced by filing a petition with the court." OKLA. STAT. tit. 12, § 2003 (1991).

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Section 2004(I) sets forth the time limit for service for civil actions filed in Oklahoma. Section 2004(I) provides:

If service of process is not made upon a defendant within one hundred eighty (180) days after the filing of the petition and the plaintiff cannot show good cause why such service was not made within that period, the action may be dismissed as to that defendant without prejudice upon the court's own initiative with notice to the plaintiff or upon motion. The action shall not be dismissed where a summons was served on the defendant within one hundred eighty (180) days after the filing of the petition and a court later holds that the summons or its service was invalid. After a court quashes a summons or its service, a new summons may be served on the defendant within a time specified by the judge. If the new summons is not served within the specified time, the action shall be deemed to have been dismissed without prejudice as to that defendant. This subsection shall not apply with respect to a defendant who has been outside of this state for one hundred eighty (180) days following the filing of the petition.

OKLA. STAT. tit. 12, § 2004(I) (1991 & Supp. 1997). Section 2004(I) substantially conforms with

FED. R. CIV. P. 4(m). FED. R. CIV. P. 4(m) provides in pertinent part:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

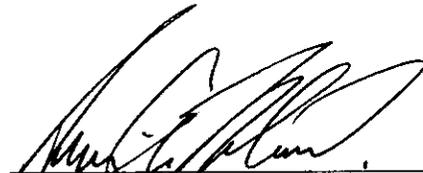
In the case at bar, the defendant was not served with notice of the commencement of the suit within the 180 day limitations period provided by Section 2004(I). Moreover, the plaintiff has not demonstrated any good cause for his failure to serve the defendant within the requisite time period.

See Bryant v. Brooklyn Barbeque Corp., 130 F.R.D. 665, 668 (W.D. Mo. 1990), aff'd, 932 F.2d 697 (8th Cir. 1990).

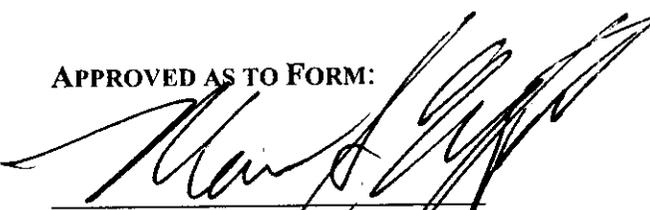
In light of the foregoing, it is hereby **ORDERED, ADJUDGED AND DECREED**, that:

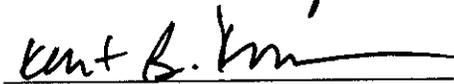
- (i) the relief requested in the defendant's Motion to Dismiss for Insufficiency of Process and Insufficiency of Service of Process is **GRANTED**;
- (ii) the plaintiff's original petition, filed April 21, 1997, is **DISMISSED WITHOUT PREJUDICE** for failure to effect timely service;
- (iii) thus, the plaintiff's amended petition filed March 12, 1998, is a nullity; and
- (iv) the plaintiff's attempted service of the amended petition upon the defendant is therefore, **QUASHED**.

Dated this 19<sup>TH</sup> day of August, 1998.

  
SVEN ERIC HOLMES  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

  
Marcus S. Wright, OBA #12179  
Attorney for Plaintiff, Cox White

  
Neal E. Stauffer, OBA #13168  
Kent B. Rainey, OBA #14619  
Attorney for Defendant, State Farm  
Fire and Casualty Company

6-13-98

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

**FILED**  
AUG 20 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FLOWSERVE, INC., a corporation, )  
KENT JOHNSON, an individual, )  
and STEVE SIMONE, an individual, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
MICHAEL MARES, )  
 )  
Defendant. )

Case No. 97-CV-895-H(J) ✓

ENTERED ON DOCKET

DATE AUG 20 1998

**ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

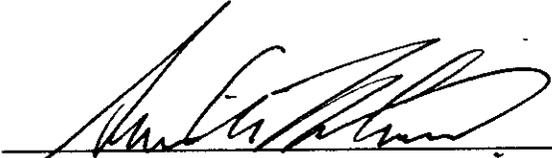
This matter comes before the court upon the Defendant's Motion for Summary judgment filed on May 8, 1998, concurrently with its brief in support of the motion for summary judgment. Having considered the briefs submitted by the parties, the court finds: that on October 27, 1997, the Plaintiffs filed their complaint; that on November 24, 1997 Defendant filed his answer; that on May 8, 1998, the Defendant filed his Motion For Summary Judgment; that on May 26, 1998, Plaintiff's filed their Objection to Defendant's Motion For Summary Judgment; that on June 1, 1998, Defendant filed his Reply To Plaintiff's Objection to Defendant's Motion For Summary Judgment; that on August 6, 1998, oral arguments were presented to Judge Holmes regarding the pending Motion For Summary Judgment; that at the hearing Defendant prevailed in his Motion For Summary Judgment with Judge Holmes finding that there were four (4) elements necessary for Plaintiffs to prevail; that those four (4) elements were: (1) intent

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on the part of the Defendant to intercept and record the conversation in question, (2) lack of consent by the Plaintiffs, (3) that the Defendant had been a party to the conversation, (4) harm to the Plaintiffs; that Plaintiffs failed to establish any of the required elements and that there is no substantial controversy concerning any genuine issue of material fact; that the Defendant is entitled to judgment as requested in its motion and brief in support of its motion for summary judgment; and that the Defendant's Motion for Summary Judgment should be granted.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the complaint FLOWSERVE, INC., a corporation, KENT JOHNSON, an individual, and STEVE SIMONE, and individual, Plaintiffs vs. Michael Mares, Defendant, Case No. 97-CV-895-H(J) be dismissed with prejudice.

DATED this 19<sup>TH</sup> day of AUGUST, 1998.

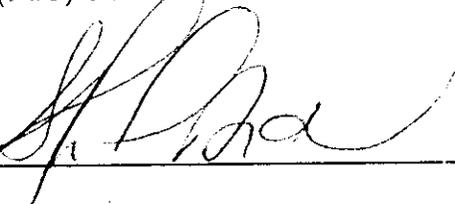
  
UNITED STATES DISTRICT JUDGE

**APPROVED AS TO FORM:**

J. ANDREW ENLOW, OBA #17024  
IKE A. HOBAUGH, OBA # 17097  
320 South Boston Avenue  
Suite 1024  
Tulsa, Oklahoma 74103-3703  
(918) 583-8205

By:  \_\_\_\_\_

STEPHEN L. ANDREW, OBA # 294  
STEPHEN L. ANDREW & ASSOCIATES  
A Professional Corporation  
125 West Third Street  
Tulsa, Oklahoma 74103  
(918) 583-8205

By:  \_\_\_\_\_

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

AUG 20 1998

CORA D. BARR, -  
SSN: 445-60-4006,

Plaintiff,

v.

KENNETH S. APFEL,  
Commissioner of Social Security,

Defendant.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 96-CV-0951-EA

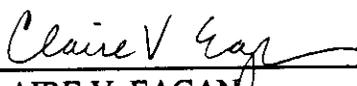
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DATE AUG 21 1998

**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.

It is so ordered this 20th day of August 1998.

  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

**F I L E D**

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

AUG 20 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CORA D. BARR, )  
 SSN: 445-60-4006, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 KENNETH S. APFEL, )  
 Commissioner of Social Security,<sup>1</sup> )  
 )  
 Defendant. )

Case No. 96-CV-0951-EA

**ENTERED ON DOCKET**

DATE AUG 21 1998

**ORDER**

Claimant, Cora D. Barr, 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.<sup>2</sup> 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.

<sup>1</sup> 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).

<sup>2</sup> On July 17, 1992, claimant protectively applied for disability benefits under Title II (42 U.S.C. § 401 *et seq.*), and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 *et seq.*). Claimant's application for benefits was denied in its entirety initially (October 27, 1992), and on reconsideration (December 15, 1992). A hearing before Administrative Law Judge James D. Jordan ("ALJ") was held July 26, 1993, in Tulsa, Oklahoma. The January 13, 1994 decision of the ALJ denied claimant's application for benefits. That January 13, 1994 decision was vacated and remanded by the Appeals Council on June 17, 1994. A second hearing was held in Tulsa on March 17, 1995. On remand, by decision dated June 12, 1995, the ALJ found that claimant was not disabled on or before the date of the decision. On August 12, 1996, the Appeals Council denied review of the ALJ's findings. Thus, the March 17, 1995 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 November 27, 1955 and lived in Tulsa, Oklahoma at the time of filing her complaint. Claimant graduated from high school and received further training through Job Corps to be a receptionist. Her past relevant work is as a cook's helper and a day-care worker, both of which were classified as unskilled, medium-exertion level work. Claimant alleges that she became unable to work on August 13, 1990 due to back pain.

### **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.<sup>3</sup>

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

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

---

<sup>3</sup> 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.

whole, 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 work activities at the light to sedentary exertional level, with limitations on prolonged time on the feet, no prolonged use of feet for pushing/pulling, no frequent, rapid, or extensive bending, twisting, or movement of back, especially with weight.” (R. 21) The ALJ concluded that claimant could not perform her past relevant work. But, using the Medical-Vocational guidelines as a framework for decision-making and relying on the testimony of a vocational expert, the ALJ found that there were other jobs existing in significant numbers in the national and regional economies that claimant could perform, based on her RFC, age, education, and work experience. Having found that there were a significant number of jobs which claimant could perform, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

### **IV. REVIEW**

Claimant asserts that the Commissioner erred because the ALJ failed to properly assess claimant’s credibility regarding her subjective complaints of back pain. The framework for the proper analysis of evidence of allegedly disabling pain was set forth by the Tenth Circuit in Luna v. Bowen, 834 F.2d 161, 163-64 (10th Cir. 1987). That analysis requires the court to consider:

- (1) whether Claimant established a pain-producing impairment by objective medical evidence; (2) if so, whether there is a “loose nexus” between the proven impairment and the Claimant’s subjective allegations of pain; and (3) if so, whether, considering all the evidence, both objective and subjective, Claimant’s pain is in fact disabling.

Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992) (citing Luna). Accord, Kepler v. Chater, 68 F.3d 387, 390 (10th Cir. 1995).

The Tenth Circuit has stated that “subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings.” Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Unsubstantiated subjective evidence is not sufficient to prove disability. Diaz, 898 F.2d at 777. Claimant argues that she has presented objective evidence of a chronic muscle strain in her back. While the record contains many references to back pain, the basis for such references is claimant’s subjective complaints. Dr. McGovern, an orthopedic surgeon, examined claimant on October 24, 1994 and noted that claimant had a back flexion of 50 degrees, hip flexion with knee extended (lying straight-leg-raising) of 30-35 degrees, and sitting straight-leg-raising of 80 degrees. (R. 526) Dr. McGovern questioned claimant’s truthfulness, stating “[t]o be believable, [the range of motion results] should be similar but were not.” Id. Dr. McGovern concluded “[t]here was no objective evidence of nerve root compression.” Id. Dr. Goldman testified “I can find in the medical documents no medical evidence of any anatomical abnormality that would correlate with a pain syndrome.” (R. 109) The ALJ found that “[o]bjective evidence has been essentially negative, other than the axillary ‘knots’ under either arm and the left great toe bunionectomy and x-rays of the foot itself have been negative.” (R. 23)

Despite this finding, the ALJ continued his analysis and included an extensive discussion of claimant’s credibility and subjective complaints of pain, finding that claimant’s complaints were not credible. (R. 23-24) Even if there were objective evidence of chronic back strain, the ALJ’s assessment of claimant’s credibility as to the level of disabling pain caused by such impairment is

supported by substantial evidence and, thus, the ALJ did not fail to properly consider the claimant's subjective complaints.

The ALJ stated:

The undersigned is not persuaded by the claimant's testimony of constant, severe, sharp, stabbing pain in the back, right side and shoulders, right knee, and left foot . . . . The claimant has earlier testified and did again at the supplemental hearing that the pain lasted about 30-60 minutes and was resolved in about 30 minutes by medication, and it was not until she was repeatedly "questioned" by her attorney that she stated the pain was constant. Her allegations of limitations are not convincing, considering the inconsistency of the findings (on straight-leg-raising) at the consultative examination. She says she can walk only 15 minutes, stand only 10 minutes, lift only 10 pounds, and sit a maximum of 5 minutes, yet she did not stand at any time at the hearing until leaving, and she testifies to sitting and lying around all day at home, sleeping and watching TV. The undersigned is cognizant of the rules which prevent the claimant's behavior at the hearing establishing the decision of disability, but her behavior can be used to shed light on the credibility of her statements or the level of exaggeration. She claims that she could not do the light exertional level because of the standing or the sedentary level because of the sitting, but she has adopted a markedly sedentary life style. Nevertheless, she still does housework (as evidenced by the claims that she has increased symptoms when she does it), cooks occasionally, and goes shopping and to church (without mention of being unable to sit for more than "5 minutes maximum" in church). She works word puzzles. Her activities as reported in the earlier case documents, in which she reported shopping, cooking, cleaning, visiting with friends and family, and taking the bus to attend to business . . . are markedly different from her current alleged restrictions. In fact, she was standing on a bus when the "jarring" accident occurred in November 1991. She claims that her Xanax makes her drowsy, and testifies to spending most of the day in bed, sometimes sleeping, but she states that she probably sleeps no more than 8 hours in a 24-hour day and earlier statements said she slept about 5 hours per night . . . contrary to her counsel's hypothetical which posits 14-hours of sleep daily. Thus, the hypothetical is contradicted by the claimant's own statement.

(R. 23-24) (references omitted).

This Court generally gives great deference to the credibility determinations made by an ALJ. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such

determinations when supported by substantial evidence.” Diaz, 898 F.2d at 777. However, the ALJ’s credibility determinations must be closely and affirmatively linked and logically connected to substantial evidence: See Kepler, 68 F.3d at 391. Considering all the evidence, both objective and subjective, this Court finds that the ALJ did not err in concluding--and demonstrating by specific and substantial evidence--that claimant’s complaints of pain were disproportionate to the objective findings and not credible beyond the limitations set forth by the ALJ.

Claimant further argues that the ALJ’s assessment of claimant’s credibility is tainted in that one of the reasons the ALJ relied on in making his credibility determination was not supported by substantial evidence. Specifically, claimant contends that the ALJ misinterpreted a doctor’s change of claimant’s prescription from Xanax to Alprazolamo.

Claimant argues:

[T]he ALJ disregarded [claimant’s] testimony of side effects of medication Xanax even though Dr. Goldman’s testimony confirmed those effects because he concluded that Dr. Reed had modified the prescription, prescribing Alprazolamo instead. (R. at 24). Plaintiff would point out that Alprazolamo is the generic chemical found in Xanax. So, the ALJ’s rationale for rejecting that testimony is flawed.

Plaintiff’s Brief (Docket #15), at 5-6. Even assuming that if this one reason were unsupported by substantial evidence then the ALJ’s entire credibility determination would be unsupported, the Court finds claimant’s argument to be without merit. The ALJ found:

The claimant’s current medication list includes numerous prescriptions from Dr. Reed, but the evidence indicates that she has not seen him for quite some time. Dr. English is her current treating physician . . . but none of the medications on the current list are from him, and his records indicate a variation in prescriptions over time. The claimant currently lists Xanax as a medication, as well as “Alprazolamo”. Thus, it is clear that the physicians are willing to change her prescriptions if advised of problems with them. Yet, she apparently has not told them of any drowsiness problems, which suggests to the undersigned that she is not unhappy with any side effects.

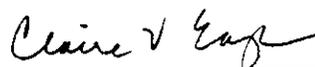
(R. 24) (reference omitted).

The ALJ's rationale is sound. Dr. Goldman testified as a medical expert that the only medication claimant takes which could possibly cause drowsiness is Xanax. (R. 111-12) The ALJ argues that if claimant had experienced ongoing side effects, she likely would have complained of such side effects to her prescribing physician, and perhaps alternative medication could have been explored. The ALJ's statement as to claimant's change from Xanax to Alprazolamo is merely one example in support of his contention that claimant's physicians were willing to change claimant's medication if necessary. The lack of any attempt to find alternative medicine evidences that claimant expressed no worries about side effects of the prescribed medication. Such conclusion is supported by substantial evidence.

#### **V. CONCLUSION**

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

DATED this 20th day of August, 1998.



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CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 20 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ALBERT PALMER,  
SSN: 543-56-3850

Plaintiff,

v.

KENNETH S. APFEL, Commissioner  
of Social Security Administration,

Defendant.

No. 97-C-663-J

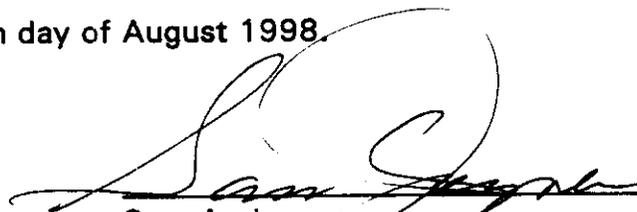
ENTERED ON DOCKET  
AUG 21 1998

DATE \_\_\_\_\_

**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 20th day of August 1998.

  
Sam A. Joyner  
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

AUG 20 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ALBERT PALMER,  
SSN: 543-56-3850

Plaintiff,

v.

KENNETH S. APFEL, Commissioner  
of Social Security Administration,<sup>1/</sup>

Defendant.

No. 97-C-663-J ✓

ENTERED ON DOCKET  
DATE AUG 21 1998

ORDER<sup>2/</sup>

Plaintiff, Albert Palmer, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.<sup>3/</sup> Plaintiff asserts that the Commissioner erred because (1) the ALJ's RFC finding is not supported by substantial evidence, (2) the ALJ did not correctly evaluate Plaintiff's complaints of pain, and (3) the ALJ failed to identify a significant number of jobs which Plaintiff could perform and improperly concluded that transferability of skills was immaterial. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

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<sup>1/</sup> 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.

<sup>2/</sup> 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.

<sup>3/</sup> Administrative Law Judge Jeffrey S. Wolfe (hereafter "ALJ") concluded that Plaintiff was not disabled by decision dated April 25, 1996. [R. at 11]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on February 11, 1997. [R. at 7]. The Appeals Council extended Plaintiff's time for filing an appeal by letter dated June 12, 1997. [R. at 3].

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## I. PLAINTIFF'S BACKGROUND

Plaintiff testified that he completed eighth grade and obtained his GED. [R. at 41]. Plaintiff was born April 14, 1949. [R. at 74].

Plaintiff testified that his last day of work was March 30, 1996. [R. at 32]. According to Plaintiff, he quit work because he had a disagreement with the daughter of the boss. [R. at 56].

Plaintiff testified that he could not sit longer than an hour, that he could walk for approximately ten minutes and that he would have difficulty picking up his toolbox (which weighs 100 pounds) and carrying it. [R. at 40]. Plaintiff stated that he could comfortably lift 20 - 25 pounds, and that he could stand in line for approximately one hour. [R. at 52].

Plaintiff has no vision in his right eye. According to Plaintiff, he has had an artificial eye since he was 23. [R. at 53]. Plaintiff's vision in his left eye is 20/25. [R. at 160]. Plaintiff testified that he began having difficulty reading small print with his right eye. Plaintiff additionally stated that he has pain in the lower part of his back, and that he experiences numbness in his right foot and thigh. [R. at 41]. Plaintiff has had cysts removed from his wrists. [R. at 43].

Plaintiff testified that he uses Ben Gay when he has pain in his back. According to Plaintiff, he takes no other pain medications. [R. at 49]. Plaintiff additionally stated that he experiences pain in his neck. [R. at 51].

Plaintiff additionally testified that he had been performing odd jobs (hauling trash and beer cans) to supplement his income. [R. at 54].

A Residual Functional Capacity Assessment which was completed on August 17, 1995, indicated that Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand six out of eight hours, and sit six out of eight hours. [R. at 85]. In a social security report which Plaintiff completed on May 17, 1995, Plaintiff indicated that he mowed the yard, drove a car, and rode a three-wheel motorcycle. [R. at 108].

## II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.<sup>4/</sup> 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

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<sup>4/</sup> Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

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

42 U.S.C. § 423(d)(2)(A).

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

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

"The finding of the Secretary<sup>5/</sup> 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

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<sup>5/</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

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

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

### **III. THE ALJ'S DECISION**

The ALJ concluded that Plaintiff could not return to his past relevant work. The ALJ determined that Plaintiff was limited to performing light work which would permit him to alternatively sit or stand each hour. Based on the testimony of a vocational expert, the ALJ found that Plaintiff was not disabled.

### **IV. REVIEW**

#### **RFC FINDING**

Plaintiff asserts that the finding of the ALJ that Plaintiff can perform the exertional and non-exertional requirements of work is contrary to the substantial evidence in the record. Plaintiff asserts that the record reflects that he suffers from degenerative disc disease and cannot lift, squat, sit, or stand for prolonged periods of time. Plaintiff contends that these medical problems have left him unable to perform his past relevant work and he is disabled.

Plaintiff does not refer the Court to any specific references in the record which support Plaintiff's argument. Plaintiff does not specify the complaints that he has with the conclusions of the ALJ. The record reflects that Plaintiff has the physical capability of performing the requirements of light work. Plaintiff's own testimony was that he could lift 20 - 25 pounds and stand for approximately one hour. The ALJ used the limitations provided by Plaintiff in the hypothetical question which was posed to the ALJ. The Court concludes that the findings as to Plaintiff's RFC are supported by substantial evidence.

#### **PAIN ANALYSIS**

Plaintiff observes that the ALJ concluded that Plaintiff could perform light work. Plaintiff asserts, however, that this conclusion is improper because the ALJ failed to consider Plaintiff's complaints of pain. Plaintiff states that "Mr. Palmer submitted to surgery to rectify the pain in both his back and his wrist." Plaintiff's Brief at 3. Of course, if Plaintiff "submitted" to surgery which "rectified" his pain, Plaintiff's pain has been alleviated.

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

maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

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

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

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

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

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

as to preclude any substantial gainful employment."). Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

The Court has reviewed the opinion of the ALJ, the asserted errors by Plaintiff, and the record. The Court concludes that the ALJ's opinion with regard to Plaintiff's complaints of pain is supported by substantial evidence.

#### **SIGNIFICANT NUMBER OF JOBS AND TRANSFERABILITY**

Plaintiff additionally contends that the ALJ erred by concluding that a significant number of jobs existed in the regional economy which Plaintiff could perform. Plaintiff states that the ALJ improperly relied on a vocational expert's statistics and ignored the requirements of Plaintiff's past jobs. Plaintiff notes that he has worked his entire life in skilled and semi-skilled jobs, and that for the ALJ to state that transferability of skills is immaterial is error.

Initially, the Court notes that Plaintiff's assertion with respect to transferability is misplaced. In social security law, "transferable skills" is a term of art. Under the "grids," an individual who is "closely approaching advanced age" (age 50-54) is considered disabled if the individual can perform only sedentary work and has only a specified educational level. See 20 C.F.R. Pt. 404, Subpt. P, App. 2. In this case, by noting that the issue of "transferability" was "immaterial," the ALJ was merely observing that because of Plaintiff's age (47 at the time of the hearing), educational level, and RFC, the issue of whether or not Plaintiff possessed transferable skills was not material to his decision. Pursuant to the grids, the ALJ's conclusion was correct.

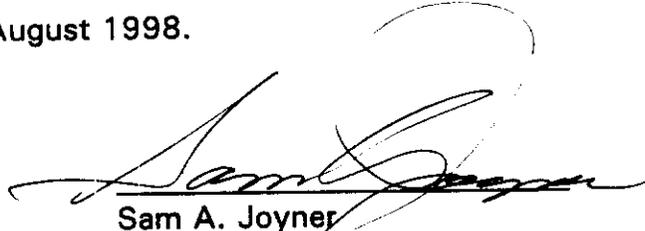
The ALJ concluded that Plaintiff could not return to his past relevant work (Step Four), and proceeded to Step Five in evaluating whether other jobs existed in the national economy which Plaintiff could perform. The ALJ presented a hypothetical question to the vocational expert which included Plaintiff's RFC and other limiting factors. Based on the hypothetical question, the vocational expert concluded that a significant number of jobs existed in the national economy that Plaintiff could perform. The testimony of a vocational expert in response to a hypothetical question can constitute evidence upon which the ALJ may rely.

Plaintiff additionally asserts that the ALJ found only 17,000 jobs and that this number of jobs is not sufficient. The ALJ noted several jobs at the light level: assembly jobs (5,600 regionally and 450,000 nationally); inspector jobs (750 regionally and 62,000 nationally); cashier jobs (3,000 regionally and 250,000 nationally). The ALJ additionally identified sedentary jobs in assembly (2,700 regionally and 225,000 nationally), inspector (720 regionally and 60,000 nationally), and cashier (4,000 regionally). Based on the facts of this case, the Court concludes that the record contains substantial evidence to support the ALJ's conclusion that a significant number of jobs exist which Plaintiff is capable of performing. See Trimiar v. Sullivan, 966 F.2d 1326, 1330 (10th Cir. 1992) (refusing to draw a bright line, but indicating the criteria for consideration in determining whether a significant number of jobs is present). See also Lee v. Sullivan, 988 F.2d 789, 793 (7th Cir. 1992) (summarizing the various positions of the circuits: Sixth Circuit found 1,350 positions significant; Ninth Circuit found 1,266 positions significant; Tenth Circuit found 850-

1,000 potential jobs significant; Eighth Circuit found 500 jobs significant; Eleventh found 174 positions significant). See also Queen v. Chater, unpublished decision 1995 WL 74683 (72 F.3d 138).

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

Dated this 20 day of August 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