

FILED

SEP - 9 1998

Phil Lombard, Clerk
U.S. DISTRICT COURT

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

TABITHA ANDERSON,)
)
Plaintiff,)
)
v.)
)
CARTER'S FOOD CENTER OF VINITA,)
INC., an Oklahoma corporation,)
)
Defendant.)

Case No. 97-CV-10988B(J)

SEP 10 1998
DATE

ORDER OF DISMISSAL WITH PREJUDICE

NOW, on this 9th day of Sept, 1998, pursuant to the Notice and Stipulation of Dismissal With Prejudice signed by all parties to this action and filed herein, THE COURT ORDERS, ADJUDGES AND DECREES,

The above-styled action is dismissed with prejudice, each party to bear its own attorney fees, costs and expenses.

for Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT COURT JUDGE

APPROVED:

Tabitha Anderson
Tabitha Anderson, Plaintiff

Donna L. Smith
Donna L. Smith, O.B.A. #12865
Attorney for Defendant

4

DATE 9-10-98

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

FILED

1998 10

OZARK-MAHONING COMPANY,)
a Delaware Corporation,)
)
Plaintiff,)

vs.)

No. 97-CV-456-K(E) ✓

Phil Lombardi, Clerk
U.S. DISTRICT COURT

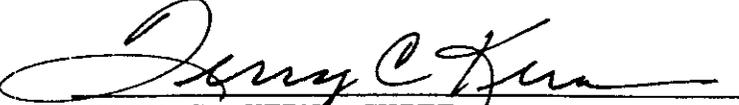
DEERE & COMPANY, a Delaware)
corporation; ENSERCH)
CORPORATION, f/k/a NIPAK, INC.)
a Texas corporation and)
JOHN DEERE CHEMICAL COMPANY,)
a foreign corporation,)
)
Defendants.)

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 9th day of September, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

KEITH HURT and LINDA HURT,)
)
Plaintiffs,)
)
v.)
)
AAON, INC. HEALTH AND)
WELFARE BENEFIT PLAN,)
)
Defendant.)

SEP - 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-849 K (J) ✓

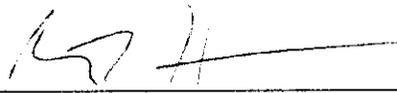
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DATE 9-10-98

STIPULATION OF DISMISSAL WITH PREJUDICE

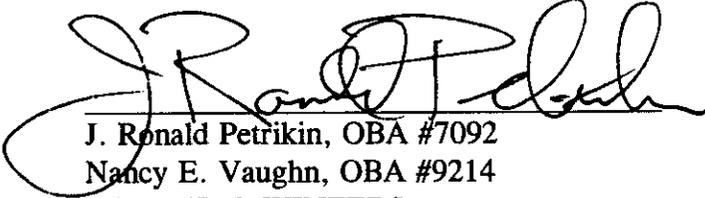
IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their undersigned counsel of record, that the above-entitled matter is dismissed with prejudice and without costs to any party herein.

DATED this 9th day of ~~August~~ ^{September}, 1998.



Steven R. Hickman
Frasier, Frasier & Hickman
1700 Southwest Boulevard
P.O. Box 799
Tulsa, OK 74101-0799

ATTORNEYS FOR THE PLAINTIFFS



J. Ronald Petrikin, OBA #7092
Nancy E. Vaughn, OBA #9214
CONNER & WINTERS
15 East Fifth Street, Suite 3700
Tulsa, OK 74103-4344

ATTORNEYS FOR THE DEFENDANT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP - 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TONYA ROSS)
o/b/o ANTONIO CRAWFORD,)
)
Plaintiff,)

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

Defendant.)

No. 97-C-862-J ✓

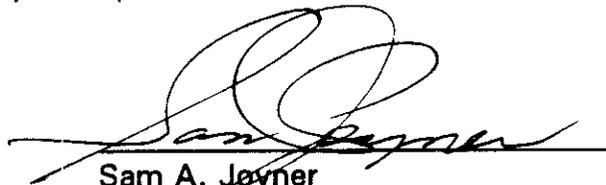
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DATE SEP 10 1998

JUDGMENT

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

It is so ordered this 9th day of September 1998.



Sam A. Joyner
United States Magistrate Judge

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

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

F I L E D

SEP - 8 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TABITHA ANDERSON,)
)
Plaintiff,)
)
v.)
)
CARTER'S FOOD CENTER OF VINITA,)
INC., an Oklahoma corporation,)
)
Defendant.)

Case No. 97-CV-1098(B)(J) ✓

**NOTICE AND STIPULATION
OF DISMISSAL WITH PREJUDICE**

SEP 09 1998

The Plaintiff, Tabitha Anderson, hereby dismisses all claims in the above-captioned matter with prejudice, each party to bear its own attorney fees, costs and expenses.

Tabitha Anderson
Tabitha Anderson, Plaintiff

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

Attorneys for Defendant Carter's Food Center of
Vinita, Inc.

By: Donna L. Smith
Donna L. Smith, O.B.A. #12865
David E. Jones, O.B.A. #14256

mail
0/1/98
am hte

Logan & Lowry, LLP

LAW OFFICES

101 SOUTH WILSON STREET
P. O. BOX 558
VINITA, OKLAHOMA 74301-0558

TELEPHONE (918) 256-7511
FAX (918) 256-3187

GROVE

19 EAST 3RD STREET
P. O. BOX 452469
GROVE, OK 74345-2469
TELEPHONE (918) 786-7511
FAX (918) 786-5687

J. DUKE LOGAN
RICHARD W. LOWRY
O. B. JOHNSTON, III
THOMAS J. MCGEADY
MARK W. CURNUTTE
LEONARD M. LOGAN, IV
DONNA L. SMITH
ROBERT ALAN RUSH
DAVID E. JONES
MICHAEL S. LINSKOTT
TAMARA E. JAHNKE
ERIC O. JOHNSTON

OF COUNSEL
CHARLES E. WEST

September 3, 1998

RECEIVED

SEP - 8 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Phil Lombardi, Court Clerk
U.S. District Court for the
Northern District
4411 U.S. Courtroom
333 W. 4th Street
Tulsa, OK 74103

Re: *Tabitha Anderson v. Carter's Food Center of Vinita, Inc.*; in the U. S. District Court
for the Northern District of Oklahoma, Case No. 97-CV-10988B(J)

Dear Mr. Lombardi:

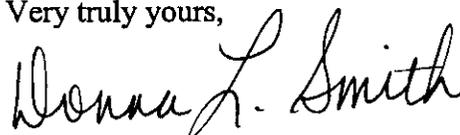
Enclosed please find an original and two (2) copies of Notice and Stipulation of Dismissal
with Prejudice in the above-referenced matter.

We are also enclosing an original and two (2) copies of a proposed Order of Dismissal with
Prejudice which has been signed by the plaintiff and by defendant's counsel. Please present the
proposed Order to Judge Brett for approval.

Please return a file-stamped copy of each to me in the enclosed self-addressed, stamped
envelope.

Thank you in advance for your assistance.

Very truly yours,



Donna L. Smith
For the Firm

DLS/skh
Enclosures

Page 2

cc: Tabitha Anderson
Route 2, Box 701
Afton, OK 74331

Tom Allen
Cory Allen
Carter's Food Center of Vinita, Inc.
102 N. Scraper
Vinita, OK 74301

David W. Davis, Esquire
Suite 416, 406 S. Boulder Avenue
Tulsa, OK 74103

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

FILED

SEP - 8 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

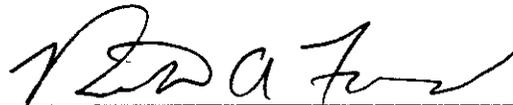
GARY BURTON,)
)
Plaintiff,)
)
vs.)
)
TOYOTA MOTOR SALES, U.S.A., INC.,)
ex rel. LEXUS MANUFACTURERS,)
)
Defendant.)

Case No. 97-CV-651-B(W)

SEP 09 1998
DATE

STIPULATION FOR ORDER OF DISMISSAL WITH PREJUDICE

By and through their counsel of record, the parties herein stipulate and agree that the above styled and numbered cause should be dismissed with prejudice to the bringing of a further action thereon. It is further stipulated and agreed that each party shall bear his own costs and attorney fees and that the award of costs ordered by Magistrate Claire V. Eagan on July 29, 1998, shall be deemed waived, satisfied, and held for naught.



Richard A. Ford, OBA No. 16498
RICHARDSON & WARD
6846 South Canton, Suite 200
Tulsa, Oklahoma 74136-3414
(918) 492-7674 Telephone
ATTORNEYS FOR PLAINTIFF



James A. Jennings, OBA No. 4647
HOLLOWAY, DOBSON, HUDSON, BACHMAN,
ALDEN, JENNINGS & HOLLOWAY
One Leadership Square, Suite 900
Oklahoma City, Oklahoma 73102
(405) 235-8593 Telephone
ATTORNEYS FOR DEFENDANT

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

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
vs.)
)
TOMMY E. POWERS,)
)
Defendant.)

ENTERED ON DOCKET

DATE SEP 9 1998

No. 97-CV-728 K (J) ✓

FILED

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

Now before the Court is the Motion by Plaintiff, the United States of America by Stephen C. Lewis, United States Attorney, Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney ("U.S." or "Plaintiff"), for Summary Judgment against Defendant Tommy E. Powers ("Powers" or "Defendant").

Plaintiff filed suit in this matter on August 11, 1997 to recover repayment on a defaulted federally insured student loan debt. In his Answer, filed October 15, 1997, the defendant admitted responsibility for the student loan debt but disputed the amount owed.

Plaintiff filed this Motion for Summary Judgment July 22, 1998. The defendant has failed to respond to the motion in a timely manner.

I. Standard of Fed.R.Civ.P 56 Motion for Summary Judgment.

According to Local Rule 56.1(B), "All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the

statement of the opposing party." Because the defendant has failed to file a response to the summary judgment motion, the facts as set out in the plaintiff's motion are to be deemed admitted pursuant to the local rules. This Court has nevertheless independently examined Plaintiff's motion.

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, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986), cert den. 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

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

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. In Anderson v. Liberty Lobby, Inc., the Court stated:

The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

477 U.S. at 252. The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

II. Discussion

In order to survive a motion for summary judgment, the defendant must demonstrate that there exists a genuine issue as to a material fact. The defendant's answer to the complaint alleges that the plaintiff miscalculated the loan debt by failing to offset the debt by the amount of tax refund payments made by the defendant. Defendant has failed, however, to provide any evidence of such payments, and, furthermore, has failed to assert these claims in a response to the Motion for Summary Judgment. A mere conclusory allegation in the defendant's Answer, taken together with the absence of a response to the Motion for Summary Judgment, fails to adequately present a genuine issue of material fact.

For the reasons discussed above, the Plaintiff's Motion for Summary Judgment (#3) is granted.

ORDERED THIS DAY OF 4 SEPTEMBER, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
vs.)
)
TOMMY E. POWERS,)
)
Defendant.)

ENTERED ON DOCKET

DATE SEP 9 1998

No. 97-CV-728 K (J) ✓

FILED

SEP 9 1998

JUDGMENT

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Plaintiff and against the Defendant in the amount of \$1559.26 as of June 30, 1998, plus interest accruing on the unpaid balance at the promissory note rate of eight percent (8%) per annum.

ORDERED THIS DAY OF 4 SEPTEMBER, 1998.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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Q

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

OXY USA INC. and MOBIL)
EXPLORATION & PRODUCING)
U.S. INC.,)
)
Plaintiffs,)
)
vs.)
)
BRUCE BABBITT, SECRETARY,)
DEPARTMENT OF THE INTERIOR,)
et al,)
Defendants.)

ENTERED ON DOCKET

DATE SEP 9 1998

No. 96-C-1067-K

FILED

SEP - 8 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the Motions of the Plaintiffs 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 Plaintiffs and against the Defendants. The Defendants are hereby enjoined and prohibited from enforcing the Orders to Pay at issue in this litigation.

DE

ORDERED this 8 day of September, 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

OXY USA INC. and MOBIL
EXPLORATION & PRODUCING
U.S. INC.,

Plaintiffs,

vs.

BRUCE BABBITT, SECRETARY,
DEPARTMENT OF THE INTERIOR,
et al,

Defendants.

No. 96-C-1067-K ✓

FILED

SEP - 8 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court are the cross-motions of the parties for summary judgment. Plaintiffs bring this action seeking a declaratory judgment that "Orders to Pay" issued to plaintiffs by the Minerals Management Service (MMS) are invalid or otherwise barred, and seeking injunctive relief against enforcement of those orders. The parties previously agreed that the Court could, under the traditional "futility exception" to the requirement of exhaustion of remedies, address plaintiffs' assertion of a statute of limitations bar.

Mobil Exploration & Producing U.S. Inc. (MEPUS) and OXY USA, Inc. (OXY) are federal oil and gas lessees in California on leases issued primarily under the Mineral Leasing Act, 30 U.S.C. §§ 181-287. Also, MEPUS and OXY are federal lessees on leases issued under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356. MEPUS is a subsidiary of Mobil Corporation and OXY is a subsidiary of Occidental Oil and Gas Company.

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The Secretary of the Interior administers these leases and has authority to determine royalty value under these acts and the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. §§ 1701-1757. The MMS is the agency of the Department of the Interior (DOI) responsible for determining royalty value and collecting royalties due on federal and Indian oil and gas leases.

Plaintiffs allege that on October 18, 1996, the MMS issued to OXY an Order to Pay additional royalties in the amount of \$354,955.26, plus interest, and issued MEPUS an Order to Pay additional royalties in the amount of \$952,485.06, plus interest. The Orders state that they cover the period October 1, 1983 through February 29, 1988. The MMS ultimately withdrew the OXY 1983-1988 Order to Pay but also notified OXY that the MMS intended to expand its ongoing audit of OXY to include audits of royalties paid by OXY during the period covered by the withdrawn order. On December 20, 1996, the MMS issued to OXY an Order to Pay additional royalties of \$551,693.26, plus interest, for the period January 1, 1980 through September 30, 1983. On December 20, 1996, the MMS also issued to MEPUS an Order to Pay additional royalties in the amount of \$151,907.51, plus interest, for the period January 1, 1980 through September 30, 1983. On June 18, 1997, MMS issued to MEPUS an Order to Pay additional royalties in the amount of \$1,963,735.04. That Order supersedes the two previous Orders to Pay issued to MEPUS.

Plaintiffs argue that the Orders to Pay issued them are barred by operation of the six-year statute of limitations in 28 U.S.C. §2415(a). Section 2415 states in pertinent part as follows:

Subject to the provisions of section 2416 of this title. . . every action for money damages brought by the United States . . . or [an] agency thereof which is founded upon any contract . . . shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

The government denies that this provision is applicable to MMS royalty orders. This Court's analysis must proceed in stages, because all parties have discussed at length a potentially controlling Tenth Circuit decision, Phillips Petroleum v. Lujan, 4 F.3d 858 (10th Cir.1993). A district court must follow the precedent of its circuit, regardless of its own views as to that precedent's correctness. See United States v. Spedalieri, 910 F.2d 707, 709 n.2 (10th Cir.1990). Therefore, if this Court concludes that the Tenth Circuit has addressed the pending issue as a matter of precedent, this Court's task is at an end.

The plaintiffs argue that the Tenth Circuit has indeed issued a binding ruling upon the issue of §2415(a) and collection of royalty payments. The government replies that the statements in the Phillips opinion constitute dicta, and that the issue remains open for this Court's independent analysis. The court in Phillips begins by stating that the "central issue" before it is at what point the statute of limitations should commence to run "in an action to recover underpaid royalties from an oil and gas lease." 4 F.3d at 859. The appeal involved litigation of a suit against the government to enjoin it from enforcing an Order to Pay, as in the case at bar. In initiating its analysis, the court noted that "[t]he parties agree that 28 U.S.C. §2415(a) is the applicable

statute for determining when the government must commence its action to collect the royalty underpayment." Id. at 860. From that premise, the Tenth Circuit continued its discussion, ultimately reversing the district court on grounds not applicable here.¹

The government argues that the Phillips court merely referred to the fact of the parties' agreement as to the applicability of §2415(a), and did not make an independent finding on the point. This Court disagrees. First, it is established that a court is not bound by the parties' stipulations regarding questions of law. See Koch v. United States, 47 F.3d 1015, 1018 (10th Cir.), cert. denied, 516 U.S. 915 (1995). An "independent evaluation" must be made of a legal principle necessary for decision. Moreover, the Phillips court did so explicitly. In a footnote, the court stated "[b]oth parties recognize, and we agree, that oil and gas leases are contracts. Thus, we likewise agree with the parties that 28 U.S.C. §2415(a) is the controlling statute of limitations" relating to the government's collection of royalty underpayments. 4 F.3d at 860 n.1 (emphasis added) (citations omitted).

The government further argues that because of the parties' agreement on the point in Phillips, the issue was not sufficiently "contested" to render the Tenth Circuit's discussion binding. If this principle were adopted, any and all rulings on a point of law

¹The government has expressly disavowed that its Orders meet the one-year savings clause of §2415(a) or that the statute of limitations at §2415(a) has been tolled in this case pursuant to 28 U.S.C. §2416(c).

raised by a court sua sponte would be properly characterized as dicta. This Court does not accept the principle.

"Dicta are `statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand.'" Rohrbaugh v. Celotex Corp., 53 F.3d 1181, 1184 (10th Cir.1995) (quoting Black's Law Dictionary 454 (6th ed. 1990)). This Court finds that the language of the Phillips decision holding §2415(a) applicable to Orders to Pay was necessary and essential to the decision. A separate holding of the decision establishes when the government's right of action accrues on royalty claims for purposes of §2415(a). 4 F.3d at 861. It is, as a matter of logic, essential to the holding concerning accrual of a claim under §2415(a) that §2415(a) applies in the first place. Accordingly, this Court characterizes the discussion in Phillips of a six-year statute of limitation as binding Tenth Circuit authority, rather than dicta.

Having reached this conclusion, this Court need not and will not engage in any discussion of conflicting authority from other jurisdictions cited by the government.² Only the Tenth Circuit itself or the United States Supreme Court may modify or overrule Tenth Circuit precedent.

The Court declines to address the plaintiffs' alternative argument, that even if §2145(a) does not apply, the issuance of the Orders to Pay is arbitrary and capricious because they violate the

²This authority is from the district court level, with the exception of an unpublished Fifth Circuit opinion.

general "timeliness" requirement imposed on the Secretary by 30 U.S.C. §1711(a). First, reaching the issue is unnecessary to a decision, the Court having already ruled that §2145(a) does apply. Second, it appears to be outside the stipulation of the parties when they agreed that the Court could address the statute of limitations issue rather than require plaintiffs' to pursue futile administrative remedies. In agreeing that the Court could retain jurisdiction over Count IV of plaintiffs' complaint, the government stated "[t]he only issue before the Court would then be the narrow one of whether 28 U.S.C. §2415(a) bars MMS's orders to pay." (Defendants' reply brief of May 2, 1997 at 6). The Court has found that the defendants' Orders to Pay are time-barred under the statute and may not be pursued. Having addressed this narrow issue, the Court elects to proceed no further.

In its previous order, the Court also retained jurisdiction over any claim for attorney fees which plaintiffs might wish to pursue. Such a motion may be filed in accordance with the Local Rules.

It is the Order of the Court that the motions of the plaintiffs for summary judgment (#51 & #70) are hereby GRANTED and the motion of the defendant for summary judgment (#59) is hereby DENIED. The plaintiffs' motion for leave to file response (#40) is DENIED as moot. The defendants' motion (#43) for publication of the Court's Order filed September 23, 1997 is hereby GRANTED. The plaintiffs' motion for oral argument (#83) is DENIED as moot.

ORDERED this 8 day of September, 1998.

A handwritten signature in black ink, appearing to read "Terry C. Kern", written over a horizontal line.

TERRY C. KERN, Chief

UNITED STATES DISTRICT JUDGE

5/12

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

SEP - 8 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN ARTHUR OLDEN CHATMAN,)

Plaintiff,)

vs.)

MADDEN INVESTMENT FUND, INC.,)
a Florida corporation, registered and doing)
business in Oklahoma as a franchise of)
SUBWAY SANDWICHES,)

Defendant.)

Case No. 97-CIV-1086H-M ✓

ENTERED ON DOCKET

DATE SEP 09 1998

STIPULATION FOR DISMISSAL WITH PREJUDICE

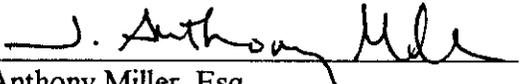
COME NOW, the parties, by and through their respective attorneys of record, and hereby stipulate and agree that Plaintiff's Petition against Madden Investment Fund, Inc. be dismissed with prejudice, each party to bear its own costs.

Respectfully submitted:



Edward G. Lindsey, Esq.
4143 E. 31st Street
Tulsa, OK 74135

ATTORNEY FOR PLAINTIFF



J. Anthony Miller, Esq.
1722 S. Carson, Suite 3101
Tulsa, OK 74119

ATTORNEY FOR DEFENDANT

Exhibit A

6

QT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP - 8 1998

VEDA L. GOUGOLIS,
SSN: 448-48-4151,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security,

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-0061-EA

ENTERED ON DOCKET

DATE SEP 09 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 8th day of September 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP - 8 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VEDA L. GOUGOLIS,)
SSN: 448-48-4151,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner of Social Security,¹)
)
Defendant.)

Case No. 97-CV-0061-EA

ENTERED ON DOCKET
DATE SEP 09 1998

ORDER

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

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

² On August 12, 1994, claimant applied for disability benefits under Title II (42 U.S.C. § 401 *et seq.*). Claimant's application for benefits was denied in its entirety initially (September 20, 1994), and on reconsideration (December 15, 1994). A hearing before Administrative Law Judge Leslie S. Hauger, Jr. ("ALJ") was held October 16, 1995, in Tulsa, Oklahoma. By decision dated November 21, 1995, the ALJ found that claimant was not disabled on or before December 31, 1994, claimant's last-insured date for purposes of disability benefits under Title II. On December 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. § 404.981.

Claimant appeals the decision of the Commissioner 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 September 15, 1950 and lived in Tulsa County, Oklahoma at the time of filing her complaint. Claimant graduated from high school and, in addition, finished an accounting course in business school. She has worked as a receptionist, payroll clerk, and waitress. Claimant alleges that she became unable to work on April 15, 1994 due to fatigue, muscle spasms in her legs, and instability of gait resulting from post-polio syndrome.

II. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

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

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

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

One of the issues now before the Court is whether there is substantial evidence in the record to support the final decision of the Commissioner that claimant was not disabled within the meaning of the Social Security Act. The term substantial evidence has been interpreted by the U.S. Supreme Court to require ". . . more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed.2d 842 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S. Ct. 206, 216, 83 L. Ed. 126 (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

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

(10th Cir. 1981). -Nevertheless, the court must review the record as a 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, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951).

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fourth step of the sequential evaluation process. He found that claimant had the residual functional capacity (“RFC”) to perform a full range of sedentary work. The ALJ found that claimant had no nonexertional impairments to further diminish her occupational base. The ALJ concluded that claimant could perform her past relevant work as a receptionist or a payroll clerk. Having determined that claimant could perform her past relevant work, the ALJ concluded that claimant was not disabled under the Social Security Act at any time through her last-insured date.

IV. REVIEW

Claimant asserts as error that the ALJ:

- A. failed to give proper weight to treating physicians’ opinions and improperly substituted his own medical conclusions;
- B. improperly concluded that claimant could perform past relevant work; and
- C. improperly concluded that claimant did not meet Listing of Impairments Section 11.14.

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

A. Treating-Physicians' Opinions

Claimant's first proposition of error is that the ALJ discounted the seriousness of claimant's impairments noted in treating physician's reports, and failed to address their findings regarding fatigue and weakness. It is axiomatic that the treating physicians' opinions are entitled to substantial weight, Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984), and that the ALJ must give specific, legitimate reasons for disregarding a treating physician's opinion. Talbot v. Heckler, 814 F.2d 1456, 1464 (10th Cir. 1987).

The treating physicians diagnosed claimant with post polio syndrome (R. 112-13, 115, 124, 134, 136, 166), and noted that she has problems with her gait. (Id.) Claimant has some muscle atrophy and weakness in her legs (R. 132, 134, 136, 140, 162-63, 165), and consequent leg fatigue. (R. 132, 134, 165) With regard to an ability to sit, claimant reported to one physician, Dr. Shore, that if she sits a long time, her left leg goes to sleep from above the knee to her foot. (R. 136)

The ALJ did not disregard the treating physicians' opinions. The ALJ found that "[t]he evidence supports a finding that on the date her insured status expired Ms. Gougolis had post polio syndrome, an impairment which causes significant vocationally relevant limitations." (R. 20) The ALJ noted that "[n]o treating or examining physician has mentioned findings equivalent in severity to the criteria of any listed impairment." (Id.) The ALJ summarized the major medical events discussed in the treating physicians' reports for the six months immediately prior to the expiration of her insured status:

Objectively, in June 1994 arthroscopic investigation or orthopedic surgery of the claimant's left knee was recommended; the claimant declined. The claimant was thought to have post polio syndrome on July 22, 1994. The claimant fell and hurt her left knee and underwent arthroscopic surgery in August 1994. The claimant

complained of charlie horses in both legs on October 5, 1994, and reported problems walking and falling on November 3, 1994 (Exhibit 15).”

(R. 21) The ALJ then made the following findings:

3. The medical evidence establishes that on the date her insured status expired the claimant had post polio syndrome, an impairment which is severe but which does not meet or equal the criteria of any of the impairments listed in Appendix 1, Subpart P, Regulations No. 4.
4. The claimant’s statements concerning her impairment and its impact on her ability to work on the date her insured status expired are not entirely credible in light of discrepancies between the claimant’s assertions and information contained in the documentary reports, the reports of the treating and examining practitioners and the findings made on examination.

(R. 23)

The ALJ discussed the content of the treating physicians’ reports, albeit not by identification of the treating physicians nor in the detail which would have been desirable. However, the diagnoses and impairment described by the treating physicians were given substantial weight by the ALJ.

With regard to the ALJ’s alleged failure to consider claimant’s weakness, the Court notes that a recognized aftereffect of poliomyelitis is “subsequent atrophy of groups of muscles, ending in contraction and permanent deformity.” Dorland’s Illustrated Medical Dictionary 1325 (28th ed. 1994). Muscle weakness is subsumed in a finding of post polio syndrome. By his specific finding of post polio syndrome “which causes significant vocationally relevant limitations” (R. 20), and his reliance on the treating physicians’ reports, the ALJ did not ignore claimant’s weakness.

Next, claimant contends that the ALJ erred in ignoring claimant’s fatigue. In this case, claimant’s fatigue is relative to her gait, or her ability to walk. (R. 132, 134, 165) The ALJ found, after considering the medical evidence and claimant’s activities, that claimant had a severe impairment which limited her to sedentary work: “The medical evidence clearly establishes that claimant cannot

walk or stand significantly. . . . Standing and walking are not required to any significant degree in sedentary work and claimant's testimony shows that she can fulfill that requirement." (R. 22)

Although the ALJ was incorrect in stating that the medical evidence did not show any objective basis for complaints of fatigue, what claimant is really arguing is that the ALJ reached an incorrect result when he weighed the evidence. 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). This Court's review is limited to whether the ALJ's conclusion was supported by substantial evidence. 42 U.S.C. § 405(g). The ALJ's conclusion that claimant was not disabled on or before December 31, 1994 is supported by substantial evidence.

First, diagnoses and remarks by the treating physicians support the ALJ's finding. In July 1994, Dr. Sonny Cobble discussed claimant's fatigability, particularly of the right dorsiflexors, and concluded ". . . this is probably amenable to stretching to be complimented [sic] by an AFO [ankle-foot orthosis] when the patient is fatigued." (R. 134) One month later, Dr. Cobble wrote to the orthotics specialist that it would be ". . . the better part of wisdom and more efficient to treat [claimant] with an AFO . . ." (R. 124) Claimant was fitted for an AFO. After the expiration of claimant's insured status, Dr. Donald Baldwin commented in August 1995:

Patient has not been working on her quad exercises and has had several episodes in which she fell because her knee gave way. I do not believe that her major problem is now because of the persistent chondromalacia [cartilage softening] but the secondary quadriceps atrophy. Consequently, no injections were given today. She is noted that when she walks, in order to get her foot flat, she hyperextends her knee. I have asked that she work on dorsiflexion exercises. In addition, I have ordered physical therapy for quad strengthening.

(R. 162) Claimant's fatigue was found by the treating physicians to be amenable to an AFO and strengthening exercises (which one physician noted claimant had not been doing). Remediable conditions cannot provide a basis for disability benefits.

Additionally, claimant's testimony as to her activities (R. 36-38) supports the finding that claimant's fatigue was not disabling before her insured status expired: "As to her daily activities, she cleans the house, does the laundry, cooks, shops once every 2 weeks and does nothing outside. She can lift a 10-15 pound bag of groceries, stand 25 minutes, walk 20-25 minutes and sit 20-25 minutes."⁴ (R. 21) The ALJ may discount the significance of subjective complaints because of a lack of corroborative objective evidence. See Talley v. Sullivan, 908 F.2d 585 (10th Cir. 1990). The ALJ may also discredit subjective complaints by enumerating claimant's activities, Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988), which he did. Gossett v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988).

The Court finds that the ALJ adequately considered the medical evidence, and did not substitute his own medical conclusions for those of the treating physicians. None of the treating physicians stated that claimant's condition was disabling. Substantial evidence supports the ALJ's findings.

B. Past Relevant Work

Claimant argues that the ALJ's finding of an ability to perform past relevant work is incorrect. The issue is again whether that decision is supported by substantial evidence.

⁴ The Court notes that in her August 12, 1994 description of recreational activities, claimant listed hiking and camping. (R. 98) This is inconsistent with disabling weakness and fatigue.

Claimant's focus in this regard is an alleged inability to perform the walking, standing, and sitting requirements of sedentary work. Sedentary work is defined as that which

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

20 C.F.R. § 404.1567(a).

While the medical evidence relates to limitations on walking and standing as a result of post polio syndrome (R. 112-13, 115, 124, 132, 134, 136, 162-67), there is no evidence of limitations on sitting other than claimant's testimony that she can sit 20-25 minutes before she has to move her leg. (R. 39) The ALJ took the medical evidence into account when he found that "[t]he medical evidence clearly establishes that claimant cannot walk or stand significantly." (R. 22) (emphasis added) The ALJ found there was no objective medical evidence of limits on claimant's ability to sit and no medically described basis for a limitation on sitting. (Id.) Based upon all the evidence, including claimant's descriptions of her own activities, the ALJ determined that claimant retained the RFC to perform sedentary work, and claimant's past relevant work was within the scope of her RFC. (R. 22) The ALJ's finding is supported by substantial evidence.

The claimant also objects to the ALJ's failure to adopt the vocational expert's testimony that an individual with the limitations on sitting, standing, and walking testified to by claimant could not perform her past relevant work. (R. 52) In forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). It was only when the expert was asked to assume impairments that the ALJ properly deemed

unsubstantiated that the expert found claimant could not perform her past relevant work. This opinion, based on unsubstantiated assumptions, was not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993).

Further, although at Step Four a vocational expert may supply information to the ALJ about the demands of claimant's past relevant work, Soc. Sec. Rulings 82-61 and 82-62, Soc. Sec. Rep. Serv., Rulings 1975-1982, at 811-12, 836-38, and the ALJ may rely on such information, Winfrey v. Chater, 92 F.3d 1017, 1025 (10th Cir. 1996), the ALJ himself must make the required findings. Id. Due to the ALJ's determination that claimant could perform her past relevant work, he was under no obligation to seek information from a vocational expert. A case decided at Step Four does not require support with a vocational expert's testimony. Glenn v. Shalala, 21 F.3d 983, 988 (10th Cir. 1994); Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992). The ALJ decision at Step Four was supported by substantial evidence.

C. Listing of Impairments Section 11.14

Claimant contends that the medical evidence supports a conclusion that she met Listing of Impairments Section 11.14 before December 31, 1994. Section 11.14 defines peripheral neuropathies as a listed impairment when accompanied by disorganization of motor functions as described in Section 11.04B, in spite of prescribed treatment. 20 C.F.R. Part 404, Subpart P, Appendix 1, Part A, § 11.14. Section 11.04B requires "[s]ignificant and persistent disorganization of motor function in two extremities, resulting in sustained disturbance of gross and dexterous movements, or gait and station (see 11.00C)." Id., § 11.04B. Section 11.00C explains that:

C. Persistent disorganization of motor function in the form of paresis or paralysis, tremor or other involuntary movements, ataxia and sensory disturbances [sic] . . . which occur singly or in various combination, frequently provides the sole

or partial basis for decision in cases of neurological impairment. The assessment of impairment depends on the degree of interference with locomotion”

Id., § 11.00C.

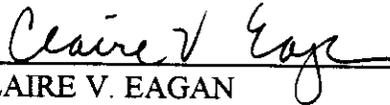
The record supports the ALJ’s conclusion that claimant had no impairment which meets the criteria of this Listing. In July 1994, six months prior to expiration of her insured status, Dr. Cobble noted that claimant had functioned without braces and had been relatively active all of her adult life. (R. 132) She was fitted with a right leg AFO. (R. 124) Six months after her insured status expired, claimant was diagnosed with mild synovitis/tendinitis of the left knee, with secondary quadricep atrophy. (R. 165) He recommended stretching and strengthening exercises. (Id.) Claimant failed to prove that her impairment significantly interfered with her motor function in both legs, “resulting in sustained disturbance of gross and dexterous movements, or gait and station.”

At Step Three of the sequential evaluation process, a claimant's impairment is compared to the Listings (20 C.F.R. Pt. 404, Subpt. P, App. 1). If the impairment is equal or medically equivalent to an impairment in the Listings, the claimant is presumed disabled. A claimant has the burden of proving that a Listing has been equaled or met. Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988). Claimant did not meet her burden, and the ALJ properly found that claimant did not meet Section 11.14 of the Listings.

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 8th day of September, 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

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

ANTHONY R. MATHIS,

Plaintiff,

vs.

SOONER PROCESS AND
INVESTIGATION, INC., an
Oklahoma corporation, d/b/a
S.P.L SECURITY, INC.,
LARRY FERGUSON, an individual,
and PACIFIC LIFE INSURANCE
COMPANY, f/k/a PACIFIC MUTUAL
LIFE INSURANCE COMPANY, d/b/a
PACIFIC GROUP LIFE INSURANCE
COMPANY

Defendants.

Case No. 97-CV-757-BU(W)

ENTERED ON DOCKET
DATE SEP 8 1998

AMENDED ADMINISTRATIVE CLOSING ORDER

As the parties have reached a Settlement and Compromise of this matter, it is ordered that the Clerk continue the administrative termination of this action in his records without prejudice to the rights of the parties to re-open the proceeding for good cause shown, for the entry of any stipulation or order or for any other purpose required to obtain a final determination of the litigation.

If the parties have not re-opened this case on or before October 5, 1998, for the purpose of dismissal pursuant to the Settlement and Compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

ENTERED this 4th day of September, 1998.

Michael Burrage
THE HONORABLE MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

F I L E D

SEP - 4 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ALICE ROSE,)
)
Plaintiff,)
)
vs.)
)
AMERICAN COMMUNITY MUTUAL)
INSURANCE COMPANY, a)
foreign insurance company,)
)
Defendant.)

No. 97-CV-827 E (M)

ENTERED ON DOCKET

DATE SEP 2 1998

STIPULATION OF DISMISSAL WITH PREJUDICE

The Defendant, American Community Mutual Insurance Company, and the Plaintiff, Alice Rose, by their respective counsel, and pursuant to Rule 41 (a)(1)(ii), hereby stipulate that the above-entitled cause be dismissed with prejudice.

Respectfully submitted,

PIERCE COUCH HENDRICKSON
BAYSINGER & GREEN, L.L.P.



Kevin T. Gassaway, OBA #3281
Of Counsel
100 West 5th Street
ONEOK Plaza, Suite 707
Tulsa, Oklahoma 74103-4290
(918) 583-8100
ATTORNEY FOR DEFENDANT

*mail
CLS
LWA*



Mr. Fred E. Stoops, Sr., OBA #8666
Stoops, Smith & Clancy, P.C.
2250 East 73rd St., Suite 400
Tulsa, Oklahoma 74136-6833
(918) 494-0007
ATTORNEY FOR PLAINTIFF

ENTERED ON DOCKET
DATE 9-8-98

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

Case No. 98-CV-0007-K

FILED

ORDER

NOW ON THIS 4 day of September, 1998, for good cause shown, the above styled cause is dismissed with prejudice.

IT IS SO ORDERED.


UNITED STATES DISTRICT JUDGE

FILED
SEP - 4 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

DAVID MAULE and TRACI MAULE,)
)
 Plaintiffs,)

vs.) Case No. 98-CV-84-C ✓

SOONER EQUIPMENT & LEASING, INC.,)
 GEORGE CORNELISON, d/b/a/ SOONER)
 TRUCK SALES and JASON LEONARD,)
)
 Defendants.)

ENTERED ON DOCKET
DATE SEP 3 1998

ORDER

Before the Court is a motion for summary judgment filed by the defendants Sooner Equipment & Leasing, Inc., George Cornelison, d/b/a/ Sooner Truck Sales and Jason Leonard. Defendants contend that there is no genuine dispute as to any material fact and that the defendants are entitled to summary judgment as a matter of law.

Plaintiffs are seeking monetary relief for damages that they have allegedly suffered from their acquisition of a 1989 Kenworth dump truck. Plaintiffs contend that the defendants intentionally misrepresented to them the mileage and odometer reading of the truck at the time that the plaintiffs purchased the truck from the defendant Sooner Truck Sales. Plaintiffs bring this action asserting claims for Violation of the Odometer Act under 49 U.S.C. § 32701, Fraud and Breach of Contract under common law, and Breach of Express Warranty under the Uniform Commercial Code.

The central issue in dispute in defendants' motion for summary judgment is plaintiffs' allegation that this action involves a sales contract between plaintiffs and defendants. Defendants contend that Sooner Truck Sales conveyed title to the truck to Appleway Equipment Leasing, Inc., which in turn leased the truck to plaintiffs. Appleway Equipment Leasing, Inc. is not a party to this

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action. The dispute is whether plaintiffs entered into a sales contract with the defendants or entered into a lease agreement with Appleway.

From a review of the record, it is clear that plaintiffs did not enter into a sales contract with the defendants nor was legal ownership of the truck transferred to the plaintiffs on October 13, 1997. The only document executed by the plaintiffs was the Equipment Lease, dated October 25, 1997 which was in favor of Appleway. In conjunction with plaintiffs executing the lease, defendants conveyed title to the truck to Appleway on October 13, 1997. The language of the Equipment Lease is controlling. Section 4.14 of the Equipment Lease provides:

It is agreed between the Parties that this Lease is a true lease; that the Lessor has and shall retain title to the Equipment; that the Lessee has not been granted any option to purchase the Equipment or any portion thereof, and that the transactions between the Parties hereunder are not to be construed as a sale or a loan for any purpose. No equity, title or interest in the Equipment shall pass to the Lessee except for the leasehold interest of the Lessee as a Lessee hereunder.

Plaintiffs did not acquire an ownership interest in the truck by their \$9,759 "capitalized cost reduction" payment to Sooner Truck Sales. Section 3.3 of the Equipment Lease provides:

If the Lessee has paid a "capitalized cost reduction" The amount of any such payment or trade-in shall not be refundable to the Lessee under any circumstance, nor shall the Lessee have any ownership interest in the Equipment by virtue thereof, it being agreed between the Parties that the amount of any such payment has been taken into account in their negotiation of the amount of the Rent payable hereunder.

Additionally under Section 3.30, plaintiffs did not have an automatic right to purchase the truck upon termination of the lease. At the end of the lease, plaintiffs were obligated to surrender the truck to Appleway. The \$ 3,225, shown as the Projected Residual Value, was the anticipated fair market value of the truck at the end of the 30 month lease term. Plaintiffs were granted an option for a period of ten days to make an offer to purchase the truck at the conclusion of the lease.

However, Appleway was not obligated to sell and Appleway had the option to look to other bona fide offers to purchase the truck.

The Court finds and concludes that pursuant to the terms of Equipment Lease, ownership of the truck was not transferred from the defendants to the plaintiffs, nor did the defendants enter into a contract to sell with the plaintiffs. Accordingly, plaintiffs' action is not premised on a sales contract or upon a transfer of an ownership interest to them in the truck.

Based upon this finding, plaintiffs have not stated a viable cause of action for Violation of the Odometer Act, under 49 U.S.C. § 32701, Breach of Contract, or Breach of Express Warranty. The Odometer Act does not impose the odometer disclosure requirements on lessors of vehicles. *See, e.g. Acevedo v. Dan Motors*, 1998 WL 382697 (6th Cir. 1998) (unpublished). The Odometer Act is limited to actions involving the transfer of the ownership of a vehicle. Similarly, plaintiffs claim for Breach of Contract fails because plaintiffs did not enter into a contract with the defendants. Under the Uniform Commercial Code, an action for Breach of Express Warranty may only be brought against the seller of the product, under 12A O.S. § 2-313 or a lessor of a product under 12A O.S. § 210. In that plaintiffs have not asserted that they were a third party beneficiary of the sales contract between Sooner Truck Sales and Appleway, plaintiffs cannot assert a claim under 12 A O.S. § 2-313. Additionally, in that plaintiffs have not joined Appleway, the lessor, as a party defendant herein, plaintiffs cannot assert a claim under 12A O.S. § 210.

However, plaintiffs have stated a viable claim against the defendants for common law Fraud. Under plaintiffs Fraud claim, there is insufficient proof that plaintiffs had adequate experience and expertise to put them on notice or to investigate the true mileage of the dump truck. Accordingly, plaintiffs may proceed to trial on their claim for Fraud.

ACCORDINGLY, IT IS THE ORDER OF THE COURT, that defendants' motion for summary judgment as to plaintiffs' claims for Violation of the Odometer Act, Breach of Contract and Breach of Express Warranty are hereby granted.

IT IS THE FURTHER ORDER OF THE COURT, that defendants' motion for summary judgment as to plaintiffs' claim for Fraud is hereby denied.

IT IS SO ORDERED this 3rd day of September, 1998.


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

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

ESCO FRANKLIN PORTERFIELD,)
)
Petitioner,)
)
vs.)
)
JAMES SAFFLE, Director,)
Oklahoma Department of Corrections;)
and TWYLA SNIDER, Warden,)
)
Respondent.)

ENTERED ON DOCKET

DATE SEP 4 1998

No. 98-CV-650-K (E)

F I L E D
SEP 03 1998

U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF TRANSFER

Petitioner, a state prisoner appearing pro se, has filed a motion for leave to proceed in forma pauperis and an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

A prisoner in custody pursuant to the judgment and sentence of a State court 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 over 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 Cimarron Correctional Facility, Cushing, Oklahoma, located within the jurisdictional territory of the Northern District of Oklahoma. 28 U.S.C. § 116(a). However, Petitioner was convicted in Pottawatomie County, Oklahoma, which is located within the territorial jurisdiction of the Western District of Oklahoma. 28 U.S.C. § 116(c). The Court finds

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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 United States District Court for the Western District of Oklahoma.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's application for a writ of habeas corpus and Petitioner's motion for leave to proceed in forma pauperis are **transferred** to the United States District Court for the Western District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d).

IT IS SO ORDERED this 1 day of September, 1998.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

IN RE: -
MICHELLE FELLERS,
Debtor,
MICHELLE FELLERS,
Appellant,
vs.
LONNIE D. ECK,
Appellee.

F I L E D

SEP 03 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-180-K (M) ✓
Bankruptcy Case No. 97-02679-M

ENTERED ON DOCKET
DATE SEP 4 1998

REPORT AND RECOMMENDATION

The instant appeal from the United States Bankruptcy Court for the Northern District of Oklahoma is before the undersigned United States Magistrate Judge for report and recommendation. *Greigo v. Padilla*, 64 F.3d 580 (10th Cir. 1995).

A Notice of Appeal was filed in the captioned bankruptcy case on October 6, 1997. By order dated July 7, 1997, the parties were notified that the Court is in receipt of an affidavit from the Clerk of the Bankruptcy Court advising that a designation of record contemplated by Fed. R. Bankr. 8006 has not been received from debtor, Michelle Fellers and that in accordance with Rule 8006, all designations of record should have been made and the record should have been transferred to this Court by now. Appellant was directed to show cause, on or before July 17, 1998, why her appeal from the Bankruptcy Court should not be dismissed for failure to prosecute. Appellant was advised that failure to respond within the time specified

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would result in a recommendation that her appeal be dismissed for failure to prosecute. [Dkt. 3]. To date, Appellant has not responded to the order to show cause.

The district court has discretionary authority to dismiss a bankruptcy appeal for failure to file a designation of record as required by Rule 8006. Fed. R. Bankr. 8001, *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) (Dismissal of bankruptcy appeal based on debtors' unexplained failure to designate record or timely file a brief was within court's discretion). The undersigned United States Magistrate Judge therefore RECOMMENDS that the Court exercise its discretion and DISMISS the case for failure to prosecute.

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

DATED this 3rd Day of September, 1998.

CERTIFICATE OF SERVICE

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

4th Day of September, 1998.

C. Portillo, Deputy Clerk

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

FILED

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

SEP - 3 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LENA LORETTA FIARRIS,

Plaintiff,

v.

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

Defendant.

Case No. 97-CV-194-B

ENTERED FOR DEPOSIT
DATE **SEP 04 1998**

ORDER

On May 15, 1998, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded the case to the Commissioner for an award of benefits. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on or around August 13, 1998, the parties have stipulated that an award in the amount of \$3,357.50 for attorney fees and no costs for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees of \$3,357.50 and no costs under the Equal Access To Justice Act in the amount of \$3,357.50.



**THOMAS R. BRETT
United States Magistrate Judge**

16

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

F I L E D

SEP - 3 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRYAN R. RAMER,)
)
Petitioner,)
)
vs.)
)
RITA MAXWELL,)
)
Respondent.)

Case No. 97-CV-383-BV

FILED ON DECKET
DATE **SEP 04 1998**

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that plaintiff's action herein is dismissed without prejudice to refile same, for failure to exhaust state remedies.

SO ORDERED this 3rd day of September, 1998.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

13

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

F I L E D

SEP - 3 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRYAN R. RAMER,

Petitioner,

vs.

RITA MAXWELL,

Respondent.

Case No. 97-CV-383-B

ENTERED ON DOCKET
DATE SEP 04 1998

ORDER

Before the Court is Respondent's motion to dismiss for failure to exhaust state remedies (Docket #5). Petitioner, a state inmate appearing *pro se*, has filed a response to the motion to dismiss (#9) and a motion for a ruling (#10). For the reasons discussed below, the Court finds Respondent's motion should be granted. As a result of this ruling, Petitioner's motion for a ruling has been rendered moot.

BACKGROUND

In December, 1978, Petitioner pleaded guilty in Tulsa County District Court, Case Nos. CRF-78-1025, -1026, -1027 and -1028, and was convicted of robbery and kidnaping. He was sentenced to two 25 year terms and two 10 year terms of imprisonment, to run concurrently. He did not appeal his convictions.

On November 25, 1983, Petitioner failed to return to the Lawton Community Treatment Center from a pass. The next day, November 26, 1983, he was stopped by New Mexico State Police. During the stop, Petitioner shot two officers, one of whom returned fire, striking Petitioner. Petitioner was incarcerated in New Mexico until July, 1992, as a result of those events. Petitioner

//

was returned to the Comanche County Jail on July 4, 1992. On July 10, 1992 a copy of a misconduct report related to the 1983 escape, was served on Petitioner. A disciplinary hearing was held before a three-member committee on July 15, 1992. Petitioner was present and allowed to present his defense. At the conclusion of the hearing, the committee unanimously found Petitioner guilty of administrative misconduct and imposed a sentence of 15 days in the disciplinary unit, loss of designated privileges (canteen) for 45 days and loss of all accrued earned credits, totaling approximately 1,489 days.

On December 30, 1993, after exhausting his administrative remedies, Petitioner filed a petition for writ of habeas corpus, construed as a petition for writ of mandamus, in Alfalfa County District Court. (#6, Ex. A). Petitioner raised three (3) grounds for relief all arising from the misconduct proceedings: (1) he was not given timely notice of the charges against him (2) the committee failed to consider his defense and mitigating evidence; and (3) a change in DOC policy which allowed for the forfeiture of all good time credits constituted an *ex post facto* violation. On August 23, 1994, the state district court denied relief. (#6, Ex. B). Petitioner appealed to the Oklahoma Court of Criminal Appeals where, on May 15, 1995, his appeal was dismissed because Petitioner failed to file a brief in support of his petition as required by Rule 10.1, *Rules for the Court of Criminal Appeals*. (#6, Ex. C).

In the instant habeas corpus action, filed April 22, 1997, Petitioner raises six (6) challenges to the administration of his sentence by Oklahoma Department of Corrections officials. He claims that (1) he was denied notice and an impartial tribunal at the 1992 disciplinary hearing in violation of the due process clause, and revocation of all earned credits constituted *ex post facto* violation; (2) DOC's earned credit policy concerning blood donation constitutes due process and *ex post facto*

violations; (3) DOC's failure to credit Petitioner for nine (9) days of incarceration at Comanche County Jail in 1992 constitutes due process and *ex post facto* violations; (4) DOC classification policy denied Petitioner the opportunity to work and earn good time credits constituting due process and *ex post facto* violations; (5) DOC's policy prohibiting restoration of revoked credits for violent offenders constitutes due process and *ex post facto* violations; and (6) Petitioner's ineligibility for public works program as a result of the 1992 issuance of misconduct for 1983 escape constitutes due process and *ex post facto* violations.

In her motion to dismiss, Respondent argues that while Petitioner has exhausted his due process and *ex post facto* claims arising from his disciplinary hearing (claim #1), he has not exhausted the remainder of his claims (#s 2-6). Respondent also contends that Petitioner has an available state remedy, the writ of mandamus. Therefore, Respondent argues the petition for writ of habeas corpus is a mixed petition and must be dismissed for failure to exhaust state remedies. Petitioner responds that "under Oklahoma law, Ramer CANNOT file for mandamus relief unless he 'would have earned enough credits to be entitled to immediate release.'" (#9 at 1-2) (emphasis in original) (quoting Ekstrand v. State, 791 P.2d 92, 95 (Okla. Crim. App. 1990)). Because he would not be entitled to immediate release even if his arguments were successful, Petitioner contends he has no adequate state remedy and exhaustion is not required.

ANALYSIS

A petitioner may seek federal habeas review only if he has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1). And to meet the exhaustion requirement, "it is not sufficient merely that the federal habeas applicant has been through the state courts." Picard v. Connor, 404

U.S. 270, 275-76 (1971). Rather, a federal claim generally will not be deemed exhausted unless the "substance" of the claim has been "fairly presented" to the state courts. Id., at 275, 277-78; Johnson v. Cowley, 40 F.3d 341, 344 (10th Cir.1994). The state courts must have had an opportunity to pass on the claim in light of a full record, and where the factual basis for a claim was not presented to the state courts, the claim is unexhausted.

Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam). The exhaustion requirement is based on the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." Darr v. Burford, 339 U.S. 200, 204 (1950). The Tenth Circuit has stated that a "rigorously enforced" exhaustion policy is necessary to serve the end of protecting and promoting the state's role in resolving the constitutional issues raised in federal habeas petitions. Naranjo v. Ricketts, 696 F.2d 83, 87 (10th Cir. 1982). Furthermore, in Rose v. Lundy, 455 U.S. 509 (1982), the United States Supreme Court held that when a habeas corpus petition contains both exhausted and unexhausted grounds for relief, the federal district court must dismiss the petition. The Court stated:

In this case we consider whether the exhaustion rule in 28 U.S.C. § 2254(b), (c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statutes, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

Id. at 510 (emphasis added).

A review of the record in this case reveals that the first ground raised by Petitioner in his petition repeats the issues presented to the Oklahoma courts in Petitioner's mandamus action. The remaining five (5) issues have not been presented to the Oklahoma courts and therefore are unexhausted if a state remedy is available. See 28 U.S.C. § 2254(b). Petitioner correctly states that in Ekstrand, the Oklahoma Court of Criminal Appeals ruled that a petitioner's constitutional challenge to the state's earned credit statute would not be viable unless the petitioner could demonstrate he was entitled to immediate release. Ekstrand, 791 P.2d 92, 95 (Okla. Crim. App. 1990). However, in Waldon v. Evans, 861 P.2d 311 (Okla. Crim. App. 1993), the court stated that:

If this Court has exclusive jurisdiction to determine issues relating to credit time for the reduction of a sentence, then concomitant with such jurisdiction comes the responsibility to fashion appropriate remedies when rights have been violated. This Court finds that a writ of mandamus must lie against appropriate prison officials when a prisoner's minimum due process rights have been violated. The District Court's action is a due process review only, and not an appellate review of the decision of the disciplinary authority. Therefore, we abandon our previous requirement that the only remedy available for sentence credit right violations is a writ of habeas corpus when entitlement to immediate release can be shown. Mahler v. State, 783 P.2d 973 (Okla.Cr.1989); Ekstrand v. State, 791 P.2d 92, 95 (Okla.Cr.1990).

Id. at 313. Thus, in Waldon, the Court of Criminal Appeals abrogated that portion of Ekstrand requiring entitlement to immediate release before constitutional challenges to earned credit considerations could be reviewed. Clearly, pursuant to Waldon, inmates may now challenge the constitutionality of the application of the earned credit statute via the writ of mandamus even if they cannot demonstrate they would be entitled to immediate release.

In the instant case, Petitioner has never presented his claims numbered 2-6 to the Oklahoma Court of Criminal Appeals making this a "mixed petition." Because he may challenge the

constitutionality of the application of the earned credit statute to his sentence via a petition for a writ of mandamus, Petitioner has an available state remedy. Furthermore, as to the possibility that the state courts could impose a procedural bar on Petitioner's claims, the Court finds it may not be futile to require him to return to state courts given the nature of the unexhausted claims. Therefore, pursuant to Rose v. Lundy, 455 U.S. 509 (1982), the Court finds Respondent's motion to dismiss should be granted and the petition for writ of habeas corpus should be dismissed without prejudice for failure to exhaust state remedies.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss for failure to exhaust (#5) is **granted**.
2. The petition for writ of habeas corpus is **dismissed without prejudice** for failure to exhaust state remedies.
3. Petitioner's "motion for a ruling" (#10) is **denied as moot**.

SO ORDERED THIS 2nd day of Sept., 1998.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

SEP - 3 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LOUIS EDWARD BISHOP,)
)
Petitioner,)
)
vs.)
)
RITA MAXWELL,)
)
Respondent.)

Case No. 97-CV-329-B ✓

FILED IN DOCKET
DATE SEP 04 1998

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that plaintiff's action herein is dismissed without prejudice to refileing same, for failure to exhaust state remedies.

SO ORDERED this 3rd day of September, 1998.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

12

F I L E D

SEP 1 1998 *P*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

KABALA OIL & GAS, L.L.C.,)
)
Plaintiff,)
)
vs.)
)
EXXON CORPORATION,)
)
Defendant.)

No. 97-C-664-E ✓

ENTERED ON DOCKET

DATE 9-2-98

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been 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 that settlement has not been completed and further litigation is necessary.

ORDERED this 1st day of September, 1998.

James O. Ellison

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

12

IN THE UNITED STATES DISTRICT COURT **FILED**
FOR THE NORTHERN DISTRICT OF OKLAHOMA SEP - 2 1998

KCI LIQUIDATING, L.L.C., a limited liability
company, BREENE M. KERR and SHERYL
V. KERR, individuals,

Plaintiffs.

v.

RUSH ENTERPRISES, INC., a Texas
corporation,

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98CV405 K (J)

ENTERED ON DOCKET

DATE SEP 02 1998

PLAINTIFFS' NOTICE OF DISMISSAL

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COME NOW KCI LIQUIDATING L.L.C., BREENE M. KERR, and SHERYL
V. KERR ("Plaintiffs"), and pursuant to Fed. R. Civ. P. 41(a)(1)(i), file this Notice of Dismissal
of Plaintiffs' causes of action against RUSH ENTERPRISES, INC. ("Defendant") and would
respectfully show unto the Court the following:

1. On or about June 5, 1998, Plaintiffs filed this lawsuit against Defendant
asserting causes of action against Defendant for: (1) breach of real estate of dealership purchase
agreement; (2) breach of real estate lease agreement; and (3) breach of dealership purchase
contract. Defendant was served with this lawsuit on June 26, 1998. Defendant has not filed an
answer or a motion for summary judgment in this lawsuit.

2. Pursuant to Fed. R. Civ. P. 41(a)(1)(i), Plaintiffs file this Notice of Dismissal
with prejudice to refiling as to Plaintiffs' causes of action against Defendant for: (1) breach of
real estate purchase agreement; and (2) breach of real estate lease agreement (as stated in
paragraphs 12 through 15 of Plaintiffs' Complaint).

3. Plaintiffs file this notice of Dismissal *without prejudice to refiling* as to Plaintiffs' causes of action Defendant for breach of dealership purchase contract (as stated in paragraphs 16 through 19 of Plaintiffs' Complaint).

4. Plaintiffs intend for this Notice of Dismissal to address all causes of action asserted by Plaintiffs against Defendant in this lawsuit.

5. Plaintiffs intend for this Notice of Dismissal to be effective immediately upon the filing of same.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs KCI LIQUIDATING L.L.C., BREENE M. KERR, and SHERYL V. KERR request that the Court and Defendant, RUSH ENTERPRISES, INC. take note of this Notice of Dismissal.

Respectfully submitted,

McKINNEY & STRINGER P.C.
401 South Boston, Suite 2100
Tulsa, Oklahoma 74103
918/582-3176
918/582-1403

By: 

DAVID A. CHEEK, OBA #001638

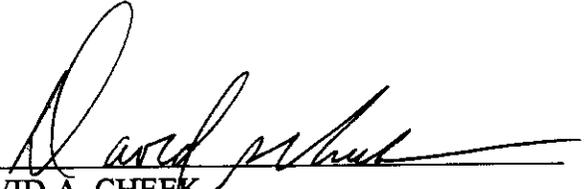
PATRICK H. KERNAN, OBA #004983

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

This pleading was served in compliance with Rule 5 of the Federal Rules of Civil Procedure by mail on August 31, 1998 to the following counsel of record:

Rush Enterprises, Inc.
c/o Marvin Rush
8810 Interstate Highway 10 East
San Antonio, Texas 78219


DAVID A. CHEEK

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

FILED

SEP - 1 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HAROLD D. HORNSBY,)

Petitioner,)

vs.)

EDWARD L. EVANS, JR.,)

Respondent.)

No. 95-C-940-B

ENTERED ON DOCKET

DATE SEP 02 1998

ORDER

This matter comes before the Court on remand from the Tenth Circuit Court of Appeals for an evidentiary hearing on the following limited issue: whether the procedural default of petitioner Harold D. Hornsby ("Hornsby") was excused by his attorney's ineffectiveness in allegedly failing to comply with Hornsby's request to file a motion to withdraw his guilty plea and perfect an appeal in Case No. CRF-90-3198 in Tulsa County District Court. This Court had denied Hornsby's petition for writ of habeas corpus challenging his convictions and sentences in Case Nos. CRF-90-3198, CRF-90-461, and CRF-92-170¹ and denied his request for evidentiary hearing, concluding Hornsby had failed to show cause and prejudice to excuse his procedural defaults and his failure to raise his issues on direct appeal barred this Court from reviewing them under 28 U.S.C. §2254. The Tenth Circuit reversed and remanded for an evidentiary hearing solely on Hornsby's claim of ineffective

¹ The Tenth Circuit affirmed this Court's denial of Hornsby's petition pertaining to issues arising from his convictions and sentences in CRF-90-461 and CRF-92-170, and its dismissal of the appeal of those issues is final. However, as Hornsby has served his sentence in CRF-90-3198, the only relevance of his felony conviction in CRF-90-3198 to this habeas review is the effect of that conviction in enhancing Hornsby's sentence in CRF-92-170 for First Degree Robbery, After Former Conviction of a Felony. Thus, if this Court were to find cause and prejudice to excuse Hornsby's default in CRF-90-3198, the effect of the conviction in enhancing Hornsby's sentence in CRF-92-170 would then be reviewable.

assistance of counsel in CRF-90-3198. Accordingly, the Court appointed counsel for Hornsby and an evidentiary hearing was held on August 28, 1998.² Based on the evidence presented, the Court finds Hornsby has failed to show cause to excuse his procedural default. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986).

Hornsby alleges he was provided ineffective assistance of counsel when his counsel refused his request to withdraw his guilty plea and appeal his sentence. Hornsby claims he entered his guilty plea in CRF-90-3198 based on the prosecutor's assurance that he would recommend three-year probation or suspended sentence to the trial judge. When the judge later sentenced him to three years imprisonment, Hornsby alleges he asked his attorney, Jim Beckert ("Beckert"), to file a motion to withdraw the guilty plea, and when Beckert informed Hornsby that the judge would not allow him to withdraw his guilty plea, Hornsby asked and Beckert agreed to file an appeal although an appeal was never filed.

After reviewing the transcript of the plea and sentencing hearings in CRF-90-3198 and considering the testimony of witnesses, the Court concludes Hornsby had effective assistance of counsel in his defense in Case CRF-90-3198. The transcript of the plea hearing before the Honorable Joe Jennings on September 10, 1990 directly contradicts Hornsby's testimony that he did not know he could receive a three-year sentence of imprisonment if he entered a plea of guilty for

² At the hearing the Court also ruled on the following pro se motions filed by Hornsby: Motion to Enlarge State Court Record (Docket No. 44) and Petition for Preliminary Injunction and Restraining Order (Docket No. 45). The Court denied Hornsby's Motion to Enlarge State Court Records as the records sought pertained to Case Nos. CRF-90-461 and CRF- 92-170 which were not before the Court for review. The Court, however, granted Hornsby's Petition for Preliminary Injunction and Restraining Order to the extent such motion sought retrieval of certain legal documents held by the Davis Correctional Facility. The Court directed Respondent to assist Hornsby in the retrieval of documents identified and set aside by officials at Davis Correctional Facility as belonging to Hornsby.

Larceny from the Person.³ After determining Hornsby's understanding and competence to waive his right to a trial by jury on the charge against him, Judge Jennings entered into the following colloquy with the defendant:

THE COURT: Have any promises of any kind been made to you to get you to give up your right to a jury trial?

THE DEFENDANT: No, sir.

THE COURT: Mr. Beckart [sic] tells me that you not only want to give up your right to a jury trial, but you want to waive your right to any type of a trial and plead guilty to this amended charge.

THE DEFENDANT: Yes, sir.

THE COURT: Are you guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Now, even though the charge has been amended, it still concerns an incident that happened on July 27, it's alleged under an amended charge that you stole property, took property from the person of Patsy Arthur on that day, property that she had in her possession on her person. Do you understand that's the nature of the charge?

THE DEFENDANT: Yes, sir.

THE COURT: And are you guilty of that offense?

THE DEFENDANT: Yes, sir.

THE COURT: Take her purse?

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied, Mr. Hornsby, that if you had a trial the State has enough evidence to be able to convict you?

MR. HORNSBY: Yes, sir.

* * * *

THE COURT: Do you understand you're entering a guilty plea to a felony charge that carries up to five years in the penitentiary?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Hornsby, has anybody told you that if you plead guilty here today, that you are not going to have to serve some time?

THE DEFENDANT: No, sir.

THE COURT: Anybody told you or promised you that if you plead guilty, you are going to receive probation?

THE DEFENDANT: No, sir.

THE COURT: Have any promises of any kind been made to you to get you to plead guilty?

³ The transcript of these hearings was not made part of the record until the case was remanded to this Court for an evidentiary hearing. The Tenth Circuit Court of Appeals, therefore, did not have the benefit of this evidence at the time of its review.

THE DEFENDANT: No, sir.

THE COURT: Now, do you understand that if you plead guilty to this charge that's going to constitute a revocation of your misdemeanor matter? ⁴ You are on a suspended sentence in a misdemeanor matter.

THE DEFENDANT: Yes, sir.

THE COURT: And do you understand that's going to constitute a revocation of your misdemeanor sentence, if you plead guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Have any promises of any kind been made to you to get you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Mr. Beckart, you've had some plea negotiations with the District Attorney?

THE DEFENDANT: Yes, I have, Your Honor.

THE COURT: What do you understand those to be?

MR. BECKART: I understand those to be on the instant felony charge a three year sentence, subject to a Pre-Sentence Investigation Report, thousand dollar fine and the costs, \$250.00 to the Victims of Crime Fund, 100 hours with the Tulsa County Work Program and also that the application to revoke the suspended sentence on the misdemeanor is to be one year, and to run cc with the three PSI on the felony charges.

THE COURT: Is that the State's recommendation?

MR. LITCHFIELD: Yes, Your Honor.

THE COURT: Now, it's my understanding, Mr. Hornsby, that at the time of sentencing, the State's going to make a recommendation to me about the length of your sentence, in this new matter three years, and a fine, and that that sentence is going to run concurrently with your misdemeanor. Based on the District Attorneys [sic] knowledge of this case and negotiations of your attorney, I don't have any reason to believe that I won't follow that recommendation on the length of your sentence, so the issue left to be decided then, as I understand it, is whether or not you get probation for three years, or whether you are sentenced to serve three years in the penitentiary. Now, is that your understanding?

THE DEFENDANT: Yes, sir.

THE COURT: Other than the recommendation on the length of your sentence, have any other promises of any kind been made to you to get you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Are you satisfied with the legal representation you've received?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand what's going on here today sir?

THE DEFENDANT: Yes, sir.

⁴ The referenced misdemeanor matter is CRF-90-461 in which Hornsby pleaded guilty to Larceny of Merchandise and received a deferred sentence. Upon Hornsby's plea of guilty to Larceny from the Person in CRF-90-3198, the court revoked the deferred sentence and imposed a one-year jail sentence in CRF-90-461 to run concurrently with the three-year sentence imposed in CRF-90-3198.

THE COURT: Do you have any questions you want to ask me about the proceedings here today or the legal effect of your plea of guilty?

THE DEFENDANT: No, sir.

THE COURT: Now we're going to pass sentencing so that the Department of Corrections can prepare a sentencing report. The law requires that they have to put in that report their recommendation about whether or not they recommend probation, or whether they recommend that you go to the penitentiary. But do you understand I don't have to follow their recommendation, no matter what it is?

THE DEFENDANT: Yes, sir.

[Respondent's Ex. 1, Transcript at 5-9]. Also, at the sentencing hearing on October 19, 1990, after imposing a sentence of three years imprisonment in CRF-90-3198,⁵ Judge Jennings informed Hornsby of his right to file a motion to withdraw his guilty plea:

THE COURT: . . . Now, the law requires that you be advised that since you pled guilty in this case the only way you could appeal this sentence would be to file a Written Motion with the Court Clerk within 10 days from today asking to withdraw your plea of guilty.

Do you have any questions you want to ask me about your appeal rights or anything connected with these cases?

THE DEFENDANT: No, sir.

[Respondent's Ex. 1, Transcript at 12]. In sum, the transcript of the hearings clearly evidences Hornsby understanding that he could receive a three-year sentence of incarceration upon entering his guilty plea and that he had a right to file a motion to withdraw his guilty plea after receiving this sentence if filed within ten days, as well as Hornsby's admission that no promise of probation was made to him by anyone to secure his guilty plea.

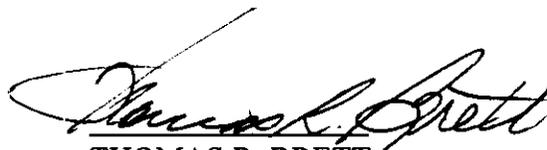
Beckert's testimony concerning the events surrounding Hornsby's guilty plea is consistent with the above transcript evidence. Beckert testified at the evidentiary hearing that (1) he never told Hornsby he would receive probation or a suspended sentence as a result of his guilty plea; (2) he informed Hornsby it was completely within the judge's discretion whether to impose

⁵ After the plea hearing and before sentence was imposed in Case Nos. CRF-90-461 and CRF-90-3198, evidence that Hornsby had tested positive to cocaine use was presented to the court.

imprisonment, suspended sentence or probation; (3) Hornsby never indicated to Beckert his desire to withdraw his guilty plea or pursue a direct appeal of his conviction and sentence in CRF-90-3198; and (4) Hornsby never asked Beckert to file a timely motion to withdraw his guilty plea or pursue any appeal of his sentence.⁶

Based on the evidence, the Court concludes Beckert provided Hornsby with effective legal assistance in the defense of the charge and the entry of a guilty plea in CRF-90-3198. Accordingly, the Court finds no cause to excuse petitioner's default and thus denies Hornsby's petition for writ of habeas corpus pertaining to his conviction and sentence in CRF-90-3198.⁷

ORDERED this 1st day of September, 1998.



THOMAS R. BRETT
UNITED STATES DISTRICT COURT

⁶ Curiously, Hornsby's assessment of Beckert's representation of him in CRF-90-3198 did not dissuade him from retaining Beckert to defend him two years later in Case No. CRF-92-170.

⁷ Having so found, the Court need not reach the effect of Hornsby's conviction in CRF-90-3198 on his conviction and sentence in CRF-92-170.

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

FILED

SEP - 1 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LOUIS EDWARD BISHOP,)
)
Petitioner,)
)
vs.)
)
RITA MAXWELL,)
)
Respondent.)

No. 97-CV-329-B

ENTERED ON DOCKET
DATE 9-2-98

ORDER

Before the Court for consideration is Respondent's motion to dismiss Petitioner's application for a writ of habeas corpus for failure to exhaust state remedies (#7). Petitioner has filed a response (#9) and supporting brief (#10). For the reasons discussed below, the Court finds Respondent's motion should be granted.

BACKGROUND

On January 10, 1994, Petitioner pled guilty to Count I: Unlawful Delivery of Marijuana, and Count II: Unlawful Delivery of CDS-Valium, in Pawnee County District Court, Case Nos. CRF-93-24 and CRF-93-25. He was sentenced to 10 years imprisonment on each count, with the terms to run concurrently, and with 9 years of the sentence suspended and 1 year to be served in the Community Service Program. Thereafter, an Information was filed in Pawnee County District Court, Case No. CRF-94-4, charging Petitioner with Escape from a Penal Institution. On September 19, 1994, the state district court revoked the suspended sentences imposed in CRF-93-24 and CRF-93-25 and ordered Petitioner committed to DOC custody to serve his 10-year sentence. On February 27,

1995, Petitioner was found guilty by a jury of Escape in Case No. CRF-94-4. He was sentenced to "one (1) year and seven (7) months imprisonment consecutively to the court's sentence in Pawnee County Case Number CRF-93-25." (#10, Ex. C).

Thereafter, Petitioner was committed to DOC custody to serve his sentences. Petitioner alleges that after receiving his monthly record of remaining days on his sentence, he became aware that he was serving the sentence imposed in CRF-94-4 before the sentences resulting from the revocation of the suspended sentences imposed in CRF-93-24 and 93-25. Petitioner believes it was error to serve the later imposed sentence first and claims he immediately brought this issue to the attention of his case manager who allegedly informed Petitioner that there were no errors in DOC's records.¹ On November 6, 1995, Petitioner was released from custody, having discharged the sentence related to the Escape conviction. Petitioner was instructed to report to the Muskogee District Probation and Parole Office for supervision of his parole for the sentences entered in CRF-93-24 and CRF-93-25. However, on January 9, 1996, after reporting to the Probation and Parole Office as instructed, Petitioner was placed under arrest and told he was going back to prison to serve the 10 years he owed on the revoked suspended sentences.

Petitioner filed a petition for writ of habeas corpus in Muskogee County District Court, apparently challenging the administration of his sentences. That Court denied the requested relief on December 3, 1996. See #1, Order attached as an exhibit. Thereafter, on January 31, 1997, Petitioner moved to withdraw his petition based on his belief that the court lacked jurisdiction to hear the case. (#10, Ex. 2). Petitioner did not appeal the denial of relief to the Oklahoma Court of

¹Neither Petitioner nor Respondent address whether Petitioner has exhausted available administrative remedies.

Criminal Appeals. Petitioner then filed the instant federal petition for writ of habeas corpus on April 10, 1997. He claims he has been denied due process of the law by being forced to serve his second sentence imposed as a result of the escape conviction before the completion of the revoked sentence. See #1 and #10, Brief in Support of Petition for Writ of Habeas Corpus, attached to Brief in Support of Reply to Motion to Dismiss. As a result, Petitioner claims the duration of his confinement has been extended by approximately six (6) years. See #10, Brief in Support of Petition for Writ of Habeas Corpus, attached to Brief in Support of Reply to Motion to Dismiss.

In the motion to dismiss for failure to exhaust state remedies, counsel for Respondent states that:

The Petitioner entered a guilty plea in Pawnee County on January 10, 1994. The Petitioner was sentenced to ten years, with all but the first year suspended. On September 19, 1994, the Petitioner's sentence was revoked based on an escape charge. The Petitioner is presently challenging the suspended sentence and the revocation of his suspended sentence. There has never been an application to revoke his guilty plea or an appeal of if [sic] that application was denied. The Petitioner has never done anything in state court to withdraw his guilty plea or pursue any remedies in state court . . . In the instant case, the Petitioner alleges that there is no state corrective process or that the state process is inadequate. However, the Petitioner could seek an appeal out of time on the revocation or post-conviction application. The Petitioner has done neither and expects to be able to waltz into federal court have his claims heard as a substitute for a direct appeal.

(#8). As evident from the quoted passage, Respondent bases his motion to dismiss on the presumption that Petitioner is challenging the suspended sentence and the revocation of his suspended sentence. However, after reviewing Petitioner's petition and his response to Respondent's motion to dismiss, it is clear to the Court that Petitioner is in fact challenging the administration of his sentence by the DOC. It is Petitioner's contention that DOC has violated his due process and equal protection rights by forcing him to serve his second sentence, entered on the escape conviction,

before the completion of the revoked sentence.² Petitioner objects to the motion to dismiss, arguing that "exhaustion of state remedies is not required where the State's highest court has recently decided the precise legal issue that Petitioner does seek to raise on his Federal Habeas Petition." (#10 at 2). Furthermore, Petitioner states it would be futile to require him to exhaust his state remedies because he believes there is no state remedy available for this type of challenge.³

ANALYSIS

The United States Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the state highest Court. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

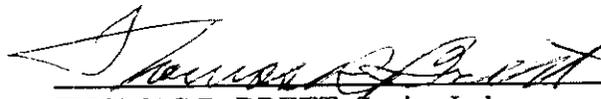
²Petitioner bases his argument on Fox v. State, 501 P.2d 834, 835 (Okla. Crim. App. 1972), where the Court of Criminal Appeals granted a petition for writ of mandamus and stated that "[p]enitentiary officials do not have the discretion of crediting time served by inmates on either of two or more convictions, but must credit time on the first conviction sustained by the inmate until it has been satisfied." However, the Fox decision was based on Okla. Stat. tit. 21, § 61 (1971). That statute was repealed in 1979. Currently, where a person has multiple convictions, and the judgment and sentence for each conviction arrives at a state penal institution on different dates, the sentence which is first received at the institution shall commence and be followed by those sentences which are subsequently received at the institution, regardless of the order in which the judgments and sentences were rendered by the respective courts. Okla. Stat. tit. 21, § 61.1 (1983).

³Petitioner cites to Canady v. Reynolds, 880 P.2d 391 (Okla. Crim. App. 1994), as the "recent" Court of Criminal Appeals decision whereby the "State of Oklahoma has successfully eliminated any type of Redress that the Petitioner could use." (#10, attached "Brief in Support" at 3). Thus, Petitioner believes he has no available state remedy and the exhaustion requirement of 28 U.S.C. § 2254(b) should be excused.

After carefully reviewing the record in this case, the Court concludes that Petitioner has not fairly presented his claim to the Oklahoma Court of Criminal Appeals and has not exhausted his state remedies. Contrary to Petitioner's assertions, he does have an available state remedy which must be exhausted before this Court can consider his claim. See Canady v. Reynolds, 880 P.2d 391, 396-97 (Okla. Crim. App. 1994) (discussing scope of mandamus and habeas corpus); Waldon v. Evans, 861 P.2d 311, 313 (Okla. Crim. App. 1993) (holding that a writ of mandamus must lie against appropriate prison officials when a prisoner's minimum due process rights have been violated where prisoner would not be entitled to immediate release). Thus, if Petitioner can demonstrate that he would be entitled to immediate release if his due process challenge to the administration of his sentence were successful, then he should file, in the state district court located in the county of his incarceration, a petition for writ of habeas corpus. If Petitioner cannot demonstrate that he would be entitled to immediate release, then he should file, in the state district court located in the county of his incarceration, a petition for writ of mandamus alleging a violation of his due process rights in the administration of his sentence. See Waldon, 861 P.2d at 313 (distinguishing between due process review to be provided by the state courts and appellate review of disciplinary decisions which is not to be provided by the courts). Should the state district court deny the relief requested, Petitioner must appeal the denial to the Oklahoma Court of Criminal Appeals. If the appellate court affirms the state district court's denial of relief, Petitioner may then return to this Court having exhausted his state remedies.

ACCORDINGLY, IT IS HEREBY ORDERED that Respondent's motion to dismiss (Docket #7) is **granted**. The petition for a writ of habeas corpus is **dismissed without prejudice** for failure to exhaust state judicial remedies.

SO ORDERED this 31st day of Aug, 1998.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

SEP - 1 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD DAVIS d/b/a
VANS UNLIMITED

Plaintiff

vs.

C.A. No. 97-CV-532-H (M)

JERRY J. MOORE and J.J.M.A., Inc. d/b/a
BRITISH ROYAL MOTOR COACH

Defendants.

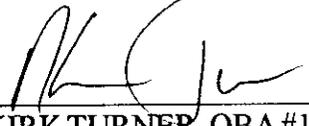
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DATE SEP 02 1998

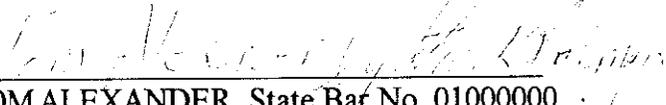
VOLUNTARY STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED, by and between counsel for all parties hereto, as follows:

1. All claims presented by the complaint, the amended complaint, and all the counter-claims herein shall be dismissed with prejudice as to all parties pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.

2. Each party shall bear his or its own costs and attorneys' fees.


W. KIRK TURNER, OBA #13791
NEWTON, O'CONNOR, TURNER & AUER
2700 NationsBank Center
15 West Sixth Street
Tulsa, Oklahoma 74119


TOM ALEXANDER, State Bar No. 01000000
ALEXANDER & ASSOCIATES
700 Louisiana, Suite 3730
Houston, Texas 77002


DOUGLAS M. BOROCHOFF, OBA #13877
SECRETST, HILL & FOLLUO
7134 South Yale, Suite 900
Tulsa, Oklahoma 74136


STEVEN K. BALMAN, OBA #492
INHOFE JORGENSEN & BALMAN
907 Philtower Building
427 South Boston Avenue
Tulsa, Oklahoma 74103-4114

COUNSEL FOR PLAINTIFFS

LOCAL COUNSEL FOR DEFENDANTS
AND COUNTER-PLAINTIFF

c/j

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP - 1 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENSERCH CORPORATION,
a Texas Corporation,

Plaintiff,

vs.

CNA INSURANCE COMPANIES, INC.
a Delaware Corporation, and
CONTINENTAL CASUALTY COMPANY,
an Illinois Corporation,

Defendants.

Case No: 98-CIV-196 H (Ea)

ENTERED ON DOCKET
DATE SEP 02 1998

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Federal Rule of Civil Procedure 41(a), the parties to this action, through their counsel of record, hereby stipulate to the dismissal of CNA Insurance Companies, Inc. from this action, said dismissal to be without prejudice to refileing.

Respectfully submitted,

SHIPLEY, JENNINGS & CHAMPLIN, P.C.

~~By~~ 

Blake K. Champlin
Jamie Taylor Boyd
201 West Fifth Street, Suite 201
Tulsa, Oklahoma 74103

ATTORNEYS FOR PLAINTIFF ENSERCH
CORPORATION

AND

MCGIVERN, GILLIARD & CURTHOYS

By:



Robert P. Fitz-Patrick, OBA # 14713
1515 S. Boulder Ave., P.O. Box 2619
Tulsa, Oklahoma 74101-2619
(918) 584-3391; fax (918) 592-2416

and

MILLER CHRISTERSON McNABOE & CORTNER

Mark W. Peck
444 South Flower Street, Suite 2000
Los Angeles, California 90071.

ATTORNEYS FOR DEFENDANT
CONTINENTAL CASUALTY COMPANY

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's motion for leave to proceed *in forma pauperis* (attached to the petition) is **denied**.
 2. Within thirty (30) days of the entry of this Order, or by OCT 1 1998, 1998, Petitioner shall pay in full the \$5.00 filing fee or show cause in writing for failure to do so.
 3. Petitioner's motion to supplement the record with a state district court order (#2) is **granted**.
- Failure to comply with this Order could result in the dismissal of this case without prejudice and without further notice.

SO ORDERED THIS 27 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

DIANE COPPEDGE,

Plaintiff,

v.

SHADY REST CARE CENTER LLC,
an Oklahoma Limited Liability Corporation,
TERESA MASON, JACKIE JAMES,
CHERYL BLANKENSHIP, and
VICKIE L. BEESE,

Defendants.

ENTERED ON DOCKET

DATE SEP 1 1998

Case No. 98-CV-205-H(J) ✓

FILED

AUG 31 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court on a Motion for Summary Judgment by Defendants.

The Court duly considered the issues and rendered a decision in accordance with the order dated August 28, 1998.

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

IT IS SO ORDERED.

This 28TH day of August, 1998.



Sven Erik Holmes
United States District Judge

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

OLS CONSULTING SERVICES, INC.,)

Plaintiff,)

vs.)

POLY PLUS INCORPORATED,)
NEECO, INC.; DONALD G. NEEDHAM)
and JIM HARRIS,)

Defendants,)

and)

ORES PAUL SEAux; THE LOMA)
COMPANY, LLC; SOLOCO, LLC;)
NEWARK RESOURCES, INC.)
and KEN SEAux,)

Additional Parties.)

FILED
SEP 01 1998

Case No. 97-CV-108-B

FILED
AUG 31 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

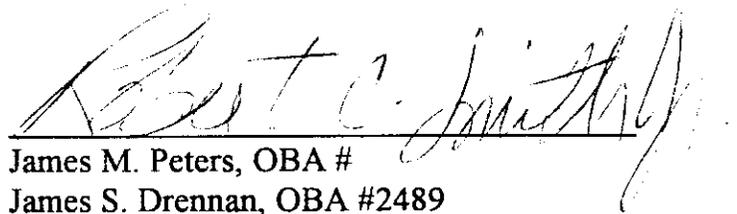
**STIPULATION OF DISMISSAL
WITH PREJUDICE OF ALL CLAIMS BY ALL PARTIES**

Pursuant to FRCP 41(a)(1)(ii) and (e), the parties, OLS Consulting Services, Inc. ("OLS"), Paul Seaux, Ken Seaux, The Loma Company, L.L.C. ("Loma"), Newark Resources, Inc. ("Newpark"), Soloco, L.L.C. ("Soloco"), Poly Plus Incorporated ("PPI"), NEECO, Inc., Donald G. Needham and James Harris, hereby stipulate that all claims, counterclaims, and third-party claims are hereby dismissed with prejudice (excepting only those claims which may be asserted under the Settlement Agreement and Mutual Release executed by the Parties), with each party to bear its/his own costs and attorney's fees.

104

CJT

DATED this 31st day of August, 1998.



James M. Peters, OBA #

James S. Drennan, OBA #2489

Robert C. Smith, Jr., OBA #8407

**MONNET, HAYES, BULLIS, THOMPSON
& EDWARDS**

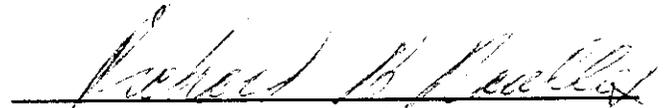
1719 First National Center West

120 North Robinson

Oklahoma City, Oklahoma 73102

(405) 232-5481

**ATTORNEYS FOR PLAINTIFF, OLS
CONSULTING SERVICES, INC. and
ADDITIONAL PARTIES, ORES PAUL
SEAX, KENNETH SEAX and THE
LOMA COMPANY, L.L.C.**



Richard B. Noulles, OBA #6719

GABLE & GOTWALS

15 West Sixth Street, Suite 2000

Tulsa, Oklahoma 74119-5447

(918) 582-9201

**ATTORNEY FOR DEFENDANTS,
POLY PLUS INCORPORATED,
DONALD G. NEEDHAM, JAMES
HARRIS and NEECO, INC.**



Henry A. King
NESSER, KING & LeBLANC
201 St. Charles Avenue
Suite 3800 Place St. Charles
New Orleans, Louisiana 70170

**ATTORNEY FOR NEWPARK
RESOURCES, INC. and SOLOCO,
L.L.C.**

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

EAST TEXAS SEISMIC DATA, LLC,)
an Oklahoma company and)
CAPMAC EIGHTY-TWO LIMITED)
PARTNERSHIP, an Oklahoma)
limited partnership,)

Plaintiffs,)

vs.)

SEITEL DATA, INC., a)
corporation, and FIRST SEISMIC)
CORPORATION, a corporation,)
SANTA FE ENERGY RESOURCES, INC.,)
a corporation, and IMC GLOBAL,)
INC., a corporation,)

Defendants.)

FILED

AUG 31 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-981-BU

ENTERED ON DOCKET
SEP 01 1998
DATE _____

**FED.R.CIV.P. 54(b) JUDGMENT AS TO DEFENDANTS,
SANTA FE RESOURCES, INC. AND IMC GLOBAL, INC.**

This action came before the Court upon the motions of Defendants, Santa Fe Resources, Inc. and IMC Global, Inc., for summary judgment, and the issues having been duly considered and a decision having been duly rendered, and the Court having expressly directed that judgment be entered and expressly determined that there was no just reason for delay,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Defendants, Santa Fe Resources, Inc. and IMC Global, Inc., and against Plaintiffs, East Texas Seismic Data, L.L.C. and Capmac Eighty-Two Limited Partnership, and that Defendants, Santa Fe Resources, Inc. and IMC Global, Inc., recover of Plaintiffs, East Texas Seismic Data, L.L.C. and Capmac Eighty-

Two Limited Partnership, their costs of action.

Dated at Tulsa, Oklahoma, this 31st day of August, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

:-

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

F I L E D

AUG 31 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LEONARD G. MYERS,
SSN: 515-32-3528,

Plaintiff,

v.

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

Defendant.

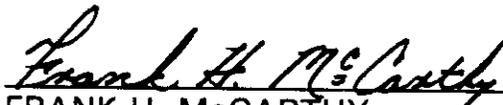
CASE NO. 97-CV-821-M ✓

ENTERED ON DOCKET

DATE SEP 01 1998 :-

JUDGMENT

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


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 31 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LEONARD G. MYERS,
SSN: 515-32-3528,

PLAINTIFF,

vs.

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

DEFENDANT.

CASE No. 97-CV-821-M

ENTERED ON DOCKET
DATE SEP 01 1998

ORDER

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

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

¹ Plaintiff's April 18, 1994 application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held November 7, 1995. By decision dated May 29, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on July 2, 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 April 29, 1938 and was 57 years old at the time of the hearing. He attained a high school equivalency education (GED) with some additional training courses while serving in the U.S. Navy. [R. 36, 146]. He claims to be unable to work due to lower back pain. [R. 42, 70]. The ALJ determined that Plaintiff is capable of performing his past relevant work as an "interior trim carpenter." [R. 19, 21]. The case was thus decided at step four of the five-step evaluative sequence for determining whether Plaintiff is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ failed to establish that Plaintiff's past relevant work (PRW) included work as an interior trim carpenter and that he failed to make specific findings regarding the physical and mental demands of his PRW.

Social Security regulations require the ALJ to 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. SSR 82-62. Specific findings must be included in the decision:

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.

One important function of the specific findings of fact is their utility for the Court in adhering to its limited role in reviewing Social Security appeals. The Court is not to reweigh the facts or exercise discretion in Social Security appeals. The Court's function is to determine if there is substantial evidence to support the decision and to determine if the correct legal standards were applied. *Musgrave, supra.* at 1374. In the absence of specific findings of fact, the Court has difficulty confining its review to the appropriate parameters and runs the risk of engaging in fact finding and discretionary judgments on its own.

In the present case the Court finds that the ALJ did not perform the analysis required by SSR 82-62. The record contains only a brief description of the

requirements of Plaintiff's past work as a carpenter. [R. 38, 48, 74, 90]. In this regard the Court notes that Plaintiff described his past work as requiring heavy lifting and bending, stooping and climbing about 70% of a normal 10 hour day. [R. 48-49].

The only mention of "interior trim carpentry work" is in a treatment note recorded by H.C. McMahan, M.D., on June 28, 1995, as follows:

Consultation in office w/ Adicia Asbell, representative of Case Management Solutions, who is managing Mr. Myers' disability claim. There have been several conflicting evaluations regarding Mr. Myers' current status and work ability. He remains on disability with 22% total body permanent disability alleged per Dr. June Wheat Kim physiatrist. [sic]. However, Dr. Keating of the Keating Group has done a more recent evaluation and feels that there is no orthopedic impairment present at this time, and that according to his job description as interior trim carpenter, there, therefore, should be no prohibition from him returning to full employment. By my previous examinations and consultations w/ Mr. Myers with the most recent being 4-13-95, the patient is still complaining of chronic low back pain and stiffness w/ disability as far as limitation of range of motion and w/ pain and disability w/ any lifting. After a discussion w/ Ms. Asbell, we feel that according to the work description, there is actually no restrictions from what we have been able to tell regarding interior trim carpentry work. It is our suggestion that we put him back into physical therapy program for 2-4 weeks w/ full PT evaluation and possibly even OT in an effort to get him ready to go back to work, at least in a restricted capacity w/ interior trim work and avoidance of any heavy construction.

[R. 154].

Based upon this one office note, the ALJ found that: 1) Dr. McMahan had "released his patient for 'light duty' less than 12 months after the alleged onset of 'disability', and ultimately reached a determination that claimant could perform the

medium exertion required in his past relevant work"; and, 2) Dr. McMahan found "no prohibition from returning claimant to full employment as an interior trim carpenter." [R. 17]. The ALJ then cited the Dictionary of Occupational Titles (DOT), 860.381-022, stating that the interior trim carpenter job required medium exertion, and determined that Plaintiff was able to return to his PRW as interior trim carpenter. [R. 19, 21].

Plaintiff claims the isolated reference of interior trim carpentry work in the doctor's treatment notes is not sufficient to establish, first of all, that Plaintiff's PRW even included interior trim carpentry work. Plaintiff also contends that this note does not provide any information regarding the specific requirements of his past relevant work which the ALJ was required to obtain in his step four analysis. The Court agrees. In determining whether a claimant's past work experience qualifies as past relevant work, the ALJ considers whether the work was performed within the last fifteen years, lasted long enough for the claimant to learn to do it, and was substantial gainful activity. See 20 C.F.R. §§ 404.1565(a); 416.965(a).

The office note by Dr. McMahan is the **only** reference in the record to the performance of interior trim carpentry work. There is nothing more to establish, either by way of testimony by Plaintiff or a description of the job in his disability report, that Plaintiff ever actually worked as an interior trim carpenter. Nor is there any evidence that describes the mental and physical demands required in the performance of an interior trim carpenter job. Furthermore, Dr. McMahan never concluded that Plaintiff can do medium, interior trim carpentry work, as the ALJ stated. [R. 17]. All Dr.

McMahan concluded was that Plaintiff should have therapy "in an effort to get him ready to go back to work." [R. 154].

At the hearing before the ALJ, Plaintiff did not discuss the specific requirements of his past relevant work other than the lifting and other exertional requirements of his job as a "working carpenter" and the ALJ did not inquire into the matter. [R. 48]. Even when a claimant is represented at the hearing by counsel, as here, the ALJ has a duty to develop the record sufficiently to make findings concerning the claimant's residual functional capacity, the physical and mental requirements of the claimant's past relevant work, and the claimant's ability to return to that past relevant work given his or her residual functional capacity. Social Security Ruling 82-62; *Henrie v. United States Dep't of Health & Human Servs.*, 13 F.3d 359, 361 (10th Cir. 1993).

Furthermore, when the ALJ relies on a job description in the Dictionary of Occupational Titles to determine how that job is usually performed in the national economy, see Social Security Ruling 82-61, the ALJ must develop the record concerning the requirements of the claimant's past relevant work sufficiently to ascertain what job listing in the DOT matches the claimant's past relevant work. The Court notes that the DOT description cited by the ALJ in his decision is that of "Carpenter (construction)" with the strength requirement of "medium." See DOT, 4th Ed., Vol. II, p.894, § 860.381.022. However, Plaintiff's description of the "working carpenter" job he performed in the past included heavy lifting and might be more comparable to other construction job descriptions contained in the DOT. See DOT, 4th Ed., Vol. II, p. 894-895. If the vocational and disability reports the claimant submits

are not sufficient to match the claimant's past relevant work with a job description in the DOT, the ALJ must develop testimony from the claimant at the hearing or obtain further information from the claimant's employers. In this case, there is no indication in the record, or in the ALJ's decision, that he attempted to do so.

The ALJ stated in his decision that a "work description" had been provided by claimant's former employer to Dr. McMahan which enabled the doctor to recommend that he "return to work as an interior trim carpenter, avoiding only heavy construction." [R. 17]. The Court notes that the consultation referred to by Dr. McMahan, was with a person he said was a "representative of Case Management Solutions, who is managing Mr. Myers' disability claim." [R. 154]. It is not clear whether this person was a representative of Plaintiff's former employer or an insurance claim representative, but, at any rate, the "work description" was not provided to the ALJ nor was it contained anywhere in the record. Under the circumstances described, the Court finds that substantial evidence is lacking to support the Commissioner's determination that interior trim carpenter was a job previously performed by Plaintiff and that it met the criteria for past relevant work.

The Court finds that the ALJ's analysis at step four was flawed. *See Winfrey v. Chater*, 92 F.3d 1017 (10th Cir 1996). Plaintiff requested remand of his claim to the Commissioner for full development of the record and to re-evaluate his residual functional capacity to determine his ability to engage in work activity. The Court agrees this should be done. Therefore, the case is REVERSED and REMANDED for that purpose.

SO ORDERED this 31ST day of AUG., 1998.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

! =

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EDWARD L. BRUCE,

Plaintiff,

v.

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

Defendant.

ENTERED ON DOCKET
DATE SEP 01 1998

No. 97-C-271-J ✓

FILED

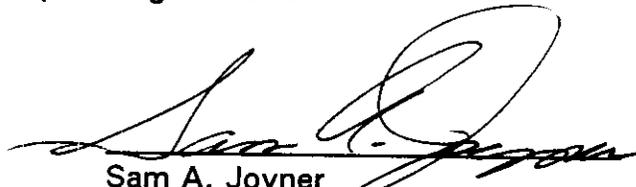
AUG 31 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

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

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


Sam A. Joyner
United States Magistrate Judge

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

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EDWARD L. BRUCE,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security
Administration,

Defendant.

ENTERED ON DOCKET

DATE SEP 01 1998

Case No. 97-CV-271-J ✓

FILED

AUG 31 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

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

THUS DONE AND SIGNED on this 31 day of AUGUST 1998.


Sam A. Joyner
United States Magistrate Judge

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Entered

FILED

SEP 1 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA)
Plaintiff)
VS)
Robert Lewis Pettigrew)
Defendant)

Case Number 93-CR-92-001-E
ENTERED ON DOCKET

DATE 9/1/98

ORDER REVOKING SUPERVISED RELEASE

Now on this 28th day of August 1998, this cause comes for sentencing concerning allegations that Pettigrew violated conditions of supervised release as set out in the Petition on Supervised Release filed on July 9, 1998. Pettigrew is present in person and represented by counsel, Cindy Cunningham. The Government is represented by Assistant United States Attorney, Lucy Creekmore, and the United States Probation Office is represented by Terril R. Sweetwood.

A Revocation Hearing was held on August 14, 1998 and the defendant was found to have violated his terms and conditions of supervised release as noted in the Petition on Supervised Release. Said allegations reflect that Pettigrew was arrested on March 24, 1998 for Driving Under the Influence of Liquor, Speeding, Driving Under Suspension, No Insurance, Eluding and Domestic Assault. The petition further alleges on April 1, 1998, Pettigrew was arrested for Domestic Violence/Assault and Battery. Additionally, the petition alleges Pettigrew failed to successfully participate in a program of testing and treatment (to include inpatient) for drug and alcohol abuse as directed by the Probation Officer.

Sentencing was held at which time the Court found that the offense of conviction occurred after November 1, 1987, and Chapter 7 of the U. S. Sentencing Guidelines is applicable by the Court.

United States District Court)
Northern District of Oklahoma) SS
is a true copy of the original on file)
in this court.

Phil Lombardi, Clerk
By Beverly McLaughlin
Deputy

Court found that the violation of supervised release constituted a Grade B violation in accordance with USSG § 7B1.1(a)(2), and Pettigrew's Criminal History Category of V is applicable for determining the imprisonment range. In addition, the Court found that a Grade B violation and a Criminal History Category of V establish a revocation imprisonment range of 18 to 24 months in accordance with USSG § 7B1.4(a). The following sentence is ordered:

It is the judgment of the Court that the defendant, Robert Lewis Pettigrew, is hereby committed to the custody of the U.S. Bureau of Prisons to be imprisoned for a term of 18 months on Counts One and Four, said Counts One and Four shall run concurrently. The Court further reimposes the remaining fine amount of \$1,328 as to Count One. The fine shall be due immediately, any amount not paid immediately shall be paid during the term of confinement. Any remaining amount shall be due during the term of supervised release.

The Court recommends, the defendant be incarcerated at a jail-type facility.

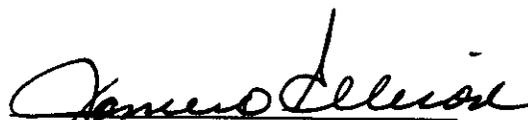
Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 18 months on Counts One and Four. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released.

During the term of supervised release, the defendant shall not commit another federal, state, or local crime. Pettigrew is prohibited, during the period of supervised release, or afterward, from possessing a firearm, destructive device, or other dangerous weapon unless he receives express written permission of the appropriate federal and state agency. Further, while on supervised release Pettigrew shall not illegally possess a controlled substance. Pettigrew shall comply with the standard conditions that have been adopted by this court, and shall comply with the special conditions

previously imposed on December 10, 1993.

Further, the Court recommends that the defendant be placed in a facility providing substance abuse counseling.

Pettigrew is remanded to the custody of the U.S. Marshal pending transportation to the designated institution.


The Honorable James O. Ellison
United States District Judge