

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

F I L E D

OCT 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRIDGETTE LONG, o/b/o)
MARQUET LONG, a minor,)
SSN: 443-82-5461,)

Plaintiff,)

v.)

CASE NO. 97-CV-763-M ✓

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

Defendant.)

ENTERED ON DOCKET

DATE OCT 30 1998

JUDGMENT

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

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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

BRIDGETTE LONG, o/b/o)
MARQUET LONG, a minor,)
SSN: 443-82-5461,)

OCT 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PLAINTIFF,)

vs.)

CASE NO. 97-CV-863-M

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

ENTERED ON DOCKET

DEFENDANT.)

DATE OCT 30 1998

ORDER

Plaintiff, Bridgette Long, on behalf of Marquet Long, a minor child, 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 March 11, 1994 application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held August 16, 1995. By decision dated August 22, 1995, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on June 16, 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).

Marquet Long (Marquet), was born September 5, 1983 and was eleven years old at the time of the hearing. [R. 31, 135]. Plaintiff claims Marquet has been disabled since August 30, 1991 due to a learning disability and emotional problems. [R. 57, Plaintiff's Brief, p. 1]. Although Plaintiff did not state in her brief the specific Listings she believes apply to Marquet's claim, it appears that she does not contend any Listings other than 112.04 and 112.05 should be considered for this claim. Therefore, the Court reviews the ALJ's decision under the above standard for substantial evidence in support of his findings relative to Listings 112.04 and 112.05.

The statutory and regulatory criteria in effect at the time of the ALJ's decision required the decision maker to apply a four-step evaluation process to a claim of disability benefits made on behalf of a child. *See* 42 U.S.C. § 1382c(a)(3)(A)(1994),

as implemented by 20 C.F.R. § 416.924(b)(1994).² The ALJ denied benefits at step four. The ALJ mentioned step three, noting that "[t]he evidence does not reflect an impairment of a degree of severity required to meet or equal any impairment(s) listed in [Part B or Part A of Appendix 1 to Subpart P of Part 404 of the] regulation. Specific emphasis has been given to Listing 112.04 - mood disorders and 112.05 - mental retardation and 12.04 and 12.05." [R. 14].

The ALJ then went on to discuss at length his determination at step four that, although Marquet "has a mild limitation in concentration, persistence, and pace, and a moderate limitation in cognitive development, it would not affect his ability to function independently, appropriately, and effectively in an age-appropriate manner." [R. 18]. The ALJ concluded Marquet does not have an impairment or combination of impairments of comparable severity to that which would disable an adult and was, therefore, not under a disability as that term is defined in the Social Security Act. [R. 18].

² First, he had to determine whether the claimant was engaged in substantial gainful activity. See 20 C.F.R. § 416.924(c). If so, he was not disabled. *Id.* If the claimant was not engaged in substantial gainful activity, the ALJ had to determine whether he had a severe impairment. *Id.* § 416.924(d). If not, he was not disabled. *Id.* If the claimant had a severe impairment, the ALJ had to determine whether that impairment met or equaled an impairment listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1 (Listings). *Id.* § 416.924(e). If a Listing was met or equaled, the claimant would be deemed disabled. *Id.* If no Listing was met, the evaluation would proceed to the fourth step, where an individualized functional assessment (IFA) would be made to determine whether the claimant had an impairment or impairments of comparable severity to that which would prevent an adult from engaging in substantial gainful activity. *Id.* § 416.924(f).

Subsequent to the ALJ's decision, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, Pub.L. No. 104-193, 110 Stat. 2105. The Act amended the standard for evaluating children's disability claims, as follows:

An individual under the age of 18 shall be considered disabled ... if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. § 1382c(a)(3)(C). Section 211(d)(1) of the Act, found in the notes following 42 U.S.C.A. § 1382c, states that the new standard for evaluating children's disability claims applies to all cases which have not been finally adjudicated as of the effective date of the Act, August 22, 1996, including those cases in which a request for judicial review is pending. Thus, the new version of the Act is applied to this case. *Brown v. Callahan*, 120 F.3d 1133, (10th Cir. 1997).

Under the new statute, a child is considered disabled only if his or her condition meets or equals a Listing at step three of the sequential evaluation process. A claimant has the burden of proving that a Listing has been equaled or met. *Bowen v. Yuckert*, 482 U.S. 137, 107 S.Ct. 2287 (1987); *Williams v. Bowen*, 844 F.2d 748 (10th Cir. 1988). The ALJ is "required to discuss the evidence and explain why he found that [the claimant] was not disabled at step three." *Clifton v. Chater*, 79 F.3d 1007 (10th Cir. 1996). Consequently, the Court does not review the ALJ's findings or decision at step four of the evaluation and the sole issue in this case is to review

whether the ALJ's finding that Marquet did not meet or equal a listing is supported by substantial evidence. See *Brown*, 120 F.3d at 1.135.

In this case, the ALJ identified the relevant Listings. Although he did not specifically outline the relevant Listing criteria, he did address them through his discussion of the medical evidence in his step four determination. The listings identified by the ALJ were 112.04 and 112.05.

Listing 112.04 requires:

112.04 *Mood Disorders*: Characterized by a disturbance of mood (referring to a prolonged emotion that colors the whole psychic life, generally involving either depression or elation), accompanied by a full or partial manic or depressive syndrome.

The required level of severity for these disorders is met when the requirements in both A and B are satisfied.

A. Medically documented persistence, either continuous or intermittent, of one of the following:

1. Major depressive syndrome, characterized by at least five of the following, which must include either depressed or irritable mood or markedly diminished interest or pleasure;

- a. Depressed or irritable mood; or
- b. Markedly diminished interest or pleasure in almost all activities; or
- c. Appetite or weight increase or decrease, or failure to make expected weight gains; or
- d. Sleep disturbance; or
- e. Psychomotor agitation or retardation; or
- f. Fatigue or loss of energy; or
- g. Feelings of worthlessness or guilt; or
- h. Difficulty thinking or concentrating; or
- i. Suicidal thoughts or acts; or
- j. Hallucinations, delusions, or paranoid thinking;

OR

2. Manic syndrome, characterized by elevated, expansive, or irritable mood, and at least three of the following:

- a. Increased activity or psychomotor agitation; or
- b. Increased talkativeness or pressure of speech; or
- c. Flight of ideas or subjectively experienced racing thoughts; or
- d. Inflated self-esteem or grandiosity; or
- e. Decreased need for sleep; or
- f. Easy distractibility; or
- g. Involvement in activities that have a high potential of painful consequences which are not recognized; or
- h. Hallucinations, delusions or paranoid thinking;

OR

3. Bipolar or cyclothymic syndrome with a history of episodic periods manifested by the full symptomatic picture of both manic and depressive syndromes (and currently or most recently characterized by the full or partial symptomatic picture of either or both syndromes);

AND

B. ...[F] children (age 3 to attainment of age 18), resulting in at least two of the appropriate age-group criteria in paragraph B2 of 112.02.³

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

20 C.F.R. § 112.05 provides:

112.05 *Mental Retardation*: Characterized by significantly subaverage general intellectual functioning with deficits in adaptive functioning.

The required level of severity for this disorder is met when the requirements in A, B, C, D, E, or F are satisfied.

A. ...[F]or children (age 3 to attainment of age 18), resulting in at least two of the appropriate age-group criteria in paragraph B2 of 112.02;

³ 112.02 B2 reads: For children (age 3 to attainment of age 18), resulting in at least two of the following: a. Marked impairment in age-appropriate cognitive/communicative function, documented by medical findings (including consideration of historical and other information from parents or other individuals who have knowledge of the child, when such information is needed and available) and including, if necessary, the results of appropriate standardized psychological tests...; or b. Marked impairment in age-appropriate social functioning...; or c. Marked impairment in age-appropriate personal functioning, ...; or d. Deficiencies of concentration, persistence, or pace resulting in frequent failure to complete tasks in a timely manner.

OR

B. Mental incapacity evidenced by dependence upon others for personal needs (grossly in excess of age-appropriate dependence) and inability to follow directions such that the use of standardized measures of intellectual functioning is precluded;

OR

C. A valid verbal, performance, or full scale IQ of 59 or less;

OR

D. A valid verbal performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant limitation of function;

OR

E. A valid verbal, performance, or full scale IQ of 60 through 70 and:

* * *

2. For children (age 3 to attainment of age 18), resulting in at least one of paragraphs B2b or B2c or B2d of 112.02;

OR

* * *

F.2. For children (age 3 to attainment of age 18), resulting in the satisfaction of 112.02N2a, and a physical or other mental impairment imposing additional and significant limitations of function.

In his decision, the ALJ discussed at length Marquet's medical and educational history, the results of certain psychological evaluations and the child's and mother's testimony. He concluded that Marquet has a cognitive deficit, a moderate limitation in cognitive skills involved in reading and writing and, to a lesser extent, in mathematics. He noted that Marquet's IQ testing scores placed him in the low average range of intellectual ability, but determined that the evidence showed no deficit in communication, motor skills and self care. The ALJ also found that Marquet has a mild limitation in social development but that he is able to play alone or with

other children or in a group, that he can develop friendships and relate to his siblings and his mother, that he made friends at school and that he improved with attention given him by his teachers and mother. [R. 16].

As to Plaintiff's claim that Marquet's condition meets the listing for a mood disorder, the ALJ found that, although Marquet has a mild personal or behavioral deficit, he is able to help himself and cooperate with others in taking care of his personal needs, to understand authority relationships and school rules, to develop a sense of responsibility for himself and respect for others and to learn new skills. The ALJ determined that Marquet has a mild limitation in concentration, persistence and pace, but that the evidence does not show a disturbance of mood, accompanied by a full or partial manic or depressive syndrome.

Plaintiff complains the ALJ erred in preparing a PRT form⁴, asserting that, in doing so, the ALJ applied incorrect criteria for assessing whether Marquet met the appropriate listings. It is true that a PRT was attached to the ALJ's decision. However, it is clear from reading the body of the ALJ's decision that he did not, as Plaintiff alleges, evaluate Marquet's claim under the criteria for the adult listings. The ALJ detailed his findings relevant to the requirements of the appropriate child's listings.

⁴ The procedure for evaluation of an adult's mental impairment is outlined at 20 C.F.R. § 1520a. If a claimant has a mental impairment, the degree of functional loss resulting from the impairment must be rated in four areas: (1) activities of daily living, (2) social functioning, (3) concentration, persistence or pace; and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. §1520a(b)(3). If each of the four areas is rated as having an impact of "none", "never", "slight", or "seldom", the conclusion is that the impairment is not severe, unless the evidence otherwise indicates there is significant limitation of the claimant's mental ability to do basic work activities. See 20 C.F.R. §1520a(c)(1). An ALJ must attach to his decision a PRT form detailing his assessment of the claimant's level of mental impairment. 20 C.F.R. §1520a(d).

In fact, much of the language contained in the ALJ's decision are direct quotes from Listings 112.04, 112.05 and 112.02B2. See *Decision*, R. 17. The ALJ concluded that Marquet exhibited no marked limitations in any of the areas identified part B of those listings. Because Marquet did not have marked limitations in even one of those areas, his impairment was not of the required level of severity to meet or equal the listings. Substantial evidence in the record, including the testimony of Marquet and his mother, supports these findings.

Plaintiff also asserts the ALJ was required to obtain a psychiatric examination to ascertain the exact nature and severity of Marquet's emotional problems. [Plaintiff's Brief, p. 3]. The ALJ has broad latitude in ordering a consultative examination, *Diaz v. Secretary of Health & Human Servs.*, 898 F.2d 774 (10th Cir. 1990). A consultative examination is not required unless the record establishes that such an examination is necessary to enable the administrative law judge to make the disability decision, *Turner v. Califano*, 563 F.2d 669 (5th Cir. 1977). In addition to the school records and testimony evidence, the ALJ referred to the psychological evaluation and Wechsler Intelligence Scale for Children-Revised (IQ) test conducted by William L. Cooper, Ph.D. [R. 111-112]. The ALJ also noted the opinion of the consultative examiner, Ron Smallwood, Ph.D. [R. 15, 42-45]. Both opinions indicate findings of low average intelligence and performance with moderate impairments in cognitive and social domains only. The Court concludes that the ALJ had sufficient medical evidence before him to make an informed decision about Marquet's impairment without the need for an additional consultative medical examination.

The record evidence bears out the ALJ's conclusion that Marquet has no more than moderate limitations in any of the areas referenced in part B of Listings 112.04 and 112.05. The record contains substantial evidence supporting the ALJ's decision at step three that Marquet's impairment did not meet or equal the Listings and that he was, therefore, not disabled. Accordingly, the decision of the Commissioner finding Marquet Long not disabled is AFFIRMED.

SO ORDERED this 27th day of Oct., 1998.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

PC

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

FILED

OCT 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GLEN JOHNSON,

Plaintiff,

vs.

GEA RAINEY CORPORATION,
an Oklahoma corporation,

Defendant.

Case No. 98-CV-0152-BU (E)

ENTERED ON DOCKET
DATE 10-30-98

STIPULATION OF DISMISSAL

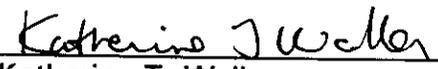
The Plaintiff, Glen Johnson, and the Defendant, GEA Rainey Corporation,
hereby stipulate to the dismissal of the above-referenced cause, with prejudice.

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



Katherine T. Waller
403 South Cheyenne, Suit 1100
Tulsa, OK 74103
ATTORNEY FOR PLAINTIFF

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CP

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

FILED
OCT 29 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

VW CREDIT, INC.

Plaintiff,

v.

MEMORIAL VOLKSWAGON, INC.,
d/b/a MEMORIAL VOLKSWAGON/
AUDI, et al.,

Defendants.

Case No. 97-C-163-H ✓

ENTERED ON DOCKET

DATE 10-30-98

JUDGMENT

The Court having granted in full VW Credit, Inc.'s ("VCI") Motion for Summary Judgment on VCI's claims against defendants Memorial Volkswagen, Inc. and Steven Kitchell, and having granted in full VCI's Motion for Summary Judgment on the claims of defendants Memorial Volkswagen, Inc. and Steven Kitchell against VCI,

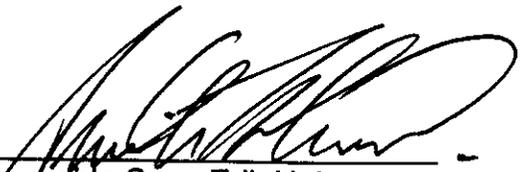
It is therefore ordered, adjudged and decreed:

That VCI have and hereby receives judgment in its favor and against defendants Memorial Volkswagen, Inc. and Steven Kitchell, jointly and severally, in the amount of ~~\$439,130.32~~ **\$379,044.78**, including costs assessed against the defendants, with interest thereon pursuant to 28 U.S.C. § 1961, and for which execution may immediately issue.

It is also ordered that VW Credit, Inc.'s Replevin Bond, as filed herein, in the amount of \$3,035,890.00, be and is hereby released.

IT IS SO ORDERED.

Dated: 10/29/98


Honorable Sven Erik Holmes
United States District Judge

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

OCT 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CARLA CHAPPELL,)
)
Plaintiff,)
)
vs.)
)
NORTHEAST OKLAHOMA ELECTRIC)
COOPERATIVE, INC., an)
Oklahoma corporation,)
)
Defendant.)

Case No. 98-CV-316-BU

ENTERED ON DOCKET

DATE 10-30-98

ORDER

This matter comes before the Court upon Defendant's Motion for Summary Judgment. The record reflects that Plaintiff has not responded to the motion within the time prescribed by N.D. LR 7.1(C) and has not requested an extension of time to respond to the motion. Pursuant to N.D. LR 7.1(C), the Court, in its discretion, deems the motion confessed.

Upon review, the Court finds that no genuine issue of material fact exists and that Defendant is entitled to judgment as a matter of law.

Accordingly, Defendant's Motion for Summary Judgment (Docket Entry #10) is GRANTED. A judgment shall issue forthwith.

ENTERED this 29th day of October, 1998

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

OCT 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LAVONNE PACK,)
)
Plaintiff,)
vs.)
)
SODEXHO MARRIOTT SERVICES, INC.,)
a Delaware corporation,)
)
Defendant.)

Case No. 98-cv-660-BU

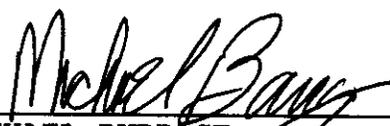
ENTERED ON DOCKET
DATE 10-30-98

ADMINISTRATIVE CLOSING ORDER

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

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

Entered this 29th day of October, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

③

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

FILED

OCT 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MACK FREEMAN and DEANNA
FREEMAN,)

Plaintiffs,)

vs.)

Case No. 97-CV-865-BU(J)

ALLSTATE INSURANCE COMPANY,)
the SHERIFF OF DELAWARE)
COUNTY, OKLAHOMA, the CITY)
OF GROVE, OKLAHOMA, the CITY)
OF COMMERCE, OKLAHOMA, and)
the OKLAHOMA HIGHWAY PATROL,)

Defendants.)

ENTERED ON DOCKET

DATE OCT 29 1998

ADMINISTRATIVE CLOSING ORDER

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

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

Entered this 28 day of October, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

(67)

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

SAM BELL,)
)
Plaintiff,)
)
vs.)
)
VENTAIRE,)
)
Defendant.)

No. 97-C-935-B(M)

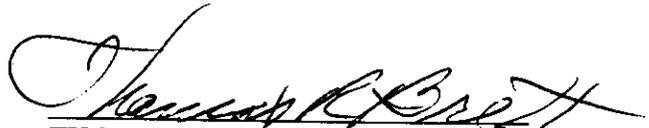
FILED
OCT 27 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE OCT 29 1998

AMENDED JUDGMENT

In accord with the Order filed on October 9, 1998 sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of Defendant Venteaire and against Plaintiff Sam Bell. Costs are assessed against Plaintiff if properly applied for pursuant to Local Rule 54.1. Pursuant to the August 14, 1998 Order granting attorney fees to Defendant Venteaire on its motion to compel Plaintiff to respond to discovery requests, attorney fees in the amount of \$1,381.00 are awarded to Defendant Venteaire.

Dated, this ^{AW} 26 day of October, 1998.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

30

clerk

lc

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

FILED

OCT 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LELA A. FLETCHER,

Plaintiff,

vs.

ROYAL FINANCE CORP., An Oklahoma
Corporation, and CUSTOMER CREDIT
CORPORATION, An Oklahoma Corporation,

Defendants.

Case No. 98-CV-0218BU(J)

ENTERED ON DOCKET

DATE OCT 29 1998

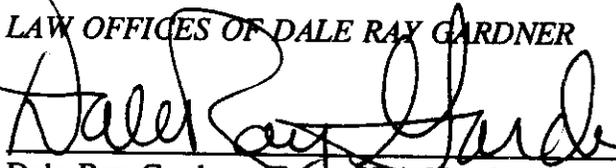
STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties and, pursuant to Federal Rules of Civil Procedure 41(a)(1), hereby stipulate that this action in its entirety should be, and hereby is, dismissed with prejudice.

The parties stipulate that this dismissal with prejudice applies to all claims and all parties in this action. The parties further stipulate that each party shall bear its own attorney fees, litigation expenses, and costs.

APPROVED AS TO FORM AND CONTENT:

LAW OFFICES OF DALE RAY GARDNER



Dale Ray Gardner, Esq., OBA No. 3238

Seven South Park Street

Sapulpa, Oklahoma 74066-4219-01

Attorneys for Plaintiff LELA A. FLETCHER

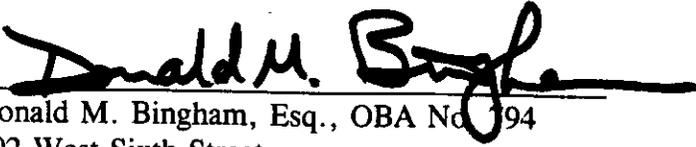


LELA A. FLETCHER, Plaintiff

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RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS

A handwritten signature in black ink, reading "Donald M. Bingham". The signature is written in a cursive style and is positioned above a horizontal line.

Donald M. Bingham, Esq., OBA No. 194
502 West Sixth Street
Tulsa, Oklahoma 74119-1010
Attorneys for Defendants ROYAL FINANCE
CORP. AND CUSTOMER CREDIT CORP.

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

F I L E D

OCT 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LIZZIE NORMAN, o/b/o)
TRAE L. NORMAN, a minor,)
SSN: 444-86-6507,)
)
Plaintiff,)

v.)
)
KENNETH S. APFEL,)
Commissioner of the Social Security)
Administration,)
)
Defendant.)

CASE NO. 97-CV-934-M

ENTERED ON DOCKET

DATE OCT 29 1998

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 28th day of Oct., 1998.

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

(12)

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).

Trae L. Norman (Trae), was born December 2, 1985 and was ten years old at the time of the hearing. [R. 48, 212]. Plaintiff claims Trae has been disabled since birth due to hyperactivity (Attention Deficit Disorder - ADD) and mental retardation. [R. 210, 214, 226, Plaintiff's Brief, p. 1].

The statutory and regulatory criteria in effect at the time of the ALJ's decision required the decision maker to apply a four-step evaluation process to a claim of disability benefits made on behalf of a child. See 42 U.S.C. § 1382c(a)(3)(A)(1994), as implemented by 20 C.F.R. § 416.924(b)(1994).²

² First, he had to determine whether the claimant was engaged in substantial gainful activity. See 20 C.F.R. § 416.924(c). If so, he was not disabled. *Id.* If the claimant was not engaged in substantial gainful activity, the ALJ had to determine whether he had a severe impairment. *Id.* § 416.924(d). If not, he was not disabled. *Id.* If the claimant had a severe impairment, the ALJ had to determine whether that impairment met or equaled an impairment listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1 (Listings). *Id.* § 416.924(e). If a Listing was met or equaled, the claimant would be deemed disabled. *Id.* If no Listing was met, the evaluation would proceed to the fourth step, where an

In this case, the ALJ denied benefits first at step three, stating:

The evidence does not reflect an impairment of a degree of severity required to meet or equal any impairment(s) listed in Appendix 1, Part A or B, Subpart P, Regulations No. 4. Specific emphasis has been given to Listing 112.11 - Attention deficit hyperactivity disorder. To meet the requirements of this listing the claimant must have medically documented findings of marked inattention; and marked impulsiveness; and marked hyperactivity; and at least two of the following: a marked impairment in cognitive/communication function, or a marked impairment in social functioning; or a marked impairment in personal/behavioral functioning. The evidence does not reflect that the claimant's impairment is of the severity required to meet or equal this listing (20 CFR 404.1500, Appendix 1, and see 416.924(e)).

[R. 16].

The ALJ then went on to discuss at length his determination at step four that, although Trae has an attention deficit hyperactivity disorder, the record does not reflect an impairment or combination of impairments of comparable severity to that which would disable an adult. [R. 19]. The ALJ concluded Trae has moderate limitations in cognitive skills and concentration, persistence, or pace, but that [they] would not affect his ability to function independently, appropriately, and effectively in an age-appropriate manner and that Trae was, therefore, not under a disability as that term is defined in the Social Security Act. [R. 20].

individualized functional assessment (IFA) would be made to determine whether the claimant had an impairment or impairments of comparable severity to that which would prevent an adult from engaging in substantial gainful activity. *Id.* § 416.924(f).

Subsequent to the ALJ's decision, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, Pub.L. No. 104-193, 110 Stat. 2105. The Act amended the standard for evaluating children's disability claims, as follows:

An individual under the age of 18 shall be considered disabled ... if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. § 1382c(a)(3)(C). Section 211(d)(1) of the Act, found in the notes following 42 U.S.C.A. § 1382c, states that the new standard for evaluating children's disability claims applies to all cases which have not been finally adjudicated as of the effective date of the Act, August 22, 1996, including those cases in which a request for judicial review is pending. Thus, the new version of the Act is applied to this case. *Brown v. Callahan*, 120 F.3d 1133, (10th Cir. 1997).

Under the new statute, a child is considered disabled only if his or her condition meets or equals a Listing at step three of the sequential evaluation process. A claimant has the burden of proving that a Listing has been equaled or met. *Bowen v. Yuckert*, 482 U.S. 137, 107 S.Ct. 2287 (1987); *Williams v. Bowen*, 844 F.2d 748 (10th Cir. 1988). The ALJ is "required to discuss the evidence and explain why he found that [the claimant] was not disabled at step three." *Clifton v. Chater*, 79 F.3d 1007 (10th Cir. 1996). Thus, analysis of the medical evidence in light of the Listings is of primary importance.

In this case, the ALJ identified Listing 112.11 as the relevant Listing and found that, although Trae does have ADD his condition does not meet the criteria of Listing 112.11. Plaintiff does not argue with this finding, contending instead that Trae's severe impairment of ADD as described by the ALJ in his decision, in combination with his mental impairment, meets the criteria for disability under Listing 112.05. [Plaintiff's Brief, p. 5]. Plaintiff contends that the failure of the ALJ to discuss the evidence in light of Listing 112.05 is grounds for reversing the decision of the Commissioner. Plaintiff also complains that the ALJ did not accord proper weight to the IQ tests, discounted Trae's "intellectual limitations" and substituted his own opinion for medical and educational evidence. The Commissioner argues that Plaintiff did not meet her burden of proof that Trae's condition meets a Listing and that the IQ tests were given proper consideration by the ALJ. For the reasons stated below, the Court finds this case must be remanded to the Commissioner for further consideration.

The pertinent portions of 20 C.F.R. § 112.05, which Plaintiff asserts apply to this case, provide:

112.05 *Mental Retardation*: Characterized by significantly subaverage general intellectual functioning with deficits in adaptive functioning.

The required level of severity for this disorder is met when the requirements in A, B, C, D, E, or F are satisfied.

C. A valid verbal, performance, or full scale IQ of 59 or less;
OR

D. A valid verbal performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant limitation of function.

In his decision, the ALJ discussed at length Trae's medical and educational history and the mother's testimony. He mentioned the "disparity" in Trae's achievements on intellectual testing. [R. 18]. In this regard, the Court notes that the record contains the results of three independent Wechsler Intelligence Scale for Children (WISC) tests.

The first test was given on February 10, 1992 when Trae was 6 years and 2 months of age. [R. 119]. On that test, Trae scored: verbal 82, in the low average range; performance 74, borderline range; and full scale 77, borderline range. The examiner reported that Trae was functioning in the borderline range of measured ability. [R. 121]. Processing difficulties were noted in auditory and sensory motor areas. *Id.*

The second test was given August 5, 1994, when Trae was 8 years old. [R. 135-136]. His scores on that test were: verbal 60, performance 65, and full scale 59. William L. Cooper, Ph.D., a Licensed Clinical Psychologist, summarized the report as follows:

Trae Norman is an eight year old male who scored in the Mentally Deficient range of intellectual ability in the present assessment. However, he probably has Borderline potential. He appeared guarded and somewhat reluctant to cooperate today, and also appeared somewhat hyperactive.

On May 3, 1995, at age 9, Trae was again tested. [R. 188-189]. He scored a 63 in the verbal classification, 68 in performance and 62 full scale. The summary on that test was as follows:

Results of the WISC-III are indicative of overall mentally deficient intellectual ability. Achievement in reading, spelling, and math are at or above expected levels. Processing deficits were viewed in the visual and sensory motor areas.

In his decision to deny benefits, the ALJ relied upon the second test, given by Dr. Cooper, stating:

The claimant's motivation and reluctance to cooperate in testing, noted in the report by Dr. Cooper (Exhibit 27) is considered to be consistent with the assessment by Shirley Sayer (the claimant's special education teacher) that when the claimant is cooperating and listening, he does very well in all academic subjects (Exhibit 23). A decision in this case cannot be reached by considering IQ testing alone. Teachers' evaluations and individual education assessments must also be considered. It would be incongruous for the school system to place the claimant in a regular classroom for the majority of the day if his most recent IQ scores were taken at face value.

[R. 18]. The Court finds the ALJ's reasoning in this regard flawed in several respects.

The ALJ noted that Dr. Cooper had stated his test results were probably not Trae's likely optimal level of functioning due to "less than ideal" effort. For that reason, the Commissioner asserts the ALJ was entitled to rely on the results of the first test because Dr. Cooper had believed the first test showed Trae's true potential. Yet, the third test also resulted in lower scores than the first test even though Trae's behavior during the third test was reported as "quiet manner, rarely initiating conversation, but responding appropriately when questioned. He carefully assessed each task when presented, although he seldom monitored or made corrections when necessary." [R. 189A].

The ALJ said the assessment by Shirley Sayer, the Special Education teacher at Anderson Elementary School, was consistent with Dr. Cooper's opinion that the low IQ test results were due to Trae's reluctance to cooperate. However, he failed to note that Ms. Sayer had earlier reported, on December 21, 1993, that Trae was properly placed in special education, requiring extra help in every academic area and with social skills. [R. 115]. Ms. Sayer's follow-up activity report of October 10, 1994, which contains the comment relied upon by the ALJ in his determination, noted that when he cooperated and listened, Trae was making academic progress **that would be expected for him in his present placement** in special education classes. [R. 116]. The ALJ also failed to note that all five members of an evaluation team, including Special Education teachers, signed off on a Multidisciplinary Summary and Conclusion sheet on August 29, 1995 assessing Trae's achievement in reading, spelling and math at or above expected levels **for overall mentally deficient intellectual ability** and his retention in special education and related services was recommended. [R. 172].

The ALJ's statement that Trae was placed in a regular classroom for the majority of the day is inaccurate. In September 1995, Trae was moved from a self-contained special class to a **part-time special class** in order to help boost his self-esteem. [R. 173]. It was specifically noted in the school records by both his regular teacher and the Special Education teacher, that Trae still needed extra help academically and that he was functioning well below the level of skill required for placement in a regular classroom. [R. 174, 178-179].

Plaintiff claims the ALJ's failure to even mention the results of the third WISC test in his decision undermines his conclusion regarding Trae's mental limitations. The Commissioner argues that, because the third test was not administered by a specialist, the ALJ was not required to give it "determinative weight." [Defendant's Brief, p. 4]. The Commissioner contends the ALJ's catch-all phrase that he had "considered all of the evidence before him, including the exhibits not specifically cited in his decision" was sufficient for the Court to determine that he had properly considered the evidence and had assigned proper weight to all the IQ reports. This is simply not so. Specific weighing of the evidence related to the Listings was required, especially in this case, where proper consideration and weighing of the evidence is material to the determination of disability. *Clifton*, 79 F.3d at 1010. The Commissioner must apply the correct legal standards, and show that he has done so. *Winfrey*, 92 F.3d at 1019.

Plaintiff clearly asserted a claim of disability for Trae under Listing 112.05. See Application for Supplemental Security Income, R. 34, Type of Impairment: "hyper/LD." Also see Request for Hearing, R. 70; Disability Report, R. 72 and 75: "unable to complete the age appropriate tasks" and "learning disability." And, although his mother was unable to articulate the precise terms for Trae's impairments at the hearing, her testimony that Trae was hyperactive and that he had "low skill" should have alerted the ALJ that her claim was to be considered under Listing 112.05 as well as 112.11. [R. 214, 226]. At any rate, counsel's letter to the Appeals Council set forth definitively that Plaintiff's claim was asserted under Listing 112.05.

The ALJ's determination that Trae does not have a listed impairment did not include a discussion of the evidence in relation to Listing 112.05. In the absence of the required rationale the Court cannot assess whether relevant evidence adequately supports the ALJ's conclusion that Trae's condition does not meet the Listings. Remand of this case is ordered to enable the ALJ to further analyze the medical evidence in the context of the appropriate listings. The ALJ must identify the relevant listings and set out his specific findings and reasons for accepting or rejecting evidence at step three. *Clifton*, 79 F.3d at 1010.

Accordingly, the case is REVERSED AND REMANDED for an analysis of the evidence as it relates to the applicable Listings and for specific findings at step three. In remanding this case, the Court does not dictate the result. Remand is ordered to assure that a proper analysis is performed and the correct legal standards are invoked in reaching a decision based upon the facts of the case. *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir. 1995).

SO ORDERED this 28th day of Oct., 1998.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

MARY C. GRIFFIN,
SSN: 447-42-1966

Plaintiff,

v.

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

Defendant.

OCT 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-CV-1100-J ⁶¹³

ENTERED ON DOCKET

DATE OCT 27 1998

ORDER^{2/}

Plaintiff, Mary C. Griffin, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{3/} Plaintiff asserts that the Commissioner erred because (1) the ALJ failed to properly evaluate the medical evidence, (2) the ALJ incorrectly concluded that Plaintiff's mental impairment was not severe prior to September 30, 1990, and (3) the ALJ improperly evaluated Plaintiff's credibility. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

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

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

^{3/} Administrative Law Judge James D. Jordan (hereafter "ALJ") concluded that Plaintiff was not disabled on April 18, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on June 5, 1997. [R. at 4].

I. PLAINTIFF'S BACKGROUND

Plaintiff was born September 15, 1943. [R. at 40]. Plaintiff testified that she had not worked since 1990 when she was laid off due to an on-the-job injury. [R. at 44]. Plaintiff testified that she had had problems with sexual harassment at her previous place of employment. [R. at 45].

Plaintiff stated that she sometimes slept 15 hours each day. According to Plaintiff, her doctor told her she should see a counselor, but she has not because she does not trust people. [R. at 60]. Plaintiff testified that she experiences panic attacks, that she can cry for no reason, that she does not like or trust people, that she is especially distrustful of men, and that sometimes her crying spells can last for hours. [R. at 58-66].

A doctor testified at the hearing before the ALJ. [R. at 74]. He noted that the information on Plaintiff was limited and that he could not reach any definite conclusions. [R. at 76].

A PRT completed April 3, 1995 by Carolyn Goodrich, Ph.D., noted that Plaintiff had marked difficulties remembering, performing detailed instructions, and interacting with people. [R. at 109]. Dr. Goodrich indicated that Plaintiff suffered from sleep disturbance, anxiety, and feelings of guilt or worthlessness. [R. at 112].

Plaintiff indicated that she had no physical limitations, but that she was unable to associate with others. [R. at 165]. Plaintiff additionally stated that she suffered from stress because one of her neighbors continually threatened her. [R. at 188].

The record contains a deposition by William C. Lantz. [R. at 204]. Dr. Lantz indicated that he obtained his Ph.D. in a "divisional major" which was a combined department of psychology, communication, religion, and education. [R. at 208]. Dr. Lantz stated that he first saw Plaintiff in November 29, 1990 and that he spend approximately 45 minutes with her on that day. [R. at 216]. He saw her again on December 19, 1990. He concluded that Plaintiff did need treatment. [R. at 228]. He noted that the tests that he performed would not indicate for how long Plaintiff had needed treatment. [R. at 229, 242]. Dr. Lantz additionally agreed that he only saw Plaintiff on two occasions and that any diagnosis he made of Plaintiff would be tentative. [R. at 236].

On January 23, 1996, Marjorie Bennett, M.D., noted that, in her opinion, Plaintiff suffered from depression with post-traumatic stress disorder. [R. at 329].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

Disability under the Social Security Act is defined as the

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

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

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

42 U.S.C. § 423(d)(2)(A). The Commissioner has established a five-step process for the evaluation of social security claims.^{4/} See 20 C.F.R. § 404.1520.

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

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

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

"The finding of the Secretary^{5/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

III. THE ALJ'S DECISION

The ALJ found that Plaintiff was not disabled at Step Two of the sequential evaluation, prior to September 30, 1990. The ALJ concluded that the medical evidence did not contain clinical findings or laboratory tests to support Plaintiff's allegation of disability prior to September 30, 1990. The ALJ noted that Dr. Lantz saw Plaintiff on only two occasions. The ALJ notes that Plaintiff's attorney refers to

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

page 46 of Dr. Lantz's deposition that Plaintiff's workplace sexual harassment (between 1985 and 1987) probably intensified her emotional distress if Plaintiff had any pre-existing distress. The ALJ was not convinced that this could establish a date of onset for Plaintiff's mental disability. The ALJ additionally noted that in an effort to establish a date of onset the ALJ called a medical expert to testify. The ALJ noted that the expert concluded that the record was not adequate to establish a definitive diagnosis during the relevant time period. [R. at 21]. The ALJ concluded that Plaintiff's alleged impairment was not severe prior to September 30, 1990.

With regard to Plaintiff's status as of February 1, 1995, the ALJ concluded that Plaintiff's mental status was significantly different. The ALJ found that Plaintiff lacked the RFC^{6/} to perform work and that Plaintiff was disabled as of February 1, 1995.

IV. REVIEW

STEP TWO EVALUATION

Step Two of the Sequential Evaluation Process, is governed by the Secretary's "severity regulation." Bowen, 482 U.S. at 140-41; Williams, 844 F.2d at 750-51.

The "severity regulation" provides that:

If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, [the Commissioner] will find that you do not have a severe impairment and are, therefore, not disabled. [The

^{6/} Residual Functional Capacity is "the maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirement of jobs." 20 C.F.R. Pt. 404, Subpt. P, App. 2 § 200.00(c).

Commissioner] will not consider your age, education, and work experience.

20 C.F.R. § 404.1520(c). Pursuant to this regulation, claimant must make a "threshold showing that his medically determinable impairment or combination of impairments significantly limits his ability to do basic work activities." Williams, 844 F.2d at 751. This threshold determination is to be based on medical factors alone. Vocational factors, such as age, education, and work experience, are not to be considered. Bowen, 482 U.S. at 153; Williams, 844 F.2d at 750.

The ability to do basic work activities is defined as "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 404.1520(b). These abilities and aptitudes include the following:

- (1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;
- (2) Capacities for seeing, hearing, and speaking;
- (3) Understanding, carrying out, and remembering simple instructions;
- (4) Use of Judgment;
- (5) Responding appropriately to supervision, co-workers and usual work situations; and
- (6) Dealing with changes in a routine setting.

20 C.F.R. § 404.1521(b).

Plaintiff's burden on the severity issue is *de minimis*. Williams, 844 F.2d at 751. As the United States Supreme Court explains, the Secretary's severity regulation

increases the efficiency and reliability of the evaluation process by identifying at an early stage those claimants whose medical impairments are so slight that it is unlikely they would be found to be disabled even if their age, education, and experience were taken into account.

Bowen, 482 U.S. at 153 (emphasis added). The Secretary's own regulations state that

[g]reat care should be exercised in applying the not severe impairment concept. If an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation process should not end with the not severe evaluation step. Rather, it should be continued.

Social Security Ruling 85-28 (1985). In other words, Step Two "is an administrative convenience [used] to screen out claims that are 'totally groundless' solely from a medical standpoint." Higgs v. Bowen, 880 F.2d 860, 863 (6th Cir. 1988) (per curiam) (quoting Farris v. Secretary of HHS, 773 F.2d 85, 89 n. 1 (6th Cir. 1985)).

In this case, the ALJ concluded that Plaintiff had not met her burden of establishing that she had an impairment prior to September 30, 1990.

EVALUATION OF THE MEDICAL EVIDENCE

Plaintiff's argument does not specifically address the ALJ's decision at Step Two. Plaintiff initially focuses on the medical evidence and asserts that the ALJ did not provide specific reasons for rejecting the findings regarding Plaintiff's mental impairment provided in Dr. Lantz's deposition.

The ALJ noted that Dr. Lantz saw Plaintiff on two occasions. After the hearing before the ALJ, Plaintiff's attorney, in a brief submitted to the ALJ requested that the

ALJ focus on Dr. Lantz's deposition (page 46) where Dr. Lantz discusses the onset of Plaintiff's "current problem." The ALJ notes that "Dr. Lantz merely states that the alleged workplace sexual harassment at Shadow Mountain Institute 'probably intensified her emotional distress, if there was any pre-existing distress.'" [R. at 21]. The Court has thoroughly reviewed Dr. Lantz's deposition. Dr. Lantz notes that he saw Plaintiff on two occasions and that he could not be certain when Plaintiff's mental difficulties began. Dr. Lantz additionally did not testify at length as to whether or not Plaintiff had a disabling condition. His predominant conclusion was that Plaintiff needed treatment. This conclusion does not require a conclusion that Plaintiff was disabled. Plaintiff additionally refers to the testimony of the medical expert at the hearing before the ALJ. The ALJ noted that he was particularly concerned with the period of time between June 1, 1990 and September 30, 1990, and whether or not Plaintiff was disabled prior to September 30, 1990. The medical expert testified that he was unable to determine whether or not Plaintiff was disabled at that time, that the data was limited and that he could not reach a definitive diagnosis. The Court cannot conclude that the ALJ improperly disregarded either the testimony of Dr. Lantz or the medical expert.

Plaintiff asserts that the only way for the ALJ to have discounted the conclusions of Dr. Lantz and Dr. Kelley would have been for the ALJ to draw his own medical conclusions which Plaintiff states is prohibited. The Court disagrees with Plaintiff's premise. The ALJ did not discount the testimony of either Dr. Lantz or Dr. Kelley. Rather, the ALJ concluded, based on the testimony and the medical record,

that Plaintiff had not established that she had a severe impairment prior to September 30, 1990. This conclusion is not contradicted by the testimony or medical evidence referenced by Plaintiff.

Social security disability^{7/} provides a system of limited benefits to individuals who meet certain requirements. Generally, an individual must establish that he or she was disabled prior to the expiration of his or her "insured status." Potter v. Secretary of Health and Human Services, 905 F.2d 1346, 1348-49 (10th Cir. 1990) ("the relevant analysis is whether the claimant was actually *disabled* prior to the expiration of her insured status. . . . A retrospective diagnosis without evidence of actual disability is insufficient. This is especially true where the disease is progressive.") (citations omitted, emphasis added).

In this case, Plaintiff's last date of eligibility for disability insurance is September 30, 1990. The record contains very few medical records for Plaintiff prior to September 1990. The testimony from Dr. Lantz does indicate that Plaintiff needed treatment as early as November 1990 and may have needed treatment as early as 1985 or 1987. However, the critical question is not whether or not Plaintiff needed treatment, or had some mental or emotional distress. The issue is whether or not Plaintiff was disabled from the limitations imposed on her by the disease prior to

^{7/} SSI, or supplemental security income is a separate social security program which provides similar benefits to disabled individuals whose income is below a certain level. SSI benefits do not have the same "insured status" requirements as social security disability benefits or "SDI."

September 30, 1990.^{8/} To qualify for disability under the Social Security Act, an individual must be determined "disabled" prior to the expiration of the individual's insured status.

VOCATIONAL ASSESSMENT

Plaintiff asserts that the ALJ made erroneous vocational findings. Plaintiff notes that although the ALJ found her mental impairment not severe prior to September 30, 1990, Plaintiff's RFC prevented her from working. Plaintiff additionally states that the hypothetical questions asked of the vocational expert supports Plaintiff's position that she is disabled.

Plaintiff does not distinguish between her RFC prior to September 30, 1990 and her RFC after that date. The ALJ concluded that Plaintiff was disabled, pursuant to SSI, as of February 1, 1995. The ALJ additionally concluded that Plaintiff did not establish that she had a severe impairment prior to September 30, 1990. Vocational findings are not required when an individual is determined not disabled at Step Two.

CREDIBILITY ANALYSIS

Plaintiff asserts that the ALJ erred in assessing Plaintiff's credibility. Plaintiff states that the ALJ did not follow the appropriate procedures in evaluating Plaintiff's credibility.

^{8/} The ALJ concluded that Plaintiff's alleged impairment was "not severe" prior to September 30, 1990. Plaintiff has the burden of establishing that her impairment was severe. Plaintiff does not specifically tailor her argument to the ALJ's Step Two analysis.

In this case, the ALJ concluded that Plaintiff's medical record did not sufficiently establish that Plaintiff suffered from a severe mental impairment prior to September 30, 1990. Plaintiff focuses on her own testimony and requests that the Court reverse the decision of the ALJ based on the testimony of Plaintiff. However, a claimant's testimony, alone, cannot be sufficient to establish the existence of a mental impairment.

If you are not doing substantial gainful activity, we always look first at your physical or mental impairment(s) to determine whether you are disabled or blind. Your impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. A physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by your statement of symptoms.

20 C.F.R. § 404.1508 (emphasis added). See also 20 C.F.R. § 404.1528 ("*Symptoms* are your own description of your physical or mental impairment. Your statements alone are not enough to establish that there is a physical or mental impairment.")(emphasis in original).

This case is additionally complicated because the ALJ reached his decision at Step Two of the sequential evaluation. However, the Court concludes, after reviewing the record, the testimony of the Plaintiff, and the briefs, that the ALJ's evaluation of Plaintiff's credibility was sufficient.

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

Dated this 28th day of October 1998.



Sam A. Joyner
United States Magistrate Judge

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

F I L E D

OCT 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM D. CARPENTER,)
)
Plaintiff,)
)
vs.)
)
STANLEY GLANZ, et al.,)
)
Defendants.)

No. 97-CV-152-BU

ENTERED ON DOCKET

DATE ~~OCT 29 1998~~

ORDER AMENDING SEPTEMBER 28, 1998 ORDER

On September 28, 1998, this Court entered its Order dismissing Plaintiff's complaint as frivolous. That Order is hereby amended to provide as follows:

Before the Court are Plaintiff's civil rights complaint filed pursuant to 42 U.S.C. § 1983 as well as Plaintiff's notice of intent to request depositions (Docket #30), Plaintiff's motion for order requiring Defendants or Courtroom Deputy assigned to take Plaintiff's depositions to locate witness presently in federal custody (#32), Plaintiff's motion for summary judgment on Count II (#33), and Defendants' motion to strike Plaintiff's motion for summary judgment (#35). Plaintiff, a state inmate appearing *pro se*, has been granted leave to proceed *in forma pauperis*. For the reasons discussed below, the Court finds Plaintiff's claims lack any arguable basis in law and are frivolous. Therefore, pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), this action should be dismissed with prejudice. All pending motions should be denied as moot

BACKGROUND

During approximately twenty-six (26) days in the month of January, 1997, Plaintiff was housed in the Tulsa County Jail ("TCJ") while facing federal criminal charges filed in the United States District Court for the Northern District of Oklahoma, Case No. 96-CR-168.¹ In his complaint, filed February 19, 1997 against Defendants Sheriff Stanley Glanz, Detention Officers Sheaffer, Cherry, and England and Corporal Jack Smith, Plaintiff raises two claims arising from events occurring during his stay at TCJ. Plaintiff claims that he was subjected to:

- (1) Unjustified use of O.C. spray, failure to adhere to Tulsa County Sheriff's Office follow up procedures 3.1.9 and S1403 regarding use of Oleoresin Capsicum spray as well as U.S. Dept. of Justice and U.S. District Court Orders.
- (2) Imposition of summary punishment, disciplinary sanctions without due process, equal protection of law as set forth by our United States Supreme Court under the guidelines of Wolff v. McDonnell, 94 S.Ct. 2963 and T.C.S.O. Disciplinary Procedures.

(#5).

In support of his first claim, Plaintiff states that on January 16, 1997, Defendant Sheaffer entered cell S-2-8, the cell adjacent to Plaintiff's cell S-3-8, and sprayed the occupants with O.C. spray (oleoresin capsicum or pepper spray). According to Plaintiff, cell S-3-8 shared the air intake system with cell S-2-8. As a result, the occupants of cell S-3-8 were affected by the O.C. spray "to the point that inmate John Pellegrino threw up his meal he had just eaten and was immediately taken to medical thereby removing him from the gaseous environment [sic] for aprox. one hour after the pepper gas incident." Plaintiff claims he advised Defendants Cherry and Sheaffer that he was "suffering from the effects of the chemical agents and that he needed to go

¹For purposes of the constitutional analysis that follows, the Court will assume Plaintiff was a pretrial detainee at the time of the events giving rise to his claims.

to medical and to be removed from the gaseous environment [sic].” Neither detention officer removed Plaintiff from his cell. Plaintiff also claims he made the same request of Defendant England later in the day, but that Defendant England only advised “he would check on it.” Plaintiff complains that “absolutely no attention was given to this plaintiff who was suffering from the exact same symptoms of the chemical agents as inmate Pellegrino.”

In support of his second claim, Plaintiff asserts that on January 8, 1997, Defendants Cherry and Smith imposed “summary punishment” on all four inmates, including Plaintiff, housed in cell S-3-8 by “completely restricting exercise (shower) periods and telephone use for an indefinite [sic] period of time.” According to Plaintiff, the restrictions imposed by Defendant Cherry resulted from the deliberate trashing of the walkway between the cells by “‘someone’ unknown to [Cherry].” Plaintiff claims these restrictions infringed on his right to exercise, to maintain a reasonable degree of hygiene, to confer with his attorney regarding the pending Federal charge against him and otherwise interfered with his ability to file “meaningful pleadings to the Courts” as guaranteed under the provisions of Bounds v. Smith, 97 S.Ct. 1491. Plaintiff complains that these restrictions were imposed without the basic disciplinary due process guarantees set forth in Wolff v. McDonnell, 94 S.Ct. 2964.

Plaintiff seeks monetary damages in the amounts of \$50,000 from each Defendant involved in Count I and \$20,000 from each Defendant involved in Count II.

On July 18, 1997, Defendants submitted their answer (#14) along with a Special Report (#15) in compliance with the Court’s May 20, 1997 Order. Defendants state Plaintiff’s constitutional rights were not violated during his incarceration at TCJ.

ANALYSIS

Pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) and (ii), this Court “shall dismiss the case at any time if the court determines that . . . the action . . . is frivolous or malicious” or “fails to state a claim upon which relief may be granted.” A complaint may be dismissed as frivolous only if “it lacks an arguable basis either in law or in fact.” Neitzke v. Williams, 490 U.S. 319, 325 (1989); see also Fratus v. Deland, 49 F.3d 673, 674 (10th Cir. 1995). A complaint is subject to dismissal for failure to state a claim only if the plaintiff can prove no set of facts that would entitle him to relief, accepting the well-pleaded allegations as true and viewing them in the light most favorable to the plaintiff. This Court construes Plaintiff’s *pro se* pleadings liberally. See Haines v. Kerner, 404 U.S. 512, 520-21 (1972).

1. Plaintiff’s claim concerning the January 16, 1997 pepper spray incident lacks an arguable basis in law and is frivolous.

The focus of Plaintiff’s first claim is that Defendants violated TCJ procedures when they failed to provide follow up medical care after the spraying of pepper gas in the cell adjacent to Plaintiff’s cell. However, in order to state a constitutional claim for denial of medical care, a plaintiff must allege and prove facts indicating that defendants displayed deliberate indifference to his serious medical needs. Estelle v. Gamble, 429 U.S. 97 (1976); see also Martin v. Board of County Comm’rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990) (holding that under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection for medical care as that afforded convicted prisoners under the Eighth Amendment). In the instant case, Plaintiff has not claimed nor has he presented evidence to indicate that he

suffered serious injury requiring medical attention as a result of the pepper gas incident. He merely states that he suffered “from the exact same symptoms of the chemical agents as inmate Pellegrino.” Although inmate Pellegrino was removed from Plaintiff’s cell for medical treatment after demonstrating a possible allergic reaction to the pepper spray, Plaintiff indicates that Pellegrino was treated by the medical staff for only one hour. Furthermore, other than stating that Pellegrino vomited his recently consumed meal, Plaintiff fails to describe any other symptoms suffered by either himself or inmate Pellegrino. The Court concludes that even if Plaintiff suffered “from the exact same symptoms” as inmate Pellegrino, the relatively minor, short-term effects of pepper spray do not constitute “serious medical needs” implicating a constitutional violation. Thus, Plaintiff’s claim fails.

2. Plaintiff’s claim concerning imposition of “summary punishment” without due process lacks an arguable basis in law and is frivolous.

In Sandin v. Conner, 515 U.S. 472 (1995), the United States Supreme Court cited Bell v. Wolfish, 441 U.S. 520 (1979), as setting the correct standard for assessing the rights guaranteed to pretrial detainees under the Due Process Clause. In Bell, the Court held that conditions of pretrial detention are constitutional under the Due Process Clause as long as they do not amount to punishment of the detainee prior to an adjudication of guilt. Bell, 441 U.S. at 535-37. The Court expressly recognized a distinction between “punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may.” Id. at 537. Restrictions on pretrial detainees that are reasonably related to a prison’s interest in maintaining order and security do not rise to the level of constitutionally prohibited punishment.

Id. at 539-40. Whether such a reasonable relation exists is “peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations [of order and security], courts should ordinarily defer to their expert judgment in such matters.” Id. at 540 n.23 (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)). Courts cannot impose their own ideas of “how best to operate a detention facility.” Id. at 538.

In the instant case, Plaintiff has failed to state any facts demonstrating that the restrictions were imposed for any reason other than to maintain order and security at the jail. According to the Special Report, Defendant Cherry found that cell S-3-8 was “making messes and trashing out the walkway around the cells.” After asking the cell to keep the area clean, he returned on his next round to find that unidentified members of the cell had taken wet newspaper and thrown it on and about the catwalk. Cherry told them that “this was not going to work and that if they did not stop he would pull privileges.” (#15 at 16-17). The Special Report also indicates Defendant Smith inspected the area adjacent to cell S-3-8 after receiving information that the cell was throwing trash on the catwalk. Smith confronted the group of inmates and warned them that creating a mess would not be tolerated. After having the mess cleaned up by trusties, Smith returned later and found the catwalk trashed once more. At that point, he informed cell S-3-8 that he was placing a phone restriction on the cell for failure to clean (see #15, Ex. O, Policy 5.4.3: “Telephones will be available after all unit cleaning is complete . . .”).

If the TCJ officials’ decision to impose telephone and shower restrictions until the occupants of S-3-8 stopped “trashing” the walkway was “reasonably related to a legitimate governmental objective, it does not, without more, amount to ‘punishment.’ ” See Wilson v.

Philadelphia Detention Center, 986 F.Supp. 282, 288-89 (E.D. Pa. 1997) (citing Bell, 441 U.S. at 539). Legitimate penological goals include "maintaining institutional security and preserving internal order." Bell, 441 U.S. at 538. In this case, the restrictions at issue were imposed by TCJ officials only after the inmates repeatedly threw trash out of their cell and onto the walkway. Thus, Defendants took action they determined to be necessary in order to maintain order and safety within the facility. Plaintiff has failed to provide any evidence to suggest the officials' response to the January 8, 1997 conditions was exaggerated. The Court concludes that a due process violation is not implicated. Therefore, Plaintiff's claim lacks an arguable basis in law and is frivolous.

As to Plaintiff's related claim that he was effectively denied access to the courts as a result of the restrictions on telephone use, the Court again finds that Plaintiff's claim is frivolous. In Bounds v. Smith, 430 U.S. 817, 825 (1977), the Supreme Court held that prisoners were entitled to "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." The Tenth Circuit and many other Circuits have construed Bounds to require some showing of prejudice or injury--i.e., actual denial of access. See Smith v. Maschner, 899 F.2d 940, 944 (10th Cir. 1990) (interference with plaintiff's right to counsel or to access to the courts without more does not give rise to a constitutional violation); Twyman v. Crisp, 584 F.2d 352, 357-58 (10th Cir. 1978) (use of library restricted to two hours a week did not lead to any prejudice, so no denial of access).² Accordingly, the temporary inability to confer

²Chandler v. Baird, 926 F.2d 1057, 1062 (11th Cir. 1991) (prejudice is required where deprivation of legal material is minor and for a short period); Magee v. Waters, 810 F.2d 451, 452-53 (4th Cir. 1987) (actual injury required of city jail inmate who received books after delay and was allowed one hour of library time a week); Mann v. Smith, 796 F.2d 79 (5th Cir. 1986) (no denial of access to county jail inmate with access to legal assistance but not library who nevertheless was able to file legally sufficient claim); Cookish v. Cunningham, 787 F.2d 1 (1st Cir.

with counsel and temporary deprivation of legal materials absent a showing of prejudice or actual interference with the right of access to the courts lacks any arguable basis in law. Cf. Chandler v. Baird, 926 F.2d 1057, 1061 (11th Cir. 1991) (to establish denial of access to the courts where alleged deprivations are of minor and short-lived nature and do not implicate general policies, inmate must articulate facts indicating some prejudice such as being unable to do timely research on a legal problem or being procedurally or substantively disadvantaged in the prosecution of an action); Vigliotto v. Terry, 873 F.2d 1201, 1202-03 (9th Cir. 1989) (three-day seizure of legal files was not unconstitutional).

In the instant case, Plaintiff alleges he was unable to confer with counsel concerning his pending federal criminal charge and unable to conduct discovery in another civil rights action pending in this Court, Case No. 96-CV-57. Significantly, however, Plaintiff fails to allege or demonstrate that he suffered prejudice in either referenced proceeding.³ As a result, the Court concludes Plaintiff was not denied access to the courts as a result of the telephone restriction imposed by Defendants.

1986) (denial of access to law library, except for emergency matters, during two-week quarantine period does not state violation); Hudson v. Robinson, 678 F.2d 462 (3rd Cir. 1982) (actual injury must be shown; that library is noisy, open at inconvenient times, with no free supplies, and with notary not always available does not state a claim).

³In Plaintiff's criminal case, No. 96-CR-182, the docket sheet indicates Plaintiff entered a guilty plea on January 23, 1997. The Hon. H. Dale Cook entered judgment on May 21, 1997. Plaintiff did not appeal the conviction and sentence. In Plaintiff's civil case, No. 96-CV-57, the Hon. Terry C. Kern granted Defendants' motion for summary judgment and entered Judgment in favor of Defendants on February 9, 1998. Nothing in either record indicates Plaintiff suffered actual prejudice as a result of the January, 1997 restrictions at TCJ. In fact, the docket sheet for Case No. 96-CV-57 indicates that during the month of January, 1997, Plaintiff submitted three motions, one reply, one letter to the Court and one notice to the Court.

CONCLUSION

Plaintiff's claims lack an arguable basis in law and are frivolous. The Court concludes that pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), this action should be dismissed with prejudice. This dismissal counts as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).⁴

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's complaint is **dismissed with prejudice** as frivolous.
2. Any pending motion is **denied as moot**.
3. The Clerk is directed to **flag** this dismissal as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).

SO ORDERED THIS 28th day of October, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

⁴Section 1915(g) provides, in pertinent part, as follows:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LARRY J. RICHARDS,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner of Social Security, et al.,)
)
Defendant.)

Case No. 98-CV-0834-BU (E)

ENTERED ON DOCKET

DATE OCT 29 1998

REPORT AND RECOMMENDATION

The Court has referred to the undersigned for Report and Recommendation certain motions filed by *pro se* plaintiff, Larry J. Richards. These include a Motion for Temporary Restraining Order and Application for an Emergency Ex Parte, Temporary Restraining Order,¹ plaintiff's Motion to Proceed Without Prepayment of Costs and Affidavit in Support Thereof, and accompanying documents. Plaintiff sets forth some 29 causes of action for, *inter alia*, civil rights violations, purportedly arising from defendants' wrongful termination of the disability benefits he previously received pursuant to the Social Security Act and regulations. He seeks both injunctive and monetary relief.

¹ Plaintiff also filed a Memorandum of Law in Support of the Plaintiff's application for an Emergency, Ex Parte, Temporary Restraining Order, a Motion for an Immediate Ex Parte Hearing, a Preliminary Statement of Facts, a Bond for Temporary Restraining Order, and a "Warning of A Fraud Committed Upon This Honourable [sic] District Court for the Northern District of Oklahoma." The undersigned considers these documents part of plaintiff's Motion for Temporary Restraining Order.

(8)

MOTION FOR TEMPORARY RESTRAINING ORDER

Under Fed.R.Civ.P. 65(b),

A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

Plaintiff indicates that he has not been receiving benefits for a period of time. Preserving the *status quo*, in this matter, would mean that plaintiff will continue to live without disability benefits. It does not clearly appear that irreparable injury will result before the adverse party can be heard in opposition. The record does not reflect that plaintiff has made any effort to give notice to the adverse parties or their attorneys. Since plaintiff has failed to meet either of the requirements of Rule 65(b), the undersigned recommends that plaintiff's motion for temporary restraining order be **DENIED**.

MOTION TO PROCEED IN FORMA PAUPERIS

Plaintiff's Motion to Proceed Without Prepayment of Costs and Affidavit in Support Thereof is a motion to proceed *in forma pauperis* governed by 28 U.S.C. § 1915. Plaintiff has complied with the provisions of § 1915(a)(1) by submission of his affidavit. The undersigned recommends that the motion to proceed *in forma pauperis* be **GRANTED**.

THE COMPLAINT

The District Court must dismiss the case if it determines that the action is "frivolous," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. §§ 1915(c)(2)(B)(i) - (iii). Plaintiff fails to state a claim on which relief may be granted under 42 U.S.C. § 1983 and he seeks monetary relief against

numerous government officials who are immune from relief. The United States Supreme Court has expressly held that the improper denial or termination of Social Security disability benefits does not give rise to claims for money damages against government officials who administered the program. *Schweiker v. Chilicky*, 487 U.S. 412 (1988). Insofar as plaintiff's complaint purports to state claims for civil rights violations against these defendants, the undersigned recommends that such claims be **DISMISSED**.

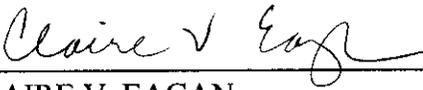
However, since *pro se* petitions must be read liberally, *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)), the undersigned recommends construction of plaintiff's complaint as asserting an appeal from an adverse decision of the Commissioner under 42 U.S.C. §§ 405(g) and 1383(c)(3), and that all defendants other than the Commissioner be **DISMISSED**. The undersigned recommends as to the remaining claim that the Court Clerk should, pursuant to 28 U.S.C. § 1915(d), issue and serve all process upon the Commissioner, the United States Attorney and the United States Attorney General on behalf of the Commissioner. The undersigned further recommends that the Commissioner be ordered to include in his answer a chronology of events since 1995 pertaining to plaintiff's social security application(s).

OBJECTIONS

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

the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See *Thomas V. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Ayala v. United States*, 980 F.2d 1342 (10th Cir. 1992).

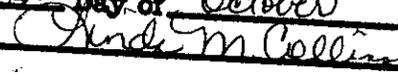
Dated this 28th day of October, 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

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



Andrew M. Collins

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FILED

OCT 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 SAMMY D. SIMMONS,)
)
 Defendant.)

Case No. 98CV0669C(M)

ENTERED ON DOCKET
DATE OCT 28 1998

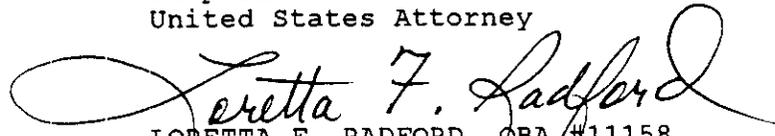
NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 27th day of October, 1998.

UNITED STATES OF AMERICA

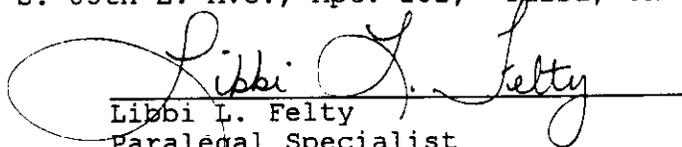
Stephen C. Lewis
United States Attorney



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

CERTIFICATE OF SERVICE

This is to certify that on the 27th day of October, 1998, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Sammy D. Simmons, 2416 S. 85th E. Ave., Apt. 252, Tulsa, OK 74129.



Libbi L. Felty
Paralegal Specialist

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

FILED

OCT 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE HOME-STAKE OIL & GAS COMPANY)
and THE HOME-STAKE ROYALTY)
CORPORATION,)

Plaintiffs,)

v.)

HOME-STAKE ACQUISITION)
CORPORATION, a Delaware corporation;)
ENVIROMINT HOLDINGS, INC., a)
Florida corporation f/k/a TRI TEXAS, INC.;)
INTERNATIONAL INSURANCE INDUSTRIES,)
INC., a Delaware corporation; SUMMIT)
PARTNEFS MANAGEMENT CO., a Texas)
corporation; CHARLES S. CHRISTOPHER;)
MICHAEL J. EDISON, an individual sometimes)
d/b/a International Insurance Industries, Inc.;)
MADERA PRODUCTION COMPANY, a Texas)
corporation; AGO COMPANY, a Texas)
corporation; and ACR CORPORATION, a)
Texas corporation,)

Defendants.)

Case No. 93-C-303-H ✓

ENTERED ON DOCKET

DATE 10-28-98

ORDER

This matter comes before the Court on a supplemental motion for a new trial by M. Tom Christopher (Docket # 162). In support of the supplemental motion, Mr. Christopher has offered additional arguments and authorities, as well as the deposition under oath of Mr. Larry Jasper.

Based upon a careful review of the evidence submitted by Mr. Christopher in this case, including but not limited to Mr. Christopher's papers filed in this matter on March 4, 1998 (Docket # 147) and March 27, 1998 (Docket #152), the representations of Mr. Christopher's counsel at the hearing on April 22, 1998, and Mr. Christopher's report concerning the deposition

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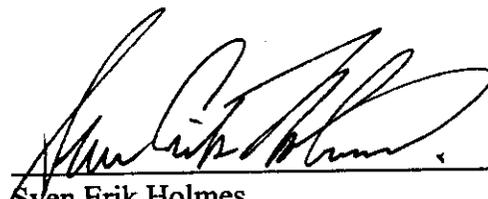
of Mr. Jasper (Docket #165), attached to which is a transcript of Mr. Jasper's deposition, the Court finds that the statements asserted in support of Mr. Christopher's supplemental motion are markedly different from previous representations of fact by Mr. Christopher and his counsel. Clearly, the sworn testimony of Mr. Jasper and the previous representations of fact in this record cannot both be true. The Court is not required to determine which statement of facts is true and which is false. It is sufficient that the Court finds false statements have been made in support of Mr. Christopher's claim in this action. Pursuant to this finding, the Court hereby strikes Mr. Christopher's claim.

Moreover, assuming arguendo that one of the representations of fact submitted by Mr. Christopher were true, as matter of law either such representation would be insufficient to support Mr. Christopher's motion.

Based on the above, the instant motion for new trial (Docket #162) is hereby denied. Plaintiffs are hereby ordered to prepare a form of judgment consistent with this ruling and, following review by Mr. Christopher's counsel as to form, to submit such form of judgment to the Court within ten (10) days of the file date of this order.

IT IS SO ORDERED.

This 26TH day of October, 1998.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FREDERIC C. ROBIN,)
)
 Plaintiff,)
)
 vs.)
)
 OKLAHOMA GAS AND)
 ELECTRIC COMPANY,)
)
 Defendant.)

ENTERED ON DOCKET

DATE 10-28-98

Case No. 97-CV-985-H(J)

F I L E D

OCT 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

Now before the Court is Plaintiff's "Motion for Partial Summary Judgment" and Defendant's "Motion for Partial Summary Judgment." [Doc. Nos. 8 and 12]. These motions have been referred to the undersigned for a Report and Recommendation pursuant to 28 U.S.C. § 636. The undersigned has reviewed the parties' briefs and for the reasons discussed below, the undersigned recommends that Plaintiff's motion for partial summary judgment be **GRANTED**, and that Defendant's motion for partial summary judgment be **DENIED**.

I. THE UNDISPUTED FACTS

The parties agree that the facts in this case are largely undisputed. The parties do not, however, agree on the legal significance that should be given to the undisputed facts. The following summary is a summary of facts which, unless otherwise indicated, are not in dispute.

A. THE 1972 AND 1974 TAKE-OR-PAY GAS PURCHASE CONTRACTS

At all relevant times, Frederic C. Robin was the owner of a working interest in the following oil and gas wells: the Rivers No. 1-14, the Biswell No. 1-12 and the Young No. 1-22, all located in Blaine County, Oklahoma ("the Wells").^{1/} On December

^{1/} Defendant, Oklahoma Gas and Electric Company ("OG&E"), attempts to create a question of fact regarding Mr. Robin's continued ownership of the working interests in the Wells after 1990. OG&E has submitted a January 26, 1990 letter from Dickson M. Saunders of the law firm Doerner, Stuart, Saunders, (continued...)

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15, 1972, OG&E, as buyer, and Mr. Robin and his brother, as seller, entered into a long-term gas purchase contract ("the 1972 contract"). The gas attributable to Mr. Robin's leasehold interest in the Rivers No. 1-14 well was dedicated to the 1972 contract. The term of the 1972 contract expired on February 21, 1997. On August 1, 1974, OG&E, as buyer, and Mr. Robin and his brother, as seller, entered into a second, long-term gas purchase contract ("the 1974 contract"). The gas attributable to Mr. Robin's leasehold interest in the Biswell No. 1-12 and the Young No. 1-22 wells was dedicated to the 1974 contract. The 1974 contract expired on January 14, 1995. See Doc. No. 15, Exhibits "A," "B," and "C."

B. LOAN TRANSACTIONS BETWEEN PLAINTIFF AND G AND E ROBIN INVESTMENTS

After the 1972 and 1974 contracts were executed, Mr. Robin mortgaged his working interests in the Wells to Utica National Bank and Trust Company in Tulsa, Oklahoma ("Utica Bank"). There are no documents in the record reflecting this mortgage. According to Mr. Robin, he "agreed" that payments for gas under the 1972 and 1974 contracts could be made to Utica Bank. Again, there are no documents in the record reflecting an assignment to Utica Bank of Mr. Robin's contractual right to payment under either the 1972 or the 1974 contract. However, OG&E does not dispute any of these facts.

G and E Robin Investments ("G&E Investments") is a d/b/a of George and Esther Robin, Plaintiff's parents.^{2/} On November 13, 1985, G&E Investments loaned Plaintiff \$250,000.00 for one year at a rate of 9% per anum. As security for the loan, G&E Investments took a mortgage, second to Utica Bank's mortgage, on Plaintiff's oil and

^{1/} (...continued)

Daniel and Anderson to Mustang Production Company ("Mustang"). In his letter, Mr. Saunders informs Mustang that his clients "George and Esther Robin . . . have succeeded to the interest of Frederic C. Robin in the [Rivers No. 1-14 in Blaine County, Oklahoma] and other wells and leases in which Frederic C. Robin has heretofore had an interest" [Doc. No. 14, Exhibit "A"]. Other than this statement, there is no evidence that, apart from taking a mortgage and an assignment for security, that G and E Robin Investments "succeeded" to Plaintiff's interests in the Wells or contracts at issue. Furthermore, OG&E has admitted that for all relevant time periods, Plaintiff held a working interest in the Wells and that there had been no title transfer from Plaintiff to G and E Robin Investments. See Doc. No. 9, Exhibit "1," Requests Nos. 1, 2 and 7. Thus, the undersigned finds that Mr. Saunders' January 26, 1990 is not sufficient to create a question of fact regarding Mr. Robin's continued ownership of the working interests in the Wells after 1990. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (holding that "[t]he mere existence of a scintilla of evidence in support of [a] position will be insufficient" to create a genuine issue of material fact for trial).

^{2/} From the record it is not clear whether G and E Robin Investments was or was not a partnership. George Robin executed documents on behalf of G and E Robin Investments as a "partner." See, e.g., Doc. No. 15, Exhibits "M" through "R." The parties have not, however, suggested that G and E Robin Investments' status as a partnership is material to any of the issues before the Court.

gas leasehold interests, from which the Wells were producing. Doc. No. 10, Exhibit "A."^{3/}

On March 27, 1987, G&E Investments and Plaintiff entered into an agreement that (1) extended the maturity date of the \$250,000.00 loan by approximately 1 ½ years, and (2) loaned Plaintiff an additional \$500,000.00 for one year at a rate of 9% per anum. Doc. No. 10, Exhibit "B" - the "Mortgage and Security Agreement Amendment and Ratification and Mortgage and Security Agreement and Assignment." Plaintiff used a portion of these new loan proceeds to pay off his loan with Utica Bank, and G&E Investments received an assignment of the Utica Bank mortgage. As security for the extension and the new loan, G&E Investments again took a mortgage on Plaintiff's oil and gas leasehold interests, from which the Wells were producing. Doc. No. 10, Exhibit "B."^{4/} Plaintiff also assigned his interests in the 1972 and 1974 contracts to G&E Investments with the following language:

For the purpose of additionally securing payment of all of the Secured Indebtedness and to facilitate the discharge of all of the Secured Indebtedness and as cumulative of any and all rights herein provided for, [Plaintiff] hereby warrants, bargains, conveys, sells, transfers, assigns, sets over and delivers unto [G&E Investments] all oil, gas, casinghead gas and other hydrocarbons produced from or allocated to the Mortgaged Properties . . . , all proceeds thereof and all accounts and contract rights of [Plaintiff] under which such proceeds may arise (all such accounts and contract rights and proceeds being hereinafter referred to as the "proceeds of runs").

Id. at ¶ 5. The parties' agreement specifically required Plaintiff to "direct and instruct" all purchasers of gas from the mortgaged properties (i.e., OG&E) to make payments

^{3/} Plaintiff actually mortgaged all "right, title and interest . . . in and to the valid, existing and indefeasible oil and gas mining leases [covering the Wells] . . . ; together with all . . . income, . . . royalties, profits and proceeds from the mortgaged property, and all oil, gas and casinghead gas hereinafter produced from the mortgaged property; together . . . with all of [Plaintiff's] right, title and interest in and to all [buildings and equipment] located upon or used in connection with said lease." Doc. No. 10, Exhibit "A," p. 1.

^{4/} The language employed is virtually identical to the language used in the November 13, 1985 mortgage. See n. 3, *supra*.

for the gas directly to G&E Investments in Palm Springs, California, "until such time as all of the Secured Indebtedness have been paid in full" Id. at ¶ 5.1.^{5/}

On May 18, 1987, OG&E received executed division orders for the Wells. These division orders directed that OG&E make payment for gas produced under the 1972 and 1974 contracts from the Wells to G&E Investments, rather than to Plaintiff. The face of the division orders reflected that a mortgage was involved and that "[r]ecord title [had] not changed," and that the purpose of the division orders was "for payment only." The division orders were executed by Plaintiff and G&E Investments and they were to be effective as of April 1, 1987. Doc. No. 15, Exhibits "J" through "L."^{6/} See also Doc. No. 10, Exhibits "F" through "H." Pursuant to these division orders, OG&E began making payment under the 1972 and 1974 contracts to G&E Investments, rather than to Plaintiff, for gas purchased by OG&E that was attributable to Plaintiff's interest in the Wells. OG&E admits that it was aware that Plaintiff's title to the leasehold interests underlying the Wells was not changed by virtue of the division orders. Doc. No. 9, Exhibit "1," Request No. 7.

After the division orders were executed, G&E Investments began receiving 100% of the revenue attributable to Plaintiff's interest in production from the Wells. Plaintiff continued to receive monthly statements for the operating costs of the Wells. Pursuant to a verbal agreement executed some time after the March 27th agreement, Plaintiff and G&E Investments agreed that G&E Investments would pay the monthly operating expenses out of the revenue that G&E Investments was receiving from the Wells. Doc. No. 37, Exhibit "A."

The initial term of the March 27th agreement was one year. That is, Plaintiff was required to pay back the \$750,000.00 within one year. However, once G&E Investments saw that the Wells would actually produce a satisfactory monthly revenue stream, Plaintiff and G&E Investments agreed to modify the term of the March 27th agreement. The parties agreed that G&E Investments would continue to receive 100%

^{5/} According to Plaintiff, dealing with his father, George Robin, "was slightly more difficult than dealing with a bank and certainly as arms-length as you would have at a bank." Doc. No. 14, Exhibit "B," p. 57, ln. 9-15. According to Plaintiff, "[g]etting a loan from [his father] was probably harder than getting one from the bank, it had to be well-collateralized." Doc. No. 37, Exhibit "A," p. 55, ln. 9-11.

^{6/} In particular, the division orders contained the following language:

Mortgage on this interest and by execution of this Division Order both parties agree to have payment made in the above manner until Oklahoma Gas and Electric Company receives written notice to the contrary. Record title has not changed and the purpose of this Division Order is for payment only.

See Doc. No. 15, Exhibits "J" through "L."

of the revenue in exchange for G&E Investments agreement to extend the term of the notes for as long as the Wells produced revenues or until the loans were paid off. Doc. No. 37, Exhibit "A."

C. THE VOLUNTARY PRICE REDUCTION LETTERS

Due to adverse market conditions in the mid-1980's, OG&E^{7/} began sending letters to various parties who had entered into gas purchase contracts with OG&E. These letters, known as voluntary price reduction letters ("VPR letters"), were requests by OG&E for modification of the price term in the gas purchase contract(s) covering the wells identified in the letters.^{8/} From 1985 to 1989, OG&E sent six VPR letters to Mr. Robin. Mr. Robin signed each of these six letters, agreeing to a modification/reduction of the price terms in the 1972 and 1974 contracts. See Doc. No. 15, Exhibits "D" through "I."^{9/} From 1989 to 1995, OG&E sent six VPR letters

^{7/} The record reflects that much of the correspondence in this case was actually sent by Mustang Fuel Corporation ("Mustang") or Enogex, Inc. ("Enogex"). There is no evidence in the record which establishes OG&E's relationship with Mustang or Enogex. Throughout the pleadings, however, OG&E refers to communications with or actions by Mustang or Enogex as communications with or actions by OG&E. It appears undisputed, therefore, that Mustang and Enogex were acting as OG&E's agent. It appears that Mustang ceased acting as OG&E's agent and Enogex began acting as OG&E's agent some time between April 12, 1986 and October 30, 1986. See Doc. No. 15, Exhibits "E" and "F." Thus, a reference to OG&E is intended to include a reference to Mustang or Enogex where appropriate.

^{8/} In a footnote, Plaintiff argues that the modification requested by the VPR letters is not enforceable because it is not supported by consideration. According to Plaintiff, apart from making a gift to OG&E, the modification confers little benefit to the working interest owners. Doc. No. 9, p. 7 n.1. Plaintiff ignores, however, § 2-209(1) of the UCC which provides that "[a]n agreement modifying a contract within [Article 2] needs no consideration to be binding." 12A Okla. Stat. § 2-209(1).

Modifications must, however, meet the test of good faith imposed by the UCC. See 12A Okla. Stat. §§ 1-201(19), 1-203, and 2-103(1)(b). "The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a 'modification' without legitimate commercial reason is ineffective as a violation of the duty of good faith." Id. at § 2-209, comment 2. In its VPR letters, OG&E offered the following reason for requesting modification of the contract's price term: The price of gas under the contracts was exceeding "the market clearing level," which "contributed to an increase in the cost of gas," which in turn resulted "in loss of market for electricity and natural gas as a boiler fuel." Doc. No. 15, Exhibit "D," ¶ 1. The VPR letters asked for a modification of the price term "to reverse this loss of market" by making OG&E more competitive. Id. Plaintiff has offered nothing which would demonstrate that the reason offered by OG&E for the requested modification was not a legitimate commercial reason or that OG&E was requesting the modification in bad faith.

^{9/} Plaintiff and G&E Investments executed a mortgage and assignment agreement on March 27, 1987. OG&E argues that it is ¶ 5 of this agreement that authorized G&E Investments to modify the price terms of the 1972 and 1974 contracts by executing VPR letters. Plaintiff and G&E Investments also executed division orders, which were to be effective April 1, 1987. These division order directed OG&E to make payment under the 1972 and 1974 contracts to G&E Investments. It was after these division orders were executed that OG&E was aware that G&E Investments existed, and that is when OG&E began sending
(continued...)

to G&E Investments. George Robin signed each of these letters on behalf of G&E Investments, purportedly agreeing to a modification/reduction of the price terms in the 1972 and 1974 contracts. Id. at Exhibits "M" through "R."^{10/}

OG&E did not send Plaintiff copies of the VPR letters that were sent to G&E Investments, and Plaintiff himself signed none of the VPR letters sent to G&E Investments. For most of the relevant periods covered by the VPR letters, OG&E reduced the price it paid for gas purchased under the 1972 and 1974 contracts. See Doc. No. 15, Exhibit "T."^{11/} Apart from the language in the November 1985 and March 1987 mortgage/assignment documents, Plaintiff never expressly authorized anyone to modify the price terms of the 1972 or 1974 contracts.^{12/}

D. PAYMENT METHODS

OG&E paid for gas purchased under the 1972 and 1974 contracts by mailing a monthly check for the prior month's production. The stub of this monthly check served as a "Gas Statement," which summarized the preceding month's transactions. See Doc. No. 15, Exhibit "S." Among other things, the "Gas Statement" lists the price per mcf paid for the gas purchased by OG&E. At all relevant times, even after OG&E began mailing checks and stubs to G&E Investments, Plaintiff had the right to review OG&E's and/or G&E Investments' records to determine the price being paid for any gas purchased by OG&E.

Before the division orders in this case were executed, OG&E sent checks and stubs to a mailing address designated by Plaintiff. After the division orders were executed, OG&E sent checks and stubs to Utica Bank in care of and for deposit into G&E Investments' account at Utica Bank. Utica Bank would then send copies of the

^{9/} (...continued)

VPR letters to G&E Investments for approval. There is, however, no explanation of why OG&E sent a February 19, 1988 and a January 30, 1989 VPR letter to Plaintiff. If, as OG&E argues, G&E Investments was authorized to modify the contracts, at least after April 1, 1987, why did OG&E send the February 19, 1988 and the January 30, 1989 VPR letters to Plaintiff, rather than G&E Investments?

^{10/} George Robin is deceased. There is, therefore, no testimony from him regarding his intentions when he executed the six VPR letters.

^{11/} OG&E did not reduce the contract price for the Young No. 1-22 between February 1992 and July 1992 or for the Rivers No. 1-14 between March 1995 and December 1995, even though G&E Investments had signed VPR letters covering these time periods. See Doc. No. 15, Exhibits "M," "O," and "T."

^{12/} OG&E argues that, through his conduct, Plaintiff impliedly authorized G&E Investments to modify the contracts. There is, however, no evidence to suggest an express authorization, unless an express authorization can be found in the mortgage/assignment documents executed by Plaintiff and G&E Investments.

check stubs/"Gas Statements" to G&E Investments. G&E Investments would then turn the check stubs over to its accountant.

Plaintiff's accountant would contact and cooperate with G&E Investments' account to obtain information needed to file Plaintiff's tax returns. Plaintiff, not G&E Investments, reported the proceeds of gas sales under the 1972 and 1974 contracts as income, and deducted, as a business expense, the cost of producing the gas. See Doc. No. 14, Exhibit "B," pp. 23-24 and 134-35. Using the information obtained from G&E Investments' accountant, Plaintiff's accountant would prepare a spreadsheet which showed by month the revenue from gas sales, interest on the loans to G&E Investments, and the remaining loan balances. Id. at pp. 25-26. Other than reviewing the documents prepared by his account, Plaintiff admits that he did not pay a lot of attention to his investment in the Wells primarily because he never saw any money from the investment - the revenues from the investment were all going to pay off the notes held by G&E Investments. Id. at 60-61.

While there may be a question of fact as to when Plaintiff obtained constructive knowledge of the fact that OG&E reduced the price paid for gas under the 1972 and 1974 contracts pursuant to VPR letters executed by G&E Investments, there is no dispute as to when Plaintiff obtained actual knowledge of this fact. Plaintiff testified in his deposition that during a 1997 conversation with his brother, he learned for the first time that OG&E was paying him less for gas purchased under the 1972 and 1974 contracts than his brother. Following up on the conversation with his brother, Plaintiff discovered that OG&E had reduced the price paid for gas under the 1972 and 1974 contracts pursuant to VPR letters executed by G&E Investments. See Doc. No. 14, Exhibit "B," pp. 73-78; and Doc. No. 34, Exhibit "A," pp. 44-50. OG&E has offered no other evidence which would establish actual knowledge by Plaintiff prior to his 1997 conversation with his brother. OG&E admits that neither the VPR letters nor the checks or stubs were being sent to Plaintiff during the period when payments were being sent to G&E Investments.

E. MAILING ADDRESS CONFUSION

When the division orders in this case were executed, OG&E was directed to mail payment to Utica Bank in care of G&E Investments at the following address: Utica National Bank and Trust Company, P.O. Box 1559, Tulsa, Oklahoma 74101. Doc. No. 10, Exhibit "H." The division orders themselves showed the following address for G&E Investments: 1325 Via Estrella, Palm Springs, California 92264. Doc. No. 15, Exhibits "K" and "L."

On February 1, 1991, Mr. Saunders, acting as an attorney for Plaintiff and G&E Investments, requested that OG&E "correct [its] mailing information with respect to any . . . records that may refer to Frederic C. Robin and/or G & E Robin Investments

and Utica National Bank & Trust Company, Tulsa" Doc. No. 10, Exhibit "I." Mr. Saunders requested that any correspondence to Plaintiff, G&E Investments or Utica Bank be sent to the following address: P.O. Box 1842, Suite 362, Encino, California 91426. Id.

On December 29, 1994, Carol Taylor, Plaintiff's personal secretary, requested that OG&E send items relating to Plaintiff to the following address: Frederic Robin, 16161 Ventura Blvd., #362, Encino, California 91436. This appears to be the same address that was referenced in Mr. Saunders' 1991 letter. This address simply substitutes a street address for a post office box. See Doc. No. 17, attachments to Affidavit of Lewis N. Carter.

Five of the six VPR letters mailed by OG&E to G&E Investments were mailed after Mr. Saunders' February 1, 1991 letter. Despite Plaintiff's 1991 and 1994 requests for an address change, OG&E continued to mail post-1991 VPR letters to either the Utica Bank address provided to OG&E at the time the division orders were executed, or to the original G&E Investments address reflected on the division orders. See Doc. No. 15, Exhibits "N" through "R." OG&E admits that the 1991 and 1994 letters requesting address changes should have been sufficient to change the relevant addresses. Doc. No. 27, Exhibit "A," p. 43, ln. 7 to p. 44, ln. 9. OG&E has, however, offered no explanation of why the addresses were not in fact changed.

!! DISCUSSION

A. THE MARCH 27, 1987 AGREEMENT BETWEEN PLAINTIFF AND G&E INVESTMENTS DID NOT CONFER ON G&E INVESTMENTS THE RIGHT TO MODIFY EITHER THE 1972 OR THE 1974 CONTRACTS.

Mr. Robin executed the "Mortgage and Security Agreement Amendment and Ratification and Mortgage and Security Agreement and Assignment" in favor of G&E Investments on March 27, 1987 ("the Mortgage and Assignment Agreement"). Paragraph 5 of the Mortgage and Assignment Agreement provides as follows:

For the purpose of additionally securing payment of all of the Secured Indebtedness and to facilitate the discharge of all of the Secured Indebtedness and as cumulative of any and all rights herein provided for, **[Plaintiff] hereby warrants, bargains, conveys, sells, transfers, assigns, sets over and delivers unto [G&E Investments]** all oil, gas, casinghead gas and other hydrocarbons produced from or allocated to the Mortgaged Properties . . . , all proceeds thereof and **all accounts and contract rights of [Plaintiff] under which such proceeds may arise** (all such accounts and contract rights

and proceeds being hereinafter referred to as the "proceeds of runs").

Doc. No. 19, Exhibit "B," ¶ 5 (emphasis added).

OG&E argues that the ability to modify a contract's price term is a contract right. OG&E argues further that pursuant to ¶ 5 of the Mortgage and Assignment Agreement Mr. Robin conveyed all his rights under the 1972 and 1974 contracts to G&E Investments. From these two premises, OG&E wishes the Court to conclude, that by executing the Mortgage and Assignment Mr. Robin "gave his parents, doing business as G and E Robin Investments, the express authority to act on *all* of his contract rights," including the right to modify the price terms of the 1972 and 1974 contracts. Doc. No. 14, p. 14 (emphasis original). The undersigned does not accept OG&E's premise because OG&E's argument fails to adequately account for the difference between an absolute assignment of a contract and an assignment of a contract right as security for a debt (i.e., a "collateral assignment"). See, e.g., 9 Ronald A. Anderson, Anderson on the Uniform Commercial Code, §§ 9-318:20-21 (3rd ed. 1994 and 1998 Supp.).

1. The Impact of Article 2 of the Uniform Commercial Code

"A take-or-pay gas purchase contract relates to the sale of natural gas reserves to be severed from realty by the seller. Therefore, under 12A O.S.1981 § 2-107, such a contract is governed by the provisions of [Article 2 of] the Oklahoma Uniform Commercial Code (UCC)." Roye Realty & Developing, Inc. v. Arkla, Inc., 863 P.2d 1150, 1153-54 (Okla. 1993) (emphasis added). The 1972 and 1974 contracts are substantially similar to the take-or-pay contracts at issue in Roye. Thus, the 1972 and 1974 contracts are contracts for the sale of goods. Consequently, where Article 2 of the UCC has applicable provisions, those provision must be applied to the 1972 and 1974 contracts. See 12A Okla. Stat. § 2-102 and 2-107(1). But see 12A Okla. Stat. § 1-103 (permitting the application of other principles of law and equity to contracts for the sale of goods, unless those principles are displaced by a specific provision of the UCC).

The terms "assignment" and "delegation" are terms of art. Contractual "rights" may be assigned and contractual "duties" may be delegated. Assignment refers to the transfer of a contractual right to a third party. Delegation refers to the appointment of a third party to perform a contracting parties' contractual duties. A third party who agrees to perform the delegator's duties is said to have "assumed" the delegator's duties. See, e.g., 12A Okla. Stat. § 2-210; and Restatement (Second) Contracts §§ 317 and 318.

The terms "assignment" and "delegation" are often confused and misused.

Perhaps more frequently than is the case with other terms of art, lawyers seem prone to use the word "assignment" inartfully, frequently intending to encompass within the term the distinct (concept) of delegation An assignment involves the transfer of rights. A delegation involves the appointment of another to perform one's duties.

Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 924 (2nd Cir. 1977) (citing J. Calamari & J. Perillo, Contracts § 254 (1970)). When the word "assign" is used generally, it is often unclear whether just an assignment of rights (i.e., typically an assignment for security) or whether or assignment of rights and a delegation of duties (i.e., an absolute assignment) was contemplated. The Uniform Commercial Code ("UCC") has several rules of construction that help resolve the ambiguity that can be caused when the general term "assignment" is used.

In particular, § 2-210(4) of the UCC provides as follows:

An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

12A Okla. Stat. § 2-210(4). Under this section, an assignment made using general terms will ordinarily be construed as an assignment of all rights and a delegation of all duties under the contract to the assignee (i.e., an absolute assignment). An assignment of a contract made in general terms will be construed as only an assignment of rights, and not a delegation of duties, when the language of the contract or the circumstances indicate otherwise. Section 2-210(4) specifically indicates that one circumstance in which there will be an assignment of rights, without a delegation of duties, is when the assignment occurs within the context of a secured transaction.

An absolute assignment of a contract occurs when there has been an assignment of all rights and a delegation of all duties to an assignee/delegatee. When an absolute assignment occurs, the assignee/delegatee steps into the shoes of the

assignor/delegator and the assignor/delegator no longer has any rights in the assigned/transferred contract.^{13/} In other words, the contract has been completely "sold/conveyed" by the assignor/delegator to the assignee/delegatee. Thus, when a contract is absolutely assigned, the assignee, as the holder of all of the assignor's rights and duties under the contract, has the right to agree with the other party to the contract to any modification of the contract. The assignment in this case was not absolute. The assignment in this case was an assignment for security. Generally, the assignment of a contract right as security for a debt is not an absolute assignment because the assignor's duties associated with the contract being assigned are not delegated to the assignee/secured party. See, e.g., The Prudential Ins. Co. of America v. Glass, 959 P.2d 586, 591-92 (Okla. 1998) (recognizing the distinction between absolute and collateral assignments).

The tenor of the language in the entire Mortgage and Assignment Agreement demonstrates that the agreement was designed to provide security to G&E Investments for a loan of \$750,000.00 to Plaintiff. In particular, the first sentence of ¶ 5 of the Mortgage and Assignment Agreement, the paragraph relied on by OG&E, states that the assignment in that paragraph is "[f]or the purpose of additionally securing payment of all of the Secured Indebtedness" Doc. No. 10, Exhibit "B," ¶ 5. Mr. Robin clearly assigned the 1972 and 1974 contracts to G&E Investments as security for the loans he received from G&E Investments. The Mortgage and Assignment Agreement was, therefore, an assignment for security not an absolute assignment.^{14/} See, e.g., Prudential, 959 P.2d at 592 (holding that an assignment that appears absolute on its face nonetheless extends no farther than necessary to satisfy repayment of a debt if the assignment was in fact given as collateral for the debt); and Georgia-Pacific Corp. v. Lumber Products Co., 590 P.2d 661, 664-65 (Okla. 1979) (holding that an agreement similar to the one at issue here was intended as an assignment for security and not an absolute assignment, despite very broad assignment/transfer language).

By executing the Mortgage and Assignment Agreement, Plaintiff assigned the 1972 and 1974 contracts as security for the loans he received from G&E Investments.

^{13/} While the assignor no longer has an interest in a contract that has been absolutely assigned, absent an agreement by the other party to the contract (i.e., a novation), the assignor/delegator will be liable to the other party if the assignee/delegatee fails to perform the duties delegated by the assignor/delegator.

^{14/} The 1972 and 1974 contracts specifically permit assignment/transfer of the contracts to a third party. Doc. No. 15, Exhibits "A" and "B," ¶ 14.5. However, for an assignment/transfer to be effective against OG&E, the seller was required to give OG&E "written notice and satisfactory evidence of such conveyance or transfer." Id. OG&E admits that it had no evidence that the 1972 and 1974 contracts had been assigned/transferred by Plaintiff to a third party under ¶ 14.5 of the contracts. Doc. No. 27, Exhibit "A," p. 71, ln. 1-11. These facts further confirm that the assignment effected by the Mortgage and Assignment Agreement was an assignment for security, and not an absolute assignment.

Under § 2-210(4) of the UCC, the language of the assignment in the Mortgage and Assignment Agreement must be construed as only an assignment of rights under the 1972 and 1974 contracts, and not a delegation of duties under the contracts. Pursuant to the Mortgage and Assignment Agreement, G&E Investments received certain rights under the 1972 and 1974 contracts, but G&E Investments had no duties of performance under the contracts. The duties of performance stayed with Mr. Robin.

2. The Impact of Article 9 of the Uniform Commercial Code

A "security interest" is "an interest in personal property or fixtures which secures payment or performance of an obligation." 12A Okla. Stat. § 1-201(37)(a). Article 9 of the UCC applies to "any transaction, regardless of its form, which is intended to create a security interest" *Id.* at § 9-102(1)(a). A security interest is created by the contract (i.e. agreement) of the debtor and the creditor, and that contract can take the form of a pledge, an assignment, a chattel mortgage, etc. *Id.* at § 9-102(2). An agreement which "creates or provides for a security interest" is a "security agreement." *Id.* at § 9-105(l).

By executing the Mortgage and Assignment Agreement, Plaintiff intended to give G&E Investments an interest in his personal property^{15/} as security for the payment of the \$750,000.00 Plaintiff owed G&E Investments. Unless specifically excluded by § 9-104, the Mortgage and Assignment Agreement is, at least in part, a security agreement which is subject to Article 9 of the UCC. The only relevant exclusion is found at § 9-104(e), which excludes from Article 9's application "a transfer of a right to payment under a contract to an assignee who is also to do the

^{15/} The personal property in which Plaintiff gave G&E Investments an interest is classified under Article 9 of the UCC as an "account." *See* 12A Okla. Stat. § 9-106. An "account" is defined as "any right to payment for goods sold . . . which is not evidenced by an instrument or chattel paper, whether or not [the right to payment] has been earned by performance." By executing the Mortgage and Assignment Agreement, Among other rights, Plaintiff transferred to G&E Investments his right to payment for gas sold under the 1972 and 1974 contracts. That right to payment was not evidenced by an instrument or chattel paper as those terms are defined in § 9-105(1)(b) and (i). The right to payment was also the right to payment for "goods." *See* 12A. Okla. Stat. §§ 9-105(h), 2-107(1); and *Roye*, 863 P.2d at 1153-54. Thus, with the Mortgage and Assignment Agreement, Plaintiff gave G&E Investment an interest in an "account," arising out of the 1972 and 1974 contracts. *See, e.g., Octagon Gas Systems, Inc. v. Rimmer*, 995 F.2d 948, 954 (10th Cir. 1993).

OG&E makes much of the fact that prior to 1972, Article 9 distinguished between "contract rights" and "accounts." A "contract right" was "thought of as an 'account' before the right to payment became unconditional by performance of the creditor. But the distinction was not used in the Article except in [§ 9-318(2)] . . ." 12A Okla. Stat. § 9-106, Official Reasons for 1972 Change. Section 9-318(2) permits the original parties to a contract to modify the contract and make it effective against an assignee for security, so long as the right to payment has not yet been fully earned by performance. Section 9-318(2) was redrafted in 1972 to preserve this distinction without the need for "contract rights" as a defined term. *Id.* Thus, the 1972 elimination of "contract rights" as a defined term did not constitute a substantive change.

performance under the contract" 12A Okla. Stat. § 9-104(e). Thus, § 9-104(e) excludes absolute assignments from Article 9's coverage. As discussed in section II(A)(1), *supra*, the assignment in this case was not absolute because G&E Investments was not "to do the performance under the [1972 and 1974] contract[s]." The Mortgage and Assignment Agreement is, therefore, not excluded from Article 9's reach by § 9-104(e).^{16/}

Section 9-318 of the UCC provides as follows:

So far as the right to payment or a part thereof under an assigned contract has not been fully earned by performance, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

12A Okla. Stat. § 9-318(2). The comment to this section provides as follows:

Prior law was in confusion as to whether modification of an executory contract by account debtor and assignor [i.e., the original contracting parties] without the assignee's consent was possible after notification of an assignment. Subsection (2) makes good faith modifications by assignor and account debtor without the assignee's consent effective against the assignee even after notification. This rule may do some violence to accepted doctrines of contract law. Nevertheless it is a sound and indeed a necessary rule in view of the realities of large scale procurement. When for example it becomes necessary for a government agency [or a large corporation] to . . . modify

^{16/} A security agreement becomes enforceable against the debtor and third parties and is said to "attach" to the collateral when all of the elements in § 9-203(1) have been satisfied. 12A Okla. Stat. § 9-203(2). Section 9-203(1) requires that the debtor sign a security agreement which contains a description of the collateral, that value be given, and that the debtor have rights in the collateral. Plaintiff signed the Mortgage and Assignment Agreement and that agreement contains a description which reasonably identifies the collateral involved. See 12A Okla. Stat. § 9-110. Value was given for the security interest in the form of a \$750,000.00 loan and Plaintiff had rights in the contracts assigned as collateral. Thus, the Mortgage and Assignment agreement, as a security agreement, is enforceable and it has attached.

existing contracts, comparable arrangements must be made promptly in hundreds and even thousands of subcontracts lying in many tiers below the prime contract. Typically the right to payments under these subcontracts will have been assigned. . . . This subsection gives the prime contractor (the account debtor) the right to make the required arrangements directly with his subcontractors without undertaking the task of procuring assents from the many banks to whom rights under the contracts may have been assigned. Assignees are protected by the provision which gives them automatically corresponding rights under the modified or substituted contract.

Id. at comment 2.^{17/}

Section 9-318(2) establishes that, unlike an assignee to whom a contract has been absolutely assigned, an assignee/secured party who takes an assignment of a contract for security does not fully step into the shoes of the assignor. Section 9-318(2) suggests, at least by implication, that the assignor (Plaintiff), not the assignee (G&E Investments), and the account debtor (OG&E) retain the power to modify the contract. The undersigned's conclusion regarding the power of an assignee to modify the contract involved does not turn, as OG&E suggests, on what rights under a contract are assigned (i.e., the right to payment versus some other right under the contract). Rather, the undersigned's analysis hinges on the purpose for the assignment. Was it an assignment by which the assignor intended to transfer the entire contract to the assignor, or was it an assignment to secure an obligation? If the assignment was of the former type, the assignee has modification rights. If the assignment was of the latter type, the assignee does not have modification rights.

The conclusion that an assignee of a contract for security does not have the right to modify the terms of the contract is supported by at least two important policies. First, where an assignee has only rights, and no duties of performance, under a contract, it would be unfair to give the assignee the power to modify the contractual benefits that are generated through the performance of duties by the assignor. Second, in most assignments for security, the assignee/secured party will be the beneficiary of the assigned contract rights only as long as is necessary to satisfy the obligation being secured. Again, it would be unfair to permit the assignee/secured party to return to the assignor a contract that, because of a modification by the

^{17/} Even if Article 9 does not apply fully to the Mortgage and Assignment agreement, the undersigned finds that Article 9 and § 9-318 should be applied by analogy to the facts of this case. See BPM International, LTD v. Alexander, No. 96-5121, 1997 WL 748664, at *2 (10th Cir. Dec. 3, 1997) (holding that Article 9 may be applied by analogy to a factual scenario not directly covered by the code).

assignee, is worth significantly less or contains fewer rights or benefits than it did when the contract was originally assigned to secure the obligation. The undersigned finds, therefore, that the assignee of a contract for security does not have the right/power to modify the contract without approval of the assignor. Consequently, the undersigned further finds that ¶ 5 of the Mortgage and Assignment Agreement did not give G&E Investments the right/power to modify the 1972 or the 1974 contracts without Plaintiff's approval.

B. THERE IS NO EVIDENCE THAT G&E INVESTMENTS WAS AUTHORIZED TO ACT AS PLAINTIFF'S AGENT WITH REGARD TO THE CONTRACTS.

A party asserting an agency relationship bears the burden of establishing its existence. An agency relationship does not exist merely because OG&E "assumed that it existed, nor because the alleged agent assumed to act as such, nor because the conditions and circumstances were such as to make such an agency seem rational and probable. . . ." Branding Iron Motel, Inc., v. Sandlian Equity, Inc., 798 F.2d 396, 401 (10th Cir. 1986) (citing Kansas cases). An agency relationship is established only when the evidence demonstrates an agreement with the following terms: (1) that one (i.e., the principal) agrees to have another (i.e., the agent) act on his behalf, (2) that the agent agrees to act on behalf of the principal, and (3) that the parties agree that the agent will act subject to the principal's control. Curtis v. CIA Machinery, Inc., 571 P.2d 862, 865 (Okla. 1977); Farmers Nat. Grain Corp. v. Young, 102 P.2d 180, 181 (Okla. 1940); Bank of Oklahoma, N.A. v. Briscoe, 911 P.2d 311, 317 (Okla. App. 1995).

The agreement which creates an agency relationship may be express, as in the case of a written or oral agreement. The agreement which creates an agency relationship may also be implied from the facts and circumstances of the particular case, including the words and conduct of the parties. Holmes v. McKey, 383 P.2d 655, 665 (Okla. 1962) (quoting 3 Am. Jur. 2d Agency § 18). Once it is established that an agency relationship exists, "evidence of the principal's long-term acquiescence in an agent's unauthorized conduct may amount to ratification of such conduct by the agent so that the principal is estopped from denying liability for it." Briscoe, 911 P.2d at 317 (citing Mertz v. Owen, 126 P.2d 720, 729-30 (1942)).

1. There Is No Evidence of an Express Agency Relationship

OG&E argues that an express agency relationship is created between Plaintiff and G&E Investments by either (1) ¶ 5 of the Mortgage and Assignment Agreement, or (2) by the Division Orders executed on April 27, 1987. The undersigned does not agree.

As discussed in section II(A), *supra*, the Mortgage and Assignment Agreement did not authorize G&E Investments to modify either the 1972 or the 1974 contract. There is also no language in the agreement which expressly authorizes G&E Investments to act as Plaintiff's agent. The Mortgage and Assignment Agreement is mortgage and a security agreement and the agreement gives G&E Investments the rights of a secured party. The agreement does not establish G&E Investments as Plaintiff's agent. Even if the Mortgage and Assignment Agreement purported to designate G&E Investments as Plaintiff's agent, the agreement is not signed by G&E Investments. There is, therefore, no evidence in the agreement that G&E Investments agreed to act as Plaintiff's agent.

OG&E also argues that "by approving the Division Orders dated April 27, 1987, Plaintiff specifically authorized G and E Robin Investments to act as his agent for all purposes with respect to payment from the Wells." Doc. No. 18, p. 6. The undersigned understands OG&E to be arguing that an agency relationship is created when a division order is executed. OG&E has offered no authority to support this argument. The division orders in this case simply directed OG&E, as to certain wells, to send Plaintiff's payments under the 1972 and 1974 contracts to G&E Investments. Nothing in the division orders can be construed as an agreement by Plaintiff to have G&E Investments act on Plaintiff's behalf or an agreement by G&E Investments to so act. In fact, the division orders themselves reflect that they were being executed "for payment only." Doc. No. 15, Exhibits "J" through "L." The division orders do not establish an express agency relationship between Plaintiff and G&E Investments.

2. There Is No Evidence of an Implied Agency Relationship

OG&E argues that under the facts of this case an agency relationship between Plaintiff and G&E Investments can be implied. Doc. No. 14, p. 15. The undersigned does not agree. OG&E has presented no evidence from which a jury could imply the existence of an agency relationship between Plaintiff and G&E Investments.

An implied agency relationship is necessarily based on conduct and representations between the alleged principal (Plaintiff) and the alleged agent (G&E Investments). What a third party (OG&E) observed is not relevant. ESSO International, Inc. v. SS Captain John, 443 F.2d 1144, 1148 (5th Cir. 1971) (a case relied on by OG&E citing Restatement (Second) of Agency § 7 and 2 C.J.S. Agency § 99c). The only evidence of conduct or representations between Plaintiff and G&E Investments is (1) the fact that the principals of G&E Investments are Plaintiff's parents, (2) the execution of the Mortgage and Assignment Agreement, and (3) the sharing of information between G&E Investments' and Plaintiff's accountants.

The fact that George and Esther Robin are Plaintiff's parents is not particularly relevant absent additional evidence that Plaintiff agreed that his parents could act on

his behalf. This is particularly true in light of the fact that according to Plaintiff transactions with his parents were more at arms-length than transactions with a bank. As discussed above, the Mortgage and Assignment Agreement cannot be viewed as creating an agency relationship. There is also nothing about the sharing of information between the parties' accountants which establishes that Plaintiff agreed to have G&E Investments act on his behalf. In short, OG&E has not presented any evidence which, absent an express agency, would demonstrate an implied agency.

OG&E argues that an agency relationship between Plaintiff and G&E Investments should be implied because Plaintiff had constructive knowledge of the fact that G&E Investments had agreed to a price modification, and despite having this constructive knowledge Plaintiff never objected. As support for this argument, OG&E relies on Esso, which holds as follows:

Knowledge of, and acquiescence in, the agent's acts can be enough to establish implied authority if it manifests the principal's consent to the agent's acts. The test in this regard is whether the agent may reasonably draw an inference that the principal intended him so to act.

Esso, 443 F.2d at 1148 (internal citations omitted).^{18/} Again, the focus is on the relationship between Plaintiff and G&E Investments. Under the facts of this case, could G&E Investments have reasonably drawn an inference that Plaintiff intended G&E Investments to act on his behalf?

If G&E Investments knew that Plaintiff knew that G&E Investments was agreeing to modifications of the contracts' price terms, and if Plaintiff never objected, then G&E Investments could reasonably have inferred that Plaintiff was authorizing G&E Investments to enter into price modifications. There is, however, no evidence in the record which establishes that G&E Investments was itself aware that Plaintiff knew that G&E Investments was executing price modification agreements. It is undisputed that Plaintiff was not receiving any correspondence from OG&E or G&E Investments regarding the VPR letters. There is also no evidence that anyone at G&E Investments and Plaintiff ever discussed the matter. In short, there is insufficient evidence to establish that it would have been reasonable for G&E Investments to rely on Plaintiff's failure to object as a clear manifestation of Plaintiff's consent to G&E Investments' execution of the VPR letters.

^{18/} OG&E also relies on Schwartz v. McDaniel, 213 P.2d 568 (Okla. 1950) and Ocean Accident & Guarantee Corp. v. Denner, 250 P.2d 217 (Okla. 1952). Both of these cases are more properly viewed as apparent authority cases. See Section II(B)(3), *infra*.

3. There Is No Evidence of Apparent Authority

Apparent authority arises from representations made by the alleged principal (Plaintiff) to a third party (OG&E) that another person (G&E Investments) is his agent. In essence the apparent authority doctrine is an estoppel-based doctrine which prevents an alleged principal (Plaintiff) from denying the natural consequences of his conduct. Thus, apparent authority can arise only from the acts of the alleged principal (Plaintiff) himself and not from the acts of the alleged agent (G&E Investments). Anglo-American Clothing Corp. v. Marjorie's of Tiburon, Inc., 571 P.2d 427, 429 (Okla. 1977); Barefoot v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 424 F.2d 1001, 1004 (10th Cir. 1970).

"To establish that an agent [G&E Investments] has apparent authority to act, the principal [Plaintiff] must have manifested his consent to the exercise of such authority or have knowingly permitted the agent to act exercising that authority. Additionally, the third person [OG&E] must know the facts and, acting in good faith, have reason to believe, and also actually believe, the agent [G&E Investments] possessed that authority." Wheeler v. Puritan Ins. Co., 720 P.2d 729, 731 (Okla. 1986).

OG&E has offered no evidence which would establish that Plaintiff represented to OG&E that G&E Investments was Plaintiff's agent. From the record, the only representations made by Plaintiff to OG&E were contained in the following: (1) the execution of the contracts, (2) the execution of the VPR letters, (3) the execution of the division orders, and (4) the correspondence sent by Plaintiff to OG&E.

There is no evidence that, until this lawsuit was filed, OG&E had seen the Mortgage and Assignment Agreement. Thus, the Mortgage and Assignment Agreement could not have formed the basis of OG&E's belief that Plaintiff had authorized G&E Investments as his agent.

There is nothing in either the contracts or the VPR letters executed by Plaintiff which could be reasonably interpreted by OG&E as a representation by Plaintiff that G&E Investments was authorized to act as Plaintiff's agent. As discussed above, there is also nothing in the division orders which could be reasonably interpreted by OG&E as a representation by Plaintiff that G&E Investments was authorized to act as Plaintiff's agent. The only remaining representations are the correspondence from Plaintiff to OG&E.

The correspondence from Plaintiff to OG&E can be segregated into three categories. First, there are two letters sent by Mr. Saunders, Plaintiff's lawyer, that relate to the drafting and execution of the division orders. See Doc. No. 10, Exhibits "F" and "H." There is nothing in these letters which could be reasonably interpreted

by OG&E as a representation by Plaintiff that G&E Investments was authorized to act as Plaintiff's agent. As do the division orders themselves, these letters make it clear that Plaintiff was simply trying to direct payment under the 1972 and 1974 contracts to G&E Investments as to certain wells.

Second, there are two letters dealing with Plaintiff's attempts to get OG&E to show Plaintiff's correct address in its records - one from Mr. Saunders and one from Carol Taylor, Plaintiff's secretary. See Doc. No. 10, Exhibit "I" and Doc. No. 17, Exhibit "A." There is nothing in these letters which could be reasonably interpreted by OG&E as a representation by Plaintiff that G&E Investments was authorized to act as Plaintiff's agent. Again, these letters tend to establish the opposite. These letters make it clear that Plaintiff did not want any mail that related to him sent to G&E Investments.

Third, there is a January 26, 1990 letter sent by Mr. Saunders to Mustang Production Company. Mr. Saunders' letter was asking Mustang to provide information regarding two statements which were a "mystery to the Robins." See Doc. No. 14, Exhibit "A." In his letter to Mustang, Mr. Saunders stated that "George and Esther Robin . . . have succeeded to the interest of [Plaintiff] in the [Rivers No. 1-14] and other wells and leases in which [Plaintiff] has heretofore had an interest" Id. OG&E argues that this statement, which is not supported by any other record evidence, suggests that by January 1990 Plaintiff had at least authorized G&E Investments to be his agent. While OG&E's argument might be supported by the language of the letter, the letter is not a representation that was made to OG&E. The letter was sent to Mustang and it appears that by January 1990, Mustang was no longer acting as OG&E's agent; Enogex was. There is, however, no evidence that OG&E ever saw the Mustang letter prior to obtaining a copy of the letter during discovery in this case. If OG&E did not see the January 1990 letter until 1997, then OG&E cannot use the letter as a basis for its belief that Plaintiff had authorized G&E Investments to act as his agent from 1990-1995.

C. THE ELEMENTS OF ESTOPPEL ARE NOT MET IN THIS CASE.

OG&E argues that Plaintiff should be estopped from denying the enforceability of the price-term modifications executed by G&E Investments (1) because Plaintiff himself signed several VPR letters modifying the contracts' price terms, and (2) because Plaintiff had constructive knowledge that G&E Investments had executed price-term modifications and said nothing. The undersigned does not agree that an estoppel against Plaintiff can be supported by the facts of this case.

1. Plaintiff's Prior Execution of VPR Letters

Prior to his taking a loan from G&E Investments, Plaintiff himself executed six VPR letters over the course of five years. By executing these VPR letters, Plaintiff agreed to a modification/reduction of the price term in the 1972 and 1974 contracts for June 1985 through December 1989. See Doc. No. 15, Exhibits "D" through "I." OG&E's estoppel argument appears to follow this logic: Because Plaintiff executed VPR letters in the past, OG&E had a right to expect that Plaintiff would not object to the execution of VPR letters in the future.

Each time OG&E sent a VPR letter to Plaintiff, OG&E was requesting a price-term modification for less than one year. Plaintiff was free to decide for himself whether he would agree to the requested price modification. There is no evidence that Plaintiff did not make an independent decision each year when he received a VPR letter from OG&E. Presumably, Plaintiff's decision was based on market conditions at the time OG&E requested the modification. Thus, OG&E could not have the legitimate expectation that because a VPR letter had been executed in the past, a VPR letter would be executed in the future.

At most, Plaintiff's prior execution of six VPR letters over five years established a course of dealing between Plaintiff and OG&E. See 12A Okla. Stat. §1-205(1). A "course of dealing" is established by the conduct of the parties prior to an actual agreement being reached. Id. at comment 2. The parties' conduct prior to the execution of the 1989 to 1995 VPR letters by G&E Investments established that to obtain a modification of the contracts' price-terms OG&E would send a VPR letter to Plaintiff, Plaintiff would review the letter to determine if he could agree to the requested modification, and Plaintiff would execute the VPR letter and return it to OG&E if he agreed to the requested modification. Thus, based on the parties' course of dealing, OG&E could have no expectation regarding a requested price modification at least until it received an executed VPR letter from Plaintiff.

2. Plaintiff's Constructive Knowledge and Failure to Object

An estoppel arises when one party, by its words or actions, misrepresents a fact, and the other party reasonably relies upon such representations to its detriment.

United Services Auto. Ass'n v. Royal-Globe Ins. Co., 511 F.2d 1094, 1097 (10th Cir. 1975). Under Oklahoma law, a party asserting the defense of equitable estoppel must prove the following essential elements: (1) the party to be estopped (Plaintiff) made a false representation of fact or concealed material facts from the party asserting the defense (OG&E); (2) the false representation or concealment was made by the party to be estopped (Plaintiff) with knowledge, actual or constructive, of the true facts; (3) the party to be estopped (Plaintiff) made the false representation or concealed the true

facts with the intent that the party asserting the defense (OG&E) rely on the false representation or concealment; (4) the party asserting the defense (OG&E) was without knowledge of, and without the means of obtaining knowledge of, the true facts; and (5) the party asserting the defense (OG&E) did in fact reasonably rely on the false representation or concealment to its detriment. State ex rel. Western State Hospital v. Stoner, 614 P.2d 59, 64 (Okla. 1980); Rosser v. Texas Co., 48 P.2d 327, 328 (Okla. 1935); Rea v. Wichita Mortgage Corporation, 747 F.2d 567, 573 (10th Cir. 1984) (citing several cases).

The first element of the equitable estoppel defense requires OG&E to prove that Plaintiff made a false representation to or concealed material facts from OG&E. Plaintiff's knowledge regarding G&E Investments' execution of the VPR letters is, therefore, irrelevant unless OG&E can demonstrate that, armed with this knowledge, Plaintiff made a false representation to OG&E or Plaintiff concealed some fact from OG&E which Plaintiff was obligated to divulge to OG&E. OG&E has presented no evidence which establishes that Plaintiff falsely represented any fact to OG&E. There is also no evidence that Plaintiff concealed from OG&E facts which Plaintiff was obligated to report to OG&E. As discussed in section I(B)(3), *supra*, Plaintiff did nothing which would have caused OG&E to reasonably believe that G&E Investments had been authorized to act on Plaintiff's behalf. Thus, OG&E cannot establish the first element of the equitable estoppel defense.

An estoppel defense is an equitable defense. A party that seeks equity must come to court with clean hands. In other words, the Court will consider any conduct by the party asserting the defense which relates to the particular transaction being considered by the court and which affects the equitable relationship between the two parties. Teuscher v. Gragg, 276 P. 753, 760 (Okla. 1929). Under the facts of this case, the equities are not tipped in OG&E's favor.

Plaintiff repeatedly asked OG&E to insure that OG&E was sending to Plaintiff any information that related to Plaintiff. For reasons not explained in the record, OG&E failed to direct information relating to Plaintiff to the address given OG&E by Plaintiff. In essence OG&E is arguing that even though OG&E ignored Plaintiff's requests that information be sent to him, Plaintiff was under an obligation to discover that OG&E had ignored his requests and sent certain information to G&E Investments. OG&E had nothing in its possession which would authorize it to send anything to G&E Investments other than a monthly check for payment pursuant to the division orders executed by the parties. OG&E itself should have conducted a reasonable inquiry before it started sending requests for modification to G&E Investments. In short the record fails to demonstrate that Plaintiff's knowledge was superior to OG&E's or that Plaintiff's alleged duty of inquiry was superior to OG&E's.

D. 52 OKLA. STAT. § 570.10 APPLIES TO THIS CASE.

The undersigned has determined that the VPR letters executed by G&E Investments were not legally enforceable modifications of the price terms in the 1972 and 1974 contracts. OG&E was, therefore, obligated to pay the contract price for the periods during which OG&E reduced the price pursuant to VPR letters executed by G&E Investments. The parties have stipulated that Plaintiff's damages for OG&E's failure to pay the full contract price are \$139,593.40. See Doc. No. 31. Thus, the undersigned recommends that summary judgment be granted in Plaintiff's favor in the amount of \$139,593.40 as compensatory damages for OG&E's breach of the 1972 and 1974 contracts.

The parties also agree that Plaintiff's compensatory damages are subject to pre-judgment interest at a 12% rate if 52 Okla. Stat. § 570.10 applies or a 6% rate if § 570.10 does not apply to this case. See Doc. No. 31. Section 570.10 is part of Oklahoma's Production Revenue Standards Act. See 52 Okla. Stat. §§ 510.1-570.15. Section 570.10 defines time periods within which proceeds from the sale of oil and gas must be paid to interest owners. Section 570.10(D) provides as follows:

1. Except as otherwise provided in paragraph 2 of this subsection, where proceeds from the sale of oil or gas production or some portion of such proceeds are not paid prior to the end of the applicable time periods provided in this section, that portion not timely paid shall earn interest at the rate of twelve percent (12%) per annum to be compounded annually, calculated from the end of the month in which such production is sold until the day paid.

2. a. Where such proceeds are not paid because the title thereto is not marketable, such proceeds shall earn interest at the rate of six percent (6%) per annum to be compounded annually, calculated from the end of the month in which such production was sold until such time as the title to such interest becomes marketable. Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association.

b. Where marketability has remained uncured for a period of one hundred twenty (120) days from the date payment is due under this section, any person claiming to own the right to receive proceeds which have not been paid because of unmarketable title may require the holder of

such proceeds to interplead the proceeds and all accrued interest into court for a determination of the persons legally entitled thereto. Upon payment into court the holder of such proceeds shall be relieved of any further liability for the proper payment of such proceeds and interest thereon.

52 Okla. Stat. 570.10(D) (emphasis added).

Section 570.10(D) imposes interest on payments of oil and gas proceeds that are not made within the time periods set out in § 570.10(B).

Section 570.10(D)(2)(a) provides for six percent interest on unpaid proceeds, in the event that funds are withheld because the interest owner's title is not marketable. Section 570.10(D)(1) provides for twelve percent interest, in the event that payments are withheld for any other reason.

Tulsa Energy, Inc. v. KPL Production Co., 111 F.3d 88, 90 (10th Cir. 1997) (emphasis added).

OG&E did not withhold a portion of the proceeds in this case because the interest owner's (Plaintiff's) title was not marketable. There was no dispute about who the owner of the interest was - OG&E admits that Plaintiff was. There was also no dispute about where and to whom payment was to be made - pursuant to the division orders, payment was to be sent to G&E Investments. Rather, OG&E withheld a portion of the proceeds for some other reason - because OG&E erroneously believed it had valid modifications of the 1972 and 1974 contracts. The undersigned is, therefore, compelled by the Tenth Circuit's holding in Tulsa Energy to find that § 570.10(D)(1)'s 12% interest rate applies under the facts of this case.

The parties have stipulated that the pre-judgment interest on Plaintiff's compensatory damages at 12% would be \$97,195.69 through September 30, 1998. The parties also agree that at 12%, interest would accrue at "\$77.85 per day from and after October 1, 1998," with a new daily rate to be calculated on October 1, 1999 if needed. See Doc. No. 32. Thus, the undersigned recommends that summary judgment be granted in Plaintiff's favor in the amount of \$97,195.69 as interest on Plaintiff's compensatory damages, for a total judgment of \$236,789.09 with interest accruing from October 1, 1998 at 12% per annum, compounded annually.

RECOMMENDATION

Paragraph 5 of the Mortgage and Assignment Agreement did not authorize G&E Investments to modify the 1972 or the 1974 contract. G&E Investments was not authorized, expressly, impliedly or through apparent authority, to act as Plaintiff's agent. OG&E has failed to establish its defense of equitable estoppel. For these reasons, the undersigned recommends that Plaintiff's motion for partial summary judgment be **GRANTED** and that OG&E's motion for partial summary judgment be **DENIED**. [Doc. Nos. 8 and 12]. Because the parties have stipulated as to damages, the undersigned further recommends that judgment be granted in Plaintiff's favor in the amount of \$236,789.09, consisting of \$139,593.40 as compensatory damages and \$97,195.69 as interest, with interest accruing from October 1, 1998 at 12% per annum, compounded annually.

OBJECTIONS

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

Dated this 27 day of October 1998.

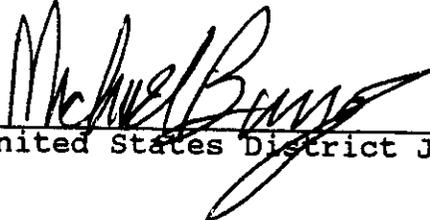

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

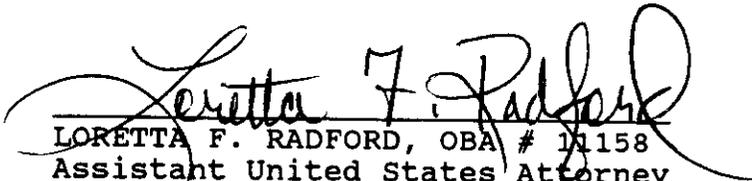
The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the

-- 24 -- 28th Day of October 1998.
C. Portillo, Deputy Clerk

\$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.730 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

LFR/11f

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHARLES W. PRATHER,

Defendant.

)
)
)
)
) No. 98CV0490BU(M)
)
)
)
)

ENTERED ON DOCKET

DATE OCT 28 1998

DEFAULT JUDGMENT

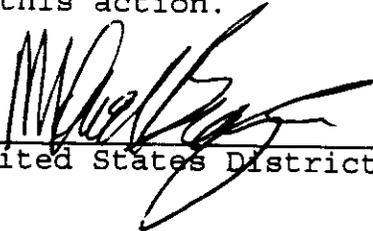
This matter comes on for consideration this 27th day of Oct, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Charles W. Prather, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Charles W. Prather, was served with Summons and Complaint on September 16, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Charles W. Prather, for the principal amount of \$4,311.73, plus accrued interest of \$1,292.81, plus interest thereafter at the rate of 7 percent per annum until judgment, plus filing fees in the amount of

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\$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.730 percent per annum until paid, plus costs of this action.



United States District Judge

Submitted By:



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

LFR/jmo

ENTERED ON DOCKET
DATE 10-28-98

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

GLENN M. ANDERSON, and
SUSAN F. ANDERSON,

Plaintiffs,

vs.

J. WHITAKER, individually, and the
UNITED STATES OF AMERICA,

Defendants.

No. 98-CV-570-K

FILED

OCT 27 1998

Phil Lombard, Clerk
U.S. DISTRICT COURT

AMENDED ORDER

Now before the Court is the Defendants', United States of America and J. Whitaker, Motion to Dismiss Plaintiff's complaint pursuant to Fed.R.Civ.P. 12(b)1, 12(b)2, 12(b)5, and 12(b)6. In addressing this Motion, this Court will resolve the Defendant's Motion to Extend Date for Filing Joint Case Management Plan and for Stay of Discovery Pending Resolution of Dispositive Motions.

The Plaintiffs in this case have failed to respond to the Defendants' Motion to Dismiss. Pursuant to *Local Rule 7.1.C*, all claims asserted in the Motion to Dismiss will be considered confessed when the opposing party has failed to respond. We have, nevertheless, reviewed the Defendants' Motion to Dismiss, and, through an independent inquiry, have determined that the Plaintiffs have failed to state a claim for which relief can be granted.

For the reasons stated herein, the Defendants' Motion to Dismiss (#4) is GRANTED. The Motion to Extend Date for Filing Joint Case Management Plan and for Stay of Discovery Pending Resolution of Dispositive Motions is moot (#6-1, #6-2), and therefore DENIED.

ORDERED this 27 day of October, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 10-28-98

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

STEPHEN T. PEAKE,Plaintiff,)
)
v.)
)
PROVIDENT LIFE AND ACCIDENT)
INSURANCE COMPANY,Defendant.)

No. 97-CV-1091K(M)

FILED

OCT 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER ALLOWING DISMISSAL WITHOUT PREJUDICE

NOW, on this 27 day of October, 1998, this matter comes on before the
undesignated Judge of the above-entitled Court upon the Plaintiff's Motion For Order Allowing
Dismissal Without Prejudice filed herein, and the Court, being fully advised in the premises, finds
that for good cause shown such Motion should be granted, and pursuant thereto,

IT IS THEREFORE ORDERED by the Court that Plaintiff's said Motion be, and it is hereby
granted, and the above-styled and numbered action is dismissed without prejudice to refiling.


UNITED STATES DISTRICT JUDGE

ROBERT M. BUTLER, OBA#1380
Counsel for Plaintiff
1714 South Boston Avenue
Tulsa, Oklahoma 74119
Telephone (918) 585-2797
Facsimile (918) 585-2798

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

FILED
OCT 26 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NATIONAL OCCUPATIONAL HEALTH SERVICES, INC., an Oklahoma corporation,
Plaintiff,

v.

ADVANCED INDUSTRIAL CARE, a California corporation; SHERRY J. VON STESS,
Defendants.

Case No. 97-CV-1127-H ✓

ENTERED ON DOCKET
DATE 10-27-98

ORDER

This matter comes before the Court on a motion to dismiss (Docket # 2) by Defendants Advanced Industrial Care ("AIC") and Sherry J. Von Stieff. In its Complaint, Plaintiff National Occupational Health Services, Inc. ("NOHS") alleges that Defendant tortiously interfered with the contractual relationship between NOHS and Mobilization Optimization Stabilization and Training ("MOST"). In the instant motion, Defendants request that this action be dismissed for, inter alia, lack of personal jurisdiction and improper venue.

I

For purposes of the present motion, the Court accepts as true the following uncontroverted statements of fact by NOHS:

1. In 1994, NOHS contracted with MOST to provide health screening, testing, and other services for MOST on a nationwide basis ("the Contract"). MOST is a trust established by the National Association of Construction Boilermaker Employees and the International Brotherhood of Boilermakers.

2. Under the Contract, NOHS had the following duties:

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- * Establishing a network of physicians or clinics to complete physical examinations of MOST members;
- * Creating, assembling, and supplying documents, forms, and lab testing kits for use by the network physicians;
- * Obtaining favorable pricing for the services of the network physicians;
- * Gathering information from mobile testing, network physicians and clinics, and analyzing and compiling that information in a format useful to MOST; and
- * Maintaining accurate and easily accessible records of all equipment calibration, testing, test data, and employee certifications.

All of NOHS' duties either were performed, or originated, in Tulsa, Oklahoma. MOST's duties under the Contract were simply to pay for services provided by NOHS as invoiced, and to provide background support as necessary on individual members.

3. In order to be able to perform under the Contract, NOHS created a unique and proprietary system for gathering, transmitting, processing, storing, and compiling the information required by MOST relating to its individual Boilermaker members. The system includes proprietary computer programs, forms, manuals, and procedures, all of which were created by NOHS in Tulsa, Oklahoma.

4. The procedure for testing MOST's individual members under the Contract worked as follows: NOHS would prepare prepackaged "kits" for MOST to send to its constituents for use in their individual testing. Each kit was assembled in Tulsa, and consisted of the requisite forms and paperwork (created by NOHS), lab materials, including plastic vials for the capture and transport of blood and urine specimens, x-ray forms, OSHA-required respirators to be custom-fitted to the individual, and a collection of pre-addressed and prepaid Federal Express

envelopes and containers for transmission of the data and samples to NOHS in Tulsa for analysis and compilation.

5. When a member Boilermaker called MOST in Kansas City, MOST would send the kit to the member for testing. The member would then be tested by NOHS personnel when the remote testing facility was in the member's area.

6. NOHS initially provided its remote screening and testing services to MOST through the use of two (2) mobile testing buses. These buses were headquartered in Tulsa, Oklahoma. Each of the buses was staffed by NOHS personnel, all of whom were residents of Tulsa. These personnel would travel in two-to-four week shifts to remote sites around the country to perform the tests and gather the data and physical samples required by MOST from its members.

7. Upon completion of the initial mobile screening, the member was sent to an NOHS contracted clinic to complete the physical portion of his testing. The contracted clinic returned the results of the member's physical tests to NOHS in Tulsa for analysis and input into NOHS' computer program. Upon completing all testing, the member would be eligible to work any Boilermaker job for the next year without further testing or paperwork.

8. Blood and urine samples were sent for testing from the remote site to a laboratory in St. Louis, Missouri. When the test results were completed, the laboratory completed an NOHS form and returned the information to NOHS in Tulsa for analysis and input into NOHS' computer program.

9. X-rays were sent from the remote site directly to NOHS in Tulsa. NOHS then forwarded the x-rays, along with an NOHS "diagnostic overread results" form, to Diagnostic

Imaging in Tulsa for analysis. Upon completing the x-ray overread, the x-rays and completed forms were then returned to NOHS in Tulsa for analysis and input into NOHS' computer program.

10. Other data gathered at the remote site, including blood pressure, heart rate, respiratory results, and the member's health history, was immediately transmitted to NOHS in Tulsa for processing, analysis, and input into NOHS' computer program.

11. When NOHS had received all of the information gathered concerning an individual MOST member, that information was compiled, using NOHS' computer program, into a 4-5 page report on the member for use by MOST. NOHS also generated a report on computer floppy disk which contained the member's test results in OSHA-specified format. The report and disk were then sent from Tulsa to MOST in Kansas City, along with an invoice for NOHS' services.

12. In 1996, MOST expanded the services to be performed by NOHS under the Contract to include pre-apprenticeship fixed site testing of its members. In January of 1997, MOST authorized NOHS to assume the operation and management of its drug screening program. Shortly thereafter, MOST elected to discontinue the use of mobile site testing, and instead directed NOHS to secure fixed sites around the country at which the required tests could be performed. NOHS had to lay off between 10 and 12 Tulsa employees when the mobile testing program was discontinued.

13. The procedure with the fixed site facilities is identical to that used by the mobile facilities. Urine and blood are sent to St. Louis for analysis, with the results returned to NOHS in Tulsa for analysis and input into NOHS' computer program. X-rays are returned to NOHS in

Tulsa for analysis and overread by Diagnostic Imaging, with the results returned to NOHS for analysis and input into NOHS' computer program. All other patient information is returned to NOHS in Tulsa for analysis and input into NOHS' computer program.

14. NOHS compiled and distributed a "training and operating kit" for each fixed site facility under the Contract. Included in the kit was the MOST Medical Manual created by NOHS, including instructions and proprietary forms for conducting the requisite MOST and OSHA testing, a copyrighted Fit Training Tape licensed exclusively to NOHS by the 3M Company, a Boilermaker video entitled "Expect the Unexpected," a 3M Fit Testing Kit, an assortment of 3M-6000 masks for customization to the individual member, and sample lab kits with extra collection tubes and bottles.

15. NOHS subcontracted with AIC to perform physicals for NOHS in California. AIC began performing these screening physicals in 1996. During that year, AIC screened seventy-five (75) Boilermakers for NOHS. In accordance with the MOST procedures, AIC returned screening information on each of the 75 Boilermakers to NOHS in Tulsa.

16. In early 1997, NOHS expanded AIC's responsibilities under its subcontract to include comprehensive fixed site testing. A training and operating kit was provided to AIC in order to enable AIC to perform these additional responsibilities in accordance with MOST requirements. AIC performed 11 pre-apprenticeship and approximately fifty (50) comprehensive screenings during 1997 and early 1998 for NOHS. For each of the approximately sixty (60) Boilermakers tested, AIC sent x-rays to NOHS in Tulsa for analysis and overread, physical information to NOHS in Tulsa for analysis and input into NOHS' computer program, and specimens to St. Louis for analysis and return to NOHS in Tulsa for analysis and input into

NOHS' computer program. AIC also sent an invoice to NOHS for the testing performed on each Boilermaker.

17. AIC's relationship with NOHS lasted the better part of two years, involved AIC's screening or testing of over 125 Boilermaker members, caused the exchange of hundreds of documents and correspondence via Federal Express and the United States Postal Service, and resulted in the payment of thousands of dollars to AIC by NOHS.

The Court further accepts as true the following uncontroverted statements of fact by Defendants:

1. AIC is a California corporation with its principal place of business in Concord, California. AIC is a business that conducts health screening services for industrial contractors and various other entities. The health screening process consists of conducting physical examinations of current and prospective employees. The physical examination can include any combination of the following: obtaining a health history of the worker, a complete physical examination, drug screening, respirator certification, and other lab work.

2. On or about December 1, 1997, NOHS sent AIC a fax requesting that AIC perform medical screening of various members of the Boilermakers Union in the San Francisco Bay Area. AIC did not solicit work from NOHS, and no negotiations concerning AIC's work occurred in Oklahoma. AIC performed the requested work in California.

3. AIC sent invoices to NOHS in Tulsa, Oklahoma for work performed by AIC in California. NOHS periodically paid AIC's invoices by sending checks to AIC in Concord, California. AIC deposited those checks in its bank account at West America Bank in Concord, California.

4. AIC has never been licensed to do business in Oklahoma, nor has it ever done business in Oklahoma. AIC has never been domesticated under Oklahoma laws, nor has it ever had an agent for service of process in Oklahoma.

5. AIC has never maintained an office, telephone listing, or mailing address in Oklahoma, and has never owned or leased any real or personal property in Oklahoma. AIC has never assigned or stationed any employee to work for it in Oklahoma.

6. AIC has never paid any Oklahoma taxes, has never had an Oklahoma shareholder, has never held any corporate meetings in Oklahoma, has never maintained any business records in Oklahoma, and has never maintained any bank account in Oklahoma.

7. Any dealings or contacts Ms. Von Stieff may have had with NOHS was in her capacity as Chief Executive Officer of AIC.

8. Any dealings or contacts Ms. Von Stieff may have had with MOST was in her capacity as Chief Executive Officer of AIC.

9. In her individual capacity, Ms. Von Stieff has never conducted business in Oklahoma, never had employees or agents in Oklahoma, never owned any real or personal property located in Oklahoma, and never maintained any records in Oklahoma. Ms. Von Stieff never sold products in Oklahoma and has never provided services to persons in Oklahoma. She has never solicited business in Oklahoma.

10. Ms. Von Stieff has never paid any Oklahoma taxes, has never maintained any bank account in Oklahoma, and never maintained an office, telephone listing, or mailing address in Oklahoma.

II

In the first instance, Defendants argue that this matter should be dismissed for lack of personal jurisdiction. It is well-established law that jurisdiction must be found over the person before the issue of venue may be addressed. See Bookout v. Beck, 354 F.2d 823 (9th Cir. 1965).

In Oklahoma¹:

[t]he plaintiff bears the burden of establishing personal jurisdiction over the defendant. Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party.

Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1417 (10th Cir. 1988) (citations omitted).

Thus, the Court must "determine whether the plaintiff's allegations, as supported by affidavits, make a prima facie showing of the minimum contacts necessary to establish jurisdiction over each defendant." Id.

"The test for exercising long-arm jurisdiction in Oklahoma is to determine first whether the exercise of jurisdiction is authorized by statute and, if so, whether such exercise of jurisdiction is consistent with the constitutional requirements of due process. In Oklahoma, this two-part inquiry collapses into a single due process analysis, as the current Oklahoma long-arm statute provides that '[a] court of this state may exercise jurisdiction on any basis consistent with

¹ The Court applies the law of the forum state, in this case, Oklahoma, to determine whether it has jurisdiction over a nonresident defendant in a lawsuit based on diversity of citizenship. See Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Co-op., 17 F.3d 1302, 1304 (10th Cir. 1994); see also Fed. R. Civ. P. 4(e).

the Constitution of this state and the Constitution of the United States.” Id. at 1416 (citations omitted).

The Rambo court stated that:

[j]urisdiction over corporations may be either general or specific. Jurisdiction over a defendant in a suit arising out of or related to the defendant’s contacts with the forum state is “specific jurisdiction.” In contrast, when the suit does not arise from or relate to the defendant’s contacts with the forum and jurisdiction is based on the defendant’s presence or accumulated contacts with the forum, the court exercises “general jurisdiction.”

839 F.2d at 1418 (citations omitted); see Doe v. Nat’l Med. Servs., 974 F.2d 143, 145 (10th Cir. 1992) (“Specific jurisdiction may be asserted if the defendant has ‘purposefully directed’ its activities toward the forum state, and if the lawsuit is based upon injuries which ‘arise out of’ or ‘relate to’ the defendant’s contacts with the state.”). The Supreme Court has explained that:

[j]urisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the foreign state . . . it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communication across state lines, thus obviating the need for physical presence within a state in which business is conducted. So long as a commercial actor’s efforts are “purposefully directed” toward residents of another state, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985).

Three criteria guide the Court’s determination of whether personal jurisdiction exists: (1) in relation to the plaintiff’s claim, the defendants must have purposefully availed themselves of the privilege of conducting activities in Oklahoma, see Henson v. Denckla, 357 U.S. 235, 253 (1958); (2) for specific jurisdiction, the cause of action must arise from the defendants’ activities in Oklahoma; and (3) the acts or the consequences of the acts of the defendants must have a substantial enough connection with Oklahoma to make the exercise of jurisdiction reasonable,

see LAK, Inc. v. Deer Creek Enters., 885 F.2d 1293, 1299 (6th Cir. 1989), cert. denied, 494 U.S. 1056 (1990).

III

In the instant case, the Court finds that personal jurisdiction exists in Oklahoma over Defendants. Plaintiff alleges in its Complaint a cause of action for tortious interference with NOHS' Contract with MOST. Under Oklahoma law, the elements of this cause of action are 1) that plaintiff had a business or contractual right that was interfered with; 2) that the interference was malicious and wrongful, and that such interference was neither a justified privilege nor excusable; 3) that damage was proximately sustained as a result of the complained-of interference. See Mac Adjustment, Inc. v. Property Loss Research Bureau, 595 P.2d 427, 428 (Okla. 1979); see also Ellison v. An-son Corp., 751 P.2d 1102, 1106 (Okla. Ct. App. 1987), cert. denied (Okla.1988).

Based on the record, the Court finds that Oklahoma has an interest in the Contract between NOHS and MOST. Plaintiff's principal place of business was in Oklahoma, tests were either performed in Oklahoma or tests results were transmitted to MOST through Oklahoma, and invoices for services performed by Plaintiff were sent from Oklahoma. Accordingly, venue for an action arising under the Contract, which this is not, would be proper in Oklahoma. See generally F.A.I. Electronics Corp. v. Chambers, 944 F. Supp 77 (D. Mass 1996). Furthermore, the Contract represented an Oklahoma property right. See Overbeck v. Quaker Life Ins. Co., 757 P.2d 846, 847 (Okla. Ct. App. 1984) (comparing tort of interference with prospective economic advantage with tort of interference with contract stating "interference with a prospective economic advantage usually involves interference with some type of reasonable expectation of

profit, whereas interference with a contractual relationship results in loss of a property right.").

Therefore, the Court concludes that the Contract is an Oklahoma contract.

Of course, as noted above, this action is not for breach of the Contract, but rather sounds in tort for conduct that occurred outside of Oklahoma. Accordingly, the question becomes whether alleged tortious interference with contractual relations based on acts outside Oklahoma that interfered with an Oklahoma contract constituted contacts with the forum state such that personal jurisdiction is proper here. The Court concludes that such acts are a sufficient basis for personal jurisdiction under applicable law.

A party that tortiously interferes with the contract of another is subject to personal jurisdiction in the state in which the property rights under that contract exist.² Clearly, the alleged conduct of such an interfering party, while outside the forum state, is "purposefully directed" toward residents of the forum state. Burger King, 471 U.S. at 476. It should be emphasized that personal jurisdiction here does not exist because injury occurred in Oklahoma.

² The Court finds that the cases cited by Defendants in opposition to personal jurisdiction in Oklahoma are inapposite. See Hill v. Noble Drilling Corp., 61 Cal. App. 3d 258 (1976) (a California resident brought an action in California for interference with a contract that was to be performed in specific states in the "Southwest Region," but which region did not include California); Munchak Corp. and RDG v. RIKO Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973) (a North Carolina resident brought an action prior to Burger King for interference with a basketball player's contract in which the court was required to determine whether the contract was a "property right" or an "asset or thing of value" within the meaning of the North Carolina state statute); Beckman v. Thompson, 4 Cal. App. 4th 481 (1992) (a California resident brought an action for interference with a contract to be performed in Tennessee); CTVC of Hawaii, Co., Ltd. v. Shinawatra, 82 Wash. App. 699 (1996) (a Washington resident brought an action for interference with a contract that was to be performed in Bangkok, Thailand); Goldberg v. Miller, 874 F. Supp. 874 (N.D. Ill. 1995) (an Illinois resident brought an action for interference with a contract that the court, in the same opinion, expressly determined "was not substantially connected with Illinois").

It is settled law that the mere foreseeability of causing injury in another state "is not a 'sufficient benchmark'" for exercising personal jurisdiction. Id. at 474. Rather, "the foreseeability that is critical to due process analysis . . . that the defendant's conduct in connection with the forum state are such that he should reasonably anticipate being haled into court there." Id. (quoting Worldwide Volkswagen, 444 U.S. at 297). "[T]here [must] be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Id. at 475. The "purposeful availment" requirement insures that a defendant will not be haled into a jurisdiction as a result of another party's unilateral act. Id. The alleged malicious acts by Defendants outside Oklahoma were intended to cause injury within Oklahoma, because such acts were directed at an Oklahoma contract.³ Thus, the alleged interference to Plaintiff's contractual relations in Oklahoma was not only foreseeable, but was in fact the deliberate consequence of Defendants' alleged conduct.⁴

Consistent with this view, the court in Jobe v. ATR Marketing, Inc., 87 F.3d 751, 753 (5th Cir. 1996), stated:

A tort is complete when, and personal jurisdiction lies where, the actual injury occurs. In determining where the injury occurred for jurisdictional purposes, actual injury must be distinguished from its result and consequences, such as pain and suffering, economic effects, or other collateral consequences that often stem

³ Defendants conceded at the hearing in this matter that a resident of Arkansas may be brought before an Oklahoma court without ever entering the forum state for committing an act of assault from the Arkansas side of the state line. Similarly, the tortious acts present here were directed across the state line at an Oklahoma contract and the Oklahoma party to that contract.

⁴ See Doe v. National Med. Servs., 974 F.2d 143, 145 (10th Cir. 1992) (stating that "[s]pecific jurisdiction may be asserted if the defendant has 'purposefully directed' its activity toward the forum state, and if the lawsuit is based upon injuries which 'arise out of' or 'relate to' the defendant's contacts with the state.")

from the actual injury. Recognizing that such collateral consequences may be far reaching (particularly in a commercial tort situation such as the one before us), our precedent holds that consequences stemming from the actual tort injury do not confer personal jurisdiction at the sight or sights where such consequences happen to occur.

Jobe, 87 F.3d at 753 (citations omitted).

Therefore, the Court finds that personal jurisdiction over the Defendants in Oklahoma is proper in this case.

IV

Personal jurisdiction, however, does not render venue proper in any state. To the contrary, venue is determined solely by statute. In its entirety, 28 U.S.C. § 1391(a) provides as follows:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

Id. (Emphasis added).

In the instant case, it is undisputed that each of the Defendants is a resident of California. Therefore, under section 1391(a)(1), this action clearly may be brought in California and this action may not be brought in Oklahoma. Furthermore, accepting as true the allegations in the Complaint, the alleged tortious interference with the Contract resulted from acts outside Oklahoma. Thus, no "substantial part of the events or omissions giving rise to the claim

occurred" in the forum state. Moreover, this action sounds in tort, and there is no property that is the "subject of this action" as that term is used in section 1391(a)(2).⁵ See 28 U.S.C.A. § 1391(a)(2), commentary at 10 (West 1993). Since neither a substantial part of the events or omissions giving rise to the claim occurred in Oklahoma, nor a substantial part of the property that is subject to the action is situated in Oklahoma, this action may not be brought in Oklahoma under section 1391(a)(2).

Finally, section 1391(a)(3) expressly requires as a condition of its applicability that ". . . there is no district in which the action may otherwise be brought." The commentaries make clear that this phrase is a condition precedent for venue under this clause. See 28 U.S.C.A. § 1391(a)(3), commentary at 11 (West 1993) ("[P]laintiff can turn to clause (3) only if there is no district that will satisfy as proper venue under clause (1) or clause (2)."). In the instant case, as discussed above, this action may be brought in California under section 1391(a)(1). Accordingly, this action cannot be brought in Oklahoma under section 1391(a)(3). Since there is no statutory basis for venue of this case in Oklahoma, and Defendant has timely objected to venue here, dismissal of this case is proper. See Polizzi v. Cowles Magazines, 345 U.S. 663 (1953).

⁵ Plaintiff argues that the Oklahoma Contract at issue here, or perhaps the transmission of proprietary information pursuant to such contract, satisfies the "property" requirement of section 1391(a)(2). This argument must be rejected. The reference to property in this section specifically contemplates that the property is the subject of the action. See Plaintiff's Brief in Response to Motion to Dismiss at 7-8.

For the reasons set forth above, Defendant's motion to dismiss for lack of venue is hereby granted. As a result, the Court need not reach the other claims in Defendant's motion to dismiss.

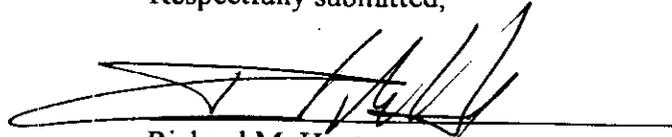
IT IS SO ORDERED.

This 23rd day of OCTOBER, 1998.



Sven Erik Holmes
United States District Judge

Respectfully submitted,



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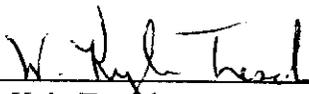
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Alta Verde, Inc., Crescent Business Management,
Inc., and BPL 91-1, A Partnership



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James Eckhart, President

UNIVERSAL TRADE FINANCE, INC.

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STIPULATION OF PARTIAL DISMISSAL
127345.1

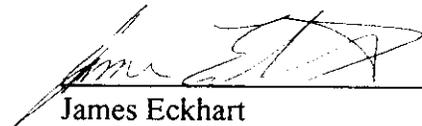
PAGE 3

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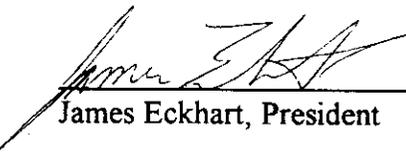
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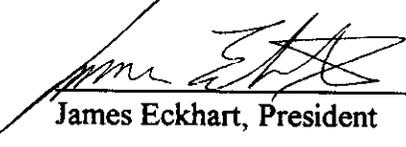
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James Eckhart, President

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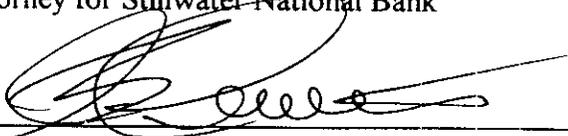
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STIPULATION OF PARTIAL DISMISSAL
127345.1

PAGE 3

ENTERED ON DOCKET
DATE 10-26-98

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

MULTIMEDIA GAMES, INC., et al.)
Plaintiffs,)
vs.)
THE UNITED STATES DEPARTMENT)
OF JUSTICE, et al.,)
Defendants.)

No. 98-C-1-K

FILED

OCT 26 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

This Court recently entered an order granting summary judgment in 97-C-1140-K, resolving that litigation. Therefore it is not necessary that this action, which had been consolidated with the other case, remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records.

ORDERED this 26 day of October, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 10-26-98

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 CHARLES W. PRATHER,)
)
 Defendant.)

No. 98CV0490BU(M)

F I L E D

OCT 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of 10-23-98 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendant, **Charles W. Prather**, against whom judgment for affirmative relief is sought in this action has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendant.

Dated at Tulsa, Oklahoma, this 23 day of October, 1998.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By J. Schwelke
Deputy Court Clerk for Phil Lombardi

ENTERED ON DOCKET
DATE 10-26-98

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

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

LEROY D. JACKSON,
SSN: 447-42-0927,

Plaintiff,

v.

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

Defendant.

CASE NO. 97-CV-624-M ✓

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 26th day of OCT., 1998.

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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 10-26-98

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN L. SWYDEN,

Defendant.

)
)
)
)
) No. 98CV0636BU(M)
)
)
)
)

F I L E D

OCT 23 1998

CLERK'S ENTRY OF DEFAULT

Phil Lombardi, Clerk
U.S. DISTRICT COURT

It appearing from the files and records of this Court as of 10-23-98 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendant, John L. Swyden, against whom judgment for affirmative relief is sought in this action has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendant.

Dated at Tulsa, Oklahoma, this 23 day of October 1998.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By A. Schwelke
Deputy Court Clerk for Phil Lombardi

ENTERED ON DOCKET
DATE 10-26-98

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

UNITED STATES OF AMERICA)

Plaintiff,)

vs.)

162 MEGAMANIA GAMBLING DEVICES)

MORE OR LESS, et al.,)

Defendants.)

No. 97-C-1140-K ✓

ORDER

Before the Court is the motion of the claimants for summary judgment. This lawsuit commenced as a forfeiture action against certain alleged gambling devices on Indian land. Claimants, (the Cherokee Nation, the Seneca-Cayuga Tribe, Multimedia Games, Inc.), have challenged the forfeiture and seek a ruling that the devices are appropriate and not subject to government seizure and forfeiture. The parties have reached a "standstill" agreement whereby the devices remain on Indian land pending disposition of this case.

In claimants' view, two issues are presented for the Court's resolution: (1) whether the seized MegaMania game is a Class II game under the Indian Gaming Regulatory Act, and (2) whether the Electronic Player Stations (EPSs) that aid play of MegaMania are legal equipment (i.e., electronic aids) rather than illegal gambling devices (electronic facsimiles). The Court will treat the two questions as distinct for purposes of discussion.

As background to decision, the Court must address the interplay of two statutory schemes. The Johnson Act makes it unlawful, within Indian country and elsewhere, to "possess" or "use" any "gambling device". 15 U.S.C. §1175(a). The Johnson Act defines "gambling device" as a "machine or mechanical device" designed "primarily" for gambling and that, when operated, either delivers money or entitles the player to receive money "as the result of the application of an element of chance." 15 U.S.C. §1171(a)(1) & (2).¹

In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA"), codified at 25 U.S.C. §2701-2721. Under the IGRA, "Indian gaming activities are divided into three classes, each of which is subject to differing degrees of tribal, state, and federal jurisdiction and regulation." Citizen Band Potawatomi Indian Tribe v. Green, 995 F.2d 179, 179-80 (10th Cir.1993). Class I gaming involves social games for prizes of minimal value and traditional forms of Indian gaming. Id. at 180; §2703(6). Class II gaming, as relevant here, includes "bingo. . . and other games similar to bingo." §2703(7)(A). Class III gaming is "all forms of gaming that are not class I gaming or class II gaming". §2703(8).

The IGRA established the Indian Gaming Commission ("the Commission") as an agency within the Department of the Interior. 25 U.S.C. 2704(a). The Commission's "principal responsibilities" involve Class II gaming. Cabazon Indians v. National Indian Gaming Commission, 14 F.3d 633, 634 (D.C.Cir.), cert. denied, 512 U.S.

¹Any "subassembly or essential part" intended to be used in connection with such a machine or device also meets the definition. 15 U.S.C. §1171(a)(3).

1221 (1994). Congress has granted the Commission the authority to promulgate such regulations and guidelines "as it deems appropriate" in performance of its duties. §2706(10). In a recent decision involving these two Acts, the District Court for the District of Columbia held that "Congress did not intend for the IGRA to implicitly repeal the Johnson Act". Diamond Game Enterprises, Inc. v. Reno, 9 F.Supp.2d 13, 17 (D.D.C.1998) (footnote omitted).² Thus, the interplay of the two Acts must be addressed, in view of the fact that Class II gaming is permitted by an Indian tribe within such tribe's jurisdiction only if "not otherwise specifically prohibited on Indian lands by federal law." 25 U.S.C. §2710(b)(1)(A).

The government contends that MegaMania bingo ("MegaMania"), the machines seized, does not meet the definition of Class II gaming and therefore, by definition, is Class III gaming. The lawful operation of Class III gaming devices requires a tribal-state compact. 25 U.S.C. §2710(d)(1)(C) & (d)(6). Without such a compact, the use of such devices is unlawful. It is undisputed that no such tribal-state compact exists between claimants and the State of Oklahoma covering the defendant machines.³

The IGRA sets forth the following definition:

²Claimants in the case at bar have not advanced a "repeal by implication" argument, but this Court notes the argument's recent rejection, with which this Court agrees.

³The legal fiction underlying civil forfeiture characterizes them as proceedings in rem against "offending inanimate objects" as defendants. United States v. \$39,000 in Canadian Currency, 801 F.2d 1210, 1218 (10th Cir.1986).

The term "class II gaming" means-

(i) the game of chance commonly known as bingo (whether or not electronic, computer or other technologic aids are used in connection therewith)--

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

25 U.S.C. §2703(7)(A). See also 25 C.F.R. §502.3.

Claimants argue that MegaMania has all three elements and therefore is Class II gaming. The record reflects that MegaMania consists of two electronic games played simultaneously: a "straight-line" game and "CornerMania". Each will be addressed separately. The "straight-line" game appears to be what one would think of as "traditional" bingo. Numbers are drawn until a player fills a complete predesignated "straight line" on a playing card.

The government argues that the "straight-line" game does not meet the statutory definition because MegaMania has an "ante up" feature. That is, a player does not pay a single charge and play without further charge, but rather must pay \$.25 for each 3-ball draw to continue playing their card or cards. The government states in conclusory fashion that this creates a "wager" between the house and the player and is not bingo.

The Court sees nothing in the statute which prohibits an "ante

up" feature. If there is an unchanging Platonic "form" of bingo, it is not affected by whether the game operators charge a single (presumably higher) price at the beginning, or establish a "pay as you go" system. When promulgating its regulations in this regard, the Commission determined that whether a card is purchased for a "preset price" or on an ante-up basis is a "marketing decision. . . outside [IGRA's] purview." 57 Fed.Reg. 12383. The Court agrees.

Next, the government makes the following argument: in MegaMania, if a player fails to achieve a bingo on a 3-ball draw, the house "keeps" the money on that draw. Then, when a player achieves a bingo, his winnings are determined based on a "parimutuel" formula. Thus, the government concludes, there is no "prize" awarded in MegaMania. If the government is arguing that, in order to comply with the IGRA, a gamemaster must award to a winning player all money which has been bet, the Court sees no such requirement. Since the purpose of permitting bingo on Indian land is to generate revenue for the Tribes, this would be an odd requirement indeed.

Third, the government asserts that, in MegaMania, the player does not actually "cover" the numbers, but merely presses a lighted "daub" button, and the machine itself does the covering. This argument is too weak to bear additional discussion.

Fourth, the government argues that the straight-line game is not won by the "first person" to cover a pattern. The basis for this argument is that in "traditional" bingo, if a \$10,000 prize is announced and four players achieve bingo on the same draw, then

\$10,000 is divided among the four players. In MegaMania, the government asserts, the identical situation results in each winning player receiving \$10,000 and the house is out \$40,000. The Court is unable to discern how paying winning players more money transforms a game into non-bingo. This argument is rejected.

Fifth, the government addresses an argument which claimants have not made, that MegaMania may be considered a game "similar to bingo" and come within the statute. Under the reasoning already stated, the Court sees no need to rule upon this argument.

As stated, MegaMania apparently involves a second game, CornerMania, played simultaneously with the straight-line game. The parties' briefs are not completely clear, but apparently the first player to cover two corners of the playing card wins a "prize" of some sort. CornerMania does not cease at that point, but a player may also win a prize for covering three corners or four corners of a card. Apparently, if there has been a CornerMania winner, the game ceases when there is a straight-line winner. However, if there is straight-line winner before there has been a CornerMania winner, CornerMania continues until there is a winner.⁴ The claimants describe CornerMania prizes as "interim wins" and assert that "the game" cannot end until at least one player has won the straight-line game and at least one player has won the corner game.

The government contends that CornerMania is not bingo. The

⁴As a matter of mathematical probability, it would seem rare that a player could achieve a straight-line bingo before another player has covered two corners, but the possibility exists.

government concedes that one pattern of traditional bingo is "Four Corner Bingo", but that two-corner or three-corner bingo are not according to Hoyle, so to speak. The Court is not persuaded. The Commission has stated that it "does not believe Congress intended to limit bingo to its classic form". 57 Fed.Reg. 12383. Nothing appears in the statutory language or the regulations dealing with a "corner bingo" game.

However, the government also argues that the "first player" to win CornerMania does not end the game, arguably violating 25 U.S.C. §2703(7)(A)(i)(III). Claimants respond that indeed the first person to achieve two corners "wins" and there is no statutory or regulatory requirement that additional players cannot win. Claimants quote a statement of the Commission which appears to indicate that, so long as "in each game there is at least a winner of a consolation prize", there is nothing problematic about interim-win games. 57 Fed.Reg. 12382. The Court agrees, seeing nothing in the statutory language prohibiting the operation of two games simultaneously.⁵

The Court now turns to the second question raised by claimants' motion, regarding the proper characterization of the equipment used in MegaMania. The IGRA provides that the term "class II gaming" does not include "electronic or electromechanical

⁵As a subsidiary argument, the government asserts that CornerMania is a "house banking game", which is classified as Class III gaming under 25 C.F.R. §502.4(a). The Court is not persuaded. The record does not make clear that "the house is a participant" in CornerMania, which is part of the definition of "house banking game" under 25 C.F.R. §502.11.

facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. §2703(7)(B)(ii) (emphasis added). Thus a distinction is drawn between "aids" to games in §2703(7)(A)(i) and "facsimiles" of games as quoted above. Not surprisingly, the parties argue for opposing characterizations.

The regulations set forth definitions. 25 C.F.R. §502.7 states:

Electronic, computer or other technologic aid means a device such as a computer, telephone, cable, television, satellite or bingo blower and that when used-

(a) Is not a game of chance but merely assists a player or the playing of a game;

(b) Is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and

(c) Is operated according to applicable Federal communications law.

25 C.F.R. §502.8 provides:

Electronic or electromechanical facsimile means any gambling device as defined in 15 U.S.C. 1171(a)(2) or (3) [sic].

Thus, the regulations expressly incorporate the Johnson Act on this point. The subsection discussed by the parties, 15 U.S.C. §1171(a)(2), provides that a gambling device means

any other machine or mechanical device [i.e., other than a "slot machine" or similar device]. . . designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money

or property. . .

The government asserts that the plain language of this statute demonstrates that the MegaMania equipment is a "gambling device". In a broad sense, a machine designed for electronic bingo, as is a MegaMania player station, is a machine designed primarily for use in connection with gambling. It also seems clear that, by operation of the machine, a player may become entitled to receive money as the result of the application of an element of chance. These are the essential elements of a gambling device. See Citizen Band of Potawatomi Indian Tribe v. Green, 995 F.2d 179, 181 (10th Cir.1993). However, the MegaMania player station does not itself provide the element of chance, even though such would be the case in a "self-contained" gambling device like a slot machine. The IGRA itself describes bingo as a "game of chance". 25 U.S.C. §2703(7)(A)(i).

Further, "standard principles of statutory construction do not have their usual force in cases involving Indian law." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985). Ambiguous statutes should be construed in favor of the Indians. Id. The canons of construction applicable are "rooted in the unique trust relationship between the United States and the Indians." Oneida County v. Oneida Indian Nation, 470 U.S. 226, 247 (1985). Here, the ambiguity arises from the interplay of the Johnson Act and the IGRA. In 1962, when Congress enacted the present definition of "gambling device", it clearly did not contemplate the advance of computer technology which has taken place since then. The use of

the terms "machine" and "mechanical device" almost certainly reflect congressional concern with slot machines and similar self-contained means of gambling. Only in the crudest sense are the MegaMania computer software and monitors properly termed a "machine . . . designed and manufactured primarily for use in connection with gambling." In light of the IGRA, the Court is not persuaded that such an interpretation is appropriate.

Tribes have objected in other litigation to the effect of the interpretation presented by the government in the case at bar, asserting that it sweeps within the definition of "gambling device" any device that might be used in gambling. The objection has been rejected, based on a narrowed interpretation.

This interpretation [i.e., the broad interpretation] of the Johnson Act is incorrect. As several cases have held, Congress has acknowledged, and the Commission has noted in the preamble to its rules, the Johnson Act applies only to slot machines and similar devices (including the pull-tab games here in issue), not to aids to gambling (such as bingo blowers and the like). When the scope of the Johnson Act is properly determined, it is clear that the definition of gambling devices is significantly less broad than plaintiffs fear.

Cabazon Band of Mission Indians v. National Indian Gaming Commission, 827 F. Supp. 26, 31 (D.D.C.1993), aff'd, 14 F.3d 633 (D.C.Cir.), cert. denied, 512 U.S. 1221 (1994) (footnotes omitted).

The Court finds this narrowed definition correct, and necessary to reconcile the statutory language and case law. Despite the apparently broad sweep of 15 U.S.C. §1175 and 25 C.F.R.

§502.8, the Ninth Circuit stated "the dictionary meaning of 'facsimile' is an 'exact and detailed copy of something'". Syucan Band of Mission Indians v. Roache, 54 F.3d 535, 542 (9th Cir.1995). See also Cabazon, 14 F.3d at 636 ("[a]s commonly understood, facsimiles are exact copies, or duplicates"). MegaMania is not an exact copy or duplicate of the game of bingo. The game of bingo is not wholly incorporated into each MegaMania machine. MegaMania does not draw numbers in a self-contained fashion. Instead, while numbers are drawn at a single location, MegaMania allows a large number of players to participate in a less cumbersome way than traditional bingo. Accordingly, MegaMania is not itself a "game of chance" and is "readily distinguishable" from the playing of a game of chance on an electronic facsimile. 25 C.F.R. §502.7. MegaMania thus appears perfectly appropriate under the statutory scheme, given the obvious congressional solicitude for bingo as it relates to Indian tribes.⁶

Claimants also rely upon the Diamond Game decision, which states that two characteristics of an "aid" are (1) it must operate to broaden the participation levels of participants in a common game and (2) it must be distinguishable from a "facsimile" in which a single participant plays with or against a machine rather than with or against other players. 9 F.Supp.2d at 19-20. Clearly, MegaMania broadens the participation levels of participants in a

⁶In the Senate Committee Report on the IGRA, the intent is stated that "tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development." Diamond Game, 9 F.Supp.2d at 19 (emphasis added).

common game, and it is also clear that players are playing against other players as opposed to against the machine in MegaMania. Both characteristics of an "aid" are present.

The government cites the Commission's statement that it "rejects the arguments that Congress intended to classify machine versions of class II theme games within class II gaming." 57 Fed. Reg. 12386.⁷ However, in the Court's view, MegaMania is not a "machine version" of bingo. The software does not permit a player to play a game of bingo in "stand-alone" fashion. Rather, the software is being used to broaden the participation levels of live bingo, which is being played with manual ball drawing or calling of the balls in real time. Therefore, MegaMania does not alter the "fundamental characteristics" of the game of bingo. See Diamond Game, 9 F.Supp.2d at 19 (quoting Senate Committee Report).

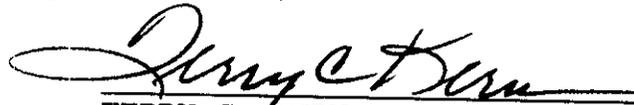
In sum, the Court finds it an absurd result that Congress would classify "paper" bingo as Class II gaming, but classify electronic bingo, at least as embodied by MegaMania, as Class III gaming. Aside from the "ante-up" and "interim win" features, against which this Court finds no statutory prohibition, nothing apparently distinguishes MegaMania from electronic bingo on tribal lands across this nation. A clearer statement from Congress is required if all such games are to be termed illegal. In the

⁷At various points in this Order, the Court has quoted explanatory commentary from the Commission published in the Federal Register when the regulations were issued. The Court is aware that such commentary is of no binding effect upon the Court, but it has been quoted for its persuasive value when the Court finds the reasoning sound.

Cabazon decision by the District of Columbia Circuit and the Ninth Circuit decision in Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 543 (9th Cir.), cert. denied, 516 U.S. 912 (1995), both cited by the government, the courts found electronic pull-tab games to be unlawful facsimiles. However, unlike MegaMania, electronic pull-tab games are self-contained. The player plays against the machine and not other players. In MegaMania, the software and monitor provides the player with a bingo "board", and the ability to "daub" the numbers. The numbers themselves are drawn elsewhere, and are announced to all players simultaneously. Contrary to the government's argument, MegaMania is not the game of bingo, as old style "video bingo" (comparable to video poker) is. Rather, it is an electronic aid to playing the game of bingo, and therefore lawful.

It is the Order of the Court that the motion of the claimants for summary judgment (#58) is hereby GRANTED. All other motions are declared moot.

ORDERED this 23 day of October, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 10-26-98

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 162 MEGAMANIA GAMBLING)
 DEVICES MORE OR LESS, et al.,)
)
 Defendants.)

No. 97-C-1140-K ✓

JUDGMENT

This matter came before the Court for consideration of the Motion by Claimants Multimedia Games, Inc., the Cherokee Nation, and the Seneca-Cayuga Tribe, for Summary Judgment against Plaintiff United States of America.

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 Claimants and against the Plaintiff.

ORDERED THIS 23 DAY OF OCTOBER, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 10-26-98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DAVID DIEDRICH,
SSN: 440-62-5724

Plaintiff,

v.

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

Defendant.

No. 97-CV-1100-J ✓

F I L E D
OCT 22 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER^{2/}

Plaintiff, David Diedrich, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{3/} Plaintiff asserts that the Commissioner erred because (1) the ALJ's credibility determination was not supported by substantial evidence, (2) the ALJ failed to consider Plaintiff's pain, (3) the ALJ failed to evaluate Plaintiff's alleged mental impairment, and (4) the ALJ failed to properly develop the record. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

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

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

^{3/} Administrative Law Judge Leslie S. Hauger (hereafter "ALJ") concluded that Plaintiff was not disabled on August 1, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on October 14, 1997. [R. at 4].

I. PLAINTIFF'S BACKGROUND

Plaintiff was born March 3, 1956, and was 40 years old at the time of his hearing before the ALJ. Plaintiff completed high school.

Plaintiff testified that he suffered from low back pain, difficulty sitting, experienced constant migraines, had joint pain, experienced numbness in his feet, suffered from depression, and had short term memory problems. Plaintiff took Zoloft for his depression for a period of time, but he testified that he had problems taking Zoloft because it caused him to have diarrhea. Plaintiff additionally stated that he experienced blurry vision and sometimes saw spots and that he limited his driving to 30 - 45 minutes at a time. According to Plaintiff, he had difficulty sleeping. Plaintiff noted that he did approximately one-half of the laundry and no yard work, but was able to lift a gallon container of milk. Plaintiff estimated that he could stand for 15 - 20 minutes and walk for 15 - 20 minutes.

Plaintiff had surgery for an inguinal hernia. [R. at 100, 108]. Plaintiff's doctor completed forms for Plaintiff to receive a handicapped parking privilege in January of 1995 to last one year. [R. at 117].

Plaintiff was treated for depression, and the medical record reflects visits by Plaintiff related to his depression on December 15, 1994, December 2, 1994, November 17, 1994, November 11, 1994, July 18, 1994, and July 12, 1994. [R. at 118].

Plaintiff had surgery on his right ankle because of an injury resulting from a gun shot wound on September 11, 1994. [R. at 125].

A social security examiner on February 17, 1995 noted that Plaintiff took Zoloft for anxiety and took Darvocet for back and neck pain. The doctor noted that Plaintiff's gait was reasonable and Plaintiff walked with a slight limp to keep his weight off of his right leg which had been injured (the gunshot wound). [R. at 144]. The examiner concluded that Plaintiff could walk one block or further without the assistance of a cane. [R. at 144]. The examiner additionally indicated that Plaintiff suffered from low back pain, cervical pain, a gunshot wound, right foot and leg discomfort, irritable bowel syndrome and diarrhea.

Donald R. Inbody, M.D., on February 24, 1995, noted that Plaintiff stated that he supported himself based on a combination of help from his brother, food stamps, and odd jobs (such as yard work with a riding lawn mower). [R. at 152]. Plaintiff denied any prior history of drugs or alcohol. [R. at 152]. Plaintiff described his typical day as including light housekeeping, preparing meals, yard work, and driving locally. The doctor noted that Plaintiff had a "lag time" in some of his answers. He also observed that Plaintiff was depressed and he rated his Global Assessment Functioning at 55. [R. at 153].

Plaintiff's record includes various medical documents reflecting visits on November 28, 1995 for neck and back pain; January 9, 1996 for chronic pain and stiff back; February 21, 1996 for migraines; March 1, 1996 for cough and congestion (diagnosed with acute bronchitis).

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

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

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

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

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

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by

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

substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

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

"The finding of the Secretary^{5/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

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

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff was not disabled at Step Five of the sequential evaluation. The ALJ found Plaintiff's testimony not fully credible based on the lack of objective findings, the lack of medication Plaintiff took for severe pain, the frequency of treatment of Plaintiff by physicians, and the lack of discomfort Plaintiff exhibited at the hearing. [R. at 14]. The ALJ additionally noted that Plaintiff did not complain of migraines, but that migraines were noted only in Plaintiff's "history," and that the record did not contain frequent complaints regarding Plaintiff's back, shoulder, knee, and hip pain. The ALJ additionally noted that the Plaintiff suffered a foot injury which would require that Plaintiff be permitted to alternate positions "at will." [R. at 15]. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff was not disabled.

IV. REVIEW

CREDIBILITY ANALYSIS

Plaintiff initially asserts that the ALJ's credibility analysis is not supported by substantial evidence. Plaintiff states that the facts upon which the ALJ relied are contrary to the record. Plaintiff references his complaints of migraines and notes that

the ALJ discounted his complaints because a report in the record indicates a "history of migraines," and the ALJ therefore concluded that Plaintiff did not currently suffer from migraines. Plaintiff claims that the report references an emergency room visit one week prior to the report for migraine headaches.

The ALJ noted that Plaintiff's "migraines were noted only as history which means that the claimant, consistent with the remainder of the medical evidence, did not then have migraine headaches, but had experienced them at some time in the past." [R. at 14-15]. As noted by Plaintiff, the record indicates that Plaintiff was seen on February 21, 1996, for migraines. [R. at 171]. Plaintiff does not consistently list his headaches as a reason for his disability. Defendant acknowledges that Plaintiff sought treatment for headaches and received two injections for his headaches, but asserts that the evidence does not indicate a significant period of complaints for headaches.

Plaintiff additionally notes that the ALJ claims that Plaintiff did not complain of pain in his shoulders, knees, or hips. Plaintiff claims that the record establishes that he did complain of pain in his back, neck, elbow, knees, wrist, and hand.

Plaintiff asserts that the ALJ claimed that Plaintiff's physical examinations ruled out any problems with his back but that the ALJ failed to refer to any particular record pages. Plaintiff notes that he was treated for back pain. The ALJ noted that Plaintiff had only infrequent complaints of back pain and that his back was "found to be normal to physical examination." [R. at 14]. The ALJ does not reference any particular portion of the record. The social security examiner noted on February 17, 1995, that

Plaintiff had disc problems at L4-5, and concluded that Plaintiff had low back pain and cervical pain. [R. at 144].

Plaintiff also asserts that the ALJ's analysis is conclusory and that the ALJ did not relate specific facts to the factors which the ALJ considered. Plaintiff additionally argues that the ALJ relied on isolated statements from Plaintiff's physicians, such as "Plaintiff was able to get on and off an examining table," but ignored contrary statements.

Although Plaintiff asserts that the ALJ's analysis is conclusory, in attacking the ALJ's analysis, Plaintiff points to specific factors considered by the ALJ. The ALJ concluded that Plaintiff's testimony was not fully credible based on the lack of objective findings in the record, the lack of opinions or findings by treating and examining physicians, the lack of medication for severe pain, the infrequency of treatments, the lack of discomfort shown at the hearing, the lack of complaints for back, shoulder, knee pain, and migraine headaches, and the lack of evidence of a "balance problem." [R. at 14-15]. As noted above, some of the statements of the ALJ are not fully supported by the record.

An ALJ's determination of credibility is given great deference by the reviewing court. See Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). On appeal, the court's role is to verify whether substantial evidence in the record supports the ALJ's decision, and not to substitute the court's judgment for that of the ALJ. Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995) ("Credibility determinations are peculiarly within the province of the finder of fact, and we will not

upset such determinations when supported by substantial evidence."); Musgrave v. Sullivan, 966 F.2d 1371, 1374 (10th Cir. 1992). In this case, some reasons given by the ALJ for his determination regarding Plaintiff's credibility are not fully supported by the record. Overall, however, the ALJ's conclusions are supported by substantial evidence.

INCLUSION OF PAIN RESTRICTIONS IN THE QUESTION TO THE VOCATIONAL EXPERT

Plaintiff notes that the ALJ decided this case at Step Five and therefore has the burden of proof. Plaintiff asserts that the ALJ was required to include Plaintiff's pain as one of the factors which affect Plaintiff's ability to work. Plaintiff states that the ALJ ignored Plaintiff's back pain, joint pain, and migraine headaches and that the only restriction placed on Plaintiff was a requirement that Plaintiff must be able to alternate positions while working. Plaintiff argues that the hypothetical presented to the vocational expert which made no reference to impairments caused by pain was therefore invalid.

An ALJ need include only those limitations in the question to the vocational expert which he properly finds are established by the evidence. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). Plaintiff asserts that Plaintiff has pain and that the ALJ therefore erred by not including "pain" as a limitation in the hypothetical question presented to the vocational expert. "Pain" is not, by itself, a limitation. Pain may cause an individual to have either non-exertional or exertional limitations. See 20 C.F.R. § 404.1569. Generally, an ALJ would include, in a hypothetical question to the vocational expert, any

limitations caused by pain. For example, if an individual has difficulty bending due to "pain" in his back, the hypothetical should include a restriction for bending. The ALJ would not simply tell the vocational expert that the individual experiences "pain." The vocational expert must know in what manner the pain interferes with the claimant's ability to perform work-related activities. Plaintiff does not assert how the pain interferes with Plaintiff's ability to perform work-related activities, and Plaintiff does not state what additional restrictions that the ALJ should have included in the hypothetical question presented to the vocational expert other than the general "limitation" of "pain."

MENTAL IMPAIRMENT

Plaintiff notes that on the PRT form the ALJ indicated the presence of depression, NOS, an affective disorder, and noted "slight" restrictions in daily living activities. Plaintiff asserts that the ALJ provided no evidence to support his conclusions on the PRT. Plaintiff also argues that because the ALJ prepared the form without the assistance of a medical advisor, the ALJ was required to discuss the form in his opinion and the conclusions which he reached. Plaintiff observes that the ALJ did not discuss the PRT form or his conclusions in the opinion.

In Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994), the Tenth Circuit Court of Appeals concluded that the ALJ erred in failing to discuss the relevant factors related to the ALJ's assessment of the Plaintiff's RFC.

The ALJ further erred by failing to discuss the other factors relevant to plaintiff's mental RFC. The only reference to these other factors appeared in the Psychiatric Review

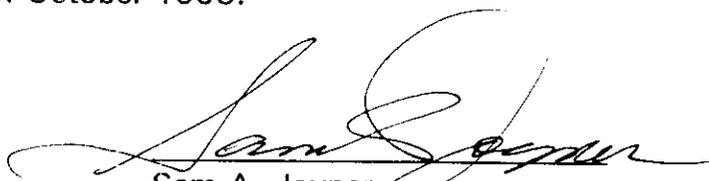
Technique (PRT) form that the ALJ completed in connection with his decision. "[T]here must be competent evidence in the record to support the conclusions recorded on the [PRT] form and the ALJ must discuss in his opinion the evidence he considered in reaching the conclusions expressed on the form." Woody v. Secretary of Health & Human Servs., 859 F.2d 1156, 1159 (3d Cir.1988).

The ALJ's opinion states only that the "claimant's depression is mild and does not affect his ability to perform mental work-related activities." [R. at 15]. Plaintiff had several visits to doctors for depression. [R. at 118]. The social security examiner noted that Plaintiff took Zoloft for anxiety. [R. at 144, 152]. Dr. Inbody noted that Plaintiff's speech was slow and "there was noted psychomotor retardation in terms of the lag time between the question I would ask and his response. However, when he did respond his answers were accurate, rational and clear with no inappropriate aspect. Affect was somewhat flat." [R. at 153]. He noted that Plaintiff had moderate depression which was being treated with medication. He described Plaintiff's GAF at 55. Plaintiff testified that he had difficulty taking the Zoloft for his depression because it caused him to have diarrhea. [R. at 194].

Plaintiff's medical records do not contain a plethora of information with regard to Plaintiff's asserted depression. The ALJ, although completing the PRT, did not discuss the PRT or his conclusions in his opinion. In accordance with the Tenth Circuit opinion in Washington, on remand, the ALJ should discuss the reasons for making the conclusions recorded in his PRT. Defendant does not address Plaintiff's argument that the ALJ should have discussed his findings, in more detail, in his opinion.

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

Dated this 22nd day of October 1998.



Sam A. Joyner
United States Magistrate Judge

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

FILED

OCT 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GARY W. CRAIG,
Plaintiff,

v.

AMERICAN AIRLINES, INC.,
Defendant.

Case No. 97-CV-831-H ✓

ENTERED ON DOCKET

DATE 10-26-98

ADMINISTRATIVE CLOSING ORDER

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

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

IT IS SO ORDERED.

This 23rd day of October, 1998.


Sven Erik Holmes
United States District Judge

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FILED

OCT 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JESSIE J. ARABIE,)
)
 Defendant.)

CIVIL ACTION NO.
98CV429E(J)

ENTERED ON DOCKET

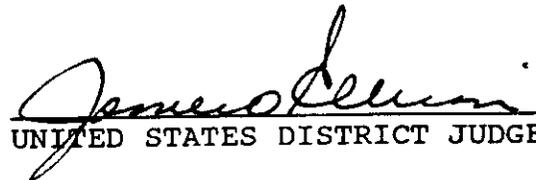
DATE OCT 26 1998

AGREED JUDGMENT

This matter comes on for consideration this 23^d
day of ~~September~~ ^{October}, 1998, the Plaintiff, United States of America, by
Stephen C. Lewis, United States Attorney for the Northern District
of Oklahoma, through Loretta F. Radford, Assistant United States
Attorney, and the Defendant, Jessie J. Arabie, appearing pro se.

The Court, being fully advised and having examined the
court file, finds that the Defendant, Jessie J. Arabie,
acknowledged receipt of Summons and Complaint on September 23,
1998. The Defendant has not filed an Answer but in lieu thereof
has agreed that Jessie J. Arabie is indebted to the Plaintiff in
the amount alleged in the Complaint and that judgment may
accordingly be entered against Jessie J. Arabie in the principal
amount of \$3,256.39, plus administrative costs in the amount of
\$6.71, plus accrued interest in the amount of \$767.32, plus
interest thereafter at the rate of 8% per annum until judgment,
plus filing fees in the amount of \$150.00, plus interest thereafter
at the current legal rate until paid, plus the costs of this
action.

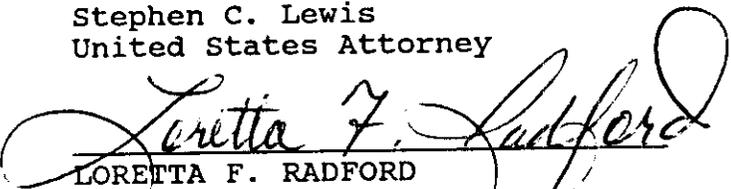
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of \$3,256.39, plus administrative costs in the amount of \$6.71, plus accrued interest in the amount of \$767.32, plus interest thereafter at the rate of 8% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

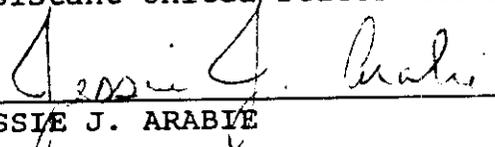

UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney


LORETTA F. RADFORD
Assistant United States Attorney


JESSIE J. ARABIE

LFR/llf

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

FILED

OCT 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONALD R. NICHOLS, et al.,)
)
Plaintiffs,)
)
vs.)
)
G. DAVID GORDON, et al.,)
)
Defendants.)

Case No. 95-C-1126H ✓

ENTERED ON DOCKET

DATE 10-26-98

ORDER

Pursuant to the Plaintiffs' Motion for Dismissal of Certain Defendants, and good cause having been shown, the Court finds that Defendants Patterson Icenogle, Inc. and Doug Nelson, should be and hereby are dismissed with prejudice, each party to bear their own costs, and Defendants James E. Turner, Betty Rose Turner, and Glyn Turner should be and hereby are dismissed without prejudice.



United States District Judge

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

ANITA HENDERSON,

Plaintiff,

v.

WHIRLPOOL CORPORATION,

Defendant.

ENTERED ON DOCKET

DATE 10-23-98

Case No. 97-CV-1052-H

FILED

OCT 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for a trial by jury on October 21-22, 1998. On October 22, 1998, the jury returned its verdict finding Defendant Whirlpool Corporation liable to Plaintiff for violating the Family and Medical Leave Act. The parties agreed that the amount of actual damages in this case was \$6,000. Accordingly, the jury awarded Plaintiff \$6,000 in actual damages.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Plaintiff and against Defendant in the amount of \$6,000.

IT IS SO ORDERED.

This 23rd day of October, 1998.


Sven Erik Holmes
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

OCT 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LEROY D. JACKSON

447-42-0927

Plaintiff,

vs.

KENNETH S. APFEL,
Commissioner Social Security
Administration,

Defendant,

Case No. 97-CV-624-M

ENTERED ON DOCKET

DATE OCT 23 1998

ORDER

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

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

¹ Plaintiff's February 14, 1994, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held May 25, 1995. By decision dated October 16, 1995, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on April 25, 1997. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born September 18, 1942, and was 53 years old at the time of the hearing. He has a high school education, can read, write and do basic math. He formerly worked as a school bus driver and welder. He claims to have been disabled since May 28, 1978, as the result of back problems, knee problems, shortness of breath and hand problems. However, Plaintiff previously filed an application for benefits on September 5, 1978, which was denied November 16, 1979 and affirmed by the district court on appeal. Therefore, the beginning date for consideration of Plaintiff's current claim is the day after his previous application was finally denied by the Social Security Administration, November 17, 1979. The ending date is September 30, 1983, the date Plaintiff was last insured for disability benefits.

Although the ALJ found Plaintiff was impaired by back, knee and hand pain rendering him unable to perform his past relevant work, he was capable of performing

a full range of unskilled sedentary work, subject to no fine manipulation with the hands. Based on the testimony of a vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to apply SSR 83-20 to determine the onset date of his disability; (2) failed to obtain the testimony of a medical expert to assist in the determination of his residual functional capacity ("RFC"); (3) improperly disregarded treating physician's findings; and (4) improperly evaluated his credibility.

APPLICATION OF SSR 83-20

Social Security Ruling 83-20 is a Social Security Program Policy Statement which describes the relevant evidence to be considered when establishing the onset date of disability. It states that for disabilities which are nontraumatic in origin, factors such as the claimant's allegation of onset, work history, date of work stoppage, and medical evidence are to be considered, with medical evidence being the "primary element in the onset determination." Although Plaintiff's argument is not particularly clear on this point, he seems to argue that the ALJ failed to take these factors into account in making the determination that Plaintiff was not disabled before the expiration of his insured status on September 30, 1983. However, since the

Commissioner determined that Plaintiff is not disabled, the criteria for determining the onset of disability are completely irrelevant.

EXPERT TESTIMONY FOR DETERMINATION OF RFC

Plaintiff has not cited any authority to support his position that "the ALJ should have obtained the testimony of a medical expert to assist in determining the Claimant's residual functional capacity." [Dkt. 17]. The Court finds that the ALJ's failure to obtain the testimony of a medical expert does not provide a basis for reversal of the disability determination.

FINDINGS OF TREATING PHYSICIANS

It is well established that the Secretary must give controlling weight to the opinion of a treating physician if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. However, good cause must be given for rejecting the treating physician's views and, if the opinion of the claimant's physician is to be disregarded, specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ, *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987); *Byron v. Heckler*, 742 F.2d 1232, (10th Cir. 1984). Plaintiff claims that the ALJ erroneously discounted the opinions of several treating physicians in violation of this rule.

The ALJ acknowledged the existence of medical opinions stating that Plaintiff is disabled. However, he noted that no objective medical evidence was cited in

support of those opinions and they are inconsistent with the medical record. [R. 149-50].

By letter dated June 4, 1980, Dr. Goen outlined the results of his physical examination and concluded that Plaintiff "could not pass a physical for obtaining a job and could not sustain an acceptable work load in any job that he might be qualified for. I believe the residuals of brain injury are such that he is not trainable for a lighter, more sedentary type of job." [R. 232]. While a physician may proffer an opinion that a claimant is totally disabled, that opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Secretary. See 20 C.F. R. §§ 404.1527(e)(2), 416.927(e)(2); *Castellano v. Secretary of Health and Human Services*, 26 F.3d 1027, 1028 (10th Cir. 1994), *Eggleston v. Bowen*, 851 F.2d 1244, 1246-7 (10th Cir. 1988) (if treating physician's progress notes contradict his opinion, it may be rejected). It is Dr. Goen's opinion that physically Plaintiff is capable of doing sedentary work. His opinion that Plaintiff is disabled takes into account vocational factors which are outside his expertise and which opinion is contradicted by the testimony of the vocational expert. Dr. Goen's opinion is not entitled to controlling weight.

On May 26, 1983, Paul Edward Michael, M.D., Plaintiff's physician since 1980, stated:

Mr. Jackson's current activity level will allow him to ambulate one-half to three-quarters of a mile. His underlying disease will also permit light housework but a minimal amount of heavier physical activity and practically no heavy lifting. The patient is unable to return to his

previous employment. In my opinion he will be unable to return to any gainful employment at this time. The patient's mild learning disorder will also probably limit his vocational or educational rehabilitation at this time, until his physical condition improves.

[R. 235]. Dr. Michael's statements concerning Plaintiff's activity level and abilities are not inconsistent with the ALJ's RFC finding. Consequently, Dr. Michael's opinion does not provide a basis for reversal. Dr. Michael's letters of July 27, 1982, [R. 236], and December 18, 1980, [R. 237] which report that Plaintiff is disabled are not supported by any objective findings.

On August 1, 1980, William Yarborough, M.D. discussed Plaintiff's physical findings and stated: "Since the patient states that he has only been trained in the past to do heavy manual type labor, it is in my opinion, that the patient is totally disabled to pursue this type of work." [R. 239]. Dr. Yarborough's findings are not inconsistent with the ALJ's RFC determination.

The Court finds that the ALJ evaluated the opinions of Plaintiff's treating physicians in accordance with the regulations.

CREDIBILITY ANALYSIS

There is no support for Plaintiff's claim that the ALJ failed to apply the appropriate standards in the evaluation of his pain and credibility. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th

Cir. 1990). The hearing was held 11 years and 8 months after the expiration of Plaintiff's insured status. The ALJ noted that Plaintiff's testimony at the May 25, 1995, hearing dealt mostly with his current problems which are not relevant to a determination about the nature of his condition between November 1979 and September 1983. Further, the ALJ noted the absence of medical treatment between December 1980 and May 1989 except for treatment of a puncture wound suffered when Plaintiff stepped on a rusty nail while he was tearing down an old barn. The ALJ's RFC evaluation took into account limitations involving Plaintiff's hands as he found Plaintiff to be limited to sedentary work of an unskilled nature, subject to no fine manipulation with the hands. [R. 152]. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Commissioner and the courts.

CONCLUSION

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

SO ORDERED this 22nd Day of October, 1998.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

OCT 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILMER DANIELS,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner, Social Security
Administration,

Defendant.

NO. 96-CV-784-M

ENTERED ON DOCKET

DATE OCT 23 1998

ORDER

This case is hereby reversed and remanded in accordance with the 10th Circuit Court of Appeals' ORDER AND JUDGMENT dated August 18, 1998 and filed in this Court on October 16, 1998.

SO ORDERED this 21st day of October, 1998.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 10-23-98

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PROCEEDS FROM THE SALE OF 3313
SOUTH ZUNIS AVENUE, TULSA,
OKLAHOMA, THE AMOUNT OF ONE
HUNDRED SEVENTY-FOUR
THOUSAND, NINETY-TWO AND
63/100 DOLLARS (\$174,092.63),

Defendant.

Case No. 98-CV-475-K(M) ✓

F I L E D

OCT 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

The following related motions are before the undersigned United States Magistrate Judge for report and recommendations: Motion to Dismiss Complaint for Forfeiture In Rem [Dkt. 9] filed by claimant, Frances M. Dodson and adopted by claimants Jack Dodson and Amy Dodson [Dkt. 26]; USA's Ex Parte Motion to Vacate Order for Disclosure for Limited Purpose [Dkt. 20]; Motion by Frances M. Dodson for Citation for Contempt Re Court Order of 9/2/98 [Dkt. 21]; and USA's Motion to Stay Proceedings [Dkt. 22].

BACKGROUND

Claimants Frances Dodson, Jack Dodson, and Amy Dodson seek dismissal of the instant civil forfeiture complaint for the government's failure to plead with the degree of specificity and particularity necessary to meet the stringent pleading requirements of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Supplemental Rules") which are applicable to this proceeding. On October 7, 1998,

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Frances M. Dodson filed a notice that she was withdrawing her claim to the Defendant Proceeds. [Dkt. 30]. The claims of Jack Dodson and Amy Dodson remain.

On July 2, 1998, the Government filed a civil forfeiture action against the proceeds from the sale of 3313 South Zunis Avenue, in the amount of \$174,092.63. The Government alleged the proceeds are subject to seizure and forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C) because they are traceable to proceeds of a violation of 18 U.S.C. § § 1341 (mail fraud) and 1344 (bank fraud). The complaint alleged that "pursuant to the attached affidavit of Robert Pruden, a Special Agent with the Federal Bureau of Investigation, who is assigned the responsibility of this case, probable cause exists that the defendant property is subject to forfeiture." [Dkt. 1, ¶ 4]. The affidavit was not attached to the complaint, it was filed separately under seal.

On July 29, 1998, claimant Frances Dodson filed her motion to dismiss which was later adopted by Jack and Amy Dodson. On August 28, 1998, 30 days after the motion to dismiss was filed and after briefing had been completed, the Government filed a *sealed* ex parte application for order allowing unsealing of affidavit of Robert Pruden in support of its complaint. [Dkt. 16]. The Court granted the order which unsealed the affidavit for the limited purpose of disclosure to Claimant Frances Dodson and her attorney. [Dkt. 17]. However, the order itself was sealed, so claimant had no notice of that order.

On September 9, after the entry of the order unsealing the affidavit and without first seeking leave to do so, the Government filed a reply to Claimant's reply brief in support of her motion to dismiss. In that "reply to reply" the Government advised that

the affidavit had been unsealed and argued that because Claimant now has access to the affidavit its complaint satisfied the Supplemental Rules. On September 14, without having disclosed the contents of the affidavit to Claimant, the Government filed *another* ex parte motion, this one seeking to vacate the order unsealing the affidavit. [Dkt. 20]. Also on September 14, the Government filed a motion to stay proceedings in the instant case pending conclusion of a related case, *USA v. Steve Martin Clayton Dodson*, Case No. 98-CR-27-C.

Claimant also filed a motion on September 14, 1998. Claimant's motion advised that upon receiving the Government's "reply to reply", her attorney personally went to the United States Attorney's office and requested a copy of the now unsealed affidavit from Assistant United States Attorney Catherine Depew. AUSA Depew refused to produce a copy of the affidavit stating that the government was going to seek a stay of the case. Claimant Francis Dodson seeks a citation for contempt against AUSA Depew for having knowingly, willfully and contemptuously disobeyed and violated a lawfully issued order of the court. [Dkt. 21]. Since Francis Dodson has withdrawn her claim, the undersigned United States Magistrate Judge recommends that the request for contempt [Dkt. 21] be denied as moot.

The undersigned United States Magistrate Judge conducted a hearing on the motion to dismiss on September 15, 1998.

MOTION FOR STAY OF PROCEEDINGS

The Government has moved to stay proceedings in this case pending the outcome of the criminal case against Steven Martin Clayton Dodson, Case No. 98-CR-

27-C. The Government's request is supported by the Declaration of Assistant United States Attorney, Kenneth P. Snoke, who is responsible for the criminal case. [Dkt. 23]. AUSA Snoke states that discovery sought by claimants in this civil forfeiture action could be detrimental to the prosecution of the federal criminal case in that law enforcement agents may be required to disclose confidential information not otherwise available to the defense. In particular, he points to pages 6 through 18 of the affidavit of Robert Pruden which discloses FBI agent interviews with four victim witnesses and information received from two other witnesses scheduled to testify at the criminal trial. Under the Jencks Act, 18 U.S.C. § 3500, the defendant in the criminal case could not otherwise obtain this information until the trial.

The Government's brief in support of its request for stay cites a number of cases in which stays were granted in civil cases where parallel criminal cases were pending. The cases cited are not analogous. Here it is the Government that has instigated the civil action and the Government which seeks a stay. However, in some of the cited cases the civil action was instigated by the non-government party and used specifically to obtain discovery of the criminal case. In others, the request for stay came from the non-government party. *U.S. v. Kordel*, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970)(corporate defendant in simultaneous civil and criminal litigation requested stay); *United States v. Little Al*, 712 F.2d 133 (5th Cir. 1983)(owner of seized vessels sought stay pending appeal of drug conviction); *U.S. v. U.S. Currency*, 626 F.2d 11 (6th Cir. 1980)(defendant in forfeiture case sought protective order from government civil discovery); *Texaco v. Borda*, 383 F.2d 607 (3d Cir. 1967)(individual

plaintiff in civil antitrust suit asked for stay pending outcome of criminal action); *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962) (in tax refund case, government sought stay of discovery from individual plaintiffs who were using civil discovery as tactical maneuver to gain information on criminal case); *May v. United States*, 515 F.Supp 600 (S.D. Ohio 1981)(did not involve the court's issuance of a stay, but concern over unreasonable delay on behalf of government); *McSurely v. McClellan*, 426 F.2d 664 (D.C.Cir. 1970)(government moved for stay in declaratory judgment action brought by individuals indicted in related criminal case); *United States v. Bridges*, 86 F.Supp. 931 (N.D. Cal. 1949)(court stayed de-naturalization proceedings during pendency of criminal proceedings).

The Court is unpersuaded that criminal discovery limitations require the entry of a stay. While there is the *potential* for a conflict between civil and criminal discovery to arise, the threat is not concrete, as there have been no requests for discovery in this case. Indeed, the Claimants have yet to be provided the bare facts necessary to enable them to formulate intelligent discovery. Similarly, the Government's concern that this proceeding will impinge on the criminal defendant's Fifth Amendment right against self incrimination is of no merit here. The criminal defendant, Steven Martin Clayton Dodson, has not asserted a claim.

Although forfeiture is sought in this case under the general civil forfeiture statute, 18 U.S.C. § 981, the Government argues that the action should be stayed because 21 U.S.C. § 881(i) provides for a stay of proceedings when a related indictment is pending. The Government states that § 881 shows congressional intent

to grant stays of forfeiture cases pending criminal prosecution. However, the provisions of 21 U.S.C. § 881 address only civil forfeitures for property used in, or purchased with, the proceeds of drug trafficking. Section 881 does not purport to affect civil forfeitures which are not related to drug charges. And, since the general forfeiture statute does not contain a similar provision, one cannot infer the congressional intent the Government imagines to exist. If the inclusion of a stay provision in § 881 says anything about congressional intent, it speaks loudly of the complete absence of congressional preference for stays in non-drug related cases.

Finally, in considering the Government's request for stay the Court is guided by the Tenth Circuit's comments in *\$39,000 in Canadian Currency* that where the Government has opted for civil proceedings, "the Government may not be heard to urge considerations going to the criminal nature of the underlying circumstances." *Id.* at 1219. Although the Tenth Circuit made that statement in the context of considering the sufficiency of a forfeiture complaint, the statement is particularly apropos to the Government's request for stay.

The Government seized the subject \$174,092.63 and seeks to hold it via this case. However, as will be discussed with regard to the motion to dismiss, the Government has not complied with the pleading and notice requirements necessary to maintain this action. But the Government wants neither dismissal of its case nor disclosure of the affidavit, so the Government seeks to stay the case, asserting that the Claimant is not likely to be prejudiced by such a stay. However, as the Court sees it, staying the case would unfairly prejudice the claimants and permit the Government

to hold the subject property without having met the very pleading and notice requirements designed to "curb excesses of government power and afford property owners some protection from the harshness of a forfeiture's attendant sanctions." *384-309 West Broadway*, 964 F.2d 1247; *\$39,000 in Canadian Currency*, 801 F.2d at 1218.

The undersigned United States Magistrate Judge finds that the Government has not demonstrated the necessity of a stay. Moreover, a stay would permit the Government to do indirectly what it cannot accomplish directly. Accordingly, the undersigned recommends that the Government's motion for stay be denied.

MOTION TO DISMISS

18 U.S.C. § 981(b)(2) provides that property subject to forfeiture shall be seized pursuant to process issued under the Supplemental Rules for certain Admiralty and Maritime Claims ("Supplemental Rules"). The Supplemental Rules are part of the Federal Rules of Civil Procedure. According to the Supplemental Rules, a complaint in an in rem action:

shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading."

Fed.R.Civ.P. E(2)(a).

The Tenth Circuit has firmly rejected the argument that notice pleading will satisfy the requirements of Rule E(2)(a). *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1216 (10th Cir. 1986). The Court stated that Rule E(2)(a)

requires a particularized complaint because of the drastic nature of an in rem forfeiture. *Id.* at 1216, 1218. The requirement "is not merely a procedural technicality." *United States v. Pole No. 3172, Hopkinton*, 852 F.2d 636, 638 (1st Cir. 1988). It "is a significant legal rule designed to curb excesses of government power and afford property owners some protection from the harshness of a forfeiture's attendant sanctions." *United States v. One Parcel or Real Property With The Building, Appurtenances, and Improvements Known as 384-309 West Broadway, South Boston, Massachusetts*, 964 F.2d 1244, 1247 (1st Cir. 1992). In other words, the Rule is a way of ensuring that the government does not seize and hold, for a substantial period of time, property to which, in reality, it has no legitimate claim. *Pole No. 3172*, 852 F.2d at 638.

It is well-established that the particularity lacking in a complaint can be supplied by supporting affidavits and other documentation attached to the complaint. See *United States v. One Parcel or Real Property With The Building, Appurtenances, and Improvements Known as 384-309 West Broadway, South Boston, Massachusetts*, 964 F.2d 1244, 1247 (1st Cir. 1992); *United States v. Premises and Real Property at 4492 South Livonia Road, Livonia, New York*, 889 F.2d 1258, 1266 (2nd Cir. 1989); *Pole No. 3172*, 852 F.2d at 629-40. The particularity requirement will be met as long as the facts "clearly appear so that all persons potentially interested in the property will be afforded fair notice of the sovereign's position and intention." *384-390 West Broadway*, 964 F.2d at 1248.

In the instant case Robert Pruden's affidavit provides ample detail to satisfy the particularity requirement of Rule E(2)(a). However, the affidavit satisfies the rule only if it is disclosed.

The Government has provided no relevant authority to support its contention that a sealed affidavit will satisfy Rule E(2)(a). *United States v. One Parcel of Real Property Described as Lot 41, Berryhill Farm Estates*, 128 F.3d 1386 (10th Cir. 1998) does not support the Government's position. In *Berryhill Farm Estates*, the Government sought in rem forfeiture of the home and personal property of Tommy Lee Dunmore. The complaint was supported by an affidavit filed under seal. Dunmore moved for disclosure of the affidavit. The Government asserted that the affidavit contained information pertaining to an ongoing criminal investigation and its disclosure could jeopardize the investigation. Then, *Dunmore* moved to stay the in rem proceeding, asserting that as long as there was a threat of criminal prosecution, participation in civil discovery might jeopardize his Fifth Amendment right against self-incrimination. The Court granted the stay which remained in effect until after Dunmore was indicted, tried, convicted, and sentenced for conspiracy and attempt to distribute cocaine, distribution of cocaine, income tax evasion, and money laundering. The real property was criminally forfeited. Following Dunmore's conviction and sentencing in the criminal action, the Government resumed its prosecution of the civil action as to the remaining personal property. On the same day it moved to lift the stay, the Government filed a motion for partial summary judgment which clearly and particularly informed Dunmore of the basis of its forfeiture claim.

On these facts, the Tenth Circuit rejected Dunmore's contention that the Government's conduct in prosecuting the civil forfeiture was fundamentally unfair and violated due process. The Court found that although the complaint was not sufficiently particular on filing, the Government's motion for partial summary judgment and its attachments satisfied the particularity requirement. "[A]t the very moment the stay was lifted, Dunmore had all of the information which a more particularized complaint would have provided." *Id.* at 1397. The Court specifically noted that "during the pendency of the stay *requested by Dunmore*, the United States was under no duty to file a more particularized complaint and Dunmore was not disadvantaged because he was not obligated to actively defend the action." *Id.* [emphasis supplied]. It stressed that its conclusion was based on "the particular facts of this case." *Id.* For the purposes of the present case, it is of particular note that the Tenth Circuit did not approve, or even address, the use of a sealed affidavit to satisfy the particularity requirement.

The Tenth Circuit has indicated its unwillingness to permit the concerns specific to criminal investigations to override the requirements of the rules applicable to civil forfeiture cases. In *\$39,000 in Canadian Currency*, the Tenth Circuit was faced with the Government's argument that requiring more than notice pleading in civil forfeiture cases would impede its ability to conduct criminal investigations and prosecutions by possibly revealing sensitive information and jeopardizing investigations. The Tenth Circuit noted that the government opted for civil proceedings with relatively lax procedural protections instead of the more stringent requirements of criminal forfeiture.

Having done so, "the Government may not be heard to urge considerations going to the criminal nature of the underlying circumstances." *Id.* at 1:219.

In this case the Government argues:

[T]he Supplemental Rules for Certain Admiralty and Maritime Claims, Rules C(2) and E(2)(a) have been met by the complaint and the accompanying affidavit, which was filed under seal. The complaint and sealed affidavit set forth sufficient facts to show that the defendant proceeds are subject to forfeiture.

[Dkt. 14, p. 1]. The complaint in the instant case provides absolutely no factual information that would support a reasonable inference that the subject proceeds were traceable to proceeds of a violation making the funds subject to forfeiture. Nor does the complaint provide a reasonable starting point from which to begin a meaningful investigation of the government's allegations.

The Government has not cited, and this court has not found any case holding that the filing of a sealed affidavit will satisfy the particularity requirements of Rule E(2)(a). The Government's argument that its sealed affidavit satisfies Rule E(2)(a) is directly contrary to the great body of case law finding the Rule to be "a significant legal rule designed to curb excesses of government power and afford property owners some protection from the harshness of a forfeiture's attendant sanctions." 384-309 *West Broadway*, 964 F.2d 1247; *\$39,000 in Canadian Currency*, 801 F.2d 1218. Consequently, the undersigned United States Magistrate Judge finds the complaint fails to meet the pleading standard set out in Rule E(2)(a).

MOTION TO VACATE ORDER FOR DISCLOSURE FOR LIMITED PURPOSE

On the Government's ex parte request, the Court ordered Robert Pruden's affidavit "unsealed for the limited purpose of disclosure to claimant, Frances Dodson and the attorney for Claimant." [Dkt. 17-sealed]. Subsequently, the Government filed another ex parte motion asking the Court to vacate its order unsealing the affidavit. The motion relies on the Declaration of Assistant United States Attorney Kenneth P. Snoke. AUSA Snoke states that disclosure should not be allowed pending conclusion of the criminal case because the affidavit includes matters which are sealed and which could compromise the criminal prosecution. Those matters are FBI agent interviews with four victim witnesses and information received from two other witnesses scheduled to testify at the criminal trial. [Dkt. 23]. AUSA Snoke also makes reference to the defendant's request for continuance of the criminal trial until January 1999. Senior Judge Cook *denied* the defendant's request for continuance of the criminal trial on September 16, 1998. [See Dkt. 16 in Case No. 98-CR-27-C]. Trial of the criminal case commenced as scheduled on October 7, 1998.

On the basis of the information before it, the Court is not in a position to evaluate AUSA Snoke's claim that disclosure of the affidavit could compromise the criminal prosecution. However, the Government is in a position to weigh the relative importance of properly maintaining the civil forfeiture action in compliance with Rule E(2)(a) against the potential compromise of the criminal prosecution. And, the Government has already made the choice to seize the subject \$174,092.63 on the basis of the information contained in the affidavit. Having made that choice, the

Government should not be permitted to hide the affidavit information behind the claim that disclosure could compromise prosecution of the criminal case. Nor should further procedural machinations on the Government's behalf allow it to obtain a *de facto* continuance. Accordingly, the undersigned recommends that the Claimants' Motion to Dismiss be granted unless the affidavit of Robert Pruden is filed of record within two days of the Court's acceptance of this recommendation. This disposition makes the Motion to Vacate the Order For Disclosure for Limited Purpose [Dkt. 20] moot.

CONCLUSION

In accordance with the foregoing findings, the undersigned United States Magistrate Judge RECOMMENDS that the following orders be entered:

- (1) CLAIMANTS' MOTION TO DISMISS COMPLAINT FOR FORFEITURE IN REM [Dkt. 9] is GRANTED, unless the affidavit of Robert Pruden is filed of record within two days of the date of this order.
- (2) USA'S EX PARTE MOTION TO VACATE ORDER FOR DISCLOSURE FOR LIMITED PURPOSE [Dkt. 20] is MOOT.
- (3) USA'S MOTION TO STAY PROCEEDINGS [Dkt. 22] is DENIED.
- (4) MOTION BY CLAIMANT FRANCES M. DODSON FOR CONTEMPT CITATION [Dkt. 21] is MOOT.

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 21st Day of October, 1998.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 23 Day of October, 1998.

L. Schwelke

ENTERED ON DOCKET
DATE 10-23-98

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

F I L E D

OCT 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KAWASAKI VILLAGE, INC.,
d/b/a DICK LANE'S OF GRAND LAKE,
an Oklahoma Corporation,

Plaintiff,

vs.

KAWASAKI MOTORS CORPORATION, USA,
a Delaware corporation; and
TOD HAMMOCK, individually,

Defendants.

Case No. 98-CV-581-K(J)

REPORT AND RECOMMENDATION

Defendants removed this case from Delaware County, Oklahoma by filing a notice of removal on August 6, 1998. See 28 U.S.C. § 1441(a) and 1446. Defendants allege that 28 U.S.C. § 1332(a) provides the Court with subject matter jurisdiction over Plaintiff's claims. See Doc. No. 1. That is, Defendants argue that the citizenship of the parties is diverse and that the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

Now before the Court is Plaintiff's "Objection to Removal." [Doc. No. 9]. The Court has previously determined that Plaintiff's objection will be treated as a motion to remand this case to state court. See Doc. No. 11 and 28 U.S.C. § 1447(c). The undersigned held a hearing on Plaintiff's motion on October 6, 1998 and received evidence and testimony at the hearing. Plaintiff argues that the Court lacks subject matter jurisdiction under § 1332(a) because the amount in controversy does not

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exceed \$75,000.00, exclusive of interest and costs. For the reasons discussed below, the undersigned finds that Defendants have failed to establish that the amount in controversy in this case exceeds \$75,000.00. Consequently, the undersigned recommends that Plaintiff's motion to remand be **GRANTED**.^{1/}

I. **SUMMARY OF THE EVIDENCE**

In March 1994, Plaintiff and Kawasaki Motors Corporation, USA ("Kawasaki Motors") entered into a Dealer Sales and Service Agreement ("the Dealer Agreement") which authorized Plaintiff as a franchise dealer of Kawasaki watercraft in Ketchum, Oklahoma. See Doc. No. 4, Exhibit 1 for an excerpted copy of the agreement. Plaintiff alleges that at some time after the Dealer Agreement was executed, Tod Hammock, the disclosed agent of Kawasaki Motors, made certain representations to Richard Lane, principal shareholder of the Plaintiff corporation.

Mr. Hammock allegedly made the following representations: (a) that Kawasaki Motors would continue its relationship with Plaintiff as an authorized franchise dealer of Kawasaki watercraft; and (b) that Kawasaki Motors would authorize Plaintiff as a franchise dealer of Kawasaki motorcycles, all terrain vehicles and other landcraft. Based on these representations, Plaintiff alleges that it designed and built a new facility to accommodate the expanding franchise and relocated its business from Ketchum,

^{1/} Plaintiff is an Oklahoma corporation with its principal place of business in Oklahoma. Defendant, Tod Hammock, is a domiciliary of Oklahoma. Plaintiff argues that the parties are, therefore, not diverse because Mr. Hammock is a necessary party to this litigation. Defendants argue that Mr. Hammock has been fraudulently joined to destroy diversity jurisdiction. Because the undersigned finds that § 1332(a)'s amount in controversy requirement is not satisfied, the undersigned will not address § 1332(a)'s diversity requirement.

Oklahoma to Grand Lake. Plaintiff further alleges that it incurred advertising and promotional expenses based in part on Mr. Hammock's representations that Plaintiff would be a dealer of Kawasaki products. Plaintiff argues that Mr. Hammock's representations, all of which occurred after the Dealer Agreement was entered into, establish a separate contract which is enforceable against Kawasaki Motors.

In February 1998, Kawasaki Motors notified Plaintiff that Kawasaki Motors had decided to terminate the Dealer Agreement. Kawasaki Motors did in fact terminate the agreement sometime in April 1998. Kawasaki Motors also refused to authorize Plaintiff to sell Kawasaki landcraft. Plaintiff alleges that these actions by Kawasaki Motors constitute a breach of the agreement which was formed when Mr. Hammock made certain representations to Mr. Lane.

In the Petition filed in Delaware County, Oklahoma, Plaintiff asked for the following relief: "As a result of the breach of Kawasaki and their failure to perform as agreed and relied upon by the Plaintiff, the Plaintiff has been damaged in excess of \$10,000.00." Doc. No. 1, Petition attached to Notice of Removal, ¶ 10. Defendants filed a Notice of Removal. In the notice, Defendants allege that "[t]he preponderance of the evidence . . . establishes that the amount in controversy exceeds \$75,000." Id. Notice of Removal, ¶ 13. The only fact offered by Defendants as support for this allegation is that it cost Plaintiff more than \$75,000.00 to build its new facility at Grand Lake.

In support of its motion to remand, Plaintiff offered an Affidavit executed by Richard Lane, Plaintiff's principal shareholder. Mr. Lane states as follows in his

Affidavit: "Affiant further alleges and states and would show the Court that a formal offer of settlement has been made for a sum substantially less than \$75,000 and Affiant agrees to be bound by any subsequent recovery, whether by settlement or court or jury verdict, or through remittitur, of a sum less than \$75,000." Doc. No. 9, Exhibit 1, ¶ 6. Plaintiff's counsel reiterated Plaintiff's intention to seek less than \$75,000 at the October 6th hearing.

The undersigned received evidence and testimony at the October 6th hearing. This evidence confirms that Plaintiff did in fact build at Grand Lake an 8,000 sq. ft. retail facility at a cost of at least \$352,530.00 and a 4,000 sq. ft. warehouse facility at a cost of at least \$63,915.00. Thus, the retail facility was built at a cost of approximately \$44/sq. ft., and the warehouse space was built at a cost of approximately \$16/sq. ft. The testimony of Mr. Hammock established that to be a "full line" dealer of Kawasaki products (i.e., a dealer of land and water craft) in a rural area such as Grand Lake, the dealer should devote approximately 2,800 sq. ft. to retail space and 700 sq. ft. to warehouse space. See Exhibit 6 admitted at the October 6th hearing. Mr. Hammock admits that these are just guidelines and that dealers often mingle several product lines at their facilities.

According to Mr. Hammock, the guidelines establish that of the \$352,530.00 spent on retail space, \$123,200.00 (i.e., \$44 * 2,800 sq. ft.) of that new retail space would have been devoted to Kawasaki products, and that of the \$63,915.00 spent on warehouse space, \$11,200.00 (i.e., \$16 * 700 sq. ft.) of that new warehouse space would have been devoted to Kawasaki products. Thus, Defendants argue that

if Plaintiff is correct that it built an expanded facility based in part on representations made by Mr. Hammock, than the cost of the expanded facility related to Kawasaki products would have been at least \$134,400.00, which is well in excess of \$75,000.00. These figures are, however, highly speculative in light of the fact that it is not known exactly how the new facility would have been utilized. Mr. Hammock's figures are also based simply on Kawasaki Motors' guidelines.

Mr. Lane testified that Plaintiff was not seeking to be reimbursed for the cost of the new facility because Plaintiff is capable of and does use the new facility to sell product lines other than Kawasaki. Given the fact that Plaintiff owns the new facility and that the testimony established that the building would have a life span of approximately 20 years, it is highly unlikely that Plaintiff would be entitled to the full cost of constructing that portion of the facility that would be devoted to Kawasaki products. At most, Plaintiff argued that it would only seek to recover something less than one year's worth of depreciated value on that portion of the building dedicated to Kawasaki products (i.e., $\$134,400.00/20$ or $\$6,720.00$). Mr. Lane testified that what Plaintiff really wants is to recover the gross annual income that Plaintiff would have made on the full Kawasaki product line during the first year, if Plaintiff had been permitted to deal in Kawasaki products. Prior to building the new facility, Mr. Lane estimated the gross annual income from the sale of Kawasaki products at \$50,000.00. Defendants offered no evidence to rebut Mr. Lane's estimate of gross annual income.

There was some evidence that Plaintiff mitigated the damages it suffered as a result of Kawasaki Motors' alleged breach of contract. Plaintiff mitigated its damages

by obtaining landcraft dealership agreements from manufacturers other than Kawasaki. The evidence established, however, that some of this mitigation occurred after the state petition and some occurred after the Notice of Removal was filed. Thus, the new, mitigating contracts did not exist when the state petition was filed. The undersigned will, therefore, not consider this evidence because the critical issue is the value of the Plaintiff's claim at the time its state petition was filed. Acts occurring after a claim is filed that reduce the value of the claim are not relevant to the jurisdictional inquiry. St. Paul Mercury v. Red Cab Co., 303 U.S. 283, 293 (1938).

II. DISCUSSION

Removal of an action properly lodged in state court is by no means automatic. Removal from state to federal court is a statutory creature governed by 28 U.S.C. § 1441-1452. The removal statutes are to be strictly construed and all doubts are to be resolved in favor of remand and against removal. Moreover, there is a presumption against removal jurisdiction. The party seeking to remove the case from state to federal court has the burden of establishing that the federal court has subject matter jurisdiction. Fajen v. Foundation Reserve Ins. Co., 683 F.2d 331, 333 (10th Cir. 1982); Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995).

Defendants allege that this Court has diversity jurisdiction under 28 U.S.C. § 1332(a). Consequently, Defendants have the burden of establishing that the amount in controversy in this case exceeds \$75,000.00, exclusive of interest and cost.

Ordinarily, the amount in controversy is to be determined by the allegations in the plaintiff's state court petition. Where the allegations in the state petition are not

dispositive, then the amount in controversy is determined by looking to the allegations in the notice of removal. Laughlin, 50 F.3d at 873; Lonnquist v. J.C. Penny Co., 421 F.2d 597, 599 (10th Cir. 1970) (citing several cases). The courts of appeal have split on which burden of proof to apply to determine if the defendant has satisfactorily established the amount in controversy in his notice of removal. At least three distinct standards have emerged. See Jack E. Karns, Removal to Federal Court and the Jurisdictional Amount in Controversy Pursuant to State Statutory Limitations on Pleading Damage Claims, 29 Creighton L. Rev. 1091 (1996).

The United States Court of Appeal for the Eleventh Circuit holds that a defendant is required to establish to a legal certainty that the plaintiff would, if successful, recover more than \$75,000.00 – the legal certainty test. The United States Court of Appeal for the Sixth Circuit holds that a defendant is required to establish that it is more likely than not that plaintiff's damages will exceed \$75,000.00 – the preponderance of the evidence test. See Gafford v. General Electric Co., 997 F.2d 150 (6th Cir. 1993). The United States Courts of Appeal for the Third and Seventh Circuits hold that a defendant is required to establish that there is a reasonable probability that the plaintiff's damages will exceed \$75,000.00 – the reasonable probability test. See Angus v. Shiley, Inc., 989 F.2d 142 (3d Cir. 1993);

Shaw v. Dow Brands, Inc., 994 F.2d 364 (7th Cir. 1993).^{2/} The Tenth Circuit has not addressed the issue.

Defendants have argued that the preponderance of the evidence standard should be applied. Plaintiffs have offered no authority or argument against use of the preponderance standard. The undersigned will, therefore, apply the preponderance of the evidence standard in this case. Using this test, the undersigned finds that Defendants have not met their burden.

According to the Tenth Circuit, the requisite amount in controversy must be affirmatively established on the face of either the state petition or the notice of removal. Laughlin, 50 F.3d at 873. When the state petition fails to affirmatively establish the amount in controversy, this Court has held that Laughlin requires the removing defendant to set forth in its notice of removal (1) its good faith belief that the amount in controversy is in excess of \$75,000.00, and (2) specific factual allegations which form the basis of the defendant's good faith belief. Conclusory allegations by the removing defendant are not sufficient. Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351, 353 (N.D. Okla. 1995); Maxon v. Texaco Refining and Marketing, Inc., 905 F. Supp. 976, 977-78 (N.D. Okla. 1995).

Plaintiff's state petition does not affirmatively establish the amount in controversy. Plaintiff's state petition simply seeks damages in excess of \$10,000.00.

^{2/} The Fifth Circuit has adopted a hybrid standard. If the plaintiff's state petition specifically requests an amount in excess of \$75,000.00, and if, in a motion to remand, the plaintiff attempts to demonstrate that the amount in controversy is actually less than \$75,000.00, then the legal certainty test is used. If, however, the plaintiff's state petition does not allege a specific amount in controversy, then the preponderance of the evidence test will be used. DeAguilar v. Boeing Co., 47 F.3d 1404, 1409 (5th Cir. 1995).

Plaintiff's counsel argues that the state petition was drafted in this manner because at the time the petition was filed, the extent of Plaintiff's damages were unknown.^{3/} Defendants' Notice of Removal also does not contain factual allegations which affirmatively establish that the amount in controversy is in excess of \$75,000.00. Defendants' Notice of Removal contains a conclusory allegation that Plaintiff's damages must exceed \$75,000.00 because Plaintiff built a new facility at a cost of more than \$75,000.00. The Notice of Removal itself contains no factual allegations which would even establish the value of the new facility. Thus, Defendants' Notice of Removal is insufficient under Laughlin.

At the October 6th hearing on Plaintiff's motion to remand, Defendants appeared with several exhibits and witnesses, which they intended to offer to prove that the amount in controversy in this case exceeds \$75,000.00. The undersigned received the evidence to preserve the record. However, the parties offered no authority which would establish that the Court can consider evidentiary materials

^{3/} Because this is a contract action, Defendants argue that Plaintiff was required by 12 Okla. Stat. § 2008(A)(2) to plead a specific dollar amount as damages. Section 2008(A)(2) provides as follows:

Every pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000.00) shall, without demanding any specific amount of money, set forth only that the amount sought as damages is in excess of Ten Thousand Dollars (\$10,000.00), except in actions sounding in contract. Every pleading demanding relief for damages in money in an amount of Ten Thousand Dollars (\$10,000.00) or less shall specify the amount of such damages sought to be recovered.

12 Okla. Stat. § 2008(A)(2). Defendants have offered no authority construing this language. The undersigned does not read this language as narrowly as do Defendants. Section 2008(A)(2) permits a plaintiff in a contract action to plead a specific amount if he so chooses (i.e., he is not bound by the "in excess of \$10,000.00" language). Section 2008(A)(2) does not, however, require that a specific dollar amount be plead in contract actions, especially when the damages are not liquidated, as in this case.

which are not in the record on the date the Notice of Removal is filed.^{4/} Plaintiff, however, did not object to the Court's consideration of Defendants' evidence. In fact, Plaintiff itself submitted evidence in the form of Mr. Lane's Affidavit after the notice of removal. Thus, both parties have urged the Court to consider evidence that was not in the record on the date Defendants' Notice of Removal was filed.

Even if the evidence submitted after the Notice of Removal can be considered, the undersigned finds that Defendants have not cured the defect in their Notice of Removal. The undersigned has reviewed and summarized in section I, *supra*, the relevant evidence submitted by the parties subsequent to the Notice of Removal. Taking all of the evidence together, the undersigned finds that Defendants have not carried their burden of establishing by a preponderance of the evidence that the amount in controversy in this case is in excess of \$75,000.00.

RECOMMENDATION

Defendants' Notice of Removal does not affirmatively establish by a preponderance of the evidence that the amount in controversy in this case is in excess of \$75,000.00, and the evidentiary materials and testimony offered by Defendants do not cure the defect in Defendants' Notice of Removal. Consequently, the undersigned recommends that Plaintiff's motion to remand (doc. no. 9) be **GRANTED**

^{4/} See, e.g., St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 293 (1938) (holding that "events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's [removal] jurisdiction once it has attached").

and that this case be remanded to the state court because this Court lacks subject matter jurisdiction.

OBJECTIONS^{5/}

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

Dated this 23 day of October 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 23 Day of October, 1998.


Sam A. Joyner
United States Magistrate Judge

^{5/} While this report and recommendation is subject to *de novo* review by a District Judge under 28 U.S.C. § 636 and Fed. R. Civ. P. 72, the undersigned notes that an order remanding a case to a state court for lack of subject matter jurisdiction is a non-reviewable order. See 28 U.S.C. § 1447(d); and Archuleta v. LaCuesta, 131 F.3d 1359, 1362 (10th Cir. 1997).

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

ENTERED ON DOCKET

DATE 10-22-98

HAROLD D. HORNSBY,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION,)
)
 Respondent.)

No. 98-CV-778-K (E)

FILED
10-22-98
P

**ORDER TRANSFERRING PETITION FOR WRIT OF HABFAS CORPUS TO
TENTH CIRCUIT COURT OF APPEALS**

On October 8, 1998, Petitioner, a state inmate appearing *pro se*, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his conviction entered in Tulsa County District Court, Case No. CRF-92-170.

A review of Petitioner's previous case filings reveals that he has in the past filed another habeas corpus action in this Court challenging this same conviction.¹ The Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996), instituted a "gatekeeping" procedure for second or successive habeas petitions. Pursuant to 28 U.S.C. § 2244(b)(3)(A), as amended by the AEDPA, a petitioner must first seek authorization from the Court of Appeals before filing a second or successive habeas petition in the District Court. In determining what is a "second or successive" petition under the statute, the "abuse of the writ" standard in effect before the AEDPA was enacted should be used. Reeves v. Little, 120 F.3d 1136 (10th Cir. 1997). Abuse of the writ required dismissal of a petition which "(1) 'successively' repeats claims previously

¹See Case No. 95-CV-940-B.

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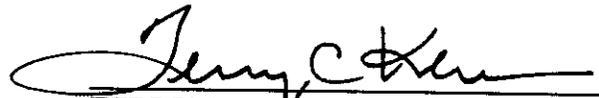
decided on the merits, or (2) 'abusively' asserts new ground unjustifiably omitted from a prior petition." Id., at 1139 (quoting Watkins v. Champion, 39 F.3d 273, 275 (10th Cir. 1994)).

Under the "abuse of the writ" standard, the Court finds that Petitioner's claims in the instant action constitute a second or successive petition filed in this Court given the Court's previous consideration of Petitioner's claims challenging his conviction in CRF-92-170. See Reeves, 120 F.3d at 1139. However, Petitioner has failed to seek authorization from the Court of Appeals before filing his petition in this Court. See 28 U.S.C. § 2244(b)(3)(A). When a petitioner fails to comply with this requirement, the District Court should transfer the habeas petition to the Court of Appeals in the interest of justice pursuant to 28 U.S.C. § 1631. Coleman v. United States, 106 F.3d 339 (10th Cir. 1997).

Therefore, in the interest of justice and pursuant to 28 U.S.C. §§ 1631 and 2244(b)(3)(A), the Court finds that Petitioner's petition for a writ of habeas corpus should be transferred to the Tenth Circuit Court of Appeals for authorization.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's petition for a writ of habeas corpus is **TRANSFERRED** to the Tenth Circuit Court of Appeals for authorization.

SO ORDERED THIS 21 day of October, 1998.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED
Phil Landford, Clerk
U.S. District Court

PENNWELL PUBLISHING COMPANY,)
et al.,)
)
Plaintiffs,)
)
vs.)
)
UNITED STATES OF AMERICA,)
et al.,)
)
Defendants.)

No. 97-C-1139-K

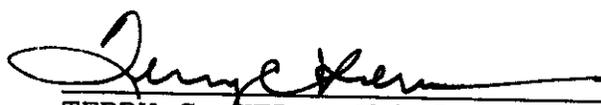
ENTERED ON DOCKET
DATE 10-22-98

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 21 day of October, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

DATE 10-22-98

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

FILED
10-22-98
PC

WANDA SOUTHARD,)
)
 Plaintiff,)
)
 vs.)
)
 TOWER MARKETING, INC.,)
)
 Defendant.)

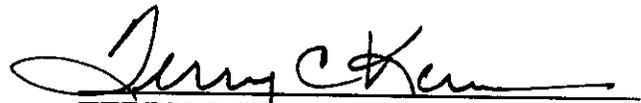
No. 97-CV-778-K ✓

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised that the parties to this action have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. 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 21 day of October, 1998.


**TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE**

ENTERED ON DOCKET
DATE 10-22-98

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

TONI YUNG,

Plaintiff,

vs.

WESTERN STATES FIRE
PROTECTION CO., d/b/a
NATIONAL FIRE SUPPRESSION,

Defendant.

No. 98-CV-114-K ✓

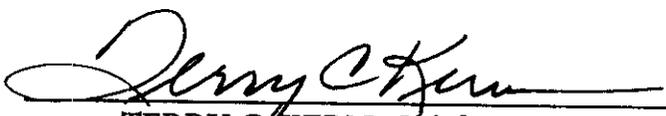
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OCT 22 1998
P
CLERK

AMENDED JUDGMENT

This matter came before the Court for consideration of the Defendant's, Western States Fire Protection Co., Motion to Dismiss. The issues having been duly considered and a decision having been rendered in accordance with this Court's Order, the Court finds the Motion to Dismiss is appropriate in favor of Western States Fire Protection Co.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Western States Fire Protection Co. and against the Plaintiff Toni Yung. This Judgment supercedes and amends the Judgment entered on October 13, 998.

ORDERED this 21 day of October, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

12

ENTERED ON DOCKET
DATE 10-22-98

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

KENNETH DEAN,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

No. 97-CV-658-K ✓

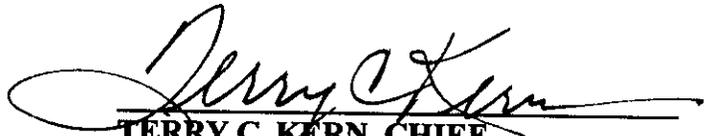
FILED
10-22-98
Clerk

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised that the parties to this action have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. 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 21 day of October, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

FILED
10-22-98
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT L. GLOVER,)
)
Petitioner,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Respondent.)

No. 98-CV-779-K (M)

ENTERED ON DOCKET
DATE 10-22-98

ORDER

On October 8, 1998, Petitioner, a federal prisoner in the custody of the United States Medical Center for Federal Prisoners at Springfield, Missouri, filed a motion for leave to proceed in forma pauperis and a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging his conviction, entered in Case No. 89-CR-56-E, for conspiracy to possess with intent to distribute methamphetamine and distribution of methamphetamine. In reliance upon the representations and information set forth in Petitioner's motion, the Court concludes that Petitioner should be granted leave to proceed in forma pauperis. Before reviewing the merits of the petition, however, the Court must determine whether Petitioner properly filed this petition for habeas corpus relief under § 2241.

Section 2241 is intended to provide a remedy for challenges to the execution of a sentence while § 2255 provides the "exclusive remedy for testing the validity of a judgment and sentence, unless it is inadequate or ineffective." Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996). Furthermore, § 2255 itself prohibits a sentencing court from entertaining a prisoner's § 2255 motion if the sentencing court has already denied a § 2255 motion "unless it also appears that the remedy by [section 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255. However, the mere denial of a prisoner's § 2255 motion by the sentencing court does not,

in itself, demonstrate that the remedy is inadequate or ineffective. Williams v. United States, 323 F.2d 672, 673 (10th Cir. 1963); see also Tripathi v. Henman, 843 F.2d 1160, 1162 (9th Cir. 1987).

In this case, Petitioner has in the past filed at least two motions pursuant to 28 U.S.C. § 2255, each challenging his conviction entered in Case No. 89-CR-56-E. The Court denied the requested relief as to the motion filed March 19, 1991. Petitioner appealed and, on June 17, 1992, the Tenth Circuit Court of Appeals affirmed. On October 25, 1995, Petitioner filed a petition for writ of habeas corpus pursuant to § 2241 challenging the same conviction. The Court construed that petition as a § 2255 motion and, on remand from the Tenth Circuit Court of Appeals, dismissed the motion based on the “abuse of the writ” doctrine. On August 11, 1998, the Tenth Circuit affirmed the dismissal.

In the § 2241 petition currently before the Court, Petitioner does not challenge the execution of his sentence. Instead, he again challenges the validity of the judgment entered against him in Case No. 89-CR-56-E by claiming that the Tenth Circuit erred in affirming the dismissal of his “second” § 2255 motion since it had been originally filed as a § 2241 petition, that he received ineffective assistance of trial counsel¹ and that he has not been afforded an evidentiary hearing on the methamphetamine structural issue in violation of his due process rights. As stated supra, § 2255 provides the exclusive remedy for Petitioner’s challenge to the judgment. However, because relief has been denied on his claims previously raised pursuant to § 2255, Petitioner now claims that the remedy provided by § 2255 is “inadequate or ineffective” entitling him to proceed under § 2241. The Court finds Petitioner’s argument is without merit. The Tenth Circuit has expressly held “habeas

¹Petitioner claims his counsel provided ineffective assistance when he failed to challenge Petitioner’s sentence based on the government’s lack of proof regarding whether the methamphetamine was D-methamphetamine or L-methamphetamine.

corpus is not an additional, alternative, or supplemental remedy, to the relief afforded by motion in the sentencing court under § 2255.” Williams, 323 F.2d at 673. Furthermore, “[f]ailure to obtain relief under § 2255 does not establish that the remedy so provided is either inadequate or ineffective.” Id. (quoting Overman v. United States, 322 F.2d 649 (10th Cir. 1963)); see also Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996).

Quite simply, Petitioner cannot use § 2241 to challenge his conviction to avoid the “abuse of the writ” doctrine or to circumvent the finality provisions of § 2255, as amended by the Antiterrorism and Effective Death Penalty Act (“AEDPA”).² A federal prisoner seeking to challenge his conviction via a “second or successive” § 2255 motion, such as Petitioner in this case, must comply with the provisions of § 2244 which mandate that the petitioner receive authorization from the circuit court of appeals before filing a “second or successive” § 2255 motion in the district court. Should Petitioner in this case believe he can make the showing necessary to receive authorization for proceeding with a second or successive § 2255 motion, he must first petition the Tenth Circuit Court of Appeals for authorization, pursuant to 28 U.S.C. §§ 2244 and 2255.

Because the exclusive remedy for Petitioner’s challenge to his conviction is provided by § 2255, the Court concludes that the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 should be dismissed with prejudice.

²Pursuant to 28 U.S.C. § 2255:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

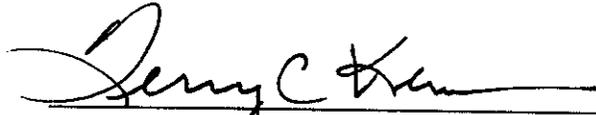
(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Petitioner's motion for leave to proceed in forma pauperis (doc. #2) is **granted**;
- (2) The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 is **dismissed with prejudice**.
- (3) All motions submitted by Petitioner as attachments to his § 2241 petition are **denied as moot**.

SO ORDERED THIS 21 day of October, 1998.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

F I L E D

OCT 21 1998

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

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STATE BANK & TRUST, N.A.,)
a national banking association,)
)
Plaintiff,)

vs.)

Case No. 97-CV-277-B ✓

FIRST STATE BANK OF TEXAS,)
a state bank organized under the laws)
of the State of Texas and headquartered)
in Denton, Texas,)
)
Defendant.)

ENTERED ON DOCKET

DATE OCT 22 1998

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law filed contemporaneously herewith:

IT IS ORDERED AND ADJUDGED that Plaintiff, STATE BANK & TRUST, N.A., recover judgment of the Defendant, FIRST STATE BANK OF TEXAS, the sum of \$157,750.00 with interest thereon as follows: prejudgment interest at the rate of 10 per cent simple interest on the sum of \$157,750.00 from March 26, 1997 to date of judgment. Thereafter, State Bank is entitled to post judgment interest at the rate of 4.242 per cent as

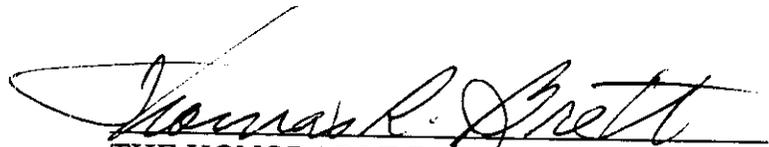
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provided by law and its costs upon timely application.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant, FIRST STATE BANK OF TEXAS take nothing from the Plaintiff, STATE BANK & TRUST, N.A., on its counterclaim, that the counterclaim be dismissed on the merits, and that Plaintiff, STATE BANK & TRUST, N.A., recover of the Defendant, FIRST STATE BANK OF TEXAS, its costs upon timely application.

IT IS FURTHER ORDERED AND ADJUDGED that the issue of attorney's fees is reserved by the Court to be determined upon proper application and briefing as set forth in the Findings of Fact and Conclusions of Law filed herein.

DATED at Tulsa, Oklahoma this 21st day of October, 1998.


THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

OCT 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STATE BANK & TRUST, N.A.,)
a national banking association,)

Plaintiff,)

vs.)

FIRST STATE BANK OF TEXAS,)
a state bank organized under the laws)
of the State of Texas and headquartered)
in Denton, Texas,)

Defendant.)

Case No. 97-CV-277-B ✓

ENTERED ON DOCKET
OCT 22 1998
DATE _____

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for non-jury trial on June 20, and June 21, 1998, on the counterclaims of First State Bank of Texas, ("Bank of Texas") against State Bank & Trust, N.A., ("State Bank"). Also before the Court are State Bank's remaining compensatory and punitive damages claims following entry of summary judgment as to liability by the Court in its Order of June 10, 1998 on State Bank's primary claim against Bank of Texas. After considering the evidence, the arguments of counsel, and the applicable law, the Court enters the following Findings of Fact and Conclusions of Law:

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I. Findings of Fact

A. Bank of Texas' Counterclaim

1. This action arises out of certain business transactions which took place between customers of the two financial institutions. State Bank's customer, Ventura Classics, ("Ventura") is a corporation in the business of buying and selling used automobiles. Ventura is owned by Brian Goss ("Goss"). Bank of Texas' customer is B. Speer & Associates ("Speer"), whose principal is Buzz Speer. Speer is also in the business of buying and selling used automobiles. Ventura and Speer established a business relationship in which they purchased and sold automobiles between their respective businesses in Oklahoma and Texas.

2. The parties had a course of dealing over a period of many months in which payment for the sale or purchase of an automobile between them was usually accomplished by means of a documentary draft. Typically, the seller would receive a documentary draft signed by the buyer which would be comprised of an envelope containing payment information and various authorizations on the front of the envelope. Inside would be placed the corresponding title documents for the automobile which was being purchased. The seller would then deposit the documentary draft ("draft") with his own bank. Seller's bank would then forward the title documents and draft to the buyer's bank for collection.

3. Once the buyer's bank received the draft, buyer Goss or Speer would come into the bank, verify the draft, determine whether the title documentation was in order, and

instruct the bank either to pay the draft, or return the draft unpaid, if not approved.

4. Occasionally, in the interest of time, if Goss and Speer had agreed to a transaction, Ventura, through Goss, would authorize Speer to sign a draft on behalf of Ventura/Goss. Likewise, Speer would occasionally authorize Goss to sign a draft on Speer's behalf. This did not occur in the transactions involved in the counterclaims before the Court. Further, there is no evidence that either bank was aware of this practice.

5. From December 5, 1996 to December 11, 1996, State Bank received seven documentary drafts drawn on Ventura and presented by Bank of Texas to State Bank for collection ("State Bank drafts") along with title documentation regarding each purported sale of a vehicle by Speer to Ventura/Goss. The first five drafts received were as follows by date of draft, amount and notations thereon:¹

a. November 28, 1996	\$17,500	"3 Day Sight"
b. December 2, 1996	12,750	"3 Day"
c. December 2, 1996	16,500	"3 Day"
d. December 5, 1996	22,500	
e. December 5, 1996	<u>18,500</u>	
	\$87,750	

Bank of Texas gave immediate credit to Speer's account on each draft and Speer withdrew the funds received for the drafts before the drafts were presented to State Bank by Bank of Texas.

6. Bank of Texas did not verify signatures on the subject documentary drafts.

7. State Bank received the first three drafts containing "3 day" notations on

¹See finding of fact numbers 21 through 24 regarding the two other drafts.

December 5 and/or 9. Bank of Texas should have received the first three returned drafts or payment for them back from State Bank by December 12, 1996, if they had been returned within three days as indicated on the face of the drafts and in the accompanying collection letter. (Weekends and holidays are not counted.)

8. Ventura drafts were not handled by State Bank's collection department as is the usual practice but were forwarded to State Bank's vice-president Coy Gallatin ("Gallatin") and his assistant, Michelle Wood ("Wood"), because of the necessity that Goss have an office within which to review the documentary drafts, which was not available in the collection department.

9. Wood first contacted Ventura on Friday, December 13, 1996, regarding the first three drafts, at which time she left a message for Goss.

10. Goss returned Woods call on Tuesday, December 17, 1996, following the weekend, and came into the bank to inspect the drafts that day. State Bank was not authorized to pay for incoming drafts drawn on the Ventura/Goss account until and unless Goss authorized payment. Goss did not authorize Speer to make the subject State Bank drafts in Ventura/Goss's name. On review of the drafts, Goss verified his initial response by telephone to State Bank that he did not order, purchase or receive automobiles represented by the State Bank drafts. Goss told State Bank that he did not sign or authorize anyone else to sign the subject State Bank drafts, that he did not authorize payment of the State Bank drafts and that State Bank should return them unpaid to Bank of Texas. Goss did not state his signature was forged but stated that the

signature was not his, that he had not negotiated for, purchased, seen or received the cars represented by the drafts and title documents. Speer had endorsed each draft on the reverse side. [Later, it is learned the subject seven automobiles were fictitious and Speer was committing fraud in forging Goss's name and submitting the drafts and title documents to receive money on the sale of the automobiles.]

11. State Bank returned the five drafts to Bank of Texas on or about Wednesday, December 18, 1996, with a uniform stamped notation on each which contained three lines as follows:

NSF Unless Indicated Otherwise

Forgery - refer to maker

Presented twice

The box preceding line 2, Forgery-refer to maker, on each draft was either checked or marked with a slash. "Refer to maker" was circled on all the drafts. A sample copy of the face of one of the drafts with a checkmark is here depicted:

Jim



OVERTON BANK AND TRUST

ARLINGTON, TEXAS

37-7607
1119

12-5

96 ASTRO VAN 1GN0M19W5TB12817Z

Pay to the order of B. SPEER ASSOL

NSF Unless Indicated Otherwise
Presented twice
to maker

\$ 18,500 -

FIFTEEN THOUSAND FIVE HUNDRED

VALUE RECEIVED AND CHARGE TO ACCOUNT OF

To: STATE BANK & TRUST
302 S. MAIN MALL
TULSA OKLA 74103

BRIAN GOSS
VENTURA CLASSIC

ATT: COLL

12. State Bank's stamped notation on the front of the returned drafts was ambiguous in reference to informing Bank of Texas that the drafts were forged as it could have also been interpreted to communicate only that they were being returned "refer to maker," unpaid.

13. State Bank collection personnel who returned the drafts were not aware they were forged because Gallatin/Wood had simply directed the collection department to return the drafts unpaid.

14. Thereafter, on Friday, December 20, 1996, Bank of Texas resubmitted the first five State Bank drafts to State Bank along with a handwritten note from Judy Massey ("Massey"), Vice President of Bank of Texas which stated "Dispute of Date of Return." Attached were copies of certain UCC provisions, suggested by Bank of Texas' attorney, which included, *inter alia*, the provision relating to the "Midnight Deadline Rule" found in UCC §4-302. The State Bank drafts and claim of late return arrived for the second time at State Bank on December 24, 1996.

15. By December 20, 1996, the date Massey at Bank of Texas returned the State Bank drafts, Bank of Texas had actual knowledge that Speer's account with Bank of Texas was experiencing irregular and or improper activities, consisting of Speer's failure to return original documentary drafts and car titles which had been given to him under a "trust agreement," including two such drafts State Bank had presented for collection. State Bank was unaware of the trust agreement arrangement and of Speer's failure to abide by its terms. Additionally, numerous drafts from Metro Imports, Inc., Speer's floor

plan financier, made payable to Speer in an amount of approximately \$100,000.00 had been returned unpaid; and Gary Hudson, ("Hudson"), Bank of Texas' executive vice-president, had issued a blanket order that Bank of Texas would no longer accept incoming drafts on Speer's account; Speer was overdrawn; and, his account had been frozen. Bank of Texas' Chairman of the Board directed Hudson to begin the investigation of Speer's account when he noted irregularities on December 16, 1996.

16. In response to the returned drafts and accompanying note from Massey, an employee of State Bank, Teresa Bray, ("Bray") issued a cashier's check in the amount of \$87,750.00 to pay the first five State Bank drafts. The cashier's check representing the first five drafts ("State Bank Cashier's Check") was mailed to Bank of Texas the afternoon of the same day, December 24, 1996.

17. Bray was authorized to issue cashier's checks, but issued the State Bank Cashier's Check in mistaken reliance upon the "dispute of date of return" representation by Bank of Texas.

18. Coy Gallatin, then vice-president of State Bank, was informed of the mailing of the \$87,750.00 State Bank Cashier's Check on the afternoon of December 24, 1996 and immediately informed another bank employee, Brenda Plowman, to attempt to retrieve it from the State Bank mail room. The State Bank Cashier's Check had already been placed in the United States mail and was irretrievable.

19. On the next business day, December 26, 1996, at 3:27 p.m, State Bank sent, via facsimile, a letter to Bank of Texas explaining that the State Bank Cashier's Check

had been mistakenly issued and sent without authorization from the State Bank customer, Ventura, and that the State Bank drafts were not authorized by Ventura/Goss, that there existed a "possibility of fraud," and that a stop payment order was being placed on the State Bank Cashier's Check. State Bank stood to lose the \$87,750.00 because its customer, Goss, had directed State Bank to return the subject drafts unpaid.

20. The time of day the State Bank Cashier's Check was received and deposited by Bank of Texas on December 26, 1996 was not established. State Bank was successful, however, in stopping payment on the State Bank Cashier's Check. ²

21. Bank of Texas received for presentment two additional documentary drafts from Speer, each dated December 11, 1996 in the amounts of \$22,500 and \$14,300 ("Two drafts"). Bank of Texas also gave immediate credit to Speer's account for the Two drafts.

22. Speer immediately withdrew the funds before Bank of Texas presented the Two drafts to State Bank for payment or collection.

23. Bank of Texas presented the Two drafts to State Bank on December 13, 1996, for payment by Ventura, both of which were marked "3 Day Sight," as were the

²In this same time frame, State Bank was attempting to obtain a replacement cashier's check covering drafts on Speer for which Bank of Texas had been provided the money by Speer to transmit to State Bank in November, 1996 but which cashier's check had never been received by State Bank. Bank of Texas claimed it was lost. When State Bank stopped payment on the State Bank Cashier's Check, Bank of Texas stopped payment on the replacement cashier's check, claiming a right of set-off. This was the subject of State Bank's primary claim on which the Court entered summary judgment. It appears both banks were positioning to minimize their losses resulting from Speer's fraudulent conduct.

accompanying collection letters.

24. State Bank did not pay the Two drafts and they were returned back to Bank of Texas from State Bank on December 27, 1996, unpaid, for the same reason as the five earlier drafts.

25. Neither State Bank or Bank of Texas consistently followed the collection letter instructions accompanying documentary drafts or notations on the drafts so as to strictly comply with the time limitations set forth and both banks had a pattern and practice of late returns beyond the time specified by some additional days.³

26. Under the facts and circumstances, including consideration of the draft language as well as weekends, holidays, and the course of dealing and practice of the parties, the seven subject drafts were returned by State Bank to Bank of Texas within a reasonable time.

27. Irrespective of the fact many of the seven drafts herein had a time limit designated, State Bank was in the status of a collecting bank in reference to them and not that of a payor bank.

28. As to each of the seven referenced drafts herein, "State Bank" and its address are hand written on the lower left-hand portion of the draft in what appears to be the same handwriting as the rest of the documentary draft.

³State Bank ran a particularly loose operation insofar as insuring that bank personnel handling drafts were knowledgeable regarding the bank's status as payor versus collecting bank and potential liabilities which flowed from a given status. In this scenario, State Bank emerges as prevailing party not on documentary draft acumen but as beneficiary of the applicable law.

29. No designation or language as to State Bank's collecting or payor status appears on the drafts nor is there reference to a specific account number. There are no recitations that the drafts are payable "through" or "at" State Bank.

30. To date, Ventura/Goss has not received the automobiles or the properly executed title documentation for the seven automobiles represented by the State Bank drafts, and there is no reasonable expectation they will be received.

B. State Bank's Damages on Primary Claim⁴

31. State Bank experienced a loss in the amount of \$157,750.00 regarding its primary claim on the 5 documentary drafts and subject automobiles delivered to Bank of Texas and Speer.

32. Bank of Texas did not act with fraud or malice when it wrongfully exercised a right of offset against State Bank or when it released the Speer drafts and title documents to Speer under the trust agreement. Bank of Texas' conduct herein does not support an award of punitive damages to State Bank.

II. Conclusions of Law

1. This Court has jurisdiction pursuant to 28 U.S.C. §1332(a) and venue is proper.
2. Any finding of fact above that could be properly characterized as a conclusion of law is incorporated herein.

A. Bank of Texas' Counterclaim

⁴The Court's Order Granting Summary Judgment of June 10, 1998 and the Court's Order denying Motion to Reconsider filed September 24, 1998 are incorporated herein by reference.

3. The seven State Bank drafts do not establish State Bank as a payor bank as defined by Okla. Stat. Ann. tit. 12A §§4-105(3) and (5) and 4-106. (West 1991). These provisions provide, in relevant part as follows:

“Payor bank” means a bank that is the drawee of a draft. §4-105(3);

“Collecting bank” means a bank presenting an item for collection except the payor bank. §4-105(5);

Payable through or Payable at Bank; Collecting Bank

(a) If an item states that it is “payable through” a bank identified in the item, (i) the item designates the bank as a collecting bank and does not by itself authorize the bank to pay the item, and (ii) the item may be presented for payment only by or through the bank.

(b) If an item states that it is “payable at” a bank identified in the item, (i) the item designates the bank as a collecting bank and does not by itself authorize the bank to pay the item, and (ii) the item may be presented for payment only by or through the bank.

(c) If a draft names a nonbank drawee and it is unclear whether a bank named in the draft is a co-drawee or a collecting bank, the bank is a collecting bank. §4-106.

4. Based upon the evidence presented, State Bank is a collecting bank in reference to the seven subject drafts of defendant’s counterclaim. *Great Western Bank v. Steve James Ford, Inc.*, 915 F. Supp. 392 (S.D. Ga. 1996)

5. As a collecting bank, State Bank is entitled to transfer warranties from Bank of Texas. Okla. Stat. Ann. tit. 12A §4-207(a)(2) provides, in pertinent part:

(a) A ... collecting bank that transfers an item and receives a settlement or other consideration warrants to the transferee and to any subsequent collecting bank that:

(2) All signatures on the item are authentic and authorized.

6. Bank of Texas breached its transfer warranty that Goss’s signatures on the State

Bank drafts were authentic and authorized. Okla. Stat. Ann. tit. 12A §4-207(a)(2).

7. A collecting bank is not subject to the "Midnight Deadline Rule" pursuant to Okla. Stat. Ann. tit. 12A §§4-302(a)(1),(2) which applies only to payor banks and effectively makes time of the essence for payor banks in complying with the time limitation on a documentary draft. This section states, in pertinent part:

PAYOR BANK'S RESPONSIBILITY FOR LATE RETURN OF ITEM

(a) If an item is presented to and received by a payor bank, the bank is accountable for the amount of:

(1) a demand item, other than a documentary draft ... if the bank...retains the item beyond midnight of the banking day of receipt without settling for it or...does not pay or return the item or send notice of dishonor until after its midnight deadline; or

(2) any other properly payable item unless, within the time allowed for acceptance or payment...,the bank either accepts or pays the item or returns it and accompanying documents.

(b) The liability of a payor bank to pay an item ...is subject to defenses based on breach of presentment warranty (Section 4-208) or proof that the person seeking enforcement of the liability presented or transferred the item for the purpose of defrauding the payor bank.

Even if State Bank were a payor bank it has valid defenses herein under (b) above.

See *Union Bank of Benton, Arkansas v. First National Bank in Mt. Pleasant, Texas*, 621 F.2d 790 (5th Cir. 1980)

8. State Bank, as a collecting bank, had a duty to use ordinary care to seasonably return unpaid documentary drafts, which it met based upon the facts and circumstances herein and the prior course of dealing between the parties. *Great Western Bank v. Steve James Ford, Inc.*, 915 F. Supp. 392 (S.D. Ga. 1996)

9. Speer did not have apparent authority to sign the seven State Bank drafts.

Further, Goss did not ratify Speer's actions in signing Goss's name to the seven subject drafts. See *Clark v. Brien*, 59 F.3d 1083 (10th Cir. 1995).

10. Bank of Texas received seasonable notification that State Bank had a stop payment claim on or a defense to payment of the State Bank \$87,750.00 Cashier's Check.

11. State Bank was justified in stopping payment on its Cashier's Check pursuant to Okla. Stat. Ann. tit. 12A §3-411(c)(ii) because the drafts were forged and Speer was attempting to perpetrate fraud. This section provides, in pertinent part:

(a) In this section, "obligated bank" means. . . the issuer of a cashier's check ...

(b) If the obligated bank wrongfully (i) refuses to pay a cashier's check ... the person asserting the right to enforce the check is entitled to compensation for expenses and loss of interest resulting from the nonpayment and may recover consequential damages if the obligated bank refuses to pay after receiving notice of particular circumstances giving rise to the damages.

(c) Expenses or consequential damages under subsection (b) of this section are not recoverable if the refusal of the obligated bank to pay occurs because . . . (ii) the obligated bank asserts a claim or defense of the bank that it has reasonable grounds to believe is available against the person entitled to enforce the instrument. . . .

12. The seven State Bank drafts are not negotiable instruments subject to Article 3 of the UCC.

13. Under the facts and circumstances, Bank of Texas is not a holder in due course of the \$87,750.00 State Bank Cashier's Check pursuant to Okla. Stat. Ann. tit. 12A §3-302. This provision, in pertinent part, defines holder in due course as follows:

"[H]older in due course" means the holder of an instrument if. . .

(2) the holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument . . . has been dishonored.

14. Bank of Texas is not a holder in due course of the State Bank drafts because it

was the presenting bank whose customer, Speer, perpetrated the fraud.

B. Bank of Texas Damage Claims

15. Bank of Texas suffered no damages for which State bank is legally liable as a result of State Bank's return of the State Bank drafts.

16. Any damages suffered by Bank of Texas were caused by the fraudulent conduct of its customer, Speer. Therefore, State Bank is not liable to Bank of Texas on the subject seven State Bank drafts.

C. State Bank Damage Claims

17. State Bank is entitled to recover from Bank of Texas the sum of \$157,750.00, the total value of the automobiles as reflected on the face of the five subject documentary drafts. State Bank is entitled to prejudgment interest at the rate of 10 per cent simple interest for conversion under the recent pronouncement by the Supreme Court of Texas, *Johnson & Higgins of Texas v. Kenneco Energy, Inc.*, 962 S.W. 2d 507 (1998) on the sum of \$157,750.00 from date suit was filed, March 26, 1997 through date of judgment. Thereafter, State Bank is entitled to post judgment interest at the rate prescribed by federal law of 4.242 per cent.

18. State Bank as prevailing party shall file a brief citing the authority under which this Court may grant attorney's fees, not to exceed 15 pages, on or before November 6, 1998, with their application for attorney's fees. Response brief, not to exceed 15 pages, shall be filed on or before November 17, 1998, and any reply brief shall

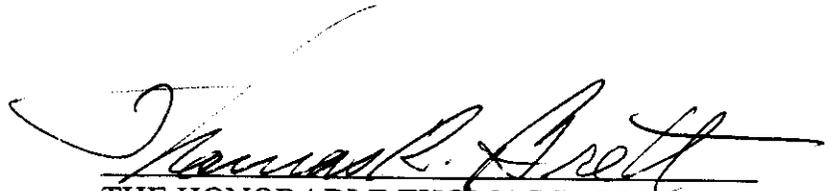
be filed on or before November 24, 1998, not to exceed five pages.⁵

19. State Bank is entitled to costs from Bank of Texas in reference to the primary claim and counterclaim if timely applied for under ND L.R. 54.1.

20. Bank of Texas is not liable to State bank for punitive damages on State Bank's primary claim.

Judgment consistent with these findings of fact and conclusions of law is being entered contemporaneously.

IT IS SO ORDERED THIS 21ST DAY OF OCTOBER, 1998.


THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

⁵The Court notes each party has claimed entitlement to attorney's fees in reference to their respective claims. The Court however feels the need for a presentation of legal authority on this issue and in particular the claim of entitlement under Okla. Stat. Ann. tit. 12 § 936 (West 1991).

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

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

FILED
 OCT 21 1998
 Phil Lombardi, Clerk
 U.S. DISTRICT COURT

Case No. 96-CV-1024H

ENTERED ON DOCKET
 DATE OCT 22 1998

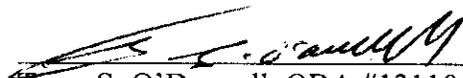
JOINT STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

COMES NOW Plaintiff, Kassey Samples and Defendant, Home of Hope, Inc., and pursuant to Fed. R. Civ. Proc. 41(a)(1), hereby stipulate to the voluntary dismissal of the above-referenced action by Plaintiff Kassey Samples, without prejudice.

DATED this 21 day of October, 1998.

Respectfully submitted,

BEST & SHARP



Terry S. O'Donnell, OBA #13110
 Karen M. Grundy, OBA #14198
 100 W. 5th St., Suite 808
 Tulsa, OK 74103-4225
 (918) 582-1234
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ATTORNEYS FOR DEFENDANT

103

C/T



Gerald R. Lee, OBA #5335
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Pryor, OK 74362
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ATTORNEY FOR PLAINTIFFS

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

FILED

OCT 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Plaintiff,)

vs.)

HOME OF HOPE, INC.,)

Defendant.)

Case No. 96-CV-¹⁰⁴²~~1024~~H

ENTERED ON DOCKET

DATE OCT 22 1998

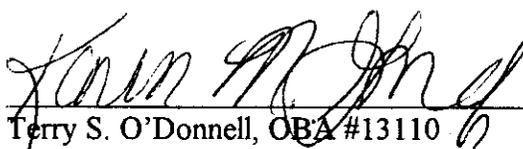
JOINT STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

COMES NOW Plaintiff, Deborah Waseleus and Defendant, Home of Hope, Inc., and pursuant to Fed. R. Civ. Proc. 41(a)(1), hereby stipulate to the voluntary dismissal of the above-referenced action by Plaintiff Deborah Waseleus, without prejudice.

DATED this 21st day of October, 1998.

Respectfully submitted,

BEST & SHARP



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ATTORNEY FOR PLAINTIFFS

F I L E D

OCT 21 1998

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

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

THOMAS R. HUTCHINSON, as Personal)
Representative of the Estate of Robert W.)
Hutchinson, deceased,)

Plaintiff,)

vs.)

RICHARD PFEIL and MARY JO PFEIL,)

Defendants.)

Case No. 92-C-1088-E ✓

ENTERED ON DOCKET

OCT 22 1998

DATE

ORDER

This matter is before the Court on Defendants' Motion for Attorney Fees and Costs pursuant to Fed.R.Civ.P. 37(a)(4), 12 O.S. §936 and 28 U.S.C. §1927 and upon the Certification of Record and Recommendation for Consideration of Additional Sanctions entered by the Magistrate Judge on December 22, 1993 in which the Magistrate Judge identified certain "abusive litigation practices," with a recommendation for additional sanctions. This Court has previously, by Order dated February 18, 1998, upheld the imposition of attorney's fees awarded to Defendants under Federal Rule of Civil Procedure 37(a)(4) by the Magistrate Judge in the amount of \$7,417. Plaintiff and Plaintiff's counsel were held jointly and severally liable for the fee award.

The Court in ruling on the request for attorney fees and the recommendation for consideration of additional sanctions has considered the entire record in the case, including the Recommendations of the Magistrate Judge and the evidence submitted at a hearing on these issues held April 30, May 1 and June 11, 1998.

Defendants urge assessment of fees in the total sum of \$158,039 costs in the sum of

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\$10,790.80 because they claim that this action was frivolous and should never have been commenced. For their secondary position, defendants request attorney fees and costs pursuant to 28 U.S.C. §1927 for conduct which unreasonably and vexatiously multiplied the proceedings or the minimal additional fee in the sum of \$10,790.80 contained in the recommendations of the Magistrate Judge. As a last resort, defendants assert that they are entitled to fees pursuant to Okla.Stat.tit.12, § 936.

Plaintiff and his counsel assert that this litigation is not frivolous and that they have not unreasonably and vexatiously multiplied the proceedings nor intentionally or recklessly disregarded an attorney's duties to the Court. Defendants argue to the contrary, urging that the proceedings since the imposition of sanctions by the Magistrate related to Plaintiff's Motion to Disqualify the Judge, the appeal of the denial of that motion, the appeal of Plaintiff's Motion to Disqualify Defendants' Counsel and Plaintiff's subsequent petition for Writ of Mandamus to the Tenth Circuit and the Petitions of Plaintiff for Writs of Certiorari to the United States Supreme Court were all designed to harass Defendants and were clearly within the purview of conduct prohibited by 28 U.S.C. §1927.

The Court will first address defendants' first argument that this litigation, in its entirety, was frivolous. Although it is a close issue, the Court finds that there was a non-frivolous argument for the extension or modification of existing law or the establishment of new law which formed the basis for the commencement of this action. Plaintiff devised a novel claim under the law of partition. That approach has fallen to defeat at the district and circuit levels. Certiorari has been denied by the United States Supreme Court. Latches clearly prevents the maintenance of this or like actions. Any further pursuit of such causes of action will be in direct defiance of existing law and clearly frivolous in their commencement. All such claims are time barred.

Defendants' application for all fees and expenses incurred since the commencement of the action is denied.

In addressing the issue of attorney fees for certain pleadings that allegedly "vexatiously and unreasonably" multiplied the proceedings and the recommendation of the Magistrate for consideration of additional sanctions, and in an attempt to fashion an appropriate remedy that is both fair to the parties and will, hopefully, deter conduct such as was present in this case in the future, the Court will, analyze this matter pursuant to the provisions of Fed.R.Civ.P. 11 rather than pursuant to 28 U.S.C. §1927.¹ This consideration is within the inherent power of the Court.

Under a Rule 11 analysis, the Court specifically finds that the motion and brief for order directing defendants to show cause why counsel should not be disqualified, the motion and brief for order recalling reference of the discovery motions to the magistrate judge, the motion and brief in support of leave to file Plaintiff's motion for imposition of rule 26 sanctions against defendants, the motion and brief in support of plaintiff's request to alter the Order and Judgment, which included a request for recusal of the district judge, and the numerous pleadings in which plaintiff's requested reconsideration of every ruling which was made against them are each inappropriate because they were harassing, caused needless delay and were without factual or legal support.

¹ Section 1927 is directed at a "person . . . who so multiplies the proceedings in any case unreasonably and vexatiously," and provides for an award of "excess costs, expenses and attorneys' fees reasonably incurred because of such conduct." Fed.R.Civ.P. 11 is directed at pleadings or motions which are presented for an improper purpose such as to harass or to cause unnecessary delay, or which are not factually or legally supportable. The sanctions under Rule 11 are limited to "what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated," and the rule contemplates both monetary sanctions and "directives of a nonmonetary nature." The Magistrate Judge, in his order awarding sanctions dated December 22, 1993, specifically raised the issue of Rule 11 violations, and recommended review of this record under a Rule 11 analysis.

With the parameters of Rule 11 in mind, and deterrence of future conduct as a goal, the Court finds that conduct of Defendants' counsel, Joan Godlove, in other litigation is relevant to a review of her conduct here. The Seventh Circuit Court of Appeals in denying her appeal of a sanction of dismissal stated:

"We see nothing but wilfulness in this record. Plaintiff does not dispute that her noncompliance was deliberate. Her excuse is only that she knew better than the district judge what response she should make. The district court concluded that after more than eighteen months of intransigence, resistance, and disregard of court orders that no other sanction could be meaningful."

Godlove v. Bomberger, Faremore, Oswald, and Hahn, 903 F.2d 1145 (7th Cir. 1990).

The record in this case also compels the unfortunate conclusion that Ms. Godlove is professionally incapable of accepting either the finality of a ruling or the good faith of a view other than her own. The Magistrate Judge in his order imposing sanctions characterized her approach to this litigation as a "scorched earth" campaign. It is an appropriate description. In these proceedings she has attempted the disqualification of the Magistrate Judge, her opposing counsel and the Court. She wrote the senior partner of her opponent's law firm asking for an investigation of her opponent; she asked the United States District Attorney to investigate her opponent's actions in this case. Her actions against the Court and counsel were found to be without merit. Hutchinson v. Pfeil, 105 F.3d 566 (10th Cir. 1997).

In similar proceedings in Indiana litigation on a claim to interests in paintings she likewise filed motions to disqualify her opponents and the trial court. The motions were denied.

Recognizing both that Ms. Godlove has violated Rule 11 in these proceedings, and that this is not isolated conduct, the Court must now fashion an appropriate remedy. The teaching of the Tenth Circuit in White v. General Motors Corp. Inc., 908 F.2d 675 (10th Cir. 1990) is helpful to our

analysis:

"... the primary purpose of sanctions is to deter attorney and litigant misconduct, not to compensate the opposing party for its costs in defending a frivolous suit. It is particularly inappropriate to use sanctions as a means of driving certain attorneys out of practice. Such decisions are properly made by those charged with handling attorney disbarment and are generally accompanied by specific due process provisions to protect the rights of the attorney in question. Doering, 857 F.2d at 196, n. 4. We agree with the Third Circuit that the amount of sanctions is appropriate only when it is the "minimum" that will adequately deter the undesirable behavior. Id. At 194 (quoting Eastway, 637 F.Supp. At 565).

The Court imposes a monetary sanction against the Plaintiff and Joan Godlove jointly and severally in the sum of \$5,000, in addition to the sum of \$7,417 heretofore granted. This sanction is for the violation of Rule 11 as well as the discovery abuses set forth in the Magistrate's Order. The sanction shall be paid to Defendant within sixty (60) days of the date of this Order. In addition, Joan Godlove, attorney for Plaintiff, is hereby enjoined from filing an original proceeding on behalf of a client in the Northern District of Oklahoma without the joinder in the pleadings of a licensed attorney admitted to practice in this Court. She is further ordered to furnish to such proposed co-counsel prior to employment copies of this Order, the order of the Magistrate Judge dated December 22, 1993, opinion of the Tenth Circuit Court of Appeals in Hutchinson v. Pfeil, 105 F.3d 566 (10th Cir. 1977), and the opinion in Godlove v. Bamberger, Faremore, Oswald, and Hahn, 903 F.2d 1145 (7th Cir. 1990). See generally Howard v. Mail-Well Envelope Co., 150 F.3d 1227 (10th Cir. 1998) (imposing similar nonmonetary sanctions). This sanction shall remain in place until further order of the Court.

The Court finds that Defendants' request for additional fees under 12 O.S. §936 is inappropriate because this was not a contract action as contemplated by the Oklahoma statute. The assessment of sanctions described above is in lieu of additional fees and costs under 28 U.S.C.

§1927 as requested by Defendants.

Because the Court finds that the more appropriate course would be to levy sanctions pursuant to Fed.R.Civ.P. 11, and does so in this Order, Defendants' Application for Attorneys' Fees and Costs to be Assessed Against Plaintiff and His Counsel (Docket # 181) is denied.

ORDERED: October ~~20th~~, 1998.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 20 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THOMAS C. HAMPTON, JR.,
SSN: 447-40-1739

Plaintiff,

v.

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

Defendant.

No. ⁹⁶~~97~~-C-993-B(J) ✓

ENTERED ON DOCKET

DATE OCT 22 1998

REPORT AND RECOMMENDATION

Plaintiff, Thomas C. Hampton, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because (1) the ALJ failed to obtain appropriate testimony from the vocational expert, (2) the ALJ erred in applying the Grids^{3/} because the Plaintiff cannot perform a full range of light work; and (3) the ALJ erred in applying the Grids because the Plaintiff has a non-exertional bilateral manual dexterity impairment.

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

^{2/} Administrative Law Judge Leslie S. Hauger (hereafter "ALJ") concluded that Plaintiff was not disabled on November 18, 1994. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on August 28, 1996. [R. at 5].

^{3/} The Medical-Vocational Guidelines, commonly referred to as the "Grids," are located at 20 C.F.R. Pt. 404, Subpt. P, App. 2.

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For the reasons discussed below, the Magistrate Court recommends that the District Court **AFFIRM** the decision of the Commissioner.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on February 2, 1942, and was 52 years old at the time of the hearing before the ALJ. [R. at 28]. Plaintiff testified that he completed high school.

At the hearing before the ALJ, Plaintiff testified that a car fell on him when he was sixteen, and that his back has hurt since that time. [R. at 31]. According to Plaintiff, he has sharp pains and cramps each night in his legs. In addition, he experiences back pain and chest pains which last one to two minutes. [R. at 31-36].

Plaintiff testified that he could walk approximately one block before needing to sit, that he could lift a flat tire, and that he could stand for approximately twenty minutes.

Plaintiff was driven to the hearing before the ALJ. The drive was approximately one and one-half to two hours and Plaintiff stopped at the mid-point of the trip. [R. at 37]. Plaintiff testified that he did some gardening at his house, and sometimes would weed the garden for approximately twenty minutes. [R. at 45].

A Residual Functional Capacity Assessment completed by Vallis D. Anthony on November 9, 1993, indicated that Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand or walk for six hours, and sit for six hours. The doctor additionally noted that "pain does limit RFC." [R. at 80]. In addition, the doctor noted that Plaintiff's "x-rays . . . show[ed] severe DDD which could account for the pain." [R. at 80].

In a disability report completed by Plaintiff, Plaintiff wrote that he was taking nine different types of pain medicine. [R. at 129]. A medications list on February 22, 1994 indicated that Plaintiff was taking APAP with Codeine, Cimetidine, Ibuprofen, Trazadone, and Enalapril. A medications list completed August 18, 1994 indicated Plaintiff was taking Ibuprofen (for pain), Trazodone (for cramps in his legs and chest), Potassium Chloride (for cramps in his legs and chest), Fosinopril (for high blood pressure), Cimetidine (for stomach relief), and Acetaminophen with Codeine (for pain).

X-rays on October 21, 1992 indicated spondylolisthesis of L5-S1 with moderate to severe degenerative disc disease at L4-L5 level. A CT of the lumbar spine indicated early degenerative arthritis of the L3-4 and L4-5 apophyseal joints, spondylolisthesis at L-5 on S-1, and prominent degenerative disc disease at L5-S-1 level.

A social security examiner on April 22, 1993, indicated that Plaintiff's gait was normal and that his dexterity and grip strength were normal. In addition, Plaintiff had no difficulty getting on and off the examination table. The examiner additionally indicated that Plaintiff had chronic back problems and low back pain. [R. at 171-74].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

Disability under the Social Security Act is defined as the

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

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

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

42 U.S.C. § 423(d)(2)(A). The Commissioner has established a five-step process for the evaluation of social security claims.^{4/} See 20 C.F.R. § 404.1520.

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

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

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

Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary^{5/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff was unable to perform his past relevant work. The ALJ determined that Plaintiff could perform a full range of light work, and that based on the Grids he was not disabled. The ALJ noted that Plaintiff's daily activities

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

included some gardening and that he sometimes helped with the laundry. In addition, Plaintiff testified that he could lift one gallon of water, stand for 20 minutes, and walk one blocks.

The ALJ observed that Plaintiff's range-of-motion of his extremities and spine were normal, and that the doctors reported that Plaintiff could get on and off of the examining table without difficulty. The ALJ seemingly acknowledged that Plaintiff did experience some pain, but concluded that the pain experienced did not further limit Plaintiff's ability to perform a full range of light work. [R. at 18].

IV. REVIEW

FAILURE TO PRESENT HYPOTHETICAL TO VOCATIONAL EXPERT

Plaintiff initially asserts that because the ALJ determined that Plaintiff could not perform his past relevant work, the burden was on the Commissioner to establish that Plaintiff was not disabled. Plaintiff asserts that to meet this burden the Commissioner was required to obtain expert testimony of a qualified vocational expert, and that the ALJ therefore failed because he did not ask the vocational expert any hypothetical questions.

However, an ALJ is not required to resort to vocational expert testimony to support a decision of non-disability at Step Five. 20 C.F.R. § 404.1569a(b). An ALJ may consult the Grids and, based on the Grids may conclude that an individual is not disabled. "The mere presence of a nonexertional impairment does not automatically preclude reliance on the grids. The presence of nonexertional impairments precludes reliance on the grids only to the extent that such impairments limit the range of jobs

available to the claimant." Gossett v. Bowen, 862 F.2d 802, 807-08 (10th Cir. 1988). See also Ray v. Bowen, 865 F.2d 222 (10th Cir. 1989) ("[T]he ALJ's finding that Miss Ray suffered from no nonexertional impairment severe enough to limit the range of jobs available to her, and his consequent reliance on the grids, was supported by substantial evidence."); Castellano, 26 F.3d at 1030 (citing Eggleston v. Bowen, 851 F.2d 1244, 1247 (10th Cir. 1988) ("Use of the Grids is only precluded to the extent that nonexertional impairments further limit the claimant's ability to perform work at the applicable exertional level.")).

Therefore, the ALJ can appropriately rely on the Grids to support a conclusion at Step Five that an individual is not disabled. The reliance on the Grids is not error unless the individual has nonexertional limitations which limit the individual's ability to work at an applicable exertional level. In this case, unless Plaintiff has other nonexertional impairments which limit Plaintiff's ability to perform a full range of light work, the ALJ's reliance on the Grids was not error.

FULL RANGE OF LIGHT WORK ACTIVITY

Plaintiff asserts that the ALJ erred because the ALJ minimized Plaintiff's impairments. Plaintiff refers to the medical record which indicated that Plaintiff has "associated Grad 1 anterior spondylolisthesis of L5 on S1 with spondylosis; moderate spondylosis deformans involving the margins of the bodies of L3-S1; and, spina bifida at S1." Plaintiff's Brief at 3, referring to record at 136-38. Plaintiff additionally notes that he testified that he could stand for only 20 minutes and walk only one block, and that he can therefore not perform a full range of light work. Plaintiff testified that he

is unable to work because his back hurts him, and because he has leg and chest cramps.

Exertional vs. Nonexertional Limitations

Limitations imposed by an impairment can be either exertional or nonexertional. The regulations provide that when an impairment affects only exertional limitations, the Grids may be applied. 20 C.F.R. § 404.1569a(b). When an impairment affects nonexertional limitations, or exertional and nonexertional limitations, the regulations state that the Grids will not direct a conclusion. 20 C.F.R. § 404.1569c a(c) & (d). Limitations from an impairment such as pain can be either exertional or nonexertional.

(a) *General.* Your impairment(s) and related symptoms, such as pain, may cause limitations of function or restrictions which limit your ability to meet certain demands of jobs. These limitations may be exertional, nonexertional, or a combination of both. Limitations are classified as exertional if they affect your ability to meet the strength demands of jobs. . . . Limitations or restrictions which affect your ability to meet the demands of jobs other than the strength demands, that is, demands other than sitting, standing, walking, lifting, carrying, pushing or pulling, are considered nonexertional. . . .

(b) *Exertional limitations.* When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect only your ability to meet the strength demands of jobs (sitting, standing, walking, lifting, carrying, pushing, and pulling), we consider that you have only exertional limitations. When your impairment(s) and related symptoms only impose exertional limitations and your specific vocational profile is listed in a rule contained in Appendix 2 of this subpart, we will directly apply that rule to decide whether you are disabled.

(c) *Nonexertional limitations.* (1) When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect only your ability to meet the demands of jobs other than the strength demands, we

consider that you have only nonexertional limitations or restrictions. Some examples of nonexertional limitations or restrictions include the following: (i) You have difficulty functioning because you are nervous, anxious, or depressed; (ii) You have difficulty maintaining attention or concentrating; (iii) You have difficulty understanding or remembering detailed instructions; (iv) You have difficulty in seeing or hearing; (v) You have difficulty tolerating some physical feature(s) of certain work settings, e.g. you cannot tolerate dust or fumes; or (vi) You have difficulty performing the manipulative or postural functions of some work such as reaching, handling, stooping, climbing, crawling, or crouching.

(2) If your impairment(s) and related symptoms, such as pain, only affect your ability to perform the nonexertional aspects of work-related activities, the rules in appendix 2 do not direct factual conclusions of disabled or not disabled. The determination as to whether disability exists will be based on the principles in the appropriate sections of the regulations giving consideration to the rules for specific case situations in appendix 2.

(d) *Combined exertional and nonexertional limitations.* When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and demands of jobs other than the strength demands, we consider that you have a combination of exertional and nonexertional limitations and restrictions. If your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and demands of jobs other than the strength demands, we will not directly apply the rules in appendix 2 unless there is a rule that directs a conclusion that you are disabled based upon your strength limitations; otherwise the rules provide a framework to guide our decision.

20 C.F.R. § 404.1569 (italics in original, underline added).

Plaintiff initially asserts that the ALJ erred by not fully considering Plaintiff's "associated Grad 1 anterior spondylolisthesis. . . ." The ALJ summarized the ALJ's testimony and the conclusions of the examining physicians. The ALJ noted that

Plaintiff's range-of-motion was not affected. The ALJ noted that Plaintiff's dexterity of gross and fine manipulation was normal according to Jimmie W. Taylor, M.D. The ALJ determined that Plaintiff's impairments did not impose any additional restrictions on Plaintiff's ability to perform a full range of light work. [R. at 18]. Plaintiff does not specifically challenge the ALJ's findings, or articulate a specific nonexertional impairment which the ALJ failed to consider. The Magistrate Judge concludes that the ALJ's findings are supported by substantial evidence.^{6/}

Plaintiff additionally asserts that he can stand for only 20 minutes at a time, can walk only one block, and can sit for only one to two hours. The ALJ evaluated Plaintiff's credibility and concluded that Plaintiff's testimony was not fully credible. In evaluating Plaintiff's credibility, the ALJ noted that Plaintiff had a full range of motion of the extremities and lumbar spine, that his gross, fine manipulation, and grip strength were fully intact, and that he was able to climb on and off of the examination table without significant difficulty. Plaintiff does not specifically challenge the basis of the ALJ's conclusions, and credibility determinations by the trier of fact are given great deference. See Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

^{6/} At the hearing before the ALJ the Plaintiff testified that he experiences pain at a level of five on a one to ten scale, and that if he moves a certain way the pain becomes a ten. [R. at 32]. The RFC on November 9, 1993 indicated that Plaintiff had an unlimited ability to push or pull, could frequently climb, balance, kneel, crouch, or crawl, had no manipulative or visual limitations, and could occasionally stoop. [R. at 81].

APPLICATION OF GRIDS WHEN PLAINTIFF HAS A NONEXERTIONAL IMPAIRMENT

Plaintiff additionally asserts that the ALJ erred by mechanically applying the Grids when Plaintiff has a nonexertional impairment. Plaintiff characterizes the impairment as a "limited bilateral manual dexterity" impairment. In this portion of his argument, Plaintiff does not refer to the record, or specify any records detailing this impairment. At the hearing before the ALJ, the Plaintiff did not state that this was an impairment. Plaintiff does note, in his statement of facts, that he has a "manual dexterity" limitation. Plaintiff does not provide additional explanation for this argument, but Plaintiff's page reference is to an examining physician who noted that Plaintiff had left grip strength that was two-thirds of right grip strength.⁷¹ [R. at 167].

The ALJ noted that Dr. Taylor's examination revealed dexterity of gross and fine manipulation and grip strength was normal. [R. at 16]. The ALJ found that Plaintiff's grip strength was "fully intact." [R. at 18]. Dr. Taylor noted that Plaintiff's gross and fine manipulation, and that Plaintiff's grip strength was "normal." [R. at 172, 174]. He additionally concluded that Plaintiff could manipulate small objects. [R. at 174]. Absent additional argument by Plaintiff, the Magistrate Judge concludes that the ALJ's opinion was supported by substantial evidence.

⁷¹ Assuming Plaintiff's left grip strength is less than the grip strength of his right does not automatically impose a limitation. The existence of a limitation would still be dependant upon the actual grip strength of the left hand.

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

FILED

OCT 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD W. TITTERUD, et al,)
)
Plaintiff(s),)
)
vs.)
)
SNAPPY CAR RENTAL, et al,)
)
Defendant(s).)

Case No. 97-C-518-B

ENTERED ON DOCKET

DATE OCT 21 1998

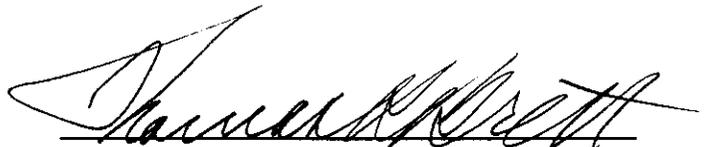
ORDER DISMISSING ACTION
BY REASON OF SETTLEMENT

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 ORDERED that the action is dismissed without prejudice. 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.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Order by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 19th day of October, 1998.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

115

FILED

OCT 20 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JANICE D. MARTIN,)
)
Plaintiff,)
)
vs.)
)
EARTHGRAINS BAKING COMPANIES, INC.)
a Delaware Corporation, d/b/a RAINBO)
BAKING COMPANY OF TULSA and)
OKLAHOMA CITY,)
)
Defendants.)

CASE NO: 97-CV-896-B (W)

**JURY TRIAL DEMANDED
ATTORNEY LIEN CLAIMED**

ENTERED ON DOCKET

DATE OCT 21 1998

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, JANICE D. MARTIN, and pursuant to Rule 41(a)(1), hereby dismisses the above-captioned lawsuit, without prejudice, against Defendant, Earthgrains Baking Companies, Inc. d/b/a Rainbo Baking Company of Tulsa and Oklahoma City, and that each respective party is liable for their own incurred legal fees and costs.

JOHN M. BUTLER & ASSOCIATES


Charles E. Jarvi, OBA #17651
John M. Butler, OBA #1377
6846 South Canton, Suite 150
Tulsa, Oklahoma 74136
(918) 494-9595
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Counsel for Plaintiff, Janice Martin

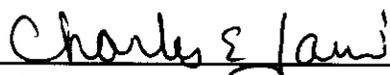
*NICHOLS, WOLFE, STAMPER, NALLY, FALLIS &
ROBERTSON, INC.*


Thomas D. Robertson, OBA #7665
124 East 4th Street, Suite 400
Tulsa, Oklahoma 74103-5010
(918) 584-5182
(918) 582-9321
Counsel for Defendant, Earthgrains, et al.

CERTIFICATE OF MAILING

I hereby verify that a true and correct copy of the foregoing *Dismissal without Prejudice*, was faxed and mailed, postage prepaid, on this 16th day of October, 1998, to:

Thomas D. Robertson
Counsel for Defendant, Earthgrains Baking Companies, Inc.
124 East 4th Street
Tulsa, Oklahoma 74103-5010



Charles E. Jarvi, OBA #17651
John M. Butler, OBA #1377
Counsel for Plaintiff, Janice Martin

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 20 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

VIRGINIA TINCUP,

Defendant.

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No. 98CV571BU(M)

ENTERED ON DOCKET
DATE OCT 21 1998

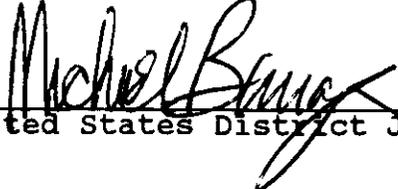
DEFAULT JUDGMENT

This matter comes on for consideration this 19th day of October, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Virginia Tincup, appearing not.

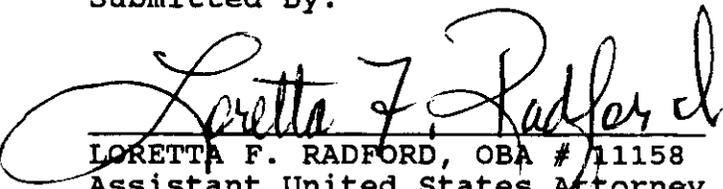
The Court being fully advised and having examined the court file finds that Defendant, Virginia Tincup, was served with Summons and Complaint on August 3, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Virginia Tincup, for the principal amounts of \$10,050.00 and \$1,500.00, plus accrued interest of \$8,597.07 and \$696.08, plus interest thereafter at the rates of 9 percent and 5 percent per annum until judgment,

plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.730 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

LFR/llf

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

OCT 19 1998

TONY R. MORRISON,
SSN: 446-64-6438,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security,¹

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-0070-EA

ENTERED ON DOCKET

DATE OCT 21 1998

ORDER

Claimant, Tony R. Morrison, 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 Tenth Circuit Court of Appeals.

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

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 26, 1993, claimant protectively applied for disability benefits under Title II (42 U.S.C. § 401 *et seq.*). Claimant's application for benefits was denied in its entirety initially (January 27, 1994), and on reconsideration (March 28, 1994). A hearing before Administrative Law Judge Dana E. McDonald (ALJ) was held October 20, 1994, in Tulsa, Oklahoma. By decision dated December 27, 1994, the ALJ found that claimant was not disabled at any time through the date of the decision. On November 19, 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.

Court **REVERSES** the Commissioner's decision, and **REMANDS** for an immediate award of benefits.

I. CLAIMANT'S BACKGROUND

Claimant was born October 9, 1967, and was 27 years old at the time of the ALJ decision. Claimant has a high school education, and his past relevant work was as a fire fighter in the United States Navy. Claimant alleges an inability to work beginning June 20, 1990 due to headaches, dizziness, disequilibrium, memory problems, depression, pain, and nervousness. (R. 23)

II. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

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

substantial gainful work in the national economy....” Id., § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.³

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

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

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

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

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform a wide range of unskilled work at all exertional levels, except for exposure to climbing, unprotected heights, dangerous moving machinery, operation of motorized vehicles, the general public, or more than simple to complex tasks, and except for work requiring full manual dexterity of the left hand. (R. 24) The ALJ concluded that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his RFC, age, education, and work experience. Having concluded that there were a significant number of jobs which claimant could perform, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

IV. REVIEW

Claimant asserts as error that the ALJ:

- failed to properly consider the effect of claimant’s episodes of migraine headaches on his ability to work on a regular basis;
- failed to properly assess claimant’s credibility as to pain from migraine headaches;
- failed to shift the burden to the Commissioner at Step Five; and
- failed to properly evaluate claimant’s mental impairment.

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).

Relevant Period

Claimant filed prior applications for disability benefits on February 21, 1991 (R. 68), and August 23, 1991 (R. 84), and initial denials were issued April 2, 1991 (R. 71), and December 18, 1991 (R. 106), respectively. Claimant did not request reconsideration of or appeal these denials. In connection with the present application, claimant requested reopening of the prior applications. (R. 518) The ALJ performed a detailed analysis of the adjudicative effect of the prior denials, including a "good cause" and "mental capacity" review. (R. 14-17) The ALJ found that the prior denials were final administrative actions under the doctrine of res judicata. (R. 17)

The ALJ expressly found no basis to reopen the prior determinations. (Id.) This finding is not reviewable by this Court absent a valid Constitutional claim. Califano v. Sanders, 430 U.S. 99 (1977); Nelson v. Sec'y of Health & Human Services, 927 F.2d 1109 (10th Cir. 1990). Claimant testified that he did not appeal the prior denials because "it was just taking a long time" (R. 43-44) The Court finds that claimant has failed to demonstrate that the ALJ's exercise of regulatory discretion violated claimant's Constitutional rights. This finding of the ALJ is, therefore, not reviewable by this Court. Disability claims for the period on or before December 18, 1991 are barred. Thus, the relevant period for this application commences December 19, 1991.

Migraine Headaches

Claimant complains of headaches accompanied by dizziness and sweats, which began while on active duty in the United States Navy in June 1990. He was evaluated at the Long Beach Naval Hospital and later at the Veterans' Administration Medical Center (VAMC) in Long Beach, California. Tests included a CT scan, an MRI scan of the head, and a gallium scan, which were negative. Repeat MRI and CT scans were also negative. The diagnosis was headaches and

disequilibrium syndrome, etiology uncertain. During the hospitalization at VAMC, claimant was also diagnosed with adjustment disorder with anxiety and somatization. In 1991, claimant was discharged from the Navy on the temporary disability retirement list. In a consultative examination after claimant's return to Oklahoma, he was diagnosed with atypical somatoform disorder. Claimant continued to complain of headaches and dizziness in his periodic visits to the Tulsa VA Clinic from 1991 to 1994, and in September 1994 reported that he was having "migraine headaches." He was diagnosed with common migraine headaches and depression.

Claimant alleges that the ALJ failed to properly consider the effect of claimant's episodes of migraine headaches on his ability to work on a regular basis. Claimant testified at the administrative hearing that his migraine headaches occur 3-4 times a week and that he often has headaches which last for several days. (R. 49, 54-55) He claims that the headaches are sometimes accompanied by nausea and vomiting, and that he has to stay away from noise and light during the migraine episodes. (Id.) During migraine episodes, he stays in his bedroom with the windows darkened. (R. 54, 56) The migraines make him dizzy. (R. 49, 56) He testified that he has headaches 90 percent of the time (R. 58), and that he has sensitivity to noise and light all the time. (R. 55)

The ALJ found claimant's testimony only partially credible (R. 22), and determined that claimant was not disabled at Step Five of the sequential evaluation process. The issue presented is whether the ALJ's credibility determination is supported by substantial evidence.

Rejecting the testimony regarding the frequency and duration of these episodes, and ignoring the effect of these episodes on claimant's ability to work on a regular basis, the ALJ determined that claimant had the RFC to perform a wide range of unskilled work at all exertional levels, with certain described non-exertional limitations. (R. 22, 24) Although the ALJ found that claimant had

headaches, and apparently credited claimant's complaints of dizziness, the ALJ found claimant's testimony credible only to the extent consistent with the RFC determined by the ALJ. (R. 22)

Claimant challenges the ALJ's credibility determination. "[C]redibility determinations are the province of the ALJ, 'the individual optimally positioned to observe and assess witness credibility.'" Adams v. Chater, 93 F.3d 712, 715 (10th Cir. 1996) (quoting Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 801 (10th Cir. 1991)). Deference is generally accorded to the ALJ on this issue, but only if the credibility determination is supported by substantial evidence. Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995).

A careful review of the record does not provide substantial evidentiary support for the ALJ's credibility determination. The medical records, in fact, tend to establish claimant's disability. The records in their entirety show that, since 1990, claimant has consistently complained of and sought relief from headaches, and received medication both for pain and for spasm, in the event they were tension-related. (R. 473 (8/1/90), 472 (8/28/90), 470 (8/19/91), 468 (3/19/92), 466 (12/28/92), 465 (2/26/93), 463 (12/8/93), 503 (3/17/94), 502 (5/19/94), 501-02 (5/20/94), 500 (6/7/94), 499 (9/1/94), 512-17 (9/26/94)) Among the medications he has received for headaches are:

- Tylenol 650 mg (R. 286, 369, 370) (for pain)
- Motrin 800 mg (R. 232, 278, 282, 368-374) (for pain)
- Tylenol #3 (R. 342) (for pain)
- Flexeril 10 mg (R. 463) (for muscle spasm)
- Cafegot (R. 503) (for migraine headache)
- Diazepam 2 mg (R. 486) (for muscle spasm)
- Cyclobenzaprine 10 mg (R. 486) (for muscle spasm)
hydrochloride
- Butalbital 3X daily (R. 498) (for tension headache)

During the relevant period, claimant was diagnosed consistently with headaches and migraine headaches. None of the doctors who examined claimant since November 1991 (just immediately

prior to the relevant period) questioned the existence of his headaches, just whether they were migraine headaches, tension headaches, or a somatoform disorder manifested by headaches. (R. 456, 460, 463, 483, 487, 499, 502, 503, 514, 516) The treating physicians' opinions cannot be ignored. Diagnoses and remarks of claimant's treating physicians support claimant's disability. (R. 463, 499, 502, 503, 514, 516) 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). Although the ALJ acknowledged that "claimant has been extensively worked up for complaints of headaches, dizziness, and disequilibrium" (R. 18), he found that "[t]he record does not reflect functional restrictions by claimant's treating physicians that would preclude a wide range of unskilled work activity." (R. 21-22) The Court disagrees with the ALJ for the following reasons. First, the medical record is not inconsistent with claimant's testimony of severe migraine headaches with debilitating side-effects. None of the treating physicians engaged in an analysis of claimant's functional restrictions.⁴ Second, the ALJ's pain analysis clearly indicates that the ALJ relied on the lack of conclusive laboratory findings confirming the headache diagnosis. (R. 22) There are no conclusive tests to determine the cause or to evaluate the severity of a migraine or its

⁴ One clinical psychologist reported in a May 20, 1994 progress note that claimant "sees himself as totally disabled and unable to work. He was administered MMPI but responses were grossly exaggerated and thus invalid." (R. 500) The same psychologist noted on June 7, 1994, "[n]o objective psychiatric problem." (*Id.*) However, the ALJ found, consistent with the medical records, that "claimant has severe an [sic] adjustment disorder with anxiety and somatization" (R. 23) Claimant was diagnosed by two consultative psychiatrists with atypical somatoform disorder, and possible somatoform disorder. (R. 456, 483) Somatoform disorder is a mental impairment which can be manifested by a "[p]reoccupation with a belief that one has a serious disease or injury." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 112.07(A)(4). Thus, the May 1994 progress note is consistent with claimant's mental impairment, and the June 1994 analysis, not based on any additional testing, is contrary to the opinions of the two consultative psychiatrists noted above. (R. 456, 483)

pain. The failure to produce such tests results cannot be the basis for discrediting claimant's uncontroverted testimony.

What the ALJ appears to have relied on most heavily is his finding of lack of credibility based on claimant's testimony on three subjects: daily activities (R. 20-21), left-side versus right-side headaches (R. 21), and driving history. (R. 22) Although claimant's account of his daily activities is consistent with the disability he claims to be suffering (R. 51-53), the ALJ simply concluded that claimant "minimized his role in the care of the children, a description the undersigned finds to have been understated." (R. 20) There is no basis in the record for the ALJ's conclusion. The ALJ attempted to bolster his credibility finding by relying on the alleged discrepancy between claimant's testimony in October 1994 that he experienced headaches on the right side that were unpredictable in occurrence and claimant's statement in November 1991 that claimant would get an "aura on the left side of his face warning him of the impending attack." (R. 21) In addition to the fact that there was a lapse of three years between these statements, the 1994 testimony relates to the location of the headaches (R. 47), and the 1991 statement relates to the onset of dizzy spells. (R. 459) There is nothing inconsistent in these statements. The claimant testified that the headache pain is "still on the right side" but he doesn't know when it is coming. (R. 47) There is nothing in the record to contradict this statement. Finally, in finding claimant unconvincing, the ALJ questioned claimant's driving history. At the administrative hearing in October 1994 claimant testified that it had been three or four years since he had driven (R. 42), and in a December 1993 consultative psychiatric examination claimant stated he had not driven during the previous two months. (R. 481) Depending on the way the question was posed by the psychiatrist, these two statements are not necessarily inconsistent. Even assuming they are, the inconsistency could be attributable to the memory loss of

which claimant complains or the medication he was taking at the time of the examination (Valium and Flexeril). (R. 481) In any event, this one inconsistency is a mere scintilla, and not substantial evidence compelling this Court to disregard the testimony of both claimant and the vocational expert that the limitations imposed by claimant's pain and the need to be in a room with no light and sound render claimant unable to work on a sustained basis. (R. 63-64)

On the basis of the medical records tending to establish claimant's disability, together with the uncontradicted evidence of continuing severe migraine headaches, the Court finds that the ALJ's credibility determination is not supported by substantial evidence and must be reversed.

Based on the reversal on this issue, claimant's other allegations of error need not be reached.

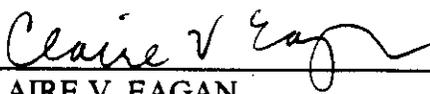
Benefits

It is within the Court's discretion to remand for further administrative proceedings or for an immediate award of benefits. Ragland v. Shalala, 992 F.2d 1056, 1060 (10th Cir. 1993). If additional fact-finding would serve no useful purpose, remand for an immediate award is appropriate. See Sorenson v. Bowen, 888 F.2d 706, 713 (10th Cir. 1989). The vocational expert testified that if claimant's testimony was credible, he would not be able to work on a sustained basis due to the limitations imposed by the pain and the need to be in a room with no light and sound. (R. 63-64) Accordingly, there is no reason for additional proceedings. The Court exercises its discretionary authority to remand for an immediate award of benefits.

V. CONCLUSION

The decision of the Commissioner is not supported by substantial evidence. For the reasons discussed above, the Court **REVERSES** and **REMANDS** for an immediate award of benefits.

DATED this 19th day of October, 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE