

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

FILED

JAN 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DARLA E. MELLOR,)
)
 Plaintiff,)
)
 vs.)
)
 METROPOLITAN LIFE INSURANCE)
 COMPANY, a foreign corporation,)
 and SHERI WELLS,)
)
 Defendants.)

Case No. 98-CV-690-BU ✓

ENTERED ON DOCKET
DATE 1-20-99

ORDER

This matter comes before the Court upon certain motions of Defendants. Upon due consideration, the Court ORDERS as follows:

1. Defendant Metropolitan Life Insurance Company's Motion to Dismiss (Docket Entry #2) is GRANTED. The Court concludes that the narrow public policy exception to the employment at-will doctrine recognized in Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989), does not apply to Plaintiff's claim of wrongful discharge based upon sexual harassment and/or retaliation. Plaintiff's statutory remedies for sexual harassment and/or retaliation are adequate. See, Richmond v. ONEOK, Inc., 120 F.3d 205, 210 (10th Cir. 1997); Marshall v. OK Rental & Leasing, Inc., 939 P.2d 1116, 1122 (Okla. 1997); List v. Anchor Paint Mfg. Co., 910 P.2d 1011, 1013-14 (Okla. 1996) The Fourth Claim for Relief against Defendant. Metropolitan Life Insurance Company, is therefore DISMISSED.

2. Defendant Sheri Wells' Motion to Dismiss (Docket Entry #3) is also GRANTED. To the extent that Defendant, Sheri Wells,

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has been sued in her individual capacity for Plaintiff's claims of sexual harassment and retaliation under Title VII, the Court finds that dismissal is warranted. Defendant, Sheri Wells, is not personally liable for Plaintiff's claims of sexual harassment and retaliation under Title VII. Haynes v. Williams, 88 F.3d 898, 899, 901 (10th Cir. 1996). To the extent that Defendant, Sheri Wells, is sued in her official capacity, the Court also finds that dismissal is warranted. Plaintiff's employer, Defendant, Metropolitan Life Insurance Company, is a named defendant in this action. Consequently, it is not necessary to sue Defendant, Sheri Wells, in her official capacity since a suit against Defendant, Sheri Wells, in her official capacity is a suit against Defendant, Metropolitan Life Insurance Company, itself. Id. at 899 (citing, Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993)). As to Plaintiff's claim of wrongful discharge based upon sexual harassment and/or retaliation, the Court finds, for the same reason stated above, that the Burk public policy exception to the employment at-will doctrine does not apply. The First Claim for Relief, Second Claim for Relief and Fourth Claim for Relief against Defendant, Sheri Wells, are therefore DISMISSED.

ENTERED this 20th day of January, 1999.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

JAN 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN HANCOCK MUTUAL LIFE)
INSURANCE COMPANY,)

Plaintiff,)

vs.)

Case No. 98-CV-338-BU ✓

BELINDA L. HOOD; ALYSSA L.)
HOOD; and TINA L. DANA, as)
guardian and next friend of)
Jesse C. Hood, a minor)
child,)

Defendants.)

1-20-99

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is hereby ordered that the Court 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, provided however, that the Court shall retain jurisdiction over this matter for the purpose of addressing any future application by the minor child, Jesse C. Hood, regarding the settlement proceeds.

Entered this 20th day of January, 1999.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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FILED

JAN 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATE DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

I.M.R. CORPORATION, an Oklahoma
corporation,

Plaintiff,

vs.

KEN BRUMMETT, STEPHEN C. WARNER,
JOHN F. HARBIN, TOM FULGER, and
BIO-CHEM RESOURCES,

Defendants.

Case No. 98-CV-960-BU (m) ✓
ROGERS COUNTY, OKLAHOMA
DISTRICT COURT CASE NO. CJ 98 519

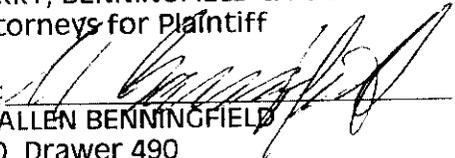
ENTERED ON DOCKET
DATE JAN 20 1999

NOTICE OF DISMISSAL WITHOUT PREJUDICE BY PLAINTIFF

To: Stephen C. Warner, Defendant
John H. Harbin, Defendant
and Michael James King, Esq., their attorney

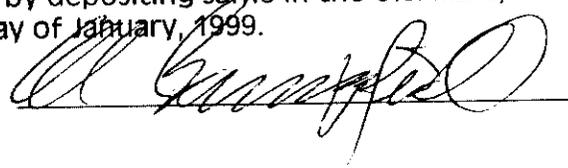
Please take notice the above-entitled action is hereby dismissed without prejudice
as to all Defendants, pursuant to Rule 41 (a)(1)(i) of the Federal Rules of Civil Procedure.

Respectfully submitted,
BERRY, BENNINGFIELD & FUGATE
Attorneys for Plaintiff

BY: 
R. ALLEN BENNINGFIELD
P.O. Drawer 490
Catoosa, Oklahoma 74015
(918) 266-4242

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Dismissal
was mailed to Michael King, Esq., Winters, King and Associates, Inc., Attorneys at Law, 2448
E. 81st, Suite 5900, Tulsa, Oklahoma, 74137-4259, by depositing same in the U.S. Mails,
proper postage prepaid thereon, on this 20th day of January, 1999.



(6)

CTJ

Orig.

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

JAN 20 1999

JOHN HANCOCK MUTUAL LIFE)
INSURANCE COMPANY,)

Plaintiff,)

vs.)

BELINDA L. HOOD; ALYSSA L. HOOD;)
and TINA L. DANA, as guardian and next)
friend of Jesse C. Hood, a minor child,)

Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-0338BU(E)

ENTERED ON DOCKET

DATE JAN 20 1999

**ORDER APPROVING
SETTLEMENT OF MINOR AND DISBURSEMENT OF FUNDS**

THIS MATTER comes on before the Court upon the application of Tina L. Dana, as guardian and next friend of Jesse C. Hood, a minor child, (the "Guardian") to approve settlement of minor and disbursement of funds and the Court, having reviewed the application and exhibits thereto and being fully advised in the premises, finds as follows:

1. The parties to this action have executed that certain Settlement Agreement, Release And Covenant Not To Sue dated as of the 19th day of January, 1999, pursuant to the terms of which, the minor child shall receive the sum of \$63,390.97, together with accrued interest thereon.
2. The amount to be paid to the minor child pursuant to the settlement is reasonable and the Court finds that the settlement is in the best interest of the minor child.
3. The Guardian, having consulted with her attorneys, has received a full and sufficient explanation of the costs and risks of litigation and the consequences of this settlement and is aware that, once the Court enters this order, and the settlement proceeds have been paid, the minor child, Jesse C. Hood, and Tina L. Dana, individually and as guardian and next friend of Jesse C. Hood, shall be forever barred from making any additional claim as a result of the claims which have been asserted

or which may have been asserted in this lawsuit.

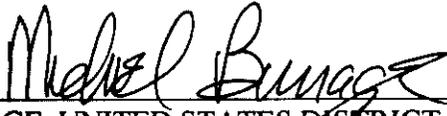
4. The Guardian has heretofore entered into a contingent fee agreement with her attorneys, Eller and Detrich, a professional corporation, and Amy L. Underwood, under which agreement said attorneys are due a reasonable attorneys fee of forty percent (40%) of the settlement. The attorneys have agreed to remit a portion of their fees such that the total due to them with respect to the recovery made on behalf of Jesse C. Hood, a minor child, will be \$24,381.39, in addition to expenses advanced in the sum of \$198.67. The Guardian has agreed to pay such sums and the Court finds that such sums are reasonable.

5. The Court finds that the Guardian should place all funds awarded to the minor, following the payment of attorneys fees and expenses, in a federally-insured account at Local America Bank, Tulsa, Oklahoma, to be withdrawn only by leave of this Court to be withdrawn only by leave of this Court until the minor child, Jesse C. Hood, reached the age of eighteen (18) years, at which time all funds remaining in said account may be released to Jesse C. Hood without further order of this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Settlement Agreement, Release and Covenant Not To Sue dated as of the 19th day of January, 1999, is hereby approved and that Tina L. Dana, as guardian and next friend of Jesse C. Hood, a minor child, shall place the settlement funds paid to such minor child as a result of the settlement, after the payment of attorneys fees and expenses, in a federally-insured account at LocalAmerica Bank, Tulsa, Oklahoma, to be withdrawn only by leave of this Court, until the minor child, Jesse C. Hood, reaches the age of eighteen (18) years, at which time all sums remaining in said account may be released to Jesse C. Hood without further order of this Court. This Court further approves the payment of the sum of \$25,356.39

as reasonable attorneys fee and expenses advanced of \$198.67 and directs that Tina L. Dana, as guardian and next friend of Jesse C. Hood shall pay these fees and expenses from the proceeds of the settlement on behalf of Jesse C. Hood, a minor child.

Dated this 20th day of JANUARY, 1999.



JUDGE, UNITED STATES DISTRICT COURT

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

IN RE:

RONALD K. SUDDARTH,

Debtor,

PATRICK J. MALLOY, III, Trustee,

Appellant,

vs.

ARCADIA FINANCIAL LTD.,

Appellee.

ENTERED ON DOCKET

DATE

1-19-99

Case No. ⁹⁸ ~~98~~-CV-⁵³⁹ ~~539~~-H(J) ✓

FILED

JAN 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

The Trustee appeals the decision of the Bankruptcy Court that Arcadia substantially complied with the Oklahoma motor vehicle perfection statute when it delivered a lien entry form to the Oklahoma Tax Commission which included a date upon which the creditor signed the security agreement but did not include the date of the security agreement. For the reasons discussed below, the United States Magistrate Judge recommends that the decision of the Bankruptcy Court be **AFFIRMED.**

I. STATEMENT OF FACTS

The Bankruptcy Court entered the following findings of fact. Ronald K. Suddarth, the debtor, entered a retail installment agreement to purchase a used 1997 Stratus on September 10, 1997. He granted a purchase money security interest in the

vehicle to Tulsa United Motor Sales. On September 11, 1997, Tulsa United Motor Sales assigned the retail installment agreement to Arcadia Financial Ltd. ("Arcadia"). On that same day an Arcadia representative executed a lien entry form as the "Secured Party/Assignee". The lien entry form was complete, with the exception of the box on the form which provides for the date of the security agreement. This box was left blank. The signature of Arcadia's representative was dated September 11, 1997. The signed lien entry form was delivered to a motor license agent on September 11, 1997. On October 14, 1997, Suddarth filed a Voluntary Petition for Relief under Chapter 7 listing the vehicle as an asset of the estate.

II. STANDARD OF REVIEW

The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. Conclusions of law are reviewed *de novo*. Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988). "When reviewing factual findings, an appellate court is not to weigh the evidence or reverse the finding because it would have decided the case differently. A trial court's findings may not be reversed if its perception of the evidence is logical or reasonable in light of the record." In re Branding Iron Motel, Inc., 798 F.2d 396 (10th Cir. 1986) (citations omitted).

Appellant submits nothing that causes this Court to disturb the Bankruptcy Court's findings of facts under the clearly erroneous standard.

III. ANALYSIS

A. SECTION 1110 REQUIRES ONLY SUBSTANTIAL COMPLIANCE

Title 47 O.S. § 1110 governs the perfection of security interests in motor vehicles. The section expressly incorporates the principles of the UCC. "In all other respects, Title 12A of the Oklahoma Statutes shall be applicable to such security interests in vehicles as to which a certificate of title may be properly issued by the Commission."^{1/} 47 O.S. 1991, § 1110.

This section was amended in July 1985. The prior statute did not contain the "express incorporation" language which is, in part, the focus of the decision of the Bankruptcy Court.^{2/} The Oklahoma Supreme Court in a case interpreting the perfection provision in Title 47, prior to the 1981 amendment of the statute, concluded that the provisions of the UCC should be used in interpreting the statute.

Although the Oklahoma Certificate of Title Statute does not expressly adopt the general concepts and principles of the Code for the interpretation and construction, it does not and should not stand severed from the modern law controlling security interests. We see no reason to adopt outmoded and harsh principles of construction in interpreting the sufficiency of perfecting a vehicle security agreement when

^{1/} This provision of "express incorporation" does have an exception. The statute provides that "[t]he filing and duration of perfection of a security interest, pursuant to the provisions of Title 12A of the Oklahoma Statutes, including, but not limited to, Section 9-302 of Title 12A of the Oklahoma Statutes, shall not be applicable to perfection of security interests in vehicles as to which a certificate of title may be properly issued by the Commission. . . ."

^{2/} The language of the previous statute did provide that "[t]he filing provisions of Title 12A of the Oklahoma Statutes, including, but not limited to, Section 9-302, shall not be applicable to perfection of security interests in vehicles as to which a certificate of title may be properly issued by the Tax Commission, except as to vehicles. . . ." Title 47 O.S. 1981, § 23.2b. The statute does not contain the additional language, as set out above by the Court, that "in all other respects" Title 12A is applicable. See 47 O.S. 1991, § 1110.

most, if not all, other goods are subject to the liberal definitions of the Code. The Legislature rejected such archaic, strict construction when it passed the Code provisions prior to the Oklahoma Certificate of Title Statute. It further affirmed its conviction that the Code principles should apply when it incorporated the very language of the Code into § 23.2b. Section 23.2b of Title 47 adopts the definition for security interests found in the Code at § 1-201 of Title 12A. Such a reference demonstrates the intertwined nature of the Statute and the Code.

Notice of a security interest in a motor vehicle on a certificate of title is the equivalent of a financing statement of other types of goods under the Code. The concepts of the Code shall govern in determining the sufficiency of notice.

In re Cook, 637 P.2d 588 (Okla. 1981).

The amended statute expressly incorporates the provisions of the UCC. In addition, prior to this amendment, the Oklahoma Supreme Court had, in case law, incorporated the provisions of the UCC to the perfection of motor vehicles. The Court concludes that the Bankruptcy Court correctly concluded that the substantial compliance provisions of the UCC should be incorporated into the perfection provisions of 47 O.S. 1991, § 1110.

B. ARCADIA HAS SUBSTANTIALLY COMPLIED WITH SECTION 1110

In accordance with 12A O.S. 1991, § 9-402(8), "[a] financing statement substantially complying with the requirements of this section [regarding form of financing statement] is effective even though it contains minor errors which are not seriously misleading."

In Hembree v. General Motors Acceptance Corporation, 635 P.2d 601, 603 (Okla. 1981), the Oklahoma Supreme Court noted that "[t]he policy underlying the perfection and recordation of security interests is to provide notice to interested parties." The Court additionally found that a "policy of liberal construction shall be applied to promote the underlying purpose of the UCC." Hembree, 635 P.2d at 603, citing 12A O.S. 1971, § 1-102(1) ("This Act shall be liberally construed and applied to promote its underlying purposes and policies.") and 12A O.S. 1971, § 1-102(2) ("Underlying purposes and policies of this Act are: (a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions."). The Cook court reaches the same conclusion with similar language.

For the reasons stated we hold that Section 23.2b is properly construed as a notice filing statute with requirements similar to those of Article 9 of the U.C.C., holding Ford's security interest was perfected if it substantially complied with the statute. Whether the filing requirements have been substantially complied with so as to give requisite notice to other creditors depends on the facts of each case.

12A O.S. 1971 § 9-402(5) provides that a filing substantially complies if it contains "minor errors" which are not "seriously misleading."

In re Cook, 637 P.2d at 590.

The Bankruptcy Court concluded that Arcadia had substantially complied with the perfection requirements. The Magistrate Judge recommends that the District Court affirm the decision of the Bankruptcy Court.

The Bankruptcy Court noted that "[s]ubstantial compliance with the perfection statute is achieved if deviations from the strict requirements of the perfection statute do not seriously mislead the creditor." See Order of Bankruptcy Court at 7. This is in accord with Oklahoma law. Under the facts of this case, substantial compliance occurs if (1) notice is given to the parties, and (2) no trustee or creditor is misled. Notice, which is the purpose of the statute, was achieved.

The Bankruptcy Court additionally noted that an evaluation of substantial compliance requires a case by case factual analysis which considers: (1) whether sufficient information has been imparted to the creditor to give the creditor notice of the existence of the lien, (2) whether the collateral upon which the lien has attached, (3) provides a general idea of when the lien arose, and (4) contains the identity of the debtor and the secured party to permit a third party to make further inquiry. See Bankruptcy Order at 9, n.3, *citing Liberty Nat'l Bank and Trust Co. v. Garcia*, 686 P.2d 303, 305 (Okla. Ct. App. 1984). In this case, the retail installment agreement was entered into on September 10, 1997. The Arcadia representative's signature is "dated" September 11, 1997, and the form was received by the motor license agent on September 11, 1997. The Court concludes that, considering the liberal construction and substantial compliance policies, the information provided was sufficient to give a party reviewing the form a "general idea" of when the lien arose.

Appellant refers to the Cook case and focuses on a Connecticut case which concluded that the omission of the date was a fatal defect. As pointed out by the Bankruptcy Court, the reference to the Connecticut case is dicta. In addition, as noted by the Bankruptcy Court, the District Court for the District of Connecticut held that the omission of the date in the security agreement did not invalidate the security interest when nothing indicated that the omission misled the trustee or creditors. See Order of the Bankruptcy Court, n. 3 at 9, *citing In re Grandmont*, 310 F. Supp. 968 (D. Conn. 1970).

III. RECOMMENDATION

The United States Magistrate Judge recommends that the District Court affirm the decision of the Bankruptcy Court.

IV. OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/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 15 day of January 1999.



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

19th Day of January, 1999.
C. Portillo, Deputy Clerk

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(275-11)

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

FILED

JAN 15 1999 *SR*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EDWARD L. HAMMONS,)
an individual,)

Plaintiff,)

vs.)

HOME OF HOPE, INC., a)
not-for-profit Oklahoma corporation,)

Defendant.)

Case No. 97-CV-737-K(W) ✓

ENTERED ON DOCKET

DATE 1/19/99

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW Plaintiff, Edward L. Hammons and Defendant, Home of Hope, Inc., and pursuant to Fed.R.Civ.Proc. 41 (a)(ii), hereby stipulate to the voluntary dismissal of the above-referenced action by Plaintiff Edward L. Hammons with prejudice.

DATED this 15th day of January, 1999.

Respectfully submitted,

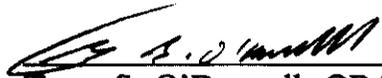
TOMLIN & GOINS

By *Ronald E. Goins*

Ronald E. Goins, OBA #3430
Ellen E. Gallagher, OBA #14717
2100 South Utica, Suite 300
Tulsa, OK 74114

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CT



Terry S. O'Donnell, OBA #13110

Karen M. Grundy, OBA #14198

BEST & SHARP

100 W. 5th St., Ste. 808

Tulsa, OK 74103-4225

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 LISA L. HASTINGS,)
)
 Defendant.)

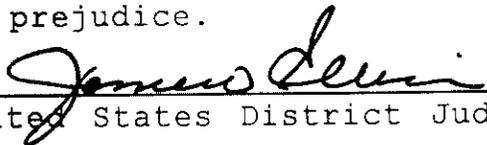
CIVIL ACTION NO. 98CV0016E

FILED ON DOCKET
JAN 19 1999

ORDER VACATING DEFAULT JUDGMENT

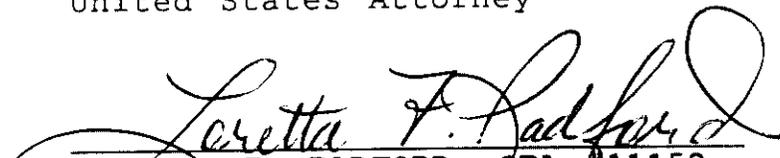
Now on this 15th day of January, 1999,
it appears that the Defendant in the captioned case was not
a resident of the Northern District of Oklahoma at the time
the complaint was filed in this matter.

IT IS THEREFORE ORDERED that the Default Judgment
against Defendant, Lisa L. Hastings, on April 29, 1998, be
and is dismissed without prejudice.


United States District Judge

SUBMITTED BY:

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

LFJ/jmo

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

FILED

JAN 15 1999 *ML*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROY ALLEN NUTTALL, JR.,)
)
Plaintiff,)
)
vs.)
)
STAX, as a trade name for CIRCLE K)
STORES, INC.,)
)
Defendant.)

Case No. 98-CV-0242-B(J) /

NOTED ON DO...

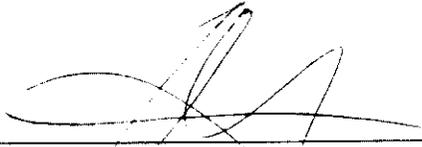
DATE JAN 19 1999

STIPULATION FOR DISMISSAL

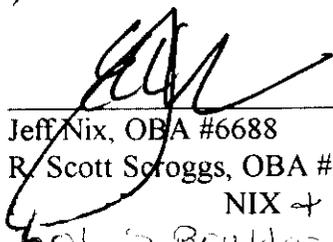
Pursuant to Rule 41, the parties hereby stipulate and agree that this matter is dismissed with prejudice, that the causes of action of Plaintiff and actions set forth in Plaintiff's Complaint against the Defendant have been satisfactorily settled by and between the parties hereto and that the consideration for said settlement has been accepted by Plaintiff, Roy Allen Nuttall in full satisfaction of his causes of action and claims against the Defendant.

It is further stipulated and agreed that each party will bear its own costs and attorney fees.

Dated this 15th day of January, 1999.



ROY ALLEN NUTTALL, JR.,
Plaintiff



Jeff Nix, OBA #6688
R. Scott Scroggs, OBA #16889
NIX + Scroggs
601 S. Boulder, Ste 512
Tulsa, Oklahoma 74119
(918) 587-3183 (telephone)
(918) 587-3491 (facsimile)

ATTORNEYS FOR PLAINTIFF

12

Handwritten notes in bottom right corner



Roberta Browning Fields, OBA #10805
RAINEY, ROSS, RICE & BINNS
735 First National Center West
120 North Robinson Avenue
Oklahoma City, Oklahoma 73102-7495
(405) 235-1356 (telephone)
(405) 235-2340 (facsimile)

ATTORNEYS FOR DEFENDANT
STAX, AS A TRADE NAME FOR
CIRCLE K STORES, INC.

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

FILED

JAN 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRENDA RICHARDS,

Plaintiff,

vs.

DR. JAMES SMALL, and SAINT JOHN
MEDICAL CENTER, ex rel., WORKMED
OCCUPATIONAL HEALTH NETWORK,

Defendants.

Case No. 96-C-67-B

Judge Thomas R. Brett

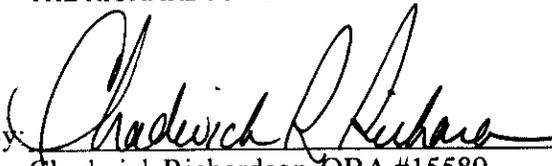
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JAN 19 1999

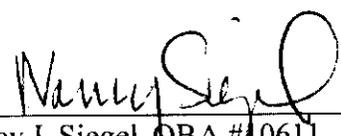
STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to the provisions of Rule 41(a)(1), Federal Rules of Civil Procedure, the parties stipulate to a Dismissal With Prejudice of all claims asserted by Plaintiff against Defendant, St. John Medical Center, Inc. in above styled and numbered cause.

THE RICHARDSON LAW FIRM

DOERNER, SAUNDERS, DANIEL & ANDERSON

By: 

By: 

Chadwick Richardson, OBA #15589
6846 S. Canton
Tulsa, OK 74136

Nancy J. Siegel, OBA #10611
320 S. Boston Ave., Suite 500
Tulsa, OK 74103

Attorney for Plaintiff

Attorneys for Defendant

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JAN 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD A. BUSH)
SSN: 117-46-2546,)
)
Plaintiff,)

v.)

KENNETH S. APFEL, Commissioner,)
Social Security Administration,)
)
Defendant.)

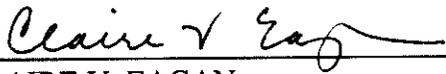
Case No. 97-CV-538-EA

ENTERED ON DOCKET
DATE JAN 19 1999

JUDGMENT

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

It is so ordered this 15th day of January 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 15 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD A. BUSH)
SSN: 117-46-2546,)
)
Plaintiff,)

v.)

KENNETH S. APFEL, Commissioner,)
Social Security Administration,¹)
)
Defendant.)

Case No. 97-CV-538-EA

ENTERED ON DOCKET
DATE JAN 19 1999

ORDER

Claimant, Richard A. Bush, 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

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

² On September 4, 1991, claimant applied for disability benefits under Title II (42 U.S.C. § 401 *et seq.*), and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 *et seq.*). Claimant's application for benefits was denied in its entirety initially (January 8, 1992), and on reconsideration (May 27, 1992). A hearing before Administrative Law Judge (ALJ) Thomas E. Bennett was held February 18, 1993, in Stillwater, Oklahoma. A supplemental hearing was held July 28, 1993, in Oklahoma City, Oklahoma. ALJ Bennett denied claimant's application for benefits at step four of the sequential process by decision dated December 23, 1993. The Appeals Council denied review of ALJ Bennett's findings on January 13, 1995. On appeal to this Court, however, the Commissioner filed a motion to remand, and the Court granted that motion on October 5, 1995. Another hearing was held by ALJ Larry C. Marcy on May 23, 1996 in Tulsa, Oklahoma. By decision dated August 30, 1996, ALJ Marcy found that claimant was not disabled on or before June 30, 1984 (the date claimant was last insured for disability benefits under Title II). On March 31, 1997, the Appeals Council denied review of the ALJ's findings. Thus, the decision of ALJ Marcy represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481. All references herein to "ALJ" shall be to ALJ Marcy unless otherwise noted.

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 Court **AFFIRMS** the Commissioner's decision.

I. CLAIMANT'S BACKGROUND

Claimant was born on January 1, 1954, and was 39 years old at the time of his first and second administrative hearings in this matter. He was 42 years old at the time of the third administrative hearing. He has a tenth grade education and a GED. Claimant has worked as a gas station attendant, tool room checker, foundry furnace operator, ranch laborer and portable building carpenter. (Complaint, at 2, ¶ 6.) Claimant alleges an inability to work beginning October 15, 1978. The date he was last insured, for purposes of Title II, was June 30, 1984. He claims that he is unable to work because of his back problems, hip problems, muscle spasms, fatigue, depression and anger, pain and limited mobility. (Complaint, at 2, ¶ 5.) He initially claimed that he suffered from a back injury sustained in 1978, joint problems, partial deafness, and breathing problems. (R. 72, 106.)

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. § 404.1521. 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 20 C.F.R. Pt. 404, Subpt. P, App. 1. 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. (R. 200-07.) He found that claimant had no severe impairment which significantly limited his ability to perform basic work-related activities prior to August 1, 1991 (for purposes of claimant’s Title II claim), but that claimant was impaired by back pain severe enough to reduce his ability to work on and after August 1, 1991 (for purposes of claimant’s Title XVI claim.) Other findings include claimant’s residual functional capacity (RFC) to perform a full range of light work subject to no more than occasional bending or stooping. 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. (R. 206.)

V. REVIEW

Claimant asserts as error that the ALJ improperly relied on the post-hearing report of a consultative examiner and erroneously denied Plaintiff’s request to subpoena the consultative examiner for cross-examination, and, absent the report, the ALJ failed to affirmatively establish by substantial evidence that claimant retained the capacity to perform the demands of light work at all times relevant to his claim. The report at issue resulted from a consultative examination that ALJ Bennett ordered after the first administrative hearing on February 18, 1993. The consultative

examiner, J. D. McGovern, M.D., saw claimant and wrote the report on June 2, 1993. (R. 172.) Dr. McGovern reported that claimant's "range of joint motion" chart revealed several inconsistencies, several of which may have been the result of "poor cooperation." (R. 173.) He could find no objective support for the position that claimant's low back problems were severe enough to cause impairment. (R. 173-74.) He observed that claimant had very few functional limitations. (R. 178-80.)

ALJ Bennett sent the report and a letter to claimant's representative on June 18, 1993, which informed the representative that he could submit written comments concerning the report, a brief or written statement as to the facts and law in the case, or additional evidence not previously supplied. He also stated: "You have the right to examine the author of the evidence. If you want to have the author answer questions, please submit the questions to me in writing. If you want to obtain oral testimony from the author in a supplemental hearing, you must submit a statement indicating the relevance of the information and why the information cannot be obtained through written questions."

(R. 181.) The relevant regulations provide:

(d) *Subpoenas*. (1) When it is reasonably necessary for the full presentation of a case, an administrative law judge or a member of the Appeals Council may, on his or her own initiative or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents that are material to an issue at the hearing.

(2) Parties to a hearing who wish to subpoena documents or witnesses must file a written request for the issuance of a subpoena with the administrative law judge or at one of our offices at least 5 days before the hearing date. The written request must give the names of the witnesses or documents to be produced; describe the address or location of the witnesses or documents with sufficient detail to find them; state the important facts that the witness or document is expected to prove; and indicate why these facts could not be proven without issuing a subpoena.

20 C.F.R. §§ 404.950(d), 416.1450(d).

Claimant's representative sent a letter to the ALJ on June 21, 1993, demanding an opportunity to cross-examine Dr. McGovern. The letter did not set out the information required by subsection two of the regulation. Although most of the information required would have been unnecessary, given that Dr. McGovern was the consultative examiner and the ALJ knew his name, address and the facts Dr. McGovern would be expected to prove, claimant did not indicate why the facts could not be proven, or, in this case, disproven, without issuing a subpoena. Instead, claimant's representative contended that claimant "has an absolute right to have [the ALJ] subpoena and cross-examine the post-hearing medical advisor." (R. 182.)

ALJ Bennett replied, by letter dated July 7, 1993: "There is no evidence available to me that you have made effort to obtain [the desired] information by other means; therefore, no action has been taken to subpoena (or to cause to appear without subpoena having been issued) Dr. J.D. McGovern to be present to testify in said supplemental hearing." (R. 186.) He also informed claimant's representative that he would remove the McGovern report from the record if the representative desired, but he warned the representative that he was not inclined to rule in claimant's favor without the report.

ALJ Bennett and claimant's representative continued this discussion at the supplemental hearing on July 28, 1993. (R. 49-53.) Claimant's representative objected to Dr. McGovern's absence, but claimant testified as to the nature of Dr. McGovern's examination as well as another examination he had at the OSU Medical Clinic in Tulsa on July 26, 1993. (R. 183-84.) ALJ Bennett issued a decision on December 21 1993, denying claimant's disability claims at step four of the sequential analysis by finding that claimant could perform his past relevant work (R. 14-20), and the Appeals Council denied claimant's request for review on January 13, 1995. (R. 3-4.) Claimant

appealed the decision of ALJ Bennett, and this Court granted the Commissioner's motion to remand pursuant to sentence four (4) of 42 U.S.C. §405(g) on October 5, 1995. (R. 264-65.) The case was remanded by the Appeals Council on November 6, 1995. (R. 266-68.) As the Commissioner points out, the case was not remanded, as claimant contends, because the ALJ had erroneously relied on Dr. McGovern's post hearing report without providing claimant the opportunity to cross examine Dr. McGovern. In fact, neither the order of this Court nor the order of the Appeals Council remanding the case address the issue. Instead the remand order explained that the evidence was insufficient to determine whether claimant's work experience as a mobile home setup person constituted relevant work, and the record contained no description of the physical and mental demands of that work. (R. 267.)

In the intervening six months between the remand and a third administrative hearing, claimant did not send interrogatories to Dr. McGovern or renew his request for the ALJ to subpoena Dr. McGovern for cross-examination. Claimant did submit additional medical evidence. (R. 280-87.) At the May 23, 1996 hearing, claimant's representative objected to Dr. McGovern's report and again demanded the right to cross-examine Dr. McGovern in person. Claimant's representative implied that Dr. McGovern might be biased or the report and examination may have been incomplete. He admitted that he had not sent any interrogatories to Dr. McGovern. (R. 213-24.) He later represented, in his October 1, 1996 letter to the Appeals Council, that "Dr. McGovern is biased against claimants for Social Security Disability Benefits and that [claimant] has the right to show that at a Supplemental Administrative hearing." (R. 191.) ALJ Marcy issued his decision denying benefits at step five of the sequential evaluation process. (R. 200-207.) The following reflects a chronology of the events set forth above in narrative form:

02/18/93	First administrative hearing (ALJ Bennett)
06/02/93	Consultative examination and report
06/18/93	Notice of consultative examination report (ALJ Bennett)
06/21/93	Claimant's demand that ALJ Bennett subpoena consultative examiner
07/07/93	Request by ALJ Bennett to send written interrogatories to examiner
07/28/93	Second administrative hearing (ALJ Bennett)
12/23/93	Denial of benefits at step four (ALJ Bennett)
01/13/95	Appeals Council denial of review
10/05/95	District Court sentence four remand
11/06/95	Appeals Council remand
05/23/96	Third administrative hearing (ALJ Marcy)
08/30/96	Denial of benefits at step five (ALJ Marcy)
03/31/97	Appeals Council denial of review

In his decision, the ALJ assessed reduced weight to the McGovern report because he recognized that Dr. McGovern was not one of claimant's treating physicians. Although the ALJ claimed that he did not rely on the report, he stated that "it still remains as the only definitive finding with respect to the claimant's residual functional capacity. . . ." and was consistent with the general conclusions and medical findings by claimant's treating physicians. (R. 204.) In part because of the ALJ's reliance on the report, claimant asserts that the ALJ's denial of his request to subpoena Dr. McGovern is legal error which operates to deny claimant his due process rights. Claimant bases his argument on the decision in Allison v. Heckler, 711 F.2d 145 (10th Cir. 1983), in which the Tenth Circuit held that "[a]n ALJ's use of a post-hearing medical report constitutes a denial of due process because the applicant is not given the opportunity to cross-examine the physician or to rebut the report." Id. at 147.

The Allison court expressly noted that the claimant in that case had no notice of the report, no opportunity to cross-examine the consultative physician (who never examined the claimant) and no opportunity to offer evidence in rebuttal. Id. Similarly, in Goree v. Callahan, 964 F. Supp. 1533 (N.D. Okla. 1997) (cited by claimant), it was specifically noted that the ALJ ignored the claimant's request to subpoena a doctor who submitted a post-hearing report without ever having examined the claimant. The ALJ relied upon the report and issued an opinion without any opportunity for claimant to submit interrogatories to the doctor, without any further communications with claimant, without any additional hearings and without any opportunity for the claimant to rebut the evidence contained in the doctor's report. Id. at 1536-37.

In this matter, the claimant had notice of the report prior to the second hearing before ALJ Bennett. Thus, the report is not truly a "post-hearing" report. Claimant's representative objected to the limited amount of time that he had to prepare due to ALJ Bennett's late mailing of the July 7, 1993 letter, but he declined ALJ Bennett's offer of additional time. (R. 49-52.) Regardless of any timing problem, claimant had the report three years before the third hearing, and he had ample time to review the report and present rebuttal evidence before the third hearing. Claimant thus had two additional opportunities to rebut the evidence at hearing, and indeed, he attempted to do so in both the second and third administrative hearings by offering his own testimony about Dr. McGovern's examination.

It should be noted that neither ALJ in this matter ever affirmatively denied claimant the opportunity to cross-examine the consultative examiner. ALJ Bennett specifically gave claimant the

opportunity to rebut the evidence by sending interrogatories to the consultative examiner.⁴ If claimant deemed Dr. McGovern's responses to the interrogatories insufficient, he could have made an effort to show that a subpoena to cross-examine Dr. McGovern was necessary. Instead, claimant repeatedly demanded an opportunity to cross-examine without ever sending interrogatories or otherwise showing the ALJ why the report could not be challenged without issuing a subpoena. Accordingly, the specific legal issue is whether a social security disability benefits claimant has an absolute right to force the ALJ to subpoena for cross-examination the author of any medical report, or if, under the regulations, the decision is within the sound discretion of the ALJ. If the Court determines that the right is not absolute, then the Court must determine if the ALJ in this instance abused his discretion by denying claimant's request to subpoena the consulting examiner for cross-examination. The Allison holding would seem to permit the ALJ to exercise discretion and refuse to issue a subpoena where cross-examination is not "reasonably necessary to the full development of the case." See 20 C.F.R. §§ 404.950(d), 416.1450(d).

While some courts have erroneously assumed that Allison confers an absolute right to cross-examination, see Flatford v. Chater, 93 F.3d 1296, 1300 n. 3 (6th Cir. 1996), this Court does not read Allison to confer such a right upon claimant. The circuit courts of appeal appear to be split on the issue of whether social security claimants have an absolute right to cross-examine the author of an

⁴ As in Mills v. Chater, 50 F.3d 1282, 1995 WL 681483 (10th Cir. Nov. 2, 1995), the claimant in this matter was notified of the ALJ's intent to rely upon a post-hearing medical report, the claimant received a copy of the report, and the claimant was afforded the opportunity to respond to it with a written statement, additional evidence, and questions to be given to the author of the report. Id. at **2 n. 1. Unlike the claimant in Green v. Shalala, 17 F.3d 1436, 1994 WL 60384 (10th Cir. March 1, 1994), claimant in this case was offered the opportunity to submit interrogatories and, if the interrogatories proved insufficient, to explain to the ALJ why cross-examination was necessary. Further, claimant in Green was not afforded additional hearings to rebut the evidence.

adverse report. Several have held that the decision to issue a subpoena to cross-examine a consulting physician at a social security hearing is within the sound discretion of the ALJ. See Yancey v. Apfel, 145 F.3d 106, 111 (2d Cir. 1998); Flatford v. Chater, 93 F.3d 1296 (6th Cir. 1996); Demenech v. Secretary of Health and Human Servs., 913 F.2d 882 (11th Cir. 1990); Williams v. Bowen, 869 F.2d 187, 194 (3d Cir. 1988); Solis v. Schweiker, 719 F.2d 301, 302 (9th Cir. 1983). By contrast, other circuit courts have held that claimants have an absolute right to subpoena witnesses for cross-examination in social security hearings. Lidy v. Sullivan, 911 F.2d 1075 (5th Cir. 1990), cert. denied, 500 U.S. 959 (1991); Coffin v. Sullivan, 895 F.2d 1206 (8th Cir. 1990); Lonzollo v. Weinberger, 534 F.2d 712 (7th Cir. 1976). The right to subpoena and cross-examine discussed in these cases often depends on whether the report at issue was rendered before or after the hearing, and, if after the hearing, whether the claimant was given notice of the report and a meaningful opportunity to rebut the evidence by means other than cross-examination. The courts appear to construe a “meaningful” opportunity as something more than the opportunity to comment on the post-hearing report or to offer a written statement about the facts and law in the case.

In perhaps the strongest case in favor of an absolute right to a subpoena, Lidy v. Sullivan, 911 F.2d 1075 (5th Cir. 1990), cert. denied, 500 U.S. 959 (1991), the ALJ refused the claimant’s request to submit a second set of interrogatories and to cross-examine an examining physician. The Fifth Circuit held that a claimant requesting a subpoena of a reporting physician has an absolute due process right to cross-examination. 911 F.2d at 1077. The Lidy court expressly declined to address the argument that 20 C.F.R. § 404.950(d) permits an ALJ to refuse a request for a subpoena of a witness whose testimony is not shown by the claimant to be “reasonably necessary for the full presentation of the case.” 911 F.2d at 1077. In Coffin v. Sullivan, 895 F.2d 1206 (8th Cir. 1990),

the Eighth Circuit held that a claimant waived his right to cross-examination of a vocational expert by not responding or objecting to proposed and answered interrogatories. However, the court appeared to assume that, for due process purposes, claimants must be given the opportunity to subpoena and cross-examine report authors. Id. at 1212 (relying upon Richardson v. Perales, 402 U.S. 389 (1971)). The Seventh Circuit made the same assumption and held that an ALJ's reliance on a post-hearing report without giving the claimant an opportunity to rebut the report or cross-examine the reporting physician violated due process. Lonzollo v. Weinberger, 534 F.2d 712, 714-15 (7th Cir. 1976). The Lonzollo claimant was given an opportunity merely to comment on the report or to submit a further written statement as to the facts and the law. Id. The opinion does not indicate that he was given an opportunity to submit interrogatories and then to show that cross-examination would still be necessary.

In three cases where circuit courts found that the ALJ has discretion to issue a subpoena for cross-examination of a physician, the courts nonetheless held that claimants were deprived of due process rights. In Demenech v. Secretary of the Dept. of Health and Human Servs., 913 F.2d 882 (11th Cir. 1990), the medical report at issue before the Eleventh Circuit contradicted all other medical evidence in the case, and the claimant was permitted to object to the report only by way of affidavit. Id. at 884-85. The Ninth Circuit held that the ALJ abused his discretion because the physician was a "crucial" witness whose findings substantially contradicted other medical testimony and the physician's responses to interrogatories were "cursory and unilluminating." Solis v. Schweiker, 719 F.2d 301 (9th Cir. 1983). In this instance, Dr. McGovern's report did not substantially contradict other medical evidence and Dr. McGovern never had the opportunity to respond to interrogatories that claimant never sent. The Solis court stated that a "claimant in a disability hearing is not entitled

to unlimited cross-examination, but rather ‘such cross-examination as may be required for a full and true disclosure of the facts.’ 5 U.S.C. § 556(d). The ALJ therefore, has discretion to decide when cross-examination is warranted.” Id. at 302.

In Wallace v. Bowen, 869 F.2d 187, 194 (3rd Cir. 1988), the ALJ permitted the claimant to object by submitting written comments about the post-hearing evidence, a written statement as to the facts and law in the case, or additional evidence not previously supplied. Indeed, it appears that the practice among ALJs before many of these cases was to send a standard form letter to claimants informing them of these three options without also informing them of their right, as set forth in 20 C.F.R. §§ 404.950(d), 416.1450(d), to subpoena the authors of the reports. Given these decisions, this Court does not deem it an abuse of discretion for an ALJ to require claimants to at least attempt to rebut the evidence by written means before requesting an opportunity to cross-examine, and to include in such their requests the reasons why the written responses they receive warrant an opportunity for cross-examination as well.

Significant to the outcome in this matter are the supplemental hearings that occurred after Dr. McGovern’s report was provided to claimant. “It may be that different considerations apply to cross-examination with respect to post-hearing evidence than pre-hearing evidence because the applicant may find it more difficult to respond effectively to post-hearing reports in the absence of an opportunity to present live rebuttal evidence.” Wallace, 869 F.2d at 194. Indeed, different considerations did apply where pre-hearing evidence was at issue in a similar case before the Second Circuit. Yancey v. Apfel, 145 F.3d 106, 111 (2d Cir. 1998). There, a claimant requested that the ALJ subpoena a treating physician who had rendered reports before two different administrative hearings. The ALJ refused both before and after an Appeals Council remand. The Second Circuit

held that a claimant did not have an absolute due process right to subpoena a treating physician for an administrative hearing. Id. at 111. The Yancey court relied heavily on the Flatford opinion from the Sixth Circuit, in which the court held that “an absolute right to cross-examination is not required in the social security disability benefits cases for the development of a complete record.” 93 F.3d at 1307.

The Flatford court followed the analysis set forth in Mathews v. Eldridge, 424 U.S. 319 (1976),⁵ noting (1) the claimant’s interest in a meaningful opportunity to present his cases and a fair determination of whether he was qualified for disability benefits; (2) the minimal risk of an erroneous deprivation of that interest due to inaccurate medical information or biased opinions (especially given the non-adversarial nature of administrative adjudications); and (3) the costs of paying reporting physicians to testify and the likely decline in physicians willing to report if they knew that a subpoena will follow every report. Flatford, 93 F.3d at 1306. The Second Circuit agreed “that practical concerns strongly militate against adopting a rule establishing an absolute right to subpoena reporting physicians. We are particularly concerned that to accept, as a matter of law, that a disability claimant has an absolute right to subpoena a reporting physician would unnecessarily increase the financial and administrative burdens of processing disability claims while diluting the ALJ’s discretion in how he develops the record.” Yancey, 145 F.3d at 113.

⁵ The Supreme Court’s general framework for analysis, as set forth in Mathews, requires consideration of three factors when determining whether an administrative procedure constitutes a denial of due process: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 335.

This Court finds the more recent opinions of the Second and Sixth Circuits to be better-reasoned and more persuasive, given the facts at issue in this case, than those holding that the right to cross-examine is absolute. Due process requires that a social security hearing be “full and fair.” Richardson v. Perales, 402 U.S. 389, 401-402 (1971). It does not require cross-examination of medical report authors, in every case, for the Commissioner’s procedures to be fair to the claimant or to achieve full disclosure of all facts relevant to the determination of disability. “‘Due process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” Mathews, 424 U.S. at 334 (citation omitted).

In Mathews, the Supreme Court held that due process did not require a pre-termination evidentiary hearing. The Court recognized that such a hearing would not greatly increase the accuracy of the decision by the Social Security Administration. Due process for social security applicants requires that claimant be given notice and an opportunity to be heard. Id. at 348-49. See also 42 U.S.C. § 405(b)(1), which provides:

Upon request [by any individual receiving an unfavorable decision or other person named in the statute] . . . who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered, the Commissioner shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner’s findings of fact and such decision.

The McGovern report constitutes “evidence adduced at the hearing” since claimant testified in rebuttal to it at the second and third hearings. In addition, claimant was permitted to submit additional medical evidence from doctors who were not subpoenaed and did not testify at the third hearing. 20 C.F.R. § 404.953(a) requires that “the administrative law judge shall issue a written decision that gives the findings of fact and the reasons for the decision. The decision must be based

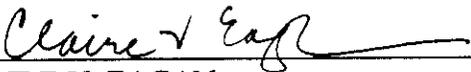
on evidence offered at the hearing *or otherwise included in the record.*" (emphasis added.) There is no dispute that the report was introduced and made a part of the hearing record at the second hearing.

Claimant had ample time and opportunity to present medical evidence to support his claim of disability and to rebut the evidence tendered by Dr. McGovern. The ALJ heard claimant's testimony and reviewed every exhibit. He thoroughly discussed all of the relevant medical reports and conducted an analysis pursuant to Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987), of claimant's alleged pain and limitations. (R. 202-04.) The ALJ had no reason to believe that Dr. McGovern's report was inaccurate or biased (other than the suggestion of claimant's representative) or that a subpoena to Dr. McGovern would have added anything of value to the proceedings. The procedures adopted by the Commissioner in this matter gave claimant notice of the report and an opportunity to be heard by submitting interrogatories, and, if those proved insufficient, then to ask for a hearing to cross-examine the author of the report. That procedure was adequately tailored to insure a meaningful opportunity for claimant to present his case. Under the circumstances present in this matter, the Court cannot say that claimant was deprived of due process. The Court finds that the ALJ's refusal to subpoena Dr. McGovern does not constitute an abuse of discretion.

VI. CONCLUSION

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

DATED this 15th day of January, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JAN 15 1999 *lc*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NELLIE M. CAMPBELL,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

No. 97-CV-1027-J ✓

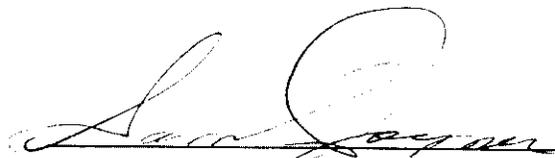
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DATE. JAN 19 1999

JUDGMENT

This action has come before the Court for consideration, and an Order remanding the case to the Commissioner has been entered pursuant to sentence 4 of 42 U.S.C. § 405(g). Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 15th day of January 1999.



Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JAN 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NELLIE M. CAMPBELL,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner of the Social)
Security Administration,)
)
Defendant.)

Case No. 97-CV-1027-J

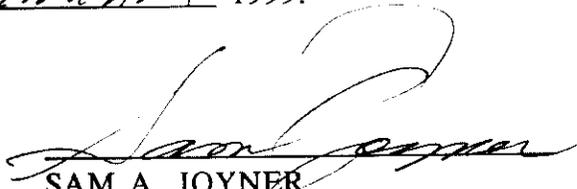
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ORDER

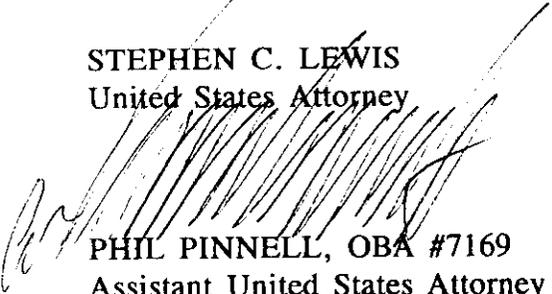
Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

DATED this 15 day of JANUARY 1999.


SAM A. JOYNER
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

BICH N. BUI,)
)
 Plaintiff,)
)
 v.)
)
 KENNETH S. APFEL, Commissioner)
 of Social Security Administration,)
)
 Defendant.)

JAN 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-CV-~~732~~-J

ENTERED ON DOCKET
DATE JAN 19 1999

ORDER^{1/}

Plaintiff, Bich N. Bui, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner. Plaintiff was granted Disability Insurance and Supplemental Security Income Benefits on August 13, 1993. Plaintiff does not appeal the August 13th finding of disability. Rather, Plaintiff asserts that the Commissioner miscalculated and paid her less benefits than that to which she was entitled.

The Court has thoroughly reviewed the record and for substantially the same reasons outlined in the ALJ's opinion and in the Commissioner's brief submitted in this case, the Court **AFFIRMS** the Commissioner's calculation of benefits owing to Plaintiff. Plaintiff has failed to establish that she was paid an incorrect amount of benefits.

IT IS SO ORDERED.

Dated this 15 day of January 1999.


Sam A. Joyner
United States Magistrate Judge

^{1/} 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.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRENDA D. KAME,
SSN: 448-62-2401

Plaintiff,

v.

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

Defendant.

No. 97-CV-999-J ✓

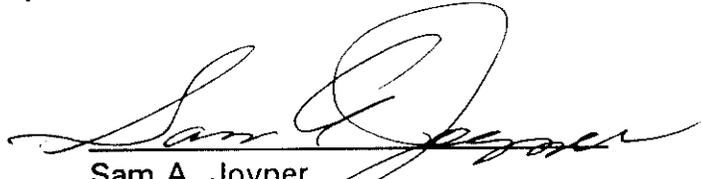
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DATE JAN 19 1999

JUDGMENT

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

It is so ordered this 14th day of January 1999.


Sam A. Joyner
United States Magistrate Judge

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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRENDA D. KAME,
SSN: 448-62-2401

Plaintiff,

v.

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

Defendant.

No. 97-CV-999-J

ENTERED ON DOCKET

DATE JAN 19 1999

ORDER^{2/}

Plaintiff, Brenda D. Kame, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{3/} The ALJ found that Plaintiff was disabled from May 13, 1993 until January 9, 1995. This is a "closed disability case." Plaintiff asserts that the Commissioner erred in concluding that Plaintiff was no longer disabled because (1) the ALJ's finding that Plaintiff could perform light work activity except for prolonged standing or walking is not supported by substantial evidence, (2) the ALJ's evaluation of Plaintiff's credibility was not supported by

^{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].

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substantial evidence,^{4/} and (3) that the vocational expert testified that an individual with Plaintiff's limitations could not perform substantial gainful activity.^{5/} For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born April 23, 1962. Plaintiff completed the tenth grade and additionally obtained her GED. [R. at 227].

A Residual Functional Capacity Assessment completed by Thurma Fiegel, M.D., on August 9, 1994, indicated that Plaintiff could lift 20 pounds occasionally, ten pounds frequently, stand six hours out of an eight hour day, and sit six hours out of an eight hour day. [R. at 43].

Plaintiff had a unilateral partial laminectomy and discectomy on June 22, 1993. Plaintiff was discharged on June 26, 1993. [R. at 113]. Plaintiff was released to return to work on November 22, 1993. The doctor recommended that Plaintiff perform no frequent bending, stooping, or lifting over 25 pounds. [R. at 150]. Plaintiff's doctor noted that she had a 20 percent permanent partial impairment to her body due to residual low back pain which affected her ability to bend, stoop, or lift. [R. at 150].

^{4/} The Court is hesitant to address this "argument" as an "issue on appeal." In the "Conclusion and Relief Sought" section, Plaintiff mentions that the ALJ did not properly evaluate her credibility. Plaintiff does not list this as a separate "issue on appeal," and does not further develop this argument.

^{5/} The Court is hesitant to address this "argument" as an "issue on appeal." In the "Conclusion and Relief Sought" section, Plaintiff mentions that the ALJ did not properly evaluate her credibility. Plaintiff does not list this as a separate "issue on appeal," and does not further develop this argument.

Plaintiff was examined by Karl Detwiler, M.D., on May 3, 1994. [R. at 126]. He noted evidence of recurrent disk herniation. Plaintiff was admitted on June 7, 1994 for surgery, and discharged on June 10, 1994. [R. at 129].

On September 28, 1994, the doctor noted that Plaintiff was doing quite well, that the fusion looked excellent, and that "this is one happy patient." [R. at 155]. Plaintiff's doctor additionally noted that Plaintiff should not return to her prior work, but that he hoped retraining would not be necessary, and that "hopefully, within the next 6 to 12 weeks, we can get her back to work." [R. at 155].

On November 21, 1994, Dr. Detwiler reported that Plaintiff was making slow but steady improvement. "I continue to believe that Mrs. Kame will not be able to return to her former employment as a nurse aide and should seek a more sedentary type occupation." [R. at 182].

On January 9, 1995, Dr. Detwiler noted that Plaintiff was ambulating well and that her strength was normal. [R. at 181]. On January 25, 1995, Dr. Detwiler wrote that Plaintiff was seven months "post-op" and had only occasional leg pain but required no narcotics. The doctor noted that Plaintiff was doing well and should continue her physical therapy. [R. at 180].

The record does not contain a date, but indicates that Plaintiff reported to the physical therapist that she could tolerate walking for one mile but that the pain on the following day was quite severe. [R. at 186].

On March 17, 1995, Dr. Detwiler indicated that Plaintiff saw him due to the advice of her attorney. Dr. Detwiler noted Plaintiff had been involved in a motor

vehicle accident but he saw no evidence of increased injury. He concluded "I do not believe Ms. Kame is going to be able to return to her former employment as a nurse aide. It would thus be my recommendation that she pursue vocational evaluation and subsequent retraining." [R. at 189].

Plaintiff testified that she was unable to work due to pain in her low back and her legs. [R. at 235]. According to Plaintiff, she can walk approximately fifteen minutes but after walking that amount of time she has so much pain she has to lie down. [R. at 237]. Plaintiff stated that she was unable to lift one gallon or milk or one bag of potatoes. [R. at 237]. Plaintiff testified that she could not sit for over one hour or lift over three pounds. [R. at 245].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{6/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

^{6/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

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

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

"The finding of the Secretary^{7/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more 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 disabled on May 13, 1993, and that her disability continued until January 9, 1995. The ALJ concluded that Plaintiff could perform light work activity which did not require prolonged standing or walking as of January 9, 1995. Based on the testimony of a vocational expert, the ALJ concluded

^{7/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

that Plaintiff could perform numerous jobs in the national economy, including several sedentary jobs.

IV. REVIEW

CLOSED BENEFIT CASE

The ALJ concluded that Plaintiff was disabled from May 13, 1993 until January 9, 1995. Plaintiff does not discuss or otherwise mention the ALJ's decision that Plaintiff was disabled for a period of time, but was no longer disabled after January 9, 1995.

In a typical social security case, benefits are granted for an indefinite period. That is, benefits continue unless they are terminated in a proceeding brought by the Secretary at some later date. After much wrangling in the federal circuit courts of appeal, it is now clear that the "medical improvement" standard, now codified at 20 C.F.R. § 404.1594, is to be applied in a proceeding to terminate benefits. Brown v. Sullivan, 912 F.2d 1194, 1196 (10th Cir. 1990).

A question not yet answered by the Tenth Circuit Court of Appeals is whether the "medical improvement" standard applies in a closed period case.

In a 'closed period' case, the decision maker determines that a new applicant for disability benefits was disabled for a finite period of time which started and stopped prior to the date of his decision. Typically, both the disability and the cessation decision are rendered in the same document.

Pickett v. Bowen, 833 F.2d 288, 289 n.1 (11th Cir. 1987). A closed period case therefore consists of two "parts" -- a disability determination and a termination of

benefits. The circuits have split over whether or not 20 C.F.R. § 404.1594's medical improvement standard^{8/} applies to the termination portion of a closed period determination. Compare Chrupcala v. Heckler, 829 F.2d 1269, 1274 (3rd Cir. 1987) (holding that "[f]airness would certainly seem to require an adequate showing of medical improvement whenever an ALJ determines that disability should be limited to a specific period.") with Ness v. Sullivan, 904 F.2d 432, 434 n.4 (8th Cir. 1990) (holding that the normal sequential evaluation process and not the medical improvement standard applies in closed period cases).

Plaintiff does not argue the applicable standard. The Court has concluded that this issue does not need to be resolved. As an initial matter, the Court does not perceive that a substantially different result would occur in this case regardless of

^{8/} The "medical improvement standard" is similar to the five step sequential evaluation process. The "medical improvement standard" evaluates: 1. Is the claimant engaged in substantial gainful activity? [Step one of the traditional sequential evaluation process]. If he is, disability benefits will be terminated. 2. Does the claimant have an impairment which meets or equals the severity of an impairment in the "Listings"? See 20 C.F.R. Pt. 404, Subpt. P, App. 1. [Step three of the traditional sequential evaluation process]. If he does, disability benefits will be continued. 3. Has the claimant experienced "medical improvement"? If not, disability benefits continue. a. Medical improvement is defined as "any decrease in the medical severity" of the claimant's impairments since the last disability determination. "A determination that there has been a decrease in medical severity must be based on changes (improvement) in the symptoms, signs and/or laboratory findings associated with [the claimant's] impairment(s)." 20 C.F.R. § 404.1594(b)(1). 4. Looking only at the impairments present at the last disability determination, has the claimant's medical improvement resulted in an increase in the claimant's residual functional capacity ("RFC") since the last disability determination? If not, disability benefits will continue. 5. Do any exceptions to the application of the medical improvement standard apply? If an exception applies, the Secretary is relieved of her burden of showing medical improvement, and disability benefits will be terminated. See 20 C.F.R. § 404.1594(d) and (e). 6. Looking at all of the claimant's current impairments, not just those present at the last disability determination, are these impairments severe? [Step two of the traditional sequential evaluation process]. If not, disability benefits will be denied. 7. Looking at all of the claimant's current impairments, not just those present at the last disability determination, can claimant perform his past relevant work? [Step four of the traditional sequential evaluation process]. If claimant can, disability benefits will be terminated. 8. Looking at all of the claimant's current impairments, not just those present at the last disability determination, does claimant have the RFC to perform an alternative work activity in the national economy? [Step five of the traditional sequential evaluation process]. 20 C.F.R. § 404.1594(f).

whether the traditional five step sequential evaluation process or the medical improvement standard was applied. Regardless, Plaintiff does not assert this as error on the behalf of the Commissioner.

RFC TO PERFORM LIGHT WORK

Plaintiff notes that light work requires lifting or carrying no more than 20 pounds at a time with frequent lifting and carrying of up to 10 pounds. Plaintiff asserts that the ALJ noted that the claimant's treating physicians did not preclude Plaintiff from performing light activity. Plaintiff argues, however, that the record does not contain any findings to support the ALJ's conclusion that Plaintiff can perform light work. The Court has reviewed the record and concludes that the ALJ's conclusion that Plaintiff can perform light work is supported by substantial evidence.

An RFC completed by Dr. Thurma Fiegel on August 9, 1994, indicated that Plaintiff could lift 20 pounds occasionally, ten pounds frequently, stand six hours out of an eight hour day, and sit six hours out of an eight hour day. [R. at 43].

The September 28, 1994 doctor's notes indicate that Plaintiff was doing quite well, that the fusion looked excellent, and that "this is one happy patient." [R. at 155]. Plaintiff's doctor additionally noted that Plaintiff should not return to her prior work, but that he hoped retraining would not be necessary, and that "hopefully, within the next 6 to 12 weeks, we can get her back to work." [R. at 155]. On November 21, 1994, Dr. Detwiler reported that Plaintiff was making slow but steady improvement. "I continue to believe that Mrs. Kame will not be able to return to her

former employment as a nurse aide and should seek a more sedentary type occupation." [R. at 182]. On January 9, 1995, Dr. Detwiler noted that Plaintiff was ambulating well and that her strength was normal. [R. at 181]. On January 25, 1995, Dr. Detwiler wrote that Plaintiff was doing well and should continue her physical therapy. [R. at 180]. On March 17, 1995, Dr. Detwiler wrote "I do not believe Ms. Kame is going to be able to return to her former employment as a nurse aide. It would thus be my recommendation that she pursue vocational evaluation and subsequent retraining." [R. at 189].

The Court concludes that the record contains substantial evidence to support the conclusion of the Commissioner that Plaintiff is not disabled.

CREDIBILITY DETERMINATION

In Plaintiff's conclusion, Plaintiff states that no evidence supports the ALJ's opinion that Plaintiff's testimony was credible only to the extent that it was consistent with the performance of light work.

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

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

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

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

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

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

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

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

In Kepler v. Chater, 68 F.3d 387, (10th Cir. 1995), the Tenth Circuit determined that an ALJ must discuss a Plaintiff's complaints of pain, in accordance with Luna, and provide the reasoning which supports the decision as opposed to mere conclusions. Id. at 390-91.

Though the ALJ listed some of these [Luna] factors, he did not explain why the specific evidence relevant to each factor led him to conclude claimant's subjective complaints were not credible.

Id. at 391. The Court specifically noted that the ALJ should consider such factors as:

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

Id. at 391. The Tenth Circuit remanded the case, requiring the Secretary to make "express findings in accordance with Luna, with reference to relevant evidence as appropriate, concerning claimant's claim of disabling pain." Id. at 10.

In this case, the ALJ discussed the Plaintiff's testimony, her treatment, and her medications. The ALJ noted that Plaintiff had been terminated for "falsifying" her employment application, however the ALJ did not emphasize this point. The ALJ noted that the doctors reports indicated that Plaintiff had reported her pain as resolving

and not requiring the use of narcotics. Although the ALJ could have provided a more thorough analysis, the Court concludes that the ALJ's opinion is supported by substantial evidence.

VOCATIONAL EXPERT TESTIMONY

Plaintiff asserts, in her conclusion, that the vocational expert testified that Plaintiff could not work if Plaintiff's testimony was considered completely truthful.

However, an ALJ is not required to accept all of a plaintiff's testimony with respect to restrictions as true, but may pose such restrictions to the vocational expert which are accepted as true by the ALJ. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). See also Evans v. Chater, 55 F.3d 530, 532 (10th Cir.1995) (ALJ's hypothetical questions to vocational expert "must include all (and only) those impairments borne out by the evidentiary record").

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

Dated this 14 day of January 1999.



Sam A. Joyner
United States Magistrate Judge

FILED

JAN 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

THOMAS EUGENE JOHNSON,)
)
Petitioner,)
)
vs.)
)
GARY GIBSON, Warden,)
)
Respondent.)

No. 98-CV-820-C (J)

FILED ON DOCKET

DATE JAN 15 1999

ORDER

On October 21, 1998, Petitioner, appearing *pro se*, submitted for filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. However, Petitioner failed to submit the \$5.00 filing fee or a motion for leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a). By Order dated October 29, 1998, the Court informed Petitioner that he must submit the filing fee or a properly completed motion for leave to proceed *in forma pauperis*. In addition, the Clerk of Court was directed to mail Petitioner the forms and information necessary for preparing the motion as ordered by the Court. Petitioner was advised that the deficiency had to be cured by November 30, 1998, and that "failure to comply . . . may result in dismissal of this action without prejudice and without further notice."

Thereafter, Petitioner submitted a motion for leave to proceed *in forma pauperis*. Based upon the statement of financial accounts, signed by an authorized prison official, the Court denied *in forma pauperis* status and directed Petitioner to submit the required filing fee by December 24, 1998, or risk dismissal of "this action without prejudice and without further notice." To date,

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Petitioner has not submitted the filing fee nor has he shown cause for his failure to do so. No correspondence addressed to Petitioner has been returned to the Court.

Because Petitioner has failed to comply with the Court's Order of November 24, 1998, and has failed to pay the filing fee, the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

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

SO ORDERED this 17th day of January, 1999.


H. DALE COOK
United States District Judge

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

NAUTILUS INSURANCE)
COMPANY,)
)
Plaintiff,)
)
vs.)
)
TEAM AIR EXPRESS, a Texas)
corporation; TOTAL TRANSPORT,)
INC., an Oklahoma corporation;)
THERON WRIGHT, an individual)
defendant; and C.R. HONEYCUTT,)
an individual defendant.)
)
Defendants.)

ENTERED ON DOCKET
DATE 1/15/99

No. 97-CV-434-K ✓

FILED

JAN 14 1999

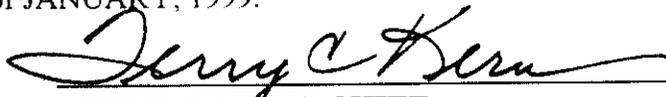
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action came on for consideration through Plaintiff's Motion for Summary Judgment before the Honorable Terry C. Kern, Chief District Judge, and the issue having been duly heard and a decision having been duly rendered.

IT IS THEREFORE ORDERED that the Plaintiff Nautilus is released from its obligation to either defend or indemnify any and all Defendants for any costs, fees, or damages resulting from the Underlying Suit.

ORDERED this 12 day of JANUARY, 1999.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

FILE

JAN 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

ORYX ENERGY COMPANY,)
)
 Plaintiff,)
 vs.)
)
 UNITED STATES DEPARTMENT)
 OF THE INTERIOR,)
)
 Defendant.)

Case No. 97-CV-337-DU ✓

ENTERED ON DOCKET
DATE JAN 15 1999

ORDER

This matter comes before the Court upon Plaintiff's Request for Administrative Closure. For good cause shown, the Court GRANTS the request. The Court Clerk is ORDERED to 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 60 days of this date for the purpose of dismissal pursuant to their settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

The case management conference currently scheduled for Tuesday, January 19, 1999, at 1:15 p.m., is STRICKEN.

Entered this 14th day of January, 1999.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

JAN 13 1999

Le
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DORIS A. WORLEY,

Plaintiff,

v.

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

Defendant.

Case No. 98-CV-656-EA ✓

ENTERED ON DOCKET

DATE JAN 15 1999

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 6 of section 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 1383(c)(3).

DATED this 13th day of January 1999.

Claire V Eagan

CLAIRE V. EAGAN
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in cursive script that reads "Phil Pinnell". The signature is written in black ink and is positioned above the typed name and address.

PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

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

FILED

JAN 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DORIS A. WORLEY,
SSN: 440-46-3827,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0656-EA ✓

ENTERED ON DOCKET

DATE JAN 15 1999

ADMINISTRATIVE CLOSING ORDER

The defendant having filed its motion to remand pursuant to sentence 6 of section 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 1383(c)(3), and these proceedings being stayed by Order dated January 13, 1999, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, within 60 days of the date of this Administrative Closing Order, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 14th day of January, 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 13 1999

ASSOCIATED BUSINESS TELEPHONE)
SYSTEMS, CORP.,)
PLAINTIFF,)
vs.)
XETA CORPORATION,)
DEFENDANT AND)
THIRD-PARTY PLAINTIFF,)
vs.)
D & P INVESTMENTS, INC.,)
THIRD PARTY DEFENDANT.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE No. 96-CV-274-H (M) ✓

ENTERED ON DOCKET

DATE JAN 14 1999

REPORT AND RECOMMENDATION

Defendant and Third Party Plaintiff, XETA Corporation's ("XETA"), MOTION TO STRIKE CERTAIN DAMAGE RELATED EVIDENCE IN CLAIMS OF PLAINTIFF Associates Business Telephone Systems, Corp., (ABTS), OR, IN THE ALTERNATIVE, TO ALLOW FURTHER LIMITED DISCOVERY [Dkt. 218] has been referred to the undersigned United States Magistrate Judge for Report and Recommendation.¹ [Dkt. 222].

XETA requests that certain documentary evidence proffered by ABTS in support of its damage claims be stricken from consideration by the jury. XETA contends that despite its discovery requests dating back to January 4, 1996, the subject evidence² was not produced or disclosed by ABTS at any time in this litigation until June 25, 1998. XETA claims prejudice in the form of increased discovery expenses as a result

¹ Part of this motion has been resolved. The court granted XETA's motion to allow further limited discovery concerning the damage claims which are the subject of XETA's motion to strike. ABTS had no objection to the additional discovery.

² The evidence consists of 97 pages of documentation concerning ABTS's Inn on the Lakes damage claim (Bates Stamp Nos. 000089 to 000186).

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of ABTS' failure to produce the subject documentation. XETA proposes two avenues to justify exclusion of the damage evidence under Fed.R.Civ.P. 37: (1) finding that ABTS violated its discovery responsibilities under Fed. R. Civ. P. 26; or (2) finding that ABTS violated the duty to comply with the Court's pre-trial scheduling order entered pursuant to Fed. R. Civ. P. 16.

A separate, but related, issue involves ABTS' damage claims related to the Omni Shoreham. Pursuant to Court order, ABTS has provided summary damage calculations reflecting damages of \$238,830.50 and \$422,452.00. XETA asserts that these summary calculations should be excluded from evidence because ABTS has failed to timely disclose an underlying contract and further because ABTS has failed to provide the underlying supporting data for this summary calculation as required under Fed. R. Evid. 1006.

Based on the following outline of the discovery history in this case, the undersigned finds that it is appropriate to impose a sanction of reasonable expenses against ABTS:

- 6/16/95 Plaintiff ABTS filed its Complaint alleging, *inter alia*, tortious interference with contracts;
- 1/4/96 XETA requests production of documents supporting ABTS's claim for damages;
- 3/20/96 ABTS response to XETA's request for production of documents did not include any of the documents at issue in this motion;
- 11/1/96 ABTS preliminary exhibit list filed; none of the documents at issue in this motion are listed as exhibits;

6/11/97 to 6/12/97 Counsel for XETA , Julie Trout Lombardi, reviews documents produced by ABTS in New Jersey;

10/17/97 Telephone hearing on XETA's motion to compel. Counsel for ABTS made the following representation to the Court concerning production of documents in this case:

MR. WILKINS: We've produced box loads of documents. I have drawers filled, and boxes, and every document that we possibly could produce, having anything to do with Xeta has been produced. It took Xeta's counsel two days to review all of these boxes. They conceded that we provided them box loads of documents.

I can't make up documents that don't exist. I know Mr. Hickey doesn't like some of the objections that were made, but we're entitled to make objections. And we've produced everything. We cannot produce anything that does not exist.

[Transcript of Proceedings Had October 17, 1997, p. 3-4].

11/18/97 Amended Preliminary Exhibit List filed by ABTS; none of the documents at issue in this motion are listed;

1/21/98 ABTS files Final Trial Exhibit List and parties file Agreed Pretrial Order; the documents at issue do not appear on the exhibit list or the Agreed Pretrial Order;

6/12/98 Second Agreed Pretrial Order submitted; none of the documents at issue in this motion are listed;

6/18/98 Pretrial Conference before Judge Holmes. Mr. Wilkins, counsel for ABTS, advises the Court, as follows:

THE COURT: And the back up for your damage claims has been identified?

MR. WILKINS: Your Honor, I think almost entirely it has been produced, I believe so. It's the, as I mentioned I don't have it off the top of my head, we have more take damage claims than that -

THE COURT: Well, that will be on the submission to the Court identifying both the witness and any backup documents supporting.

MR. WILKINS: Yes, Your Honor, absolutely.

[Transcript of Proceedings Had on June 18, 1998 Pretrial Conference, p. 55-56].

Judge Holmes granted the parties leave to take depositions of those witnesses designated by the other party to testify as to the amount of damages and ordered the parties to exchange damage witness designations and supporting documentation on June 25, 1998;

- 7/30/98 XETA filed the motion under consideration, claiming that a large portion of the documents supporting ABTS's damage claims had not previously been produced or identified;
- 8/3/98 The Court signed and entered the Pretrial Order submitted by the parties on June 12, 1998; the order does not include the exhibits at issue in this motion;
- 8/7/98 ABTS produced a new damage model concerning ABTS' claim on the Omni Shoreham which increased the damage claim for lost profit and maintenance from \$238,830.50 to \$422,452.

During a telephone hearing concerning the instant motion held on August 19, 1998, before the undersigned Mr. Wilkins stated that he believed most of the subject documents were available to Ms. Lombardi during the June 1997 document production. He stated that after viewing certain dates in the documents he could say whether the documents were available to her. The Court advised Mr. Wilkins as follows:

THE COURT: I want a representation from you, under oath, filed in this case within one week of today, as to whether or not those 100 documents that were provided to the defendant in this case, pursuant to Judge Holmes June 18th order, were made available to counsel for the

defendants when she examined documents in New jersey. And I don't want to hear that they were available in the sense that they were somewhere on the premises. I want a representation from you, Mr. Wilkins, whether they were physically within the boxes that you made available to her and pointed out to her. Do you understand that, sir?

MR. WILKINS: Yes, I do, Judge.

[Transcript of Proceedings Had on August 19, 1998, p. 18]. The Court further stated, "Well, I don't want a 'I believe' representation, Mr. Wilkins." *Id.* at 20.

In response to the Court's order, ABTS has submitted the affidavits of Stuart A. Wilkins, counsel, and Michael Dalia, Executive Vice President of ABTS, in support of its assertion that the subject documents had been provided to XETA counsel in June 1997. Mr. Wilkins' affidavit states:

It is my *understanding* that the documents which were provided to Defendant's counsel in connection with Judge Holmes' June 18, 1998, Order were physically within the boxes that were made available to Ms. Lombardi, with the following exceptions: . . .

* * *

I am not aware of any document contained in ABTS' production of documents following Judge Holmes' June 18, 1998, Order, which had not yet been made available for review by ABTS prior to Judge Holmes' June 18 1998 Order. [Dkt. 240] [emphasis supplied].

Mr. Dalia's affidavit states:

The only documents on ABTS' production in connection with Judge Holmes' June 18, 1998 Order *that I am aware of* that were not included in the production of June 1997 were: . . .

* * *

Other than the documents referenced above, *I am not aware of* any documents contained in ABTS' production of documents following Judge Holmes' June 18, 1998, Order,

which had not yet been made available for review by ABTS prior to Judge Holmes' June 18, 1998 Order. [Dkt. 239][emphasis supplied].

XETA has submitted the affidavit of attorney Julie Trout Lombardi in support of its contention that the documents at issue were not previously supplied in the June 1997 document production. In contrast to the vague assertions made in the Wilkins and Dalia affidavits that the affiants are "not aware of" any documents that were not made available for review, Ms. Lombardi's affidavit contains very specific positive assertions concerning the contents of the June 1997 document production. Ms. Lombardi positively asserts that she "was never provided with documents relating to Inn on the Lakes or the Omni Shoreham." [Dkt. 236, Ex. 4, ¶ 11]. She further stated:

12. None of the following documents were ever physically within the three (3) Banker's boxes or in the box containing the computer printouts: the Settlement Agreement and Mutual Release between ABTS and Inn on the Lakes dated March 27, 1998 (Bates stamped Nos. 000089 to 000127); the telephone bills from United Telephone, MCI Telecommunications, AT&T Business Long Distance, and Bell Atlantic paid by "ABTS International Corp." for telephone service provided to Inn on the Lakes from January 1996 to July 1996 and invoices from "ABTS (Bates stamped Nos. 000133 to 000186); the documents from 1992 and 1993 evidencing debt service paid by "ABTS Investment Corporation" to Madison Leasing Company relating to the phone equipment installed at the Inn on the Lakes (Bate [sic] stamped Nos. 000128 to 000132); nor the Master Maintenance Agreement between NEC and ABTS regarding maintenance at the Omni Shoreham Hotel.

* * *

15. There is no doubt in my mind that the documents which Mr. Dalia and Mr. Wilkins claim were physically in the boxes which were provided to me on June 11 and 12,

1997, were never provided to me nor made available to me for my review. [Dkt. 236, Ex. 4, ¶¶ 12, 15].

The Court finds the detailed positive assertions contained in Ms. Lombardi's affidavit to be more convincing than the affidavits of Mr. Wilkins and Mr. Dalia. Consequently, the Court concludes that the subject documents were not produced to XETA in the June 1997 document production.

However, even if the Court were convinced that the subject documents had been produced in June of 1997, since it is not disputed that ABTS failed to list the documents as exhibits, the Court would still have to address ABTS' failure to list the documents as exhibits on any pretrial exhibit list or in the Pretrial Order. Although exclusion of the subject documents for ABTS' failure to produce them or to list them as exhibits may be justified, Fed.R.Civ.P. 37(b)(2)(B), the Court finds that sanction to be inappropriate because XETA has not been significantly prejudiced in its ability to defend this action by ABTS' actions in that the trial has been postponed and an opportunity for additional discovery has been afforded. However, the Court finds that XETA has incurred additional expenses related to ABTS' failure to produce the subject documentation and failure to list the documents as exhibits. The chronology³ demonstrates that beginning in January 1996 XETA has diligently attempted to discover the documents which ABTS contends support its damage claims. Yet, it took

³ The Court notes that the chronology contained in this report is only a portion of the discovery efforts in this case as there have been numerous telephone hearings concerning discovery matters which are not contained in the chronology.

ABTS two and a half years to fully respond to XETA's request for the production of documents.

Furthermore, the June 1997 document production was conducted pursuant to this Court's order, reflected in the following minute:

MINUTES: by Magistrate Frank H. McCarthy; In-court hearing held 4/2/97 granting motion to compel production of docs from Associated Business Telephone Systems corp [14-1]; pltf in the form of a pleading signed off on by a representative of the pltf's client is to file a list and affirm that all resp. docs. have been prov. to deft and docs located in New Jersey [sic] are to be made avail to deft for inspection.

Fed.R.Civ.P. 37(b)(2) provides that if a party fails to obey an order to provide or permit discovery, the court "may make such orders in regard to the failure as are just" An award of reasonable expenses, including attorney's fees caused by the failure is listed among the available sanctions. This Court finds that ABTS failed to obey its order of April 2, 1997, in that all responsive documents were not provided for inspection by XETA's counsel. The Court further finds that the failure of ABTS to comply with the order caused a waste of the expenses and attorney's fees incurred by XETA in traveling to New Jersey for the June 1997 document production. The actions of ABTS were not substantially justified and there are no circumstances which make an award of expenses unjust.

The undersigned therefore recommends that ABTS be assessed the reasonable expenses, including attorney fees, XETA incurred in conducting all discovery directed to the documents at issue in this motion. This sanction will compensate XETA for the

necessary expenses and fees associated with the additional discovery necessitated by ABTS's late listing of the documents as exhibits and includes the necessary expenses and fees associated with XETA's Motion to Compel and the June 1997 trip to New Jersey for document production.

With regard to the Omni Shoreham/Comtel damage calculation, the Court recommends that the Court deny admission of the summary damage calculations unless the underlying supporting data for the calculations were produced within the extended discovery time frame.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), the parties are advised 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 15th day of January, 1999.

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

14th Day of January, 1999.

C. P. Kelly, Deputy Clerk.

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

Based on the record, the Court finds that Petitioner has failed to comply with the Court's Order of December 6, 1996. As there has been no activity in this case in more than twenty (20) months, the Court can only assume Petitioner has lost interest in pursuing his claims and finds this action should be dismissed without prejudice for failure to prosecute.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for writ of habeas corpus is **dismissed without prejudice** for failure to prosecute. This Order constitutes a final order in Case No. 96-CV-703-K.

SO ORDERED THIS 12 day of January, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

F I L E D

JAN 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES AVIATION MUSEUM,
INC., an Oklahoma corporation,

Plaintiff,

vs.

NORTHROP GRUMMAN CORPORATION,
a Delaware corporation,

Defendant.

Case No. 96-CV-98-BU (M)

ENTERED ON DOCKET

DATE JAN 14 1999

REPORT AND RECOMMENDATION

Plaintiff's MOTION FOR ATTORNEYS' FEES [Dkt. 153] is before the undersigned United States Magistrate Judge for report and recommendation.

Plaintiff, United States Aviation Museum ("USAM"), obtained judgment against defendant and now seeks an award of attorney's fees pursuant to Okla. Stat. tit. 12 § 936. Defendant ("Northrop") argues that California law, not Oklahoma law, applies. The parties agree that under California law attorneys fees cannot be recovered in this case. Alternatively, Northrop argues that even if Oklahoma law applies USAM is not entitled to a fee award because this suit does not fall within the specific terms of § 936 as interpreted by the Oklahoma Supreme Court in *Russell v. Flanagan*, 544 P.2d 510 (Okla. 1975) and its progeny.

Since USAM agrees that it cannot recover its attorneys' fees if California law is applied, it would seem that the choice of law question should be resolved first.

1602

However, this Court finds it unnecessary to reach the choice of law question, because even if Oklahoma law were to apply, USAM would not be entitled to a fee award.¹

It is well-settled that in Oklahoma attorneys' fees are not recoverable absent some statutory authority or an enforceable contract. *Oklahoma Tax Commission v. Ricks*, 885 P.2d 1336, 1339 (Okla. 1994); *Holbert v. Echeverria*, 744 p.2d 960, 965 (Okla. 1987). The contract between the parties did not provide for attorneys' fees and, no one disputes that Okla. Stat. tit. 12, §936 provides the only potential statutory authority for an attorneys' fee award in this case.

Section 936 provides:

In any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, unless otherwise provided by law or the contract which is the subject to [sic] the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs. [emphasis supplied].

USAM asserts that it is entitled to attorneys fees under § 936 because the agreement between the parties required Northrop to complete assembly of the subject aircraft at Northrop's facility. The March 27, 1997, Order which granted partial summary judgment to USAM states that the agreement "clearly and unambiguously called for the complete assembly of the Aircraft [by Northrop]." [Dkt. 70, p. 5]. Since

¹ Based on the Court's ruling in *R.L. Clark Drilling Contractors, Inc. v. Schramm*, 835 F.2d 1306 (10th Cir. 1987), USAM argues that Northrop should be estopped to deny the applicability of Oklahoma law to this case because Northrop sought attorneys' fees in its answer. The Court's conclusion that an attorneys' fees award is not afforded under Oklahoma law also eliminates the necessity of addressing the estoppel argument.

the agreement required Northrop to perform labor and services, and since USAM was successful in obtaining judgment on its claim for Northrop's breach of that agreement, USAM maintains that it should be awarded attorneys' fees under § 936.

However, in *Russell v. Flanagan*, 544 P.2d 510 (Okla. 1975), the Oklahoma Supreme Court construed § 936 and held that the phrase "relating to" modified "the purchase or sale of goods, wares, or merchandise" but did not modify the phrase "for labor or services." *Id.* at 512. As a result, "to recover under section 936, a prevailing party on a labor or services contract claim must demonstrate that the claim is for labor or services rendered, not just that the claim relates to the performance of labor or services." *Merrick v. Northern Natural Gas Company*, 911 F.2d 426, 434 (10th Cir. 1990). According to the Court in *Burrows Constr. Co. v. Independent School Dist.*, 704 P.2d 1136, 1138 (Okla. 1985), "[t]he question is whether the damages arose directly from the rendition of labor or services, such as a failure to pay for those services, or from an aspect collaterally relating to labor or services, such as loss of profits on a contract involving the rendition of labor and services." Section 936 applies to a case if "recovery is sought for labor and services as in the case of a failure to pay for them. . . . Its provisions are inapposite if the suit be one for damages arising from the breach of an agreement that relates to labor and services." *Holbert v. Echeverria*, 744 P.2d 960, 966 (Okla. 1987) [footnote omitted]. The Oklahoma Supreme Court has explained that its strict application of the "labor and services" provision of § 936 "preserves the obvious legislative intent to authorize awards of attorney fees to the prevailing parties in actions for money judgments for debts created

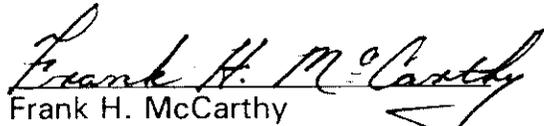
by the contracts enumerated in the statute." *Kay v. Venezuelan Sun Oil Company*, 806 P.2d 648, 652-53 (Okla. 1991).

Because USAM sought damages for the breach of an agreement to provide labor and services and not for the value of labor or services rendered, the foregoing authorities compel the conclusion that section 936 does not apply and consequently USAM's motion must be denied. *See Merrick*, 911 F.2d at 434.

Based on the foregoing, the undersigned United States Magistrate Judge RECOMMENDS that Plaintiff's MOTION FOR ATTORNEYS' FEES [Dkt. 153] be DENIED.

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).

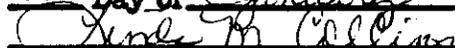
DATED this 13th Day of January, 1999.


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

14th Day of January, 1999.



Re

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

FILED

JAN 12 1999

COLEMAN E. WHITE,
Plaintiff,

vs.

STATE OF OKLAHOMA *ex rel.*
DEPARTMENT OF HUMAN SERVICES,
Defendant.

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Case No. 98-CV-0052B (M)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

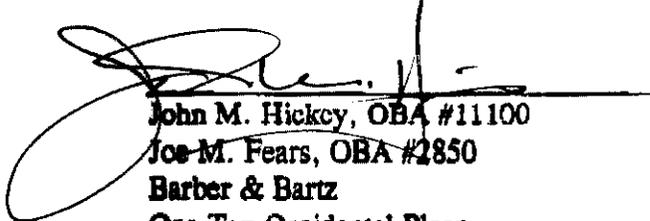
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JAN 14 1999

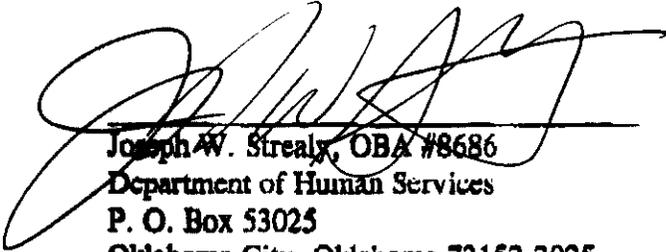
MUTUAL DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff and Defendant and hereby jointly dismiss the above-styled and numbered action with prejudice and any responsive pleadings filed herein reflecting any and all counterclaims.

DATED this 12th day of January, 1999.



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Joe M. Fears, OBA #2850
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Attorney for Defendant

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clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

ROBERT L. NEAL,)
)
) Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
)
Commissioner of the Social)
Security Administration,)
)
) Defendant.)

No. 98-CV-808-M

JAN 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
JAN 14 1999
DATE _____

ADMINISTRATIVE CLOSING ORDER

This case was remanded to the Commissioner of Social Security (Commissioner) under sentence six of 42 U.S.C. §405(g). In accordance with N.D. LR 41, it is hereby ordered that the Clerk administratively close this action. This case may be reopened for final determination upon application of either party once the proceedings before the Commissioner are complete.

IT IS SO ORDERED.

Dated this 12th day of JAN., 1999.

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

F I L E D

JAN 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

ROBERT L. NEAL,

Plaintiff,

v.

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

Defendant.

Case No. 98-CV-808-M

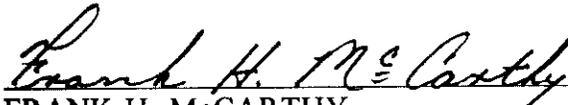
ENTERED ON DOCKET

DATE JAN 14 1999

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 6 of section 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 1383(c)(3).

DATED this 12th day of January 1999.


FRANK H. McCARTHY
United States Magistrate Judge

(5)

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in cursive script, appearing to read "Phil Pinnell".

PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

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

MARTIN MORRIS MOSES, SR.,)
)
Plaintiff,)
)
vs.)
)
COUNTY OF TULSA; STANLEY)
GLANZ; and LARRY'S JAIL)
COMMISSARY,)
)
Defendants.)

FILED ON DOCKET

DATE 1-13-99

No. 98-CV-216-H (J) ✓

FILED

JAN 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, an inmate incarcerated at the Tulsa County Jail, has filed this civil action pursuant to 42 U.S.C. § 1983, the "civil RICO laws" and the Sherman Anti-Trust Act. Plaintiff requested and has been granted leave to proceed *in forma pauperis*. Plaintiff has also filed a "motion to proceed with service of process" (#4). For the reasons discussed below, the Court finds Plaintiff's § 1983 and Sherman Act claims lack an arguable basis in law and should be dismissed as frivolous and his RICO claim fails to state a claim upon which relief may be granted. Therefore, Plaintiff's motion to proceed with service should be denied and his complaint should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B).

BACKGROUND

Plaintiff complains that Defendant Larry's Jail Commissary overcharges inmates confined at the Tulsa County Jail for food and basic hygiene items. Specifically, Plaintiff states that inmates are charged \$.70 for candy bars, potato and corn chips, cheese crackers, oatmeal cakes, vanilla cookies, and brownies; \$1.35 for 1 fluid ounce of Lubriderm Skin Lotion; \$1.20 and

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\$1.65 for 1 fluid ounce of shampoo and conditioner; \$2.45 for 1.5 ounces of deodorant; \$3.25 for 1.75 ounces of Vaseline; \$1.70 for 1.5 ounces of toothpaste; \$.75 for a comb; \$2.00 for 4 ounces of KoolAid; \$2.25 for douches; \$2.75 for tampons; \$3.75 for boxer shorts; \$15.50 for a bra; \$3.00 for panties; \$.85 for a Bic pen; \$.60 for a pencil; and \$.48 for an envelope with a \$.32 stamp affixed. Plaintiff attaches price sheets published by jail officials confirming these prices. He alleges that Defendants have created a "tri-party coporate (sic) monopoly that engages in price fixing to exploit prisoners by and through the mutual agreement of a contract operating under the color of state law, in violation of the civil RICO laws, the Sherman Anti-Trust Act, and in violation of federal laws and rights secured under the first, the fifth, the eighth, and the fourteenth amendments of the United States Constitution." (#1 at 2). In his prayer for relief, Plaintiff seeks a declaratory judgment, compensatory damages for the "psychological and emotional injuries sustained by the Plaintiff and the hardships imposed upon the plaintiff, his family and loved ones," and punitive damages.

ANALYSIS

No damages for "psychological and emotional suffering"

As an initial matter, the Prison Litigation Reform Act ("PLRA") bars civil actions "brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e. Plaintiff has not alleged a physical injury as a result of his confinement at the Tulsa County Jail. Therefore, Plaintiff's request for damages for "psychological and emotional injuries" is barred by the PLRA.

Plaintiff's claims are frivolous or fail to state a claim upon which relief may be granted

The PLRA added a new section to the *in forma pauperis statute* entitled "Screening." 28 U.S.C. § 1915A. The Screening section requires the Court to review a complaint brought by a prisoner seeking redress from a governmental entity or officer, or employee of a governmental entity, to determine if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted. In addition, the PLRA provides that a district court may dismiss an action filed *in forma pauperis* "at any time" if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. See 28 U.S.C. § 1915(e)(2)(B).

"The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Id. A plausible factual allegation which lacks evidentiary support, even though it may not ultimately survive a motion for summary judgment, is not frivolous within the meaning of section 1915(e)(2)(B). Id.

For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988); Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520

(1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

After liberally construing Plaintiff's pro se pleadings, see Haines, 404 U.S. at 520-21; Hall, 935 F.2d at 1110, the Court concludes that, as discussed below, Plaintiff's allegations brought pursuant to 42 U.S.C. § 1983 and the Sherman Anti-Trust Act lack an arguable basis in law and his RICO claim fails to state a claim upon which relief may be granted.

I. 42 U.S.C. § 1983

Title 42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States, and that defendant acted under color of law. Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. Leatherman v. Tarrant Cty. Narcotics Unit, 113 S.Ct. 1160, 1163 (1993) (rejecting heightened pleading requirements in civil rights cases against local governments). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

In the instant case, Plaintiff complains that the prices charged by Larry's Commissary are too high and that, as a result, he has been subjected to cruel and unusual punishment. Although it is unclear from the record before the Court whether Plaintiff has been convicted of a crime or

whether he is a pretrial detainee, the distinction is without effect in this case. Quite simply, the Court finds there is no legal basis for a demand that inmates be offered items for purchase at or near cost or at lower prices. French v. Butterworth, 614 F.2d 23, 25 (1st Cir. 1980); Tunnell v. Robinson, 486 F. Supp. 1265 (W.D. Pa. 1980); Owens-El v. Robinson, 442 F. Supp. 1368 (W.D. Pa. 1978); United States ex rel. Wolfish v. Levi, 439 F.Supp. 114, 134 (S.D. N.Y. 1977), appealed on other grds., 573 F.2d 118 (2d Cir. 1978), rev'd on other grounds sub nom. Bell v. Wolfish, 441 U.S. 520 (1979). As a result, the Court concludes that Plaintiff has not alleged a violation of any federally protected right and his 42 U.S.C. § 1983 claim should be dismissed as frivolous.

2. *Racketeer Influenced and Corrupt Organizations Act (RICO),
18 U.S.C. §§ 1961-68*

A private RICO claim can only be brought by a plaintiff claiming a personal injury arising from the use or investment of racketeering income. Patterson v. Shanks, 149 F.3d 1140, 1145 (10th Cir. 1998) (citing Grider v. Texas Oil & Gas Corp., 868 F.2d 1147, 1149 (10th Cir. 1989)). Plaintiff in this case alleges only that he has suffered "psychological and emotional injuries" as a result of Defendants' activities. This type of conclusory allegation without supporting factual averments is insufficient to support a claim on which relief can be granted. See Riddle v. Mondragon, 83 F.3d 1197, 1202 (10th Cir. 1996). Therefore, because Plaintiff has failed to allege a specific, actual injury resulting from the alleged racketeering activity of Defendants, the Court finds his claim should be dismissed.

3. *Sherman Anti-Trust Act (15 U.S.C. §§ 1, et seq.)*

It is well settled that the antitrust laws, including the Sherman Anti-Trust Act, 15 U.S.C. §§ 1, et seq., are aimed at private action, not at governmental action, and were not intended to authorize restraint of governmental action. See Rural Electric Co. v. Cheyenne Light, Fuel & Power Co., 762 F.2d 847 (10th Cir. 1985); Alabama Power Co. v. Alabama Electric Coop., Inc., 394 F.2d 672, 675 (5th Cir. 1968). The States and their subdivisions are afforded exemptions from various obligations imposed by Congress in the exercise of its powers under the Commerce Clause. Garcia v. San Antonio Metro., 469 U.S. 528, 553 (1985). This "state action exemption" is applicable to suits brought under the Sherman Anti-Trust Act and bars Plaintiff's instant claim. Id.; Parker v. Brown, 317 U.S. 341 (1943); see also Jackson v. Taylor, 539 F. Supp. 593, 595 (D. D.C. 1982); Jordan v. Mills, 473 F. Supp. 13, 17 (E.D. Mich. 1979). Therefore, Plaintiff's claim under the Sherman Anti-Trust Act is legally frivolous and should be dismissed.

CONCLUSION

Plaintiff's claims that Defendants' practice of overcharging inmates for food and hygiene products violates 42 U.S.C. § 1983, the civil RICO laws, and the Sherman Anti-Trust Act are legally frivolous or fail to state a claim upon which relief may be granted and should be dismissed. This dismissal counts as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).¹

¹Section 1915(g) provides as follows:

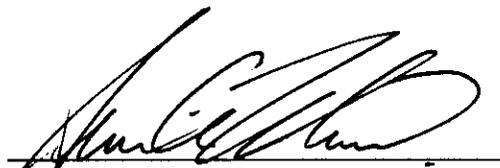
In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's motion to proceed with service (#4) is denied.
2. Plaintiff's 42 U.S.C. § 1983 and Sherman Act claims are legally frivolous and his RICO claim fails to state a claim upon which relief may be granted.
3. Plaintiff's complaint is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B).
4. The Clerk is directed to flag this dismissal as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).
5. This Order constitutes a final order in Case No. 98-CV-216-H.

IT IS SO ORDERED.

This 12TH day of January, 1999.


Sven Erik Holmes
United States District Judge

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.

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

FILED

JAN 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLOTTE CLARK,)
)
 Plaintiff,)
)
 vs.)
)
 ALLSTATE INSURANCE COMPANY,)
)
 Defendant.)

Case No. 98-C-271-H ✓

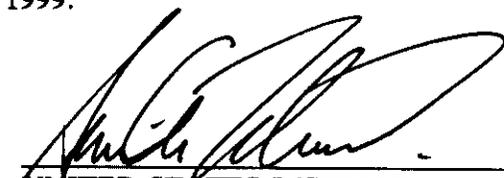
ENTERED ON DOCKET
DATE 1-13-99

ORDER GRANTING PLAINTIFF'S STIPULATION OF
DISMISSAL WITHOUT PREJUDICE

COMES NOW before the Court, Plaintiff's Stipulation of Dismissal Without Prejudice.

The Stipulation of Dismissal Without Prejudice is **HEREBY GRANTED**.

Dated this 12TH day of January, 1999.


UNITED STATES DISTRICT JUDGE

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IT IS SO ORDERED.

This 12TH day of January, 1999.



Sven Erik Holmes
United States District Judge

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

FILED
JAN 12 1999 *cl*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES WAYNE GEORGE,)
)
 Petitioner,)
)
 vs.)
)
 STORMY WILSON,)
)
 Respondent.)

Case No. 96-CV-1075-K (E) ✓

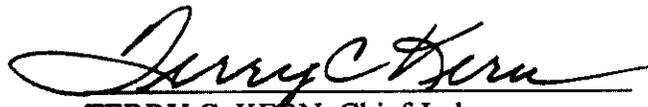
ENTERED ON DOCKET
DATE 1-13-99

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 11th day of January, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

JAN 12 1999

EDWARD L. HAMMONS,)
)
 Plaintiff,)
)
 vs.)
)
 HOME OF HOPE, INC.,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-CV-737-K

ENTERED ON DOCKET
DATE 1-13-99

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 11th day of January, 1999.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

SAZ

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

FILED

JAN 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MAGIX COMPUTER PRODUCT
INTERNATIONAL CORPORATION

Plaintiff.

versus

CSK LIMITED PARTNERSHIP

Defendant.

Case No. 98 CV 509 H(E)

ENTERED ON DOCKET

DATE JAN 13 1999

JOINT STIPULATED DISMISSALS WITH PREJUDICE

COME NOW Plaintiff, MAGIX COMPUTER PRODUCT INTERNATIONAL CORPORATION, and Defendant CSK LIMITED PARTNERSHIP, by and through their respective undersigned counsel, and, pursuant to Federal Rules of Civil Procedure No. 41(a)(1) and 41(c), hereby dismiss with prejudice all claims in the above-styled suit.

Each Party shall bear its own costs, attorneys' fees and litigation expenses incurred in connection with the above-styled case.

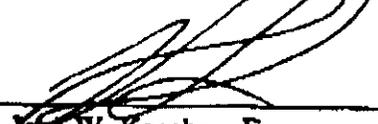
Respectively submitted,

FOR THE PLAINTIFFS:



Terry L. Watt (OBA # 16,745)
Roy C. Breedlove (OBA # 1,097)
FELLERS, SNIDER, BLANKENSHIP, BAILEY
& TIPPENS, P.C.
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321 South Boston
Tulsa, Oklahoma 74103-3318
(918) 599-0621

FOR THE DEFENDANTS:



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KENEHAN, LAMBERTSEN, & STEIN
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Suite 212B
Las Vegas, NV 89119
(702) 796-3446

Kurt M. Kennedy, Esq.
2506-A East 21st Street
Inverness Park
Tulsa, OK 74114
(918) 744-4407

(12)

CJT

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

FILED

JAN 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AMERICAN STATES INSURANCE COMPANY,)
INC., an Indiana corporation,)

Plaintiff,)

vs.)

IDEAL AUTO SALES, INC., an Oklahoma)
corporation,)

Defendant.)

Case No. 98-C-729-E

ENTERED ON BOOKLET
DATE JAN 13 1999

ORDER

The Court notes the refusal of Kay County District Court to accept the transfer of this matter pursuant to the Court's Order of December 2, 1998. This matter was dismissed, by stipulation, without prejudice, on October 14, 1998, and the Court has no further jurisdiction over this dispute. Therefore, the Agreed Order Transferring Case to the District Court of Kay County, Oklahoma, is hereby STRICKEN.

IT IS SO ORDERED THIS 11th DAY OF JANUARY, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

JAN 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GEORGE ROBERTS,)
)
 Plaintiff,)
)
 vs.)
)
 INSURANCE MANAGEMENT CORP.,)
 et. al.,)
 Defendants.)

No. 96-C-1096-B

ENTERED ON DOCKET
DATE JAN 13 1999

ORDER

The Court has for decision Defendant Lloyd's of London aka Lloyd's Insurance Motion to Dismiss for Lack of Subject Matter Jurisdiction (docket # 7), and the Court finds Plaintiff has confessed the issue of jurisdictional amount and asserted the right to refile this action in state court, a matter which must be determined by the state court should the need arise.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss is granted on the ground that Plaintiff has confessed insufficient jurisdictional amount exists to proceed in this forum..

DATED this 12th day of January, 1999.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

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

JAN 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

COLEMAN E. WHITE,)

Plaintiff,)

vs.)

Case No. 98-C-52-B)

OKLA. DEPT. OF HUMAN SERVICES,)

Defendant.)

ENTERED ON DOCKET

DATE JAN 13 1999

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.

IF, by 3-1-99, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 11th day of January, 1999.

For James A. Brett
THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

JAN 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
JOHNETTE L. CARTER,)
)
Defendant.)

Case No. 98-CV-771-BU

ENTERED ON DOCKET
JAN 13 1999
DATE

JUDGMENT

This matter came before the Court upon Plaintiff, United States of America's Motion for Summary Judgment and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Plaintiff, United States of America, against Defendant, Johnette L. Carter, and that Plaintiff, United States of America, is entitled to recover of Defendant, Johnette L. Carter, the principal sum of \$2,799.21, plus accrued interest in the amount of \$731.63 as of August 17, 1998, at the rate of 8% per annum until the date of judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest after the date of judgment at the legal rate of 4.545 until the judgment is paid and its costs of action.

DATED at Tulsa, Oklahoma, this 12th day of January, 1999.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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EOD: 1-13-99

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

JAN 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JOHNETTE L. CARTER,)
)
 Defendant.)

Case No. 98-CV-771-BU

ORDER

This matter comes before the Court upon Plaintiff, United States of America's Motion for Summary Judgment. The record reflects that Defendant, Johnette L. Carter, has not responded to the motion within the time set forth in Rule 7.1(C) of the Local Civil Rules of the United States District Court for the Northern District of Oklahoma and has not requested an extension of time to so respond. Pursuant to Rule 7.1(C), the Court, in its discretion, deems the motion confessed.

Upon review, the Court finds that no genuine issue of material facts exists and that Plaintiff, United States of America, is entitled to judgment as a matter of law on its claim against Defendant, Johnette L. Carter.

Accordingly, Plaintiff, United States of America's Motion for Summary Judgment (Docket Entry #3) is GRANTED. Judgment shall issue forthwith.

ENTERED this 12th day of January, 1999.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

(5)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Housing and)
Urban Development,)
)
Plaintiff,)
)
v.)
)
SANDRA KAY MAGILL, a single person;)
CITY OF TULSA;)
MONDRIAN MORTGAGE CORPORATION;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
)
Defendants.)

FILED

JAN 12 1999 *[Signature]*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JAN 13 1999

CIVIL ACTION NO. 98-CV-0496-BU (E) ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12th day of Jan.,
1999. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern
District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the
Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County
Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District
Attorney, Tulsa County, Oklahoma; that the Defendant, City of Tulsa, appears not, having
previously filed its disclaimer; that the Defendants, Sandra Kay Magill, a single person, and
Mondrian Mortgage Corporation, appear not, but make default.

The Court being fully advised and having examined the court file finds that the
Defendant, City of Tulsa, was served with Summons and Complaint by certified mail, return
receipt requested, delivery restricted to the addressee on October 28, 1998; that the Defendant,

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Mondrian Mortgage Corporation, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on October 30, 1998.

The Court further finds that the Defendant, Sandra Kay Magill, a single person, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning November 6, 1998, and continuing through December 11, 1998, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, Sandra Kay Magill, a single person, and service cannot be made upon said Defendant by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendant, Sandra Kay Magill, a single person. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, on behalf of the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon

this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on July 31, 1998; that the Defendant, City of Tulsa, filed its Disclaimer on October 29, 1998; that the Defendants, Sandra Kay Magill, a single person, and Mondrian Mortgage Corporation, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Two (2), Block Two (2), JEFFERSON TERRACE
ADDITION to the City of Tulsa, Tulsa County, State of
Oklahoma, according to the recorded plat No. 1202.

The Court further finds that on August 11, 1989, the Defendant, Sandra Kay Magill, a single person, executed and delivered to Commonwealth Mortgage Company of America, L. P. Limited Partnership, her mortgage note in the amount of \$30,102.00, payable in monthly installments, with interest thereon at the rate of 8.435 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Sandra Kay Magill, a single person, executed and delivered to the Commonwealth Mortgage Company of America, L.P. Limited Partnership, a real estate mortgage dated August 11, 1989, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on September 11, 1989 in Book 5206, Page 1950, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 9, 1991, Commonwealth Mortgage Company of America, L.P. assigned the above-described mortgage note and mortgage to Mondrian Mortgage Corporation. This Assignment was recorded on September 17, 1991, in Book 5349, Page 1461, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 10, 1996, Mondrian Mortgage Corporation assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment was recorded on July 29, 1996, in Book 5831, Page 1665, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 3, 1995, Sandra Kay Magill, a single person, filed her voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 95-00296-R. On April 27, 1998, a Final Decree was entered in Case No. 95-00296-R, and subsequently was closed on same date.

The Court further finds that Defendant, Sandra Kay Magill, a single person, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$28,699.86, plus penalty charges in the amount of \$767.98, plus accrued interest in the amount of \$6,011.85 as of March 24, 1997, plus interest accruing thereafter at the rate of 8.435 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, City of Tulsa, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, Sandra Kay Magill, a single person, and Mondrian Mortgage Corporation, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, on behalf of the Secretary of Housing and Urban Development, have and recover judgment **in rem** against Defendant, Sandra Kay Magill, a single person, in the principal sum of \$28,699.86, plus penalty charges in the amount of \$767.98, plus accrued interest in the amount of \$6,011.85 as of March 24, 1997, plus interest accruing thereafter at the rate of 8.435 percent per annum until judgment, plus interest thereafter at the current legal rate of 4.545 percent per annum until fully paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Sandra Kay Magill, a single person, City of Tulsa, Mondrian Mortgage Corporation, and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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


DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Case No. 98-CV-0496-BU (L) (Magill)

LFR:css

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

NOBEL INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
PETRO ENERGY TRANSPORT CO.,)
)
)
Defendant.)

ENTERED ON DOCKET
DATE 1-12-99
No. 97-CV-1079-KV

F I L E D

JAN 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Plaintiff and against the Defendant to the following extent. The Court hereby issues a declaratory judgment that plaintiff Nobel Insurance Company had the right, as primary insurance carrier, pursuant to the applicable contract of insurance with defendant Petro Energy Transport Co., and Oklahoma law, to withdraw from further defense of the Henderson lawsuit (CJ-95-64, Jackson County, State of Oklahoma), upon payment of the policy limits, interests and costs.

ORDERED THIS 11th DAY OF JANUARY, 1999


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

85

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHIRLEY H. ST. CLAIR,
SSN: 279-38-8400

Plaintiff,

v.

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

Defendant.

No. 97-CV-1099-J

ENTERED ON DOCKET

DATE JAN 12 1999

JUDGMENT

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

It is so ordered this 11th day of January 1999.


Sam A. Joyner
United States Magistrate Judge

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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JAN 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHIRLEY H. ST. CLAIR,
SSN: 279-38-8400

Plaintiff,

v.

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

Defendant.

No. 97-CV-1099-J ✓

ENTERED ON DOCKET

DATE JAN 12 1999

ORDER^{2/}

Plaintiff, Shirley H. St. Clair, 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 support his credibility analysis with specific evidence, (2) the ALJ failed to refer to specific evidence to outweigh the opinions of Plaintiff's treating physicians, (3) the ALJ erred in disregarding the evidence from Plaintiff's treating physicians, and (4) the ALJ did not properly consider Plaintiff's manipulative impairments. For the purpose of social security disability,

^{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/} This action was initially appealed by Plaintiff following a decision to deny benefits by the Administrative Law Judge (hereafter "ALJ"). That action was affirmed by the District Court (Magistrate Judge Frank H. McCarthy), and reversed by the Tenth Circuit Court of Appeals. On remand, ALJ Stephen C. Calverese concluded that Plaintiff was not disabled on May 30, 1997. [R. at 447]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review.

Plaintiff is insured only through December 31, 1992. Plaintiff must be disabled prior to this date or Plaintiff does not qualify for disability. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born July 10, 1943, and is a high school graduate. [R. at 92]. Plaintiff is 5'7" tall and her weight fluctuates between 190 and 225 pounds. [R. at 93, 145, 402].

At the hearing on September 9, 1991, Plaintiff testified that she suffered from asthma which caused breathing problems. [R. at 100]. Plaintiff noted that she had approximately one asthma attack each week and she usually used her inhaler at least two times each day. [R. at 110]. In addition, Plaintiff stated that she has significant back pain. [R. at 100-102]. According to Plaintiff, she could ride perhaps one hour before she would have to stop or lay down. Plaintiff additionally testified that she had learned to cross-stitch and that she could do so for approximately fifteen minutes and that she did ceramics approximately one hour one time per week. [R. at 107]. Plaintiff believed that she could walk approximately one block, sit for thirty minutes, and lift five pounds if she used both hands. [R. at 115]. Plaintiff testified that she participated in physical therapy (for approximately eighteen treatments) and did stretching exercises. [R. at 115-21]. Plaintiff believed that she could sit, at the longest, for two hours but would be very stiff the following day. [R. at 128].

At the hearing on June 23, 1993, Plaintiff noted that she drove 73 miles to attend the hearing that day. [R. at 137]. Plaintiff additionally stated that she

sometimes drove to the grocery store or to Tulsa to visit her doctor. [R. at 137]. Plaintiff stated that she did craft work for approximately one hour each week, that she attempted to vacuum one time each week and that she did some laundry. [R. at 137]. Plaintiff testified that her back pain was becoming worse and that it radiated up each of her legs. [R. at 143]. According to Plaintiff she could stand for approximately ten minutes and sit for approximately fifteen minutes. [R. at 147]. Plaintiff stated that her asthma was becoming worse. [R. at 155]. Plaintiff stated that she napped each day for approximately three hours, and that she attempted to make her bed but could only do one-half of the bed at a time before resting. [R. at 155]. Plaintiff additionally testified that she experienced migraines at the rate of approximately one or two each month. [R. at 161].

In a disability report completed on June 12, 1990, Plaintiff noted that she suffered from constant low back pain. Plaintiff noted that she did some light cleaning, that she was able to complete short shopping trips, that she cooked an average of once per day, that she crocheted and needlepointed some, and that she visited friends about once each week. [R. at 208].

Her August 22, 1990 medications list included ibuprofen, Tylenol, and medication for her asthma. [R. at 218].

Plaintiff was treated by a chiropractor, John W. Sibley, from March 22, 1990 until June 14, 1990. He stated that, in his opinion, Plaintiff was disabled due to her difficulty standing and sitting for long periods of time or inability to carry heavy objects. [R. at 236].

A Residual Physical Functional Capacity Assessment was completed by Paul Woodcock, M.D., on February 1, 1991. [R. at 253]. The assessment indicates that Plaintiff could occasionally lift fifty pounds, frequently lift 25 pounds, stand or walk six hours in an eight hour day, sit six hours in an eight hour day, and push or pull an unlimited amount. [R. at 247]. A Residual Physical Functional Capacity Assessment was completed by Vallis D. Anthony, M.D., on September 24, 1990. The assessment reveals she could occasionally lift fifty pounds, frequently lift 25 pounds, stand or walk six hours in an eight hour day, sit six hours in an eight hour day, and push or pull an unlimited amount. [R. at 258].

An MRI of Plaintiff's lumbar spine taken January 12, 1989 indicated normal alignment with no deformity. The interpreter noted a "very small disk protrusion to the left of midline. . . ." And some degeneration at the L3-4 level. [R. at 270].

Plaintiff was examined September 17, 1990. The examiner noted Plaintiff complained of back pain and asthma, and that Plaintiff's lungs, at the time of the examination were clear. [R. at 296]. According to the examiner Plaintiff walked with a good gait, and her range-of-motion of her cervical spine was forty degrees with some discomfort. Plaintiff's range-of-motion of her knees, shoulders, hips, ankles, wrists, elbows, and fingers were all reported as "full." [R. at 298]. Plaintiff's grip strength, biceps, triceps, and shoulder shrug was reported as "full and equal." [R. at 298]. In addition, Plaintiff's finger-to finger motion was indicated as "good." [R. at 298]. In the examiner's opinion, Plaintiff "would have impairment in prolonged standing, walking, bending, twisting, and lifting." [R. at 298].

On July 1, 1991, Bat Shunatona, M.D., wrote that Plaintiff had low back pain secondary to osteoarthritis and asthma. [R. at 351]. He noted that her disease was expected to be "slowly progressive." In addition, he indicated that her asthma was "currently controlled," with her most recent flare-up in November 1990. [R. at 351].

On September 25, 1991, Harold E. Goldman, M.D., indicated that Plaintiff did not meet any of the Listings. [R. at 354]. He concluded, based on the medical records, that Plaintiff could perform work on a sustained basis at the sedentary or light level with no prolonged standing, walking, bending, twisting, or lifting. [R. at 355].

At her hearing before the ALJ on May 15, 1997, Plaintiff testified that she was, at the time of the hearing, 53 years old, and was 49 years old at the time of her last insured status. [R. at 472]. Plaintiff testified that she experienced pain in her lower back, her shoulder blades, her neck, both legs, and that she suffered from asthma, a hiatal hernia, muscle spasms, and migraines. [R. at 475-485]. According to Plaintiff, she could walk approximately 360 feet, lift approximately five pounds, and sit 10 - 15 minutes at a time. [R. at 485]. Plaintiff did acknowledge that she was able to lift her 16 pound dog and that she could lift one gallon of milk. [R. at 492].

By letter dated March 15, 1994, Allan S. Fielding, M.D., noted that Plaintiff could heel and toe-walk supporting her weight normally, and that although Plaintiff walked stiffly and slowly she did not favor either leg. He additionally reviewed her lumbar MRI scan noting a disc degeneration from L3 through S1. He concluded, "this is a somewhat difficult case in that her disc protrusion is towards the left. The global weakness and sensory loss in the right leg certainly could not be explained by this."

He recommended that she be managed medically and recommended against surgery.
[R. at 563-64].

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).

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

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

"The finding of the Secretary^{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

^{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."

is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff was not disabled at Step Five of the sequential evaluation. The ALJ incorporated the prior decision of the ALJ and additionally evaluated whether any new evidence required a finding of disability. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff could perform several jobs in the national economy.

IV. REVIEW

CREDIBILITY ANALYSIS

Plaintiff initially asserts that the ALJ erred by failing to properly support his credibility analysis. Plaintiff states that the ALJ failed to point to specific evidence or factors to support the ALJ's evaluation of Plaintiff's credibility. Plaintiff suggests that the ALJ referred solely to one "anomaly."

The ALJ noted, in his opinion, that although Plaintiff testified she could lift only five pounds, and only with both of her hands, she additionally acknowledged that she

could lift her sixteen pound dog and she could lift one gallon of milk. However, contrary to the representations of Plaintiff, this factor is not the sole "anomaly" supporting the decision of the ALJ. The ALJ, in the May 1997 decision, incorporated the prior August 19, 1993 decision by the previous ALJ. The ALJ noted that the prior decision had been reversed as to the issue of "transferrable skills," and the ALJ incorporated the analysis of the prior ALJ with respect to the Plaintiff's residual functional capacity. The ALJ additionally noted that his focus would be on determining "what, if any, alteration in the earlier determination is warranted, bearing in mind the claimant's status is relevant only through December 31, 1992, at which time the claimant's insured status expired." [R. at 453]. Plaintiff ignores the analysis by the previous ALJ.

In the prior decision by the ALJ, the ALJ noted that Plaintiff took no prescription pain medication but controlled her pain through the use of over-the-counter medicine. The ALJ additionally observed that Plaintiff had been urged to lose weight (to help her back pain) and to stop smoking (to help her breathing difficulties), but that Plaintiff had not made a significant amount of effort with either of the suggested courses of action. The ALJ suggested that if the level of pain and breathing difficulties which Plaintiff experienced were as high as Plaintiff testified, that Plaintiff would have made a more serious effort to either reduce weight or stop smoking. The ALJ reviewed all of the medical evidence and concluded that it did not support Plaintiff's complaints of disabling pain. The Plaintiff additionally noted Plaintiff's activities and driving. The Court has reviewed the May 1997 decision of the ALJ and the ALJ decision in 1993

which was incorporated by reference. The Court concludes that the ALJ's credibility analysis is supported by substantial evidence.

TREATING PHYSICIAN

Plaintiff asserts that the ALJ ignored the treating physician evidence which established that Plaintiff was unable to perform prolonged sitting. Plaintiff refers to records from her chiropractor and her physical therapist. Defendant asserts that the the opinions of a chiropractor and physical therapist are not acceptable medical sources. Pursuant to 20 C.F.R. § 404.1513, "acceptable sources" are considered: licensed physicians, licensed osteopaths, licensed psychologists, and licensed optometrists. Information from a chiropractor is considered "information from other sources." Pursuant to the regulations, "information from other sources may also help us to understand how your impairment affects your ability to work." 20 C.F.R. § 404.1513(e). However, some courts have concluded that the opinions of chiropractors should be considered under the "treating physician rule." See, e.g. Leggitt v. Sullivan, 812 F. Supp. 1109, 1122 (D. Col. 1992).

Plaintiff was treated by a chiropractor, John W. Sibley for approximately three months (from March 22, 1990 until June 14, 1990). He stated that, in his opinion, Plaintiff was disabled due to her difficulty standing and sitting for long periods of time or inability to carry heavy objects. [R. at 236].

Assuming Plaintiff's chiropractor qualified as a "treating physician," a treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58

(more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). In this case, the ALJ noted the conclusory nature of the chiropractor's opinion. In addition, in the 1993 ALJ opinion, which was incorporated by the 1997 ALJ in his opinion, the ALJ refers to Sibley's opinion. The ALJ noted that "in that the record indicates the claimant was followed for her complaints of low back pain by other, more qualified personnel, the Administrative Law Judge turns to those records for a more reliable determination of the claimant's medical condition." Based on the opinions of the other treating physicians and based on the ALJ's summary and treatment of Plaintiff's medical record, the Court concludes that the ALJ's conclusion that Plaintiff was not disabled is supported by substantial evidence. The Court would urge future caution, however, in dealing with the opinions of chiropractors.

The Court additionally concludes that Plaintiff has waived this argument pursuant to James v. Chater 96 F.3d 1341, 1344 (10th Cir. 1996). Plaintiff appealed the decision of the ALJ to the Appeals Council. Plaintiff asserted as errors to the Appeals Council: (1) that the findings of the ALJ were not based on substantial evidence, (2) that the ALJ did not comply with Kepler, (3) that the ALJ did not properly follow the testimony of the vocational expert, (4) that the RFC findings were not based on substantial evidence, and (5) that the ALJ used an erroneous burden of

proof at Step Five. Plaintiff did not assert in his appeal to the Appeals Council that the ALJ failed to properly consider the opinions of Plaintiff's chiropractor or physical therapist.

In James, the Tenth Circuit Court of Appeals noted that "[o]rdinarily issues omitted from an administrative appeal are deemed waived for purposes of subsequent judicial review." James, 96 F.3d at 1343. The Tenth Circuit concluded that this general rule should also be applied to social security disability adjudications. In James, the claimant did not file a brief at the Appeals Council level but asserted that he was disabled and entitled to benefits. The Court concluded that "[s]uch a statement was plainly inadequate to apprise the Appeals Council of the particularized points of error counsel has subsequently argued in the courts." Id.

The Court concludes that the issues which Plaintiff asserted to the Appeals Council are insufficient to have apprised the Appeals Council of the issue which Plaintiff has raised in his current appeal to this Court. Plaintiff has therefore waived the assertion of this issue.

ABSENCE OF EVIDENCE

Plaintiff additionally asserts that the ALJ relied on an "absence of contradiction" in the medical record and did not point to specific evidence to support his conclusions with regard to Plaintiff's ability to sit. The Court disagrees. Two separate Residual Physical Functional Capacity Assessments concluded that Plaintiff could sit for six hours in an eight hour day. [R. at 253, 247]. Plaintiff testified, at one of the hearings

that she could sit for perhaps two hours although she would be very stiff the following day.

MANIPULATIVE REQUIREMENTS

Plaintiff asserts that the ALJ disregarded Plaintiff's testimony regarding her manipulative limitations due to arthritis and numbness. Initially, the Court notes that Plaintiff failed to present this argument to the Appeals Council and has therefore waived it on appeal. In addition, Plaintiff persistently asserted that she was disabled due to her back pain (and resulting radiating pain), and her asthma and shortness of breath. Regardless, the record contains sufficient medical evidence during the time period in question to support a finding that Plaintiff did not have manipulative restrictions. Richard G. Cooper, D.O., reported that Plaintiff's grip strength and finger manipulation was good. [R. at 298].

IT IS SO ORDERED.

Dated this 11 day of January 1999.


Sam A. Joyner
United States Magistrate Judge