

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D
JAN 28 1999

TONY R. MORRISON,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner, Social)
Security Administration,)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-C-70-EA

ENTERED ON DOCKET
DATE JAN 29 1999

ORDER

On October 19, 1998, this Court reversed and remanded the Commissioner's decision for further proceedings. On November 17, 1998, this Court denied Defendant's Motion to Alter or Amend Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of \$3,424.25 for attorney fees (no costs) for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of \$3,424.25 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

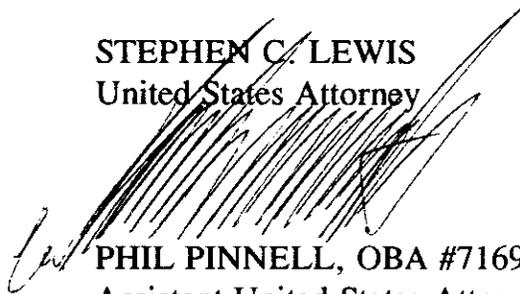
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It is so ORDERED THIS 28th day of January 1999.



CLAIRE V. EAGAN
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
(918) 581-7463

Tony R. Morrison v. Kenneth S. Apfel
Case No. 97-C-70-EA

NOTE TO FILE

Ken Roberts, OGC Dallas, called to say he had no objection to the request for attorney fees under EAJA filed in this case.

Santita S. Ogren
January 15, 1999

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AIR LIQUIDE AMERICA)
CORPORATION, a Delaware)
corporation,)
)
Plaintiff,)
)
v.)
)
CONTINENTAL CASUALTY)
COMPANY, an Illinois corporation;)
STAFFING RESOURCES OF)
OKLAHOMA, INC., an Oklahoma)
corporation,)
)
Defendants/Third-party Plaintiffs,)
)
v.)
)
CIGNA PROPERTY AND CASUALTY)
INSURANCE CO., a Connecticut corporation;)
and SAMUEL CANADA,)
)
Third-Party Defendants.)

FILED
JAN 27 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

97-CV-315-H ✓

ENTERED ON DOCKET
DATE JAN 29 1999

JUDGMENT

This matter came before the Court for consideration of Plaintiff Air Liquide America Corp. and Defendant/Third-Party Plaintiffs Staffing Resources of Oklahoma , Inc. and Continental Casualty Corp.'s Motions for Summary Judgment. The issues have been taken under consideration by this Court and a decision has been rendered in accordance with the Order filed December 23, 1998 which resolves all issues raised in the Third-Party Complaint. Pursuant to Fed. R. Civ. P. 58 and for the reasons stated in the Court's order dated December 23, 1998, the Court declares, adjudges, and decrees the following:

1. Air Liquide and Samuel Canada are insureds under CNA Insurance Policy No. 1

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57349071 ("The CN Auto Policy").

2. The CNA Auto Policy affords primary coverage to Air Liquide and Samuel Canada for claims arising from the August 1, 1996 accident.
3. Under the CNA Auto Policy, CNA has the primary duty to defend Air Liquide and Samuel Canada for all claims or suits against them arising from the August 1, 1996 accident.
4. Under the CNA Auto Policy, CNA has breached its duty to defend Air Liquide and Samuel Canada for all claims or suits asserted against them arising from the August 1, 1996 accident.
5. Under the CNA Auto Policy, CNA has the primary duty to defend Staffing Resources for all claims or suits asserted against it arising from the August 1, 1996 accident.
6. Under the CNA Auto Policy, CNA has the primary duty to indemnify Air Liquide and Samuel Canada in the event that Air Liquide and/or Samuel Canada become legally obligated to pay any sum as damages for any claim or suit against them arising from the August 1, 1996 accident.
7. Neither Air Liquide nor CIGNA has a duty to defend pursuant to CIGNA Automobile Insurance Policy No. H07124028.

IT IS SO ORDERED.

This 27TH day of January, 1999.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VELVET J. THURBER,)

Plaintiff,)

v.)

UNITED STATES OF AMERICA,)

Defendant.)

97-CV-529-H ✓

ENTERED ON DOCKET

DATE JAN 29 1999

FILED
JAN 27 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

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

IT IS SO ORDERED.

This 27TH day of January, 1999.


Sven Erik Holmes
United States District Judge

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

JAN 27 1999

EVERETT G. BARKER,
SSN: 236-90-7687

Plaintiff,

v.

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

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-288-J

ENTERED ON DOCKET

DATE JAN 27 1999

ORDER^{1/}

Now before the Court is Plaintiff's appeal of a decision by the Commissioner of the Social Security Administration ("Commissioner") denying him disability insurance benefits under Title II of the Social Security Act and supplemental security income benefits under Title XVI of the Act. The Administrative Law Judge ("ALJ"), R.J. Payne, denied benefits at step five of the sequential evaluation process used by the Commissioner to evaluate disability claims.

The ALJ determined that Plaintiff retained the residual functional capacity ("RFC") to perform a limited range of medium work and found that, given this RFC, there were significant jobs in the national economy which Plaintiff could perform. On appeal, Plaintiff argues (1) that the ALJ failed to develop the record, (2) that there is no evidence supporting the ALJ's finding that Plaintiff could occasionally lift and carry 50 pounds or frequently lift and carry 25 pounds as required by medium work or that

^{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.

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Plaintiff could carry out the frequent bending and stooping required of medium work, (3) that the ALJ misinterpreted the limitations in Plaintiff's shoulders, and (4) that the ALJ failed to consider the additional limitations caused by Plaintiff's weak knees. The Court finds that all of these alleged errors have been waived. Consequently, the Commissioner's decision is **AFFIRMED**.

I. **WAIVER – JAMES V. CHATER**

The relevant procedural facts of this case are identical to those in James v. Chater, 96 F.3d 1341 (10th Cir. 1996). As in James, counsel in this case "did not raise before the Appeals Council any of the particular objections now urged against the [Commissioner]. Counsel evidently declined the option of filing a brief, see 20 C.F.R. § 404.975, electing instead to rely solely on a summary request for review" James, 96 F.3d at 1343.

Plaintiff's summary request for review states as follows:

The [ALJ's] decision is inconsistent with evidence of record. The ALJ's actions, findings or conclusions are not supported by substantial evidence.

R. at 5. As the Tenth Circuit held in James, this type of conclusory statement is "plainly inadequate to apprise the Appeals Council of the particularized points of error counsel has subsequently argued in the courts." James, 96 F.3d at 1343.

"[I]ssues omitted from an administrative appeal are deemed waived for purposes of subsequent judicial review." James, 96 F.3d at 1343 (citing many cases). None of the issues raised by Plaintiff in this action for judicial review were raised in

Plaintiff's administrative appeal before the Appeals Council. Consequently, all of the issues currently raised by Plaintiff have been waived.

The Tenth Circuit specifically held that the waiver rule announced in James was to be applied prospectively only, and only when the affected party had notice. James, 96 F.3d at 1343-44. According to the Tenth Circuit, notice of the rule could be accomplished by "direct admonition" from the Social Security Administration or through "published case law guidance for counsel." Id. Both forms of notice are applicable in this case.

James was decided on September 19, 1996. Plaintiff filed his request for review on June 13, 1997. James is, therefore, applicable to this case, and there are no retroactivity concerns. At the time Plaintiff's request for review was filed, Plaintiff's counsel had constructive notice of the James waiver rule because James itself had been a published opinion in the controlling circuit for almost nine months. The direct admonition contained in the ALJ's May 23, 1997 opinion also provided Plaintiff and his counsel with actual knowledge of the James waiver rule.

The ALJ's opinion contains the following concluding paragraph:

In the event you appeal this decision to the Appeals Council of the United States Office of Hearings and Appeals, Social Security Administration, recent case law requires the following: (1) any issue upon which you appeal must be **specifically stated**, so as to adequately apprise the Appeals Council of the particular points of error alleged to be made by the United States Administrative Law Judge in the decision; (2) it is insufficient to simply state "I am disabled and entitled to benefits" or similar conclusory language when appealing. Such language has been held to be inadequate in apprising the Appeals Council of the error(s)

by the United States Administrative Law Judge; (3) failure to state with particularity the issues raised to the Appeals Council on appeal will result in waiver of those issues should judicial review later be sought before the United States Courts; (4) issues not stated with particularity to the Appeals Council will not be able to be raised for the first time before the United States Courts. See, James v. Chater, Case No. 95-2231 (10th Circuit 1996).

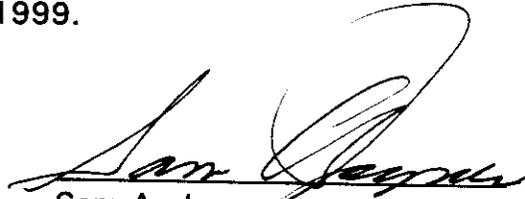
R. at 19-20 (emphasis in original). This language is clearly sufficient to put Plaintiff and his counsel on notice of the waiver rule announced in James.

CONCLUSION

Plaintiff failed to raise any of the errors asserted in this action for judicial review before the Appeals Council of the United States Office of Hearings and Appeals, Social Security Administration. All of the issues raised in this action are, therefore, waived. Consequently, the decision of the Commissioner is AFFIRMED.

IT IS SO ORDERED.

Dated this 27 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 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES of AMERICA,)

Appellant,)

vs.)

THE FIRST NATIONAL BANK OF BOSTON,)

Appellee.)

Case No. 97-CV-543-H(J)

ENTERED ON DOCKET

DATE JAN 28 1999

REPORT AND RECOMMENDATION

The Bankruptcy Court held that The First National Bank of Boston's ("Bank") lien was entitled to priority over the lien of the United States of America ("USA"). The USA appealed the decision of the Bankruptcy Court. For the reasons discussed below, the United States Magistrate Judge recommends that the decision of the Bankruptcy Court be **AFFIRMED**.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Overview

This appeal involves the final assets of the bankruptcy estates of LMS Holding Company ("LMS"), Petroleum Marketing Company ("PMC"), and Retail Marketing Company ("RMC"). RMC, in 1989, purchased most of the assets of a 7-Eleven convenience store chain from the bankruptcy estate of Mako, Inc. ("Mako"). The USA asserts that pursuant to the plan of liquidation of Mako, RMC agreed that the purchase of the Mako assets would be subject to an IRS tax lien.

On September 27, 1991, LMS, PMC, and RMC each filed Chapter 11 bankruptcy petitions. The petitions were consolidated by the Bankruptcy Court for administrative purposes.

At the time of the filing of the bankruptcy petition RMC and PMC operated 93 convenience stores. On September 29, 1993, RMC "sold" 41 of the convenience stores to Contemporary Industries Southern ("CIS"). The Bankruptcy Court held a portion of the proceeds of the sale to CIS pending the resolution of RMC's adversary proceeding against the IRS.

The Debtors sought approval of the sale of the remaining assets of the Debtors' estate on April 8, 1993. This sale was approved by the Bankruptcy Court on July 19, 1993. The Debtors received \$2,831,030 and discontinued further operations. The dispute between the parties to this appeal involves the distribution of the remaining one million dollars of the Debtors' estate.

Both the Bank and the IRS claim ^{a portion of} ~~entitlement to~~ the one million dollars. The IRS asserts a claim in the amount of \$390,000 based on a tax lien. The Bank claims the full amount of the remaining estate based on a proof of claim filed November 9, 1991 in the amount of \$7,749,284.36. The Bank observes that no party in interest has objected to the Bank's proof of claim.

The Debtors, on July 18, 1995, filed a Motion for Partial Distribution of Funds. The Debtors requested that the remaining one million dollars be distributed to the Bank. The Bank notes that the IRS did not object prior to the hearing on the motion to distribute, but appeared at the hearing and orally stated that the IRS had a claim

superior to that of the Bank. The Bankruptcy Court ordered a distribution of \$600,000 to the Bank, and a hearing to consider distribution of the remaining \$400,000 was continued.

On December 8, 1995, the Bank filed a motion to convert the Debtors' bankruptcy cases to Chapter 7 cases. The USA objected to the motion. On January 16, 1996, the Debtors voluntarily converted the cases to Chapter 7 cases. The Bank filed, on December 8, 1995,¹⁷ a motion asserting the Bank's previously filed proof of claim as a superpriority administrative claim under Section 507(b) of the Bankruptcy Code. The Bank also filed a motion to subordinate the IRS's secured claim to the Bank's 507(b) claim.

The Bankruptcy Court held an evidentiary hearing on April 26, 1996, to determine disposition of the remaining \$400,000. On May 6, 1996, the Bankruptcy Court held that the tax lien claim of the IRS was subordinate to the secured claim of the Bank under Section 724(b)(2) of the Bankruptcy Code. The Bankruptcy Court held that the Bank had suffered a failure of adequate protection under Section 507(b) in the amount of \$2,642,000 and that the remaining \$400,000 should therefore be distributed to the Bank.

B. USA's Statement of Facts

In 1980, PMC, which previously operated as an independent oil distributor, began to operate convenience stores under the name "Fast Break." In 1986, PMC

¹⁷ The USA notes that the motion was filed December 6, 1995.

purchased 40 retail stores. The Bank provided over five million dollars in financing for the purchase. RMC was formed in 1986 to provide payroll processing services to PMC. RMC provided this service to PMC until 1989 when RMC began operating its own retail stores. LMS was formed in 1988 and was a wholly owned subsidiary of RMC.

Mako operated 7-Eleven convenience stores. In 1987 and 1988 the IRS assessed tax delinquencies and filed a federal tax lien against Mako in the sum of \$334,364.00. Mako filed a Chapter 11 Bankruptcy petition in the Eastern District of Oklahoma on April 29, 1988. RMC purchased a number of convenience stores from Mako's bankruptcy estate in August of 1989 for \$2.77 million. RMC additionally agreed to assume the liability for certain of Mako's debts.

The IRS notes that in accordance with section 5.03(b) of the Mako Plan, RMC agreed that the IRS had a "disputed secured claim" on the Mako Assets and reserved the right to "dispute all or part of . . . [t]he IRS' Secured Claim, post-confirmation" of the Mako Plan. RMC, on June 22, 1990 filed a post-confirmation adversary proceeding challenging the secured status of the IRS's "disputed secured claim." The Mako Bankruptcy Court, on April 23, 1991, found that the IRS's claim was secured in the amount of \$303,068.19 plus interest, but that the penalty portion of the claim (\$55,895.03) should be equitably subordinated to the status of a general unsecured claim. The Bankruptcy Court order was affirmed by the district court, and reversed by the Tenth Circuit Court of Appeals on October 17, 1996. According to the IRS, the

Tenth Circuit requested additional factual findings regarding whether the penalties were subject to equitable subordination.

USA observes that RMC and PMC had cash flow problems during the two years prior to their bankruptcies. Due to the cash flow problems, the Bank structured its relationships with RMC and PMC to provide the companies with immediate access to uncollected funds deposited into their checking account at the Bank. The Bank provided RMC and PMC with extensions of credit by allowing the companies to cover checks presented on their checking accounts at the Bank but not yet cleared. In September 1991, the Bank informed RMC and PMC that it would no longer provide the companies with immediate access to uncollected funds, consequently, approximately \$500,000 in checks were returned due to insufficient funds. The checks returned for insufficient funds included checks to RMC and PMC's main gasoline supplier.

As a result, the gasoline supplier refused to supply gasoline unless it was paid cash on delivery. RMC and PMC were unable to meet such a demand and entered a consignment arrangement with Coastal with respect to 13 stores. The companies entered negotiations regarding the sale of the stores to Kerr McGee and contemplated the possibility of Chapter 11 bankruptcy if such an arrangement was not reached.

USA acknowledges that the participants in the bankruptcy agreed that the stores needed to remain open or the value of the assets would significantly decrease. RMC and PMC requested authorization from the Bankruptcy Court to incur post-petition debt to Coastal (for the purchase of gasoline) and requested authorization to use cash collateral resulting from the sale of inventory. According to USA the

Bankruptcy Court issued an order permitting the incurrence of post-petition debt in connection with the purchase of gasoline. This was initially permitted for \$500,000, and was later increased to \$750,000.

On July 19, 1993, the Bankruptcy Court entered an Order granting the debtors' motion to sell property to CIS. The Bankruptcy Court approved the terms of the sale which included the payment of the Coastal lien from the proceeds of the CIS sale. The USA notes that in disbursing the amounts to Coastal the Bankruptcy Court recognized that the IRS' claim was pending and that approximately \$920,000 would remain in the two funds which would be sufficient to pay the claim of the IRS if the Tenth Circuit determined that it was secured.

RMC and PMC had additionally requested and received authorization to use cash collateral in the ordinary course of business. The cash collateral consisted of inventory in the convenience stores, cash on hand, and credit card receipts. As protection for the use of the cash collateral, the Bankruptcy Court granted all creditors having a secured interest in cash collateral a replacement lien in assets acquired by the debtors post-petition. USA represents that an agreed order between the Bank and the debtors was signed by the Bankruptcy Court.

USA notes that in accordance with the stipulation, the Bank was to receive as adequate protection: (1) monthly payments of interest beginning December 18, 1991, and ending June 30, 1992; (2) copies of debtors' monthly balance sheets and income statements; (3) copies of RMC's and PMC's monthly store profit statements; (4) copies of debtors' quarterly profit and loss statements; (5) monthly accounts payable

reports; (6) daily cash summary reports from RMC and PMC; (7) weekly reports regarding the amount of RMC and PMC's debt to Coastal; (8) the right to receive proceeds from sale of any property of RMC and PMS estates after satisfaction of prior liens; (9) a replacement lien in assets acquired post-petition.

USA notes that in April 1992 the unsecured creditor committee objected to the amount of adequate protection payments owed to the Bank under the Stipulation. The Bankruptcy Court ordered the amount of payments reduced to \$65,000 per month effective March 1992. By June 1, 1992, the Bank had received adequate protection payments totaling \$185,000, which included: \$50,000 October 1991 payment, \$25,000 December 1991 payment, \$24,000 January 1992 payment, \$20,000 February 1992 payment, and \$65,000 March 1992 payment. The Bankruptcy Court held a hearing on June 1, 1992 regarding the debtors' failure to make timely adequate protection payments in April and May of 1992. The Bank agreed to a payback schedule and was to receive past due adequate protection payments by July 15, 1992. The Bank received payments of \$195,000 by July 15, 1992, and a final adequate protection payment July 1992 of \$65,000. USA asserts that although the Bank and the debtors' counsel testified that the Bank received a total of \$395,000 in adequate protection payments, the Bank actually received \$445,000.^{2/}

^{2/} The Bank acknowledges that the IRS contends the Bank has received \$445,000. The Bank explains that it received only \$395,000, but that the difference in amounts is explained because the IRS is counting a \$50,000 payment which was never made. The Bank filed a motion for payment of priority claim pursuant to 11 U.S.C. § 507(b) on February 22, 1994.

USA asserts that although the Bank could have terminated the debtors' use of cash collateral, the Bank never did. On September 24, 1992, the Bank moved for relief from the stay. On January 8, 1993, the Bankruptcy Court granted the Bank's motion to lift the stay.

USA asserts that the sale of businesses to CIS comprised 41 of the stores owned by RMC and PMC. USA asserts that most of the assets of the estate were liquidated apart from the CIS Sale. USA maintains this fact is significant because the Bank's claim was based on a lien interest in property held by the PMS estate (which the Bank valued at \$5.8 million) and nearly all of the assets covered by the CIS sale were directly traceable to RMC's bankruptcy estate. USA notes that the record is unclear as to where the proceeds from the liquidation of non-CIS sale went. USA states that the Bank believes that it is possible that the Bank received proceeds from payments as adequate protection payments under the stipulation. The debtors' attorney testified that he did not believe any of the proceeds were paid to the Bank, but that the proceeds were segregated into a property sale account which was used to pay operating expenses.

USA states that the Bank agreed to a payment of \$1,572,948.40 of the proceeds to Southland and Coastal; \$51,054.82 to Group II Leasing; \$26,963 to the U.S. Department of Agriculture; \$25,000 to Coastal Mart and CIS; \$24,000 to William King; \$12,415 and \$3,377.43 to CIS; \$10,503.97 to Ron Wright; \$6,946.67 to Mako Leasing II; and \$6,499.20 to Coastal Mart, Inc.

C. The Claim of the Bank

The Bank notes that prior to the petition the debtors executed a promissory note in the principal amount of \$7.5 million. The Bank filed a proof of claim in the debtors' bankruptcy cases on November 8, 1991, for \$7,459,284.36, secured by liens and security interests on all properties of the estates.

On September 27, 1991, the debtors requested permission of the Bankruptcy Court to enter an agreement with Coastal for post petition purchase of products on credit, and for approval of use of the collateral securing the debt owed to the Bank. The requests were made on an emergency basis. The Bank notes that at a hearing on September 27, 1991, the Court found that the Bank's secured position was adequately protected by its liens and security interests. The debtors' use of cash collateral and authorization to purchase from Coastal were conditioned on the debtors making interest payments to the Bank as adequate protection.

The Bankruptcy Court ordered the debtors to pay \$65,000 to the Bank. According to the Bank, the debtors paid only the May 1992 payment, which was paid on June 2, 1991. The Bank states that the debtors failed to make the April 1992 adequate payment or any payments after with the exception of May 1992. The Bank asserts that it received a sum of \$210,000 through June 30, 1992, although it should have received \$562,000 through that date.

The Bank filed a motion to lift stay on September 24, 1992, asserting that the debtors default on payments had resulted in a substantial diminution of the value of the Bank's collateral due to the debtors' failure to pay Coastal. The Bankruptcy Court

did not modify the automatic stay until January 12, 1993. The Bank asserts that as adequate protection for the use of the Bank's collateral and the Coastal lien, the debtors paid the Bank a total of \$395,000.^{3/}

On March 18, 1993^{4/} the debtors entered an agreement with CIS to sell 37 convenience stores to CIS. The Motion to Sell was approved and on September 29, 1993, the CIS sale occurred and \$2,831,030 was paid to the debtors. The Bank notes that pursuant to the Bankruptcy Court's order all liens attached to the sale proceeds.

According to the Bank, Southland Corporation ("Southland"), on April 29, 1993, filed a motion requesting payment of certain costs. The Bank objected but the IRS did not. The Court entered a Memorandum Opinion on May 26, 1994, disposing of the issue and finding that all of the Debtors' assets were subject to a lien in favor of the Bank and the proceeds from the CIS Sale were subject to the Bank's lien. The Court concluded that "[a]ny amount paid to Southland for cure costs will be paid out of the proceeds of the Bank's collateral," and the Bankruptcy Court ordered payment of the Southland costs from the CIS sale in the amount of \$822,948.46. In addition, Coastal filed a motion for distribution of funds seeking payment of amounts owed for credit extended. The Bank notes that the IRS also did not object to this motion although the

^{3/} The parties dispute the amount paid.

^{4/} The Bank's Brief states "March 18, 1995." However, since the sale was approved in 1993, the Court believes the "1995" date was a typographical error.

Bank "responded." *Brief of Appellee at 10.* The Bankruptcy Court ordered a disbursal of \$750,000 from the proceeds of the CIS sale to Coastal.

The Debtors had slightly more than one million on deposit as of June 30, 1995. On July 18, 1995, the Debtors filed a motion for partial distribution of funds alleging that the remaining funds were proceeds of collateral to which the Bank held a first priority security interest and requesting disbursement to the Bank. The Bank asserts that the IRS/USA did not specifically object prior to the hearing on August 25, 1995, but appeared at the hearing and asserted that the IRS/USA might have a superior lien claim.

The Bankruptcy Court entered an agreed order signed by the Bank, Debtors, and IRS ordering the distribution of \$600,000 to the Bank in partial satisfaction of the Bank's secured claim. On December 8, 1995, the Bank filed a Motion to Convert the case to Chapter 7, and an Amended Response to the motion for distribution of funds asserting the Bank's entitlement to a superpriority administrative claim under § 507(b).

The Debtors voluntarily converted their case to Chapter 7 on January 16, 1996. On April 26, 1996, the Bankruptcy Court concluded that the Bank suffered a failure of adequate protection in the amount of \$2,642,000 and was entitled to a superpriority claim under § 507(b), and that the Bank was entitled to distribution of the remaining proceeds in the Debtors' estates pursuant to § 724(b).

The Bankruptcy Court entered its order on May 6, 1996, and entered its written findings of fact and conclusions of law on July 1, 1996. The IRS filed its notice of appeal.

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). See also O'Connor v. Mbank Dallas, N.A., 808 F.2d 1393 (10th Cir. 1987) (whether debtors provided adequate protection to creditors was question of fact to be judged on review under clearly erroneous standard).

III. ANALYSIS

The USA argues that the Bankruptcy Court erred in finding that the Bank was entitled to superpriority status pursuant to § 507(b) because the bank "suffered a loss of \$1.64 million in the value of their [cash] collateral during the operation of the Chapter 11." See Appellant's Brief at 23. USA asserts that the Court should reverse the decision of the Bankruptcy Court because the Bank did not meet the burden of establishing that the Bank met the requirements to qualify for superpriority status and because the Bankruptcy Court incorrectly applied the law.

A. SECTION 507(B) AND SUPERPRIORITY STATUS

Section 507(b) provides:

If the trustee, under section 362, 263, or 264 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(1) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

To assert a claim under section 507(b), a creditor must show: (1) the trustee, under section 362, 363, or 364(d) provided adequate protection of the interest of the holder of the claim secured by a lien on property, (2) the creditor's claim must be allowable under section 507(a)(1), and (3) the claim must have arisen from either the stay of action against property under section 362, the use, sale or lease of property under 363, or the granting of a lien under 364(d).

The parties generally acknowledge that these requirements must be met for the Bank to qualify for superpriority status. The USA asserts that the first and third requirements are not met and the Bankruptcy Court therefore erred in granting superpriority status to the Bank.

REQUIREMENT NUMBER ONE: ADEQUATE PROTECTION

Order Requirement

USA initially suggests that a section 507(b) claim is dependent on the grant of adequate protection to a creditor in an order and that the Bank did not receive adequate protection so any decline in value is irrelevant. Although unclear, USA appears to assert in their brief that no order was entered providing the Bank with adequate protection. See Appellant's Brief at 26. The Bank responds that an order was entered on December 18, 1991, and that pursuant to the terms the debtors were required to make \$572,000 in adequate protection payments over a period of seven months. See Appellee's Brief at 17. USA merely restates its initial argument in its reply brief^{5/} without responding to the Bank's argument that a specific order was entered.^{6/} See Reply Brief at 7.

At oral argument, counsel for USA asserted that the adequate protection order did not cover real estate, but was limited to inventory and accounts receivable. Counsel for the Bank pointed out that the order which was entered by the Bankruptcy Court on December 18, 1991, covered real estate.

Debtors acknowledge that Lenders claim validly perfected liens against substantially all of the assets owned by the

^{5/} USA states, "The first guideline is that the absence of an order specifically granting adequate protection to a creditor prevents a finding that adequate protection failed. Clearly, adequate protection cannot fail if it was never granted." See Reply Brief at 7.

^{6/} 4 Collier on Bankruptcy ¶ 507.12(1)(b) (15th ed. 1998) ("There is no explicit requirement in section 507(b) itself that adequate protection be provided through a court order or subsequently approved by the court." citing a Tenth Circuit Court of Appeals case, Travelers Ins. Co. v. American Agcredit Corp., 859 F.2d 137 (10th Cir. 1988).).

Debtor, including, without limitation, all accounts, contracts, general intangibles, inventory, equipment, fixtures, tax refunds and other refunds, interest under insurance policies, real estate and all other property, real or personal, fixed or contingent, legal or equitable, described in any manner in the referenced exhibits, including as well all proceeds, products, increases and accessions of that collateral.

[Record on Appeal, Doc. No. 187, ¶ 5 (emphasis added)].

Failure of Adequate Protection

USA additionally asserts that the adequate protection provided to the Bank did not fail because the Bank received more through the bankruptcies than it would have received by an immediate liquidation. USA does not fully explain or develop this argument. In addition, the Court has difficulty understanding the thrust of USA's argument. The Bank had more at risk by agreeing to the continuation of the bankruptcy as opposed to insisting on an immediate liquidation.

Determining Value of Secured Claim

USA asserts that the decision of the Bankruptcy Court should be reversed because the Bankruptcy Court failed "to determine the value of the Bank's secured claim during the pertinent time period." (This argument is labeled USA's "first ground for reversal.") According to the USA, the Bankruptcy Court made a general finding that the Bank had a pre-petition blanket lien against all of the debtors' assets but the value of the Bank's secured claim in cash collateral was never addressed. USA does not explain the consequences of such a failure.

The Bank responds that the Bank had a blanket lien in all of the Debtors' property which secured the debts of all debtors and which was cross-collateralized against the assets of all debtors. The Bank notes that the Bankruptcy Court "examined the difference between the Bank's secured claim at the time the "Cash Collateral Order" was entered and the value of the secured claim when it received such value, less any adequate protection payments paid." Appellee's Brief at 20. The Bank notes that the focus of the Bankruptcy Court was on the diminution of value of the Bank's collateral caused by the Debtor's use which the Bank asserts is the difference between \$7.5 million and \$995,000.

Valuation Method

USA's "second" reason supporting reversal is that the Bankruptcy Court erred by applying an "at cost" valuation approach rather than a "liquidation" approach in determining whether the Bank suffered a lack of adequate protection. USA states that the Bankruptcy Court ignored expert testimony and relied on a general estimate of the "at cost" value of collateral. USA states that if the Bankruptcy Court had properly applied the "liquidation" approach, the value of the inventory would have been between \$522,000 and \$719,146, instead of \$1.45 million.

The Bank asserts that the determination of the valuation method is a question of fact and therefore reversible only if clearly erroneous. The Bank additionally states that the Bankruptcy Court did use a "liquidation" value and valued liquidating the collateral on an ongoing concern basis. The Bank notes that the USA's position that a "fire sale" liquidation method must be used is not supported by the case law. The

Bank notes that at no time during the first six months of the bankruptcy case was the possibility that the debtors would not reorganize contemplated. The Bank asserts that the "going concern basis" of valuation was therefore the appropriate method.

The USA additionally asserts that the Bank presented only general valuation estimates by Larry Stone an owner of the debtors on the petition date. The Bank notes that both Larry Stone and Earl Walters testified as to the values used, that the Bankruptcy Court was presented with documentary evidence regarding the going concern liquidation value of the collateral, that the Bank introduced schedules of real property, inventory, cash and accounts receivable filed by the debtor establishing the value of the collateral, and that the Bankruptcy Court took judicial notice of the September 30, 1991 hearing and the testimony by debtors' representatives as to the value of collateral on that date. The Court recommends that the District Court conclude that the valuation method used does not constitute reversible error.

Limiting Adequate Protection to the Stipulation

USA asserts that a "line of cases" holds that a creditor's superpriority claim should be limited by the amount that the creditor could have received under a stipulation providing for adequate protection. USA notes that under this theory the Bank's claim would be limited to \$341,774. USA acknowledges that the Tenth Circuit referred to this view as the "minority view" in Travelers Insurance Co. v. American AgCredit Corp., 859 F.2d 137, 140-41 (10th Cir. 1988), but USA asserts that the Circuit neither agreed nor disagreed with the theory.

The Bank notes that the USA's interpretation of the cases it cites is wrong and asserts that the cases cited by the USA stand for the opposite position. USA does not further address this argument in its Reply Brief.

USA, in its initial brief, suggests that its position is the "minority view," and was not embraced by the Tenth Circuit Court of Appeals in a previous opinion. USA's argument is tentative at best. The Magistrate Judge recommends that the District Court not reverse the decision of the Bankruptcy Court on this basis.

Acquiescence by the Bank

USA asserts that the Bankruptcy Court concluded that the lack of adequate protection suffered by the Bank was equal to the "loss of \$1.64 million in the value of their collateral during the operation of Chapter 11." USA asserts that the ruling was based on the assumption that payments to creditors other than the Bank resulted in a lack of adequate protection but that this assumption was improper because it failed to consider the Bank's agreement to such payments.

The Bank initially argues that this issue was not presented by the USA at the trial court level and cannot be raised for the first time on appeal. The Bank references Tenth Circuit Court of Appeals cases. See, e.g., Lyons v. Jefferson Bank & Trust, 994 F.2d 716, 721 (10th Cir. 1993); Terra Communications, Inc. v. Comm'r of Internal Revenue, 104 F.3d 1229 (10th Cir. 1997).

In the Reply Brief filed by the USA, the USA asserts that the Bank misses the point by arguing waiver. The USA asserts that it "was not required to plead or establish the elements of either equitable estoppel or waiver because the Bank's

acquiescence in RMC's use of cash collateral goes to the central issue of this case, whether the Bank suffered a lack of adequate protection."

The Bank's argument is that unless the USA asserted these arguments to the Bankruptcy Court the Bank cannot, for the first time on appeal, assert these arguments. USA does not address this point. The USA should have asserted, to the Bankruptcy Court, that the Bank did not suffer a lack of adequate protection because the Bank acquiesced in each of the cash payments.

REQUIREMENT NUMBER THREE: ENHANCEMENT OF VALUE OF THE BANK'S COLLATERAL

USA additionally asserts that the Bank cannot meet the third requirement of section 507(b) because the value of the Bank's collateral did not decrease, but rather was enhanced by the bankruptcy. USA asserts that the bankruptcies actually enhanced the value of the Bank's collateral and that the Bank has acknowledged this fact.

The Bank notes that at the beginning of the bankruptcy the Bank's collateral was approximately \$7.5 million and based on these values the Bankruptcy Court authorized the Coastal lien and the use of the Bank's cash collateral. The debtor used the Bank's cash collateral for the next 16 months. The Bank was paid \$395,000 as proceeds of its collateral and therefore suffered an approximate \$7 million dollar reduction in its position.

The Court notes that all parties to the bankruptcy recognized that the debtors were worth more as a going concern. The USA seems to be asserting that the Bank

benefitted by the debtors' continuation in business as opposed to immediate liquidation. Although this concept may be true, the Bank was also at greater risk because the Bank continued to provide money to the debtors. Regardless, even if the debtors were worth more as a going concern than as a defunct business, this does not automatically translate into the USA's argument that the value of the bankruptcy estate enhanced. The Bankruptcy Court concluded otherwise, and the USA's mere assertions to general references that the debtors were worth more as a going concern does not establish the argument.

B. THE BANKRUPTCY COURT ERRED IN PERMITTING THE BANK TO SATISFY THE "SECURED CLAIM" AGAINST PMC WITH PROCEEDS FROM THE SALE OF ASSETS OF RMC

USA asserts that the Bankruptcy Court erroneously concluded that the Bank could satisfy its claim against PMC from the assets of RMC. USA notes that the Bankruptcy Court decided to jointly administer the debtors estates but that such consolidation was solely for the purpose of administration. USA asserts that the IRS lien is to the assets of RMC and has priority over the more general claim of the Bank.

The Bank argues that the USA's position has no merit. Initially, the Bank notes that this issue was not raised by the USA below and has therefore been waived. In addition, the Bank states that the terms of the promissory note which is the basis for the Bank's claim provides that PMC, RMC, and LMS are each jointly and severally liable for the entire \$7.5 million debt. The Bank additionally asserts that the Bank held liens and security interests in the assets of each of the debtors and that the debt was therefore cross-collateralized.

USA never addresses the waiver argument. As noted above, absent presentation of this argument to the Court below, USA has waived the argument for the purpose of appeal.

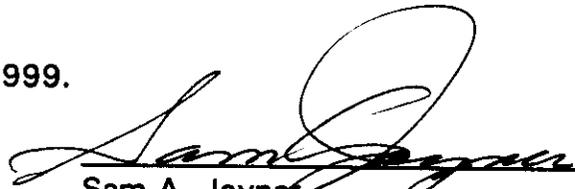
RECOMMENDATION

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

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 27th 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

28th Day of January, 1999.
C. Cortale, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 27 1999

DAVID DIEDRICH,)
)
 Plaintiff,)
)
 v.)
)
 KENNETH S. APFEL,)
 Commissioner, Social)
 Security Administration,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-1100-J

ENTERED ON DOCKET
DATE JAN 28 1999

ORDER

On October 22, 1998, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded the case to the Commissioner for further action. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on January 11, 1999, the parties have agreed that an award in the amount of \$2,174.25 for attorney fees for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees under the Equal Access To Justice Act in the amount of \$2,174.25. If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff

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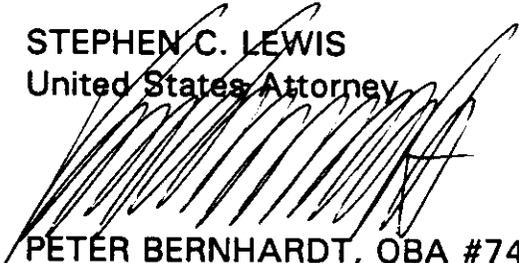
pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED this 27 day of January 1999.


Sam A. Joyner
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

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

JAN 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DENNIS L. YORK, SR.,)
SSN: 519-74-8520,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner of the Social Security)
Administration,)
)
Defendant.)

CASE NO. 97-CV-385-M ✓

ENTERED ON DOCKET

DATE JAN 28 1999

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 27th day of JAN., 1999.

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

F I L E D

JAN 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

DENNIS L. YORK, SR.,)
 SSN: 519-74-8520,)
)
 PLAINTIFF,)
)
 vs.)
)
 KENNETH S. APFEL,)
 Commissioner of the Social)
 Security Administration,¹)
)
 DEFENDANT.)

CASE No. 97-CV-385-M

ENTERED ON DOCKET

DATE JAN 28 1999

ORDER

Plaintiff, Dennis L. York, Sr., seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.² In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. § 405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine

¹ Kenneth S. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Kenneth S. Apfel is substituted for John J. Callahan as defendant in this suit. No further action need 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 Plaintiff's November 19, 1993 applications for benefits were denied initially and upon reconsideration. No further action was taken on those claims. Plaintiff filed applications for SSI and Disability Insurance benefits on September 15, 1994 (protective filing date of August 23, 1994) which were also denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held November 9, 1995. By decision dated December 14, 1995, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on February 21, 1997. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

(12)

that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born December 15, 1961 and was 33 years old at the time of the hearing. [R. 31,92]. He claims to have been unable to work since June 8, 1995 due to severe pain in his neck, arms, back and fingers; insomnia; loss of hearing; headaches and limited ability to sit, stand, walk and lift. [Plaintiff's Brief, p. 1].

The ALJ determined that Plaintiff has severe impairments consisting of congenital defect at C2-3 and mild spurring at C5-6 [cervical spine] but that he retained the residual functional capacity (RFC) to perform light work reduced by inability to lift over 5 pounds, perform repetitive arm movement or repetitive lifting, bending, stooping or twisting. [R.19]. He determined that Plaintiff is unable to perform his past relevant work (PRW) of janitor or laborer but that, based upon the testimony

of a vocational expert (VE), there are a significant number of jobs in the regional and national economies that Plaintiff could perform. He found, therefore, that Plaintiff was not disabled as defined by the Social Security Act. [R. 20]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the ALJ's decision is not supported by substantial evidence. Specifically, Plaintiff asserts: that the ALJ's RFC finding is based upon incomplete consideration of all his impairments, including prolonged standing and walking; that the ALJ failed to point to specific evidence to support his RFC assessment; that he failed to follow the testimony of the vocational expert regarding jobs available that Plaintiff could perform with his RFC; and that the Dictionary of Occupational Titles (DOT) differs from the VE's testimony as to the physical demands and specific vocational preparation (SVP) of jobs cited by the ALJ, rendering the VE's testimony unreliable and the ALJ's decision in error.

For the reasons discussed below, the Court affirms the decision of the Commissioner.

Residual Functional Capacity (RFC)

Plaintiff worked at various construction jobs and as a sanitation worker until he was injured in an automobile accident on June 9, 1993. [R. 33-36, 136, 146, 150, 154, 161]. He was treated for acute cervical strain in an emergency room where x-rays taken of his cervical spine revealed congenital fusion of C2-3. [R. 165-169]. He

underwent treatment by Raymond F. Sorenson, D.O. June 29, 1993 through September 22, 1993. [R. 184-185]. Treatment records from that time period indicate that his principal complaint was of headaches. [R. 205-211]. He was also treated for cervical and shoulder pain with medication and muscle strengthening exercises. *Id.* On December 9, 1993, Dr. Sorenson reported that he thought Plaintiff "would be able to participate in activities that do not involve lifting object[s] of greater weight than five pounds." Dr. Sorenson also limited activities that require "excessive, repetitive action." [R. 185]. Dr. Sorenson's records indicate treatment was recommenced on January 25, 1994 for continuing problems with Plaintiff's left arm and cervical area. Numbness and difficulty with the lower back area was mentioned for the first time on that date. [R. 205]. Treatment with medication was continued. [R. 202-204]. On July 6, 1994, Dr. Sorenson repeated his opinion that Plaintiff could engage in "light duty type of employment." [R. 226]. He said: "This employment would not involve lifting weights greater than five pounds, repetitive activity related to arm activity or lifting, bending, stooping or twisting." *Id.* Dr. Sorenson wrote these comments after having treated Plaintiff, off-and-on, for over a year and after having noted a fleeting complaint of lower back numbness.

Despite this opinion by his treating physician, Plaintiff claims that he should have been found disabled because "there is no medical evidence to contradict the Plaintiff's testimony regarding his severe weakness, fatigue and limited mobility." [Plaintiff's Brief, p. 3]. Although he appears to accept Dr. Sorenson's opinion regarding lifting and repetitive motion limitations and the ALJ's reliance upon that

opinion in assessing his RFC, he claims the ALJ failed to point to specific evidence to establish that, "despite his pain and limited mobility" Plaintiff could still perform the light jobs identified by the VE. *Id.*

The Court notes that Plaintiff asserted only pain in his neck, shoulders and arms in his applications for benefits and disability reports. [R. 142, 150, 158, 161]. At the hearing before the ALJ, Plaintiff claimed lower back pain "not quite as bad as my neck" and asserted for the first time that he was unable to walk more than two blocks, stand more than ten minutes and sit more than fifteen minutes. [R. 37, 41]. The medical record contains no such complaints to any of Plaintiff's medical care providers. Although "low back pain" was included in his long list of physical complaints in a report written by Plaintiff's treating chiropractor on October 13, 1993, the lumbosacral evaluation "was unremarkable." [R. 212]. Dr. Sorenson's opinion that Plaintiff could perform work included the restrictions he determined were warranted by Plaintiff's limitations. After writing his report, Dr. Sorenson continued to treat Plaintiff on a regular basis for muscle spasm and pain in the shoulder, neck/back and arm areas until October 18, 1994. [R. 200-203]. The last treatment note in the record by Dr. Sorenson, on January 31, 1995, indicates some relief with medication. [R. 199]. The ALJ was entitled to rely upon Dr. Sorenson's opinion in assessing Plaintiff's RFC. See 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987) (treating physician opinion entitled to great weight).

As to Plaintiff's other alleged limitations, occasional episodes of weakness and tingling was reported by Dr. Sorenson in his office notes which he treated by varying

Plaintiff's medication. However, Dr. Sorenson did not indicate there was any limitation on Plaintiff's ability to work due to these symptoms. Until the hearing, there is no record that Plaintiff's "fingers don't work together anymore." [R. 46]. A December 2, 1994 examination for the DDU by Terence Grew, D.O., revealed complaints of numbness and tingling in the arms but dexterity of gross and fine manipulation appeared normal and grip strength only slightly decreased on the left. [R. 195]. No mention was made of inability to use his fingers. No complaints of problems using his fingers were voiced to Dr. Sorenson or included in Dr. Sorenson's reported limitations in his reports on Plaintiff's ability to work.

Likewise, Plaintiff's complaints of trouble sleeping were addressed by Dr. Sorenson and treated with medication with some success until the problem "increased because of new infant in the house." [R. 200, 201].

As to Plaintiff's claim of hearing loss, an examination by an audiologist at the bequest of the Social Security Administration, revealed Plaintiff to be "a borderline hearing aid candidate." [R. 189]. And, although he testified he doesn't "hear too well" he acknowledged that hearing aids would help. [R. 30-59]. There is no indication that Plaintiff had auditory problems at the hearing and the record contains a claims examiner's note that Plaintiff said he could understand questions on the phone by putting "his finger in his ear to get rid of background noise." [R. 102].

Apart from his own testimony, Plaintiff points to no evidence to support his claims of fatigue, inability to sit, stand and walk and inability to use his fingers. The ALJ was not obligated to accept as true, Plaintiff's subjective complaints that are not

accompanied by medical evidence. *Taylor v. Heckler*, 765 F.2d 872, 876 (9th Cir.1985). Such complaints may be disregarded if they are unsupported by clinical findings. *Maounis v. Heckler*, 738 F.2d 1032, 1034 (9th Cir.1984); *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). While acknowledging the ALJ's prerogative to determine Plaintiff's credibility, Plaintiff contends that, because this is a step five determination, the burden was upon the ALJ to, in effect, disprove his testimony regarding those claims by pointing to specific evidence which "contradicts" his testimony.

Specific findings as to credibility are required only after a claimant has produced objective medical evidence showing that claimant's impairment reasonably could be expected to produce the symptom. See *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir. 1995) (if objective medical evidence shows a pain-producing problem, ALJ is required to consider claimant's allegations of pain and decide whether they are credible); see also SSR 96-7p, 1996 WL 374186, at *2 (July 2, 1996)(a finding as to credibility is made after a physical or mental impairment reasonably expected to produce the subjective symptom is shown by "medically acceptable clinical laboratory diagnostic techniques"). The ALJ concluded, and the Court agrees, that there was no medical evidence in the record to support Plaintiff's claims that he had limited ability to sit, stand and walk or that he was unable to work due to fatigue and finger numbness. Contrary to Plaintiff's allegation, this is not a case where the ALJ relied upon the absence of evidence in concluding Plaintiff is not disabled. See *Thompson v. Sullivan*, 987 F.2d 1482 (10th Cir. 1993). It is clear from the ALJ's discussion of the medical

evidence and Plaintiff's reported activities, that the ALJ weighed more than simply Plaintiff's credibility in determining whether he was capable of performing other work in the national economy. There is substantial evidence in the record to support the ALJ's RFC assessment, not the least of which is the opinion by Plaintiff's treating physician, upon which the ALJ was entitled to rely in assessing Plaintiff's RFC. The ALJ compared Plaintiff's testimony regarding subjective complaints with the medical record and correctly concluded that Plaintiff's impairments did not preclude him from engaging in other work. The determination is supported by substantial evidence in the record. The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 and appropriately applied the evidence to those guidelines. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain, fatigue, hearing loss and limited mobility in accordance with the correct legal standards established by the Commissioner and the courts.

Vocational Expert Testimony

Plaintiff contends that, because the ALJ did not include Plaintiff's "true limitations" in the questions he posed to the VE, his reliance upon the VE's testimony as a basis for his determination was improper. Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, in posing a hypothetical question,

the ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990).

The ALJ asked the vocational expert whether a 33 year old man with the education and experience of Plaintiff, who is restricted to only occasional bending and stooping, would be able to do work that exists in the economy. [R. 61]. The vocational expert testified as to three jobs in the light category and two jobs in the sedentary category that exist for such an individual. [R. 61-62]. The ALJ asked a second question using Dr. Sorenson's July 6, 1994 report for restrictions. [R. 62]. The VE answered that the five pound weight lifting and repetitive arm activity restrictions would eliminate the other jobs but that the taxi starter and arcade attendant jobs would still be available even with those restrictions. [R. 62-63]. The third question posed assumed all Plaintiff's testimony as fully credible, to which the VE responded that no jobs would be available. [R. 63].

According to the Plaintiff, the ALJ ignored the answer to the third hypothetical. It is clear, however, that the ALJ did not accept as true that Plaintiff suffered inability to use his hands, to sit and stand for prolonged periods or suffered insomnia to the extent alleged. As discussed above, the ALJ's credibility findings are supported by the record. Therefore, the Court finds that the ALJ was not required to rely upon the VE's answer to his third hypothetical question.

Plaintiff complains that the lifting restriction of less than five pounds conflicts with the ALJ's finding that Plaintiff can perform a "wide" range of light jobs. [Plaintiff's Brief, p. 4]. However, the ALJ did not find Plaintiff able to perform the full

or wide range of light jobs. He found Plaintiff able to perform light work activity with restrictions. [R. 19]. The response of the VE included sedentary and light jobs that met the criteria set forth by the ALJ in his hypothetical question. Plaintiff cited testimony by the VE acknowledging the difference between the 5 lb. lifting restriction imposed by Plaintiff's physician and the 10 lb. lifting requirements of sedentary work "going strictly by the definition." The testimony following the portion cited by Plaintiff in his brief, however, clearly demonstrates that the VE was aware of the exception to the strict definition of sedentary work required by Plaintiff's RFC.

Q Well, does the arcade attendant and taxi starter require lifting more than five pounds?

A No, not that I'm aware of anyway, and neither would the taxi starter or the self-service gas attendant. Now, a self-service gas attendant would have to reach repetitively and I wasn't sure -- you said no repetitive -- I thought you said bending, stooping.

Q No repetitive -- well, let me read this again. I may have missed something here. Okay, no lifting weights greater than five pounds.

A Right.

Q No repetitive activity related to arm activity. I missed that the last time. No repetitive activity related to arm activity or lifting, bending, stooping or twisting.

A Okay. Then the --

Q So the arm activity would be limited.

A The arm activity would be out for the self-service gas.

Q What about the taxi starter and the arcade attendant?

A No, those should fit your hypothetical.

[R. 62-63]. The vocational expert identified a light job and a sedentary job that Plaintiff could perform with his specific lifting restriction. Thus, the ALJ's reliance upon the VE's testimony in finding Plaintiff not disabled was proper and his decision was based upon substantial evidence.

Plaintiff also complains the ALJ "did not even follow the testimony of the vocational expert witness" because he listed the jobs cited by the VE in response to the first hypothetical question in Finding No. 12 of his decision. As discussed above, the VE identified several jobs in response to the ALJ's first hypothetical question. Then, in response to the second hypothetical which incorporated those limitations ultimately accepted by the ALJ in his assessment of Plaintiff's RFC, those jobs were narrowed to two jobs which, the VE testified, Plaintiff could still perform: taxi starter and arcade attendant. In his decision, the ALJ listed all the jobs identified by the VE after the first hypothetical **including** the two jobs that meet the RFC criteria as **examples** of jobs available to Plaintiff. [R. 63]. So, even if the other positions identified by the VE in the first hypothetical were eliminated from the potential job base, a significant number of jobs still remain that Plaintiff can perform. According to the Commissioner's regulations, 20 C.F.R. § 404.1566(b), "Work exists in the national economy when there is a significant number of jobs (*in one or more occupations*) having requirements which you are able to meet with your physical or mental abilities and vocational qualifications." [emphasis supplied]. Therefore, the ALJ's conclusion

that alternative jobs exist that Plaintiff can perform is proper and based upon substantial evidence in the record.

Equally unavailing is Plaintiff's argument concerning a contradiction between the VE's testimony about the physical requirements of taxi starter and arcade attendant and the DOT. He contends the DOT sets forth reaching, handling and fingering requirements which are contrary to the ALJ's findings. However, Plaintiff's RFC, as assessed by the ALJ, did not include restrictions as to reaching, handling and fingering. The ALJ's "finding" as to Plaintiff's RFC restricted lifting over 5 lbs, repetitive arm activity, lifting, bending, stooping and twisting. [R. 19, 62]. Nor is the term "frequent" synonymous with "repetitive" as Plaintiff seems to imply in his brief. This was acknowledged by Plaintiff's attorney at the hearing during his questioning of the VE:

Q Okay. Well, the frequent reaching, a third to two-thirds of the time, I know it's not repetitive, but how would that -- I guess that would be using the arms.

A. Right.

[R. 68]. The VE testified that Plaintiff's ability to work would be affected only in the last hypothetical, which was not relied upon by the ALJ in his determination. Furthermore, the VE testified that he had heard Plaintiff's testimony and reviewed the file and that, although the job descriptions in his "book"³ contained physical

³ It is not clear from the hearing transcript what book the VE was referring to when he testified as to the physical requirements of arcade attendant, although it appears from reading the exchange between Plaintiff's counsel and the VE, that they were referring to the definitions in *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles*, pp. 337, 365. (1993), another publication of the United States Department of Labor, Employment & Training

requirements of "frequent reaching and handling", he had observed such jobs locally and believed those jobs fit within the hypothetical presented by the ALJ.⁴ [R. 59, 72, 73].

The courts have differed on the relative weight to be given to the DOT and contradictory testimony of a VE.⁵ And, the Tenth Circuit has not specifically addressed the issue.⁶ However, as noted above, the Court is not convinced that a contradiction between the DOT and the VE's testimony in this case exists. Therefore, absent a clear contradiction between the two, the Court finds that the ALJ was entitled to rely upon the testimony of the VE.

Plaintiff also contends the ALJ's finding that Plaintiff does not have transferable skills eliminates the taxicab starter job because the DOT lists a specific vocational preparation (SVP) of 3 for that job. See Dictionary of Occupational Titles, at 1009

Administration or a like source during the hearing. [R.66-68, 72].

⁴ In the section discussing Physical Demand Components of the "Selected Characteristics" manual referenced above, there are four codes denoting the absence or presence of certain physical demands: N for "not present"; O for "occasionally", F for "frequently" and C for "constantly." *Id.*, C-3. The category "frequently" is defined as: "Activity or condition exists from 1/3 to 2/3 of the time." *Id.*, C-3. The next category, "constantly" is defined as: "Activity or condition exists 2/3 or more of the time." *Id.*

⁵ Compare *Porch v. Chater*, 115 F.3d 567, 572 (8th Cir. 1997) ("When expert testimony conflicts with the DOT, and the DOT classifications are not rebutted, the DOT controls.") with *Johnson v. Shalala*, 60 F.3d 1428, 1436 (9th Cir. 1995) ("It was...proper for the ALJ to rely on expert testimony to find that the claimant could perform the two types of jobs the expert identified, regardless of their classification."), and *Conn v. Secretary of Health & Human Serv.*, 51 F.3d 607, 610 (6th Cir. 1995) ("[T]he ALJ was within his rights to rely solely on the VE's testimony. The social security regulations do not require the Secretary or the expert to rely on [DOT] classifications.").

⁶ The Tenth Circuit declined to decide the issue and concluded there was no conflict between the DOT and the VE's testimony under similar circumstances and noted the imprecise nature of determining whether a job is unskilled, citing SSR 82-41. *Simmons v. Apfel*, 131 F.3d 152, 1997 WL 760707 **1 (10th Cir. (Okla.)); see also: *Adams v. Apfel*, 141 F.3d 1184, 1998 WL 99030 (10th Cir. (Okla.)).

(4th ed. 1991). Again, the Court does not see a contradiction between the testimony of the VE and the DOT with regard to the skill level versus the SVP level. In the DOT, SVP stands for "specific vocational preparation." Each job contains a number which equates to the amount of vocational preparation time that is necessary for the performance of the job. An SVP of "three" indicates that a job requires more than one month and up to three months of training. This period of time "does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job." *Id.* The DOT additionally notes that vocational preparation can include special vocational training, on the job training, vocational education, apprenticeship, in-plant training or experience in other jobs. *Id.*

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

The Court finds there was no direct contradiction between the VE's testimony and the DOT. The Court is required to uphold a finding of the Commissioner if it is based on substantial evidence. The Court finds the testimony of the VE constituted

substantial evidence to support the Commissioner's decision that Plaintiff is not disabled.

Conclusion

The ALJ's decision demonstrates that he considered all of the medical reports and other evidence in the record in his determination that Plaintiff retained the capacity to perform light work with restrictions. The record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 21st day of JAN., 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

JAN 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID V. HEMINGER,

Plaintiff,

vs.

UNITED INDUSTRIES CORPORATION,

Defendant.

Case No. 98-CV 0014-H (W) ✓

ENTERED ON DOCKET

DATE 1/28/99

DISMISSAL WITH PREJUDICE

COMES NOW Plaintiff David V. Heminger and hereby dismisses all of his claims against Defendant and this action in its entirety with prejudice.

Respectfully submitted,

RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS

By: Donald M. Bingham

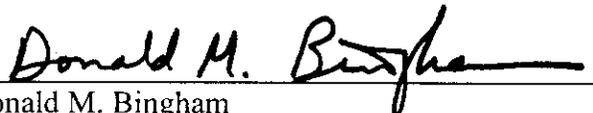
Donald M. Bingham, OBA #794
502 West Sixth Street
Tulsa, OK 74119-1010
(918) 587-3161 - Voice
(918) 587-2150 - Facsimile

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of January, 1999, a true and correct copy of the above and foregoing document was mailed, with sufficient postage thereon fully prepaid, to:

Dudley W. Von Holt, Esq.
Thompson Coburn, Esq.
One Mercantile Center
St. Louis, MO 63101-1693



Donald M. Bingham

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

ENTERED ON DOCKET

BRADLEY MCINTOSH,

Plaintiff,

v.

PROGRESSIVE NORTHERN
INSURANCE COMPANY, a
Wisconsin corporation,

Defendant.

DATE JAN 28 1999

Case No. 98-CV-962-H ✓

FILED
JAN 27 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on a notice of removal (Docket # 1) by Defendant Progressive Northern Insurance Company ("Progressive"). Plaintiff Bradley McIntosh originally brought this action in the District Court of Tulsa County. His Petition alleges that Defendant breached its fiduciary duty and acted in bad faith by refusing to pay the rated value of Plaintiff's vehicle. In his Petition, Plaintiff seeks damages "in excess of \$10,000, punitive damages, general damages, specific damages, attorney's fees, and any other relief the Court may deem just and proper" Pl.'s Pet., at 2.

Defendant removed this action to this Court on the basis of diversity jurisdiction. Defendant contends that diversity jurisdiction is properly invoked here because Progressive is a foreign corporation incorporated in Wisconsin, and because Mr. McIntosh is a citizen of Oklahoma. Defendant further contends the federal jurisdictional amount in controversy is met, stating:

¹In Oklahoma, the general rules of pleading require that:

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

Okla. Stat. tit. 12, § 2008(2).

It is this Defendant's good faith belief that Plaintiff's claim for punitive damages in his Petition places the Defendant on notice that this case is one which qualifies for removal based upon diversity of citizenship since the parties have diverse citizenship and the amount in controversy will undoubtedly exceed the jurisdictional sum of \$75,000.

Def. Notice of Removal, at 1-2 (Docket # 1).

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

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

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

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

Underwriters Ins. Co., 953 F. Supp. 350 (N.D. Okla. 1995) (same); Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995) (same); Maxon v. Texaco Ref. & Marketing Inc., 905 F. Supp. 976 (N.D. Okla. 1995) (same).

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

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

In the instant case, in his Petition, Plaintiff has only asserted a claim for relief that exceeds \$10,000, along with “punitive damages, general damages, specific damages, attorney’s fees, and any other relief the Court may deem just and proper” Pl.’s Pet., at 2. Therefore, the amount in controversy is not met by the face of the Petition. In its notice of removal, Defendant failed to set forth any specific facts that demonstrate the federal amount in controversy has been met, stating only as follows:

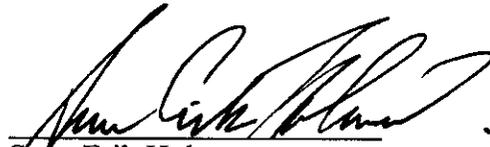
In the Petition, Plaintiff prays for damages in excess of \$10,000, punitive damages, general damages, specific damages, attorney’s fees, and any other relief the Court may deem just and proper. It is this Defendant’s good faith belief that Plaintiff’s claim for punitive damages in his Petition places the Defendant on notice that this case is one which qualifies for removal based upon diversity of citizenship since the parties have diverse citizenship and the amount in controversy will undoubtedly exceed the jurisdictional sum of \$75,000. Therefore, since it is believed the Plaintiff is claiming damages in excess of \$75,000, removal is appropriate under 28 U.S.C. § 1332.

Def. Notice of Removal, at 1-2 (Docket # 1). The Court finds that Defendant’s good faith belief and conclusory assertions do not satisfy the standards set forth by the Tenth Circuit in Laughlin. The Court concludes that removal is improper on the basis of diversity jurisdiction since it has not been established, either in Plaintiff’s Petition or in Defendant’s notice of removal, that the amount in controversy here exceeds \$75,000.

Based upon a review of the record, the Court holds that Defendant has not met its burden, as defined by the court in Laughlin. Thus, the Court is without subject matter jurisdiction and lacks the power to hear this matter. As a result, the Court must remand this action to the District Court of Tulsa County. Accordingly, the Court hereby denies Defendant’s removal of this case to federal court and orders the Court Clerk to remand the case to the District Court in and for Tulsa County.

IT IS SO ORDERED.

This 27TH day of January 1999.

A handwritten signature in black ink, appearing to read "Sven Erik Holmes", written over a horizontal line.

Sven Erik Holmes
United States District Judge

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

FILED
JAN 27 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL RENE SHERRILL,)
)
 Petitioner,)
)
 vs.)
)
 STEVE HARGETT,)
)
 Respondent.)

Case No. 96-CV-954-H

ENTERED ON DOCKET
DATE JAN 26 1999

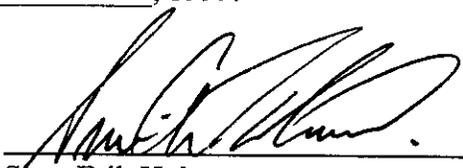
JUDGMENT

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.

IT IS SO ORDERED.

This 27TH day of JANUARY, 1999.


Sven Erik Holmes
United States District Judge

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

MICHAEL RENE SHERRILL,

Petitioner,

vs.

STEVE HARGETT,

Respondent.

ENTERED ON DOCKET

DATE JAN 28 1999

Case No. 96-CV-954-HV

FILED

JAN 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, appearing *pro se* and currently in the custody of the Oklahoma Department of Corrections, challenges his conviction entered in Tulsa County District Court, Case No. CRF-87-1147. Respondent has filed a Rule 5 response (#4) as well as a supplemental response (#12) to Petitioner's petition. Petitioner has replied (#9). For the reasons discussed below, the Court concludes that this petition should be denied.

BACKGROUND

On December 18, 1987, Petitioner was convicted by a jury in Tulsa County District Court, Case No. CRF-87-1147, of Count I, First Degree Burglary; Count II, First Degree Rape; Count III, Attempted Forcible Sodomy; and Count IV, Robbery by Force. He was sentenced to 15 years imprisonment on Count I, 40 years on Count II, 7 years on Count III, and 15 years on Count IV, to be served consecutively. At trial, Petitioner was represented by attorney Everett R. Bennett, Jr. Petitioner appealed his conviction, represented on appeal by attorney Lisbeth L. McCarty. On

13

appeal, Petitioner argued that (1) he was denied a hearing on his competency to stand trial; (2) the trial court erred by failing to rule on his competency and forcing him to stand trial while incompetent; (3) the trial court erred in admitting evidence of other crimes; (4) the prosecutor's examination of a witness concerning charges received while in the military was improper; (5) the trial court erred in admitting certain rebuttal testimony and in admitting a tape recording of Petitioner's confession to a police officer; (6) he was prejudiced by an evidentiary harpoon; and (7) he was denied a fair trial due to improper comments by the prosecutor. (See #4, Ex. A.) On April 12, 1991, the Oklahoma Court of Criminal Appeals affirmed the judgment and sentences in an unpublished opinion (#4, Ex. A).

Appearing *pro se*, Petitioner sought post-conviction relief, arguing that (1) based on Flores v. State, 896 P.2d 558 (Okla. Crim. App. 1995), he was denied a fair trial by the trial court's erroneous use of a modified jury instruction; and (2) he was denied effective assistance of both trial and appellate counsel for failing to raise adequately the Flores issue during trial and on appeal. (See #4, Ex. B.) The state trial court denied post-conviction relief, finding Petitioner's Flores claim based on the modified jury instruction to be procedurally barred and that appellate counsel did not provide ineffective assistance of counsel by failing to raise the claim on appeal. Petitioner filed a post-conviction appeal in the Oklahoma Court of Criminal Appeals. On September 26, 1996, that court affirmed the denial of post-conviction relief finding Petitioner's claims to be procedurally barred as a result of Petitioner's failure to raise the claims on direct appeal. The appellate court also affirmed the trial court's finding that Petitioner had not been deprived of effective assistance of counsel. (#4, Ex. B.)

Petitioner filed his § 2254 petition for writ of habeas corpus on October 17, 1996. He alleges that:

(1) Petitioner was denied due process of law and Sixth Amendment guarantee to be convicted, if at all, upon proof beyond a reasonable doubt when the trial court administered it's (sic) modified verison (sic) of jury instruction No. 2 diluting the presumption of innocence and diminishing (sic) the State's burden of proving Petitioner guilty beyond a reasonable doubt; and

(2) Petitioner did not receive the Constitutionally required level of effectiveness from his trial and appellate attorneys.

ANALYSIS

A. Application of AEDPA

Petitioner filed his habeas corpus petition on October 17, 1996, more than five months after the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). Therefore, the Court reviews this petition under the amended provisions of 28 U.S.C. § 2254. See Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2068 (1997).

B. Exhaustion

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Respondent concedes and this Court finds, after careful review of the record, that Petitioner has exhausted his instant claims as they were fairly presented to the highest state court in a post-conviction proceeding.

C. Petitioner's Flores claim and his ineffective assistance of trial counsel claim are procedurally barred

As a general rule, the doctrine of procedural default prohibits a federal court from considering specific habeas claims where the state's highest court declined to reach the merits of those claims on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

Applying these principles to the instant case, the Court concludes that Petitioner's first claim, that he was denied a fair trial by the inclusion of "presumed to be not guilty" language in a jury instruction, is barred by the procedural default doctrine. The Oklahoma Court of Criminal Appeals' procedural bar as applied to Petitioner's claim first presented in his state application for post-conviction relief was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently applied a procedural bar and has denied such claims unless the petitioner provides "sufficient reason" for his failure to raise the claim earlier. Moore v. State, 889 P.2d 1253 (Okla. Crim. App. 1995).

When the underlying claim is ineffective assistance of counsel, the Tenth Circuit Court of

Appeals has recognized that countervailing concerns justify an exception to the general rule. Brecheen, 41 F.3d 1343, 1363 (10th Cir. 1994) (citing Kimmelman v. Morrison, 477 U.S. 365 (1986)). The unique concerns are "dictated by the interplay of two factors: the need for additional fact-finding, along with the need to permit the petitioner to consult with separate counsel on appeal in order to obtain an objective assessment as to trial counsel's performance." Id. at 1364 (citing Osborn v. Shillinger, 861 F.2d 612, 623 (10th Cir. 1988)). The Tenth Circuit explicitly narrowed the circumstances requiring imposition of a procedural bar on ineffective assistance of counsel claims first raised collaterally in English v. Cody, 146 F.3d 1257 (10th Cir. 1998). In English, the circuit court concluded that:

Kimmelman, Osborn, and Brecheen indicate that the Oklahoma bar will apply in those limited cases meeting the following two conditions: trial and appellate counsel differ; and the ineffectiveness claim can be resolved upon the trial record alone. All other ineffectiveness claims are procedurally barred only if Oklahoma's special appellate remand rule for ineffectiveness claims is adequately and evenhandedly applied.

Id. at 1264 (citation omitted).

After reviewing the record in the instant case in light of the factors identified in English, the Court concludes Petitioner's claim of ineffective assistance of trial counsel is procedurally barred. At trial, Petitioner was represented by retained counsel, Everett R. Bennett, Jr. On appeal, Petitioner was represented by Lisbeth McCarty, identified by Petitioner as an assistant public defender. Thus, Petitioner had the opportunity to confer with separate counsel on appeal. Petitioner alleges his trial counsel provided ineffective assistance when he failed to object to the modification of the Oklahoma Uniform Jury Instruction given at trial. Because the instructions as given to the jury by the trial court are contained within the trial record, the issue could have been raised by appellate counsel and

resolved without any additional fact finding. As a result, the Court concludes Petitioner's claim of ineffective assistance of trial counsel is procedurally barred.

Because of his procedural default, this Court may not consider Petitioner's Flores claim and his ineffective assistance of trial counsel claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The "cause" standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The "fundamental miscarriage of justice" exception requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause by alleging his appellate counsel provided ineffective assistance in failing to raise these claims on direct appeal. Ineffective assistance of counsel may serve as "cause" excusing a procedural bar, Murray v. Carrier, 477 U.S. at 488, and to establish ineffective assistance of counsel a petitioner must show that his counsel's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984). There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Id. at 688. In making this determination, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id., at 690. To establish the prejudice prong of the Strickland test, Petitioner must show

that the allegedly deficient performance prejudiced the defense; namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 694. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689.

Petitioner claims in this case that his appellate counsel provided ineffective assistance in failing to argue on appeal that the language "presumed to be not guilty" found in the modified jury instruction rendered the instruction unconstitutional and that trial counsel provided ineffective assistance in failing to object to the modified instruction at trial. Petitioner's challenge to the jury instruction is based on Flores v. State, 896 P.2d 558, 562 (Okla. Crim. App. 1995) (holding that an instruction substituting "presumed not guilty" for "presumed innocent" violates the constitution by depriving a defendant of the presumption of innocence). Several dates are significant to the resolution of this claim. The Oklahoma Court of Criminal Appeals decided Flores on January 24, 1995, and denied rehearing on June 27, 1995. Petitioner was convicted December 18, 1987, more than seven (7) years before Flores. The Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction on April 12, 1991, more than three (3) years before Flores. Thus, the record clearly establishes that Petitioner's conviction became final long before the Flores opinion was issued. Counsel is not ineffective for failing to anticipate arguments or appellate issues which are based on decisions issued after the appeal was submitted. See Lilly v. Gilmore, 988 F.2d 783, 786 (7th Cir. 1993). Thus, this Court finds that appellate counsel's failure to raise either the Flores issue or ineffective assistance of trial counsel on direct appeal does not represent an unreasonable omission under Strickland. Therefore, the Court concludes that because appellate counsel's failure to raise

these claims on direct appeal does not constitute ineffective assistance of appellate counsel, Petitioner has failed to demonstrate "cause" for his procedural default.

Petitioner's only other means of gaining federal habeas review of these claims is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). However, Petitioner does not claim that he is actually innocent of the underlying crimes. Therefore, the fundamental miscarriage of justice exception has no applicability to this case.

Because Petitioner has failed to demonstrate "cause and prejudice" or a "fundamental miscarriage of justice," the Court concludes his Flores claim and his ineffective assistance of trial counsel claim are procedurally barred and should be denied on that basis.

D. Petitioner's ineffective assistance of appellate counsel claim is without merit

Petitioner asserts as part of his second claim that he received ineffective assistance of appellate counsel. As discussed above, to establish ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, id. at 694. Failure to establish either prong of the Strickland standard will result in denial of relief. Id. at 696. In the instant case, Petitioner fails to satisfy the Strickland standard as to either claim.

As determined in Part C, above, appellate counsel's failure to raise the Flores claim on direct appeal does not constitute deficient performance under Strickland. Appellate counsel need not

advance every argument on appeal urged by a defendant, regardless of merit. Evitts v. Lucey, 469 U.S. 287, 394 (1985). Therefore, as a substantive matter, appellate counsel's failure to raise the Flores claim on direct appeal does not constitute ineffective assistance of counsel. The Court concludes that Petitioner's ineffective assistance of appellate counsel claim is without merit and that habeas corpus relief on this basis should be denied.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States and that the petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied**.

IT IS SO ORDERED.

This 27TH day of JANUARY, 1999.



Sven Erik Holmes
United States District Judge

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

ALLSTATE LIFE INSURANCE COMPANY,)
)
Plaintiff,)
)
v.)
)
TIMOTHY SHAUN STEMPLER, MELISSA)
HIBBARD in her capacity as Personal)
Representative of the ESTATE OF TRISHA)
JANE STEMPLER, and WENDY MATHER)
and KEITH MATHER, in their capacity as)
Guardians of TIMOTHY SHANE STEMPLER, a)
minor, and LAUREN ELIZABETH STEMPLER,)
a minor,)
)
Defendants.)

ENTERED ON DOCKET
DATE JAN 23 1999

Case No. 97-CV-829-H(W)

FILED
JAN 27 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER AND JUDGMENT
APPROVING SETTLEMENT AGREEMENT

On this 27th day of JANUARY, 1999, the Court considered the parties' Joint Motion for Order and Judgment Approving Settlement Agreement. The Court, having reviewed the proposed Settlement Agreement of the parties, and being fully advised in the premises, makes the following findings:

1. This Order and Judgment is entered in this cause upon the consent and with the agreement of all parties.
2. Defendant Melissa Hibbard ("Hibbard") is the duly appointed personal representative of the Estate of Trisha Jane Stemple (the "Estate"). Hibbard has all necessary authority to enter into the Settlement Agreement that is the subject of this Order and Judgment, and to bind the Estate to the terms of the Agreement.

3. Defendants Wendy Mather and Keith Mather (the "Mathers") are the guardians of Timothy Shane Stemple, a minor, and Lauren Elizabeth Stemple, a minor (the "Stemple Children"). The Stemple Children are the minor children of Trisha Jane Stemple ("Trisha Stemple"), deceased, and Defendant Timothy Shaun Stemple ("Shaun Stemple"). As guardians, the Mathers have all necessary authority to enter into the Settlement Agreement that is the subject of this Order and Judgment on behalf of the Stemple Children.

4. Prior to October 24, 1996, Plaintiff Allstate Life Insurance Company ("Allstate") issued a policy of life insurance designating Trisha Stemple as insured, Policy No. 717 589 335 (the "Policy"). Under the terms of the Policy, Shaun Stemple was named as beneficiary in the event that proceeds became payable under the Policy, with no contingent beneficiary being named, and with the provision that if no payee is living, death proceeds will be paid to Trisha Stemple's Estate.

5. Trisha Stemple died on or about October 24, 1996. Subsequently, Shaun Stemple was convicted of murder in the first degree in the death of Trisha Stemple, which conviction is being appealed by Shaun Stemple.

6. Under 84 O.S. 1997 Supp., §231, no beneficiary of any policy of insurance who causes or procures to be taken the life upon which such policy is issued, and who is convicted of murder in the first degree or in the second degree, shall take the proceeds of such policy. As a result of the death of Trisha Stemple, Allstate received claims to the insurance proceeds under the Policy from Hibbard on behalf of the Estate, and from the Mathers on behalf of the Stemple Children.

7. Because of the foregoing, Allstate filed this action, seeking a determination as to whether proceeds are payable under the Policy and, if so, the proper recipient of such proceeds. Presently before the Court is the parties' Joint Motion for Order and Judgment Approving Settlement Agreement, the terms of which will, if approved by the Court, resolve this action.

8. The parties and their respective counsel have engaged in investigation and discovery necessary to knowingly and properly evaluate the merit of the terms and conditions set forth in the Settlement Agreement. The Defendants have been competently and adequately represented by their counsel in this action.

9. Continuation of this action in the absence of settlement would require the parties to incur substantial additional attorney fees and expenses litigating disputed claims with no guarantee of a favorable conclusion. Further, final resolution of this action, in the absence of a settlement, will not occur for a lengthy period of time in the likely event of an appeal by a party from an adverse judgment.

10. The terms and provisions of the Settlement Agreement are fair, reasonable, equitable and in the best interests of the parties, including the Estate and the Stemple Children. The Agreement is the product of good faith and arms-length negotiations between the parties and their counsel. The Settlement Agreement should be approved, and the Estate and the Stemple Children should be bound by the terms and provisions of the Agreement.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. The terms and provisions of the Settlement Agreement are fair, reasonable, equitable and in the best interests of the parties, including the Estate and the Stemple Children. The terms and provisions of the Agreement are approved in all respects, and they are hereby made binding on the parties, including the Estate and the Stemple Children.

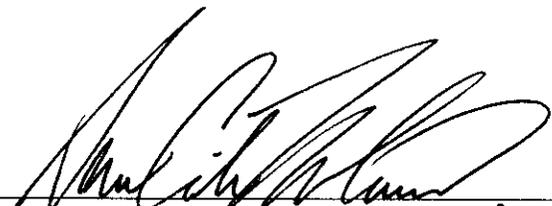
2. Pursuant to the terms of the Settlement Agreement, Allstate is directed to pay Nine Hundred Fifty Thousand Dollars (\$950,000.00), plus 6% interest per annum from October 24, 1996 until paid, by check or draft made payable to the order of the Estate of Trisha Jane Stemple, Deceased.

3. Allstate is hereby granted judgment on its interpleader action, and is discharged from this lawsuit. Allstate further is discharged from any and all liability or obligation arising from or related to the Policy, including but not limited to any liability or obligation for or relating to the payment of any insurance benefits or proceeds payable under the Policy or payable as a result of the death of Trisha Stemple. Allstate further is discharged of and from any and all liability or obligation to the Defendants or any of them respecting the Policy and any benefits or proceeds payable thereunder. This discharge includes any and all claims whether statutory, contractual or in tort.

4. The Defendants, and each of them, and their successors, executors, assigns, and those claiming by, through or under them, are hereby enjoined from instituting or prosecuting any suit or legal proceeding against Allstate in any federal or state court or in any other legal forum regarding or concerning the Policy, any amount payable thereunder, or any other claim, obligation or matter alleged or which could have been alleged in this action. This injunction includes any proceedings for statutory, tort, contract or other claims.

5. All parties shall bear their own costs and attorney fees incurred in this action.

6. This Court retains jurisdiction as necessary to protect and fully effectuate the terms of this Order and Judgment.


SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED AND AGREED:

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Representative of the Estate of TRISHA JANE
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KEITH MATHER in their capacity as
Guardians of TIMOTHY SHANE STEMPLE,
a minor and LAUREN ELIZABETH STEMPLE,
a minor

By: _____

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ATTORNEYS FOR DEFENDANT

TIMOTHY SHAUN STEMPLER

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

FILED

JAN 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 CLIFFORD R. ROGERS,)
)
 Defendant.)

CASE NO. 98CV0772H(J) ✓

ENTERED ON DOCKET

DATE JAN 28 1999

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.

2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.

3. The defendant hereby agrees to the entry of Judgment in the principal sum of \$2,711.11, plus accrued interest of \$1,938.53, plus interest thereafter at the rate of 8% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the legal rate 4.545 until paid, plus costs of this action, until paid in full.

4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that Clifford R. Rogers will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 15th day of February, 1999, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$200.00, and a like sum on or before the 15th day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney, Financial Litigation Unit, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103-3809.

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

(d) The defendant shall keep the United States currently informed in writing of any material change in his financial situation or ability to pay, and of any change in his employment, place of residence or telephone number. Defendant shall provide such information to the United States Attorney at the address set forth above.

(e) The defendant shall provide the United States with current, accurate evidence of his assets, income and expenditures (including, but not limited to his Federal income tax returns) within fifteen (15) days for the date of a request for such evidence by the United States Attorney.

5. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

6. The parties further agree that any Order of Payment which may be entered by the Court pursuant thereto may thereafter be modified and amended upon stipulation of the parties; or, should the parties fail to agree upon the terms of a new stipulated Order of Payment, the Court may, after examination of the defendant, enter a supplemental Order of Payment.

7. The defendant has the right of prepayment of this debt without penalty.

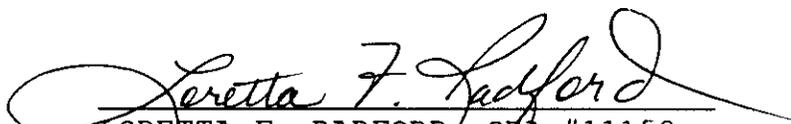
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Clifford

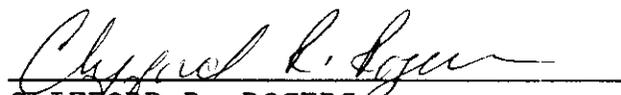
R. Rogers, in the principal amount of \$2,711.11, plus accrued interest in the amount of \$1,938.53, plus interest at the rate of 8 until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate of 4.545 percent per annum until paid, plus the costs of this action.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney


LORETTA F. RADFORD OEA #11158
Assistant United States Attorney


CLIFFORD R. ROGERS

LFR/11f

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JAN 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA *ex rel.*
WILLIAM I. KOCH and
WILLIAM A. PRESLEY,

Plaintiffs,

v.

KOCH INDUSTRIES, INC., *et al.*,

Defendants.

No. 91-CV-763-K(J) ✓

ENTERED ON DOCKET

DATE JAN 28 1999

REPORT AND RECOMMENDATION

425

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REPORT AND RECOMMENDATION

The following motions have been referred to the undersigned for report and recommendation pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72:

1. Plaintiffs' Motion for Partial Summary Adjudication, [Doc. No. 211]; and
2. Defendants' Cross Motion for Partial Summary Judgment, [Doc. No. 219].

For the reasons discussed below, the undersigned recommends that Plaintiffs' motion and Defendants' motion for partial summary judgment be **GRANTED IN PART and DENIED IN PART.**

If liability is established under the False Claims Act ("FCA"), 31 U.S.C. § 3729(a)(1)-(7), a civil penalty is to be assessed.^{1/} The parties' motions for partial summary judgment ask the Court to determine how the FCA's civil penalty will be applied given the facts of this case. The undersigned finds that Koch Industries, Inc. ("KII")^{2/} may be penalized under the FCA for each lease listed on an MMS-2014, Osage Royalty Report or Monthly Check Stub if KII reported and paid for less oil^{3/} than it actually took from that lease during the previous month.

I. INTRODUCTION^{4/}

The federal and Indian leases at issue in this lawsuit are administered by the United States Department of the Interior ("DOI"). The Minerals Management Service ("MMS") is an agency within the DOI, and the MMS is responsible for collecting the

^{1/} Prior to October 27, 1986, the FCA's civil penalty was \$2,000. The FCA was amended on October 27, 1986 and the civil penalty was raised from \$2,000 to between \$5,000 and \$10,000. This lawsuit involves both pre- and post-1986 claims. Plaintiffs have not asked for a finding, or stated their belief, regarding the retroactive effect of the increase in civil penalties. Thus, until Plaintiffs demonstrate that the 1986 amendment should be applied retroactively, the undersigned will assume that for pre-October 27, 1986 claims the civil penalty will be \$2,000, and that the civil penalty for post-October 27, 1986 claims will be between \$5,000 and \$10,000.

^{2/} Koch Industries, Inc. is the parent corporation over all of the corporations that are named as defendants in this case. The undersigned's use of the term KII in this Report and Recommendation is intended to refer to all named defendants, unless otherwise specified.

^{3/} KII purchased oil and natural gas from the federal and Indian leases at issue in this lawsuit. The parties' motions for partial summary judgment seek legal rulings regarding the application of the FCA's penalty provision to KII's oil purchases. The parties' motions do not seek rulings regarding KII's natural gas purchases. That issue will be resolved at a later time, if the Court determines that such a ruling is necessary.

^{4/} For purposes of the parties' motions for partial summary judgment, the undersigned finds that the facts summarized in this section are material and undisputed.

royalty payments on the federal and Indian leases at issue in this lawsuit, except for Osage Indian leases.

The Osage Agency is an agency within the Bureau of Indian Affairs ("BIA"), and the BIA is itself an agency within the DOI. The Osage Agency is responsible for collecting royalty payments on the Osage Indian leases at issue in this lawsuit. Thus, all royalties paid for crude oil purchased by KII from the federal and Indian leases at issue in this lawsuit were ultimately paid/transmitted to the United States *via* an agency within the Department of Interior – either the MMS or the Osage Agency.

A. GAUGING – RUN TICKETS, TANK TABLES AND METER CORRECTION FACTORS

Each time KII purchases oil from a lease it must "gauge" that oil to determine how much oil was purchased and at what price. In the majority of purchases at issue in this lawsuit, KII hand gauged the oil. When KII hand gauges oil, it is purchasing oil from a particular storage tank on or near a lease. To hand gauge a tank, KII's employee or agent takes several physical measurements including the level of the oil in the tank before and after the oil is run out of the tank (the top and bottom gauge), the temperature of the oil before and after the oil is run out of the tank (the opening and closing temperature), the gravity of the oil and the basic sediment and water ("BS&W") content of the oil. KII's employee or agent records these measurements on a run ticket. See Doc. No. 211, Exhibit "A."

The measurement information on each run ticket is entered into KII's computerized oil accounting system. For each run ticket, KII's oil accounting system determines the price to be paid for the oil in part by using the gravity and BS&W measurements on the run ticket. KII's computerized accounting system also calculates the net volume of oil removed from the lease in part by using the top and bottom gauge and opening and closing temperature measurements on the run ticket.

For each tank from which KII purchases oil, KII compiles a tank table. The table states each tank's capacity in barrels for various height increments. Tank tables are prepared by KII based on KII's prior, physical measurement or "strapping" of the tank. To calculate the net volume of oil purchased, KII's computerized accounting system compares the opening and closing gauge measurements on the run ticket with the previously compiled "tank table" for the tank from which the oil was purchased.

There are times when the oil KII purchases is gauged by a meter, and it is not hand gauged (e.g., when oil is purchased from a pipeline and not a storage tank). In these meter gauging situations, measurement information is recorded by the meter and that information, like the run ticket information, is entered into KII's computerized oil accounting system. To calculate the net volume of oil purchased from a particular

meter, KII's computerized accounting system multiplies the net volume of oil recorded on the meter by a meter correction factor.

Meters are mechanical devices, and like any mechanical device, they have a margin of error. KII periodically calibrates/"proves" each meter to determine the meter's margin of error. A meter's margin or error is reflected and compensated for with a meter correction factor. A meter correction factor is derived by dividing the actual volume (i.e., the test amount) of oil passed through a meter by the volume recorded by the meter. For example, if 10 barrels of oil were passed through a meter during a "proving" and the meter registered 8 barrels of oil, that meter's correction factor would be 10/8 or 1.25. Thus, to determine the actual amount of oil passed through that meter, any volume recorded by the meter would need to be multiplied by 1.25.

For all of the purchases at issue in this lawsuit, Plaintiffs allege that KII's employees and agents, at management's direction or with management's knowledge, created or used a false run ticket, tank table and/or meter correction factor. According to Plaintiffs, KII engaged in these falsehoods in an effort to reduce its obligation to pay for the oil it purchased from the federal and Indian leases at issue in this lawsuit. In particular, Plaintiffs allege that (1) when KII hand gauged oil, its employee or agent recorded false measurements on the run ticket; (2) when KII measured/strapped a tank to develop a tank table, its employee or agent recorded false tank measurements; and (3) when KII calibrated/proved a meter, its employee or agent calculated a false meter correction factor. See Doc. No. 414, Second Amended Complaint, Count I, ¶¶ 45-52.

B. 100% DIVISION ORDER VS. NON-100% DIVISION ORDER LEASES

During the relevant time period,^{5/} KII purchased crude oil from numerous federal and Indian leases. Pursuant to the terms of the relevant mineral leases, the lessees on these federal and Indian leases are responsible for paying or transmitting to the United States, *via* the Department of the Interior, a royalty for any crude oil production. The United States' royalty may be paid by either the lessee or the purchaser of the oil.

When KII purchases oil it may or may not assume the lessee's royalty obligation. If KII does not expressly assume the lessee's royalty obligation, KII remits 100% of the proceeds to the lessee, and the lessee is then responsible for paying the royalty. KII refers to these as 100% division order purchases because the division order on these leases requires 100% of the proceeds to be paid to the lessee.

^{5/} Cross motions for partial summary judgment are pending regarding the applicable statute of limitations. See Doc. Nos. 260 and 280. The "relevant time period" currently ranges from May 25, 1979 to December 31, 1996, unless further limited by the Court when it rules on the parties' statute of limitations motions. See also Doc. No. 186 (setting the outside limit of the relevant time period).

If KII does expressly assume the lessee's royalty obligation, KII first satisfies itself as to the correct ownership interest in the lease. If one of the interests is a federal or non-Osage Indian royalty interest, KII executes a Payor Information Form, which is required by the MMS to identify KII as the party responsible for paying the royalty on the particular lease. KII then makes royalty payments directly to either the MMS for federal and non-Osage Indian leases or to the Osage Agency for Osage Indian leases.

C. KII'S PAYMENT METHODS

1. When KII Has Assumed the Lessee's Royalty Obligation - Non-100% Division Order Leases

a. *Purchases From Federal and Non-Osage Indian Leases*

To document its purchases from federal and non-Osage Indian leases on which it has assumed the lessee's royalty obligation, the MMS requires KII to prepare and file a form 2014, titled "Report of Sales and Royalty Remittance." KII prepares a monthly MMS-2014 to reflect its purchases for the prior month. One MMS-2014 is prepared each month for all federal leases and one MMS-2014 is prepared each month for all non-Osage Indian leases from which KII purchases (i.e., two MMS-2014's per month). If KII did not purchase from a particular lease during the previous month, the lease is listed on the MMS-2014, but with a zero quantity and price. Each month, KII reports and pays for its prior month's purchases by submitting completed MMS-2014's and by wire transferring its payment to the MMS. See Doc. No. 219, Exhibit "A-2."

The only payment document KII routinely files with the MMS is the MMS-2014. While the MMS may ask to see run tickets, tank tables or meter correction factor calculations during an audit, these items are not filed with or sent to the MMS. Nevertheless, if KII has created or used false run tickets, tank tables or meter correction factors in connection with purchases being reported on an MMS-2014, then the MMS-2014 will itself be false. The MMS-2014 will be false because the use of false run tickets, tank tables and meter correction factors will cause the MMS-2014 to report that KII took less oil than it actually took from the federal and Indian leases shown on the MMS-2014.

b. *Purchases From Osage Indian Leases*

To document its purchases from Osage Indian leases on which it has assumed the lessee's royalty obligation, KII is required by the Osage Agency to prepare a Royalty Report. As with the MMS-2014, KII prepares a monthly Osage Royalty Report to reflect its purchases for the prior month. One monthly Osage Royalty Report is

prepared for all Osage leases from which KII purchased oil during the prior month. Each month, KII reports and pays for its prior month's purchases by submitting a completed Osage Royalty Report, along with its payment, to the Osage Agency. See Doc. No. 219, Exhibit "A-3."

The only payment document KII routinely files with the Osage Agency is the Osage Royalty Report. While the Osage Agency may ask to see run tickets, tank tables or meter correction factor calculations during an audit, these items are not filed with or sent to the Osage Agency. Nevertheless, if KII has created or used false run tickets, tank tables or meter correction factors in connection with purchases being reported on an Osage Royalty Report, then the Report will itself be false. The Osage Royalty Report will be false because the use of false run tickets, tank tables and meter correction factors will cause the Report to reflect that KII took less oil than it actually took from the Osage Indian leases shown on the Report.

2. When KII Has Not Assumed the Lessee's Royalty Obligation - 100% Division Order Leases

When KII does not agree to assume the lessee's royalty obligation, KII pays for the oil it purchases by issuing the lessee a monthly check. The stub of each check contains a detailed accounting of all of the transactions involving that lessee for the prior month. The stub contains the volumes, prices, and other detail in support of the amount of the check. The lessee then uses the monthly check stub to prepare MMS-2014's and Osage Royalty Reports.

II. LEGAL ISSUES PRESENTED BY THE UNDISPUTED FACTS

The liability provision of the False Claims Act provides as follows:

- (a) Liability for certain acts. - Any person who -
- (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
 - (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; [or]

- (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person

31 U.S.C. § 3729(a).

Count I of Plaintiffs' Second Amended Complaint alleges that KII "violated 31 U.S.C. § 3729(a)(7) and other provisions of the False Claims Act by knowingly making, using, and causing to be made or used [false run tickets, tank tables, and meter correction factors] to conceal and decrease [KII's obligation] to pay money[/royalties] to the United States Government in exchange for crude oil." Doc. No. 414, ¶ 51.

In their motion for partial summary judgment, Plaintiffs argue that KII should be penalized between \$5,000 and \$10,000 under § 3729(a) each time KII falsified a run ticket, tank table or meter correction factor. KII argues that if Plaintiffs can establish liability under the FCA, then KII may only be penalized between \$5,000 and \$10,000 for each MMS-2014, Osage Royalty Report and monthly check stub created by KII. If the MMS-2014 and Osage Royalty Report are the records that are to be used to calculate the FCA's penalty, Plaintiffs argue in the alternative that a penalty must be imposed for each line-item on the MMS-2014 and Osage Royalty Report because each line item represents a different federal or Indian lease. The Court must, therefore, determine how the FCA's penalty provision will be applied given the facts of this case.

In its motion for partial summary judgment, KII argues that it cannot be liable or subject to penalties under the FCA regarding the 100% division order leases because when KII purchases from a 100% division order lease, KII does not submit any records or make any payments directly to the government. When KII purchases from a 100% division order lease, Plaintiffs allege that KII submits a false run ticket or check stub to a lessee in an attempt to pay for less oil than KII actually took. According to Plaintiffs, KII's submission of false records to the lessee causes the lessee to prepare a false MMS-2014 or Osage Royalty Report and pay the MMS or Osage Agency less royalties than that to which the government would otherwise be entitled. That is, the conduct alleged by Plaintiffs indirectly causes the government to receive less royalties. While KII recognizes that the FCA would impose liability for conduct that indirectly causes the government to pay for more oil than it purchased,

KII argues that the FCA does not impose liability for conduct that indirectly caused the government to be paid for less oil than was sold from one of its leases. The Court must, therefore, determine whether the FCA imposes liability when conduct proscribed by the FCA indirectly causes the government to receive less money than that to which it would otherwise be entitled.

KII states in its motion that Plaintiff must prove the following to establish liability under § 3729(a) for purchases made from 100% division order leases: that KII knowingly (1) caused a lessee to make or use a false record or statement; (2) to conceal, avoid or decrease an obligation to pay or transmit money; (3) to the government. KII suggests that it cannot be held liable for purchases made from 100% division order leases because Plaintiffs cannot establish that KII knew that there was an obligation to the government. In other words, KII argues that even if it submits a false run ticket or check stub to a lessee in an attempt to pay for less oil than KII actually took, and even if those false records cause the lessee to prepare a false MMS-2014 or Osage Royalty Report which in turn causes the lessee to pay the government less of a royalty than that to which the government is entitled, KII cannot be liable under the FCA because KII has no way of "knowing" that the obligation it ultimately reduced was an obligation to the government. Plaintiffs argue that summary judgment in KII's favor is precluded because there are genuine issues of material fact regarding KII's knowledge, as that term is defined in 31 U.S.C. § 3729(b).

III. IF LIABILITY UNDER THE FCA IS ESTABLISHED, THE COURT SHOULD IMPOSE A PENALTY AGAINST KII OF BETWEEN \$5,000 AND \$10,000 FOR EACH LEASE ON AN MMS-2014, OSAGE ROYALTY REPORT OR MONTHLY CHECK STUB WHEN KII REPORTED AND PAID FOR LESS OIL THAN IT ACTUALLY TOOK FROM THAT LEASE DURING THE PREVIOUS MONTH.

A. THE MMS-2014'S, OSAGE ROYALTY REPORTS AND MONTHLY CHECK STUBS SHOULD BE USED TO DETERMINE THE NUMBER OF PENALTIES IN THIS CASE, NOT THE RUN TICKETS, TANK TABLES OR METER CORRECTION FACTORS.

It must be recognized at the outset that the language of the FCA is not a model of clarity on this issue. The FCA states that if a person does any of the things listed in § 3729(a), that person "is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person" On its face, this language does not unambiguously authorize multiple penalties. If the defendant violates the Act in any number of ways, "he is liable to the United States for a civil penalty."

This United States Supreme Court impliedly rejected the single penalty reading of the FCA in Marcus v. Hess, 317 U.S. 537, 552 (1943). Nevertheless, the ambiguity in Congress' language is evident, and the act offers little guidance on how to properly determine the number of penalties to be imposed in a given case.

"When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated." The will of Congress is no less subject to inevitable distortion by reason of the inadequate medium through which it must be communicated.

Grossman v. Young, 72 F. Supp. 375, 378 (S.D.N.Y. 1947) (citing The Federalist No. 37, at 243 (James Madison) (M. Dunne ed., 1901)).

1. Supreme Court Precedent

a. *Marcus v. Hess*

In Marcus the United States approved several Public Works Administration projects in the Pittsburgh area. These PWA projects were administered by local governmental units rather than the United States. These local governmental units would enter into subcontracts with local contractors to complete the projects. The defendants in Marcus were officers and members of the Electrical Contractors Association of Pittsburgh ("ECAP"), who had entered into subcontracts to perform work on various PWA projects. Marcus v. Hess, 317 U.S. 537, 539 (1943).

The plaintiff alleged and the trial court in Marcus found that defendants had engaged in a collusive bidding scheme. The officers and members of the ECAP agreed to rig the bidding process on the PWA contracts. The ECAP would average the prospective bids which its members would submit. The ECAP would then select one of its members as the one to receive the contract. The chosen member would submit a bid equal to the average bid and all other members would submit a bid higher than the average. In this manner, ECAP fraudulently controlled the bidding process for electrical work on the PWA projects. Marcus, 317 U.S. at 539, n.1.

In the trial court, plaintiff argued that the FCA's penalty should be applied to "every form" submitted by defendants in the course of their fraudulent scheme. Defendants argued that once liability under the FCA has been established, the act only imposes one penalty. Without much discussion, the Supreme Court rejected both arguments and found that defendants should be penalized "for each separate P.W.A. project." Marcus, 317 U.S. at 552. The Court rejected the one penalty argument,

finding that Congress could never have intended to allow defendants "to spread the burden progressively thinner over projects each of which individually increased their profit." Id.

b. *United States v. Bornstein*

In Bornstein, the United States contracted with Model Engineering & Manufacturing Corporation, Inc. ("Model") to provide radio kits to the Army. These kits were to contain electron tubes of a specified quality. Model subcontracted with United National Labs ("United") to supply the electron tubes. The radios were to contain new 4X150G electron tubes bearing markings showing that they had been manufactured in a plant whose quality control standards measured up to government requirements. The tube's markings were also to indicate that during manufacture the tubes had been inspected and approved by a government inspector at the plant. United States v. Bornstein, 423 U.S. 303, 307-308 (1976).

United bought several hundred surplus tubes and falsely stamped them with the required markings. United also prepared 21 packing lists, each falsely stamped with a government inspector's "Eagle" acceptance stamp. United then sent 21 boxes of tubes to Model in three separately invoiced shipments. Model installed the tubes and sent 397 radio kits to the United States with falsely marked tubes in 35 separately invoiced shipments. Bornstein, 423 U.S. at 307-308.

The United States sued United and argued that United was liable for 35 penalties – one for each invoice United caused Model to submit to the United States. The trial court agreed with the United States and assessed 35 penalties against United. The Court of Appeals reversed, holding that because there was only one subcontract between Model and United, there should be only one penalty. The Supreme Court granted *certiorari* to resolve the following question: How should the number of penalties under the False Claims Act be counted when the United States sues a subcontractor on the ground that the subcontractor has caused the prime contractor to present a false claim. Bornstein, 423 U.S. 306-308.

The Supreme Court began by recognizing that its decision in Marcus established that the FCA permits multiple penalties. To decide how many penalties were appropriate in Bornstein, the Court held that the focus must be on the conduct of the party from whom the penalty is sought (i.e., United's, not Model's, conduct). Focusing on United's conduct, the Court found that United committed three acts which caused Model to submit false claims to the United States – the three separately invoiced shipments to Model. The Court held that United was not liable for 35 penalties based on the 35 invoices Model sent to the United States because "[t]he fact that Model chose to submit 35 false claims instead of some other number was, so far

as United was concerned, wholly irrelevant completely fortuitous and beyond United's knowledge and control." Bornstein, 423 U.S. at 312.^{6/}

In Bornstein, the Court imposed penalties on the false invoices sent by United, not on all of the false tube markings and false packing lists created by United in furtherance of its fraud. In Hess the Court also refused to impose penalties for all of the false records the ECAP submitted in furtherance of its fraudulent and collusive bidding scheme, holding instead that a penalty should be imposed against each false bid submitted and accepted by the United States. The undersigned finds that the acts by KII in this case which most closely resemble the acts generating penalties in Marcus and Bornstein are the creation of false MMS-2014's, Osage Royalty Reports and monthly check stubs, and not the creation of all of the false records (e.g., run tickets, tank tables, and meter correction factors) which might have been created in furtherance of KII's alleged fraud.

2. Tenth Circuit Precedent – *Fleming v. United States*

Don Fleming operated a feed mill in New Mexico and he was a certified dealer under the Emergency Feed Program administered by the Commodity Credit Corporation, an agency of the federal government. Farmers eligible under the Emergency Feed Program received a Farmers Purchase Order ("FPO") for a specified amount of designated surplus feed. Farmers were entitled to take these FPO's and transfer them to a dealer like Fleming as partial payment for surplus feed. Dealers like Fleming were authorized to submit the FPO's to the government in exchange for a Dealers Certificate with a face value equal to the value of the FPO's. Dealers could then use the Dealers Certificates to purchase surplus feed from the government. Before a dealer could exchange an FPO for a Dealers Certificate, he was required to sign a certificate on the FPO, certifying that (1) he sold and actually delivered the designated surplus feed to the named farmer, and (2) that he accepted the FPO as partial payment for surplus feed. Fleming v. United States, 336 F.2d 475, 477 (10th Cir. 1964).

The evidence at trial established that on 15 occasions, Fleming accepted an FPO from a farmer, gave the farmer a credit on his books, but did not in fact deliver any surplus grain to the farmer. Rather, the farmer would use the credit on Fleming's books at a later date to purchase non-surplus grains offered for sale at Fleming's mill. The evidence also established that Fleming created invoices and attached those invoices to the FPO's, falsely reflecting that the farmer had received a quantity of surplus grain. Fleming then executed the certificates on the FPO's, falsely certifying

^{6/} The three-justice dissent, written by Justice Rehnquist, would have remanded and would have permitted the imposition of 35 penalties upon a showing by the United States that United could have foreseen the number or magnitude of claims which Model would ultimately submit to the government. Id. at 323.

that he had actually delivered surplus feed to the farmer. Fleming redeemed the 15 FPO's for Dealers Certificates and then exchanged the Dealers Certificates for government surplus grain. Fleming, 336 F.2d at 477-78.

The trial court found that Fleming's actions were a violation of the FCA. The trial court then imposed 15 penalties – one for each FPO submitted by Fleming. The Tenth Circuit affirmed the trial court's award of penalties. Neither the trial court nor the Tenth Circuit imposed additional penalties for the false invoices attached by Fleming to support the false certifications in the FPO's. Fleming, 336 F.2d at 480. Consistent with the Tenth Circuit's approach in Fleming, the undersigned finds that penalties should not be imposed on the run tickets, tank tables and meter correction calculations at issue in this case because, like the invoices in Fleming, those records are used only to support the allegedly false statements made in the MMS-2014's, Osage Royalty Reports and monthly check stubs.

3. Decisions From Other Courts of Appeal

a. *United States v. Rohleder*

In Rohleder the United States Navy entered into a contract with Cramp Shipbuilding Company ("Cramp") for the construction of six light cruisers. Before Cramp could begin construction, the contract required Cramp to make \$12,000,000 in improvements to its shipyards. Cramp entered into 16 fixed-fee-plus-cost subcontracts with Charles Rohleder to make the improvements to Cramp's shipyards. Cramp's contract with the Navy required Navy approval for orders of material over a certain price. Consequently, all of Cramp's subcontracts with Rohleder also required approval from Cramp for orders of materials over a certain price. The Navy would not approve an order of materials unless it was accompanied by three or more bids. United States v. Rohleder, 157 F.2d 126, 127-28 (3rd Cir. 1946).

The trial court found that under the 16 contracts, Rohleder submitted 90 purchase orders that contained one or more fraudulent bids. Rohleder would obtain bids from dealers which were higher than the bid Rohleder ultimately wanted the Navy to accept, with the dealer understanding that the bid the dealer was making would never be accepted. Rohleder was paid by Cramp on the 90 purchase orders, and Cramp was ultimately reimbursed by the Navy when Cramp submitted its Final Cost Certificate to the Navy. The trial court imposed 16 penalties – one for each of the 16 subcontracts under which Rohleder had submitted false bids. The United States appealed, arguing that 90 penalties should be imposed – one for each purchase order under which Rohleder had submitted false bids. Rohleder, 157 F.2d at 128 and 130.

The Third Circuit rejected the United States' argument and affirmed the trial court, holding that

[t]he fraud was committed with respect to the contracts. The purchase orders were part of those contracts and not definite projects in themselves. They are analogous to the great number of spurious forms in the Hess case which were absorbed into their respective projects. The grouping by the Trial Judge of the ninety purchase orders under their respective contracts generally corresponds to the distinctions made in [Marcus v. Hess]. It is reasonable and has a sound basis in the record.

Id. at 131. Consistent with the Third Circuit's holding, the undersigned finds that in this case the grouping of many run tickets, tank tables, and meter correction factors under their respective MMS-2014, Osage Royalty Report or monthly check stub generally corresponds to the Supreme Court's holding in Marcus, is reasonable, and has a sound basis in the record.

b. *United States v. Grannis*

In Grannis, the Fourth Circuit reached a substantially similar result as that reached by the Third Circuit in Rohleder. Edward Grannis and others entered into a fixed-fee-plus-cost contract with the United States to build an anti-aircraft firing center known as Camp Davis. The "cost" portion of the contract included a rental fee paid to Grannis for use of equipment he owned and reimbursement for any equipment Grannis rented. United States v. Grannis, 172 F.2d 507, 508 (4th Cir. 1949).

For equipment owned by Grannis, once the United States' rental payments on a particular piece of equipment equaled the fair value of the equipment plus 1% for each month the equipment was in use, no more rental payments would be due and title to the equipment would vest in the United States. The "fair value" of the equipment owned by Grannis was based on Grannis' actual cost for the equipment. The equipment rented by Grannis, was to be covered by a rental contract between Grannis and the third party that permitted the United States to obtain title to the equipment in the same manner as was provided with regard to equipment owned by Grannis. However, the "fair value" for equipment rented by Grannis from third parties was based on market value, not actual cost. Thus, the third party did not have to account for any discounts or rebates he might have received when the equipment was originally purchased. Grannis, 172 F.2d at 508-509.

Grannis purchased 130 Ford cars and trucks with his own money and he was given discounts and rebates on the cars because he was considered a fleet owner and

purchaser of Ford automobiles. Grannis had title to the cars and trucks placed in the name of William Jones, Grannis' brother-in-law. Grannis then immediately rented the cars and trucks from Jones for use on the Camp Davis project. In this manner, Grannis was able to retain the rebates and discounts he received because he listed the cars and trucks on the United States' rental schedules as rented equipment and not equipment which he owned. Grannis then submitted 10 vouchers to the United States for reimbursement of the rentals on the cars and trucks. Grannis, 172 F.2d at 509-10.

On appeal, Grannis' actions were found to be a violation of the FCA. The appellate court then had to determine the number of penalties that should be imposed against Grannis. The United States argued that it was entitled to recover a penalty for each act by Grannis that was prohibited by § 3729's predecessor – Rev. Stat. § 3490, 31 U.S.C. § 231.

These acts, the government says, include not only each of the ten vouchers covering the fictitious claims for the Jones rental presented to the United States, but also 130 additional violations consisting of the schedules attached to the vouchers for each of the 130 cars and trucks which contained false statements as to the ownership and valuation of the vehicles, that is to say, the government claims the sum of \$280,000 for 140 violations at \$2,000 each.

Grannis, 172 F.2d at 515. Relying on Marcus and Rohleder, the Fourth Circuit rejected the United States' argument. The Court held Grannis liable for only 10 penalties, finding that the 130 false schedules were subsumed within the 10 false vouchers. Id. at 515-16. Consistent with the Fourth Circuit's holding, the undersigned finds that in this case the run tickets, tank tables and meter correction factors, like the 130 false schedules in Grannis, are subsumed within their respective MMS-2014, Osage Royalty Report or monthly check stub.⁷¹

⁷¹ See also United States v. National Wholesalers, 236 F.2d 944, 950 (9th Cir. 1956) (holding the defendant liable for 10 penalties where 10 false vouchers had been submitted with 17 false invoices attached. The Court opted for the smaller number finding that a "loose count of false claims should not be made" because "[t]he civil Penalty provided [in the FCA] is inexact."); United States v. Woodbury, 359 F.2d 370, 378 (9th Cir. 1966) (imposing penalties for the number of false applications for payment, not including the number of false documents contained in or attached to the application); United States v. Cooperative Grain and Supply Co., 476 F.2d 47, 64 (8th Cir. 1973) (holding that a false loan application can support only one penalty regardless of how many "false representations were made in different documents submitted to the Government"); and United States v. Hibbs, 420 F. Supp. 1365, 1370-71 (E.D. Penn. 1976) vacated on other grounds by 568 F.2d 347 (3rd Cir. 1977) (holding that a default on a government-insured mortgage and a demand for payment can only support one penalty regardless of how many false records were submitted to induce the government to issue mortgage insurance in the first place).

c. *Miller v. United States*

After hurricane Camille destroyed nearly 100% of all homes in Plaquemines Parish, Louisiana, the Department of Housing and Urban Development ("HUD") began a program to provide parish residents with temporary housing by setting up approximately 1,800 HUD-leased mobile homes. HUD then contracted with the Miller brothers to repair and provide preventative maintenance on the mobile homes. The Miller brothers submitted five consolidated billings to HUD – one for each month that work was performed under the contract before HUD became suspicious. Attached to these five consolidated billing were 11 invoices for work performed. Miller v. United States, 550 F.2d 17, 19-22 (Ct. Cl. 1977).

A review of the monthly billings and attached invoices demonstrated that the Miller brothers were defrauding HUD by (1) charging for items not used to repair a mobile home, (2) charging more for items actually used to repair a mobile home than the item actually cost, and (3) charging for repairs that were never in fact made. The trial court found that the Miller brothers' actions were a violation of the FCA. On appeal, the issue was how to determine the number of penalties to be imposed. HUD argued that sixteen penalties should be imposed – five for the false monthly, consolidated billings and 11 for the false invoices attached to the monthly billings. Miller, 550 F.2d at 20-21.

The Court of Claims rejected HUD's argument and imposed five penalties – one for each monthly billing. The Court held that

[t]he invoices for which [HUD] also seeks the statutory penalty were used in determining the total of each claim. In this regard, the invoices are like tally sheets used in calculating a final figure to present to the Government; they are not the claim itself.

. . . .

[HUD's argument is] more in line with Justice Rehnquist's dissent in Bornstein than with the majority opinion. It is the position of the dissent (and [HUD] in the instant case) that, based upon the facts of a particular case, each false item used in reaching a final figure which is then submitted for payment could be a violation of the Act. We reject this reasoning.

Miller, 550 F.2d at 24. Consistent with the Court of Claims' holding, the undersigned finds that, given the facts of this case, run tickets, meter correction factors and tank

tables are also like tally sheets in that they are used to calculate a final figure which is ultimately reflected on an MMS-2014, Osage Royalty Report or monthly check stub.

The Court in Miller also held that the Miller brothers would be subjected to double punishment if penalties were imposed for the eleven invoices and the five consolidated billings. The Court found that the FCA never intended this form of double punishment. Miller, 550 F.2d at 23, n. 11. Plaintiffs recognize that the type of double punishment identified by the Court in Miller would occur in this case if a penalty were imposed on both the MMS-2014's, Osage Royalty Reports or monthly check stubs and on the run tickets, tank tables and meter correction factors used to calculate the figures reflected on the MMS-2014's, Osage Royalty Reports and monthly check stubs. See Doc. No. 211, pp. 12 and 14. Plaintiffs offer to solve this double punishment problem by accepting penalties only for the false run tickets, tank tables and meter correction factors and refusing penalties for the false MMS-2014's, Osage Royalty Reports and monthly check stubs.

Plaintiffs choose the run ticket, tank table and meter correction factor over the MMS-2014, Osage Royalty Report and monthly check stub because Plaintiffs argue, consistent with the Supreme Court's decision in Bornstein, that the FCA imposes liability "only for each 'act,' not the number of false documents created as a result of the act." Doc. No. 212, p. 14. Plaintiffs argue that given the facts of this case, the violative act for purposes of the FCA is the creation of a false run ticket, tank table or meter correction factor. Plaintiffs argue that the creation of a false MMS-2014, Osage Royalty Report or monthly check stub cannot be the violative act under the FCA because these documents are "downstream" accounting documents whose creation and use are caused by the original act of falsifying the run tickets, tank tables and meter correction factors.

The rule employed by Plaintiffs to determine which act to penalize to prevent double punishment is really a "first act" rule. In others words, Plaintiffs argue that the first false record should be penalized and then no other records which incorporate or make use of the information in the first false record should be penalized. Plaintiffs have, however, offered no reason based in either the language or the legislative history of the FCA why it is that the first act, rather than the last act, should be penalized. Plaintiffs' argument is also inconsistent with the all of the cases discussed above, where the last act was penalized. The undersigned finds that given the facts of this case it makes more sense to penalize the last act - the creation of false MMS-2014's, Osage Royalty Reports and monthly check stubs.

The MMS-2014's, Osage Royalty Reports and monthly check stubs represent the one instance in which all information comes together and KII calculates and reports a final volume of oil and a final price for that oil. Run tickets, tank tables and meter correction factors are subject to modification up until an MMS-2014, Osage Royalty

Report or monthly check stub is prepared and submitted to the DOI or a lessee. The run tickets, tank tables and meter correction factors are, therefore, subsumed within their respective MMS-2014's, Osage Royalty Reports and monthly check stubs. The MMS-2014's, Osage Royalty Reports and monthly check stubs represent KII's final statement regarding the amount of oil purchased from a particular lease and the amount of money KII will pay for that oil. Thus, it is not until KII has created a false MMS-2014, Osage Royalty Report or monthly check stub that it has definitively committed its corporate self to paying for less oil than it actually took from a particular lease.

d. *United States v. Krizek*

The United States filed an FCA action against Dr. George Krizek, a psychiatrist. For services provided to Medicare and Medicaid recipients, Dr. Krizek sought reimbursement from the government by filing a form HCFA 1500. The HCFA 1500 contains a section where each procedure performed on the patient is to be identified by using a five-digit code found in the American Medical Association's Current Procedures Terminology Manual (CPT codes).^{8/} An HCFA 1500 lists those services provided to a single patient, and it may include many CPT codes if the patient has been treated over a period of time. *United States v. Krizek*, 111 F.3d 934, 935-36 (D.C. Cir. 1997).

The government established at trial that Dr. Krizek had performed and billed for services which were not medically necessary, and that Dr. Krizek "upcoded" several procedures by using a CPT code for more extensive treatments than were actually rendered (e.g., by using CPT code 90844 when CPT code 90843 was appropriate). The district court imposed 11 penalties against Dr. Krizek – one for each CPT code the government was ultimately able to show as false. Dr. Krizek appealed, arguing that penalties should be imposed based on the number of false HCFA 1500's, and not the number of false CPT codes on the various HCFA 1500's. The District of Columbia Circuit agreed with Dr. Krizek, and relying on each of the authorities discussed above, held that whether one penalty or many should be imposed is a fact-based inquiry that must be made by focusing on the specific conduct of the defendant. Focusing on the definition of "claim" in § 3729(c) and Dr. Krizek's conduct, the Court held that the number of penalties should be tied to the number of requests or demands for payment made by Dr. Krizek. The Court held further that the HCFA 1500, and not the CPT codes recorded on the HCFA 1500, were requests or demands for payment. The Court viewed the CPT codes as nothing more than invoices used to explain how Dr.

^{8/} For example, the manual notes that CPT code 90844 is to be used to indicate a medical psychotherapy session lasting 45-50 minutes, whereas CPT code 90843 indicates a medical psychotherapy session lasting 20-30 minutes.

Krizek computed the amount requested or demanded on a particular HCFA 1500. Krizek, 111 F.3d at 938-940.

The undersigned finds that the run tickets, tank tables and meter correction factors at issue in this case are closely analogous to the CPT codes at issue in Krizek. The run tickets, tank tables and meter correction factors relevant to a particular lease are used, like the CPT codes in Krizek, to compute the amount reported as owing on a particular MMS-2014, Osage Royalty Report or monthly check stub. The run tickets, tank tables and meter correction calculations are simply supporting documentation. No court has imposed penalties for this type of supporting documentation, especially when the supporting documentation, as it is here, is subject to revision and correction until the moment an MMS-2014, Osage Royalty Report or monthly check stub is submitted to a lessee or the DOI.

4. Plaintiffs' Attempt to Distinguish The Cases Discussed Above

Section 3729(a)(1), the affirmative false claim provision of the FCA, imposes liability for "presenting" or causing to be presented a false "claim" for payment. Section 3729(a)(7), the reverse false claim provision of the FCA, imposes liability for "making or using" or causing to be made or used a "false record or statement" to conceal, avoid or decrease an obligation to pay or transmit money to the United States. The bad act under (a)(1) is the presenting of a false claim. The bad act under (a)(7) is the making or using of a false statement or record. There is no "presentment" language in § 3729(a)(7). Plaintiffs argue that all of the cases discussed above can be distinguished on this basis alone.

Plaintiffs argue that all of the cases discussed above are affirmative false claim cases, and that all of the courts' decisions can be distinguished because those courts were focusing on finding a record that was "presented" to the government and not on the reverse false claim situation which only requires the creation or use of a false record.^{9/} The gist of Plaintiffs' argument is that had the court's in the cases discussed above been focusing on the "creation" of false records rather than the "presentment" of false records, they would have reached different results given the facts of each case. The undersigned does not agree.

In all of the cases discussed above, there were multiple false records which were actually presented to the government, but the courts chose not to impose

^{9/} The parties have not cited and the undersigned has not found any reverse false claims cases where the issue of how to determine the number of penalties has been addressed.

penalties for all of the records presented.^{10/} The courts' focus was, therefore, not entirely on whether the false record in question was or was not presented to the government. Other factors, including concerns about double punishment, and a functional evaluation of the conduct involved in each of those cases, necessarily accounts for the decisions reached.

Plaintiffs' attempt to distinguish the cases discussed above appears to be premised on the conclusion that the creation and use, rather than the presentation, of a false record is only punishable in reverse false claims cases, where the false record is used to conceal or decrease an obligation to pay the government. Plaintiffs ignore the fact that even in an affirmative false claims case, like those discussed above, the FCA has always proscribed the creation or use of a false record to get a claim paid by the government. See 31 U.S.C. § 3729(a)(2); and Rev. Stat. §§ 3490-93 and 5438 (March 2, 1863 and as amended on December 23, 1943). Thus, in each of the cases discussed above, the court could have penalized all of the false records at issue in those cases merely because they had been created or used to get a false claim paid. The fact that they did not do so suggests that a wooden count of the number of false records is not an appropriate application of the FCA in either an affirmative or reverse false claims case. See Rohleder, 157 F.2d at 131 (specifically rejecting the argument that the district court's holding was incorrect because the district court had ignored language similar to that in § 3729(a)(2) and (a)(7)). Furthermore, Plaintiffs themselves admit that to the extent imposing a penalty on every false record would cause double punishment, not every false record will generate a penalty.

The authorities discussed above demonstrate that in FCA cases, courts must take a pragmatic view of the transactions involved to determine how each allegedly false record is being used. In this case, the undersigned finds that if Plaintiffs can prove the allegations in their Second Amended Complaint, KII's creation of false run tickets, tank tables and meter correction factors were all a means to an end – the creation of false MMS-2014's, Osage Royalty Reports and monthly check stubs. It was these reports and check stubs that KII ultimately used in an attempt to reduce its obligation to pay for oil taken from federal and Indian leases, and it is KII's use of these reports and check stubs that should be penalized under the FCA.

^{10/} See Marcus, 317 U.S. at 552 (refusing to penalize every form presented to the government in furtherance of defendants' fraudulent bidding scheme); Bornstein, 423 U.S. at 312 (refusing to penalize the false packing lists even though they were presented to Model); Fleming, 336 F.2d at 480 (refusing to penalize the false invoices attached to the FPO's even though they were presented to the government); Rohleder, 157 F.2d at 130-31 (refusing to penalize the false purchase orders and false bids even though they were presented to the government); Grannis, 172 F.2d at 515 (refusing to penalize the false schedules attached to the vouchers even though they were submitted to the government); and Miller, 550 F.2d at 24 (refusing to penalize the invoices even though they were presented to the government).

If the Court were to distinguish the affirmative false claims cases discussed above on the ground offered by Plaintiffs, the Court would be creating one rule for affirmative false claims and one rule for reverse false claims. Such a result would be clearly contrary to the FCA's legislative history.

Congress amended the FCA in 1986 and added § 3729(a)(7) to make it explicitly clear that it intended the FCA to impose liability against those who fraudulently attempt to reduce an obligation they owe to the government (i.e., reverse false claims). The Senate report in support of the 1986 amendments states that § 3729(a)(7) was added to make it clear that "an individual who makes a material misrepresentation to avoid paying money owed the Government would be equally liable under the Act as if he had submitted a false claim to receive money." S. Rep. 345, 99th Cong., 2d Sess., p. 18, reprinted in 1986 U.S.C.C.A.N. 5266 (July 28, 1986) (emphasis added). The House of Representatives also stated that "there is no reason to treat a false claim filed against the Government to fraudulently reduce an obligation owed to the Government differently from one filed for the purpose of fraudulently obtaining money." H. Rep. 660, 99th Cong., 2d Sess., p. 20. It is clear, therefore, that Congress did not intend for affirmative and reverse false claims to be treated differently. Thus, the holdings in the affirmative false claims cases discussed above are equally applicable to reverse false claims cases like this one.

5. KII's Eighth Amendment Argument

KII argues that if the Court were to accept Plaintiffs' argument and impose a penalty for each allegedly false run ticket, tank table and meter correction factor, the resulting penalty would violate the excessive fines clause of the Eighth Amendment to the United States Constitution. The undersigned finds that it is premature to consider the Eighth Amendment at this stage of the litigation.

First, KII has not definitively established that the Eighth Amendment's excessive fines clause would apply to civil penalties imposed by the FCA. Second, the "excessiveness" of a penalty must be assessed in light of the actual damages involved and in light of the defendant's overall culpability. See BMW v. Gore, 517 U.S. 559 (1996). This type of analysis cannot be conducted on the record presently before the Court. Third, the undersigned finds that a statute should not be interpreted initially in light of the Eighth Amendment. Rather, a penalty statute should be interpreted in light of its language, legislative history, and purpose. The penalty statute, as interpreted, should then be applied to a particular factual setting. If the statute, as interpreted and applied to a particular set of facts, produces an unconstitutionally excessive fine, the amount of the penalty can then be remitted to prevent an unconstitutional result. Thus, the excessive fines clause has not been considered in formulating the findings and recommendations expressed in this Report and Recommendation.

B. A PENALTY SHOULD BE IMPOSED FOR EACH LEASE ON AN MMS-2014, OSAGE ROYALTY REPORT OR MONTHLY CHECK STUB WHEN KII REPORTED AND PAID FOR LESS OIL THAN IT ACTUALLY TOOK FROM THAT LEASE DURING THE PREVIOUS MONTH.

Plaintiffs argue that if the MMS-2014's, Osage Royalty Reports and monthly check stubs are the records used to determine how many penalties to impose in this case, then a penalty should be imposed for each line item on the MMS-2014, Osage Royalty Report and monthly check stub. KII argues that a penalty for each line item is not appropriate and that a single penalty should be imposed for each MMS-2014, Osage Royalty Report and monthly check stub. The undersigned agrees with neither of these positions.

An examination of the MMS-2014, as an example, demonstrates why a penalty should not be imposed for each line item on the report. The MMS-2014's contain a line item for every federal and non-Osage Indian lease from which KII purchases oil, regardless of whether any oil was actually purchased during the period for which the report is being prepared. Thus, several line items reflect no purchases at all. A penalty cannot be imposed for these line items.

Plaintiffs' argument is premised on its belief that each line item on an MMS-2014 represents a separate obligation to pay money to the DOI or a lessee under a separate lease agreement with the United States. However, the uncontroverted facts establish that the line items on an MMS-2014 do not correspond directly with leases or separate transactions. More than one line can relate to a single lease and a single transaction because (a) the MMS may have assigned two separate accounting identification numbers to a particular lease, generating multiple line items for each accounting number; (b) multiple line items may be used to represent separate products from and separate selling arrangements in connection with the same lease, and (c) several line items might represent a correction to a line item on a prior month's report. These facts preclude the imposition of a penalty for each line item. KII's obligation to pay for oil taken from a particular lease is divided into several line items by the intricacies of government reporting regulations, not by any affirmative conduct of KII.

Relying primarily on Krizek, KII argues that only a single penalty can be imposed in connection with an MMS-2014, Osage Royalty Report or monthly check stub. The undersigned finds Krizek distinguishable. In Krizek, Dr. Krizek submitted an HCFA 1500, seeking reimbursement for services provided to recipients of Medicare and Medicaid. An HCFA 1500 relates to a single patient and it contains up to six CPT codes, identifying the procedures performed on the patient. The D.C. Circuit imposed one penalty for each HCFA 1500, refusing to impose a penalty for each false CPT code on the form. Krizek, 111 F.3d at 938-40. KII argues that the line items on the

MMS-2014's, Osage Royalty Reports and monthly check stubs are the same as the CPT codes on the HCFA 1500 at issue in Krizek. The undersigned does not agree.

The HCFA 1500 is not functionally equivalent to an MMS-2014, Osage Royalty Report or monthly check stub. In Krizek the obligation at issue related to a specific patient, and in this case, the obligation at issue relates to a specific mineral lease. The HCFA 1500 reports transactions for one patient, thus it made sense for the Court to impose one penalty. The MMS-2014, Osage Royalty Report and monthly check stub report transactions for many distinct mineral leases. Given the facts of this case, the CPT codes are the functional equivalent of the run ticket, not the MMS-2014 line items. The D.C. Circuit held that the CPT codes are like invoices which are tallied to determine the amount due for a particular patient. In this case, the run tickets are also like invoices, which are tallied to determine the amount owing for a particular lease. Furthermore, it is the payment of less of a royalty than that which is owed on a given mineral lease which generates liability in this case. Thus, the undersigned finds Krizek to be distinguishable from this case on its facts.

Maintaining a functional view of the transactions at issue in this case, the undersigned finds that for each MMS-2014, Osage Royalty Report and monthly check stub, all of the line items relating to a particular lease must be viewed together to determine the net effect of KII's purchases from that lease during the prior month. The basic violation alleged by Plaintiffs in this case is that KII received delivery of oil from a particular lease over the course of a month and then paid for less oil than it actually took during that month. Thus, if Plaintiffs can demonstrate, after viewing all of the line items relating to a particular lease together, that KII reported and paid for less oil than it actually took from that lease during the previous month, then a penalty should be imposed in connection with that lease.

IV. KII CAN BE LIABLE UNDER THE FCA IN CONNECTION WITH ITS PURCHASES FROM 100% DIVISION ORDER LEASES.

A. THE FCA IMPOSES LIABILITY FOR INDIRECT REVERSE FALSE CLAIMS

KII concedes, as it must, that the FCA imposes liability when a false record made by one causes another to submit a false claim to the government in attempt to get the government to part with money or property. KII refers to these types of claims as indirect false claims. The classic example of an indirect false claim is when a subcontractor prepares a false record which causes a government prime contractor to submit a false request for reimbursement to the government. See, e.g., Tanner v. United States, 483 U.S. 107, 129 (1987) (holding that "the fact that a false claim passes through the hands of a third party on its way from the claimant to the United States does not release the claimant from culpability under the Act."); Marcus, 317

U.S. at 541-45; Bornstein, 423 U.S. at 309-13; and Smith, 287 F.2d at 304. See also 31 U.S.C. §§ 3729(a)(1) and (c).

If purchases from the 100% division order leases at issue in this case involve false claims under the Act, they are indirect reverse false claims. Given Plaintiffs' allegations, the 100% division order leases involve indirect reverse false claims because KII attempted to reduce its obligation to pay money by causing the lessees on 100% division order leases to submit a false record (i.e., an MMS-2014 or Osage Royalty Report) to the DOI. KII allegedly caused the lessee to submit a false record to the DOI by submitting false monthly accountings (i.e., check stubs) to the lessees.

KII argues that it cannot be held liable under the FCA in connection with any of its purchases from 100% division order leases. KII argues that, while the FCA imposes liability for indirect false claims, it does not impose liability for indirect reverse false claims. Specifically, KII argues that Congress did not intend for the FCA to apply to indirect reverse false claims, and that nothing in the FCA creates liability for an indirect attempt to reduce an obligation to pay money to the government. As support for its argument, KII relies primarily on Congress' 1986 amendment of the FCA.

In 1986, Congress amended the FCA and added § 3729(a)(7) and § 3729(c). Congress added subsection (a)(7) to make it clear that the FCA imposed liability for reverse false claims.^{11/} Congress added subsection (c) to more specifically define "claim." Specifically, Congress added subsection (c) to make it clear that the FCA imposed liability for indirect false claims so long as government funds were involved. Subsection (c) provides as follows:

Claim Defined. – For purposes of this section, "claim" includes any request or demand whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will

^{11/} Section 3729(a)(7) provides as follows:

Any person who knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person

31 U.S.C. § 3729(a)(7) (emphasized language added by Congress in 1986).

reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c) (emphasis added).

KII argues that because subsections (a)(7) and (c) were added at the same time, the absence of any reverse false claim language in subsection (c) conclusively demonstrates that Congress did not intend the FCA to impose liability for indirect reverse false claims. In other words, KII argues that the FCA imposes liability for causing another to submit a false record in an attempt to get money from the government, but the FCA does not impose liability for causing another to submit a false record in an attempt to reduce an obligation to pay money to the government. The undersigned finds that KII's argument is not supported by either the language of the FCA or the FCA's legislative history.

KII's argument appears to be based in part on its belief that subsection (c) contains a definitive definition of "claim." However, subsection (c) is not an attempt to exhaustively define "claim." Rather subsection (c) provides one example of what can constitute a claim under the FCA. This is confirmed by the fact that Congress used the word "includes" in subsection (c). Congress said that for purposes of the FCA, the term "claim" includes the circumstances listed in subsection (c). With this language, Congress obviously left the definition of "claim" open to interpretation by the courts.

Interpreting subsection (c) as leaving the development of the definition of claim to the courts is confirmed by the legislative history of the 1986 amendments to the FCA. Congress added subsection (c) to accomplish one purpose – "to overrule [United States v.] Azzarelli], 647 F.2d 757 (7th Cir. 1981)] and similar cases which [had] limited the ability of the United States to use the act to reach fraud perpetrated in federal grantees, contractors or other recipients of Federal funds." S. Rep. 345, 99th Cong., 2d Sess., p. 22, reprinted in 1986 U.S.C.C.A.N. 5266 (July 28, 1986). The legislative history from both houses of Congress recognizes that a claim may take many forms, but at bottom a claim is the creation or use of any false record which ultimately causes a loss to the government. Id. at 9-10 and 21-22; and H. Rep. 660, 99th Cong., 2d Sess., p. 21. Given the history and purpose of the Act, the undersigned finds that the term "claim" as used in the FCA also "includes" indirect reverse false claims like those at issue in this case. See Doc. Nos. 99 and 275 for a discussion of the FCA's history and purpose.

The legislative history of the FCA also establishes that Congress did not intend for affirmative and reverse false claims to be treated differently. As was discussed in section III(A)(4), *infra*, Congress intended for affirmative and reverse false claims to

be treated the same. S. Rep. 345, 99th Cong., 2d Sess., p. 18, reprinted in 1986 U.S.C.C.A.N. 5266 (July 28, 1986); and H. Rep. 660, 99th Cong., 2d Sess., p. 20. Recognizing liability under the FCA for indirect false claims, but not for indirect reverse false claims, would be contrary to this legislative intent.

B. THERE ARE MATERIAL QUESTIONS OF FACT REGARDING KII'S KNOWLEDGE OF THE EXISTENCE OF A FEDERAL OR INDIAN ROYALTY INTEREST ON THE 100% DIVISION ORDER LEASES FROM WHICH IT PURCHASED OIL.

There is no direct contractual or other relationship between KII and the government in connection with the 100% division order leases from which KII purchases oil. Consequently, KII argues that it cannot be held liable under the FCA in connection with its purchases from 100% division order leases because KII does not know that a federal or Indian royalty interest is present on the lease. Plaintiffs argue that summary judgment on this issue is precluded by genuine issues of material fact regarding KII's knowledge, as that term is defined in § 3729(b). To the extent that the FCA requires knowledge by KII that the obligation it is reducing is federal in nature, the undersigned agrees with Plaintiffs that material questions of fact exist regarding KII's "knowledge."

The FCA defines "knowing" and "knowingly" as follows:

[T]he terms "knowing" and "knowingly" mean that a person, with respect to information -

- (1) has actual knowledge of the information;
- (2) acts in deliberate ignorance of the truth or falsity of the information; or
- (3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

31 U.S.C. § 3729(b).

Plaintiffs allege that applying the three prongs of § 3729(b), a jury could find that KII knew that a federal or Indian lease was involved on many of the 100% division order leases from which KII purchased oil. There is some evidence to suggest that the names of several of the 100% division order leases contain some indication that they are federal or Indian leases. There is also some evidence that a sign or other marking

physically present at the lease would identify the lease as a federal or Indian lease at the time oil was actually purchased. There is also evidence demonstrating that KII required the lessees from which it purchased to complete a form titled Purchase and Connection Acknowledgment and Federal Lease Notification, and that these forms would alert KII that a federal interest was on the lease. There is also evidence that the operators of federal and Indian leases and the Bureau of Land Management would occasionally send materials to KII which would identify a particular lease as a federal or Indian lease. There are, therefore, material questions of fact regarding KII's actual knowledge.

Plaintiffs also argue that in connection with certain 100% division order leases, if KII did not know the lease had a federal or Indian royalty interest, KII did not know that fact because it was deliberately ignorant of that fact. As an example, Plaintiffs point to any 100% division order lease which might exist in Osage County, Oklahoma, where virtually all leases would have an Indian royalty interest. Plaintiffs also argue that because KII operates an oil business in the mid-continent region of the United States, where a significant number of leases are subject to federal and Indian royalty interests, KII's lack of knowledge of those interests is due to KII's reckless disregard of the facts. Again, the undersigned finds that these issues present genuine questions of material fact regarding KII's knowledge of federal and Indian royalty interests on the 100% division order leases from which it purchased oil during the relevant period covered by this lawsuit.

V. DOES RECORDING A VALUE ON A RUN TICKET OTHER THAN THE VALUE WHICH WAS ACTUALLY OBSERVED BY A GAUGER MAKE THE RUN TICKET *PER SE* FALSE?

When a KII gauger purchases oil, he completes a run ticket by taking various physical measurements (e.g., top gauge, bottom gauge, etc.) and recording them on the run ticket. KII admits that its gaugers often record a measurement on the run ticket that is different than the measurement actually taken by the gauger. For example, a gauger may measure a top gauge of 11'6", and record a value of 11'2" on the run ticket. KII argues that measurements other than those actually observed by the gauger are recorded on run tickets to account for various field conditions, such as encrustation on the walls of a tank, sediment in the bottom of a tank (i.e., high bottoms), green oil (i.e., oil with a large amount of air due to the fact that it has recently been run into the tank), and others. KII does not, however, indicate on the run ticket either that an adjustment has been made or the cause for the adjustment.

The FCA imposes liability for creating or using false records. The FCA does not, however, define when a record is false. The determination of what is false is generally left to the good sense of the jury. The parties have asked the Court to determine whether the jury in this case may be permitted to find that a run ticket is *per se* false

if a gauger records a value (e.g., top gauge, bottom gauge, etc.) on the run ticket other than the value which was actually observed by the gauger when he gauged the oil, regardless of whether a field condition might justify an adjustment to the measurement actually observed by the gauger. Plaintiffs argue that the run tickets are *per se* false when anything other than an actual/unadjusted measurement is recorded because such unilateral adjustments to a run ticket are not permitted by applicable gauging regulations, standards or customs. KII argues that if a legitimate field condition justifies the adjustment, the run ticket cannot be false because the adjusted ticket accurately reflects the amount of oil purchased by KII.

The undersigned will not issue a recommendation on this issue at this time. Plaintiffs' motion for summary judgment was necessarily focused on the run ticket because Plaintiffs were arguing that penalties should be imposed in this case based on the number of false run tickets created or used by KII. Plaintiffs' position necessarily required them to seek a ruling regarding the falsity of the run tickets at issue in this case. The undersigned has recommended that penalties not be determined in this case based on the number of false run tickets. That ruling may impact Plaintiffs' position of the run ticket falsity issue.

The undersigned has also determined that, if Plaintiffs wish to pursue the falsity issue, additional briefing is necessary. On the same date this Report and Recommendation was filed, the undersigned also filed an Order directing additional briefing on this issue. KII currently has a motion for summary judgment directed to the issue of how Plaintiffs will be required to prove liability and damages in this case. See Doc. No. 331. That motion has been referred to the undersigned, and the undersigned will revisit the run ticket falsity issue when it considers that motion, and after additional briefing has been received.

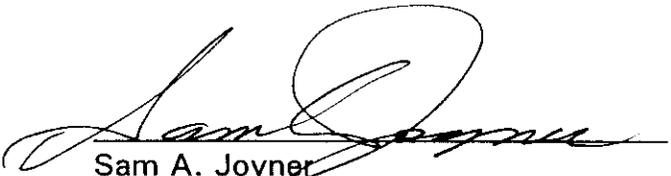
RECOMMENDATION

The undersigned recommends that Plaintiffs' motion and Defendants' motion for partial summary judgment be **GRANTED IN PART and DENIED IN PART**. [Doc. Nos. 211 and 219]. The undersigned finds that KII can be liable under the FCA in connection with its purchases from 100% division order leases, and that there are material questions of fact regarding KII's knowledge of the existence of a federal or Indian royalty interest on the 100% division order leases from which it purchased oil. The undersigned also recommends that, if liability under the FCA is established, a penalty of between \$5,000 and \$10,000 be assessed against KII for each lease on an MMS-2014, Osage Royalty Report or monthly check stub when KII reported and paid for less oil than it actually took from that lease during the previous month.

OBJECTIONS

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

Dated this 27 day of 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

28 Day of January, 1999.
C. Portillo, Deputy Clerk

SP2
2/25/99

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

F I L E D

JAN 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FELIX DUNEVANT, et al.,)
)
Plaintiffs,)
)
v.)
)
TEREX CORPORATION, d/b/a)
UNIT RIG,)
)
Defendant.)

Case No. 97-CV-951-BU (J)

ENTERED ON DOCKET
DATE JAN 27 1999

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Michael Burrage, District Judge, Presiding, and the issues having been duly tried and the jury having rendered its verdict,

IT IS ORDERED AND ADJUDGED that the Plaintiff Felix Dunevant recover of the Defendant Terex Corporation the sum of \$751, with interest therein at the rate of 4.545 % as provided by law, and his costs as provided by law.

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff Eddie Sims recover of the Defendant Terex Corporation the sum of \$3,001, with interest therein at the rate of 4.545 % as provided by law, and his costs as provided by law.

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff Ken Coleman recover of the Defendant Terex Corporation the sum of \$3,001, with

interest therein at the rate of 4.545% as provided by law, and his costs as provided by law.

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff James Moses recover of the Defendant Terex Corporation the sum of \$1,501, with interest therein at the rate of 4.545 % as provided by law, and his costs as provided by law.

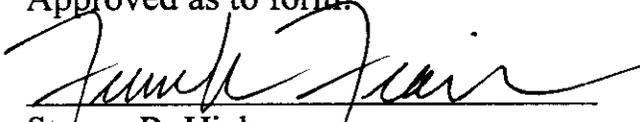
IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff Michael Jasper recover of the Defendant Terex Corporation the sum of \$1,001, with interest therein at the rate of 4.545 % as provided by law, and his costs as provided by law.

DATED at Tulsa, Oklahoma, this 27th day of January, 1999.



Michael Burrage, United States District Judge

Approved as to form:

for 

Steven R. Hickman
Attorney for Plaintiffs



Steven A. Broussard
Attorney for Defendant

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

F I L E D

JAN 26 1999

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

DONALD EUGENE GEORGE, BILLIE JOE
MYERS, RICKKI HUNT PECKENPAUGH,
JACOB MICHAEL ,

Plaintiffs,

vs.

Case No. 99-CV-5-K(M)

HAROLD BERRY, WADE FARNAN,
JANELLE BUCKSKIN,

ENTERED ON DOCKET

DATE JAN 27 1999

Defendants.

REPORT AND RECOMMENDATION

Plaintiffs, inmates at the Mayes County Jail, have filed a *pro se* civil rights complaint under 42 U.S.C. §1983 seeking injunctive relief against officials of Mayes County for conditions of confinement, including overcrowding, unsanitary conditions, lack of access to a law library, and lack of outdoor recreation. They also seek leave to proceed *in forma pauperis*.

The Plaintiffs' Motion for Leave to Proceed *In Forma Pauperis* is deficient in that it does not contain the required certified copies of the Plaintiffs' institutional account statements for the six-month period immediately preceding this filing. Rather than requiring that the Plaintiffs cure the deficiencies, the undersigned United States Magistrate Judge has conducted the screening required by 28 U.S.C. §1915A and has determined that the complaint should be dismissed.

An ongoing class action lawsuit pending in this district seeks equitable relief for the same conditions at the Mayes County Jail about which Plaintiffs complain. *Markie Garner, Scott Russell, Janice Eldridge, and Robert Thomas, individually and on behalf*

of all other persons similarly situated v. Harold Berry, in his official capacity As Sheriff of Mayes County, No. 96-CV-91-K (N.D. Okla. filed Feb. 9, 1996). Since Plaintiffs are members of the class defined as "all persons who have been, are now, or who may be in the future confined in the Mayes County Jail," any relief granted in the *Garner* suit will accrue to Plaintiffs. The purpose of a class action is to avoid duplicative litigation and inconsistent standards. These policies would be undermined if two suits seeking injunctive relief for the same conditions were allowed to proceed. *Goff v. Menke*, 672 F.2d 702, 704 (8th Cir. 1982). Consequently, where an ongoing class action seeks solely equitable relief, separate individual suits for such relief may not be maintained. *Gillespie v. Crawford*, 858 F.2d 1101, 1103 (5th Cir. 1988); see also *Dotson v. Maschner*, 764 F.Supp. 163, 167 (D.Kan. 1991).

Based on the foregoing, the undersigned United States Magistrate Judge RECOMMENDS that the instant action be DISMISSED without prejudice to refiling in the event Plaintiffs' claims are rejected as outside the scope of the *Garner* class action. *Facteau v. Sullivan*, 843 F.2d 1318 (10th Cir. 1988).

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 26th 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

27th Day of January, 1999.

C. Santillo, Deputy Clerk

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

FILED
JAN 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES EUGENE TEAGLE,)
)
Petitioner,)
)
v.)
)
RON CHAMPION, Warden,)
Dick Conner Correctional Center,)
Hominy, State of Oklahoma,)
)
Respondent.)

Case No. 99-CV-0072-H (E)

ENTERED ON DOCKET
DATE JAN 27 1999

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing *pro se*, has filed a motion for leave to proceed *in forma pauperis* and an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court has referred this matter to the undersigned for Report and Recommendation. *See* 28 U.S.C. § 636. For the reasons set forth below, the undersigned recommends that this action be transferred to the Eastern District of Oklahoma.

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

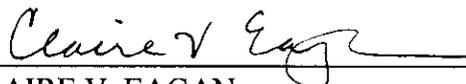
In this case, petitioner is incarcerated at Dick Conner Correctional Center, Hominy, Oklahoma, located within the jurisdictional territory of the Northern District of Oklahoma. 28

U.S.C. § 116(a). However, petitioner was convicted in Muskogee County, Oklahoma, which is located within the territorial jurisdiction of the Eastern District of Oklahoma. 28 U.S.C. § 116(c). The undersigned finds that the most convenient forum for judicial review of the issues raised in this petition would be the Eastern District of Oklahoma where any necessary records and witnesses would most likely be available. Therefore, in the furtherance of justice, the undersigned recommends that this matter be transferred to the Eastern District of Oklahoma.

Objections

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must do so within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** See *Thomas v. Arn*, 474 U.S. 140 (1985); *Ayala v. United States*, 980 F.2d 1342 (10th Cir. 1992).

Dated this 27th day of January, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE
The undersigned certifies that a true copy
of the foregoing pleading was served on each
2 of the parties hereto by mailing the same to
them or to their attorneys of record on the
27 Day of January, 1999.
C. Patillo, Deputy Clerk

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

ENTERED ON DOCKET

ERIC COURTNEY HARRIS,

Plaintiff,

vs.

STANLEY GLANZ, LORI LEDFORD,
GREG GRAVES,

Defendants.

DATE **JAN 27 1999**

Case No.99-CV-75-Bu(M) **FILED**

JAN 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

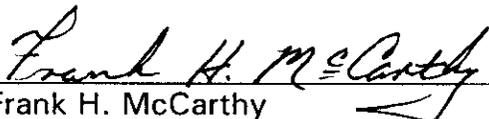
Plaintiff, a detainee at the Tulsa County Jail, has filed a complaint seeking redress from employees of governmental entities under 42 U.S.C. §1983. Pursuant to 28 U.S.C. §1915A, the undersigned United States Magistrate Judge has conducted a review of Plaintiff's allegations and concludes that Plaintiff's complaint should be dismissed as to Defendant Greg Graves because Plaintiff has failed to state a claim upon which relief can be granted as to that defendant.

According to Plaintiff's complaint, Greg Graves is the public defender assigned to his case. Court appointed counsel does not act under color of state law and therefore is not subject to a civil rights complaint under § 1983. Public defenders performing in the traditional role of attorney for the defendant in a criminal proceeding represent their client, not the state, and therefore cannot be sued in a 42 U.S.C. § 1983 action. *Polk County v. Dodson*, 454 U.S. 312, 325, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981). *See also Brown v. Schiff*, 614 F.2d 237, 238-39 (10th Cir.1980), cert. denied, 446 U.S. 941 (1980).

Therefore, the undersigned United States Magistrate Judge RECOMMENDS that the claims against Greg Graves be DISMISSED pursuant to 28 U.S.C. § 1915A(b)(1).

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 27th 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

27 Day of January, 1999.
L. Pottebelly, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LARRY BRUSE,)
)
Plaintiff,)
)
vs.)
)
KIM DELATIN, LEE HOUSEWIRTH,)
and LKL GATHERING, INC.,)
)
Defendants.)
)
and)
)
U.S. GAS SERVICES, L.L.C.,)
)
Intervenor.)

ENTERED ON DOCKET

DATE JAN 27 1999

Case No. 98 CV 0928K (E)

FILED

JAN 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

THIS MATTER coming on before this Court on this 27 day of January, 1999, upon the Joint Motion to Remand by all parties, and it appearing to the Court that the motion is made for good cause,

IT IS THEREFORE ORDERED that the Joint Motion to Remand by all parties is granted and that this case is hereby remanded to the District Court of Tulsa County.


JUDGE OF THE DISTRICT COURT

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

F I L E D

JAN 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM K. JOHNSTON,
and SAMMY G. PACK,

Plaintiffs,

vs.

DIANNE BARKER HAROLD, et al.,

Defendants.

No. 99-CV-0064-BU (E)

ENTERED ON DOCKET

DATE JAN 27 1999

REPORT AND RECOMMENDATION

Plaintiffs, prisoners appearing *pro se*, have submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 (Docket #1) and a motion to proceed *in forma pauperis* and supporting affidavit (Docket #2) as required by 28 U.S.C. § 1915(a).¹ The Court has referred this matter to the undersigned for Report and Recommendation. See 28 U.S.C. § 636. For the reasons set forth below, the undersigned recommends that this action should be dismissed without prejudice.

Plaintiffs, who are incarcerated in the Adair County Jail in Stilwell, Oklahoma, identify several defendants, all of whom are associated with plaintiffs' convictions in Adair County. Further, the events giving rise to plaintiff's claims appear to have arisen in Adair County, Oklahoma. Adair County is located within the territorial jurisdiction of the United States District Court for the Eastern District of Oklahoma. 28 U.S.C. § 116(c). Thus, it is clear that venue is not proper in this judicial district and this case should be dismissed without prejudice. 28 U.S.C. § 1406(a). See also Costlow v. Weeks, 790 F.2d 1486, 1488 (9th Cir. 1986) (court has the authority to raise venue issue *sua sponte*). The applicable venue statute for this action provides as follows:

¹ The Court notes that neither of these documents was submitted in proper form.

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. §1391(b). There is no applicable law with regard to venue under 42 U.S.C. § 1983 which would exempt this case from the general provisions of 28 U.S.C. § 1391(b). Coleman v. Crisp, 444 F. Supp. 31, 33 (W.D. Okla. 1977); D'Amico v. Treat, 379 F. Supp. 1004, 1008 (N.D. Ill. 1974), aff'd 510 F.2d 476 (7th Cir. 1975).

Plaintiff may pursue his claims in the United States District Court for the Eastern District of Oklahoma as long as he files his complaint within the applicable statute of limitations. Because there is no federal statute of limitations for a civil rights action, the time in which such action must be filed is determined by the applicable state statute of limitations for personal injury actions. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). The applicable statute of limitations under Oklahoma law is the two-year limitations period for "an action for injury to the rights of another." Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988). In such cases the cause of action accrues at the time the complained of injury occurred. Id. Thus, a plaintiff must bring an action within two years of the date of that occurrence.

Objections

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must do

so within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** See *Thomas v. Arn*, 474 U.S. 140 (1985); *Ayala v. United States*, 980 F.2d 1342 (10th Cir. 1992).

Dated this 27th day of January, 1999.

Claire V. Eagan
CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

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

27th Day of January, 1999.

Andrew M. Collins

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JAN 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Veterans Affairs,)

Plaintiff,)

v.)

ERIN D. NICHOLS, a single person;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)

Defendants.)

ENTERED ON DOCKET
JAN 27 1999
DATE _____

CIVIL ACTION NO. 98-CV-0885-BU (E)

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27th day of January,
1999. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern
District of Oklahoma, through Phil Pinnell, 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; the Defendant, Erin D. Nichols, a single person, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the
Defendant, Erin D. Nichols, a single person, was served with Summons and Complaint by
certified mail, return receipt requested, delivery restricted to the addressee on November 23,
1998.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma,
and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on

(9)

December 8, 1998; that the Defendant, Erin D. Nichols, a single person, has failed to answer and her 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 Nineteen (19), Block One (1), MAPLEWOOD THIRD ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on September 30, 1996, the Defendant, Erin D. Nichols, a single person, executed and delivered to the United States of America, acting on behalf of the Secretary of Veterans Affairs, her mortgage note in the amount of \$42,500.00, payable in monthly installments, with interest thereon at the rate of 8.25 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Erin D. Nichols, a single person, executed and delivered to the United States of America, acting on behalf of the Secretary of Veterans Affairs, a real estate mortgage dated September 30, 1996, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on September 30, 1996, in Book 5848, Page 2664, in the records of Tulsa County, Oklahoma, and was re-recorded to show correction of dollar amount of principal sum on May 28, 1997, in Book 5918, Page 2448, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Erin D. Nichols, 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 \$42,334.57, plus administrative charges in the amount of \$225.00, plus penalty charges in the amount of \$29.54, plus accrued interest in the amount of \$4,977.15 as of July 27, 1998, plus interest accruing thereafter at the rate of 8.25 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$10.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of 1998 ad valorem taxes in the amount of \$478.00, plus penalties and interest. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, Erin D. Nichols, a single person, is in default and therefore has no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment against Defendant, Erin D. Nichols, a single person, in the principal sum of \$42,334.57, plus administrative charges in the amount of \$225.00, plus penalty charges in the amount of \$29.54, plus accrued interest in the amount of \$4,977.15 as of July 27, 1998, plus interest accruing thereafter at the rate of 8.25 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 in the amount of \$10.00 (fee for recording Notice of Lis Pendens), 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 Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$478.00, plus penalties and interest, by virtue of 1998 ad valorem taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Erin D. Nichols, a single person, 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 appraisal 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 Defendant, County Treasurer, Tulsa County, Oklahoma;

Third:

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 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


PHIL PINNELL, OBA #7169
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-0885-BU (E) (Nichols)

PP:cas

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

JAN 26 1999 *[Handwritten signature]*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARKIE K. GARNER, individually and)
on behalf of his natural son,)
JESSIE J. JOHNSON)

Plaintiff,)

vs.)

No. 98-C-742-C *[Handwritten mark]*

THE DEPARTMENT OF HUMAN)
SERVICES of the City of Pryor, Oklahoma,)
ELLEN HAYES, EARNEST E. "GENE")
HAYNES, WENDY BIGHORSE, and TERRY)
MCBRIDE)

Defendants.)

FILED ON DOCKET
DATE **JAN 27 1999**

ORDER

On September 29, 1998, Markie Garner, a state prisoner, filed a pro se civil rights complaint seeking damages, a declaratory judgment, and an injunction, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202, and he contemporaneously filed a motion to proceed in forma pauperis in this Court. In an Order dated October 16, 1998, the Court granted Garner's motion for leave to proceed in forma pauperis. All defendants, except for Earnest Haynes, subsequently filed motions to dismiss. While these motions were pending, Garner filed a motion to dismiss all defendants, except for Haynes, on December 14. By way of minute order entered on December 31, the Court ordered these defendants dismissed from the present action. With respect to defendant Haynes, Garner filed a request with the Clerk to enter default. Because the record demonstrated that service had been received by a person presumably authorized to accept service on Haynes' behalf, the Clerk entered

default against Haynes on December 31 for failure to plead or otherwise defend. On January 6, 1999, the Court received a request from Garner to enter default judgment against Haynes.

In his complaint, Garner alleged a deprivation of his and his son, Jessie Johnson's, constitutional rights arising out of a deprived/juvenile action in which his son was removed from his son's mother. Defendant, Department of Human Services, is an agency of the State of Oklahoma, and the individual defendants, including Haynes, are state employees, who are sued only in their official capacities. However, the complaint is not clear as to exactly how defendants violated plaintiffs' constitutional rights, and all events complained of in the present action appear to have occurred prior to February 13, 1996, when the deprived/juvenile action was dismissed.¹

In light of the fact that all defendants, except for Haynes, have been dismissed and that default has been entered with respect to Haynes, the Court must determine whether it is appropriate to enter default judgment against Haynes for the requested relief, which includes an injunction and money damages. Having reviewed the complaint and all materials contained in the record, the Court concludes that the present case must be dismissed with respect to the single remaining defendant, Haynes, notwithstanding the fact that default has been entered. Although the Court would have expected some form of responsive pleading from Haynes, if he were in fact served, the Court finds, for the reasons stated below, that Garner's claims against Haynes are frivolous. See Olson v. Stotts, 9 F.3d 1475, 1476 (10th Cir. 1993) (a claim is frivolous if the factual contentions supporting the claim are 'clearly baseless,' or the claim is based on a legal theory that is 'indisputably meritless.').

¹ The Court recognizes that several potential grounds exist on which to grant a Rule 12(b)(6) motion to dismiss, such as the statute of limitations and failure to specifically allege constitutional violations committed by Haynes, if such a motion had been presented. However, it is unnecessary for the Court to consider the possible defects in Garner's complaint since it is clear, as explained below, that Haynes is entitled to Eleventh Amendment immunity.

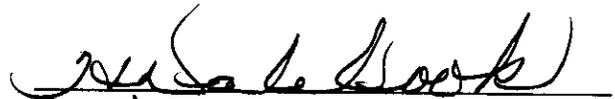
Garner represents that Haynes “is the duly elected District Attorney of Mayes County, Oklahoma,”² and, as noted above, Haynes is being sued only in his official capacity. However, it is clear that, as a district attorney sued in his official capacity, Haynes is entitled to Eleventh Amendment immunity. Laidley v. McClain, 914 F.2d 1386, 1391-92 (10th Cir. 1990) (under Oklahoma law, district attorney is an arm of the state). That is, since Haynes is a state officer, Garner, “in effect, is bringing his claim against the state of Oklahoma. Such a claim is barred by the Eleventh Amendment, which prohibits bringing an action for damages against a state in federal court.” Arnold v. McClain, 926 F.2d 963, 966 (10th Cir. 1991). Thus, to the extent that Garner’s complaint seeks damages against Haynes, such a claim is clearly frivolous. Further, the Court finds no basis for applying the narrow exception to Eleventh Amendment immunity permitting the entry of an injunction to prevent the continuing violation of federal law. It appears from the complaint that the last act complained of involving Haynes occurred in February 1996, and there is no allegation that Haynes is continuing to deprive Garner of his rights under federal law. The request for an injunction is therefore frivolous. See Neitzke v. Williams, 109 S.Ct. 1827, 1833 (1989) (claims are frivolous where it is clear from face of the complaint that defendant is entitled to immunity); Krueger v. Reimer, 66 F.3d 75, 76-77 (5th Cir. 1995) (where district attorney is entitled to absolute prosecutorial immunity, plaintiff’s civil rights action is frivolous and may be dismissed under § 1915); Clark v. State of Georgia Pardons and Paroles Board, 915 F.2d 636, 641 n.2 (11th Cir. 1990) (absolute immunity of defendant justifies dismissal of claim as frivolous under § 1915).

² It is not known whether Haynes continues to occupy the position of district attorney of Mayes County.

As the frivolity of the present action against Haynes is obvious and clear from the face of the complaint, sua sponte dismissal is proper under 28 U.S.C. § 1915(e)(2)(B)(i). The fact that the Clerk has entered default against Haynes does not alter this conclusion since § 1915(e)(2) provides that the court "*shall* dismiss the case *at any time*" if the Court determines that the action is frivolous.

Accordingly, the Clerk's entry of default against Haynes is hereby set aside, and the present action is hereby DISMISSED as frivolous, pursuant to § 1915(e)(2)(B)(i).

IT IS SO ORDERED this 25th day of January, 1999.


H. DALE COOK
Senior United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JAN 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SAINT FRANCIS HOSPITAL,)
)
 Plaintiff,)
)
 v.)
)
 LYNN MONTGOMERY, M.D.,)
)
 Defendant.)

Case No. 97-CV-1006-C (E)

ENTERED ON DOCKET

DATE ~~JAN 27 1999~~

REPORT AND RECOMMENDATION

The Court has referred to the undersigned plaintiff's Motion to Enforce Court Order, or in the Alternative, To Enforce Settlement Agreement. (Docket #31.) For the reasons set forth below, the undersigned recommends that the motion be granted and that default judgment be entered against defendant.

On November 12, 1997, plaintiff Saint Francis Hospital filed its Complaint against defendant Lynn Montgomery, M.D., for collection of two notes, return of equipment, and surrender of accounts receivable records. (Docket #1.) Defendant answered and counterclaimed on December 22, 1997, denying liability and seeking unspecified damages for alleged misrepresentations. (Docket #4.)

The discovery cutoff date was July 6, 1998. According to plaintiff, defendant represented to plaintiff a number of times during the spring and early summer 1998 that he would appear voluntarily for a deposition in Tulsa. When defendant would not agree to a date, plaintiff noticed defendant for a July 2, 1998 deposition. On July 1, defendant filed a motion for protective order (Docket #25), in which counsel for defendant indicated that Dr. Montgomery did not wish to travel to Oklahoma for a deposition, that he intended to file for bankruptcy protection to discharge the claimed obligation

to plaintiff which is the subject of this action,¹ and that “there is no legitimate reason for the continuation of discovery.” (Docket #25, at 1.) A hearing was held on the motion for protective order on July 27, 1998. In ruling on the motion, the undersigned gave defendant the option to present himself in Tulsa for deposition on or before August 14, or on or before that date to confess judgment to plaintiff’s claims and dismiss his counterclaim. (Minutes dated July 27, 1998.)

Defendant did not present himself for deposition by August 14. Thereafter, defendant dismissed his counterclaim (Docket #28), but did not confess judgment. Instead, the parties began settlement negotiations. On September 1, plaintiff offered to settle the case. (Docket #31, Ex. A.) On September 3, defendant’s counsel confirmed in writing that defendant agreed to the settlement terms outlined in the September 1 letter. (Docket #31, Ex. B.) On September 9, however, defendant conveyed through counsel that he wished to renege on his obligation to execute a confession of judgment because this would result in a tax liability he had not previously considered. (See Docket #31, Exs. C and E; Docket #34, at 1-2.) Defendant has refused to execute a confession of judgment, or to enter into the settlement agreement.

Plaintiff filed its Motion to Enforce Court Order on September 21, 1998. Since then, the parties have attempted to resolve the tax issue, to no avail. Hearings and a conference with the undersigned in recent months (November 17, 1998 and January 11, 1999) have also proved unsuccessful in resolving the dispute. To date, Dr. Montgomery has never presented himself for deposition.

¹ As late as January 20, 1999, defendant’s counsel continued to state the intention of defendant to file for bankruptcy protection.

In the latest hearing on the Motion to Enforce Court Order on January 11, 1999, plaintiff requested entry of default judgment.² The undersigned found that defendant had agreed to the terms of settlement contained in the September 1 letter, and gave the defendant the option of executing by January 15 the settlement agreement and related documents drafted by plaintiff to reflect the September 3 agreement, or the undersigned would recommend that the Court enter default judgment. The undersigned has been advised that defendant did not execute the settlement agreement and related documents, and that counsel for defendant has "been instructed not to do anything further in these proceedings." (January 20, 1999 letter from Joseph R. Farris, counsel for defendant, to Kara M. Dorssom, counsel for plaintiff.)

Pursuant to Fed. R. Civ. P. 37(b) and (d), the Court may enter default judgment for failure of a party to obey an order regarding his deposition. See FDIC v. Daily, 973 F.2d 1525, 1530 (10th Cir. 1992). Entry of default judgment is in the discretion of the Court. Fed. R. Civ. P. 37(b) and (d); Daily, 973 F.2d at 1530. Here, defendant's failure to appear for deposition was the result of a deliberate, dilatory course of conduct on the part of defendant himself, not his counsel. The actions of defendant have prejudiced plaintiff (adversary process halted)³ and have interfered with the judicial process (delay in excess of six months). Defendant ignored a court order regarding discovery. The undersigned finds, from a review of the entire record, that defendant's noncompliance was willful and that default judgment is an appropriate sanction for the conduct. Lesser sanctions would not be appropriate based on defendant's stated intention to participate no further in these proceedings.

² It appears that the equipment in issue has been returned and the accounts receivable are no longer an issue. Plaintiff seeks judgment on the two notes for the sum of \$359,755.61, plus interest at the rate of 18% per annum from July 31, 1997, plus costs and attorneys' fees.

³ To plaintiff's credit, its counsel worked for six months to attempt to resolve this matter.

For the foregoing reasons, the undersigned recommends that the Motion to Enforce Court Order, or in the Alternative, To Enforce Settlement Agreement (Docket #31) be granted, and that default judgment be entered against defendant.

It is further recommended that it would be appropriate for this Court to exercise its discretion, subject to any objections to this Report and Recommendation, not to hold an evidentiary hearing as to the Rule 37 sanction of entering judgment for the amount of the indebtedness on the two notes as stated in the Complaint, plus interest. Daily, 973 F.2d at 1531-31. However, due process requires that defendant be permitted to exercise his right to respond as to costs and attorneys' fees. Id.

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 *de novo*, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must do so within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** See Thomas v. Arn, 474 U.S. 140 (1985); Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992).

Dated this 26th day of January, 1999.

Claire V Eagan
CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

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

27 Day of Jan, 1999.
[Signature]

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

ENTERED ON DOCKET
JAN 27 1999

CAROL DOYAL,
Plaintiff,

vs.

OKLAHOMA HEART, INC.
Defendant.

CASE NO. 97-CV-805-C

FILED
JAN 26 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the motion for summary judgment filed by the defendant, Oklahoma Heart, Inc., on plaintiff's claims under The Americans With Disabilities Act, 42 U.S.C. § 12101-12213. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for the defendant Oklahoma Heart, Inc., and against the plaintiff, Carol Doyle.

IT IS SO ORDERED this 26th of January, 1999.



H. DALE COOK
Senior, United States District Judge

44

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

FILED

JAN 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CENTRILIFT, a division of)
BAKER HUGHES OILFIELD)
OPERATIONS, INC.,)

Plaintiff,)

vs.)

KEITH GUCWA, an individual,)

Defendant.)

ENTERED ON DOCKET
DATE **JAN 27 1999**

Case No. 98-CV-0368-C (J)

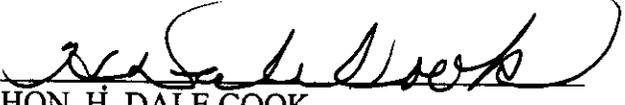
ADMINISTRATIVE CLOSING ORDER

The Court has been advised that the Parties have entered into a written settlement agreement, and pursuant to that agreement have requested the Court retain jurisdiction for a period necessary to enforce the agreed settlement.

THEREFORE, good cause having been shown, it is hereby ordered that the Clerk administratively close 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, judgment or order, or for any other purpose required to obtain a final determination of the litigation.

IF, by January 20, 2004, the Parties have not reopened this action for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 25th day of Jan, 1999.


HON. H. DALE COOK
UNITED STATES DISTRICT COURT JUDGE

3. Also in January 1995, the defendant was converting its billing and accounting system from outside the company to in-house. This involved establishing a new in-house computer accounting and billing system. The conversion to the in-house computer system caused an overall stressful work environment for the employees at Oklahoma Heart. The conversion was to be completed in April, 1995.

4. Plaintiff was in charge of managing the office staff who would be operating the new computer system. The increased work responsibilities caused plaintiff severe stress, anxiety and fatigue. In March 1995, plaintiff broke out in tears at work and spoke to her supervisor, Steve Struttman, about her feelings that she was overworked and its affect on her. Mr. Struttman is the Office Administrator for Oklahoma Heart. Between January and April, 1995, plaintiff contends her job-related stress and anxiety caused her difficulty with memory, concentration, thinking, and motivation. Plaintiff testified by deposition:

I was working nights and weekends to try to keep up with the multiple responsibilities I had been given to the point that I think that I was having trouble concentrating because I had so many things going on. There's multi-tasking and then there's overwhelming. And I was just like in a cloud and I just couldn't cope as well.

Doyle Deposition p. 8

5. Plaintiff contends the job-induced stressed caused her to suffer a mental impairment which substantially limited her major life functioning. Plaintiff testified that she would go home from work and just go to bed. Plaintiff stated that she stopped eating, she was losing weight, and she lacked the motivation to leave her home. Plaintiff stated that she stopped caring about her physical appearance.

6. Mr. Struttmann suggested that plaintiff take the remainder of the week off work. Plaintiff sought psychiatric treatment during her time off. Her psychiatrist Dr. Katherine Klaasen, prescribed zoloft and xanax for depression and anxiety, and suggested that plaintiff negotiate a reduced workload. On her return to work, plaintiff met with Mr. Struttmann and Dr. Wayne Leimbach, the managing physician at Oklahoma Heart, and informed them that she felt stressed and overworked. Dr. Leimbach suggested that plaintiff's position be restructured by eliminating her duties as Business Office Manager and placing her as the Human Resource Manager. A new employee was to be hired to manage the front desk and a nurse was to be promoted and assigned to supervise the back desk. Plaintiff readily agreed to the job restructuring. Plaintiff's reduced workload was accompanied by a reduction in pay. Dr. Leimbach testified that he created the new position for plaintiff because he believed that plaintiff was still "a valued employee" and because plaintiff had informed them that she could not perform the job of Business Office Manger. Dr. Leimbach testified that it was not created to accommodate any type of perceived disability.

7. After plaintiff's job responsibilities were reduced to Human Resources Manager, Dr. Leimbach and Mr. Struttman received complaints about plaintiff's job performance from other employees and other division managers. Dr. Leimbach testified that the major problem which was brought to his attention was that plaintiff had destroyed certain medical records. Dr. Leimbach testified:

I guess somebody had said she didn't realize they were medical records. . . . Carol had been working in the medical field for a long time and there was no way she could not know that. And at that point in time, now we're dealing with a situation that the practice is vulnerable. I have somebody's patients records get thrown away; you know, that is a major threat to the practice and as well as poor care for that patient.

And at that point when asking, you know, do they see this can be fixable, they did not see this fixable . . . She has clearly access to all medical records; she's in there working. And that's when the decision was finally made that she needed to be terminated.

Leimbach deposition p. 61

8. Plaintiff admits that after she was reassigned to the position of Human Resource Manager she had difficulty remembering the names and qualifications of people she had interviewed for jobs at Oklahoma Heart. Plaintiff also admits that she was still having difficulty concentrating or focusing on her work which impaired her ability to perform her work expeditiously.

9. Plaintiff contends that one of the staff physicians at Oklahoma Heart authorized her to destroy medical records.

10. Plaintiff testified that she felt she had been wrongfully terminated because she believed her depression and anxiety had improved after she was assigned to the position as Human Resource Manager. Plaintiff stated that when she took the medication prescribed by Dr. Klaasen "it helped tremendously."

11. On May 16, 1995, approximately three weeks after plaintiff's job restructuring, defendant terminated plaintiff's employment. Mr. Struttman provided plaintiff with a written list of reasons for her termination, which contained the following:

- 1). Follow through problems with completing certain functions and projects; unmotivated at times.
- 2). Management staff does not have confidence in her abilities to work as liaison or mediator with management and staff.
- 3). Experiencing difficulty in making decisions.
- 4). Many cases of poor judgment, i.e., discarding medical records, screening applicants.
- 5). Memory lapses in short term, current.

6). Employee confidentiality.

12. The defendant did not hire a replacement for plaintiff's position. Oklahoma Heart has not employed a Human Resources Manger since May 16, 1995. After plaintiff was terminated she took a vacation in Hawaii and enjoyed herself. Plaintiff continued seeing a psychiatrist on occasion after her employment termination with Oklahoma Heart.

13. Plaintiff contends that she was fired because the defendant perceived her as having a "mental impairment." The defendant asserts that plaintiff was fired for cause both because of her poor job performance as the Human Resource Manager and because she destroyed patients' medical records.

14. Upon receiving notice of termination, plaintiff did not request any additional job restructuring or accommodations.

CONCLUSIONS OF LAW

The primary issue to be determined is whether plaintiff has a qualified disability within the meaning of the ADA. The ADA prohibits discrimination against a "qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a).

Under 42 U.S.C. § 12102(2), the term "disability" means:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

To establish a claim under the ADA, the plaintiff must show that: (1) she is a disabled person within the meaning of the ADA; (2) she is qualified, i.e., able to perform the essential functions of the job, with or without reasonable accommodations; and (3) that her employer discriminated against her in its employment decision because of her alleged disability. *See, e.g. Siemon v. AT&T Corp.*, 117 F.3d 1173, 1175 (10th Cir. 1997).

In this case, the evidence establishes that plaintiff was not qualified to perform the essential job functions of Business Office Manager on January 1, 1995. The evidence is that plaintiff requested to be relieved from that position. An essential function of Business Office Manager was to oversee the new in-house computer billing and accounting system. It is undisputed that Plaintiff was unable to oversee the computer system in addition to performing the other duties of Business Office Manager. There were no accommodations that Oklahoma Heart could provide which would permit plaintiff to perform the job of Business Office Manager. At her request, plaintiff was then re-assigned to Human Resources Manager. The evidence is also undisputed that plaintiff was unable to perform the essential function of Human Resource Manager. Oklahoma Heart received complaints from co-workers of errors in plaintiff's job performance, plaintiff mishandled job interviews, and plaintiff destroyed medical records. Plaintiff admits that she was unable to remember the names and qualifications of job applicants, which is the primary responsibility of a Human Resource Manager. Although the parties dispute whether she had received permission from one of the staff physicians to discard the medical records, it is undisputed that the managing physician, Dr. Leimbach, did not authorize the destruction of the records; and it was Dr. Leimbach who authorized plaintiff's termination. Moreover, Dr. Leimbach's actions were based on his belief that, as a departmental manager, plaintiff either knew or should have known that the medical records should

not have been destroyed. The Court finds and concludes that under the relevant material and undisputed evidence, plaintiff was terminated by Oklahoma Heart for cause and not because of their perception that she was suffering from a mental impairment within the meaning of the ADA.

Assuming that plaintiff's job-induced stress could be classified as a "qualified disability" under the ADA, the evidence does not support the conclusion that such stress substantially limited plaintiff's performance of a major life activity. In order for a physical or mental impairment to be "substantially limiting," the individual must be:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1).

In determining whether an individual is substantially limited in a major life activity, three factors should be considered: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent long term impact, or expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. § 1630.2(j)(2).

In her testimony, Doyle did not testify that she was unable to perform any major life activity. Doyle testified that she lost interest in herself and her job. Her testimony was that she lacked the motivation to perform daily tasks, not that she was incapable of performing those same tasks. Moreover, plaintiff's job-induced stress is isolated to the situation she faced at Oklahoma Heart by the over-all stressful environment which was caused by the conversion to the in-house computer systems. Mr. Struttman testified that everyone at Oklahoma Heart felt the anxiety and stress caused

by the conversion. Apparently it was only Doyle who experienced stress to the extent that she could not perform competently any job at Oklahoma Heart. There is no evidence that plaintiff suffered from a history of mental impairment or that plaintiff's stress would have long-term effects once she was in another job environment. In fact, the undisputed evidence is that after termination from Oklahoma Heart, plaintiff vacationed in Hawaii, enjoyed her vacation in Hawaii, and only visited with a psychiatrist on occasion.¹

The Court finds and concludes, based on the undisputed material and relevant evidence, that plaintiff's job-induced stress was situational, of short-term duration, and based upon stress caused by a particular job, under particular isolated circumstances.

ACCORDINGLY, IT IS THE ORDER OF THE COURT, that the motion for summary judgment filed by the defendant, Oklahoma Heart, Inc. should be and hereby is GRANTED.

IT IS SO ORDERED this 26th day of January, 1999.


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

¹ Plaintiff also testified that her job performance at Oklahoma Heart improved when she took her anti-depressant medication and maintained treatment with her psychiatrist. Under *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997), cert. granted (Jan. 8, 1999), such corrective measures can be considered in evaluating the substantiality of a limitation on a major life activity.

FILED

JAN 25 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

MARVIN SUMMERFIELD and)
ROBIN MAYES,)

Plaintiffs,)

v.)

Case No. 98-CV-0328B (EA)

MARK McCOLLOUGH, et al.)

Defendants.)

ENTERED ON DOCKET

ORDER

DATE ~~JAN 26 1999~~

UPON the Unopposed Application of the Plaintiffs for an Order dismissing Joel Thompson, Charlie Addington, Bob Lewandowski, Housing Authority of the Cherokee Nation, Housing Authority of the Cherokee Nation Board of Commissioners, Aylene Hogner, Sam Ed Bush, Stanley Joe Crittenden, Melvina Shotpouch, and Nick Lay, in both their individual and official capacities, filed herein, and for good cause shown,

IT IS HEREBY ORDERED that the above-referenced Defendants are hereby DISMISSED WITH PREJUDICE.

DATED this 25TH day of January, 1999.


JUDGE OF THE DISTRICT COURT

for Thomas R. Brett

122

FILED

JAN 25 1999

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

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

SANDHURST RESOURCES LIMITED,)
formerly known as TUCAN VENTURES,)
INC., A British Columbia Canadian)
corporation,)

Plaintiff,)

vs.)

Case No. 98-C-346-B

AMERICAN RESERVE ENERGY)
CORPORATION, an Oklahoma corporation,))
DAVID W. HOLDEN, individually,)
HOLLIMAN, LANGHOLZ, RUNNELS,)
HOLDEN, FORSMAN & SELLERS, an)
Oklahoma Professional Corporation, and)
DALE E. STEINKEUHLER, CPA,)

Defendants.)

ENTERED ON DOCKET

JAN 26 1999

ORDER

Before the Court is the motion to dismiss without prejudice filed by Plaintiff Sandhurst Resources Limited (Docket No. 19). The Court dismisses this action without prejudice with costs to be assessed against Plaintiff and each party to pay its own attorney fees. Any application for costs must be filed within fifteen (15) days from the date of this Order.

IT IS SO ORDERED this 25TH day of January, 1999.

For 
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

CP
UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TAMMY JOHNSON &)
GERALDINE QUINTON,)
individuals, plaintiffs)
v.)
TEXACO, INC., &)
its affiliate, PETROMAN)
INC., corporations, &)
ERIC ANDERSSEN,)
co-defendants.)

Case No. 97-CV-1063-M.

STIPULATION
TO DISMISS
WITH PREJUDICE.

ENTERED ON DOCKET

DATE JAN 26 1999

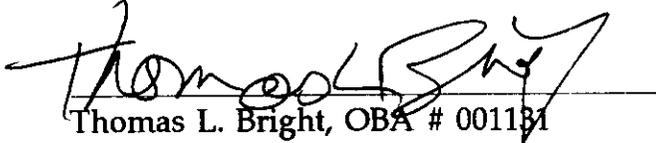
STIPULATION TO DISMISS WITH PREJUDICE.

Plaintiffs, TAMMY JOHNSON and GERALDINE QUINTON, and defendants, PETROMAN, INC. and ERIC ANDERSSEN, hereby stipulate under Federal Rule of Civil Procedure 41 to dismissal of this action with prejudice. The parties have agreed to bear their own costs and attorney fees and to not attempt to shift the burden of such costs and fees to the opposing party through the federal rules of civil procedure, or through state or federal cost or fee shifting laws.

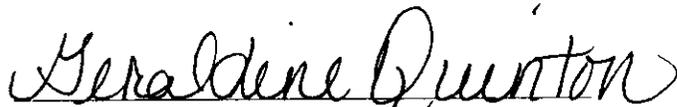
01/25-1999

Respectfully submitted,

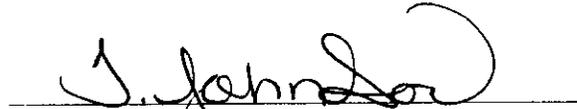
ATTORNEY FOR PLAINTIFFS
TAMMY JOHNSON and GERALDINE QUINTON:



Thomas L. Bright, OBA # 001131
ATTORNEY FOR PLAINTIFF
406 South Boulder, Suite 411
Tulsa, OK 74103-3825
Phone # 918-582-2233; fax 582-6106.

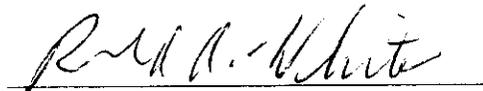


Plaintiff GERALDINE QUINTON.

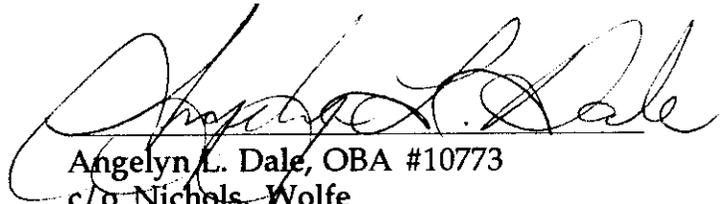


Plaintiff TAMMY JOHNSON.

ATTORNEYS FOR DEFENDANT:



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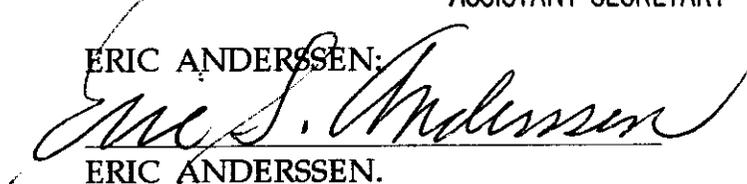
PETROMAN, INC.



PETROMAN, INC.

K. R. UPCHURCH
ASSISTANT SECRETARY

ERIC ANDERSSEN:



ERIC ANDERSSEN.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JAN 25 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT S. FLYNT,
SSN: 560-25-3137,

Plaintiff,

v.

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

Defendant.

Case No. 97-CV-0500-EA

ENTERED ON DOCKET

DATE JAN 26 1999

ORDER

Claimant, Robert S. Flynt, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.² In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals. Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

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 July 29, 1993, claimant applied for disability benefits under Title II (42 U.S.C. § 401 *et seq.*). Claimant's application for benefits was denied in its entirety initially (August 26, 1993), and on reconsideration (January 10, 1994). A hearing before Administrative Law Judge Stephen C. Calvarese (ALJ) was held August 10, 1994, in Tulsa, Oklahoma. By decision dated March 14, 1995, the ALJ found that claimant was not disabled at any time through the date of the decision. On April 23, 1997, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 404.981.

I. 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

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.

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, 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).

II. CLAIMANT'S BACKGROUND AND MEDICAL HISTORY

Claimant was born on July 31, 1956. He was 38 years old at the time of the administrative hearing in this matter. He has a high school education, and has worked as an oil field roustabout and pulling unit operator. Claimant alleges an inability to work beginning November 28, 1992, due to a back injury and constant pain in his lower back and legs. (R. 104-09)

The back injury to which claimant attributes his alleged disability occurred on November 28, 1992 (R. 67, 104), although claimant's medical records indicate that he may have had some prior back problems. (See R. 125) The injury occurred as a result of claimant's fall off of his truck. (R. 41, 124) Claimant's treating physician, William D. Smith, M.D., examined him after the fall and reported an "unremarkable" neurological exam and "negative" x-rays of the lumbar spine. (R. 124) A CT scan of the lumbar spine suggested a herniated disk at the L5-S1 level, but the L3 and L4 disks were normal. (R. 128) A myelogram confirmed the presence of a herniated disk at the L5-S1 level (R. 130, 132), and, on December 31, 1992, Dr. Smith performed an L5-S1 laminectomy and disk

excision on claimant. (R. 137) He reported that claimant's post-operative course was satisfactory and that claimant achieved complete pain relief. (R. 135)

In February 1993, Dr. Smith advised claimant to increase his walking activity and to continue postural exercises. (R. 123) In March 1993, Dr. Smith reported that straight leg raising tests and a neurological examination of claimant were unremarkable. He advised claimant to increase his activity level. He also released claimant to work, but restricted him to lifting no more than 60 pounds. (R. 123) Claimant missed an appointment with Dr. Smith scheduled for April 5, 1993. (R. 123)

In July 1993, film studies of the lumbar spine showed generalized narrowing of the L5-S1 disk space, and an MRI of claimant's lumbar spine revealed some low grade degenerative disk changes at the L4-5 and L5-S1 levels as well as soft tissue prominence posterior to the L5-S1 disk space compatible with some scarring and fibrosis. Dr. Smith could not exclude a small recurrent disk herniation on the right at the L5-S1 level, but he found no evidence of herniated disk disease at the L4-5 level (despite some mild bulging). Otherwise, claimant's lumbar spine appeared within normal limits. (R. 140)

Claimant went to see Dr. Smith again in August 1993. Claimant complained of back pain in spite of the medication he was taking. (R. 123) An electromyogram performed on August 23, 1993 failed to reveal radiculopathy in claimant, and a lumbar myelogram performed on September 15, 1993 was "unremarkable." Claimant was advised at that time to use a lumbar brace. (*Id.*) He reported to Dr. Smith on November 4, 1993 that he had not obtained the brace and wanted further surgery. A neurological examination was negative although x-rays revealed narrowing of the lumbar sacral

space. Dr. Smith told claimant that surgical fusion should not be considered unless the claimant was willing to obtain the brace and unless the brace was at least partially helpful. (R. 122)

In January 1994, Dr. Smith reported that x-rays of claimant's spine showed a narrowed lumbosacral interspace and lumbosacral fusion. (R. 147) Claimant stated that his back pain improved with use of the brace, and he demonstrated satisfactory lumbar motion in his low lumbar back. Straight-leg-raising tests and a neurological examination were negative. (Id.)

In March 1994, claimant's straight leg raising tests were again negative when he entered the hospital for a second back surgery. (R. 142) Dr. Smith performed a lumbosacral fusion on claimant's back. (R. 143) Dr. Smith diagnosed claimant as having degenerative lumbosacral disk disease. When claimant was discharged from the hospital, Dr. Smith noted that claimant's post-operative course had been satisfactory, and claimant could walk in a lumbar brace. (R. 141) On March 31, 1994, Dr. Smith advised claimant to continue using the brace when walking and to avoid fatigue and prolonged sitting. (R. 145) On May 16, 1994, Dr. Smith noted that claimant was doing satisfactorily in his brace and x-rays revealed that fusion was progressing. (R. 152) On June 27, 1994, x-rays revealed signs of progressive fusion, and Dr. Smith recommended that the claimant wear his back brace at all times. However, Dr. Smith found no objective abnormalities. (Id.)

Dr. Smith completed a residual functional capacity evaluation on August 10, 1994. He listed claimant's functional limitations to include sitting, standing and walking for only one hour each at any one time, and no more than two hours total for each in an eight-hour workday. He stated that claimant could lift and carry up to five pounds continuously, up to ten pounds frequently and 20 pounds occasionally, but never more than 20 pounds. Claimant could use his hands for simple

grasping and fine manipulation and he could frequently reach, but he could not bend, squat, crawl, or climb at all. (R. 153)

Dr. Smith's assessment may be compared with two other assessments that were completed in 1993 when the Commissioner denied claimant's disability application. On August 26, 1993, Thurma Jo Fiegel, M.D., reported that claimant could occasionally lift and/or carry up to 50 pounds; he could frequently lift and/or carry up to 25 pounds, and he could sit, stand and/or walk for a total of about six hours in an eight-hour workday. (R. 72) She stated that post-operative care has been satisfactory and claimant was ambulating without pain. She specifically wrote: "Pain does not further restrict." (*Id.*) At that time, claimant could climb, balance, kneel crouch and crawl frequently; he could stoop occasionally. (R. 73)

On reconsideration of claimant's disability application, Luther M. Woodcock, M.D., assessed claimant's RFC in December 1993. He reported that claimant could occasionally lift and/or carry up to 20 pounds; he could frequently lift and/or carry up to ten pounds, and he could sit, stand and/or walk for a total of about six hours in an eight-hour workday. His assessment of claimant's postural limitations was the same as Dr. Fiegel's. In contrast to Dr. Fiegel's report, he stated that "Pain does affect RFC." (R. 87)

III. REVIEW OF THE ALJ'S DECISION

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant, a younger individual, had the residual functional capacity (RFC) to perform a full range of light work. The ALJ concluded that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his 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. 28-29.) Claimant asserts as error that the ALJ: (1) violated established legal standards for evaluating opinions from treating physicians; (2) violated established legal standards for evaluating the claimant's credibility; and (3) made a finding with regard to the claimant's RFC that is not supported by the evidence.

A. Treating Physicians

Claimant specifically alleges that, under the controlling law, Dr. Smith's assessment of his RFC must be given controlling weight. Pursuant to regulations adopted in 1991, a treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments, including the claimant's symptoms, diagnosis and prognosis, what claimant can do despite the claimant's impairment, and any physical or mental restrictions. 20 C.F.R. § 404.1527(a)(2). The Commissioner will give controlling weight to that type of opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. Id. § 404.1527(d)(2). A treating physician may also proffer an opinion that a claimant is totally disabled. However, such an opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Commissioner. Id. § 404.1527(e)(2). Thus, Dr. Smith's post-hearing opinion that claimant cannot perform full-time work is not binding on the Commissioner in making his ultimate determination of disability.

The ALJ in this matter remarked that he had given every consideration to Dr. Smith's opinion, but "the opinion of total disability is beyond the purview of a physician's medical expertise." (R. 26.) He specifically found that Dr. Smith's "assessment of total inability to work is not supported by

objective findings and laboratory data which would indicate the claimant's remaining residual functional capacity for work (20 CFR 404.1527)." (Id.) The ALJ set out those objective findings and laboratory data in a detailed recital of the evidence, including other reports and findings by Dr. Smith. (R. 22-24) The findings and data contain numerous references to unremarkable or negative tests and examinations, as well as the lack of objective abnormalities after claimant's two operations. Significantly, the ALJ noted that claimant was released to work after the first operation (R. 22-23), and improved with the use of a back brace. (R. 24) Claimant's initial failure to use a back brace as advised by Dr. Smith is noted in the ALJ's opinion. (R. 23) A failure to follow prescribed treatment is a legitimate consideration in evaluating the severity of an alleged impairment. Decker v. Chater, 86 F.3d 953, 955 (10th Cir. 1996). The ALJ concluded:

Objective medical evidence shows that the claimant is status post lumbar laminectomy and disk excision L5-S1 and a lumbosacral fusion. Although he has continued pain and requires that use of a brace, Dr. Smith indicated on June 27, 1994, that examination failed to reveal any objective abnormalities and that x-rays showed signs of a progressive fusion.

(R. 24) It was only after the hearing that claimant went to Dr. Smith and obtained the RFC assessment. The ALJ left the file open for ten days, and claimant submitted the assessment post-hearing. (See R. 64-66)

It is the law in the Tenth Circuit that substantial weight must be given to the opinion of a treating physician unless good cause is shown for rejecting it. Goatcher v. United States Dep't of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995) (citations omitted.) A treating physician's report may be rejected if it is brief, conclusory, and unsupported by medical evidence. Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988); see also Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). If the treating physician's opinion is to be disregarded,

specific, legitimate reasons for doing so must be set forth. Eggleston v. Bowen, 851 F.2d 1244, 1246-47 (10th Cir. 1988). As set forth above, the ALJ set forth specific, legitimate reasons for disregarding Dr. Smith's conclusory statement on the RFC assessment form submitted post-hearing that claimant could not perform full-time work. Those reasons constitute good cause for rejecting the opinion. Since Dr. Smith's opinion was not well-supported by clinical and laboratory diagnostic techniques and it is not consistent with other substantial evidence in the record, the ALJ was not required to give it controlling weight.

B. Pain Analysis

With regard to claimant's allegations of pain, claimant asserts that the ALJ improperly rejected claimant's testimony, as well as Dr. Smith's instructions to claimant and evaluation of his functional limitations. Claimant also points out the observations of an interviewer for the Social Security Administration who remarked that claimant walked slowly and had to rise from his chair and move around during the 30-minute interview.

The ALJ fully considered claimant's subjective complaints. In so doing, he specifically referenced the expanded regulations for evaluating pain, as set forth in 20 C.F.R. § 404.1529, as well as Social Security Ruling 88-13 and the criteria set forth in Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987). He analyzed the relevant factors to determine the weight to be given claimant's subjective allegations of pain, and, as required by Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995), the ALJ made express findings as to the credibility of claimant's objective complaints of disabling pain, with an explanation of why specific evidence relevant to each factor led to the conclusion that claimant's subjective complaints were not fully credible. (R. 25) He specifically discussed claimant's descriptive testimony of the alleged pain, his daily activities, his medications and their side effects, and the ALJ

contrasted the claimant's descriptions with the clinical findings. (Id.) The ALJ acknowledged that claimant experiences some pain and restrictions in his range of motions, but correctly noted that "an individual does not have to be entirely pain free in order to have the residual functional capacity to engage in substantial gainful activity." (R. 26) Indeed, a finding of disability requires more than the inability to work without pain. Gossett v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988). The record supports the ALJ's conclusion that claimant could perform light work activities despite his pain. An ALJ's credibility determination evaluating non-exertional impairments such as pain will not be disturbed when supported by substantial evidence. See Diaz v. Secretary of Health and Human Servs., 898 F.2d 774, 777 (10th Cir. 1990).

C. RFC Assessment

Finally, claimant maintains that he cannot sit, stand or walk for six hours in an eight-hour workday and thus, the ALJ's assessment of his RFC is wrong. He relies on Dr. Smith's assessment and other evidence indicating that the fusion in his lumbar spine is not completely healed. As discussed above, Dr. Smith's assessment is not entitled to controlling weight. That the ALJ chose to rely, in part, on the RFC assessments of two physicians authorized by the Commissioner rather than the assessment of Dr. Smith is not improper. (See R.22) That claimant himself testified that he had looked for a job as an oil field environmental inspector after his alleged onset date of November 28, 1992, and that he could have performed the job if it had not been withdrawn due to a lack of funding (R. 39-40), is particularly telling.

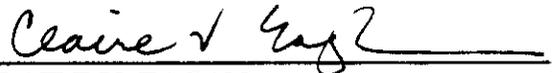
The ALJ found that claimant was impaired by some pain which was severe enough to reduce claimant's ability to work, but that claimant has the residual functional capacity to perform a full range of light work. (R. 26) Light work is defined as involving the lifting of no more than twenty

pounds, with frequent lifting of objects weighing up to ten pounds, and it requires a good deal of walking or standing, or it may involve sitting most of the time with some pushing and pulling of arm or leg controls. 20 C.F.R. § 416.967(b). The Court finds that the ALJ's assessment of claimant's RFC was properly supported by the record.

IV. CONCLUSION

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

DATED this 25th day of January, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

JAN 25 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DALE R. DILLINER,)
SSN: 445-38-4044)

Plaintiff,)

v.)

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

Defendant.)

Case No. 97-CV-580-J

ENTERED ON DOCKET

DATE JAN 26 1999

ORDER^{1/}

Now before the Court is Plaintiff's appeal of a decision by the Commissioner of the Social Security Administration ("Commissioner") denying him disability insurance benefits under Title II of the Social Security Act. The Administrative Law Judge ("ALJ"), James D. Jordan, denied benefits at step four of the sequential evaluation process used by the Commissioner to evaluate disability claims.

The ALJ determined that Plaintiff retained the residual functional capacity ("RFC") to perform a full range of sedentary work and found that Plaintiff could return to his past relevant work as a union representative. On appeal, Plaintiff argues (1) that the ALJ placed undue emphasis on Plaintiff's pre-surgery (i.e., pre-1994) medical records, (2) that the ALJ improperly evaluated Plaintiff's subjective pain complaints, (3) that the ALJ erred in relying on Plaintiff's union representative job as past work because there was no evidence that the Plaintiff's job would be available to him, (4)

^{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.

(13)

that the ALJ erred because there is not substantial evidence to support a finding that Plaintiff can perform the union representative job as he performed it in the past, and (5) that the ALJ failed to properly develop the record. The Court has meticulously reviewed the entire record and for the reasons discussed below the Commissioner's decision is **AFFIRMED**.

I. STANDARD OF REVIEW

A 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 will be found disabled

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). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.^{2/}

^{2/} 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 the claimant to 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. § 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 those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). See 20 C.F.R. § 404.1525. 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 combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional

The standard of review applied by this Court to the Commissioner's disability determinations is set forth in 42 U.S.C. § 405(g). According to § 405(g), "the finding of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ultimate 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.

To determine whether the Commissioner's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. 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).

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d

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, 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when he/she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

II. DISCUSSION

A. FIRST ALLEGED ERROR – UNDUE EMPHASIS ON PRE-SURGERY EVIDENCE

The ALJ did not give undue weight to Plaintiff's pre-surgery records. The Court finds that the ALJ considered the entire medical record and gave each portion of the record the balanced weight to which it was entitled. The Court has reviewed the medical evidence and the ALJ's thorough opinion. Based on this review, the Court finds that the ALJ's RFC determination is supported by substantial evidence.

B. SECOND ALLEGED ERROR – INCORRECT ANALYSIS OF PLAINTIFF'S SUBJECTIVE PAIN COMPLAINTS

Plaintiff argues that in assessing Plaintiff's subjective pain complaints, the ALJ violated SSR 96-7p. Plaintiff also argues that the Tenth Circuit's holding in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987) does not apply in this case. The Court does not agree.

Luna and SSR 96-7p are consistent with each other in that they outline the procedure an ALJ should use to evaluate a claimant's subjective pain complaints. Plaintiff makes general allegations without identifying how the ALJ failed to properly apply either SSR 96-7p or Luna. Again, the Court has reviewed the medical evidence and the ALJ's thorough opinion. Based on this review, the Court finds that the ALJ's

credibility determination regarding Plaintiff's subjective pain complaints is supported by the correct analysis and it is also supported by substantial evidence.

C. THIRD AND FOURTH ALLEGED ERRORS - THERE IS NO EVIDENCE THAT PLAINTIFF'S UNION REPRESENTATIVE JOB WOULD BE AVAILABLE TO HIM OR THAT HE RETAINS THE RFC TO PERFORM THE JOB AS HE ACTUALLY PERFORMED IT IN THE PAST

Plaintiff worked as a union representative/business affairs manager for a meat packers' union. Plaintiff alleges that he was hired for the job by the union president, and that when the president is replaced through an election, the new president often picks a new representative/business manager. Thus, Plaintiff argues that the ALJ erred in using his union representative job as past relevant work because there is no evidence that his particular union representative job would be available to him. Plaintiff misunderstands the nature of past relevant work for social security disability purposes.

A claimant can return to his past relevant work, even though his former job is no longer available, as long as he can still do the type of job he did in the past. Jozefowicz v. Heckler, 811 F.2d 1352, 1356 (10th Cir. 1987); Andrade v. DHHS, 985 F.2d 1045, 1051 (10th Cir. 1993). It is, therefore, irrelevant whether Plaintiff could return to his former job as the union representative for the meat cutters' union.

Pointing to an affidavit he submitted to the Social Security Appeals Council, Plaintiff argues that he does not retain the RFC to perform the union representative job as he actually performed that job in the past. Again, Plaintiff misperceives the nature of past relevant work. The phrase "past relevant work" includes a claimant's

particular past relevant job, as well as the type of work claimant performed in the past, as that work is generally performed in the national economy. Claimant must, therefore, establish that he is unable to return to his particular former job and to his former occupation as that occupation is generally performed throughout the national economy. Andrade, 985 F.2d at 1051.

The vocational expert testified that in the national economy, union representative jobs are generally performed at the sedentary level. Plaintiff has not attacked this testimony and has presented no evidence to the contrary. Because the Court has already affirmed the ALJ's determination that Plaintiff has an RFC to perform a full range of sedentary work, the Court also affirms the ALJ's determination that Plaintiff could perform his past work as a union representative as that work is generally performed throughout the national economy.

**D. FIFTH ALLEGED ERROR – THE ALJ'S
FAILURE TO DEVELOP THE RECORD**

Plaintiff makes the general allegation that the ALJ failed to develop the record. Plaintiff does not indicate what other avenues he believes the ALJ should have explored. With regard to an ALJ's duty to develop the record, the Tenth Circuit has held that the "important inquiry is whether the ALJ asked sufficient questions to ascertain (1) the nature of a claimant's alleged impairments, (2) what on-going treatment and medication the claimant is receiving, and (3) the impact of the alleged impairment on a claimant's daily routine and activities." Musgrave v. Sullivan, 966

F.2d 1371, 1375 (10th Cir. 1992). The Court has reviewed the record and finds that it is reasonably complete on all issues.

CONCLUSION

For the reasons discussed above, the Court rejects Plaintiff's alleged errors on appeal and finds that the ALJ's decision to deny benefits should be **AFFIRMED**.

IT IS SO ORDERED.

Dated this 25 day of January 1999.


Sam A. Joyner
United States Magistrate Judge

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

JAN 25 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NELLIE M. CAMPBELL,

Plaintiff,

v.

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

Defendant.

No. 97-CV-1027-J ✓

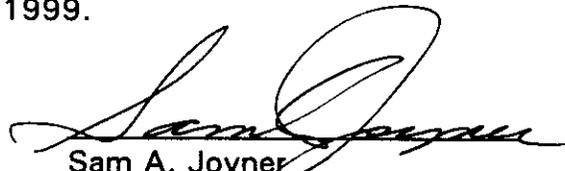
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JAN 26 1999
DATE _____

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 Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

IT IS SO ORDERED.

Dated this 25 day of January 1999.


Sam A. Joyner
United States Magistrate Judge

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

JAN 25 1999

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

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-CV-1027-J ✓

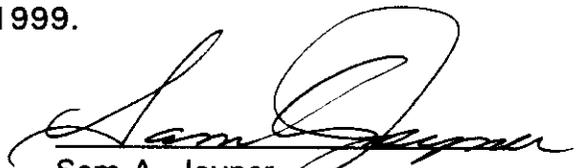
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DATE JAN 26 1999

ORDER

Pursuant to Fed. R. Civ. P. 60(a), the Court hereby strikes the Judgment entered in this case on January 15, 1999. The January 15th Judgment contains a clerical mistake, indicating that judgment was in favor of defendant. Consistent with the Court's prior orders, judgment should have been in favor of Plaintiff. A new judgment will be issued concurrently with this order.

IT IS SO ORDERED.

Dated this 25 day of January 1999.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 25 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DANIELE D. EDWARDS,
SSN: 448-68-7888

Plaintiff,

v.

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

Defendant.

Case No. 97-CV-603-J

ENTERED ON DOCKET
DATE JAN 26 1999

ORDER^{1/}

Now before the Court is Plaintiff's appeal of a decision by the Commissioner of the Social Security Administration ("Commissioner") denying him disability insurance benefits under Title II of the Social Security Act and Supplemental Security Income benefits under Title XVI of the Social Security Act . The Administrative Law Judge ("ALJ"), Richard J. Kallsnick, denied benefits at step five of the sequential evaluation process used by the Commissioner to evaluate disability claims.

The ALJ determined that Plaintiff retained the residual functional capacity ("RFC") to perform a limited range of sedentary work and found that a significant number of jobs existed in the national economy which Plaintiff could perform given his RFC. On appeal, Plaintiff argues (1) that the ALJ's RFC determination is not supported by substantial evidence, (2) that the ALJ improperly evaluated Plaintiff's subjective pain complaints, and (3) that the ALJ posed, and relied on the vocational expert's

^{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.

(11)

testimony in response to, an improper hypothetical question. The Court has meticulously reviewed the entire record and for the reasons discussed below the Commissioner's decision is **AFFIRMED**.

I. STANDARD OF REVIEW

A 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 will be found disabled

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). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.^{2/}

^{2/} 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 the claimant to 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. § 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 those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). See 20 C.F.R. § 404.1525. 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 combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at 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, 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

The standard of review applied by this Court to the Commissioner's disability determinations is set forth in 42 U.S.C. § 405(g). According to § 405(g), "the finding of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ultimate 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.

To determine whether the Commissioner's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. 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).

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to 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

he/she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

II. DISCUSSION

A. FIRST ALLEGED ERROR – THE ALJ’S RFC DETERMINATION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Plaintiff, a 28 year old male, alleges that he is disabled due to pain in both of his feet caused by arthritis and by previous bunion and hammertoe surgeries. The ALJ determined that Plaintiff retained the RFC to perform a limited range of sedentary work, finding that Plaintiff could perform sedentary work with the following qualifications: plaintiff would need to be able to sit and stand at will, and plaintiff would need a work environment with level floors which required only occasional walking. Based on the Court’s review of the sparse medical record, the Court finds that the ALJ’s RFC determination is supported by substantial evidence.

B. SECOND ALLEGED ERROR – INCORRECT ANALYSIS OF PLAINTIFF’S SUBJECTIVE PAIN COMPLAINTS

Plaintiff argues that in assessing Plaintiff’s subjective pain complaints, the ALJ failed to consider many of the factors identified in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). Plaintiff also argues that the ALJ failed to link his findings to evidence in the record as required by Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995). The Court does not agree that either of these arguments support reversal of the ALJ’s opinion.

An ALJ is not required to address every factor identified in Luna. Rather, the Luna factors are designed as a guide for the ALJ’s analysis. In this case, the ALJ gave several reasons for finding Plaintiff’s subjective pain complaints not entirely credible,

and the ALJ supported those reasons with references to the record. Thus, based on its review of the record, the Court finds that the ALJ's credibility determination regarding Plaintiff's subjective pain complaints is supported by the correct analysis and it is also supported by substantial evidence.

C. THIRD ALLEGED ERROR – IMPROPER HYPOTHETICAL GIVEN TO THE VOCATIONAL EXPERT

Plaintiff argues that the ALJ may not rely on the vocational expert's testimony to support his step five conclusion because the ALJ failed to include all of Plaintiff's limitations in the hypothetical question posed to the vocational expert. In particular, Plaintiff alleges that the hypothetical question did not include the following limitations: the need to take naps during the day, the need to soak one's feet during the day, and the need to prop one's feet up during the day.

When formulating a hypothetical question for a vocational expert, an ALJ is not required to accept all of claimant's alleged limitations as true. In his hypothetical question to the vocational expert, the ALJ need only include those restrictions which the ALJ views as true based on his review of the record as a whole. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990); Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995).

The ALJ concluded that Plaintiff could perform the limited range of sedentary work identified by the ALJ in his RFC assessment. The ALJ found that Plaintiff could perform that limited range of sedentary work without taking a nap, soaking his feet,

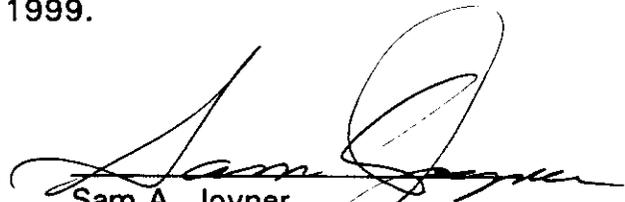
or elevating his feet for a significant amount of time. The ALJ's rejection of these additional limitations is supported by the record as a whole.

CONCLUSION

For the reasons discussed above, the Commissioner's decision to deny disability benefits under Titles II and XVI of the Social Security Act is **AFFIRMED**.

IT IS SO ORDERED.

Dated this 25 day of January 1999.


Sam A. Joyner
United States Magistrate Judge

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

FILED

JAN 25 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TGI FRIDAY'S, INC.,)
)
Plaintiff,)
)
v.)
)
JACK L. GARLAND d/b/a "NEW)
FRIDAYS", CHERYL EASTON, and)
JAMES R. POWERS,)
)
Defendants.)

Case No. 98-CV-801-BU (M)

ENTERED ON DOCKET
DATE JAN 25 1999

NOTICE OF DISMISSAL

COMES NOW the Plaintiff, TGI Friday's, Inc., and, pursuant to Rule 41 (a) (1) of the Federal Rules of Civil Procedure, dismisses without prejudice its Complaint in Cause No. 98-CV-801-BU (M). This dismissal is filed without prejudice since Defendants have not been served with a summons and complaint in this matter and have not filed any answer to this Complaint.

Dated: January 25, 1999.

Elsie Draper
Elsie Draper, OBA No. 2482
GABLE & GOTWALS
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(918) 582-9201

ATTORNEYS FOR PLAINTIFF,
TGI FRIDAY'S, INC.

(2)

clj

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

FILED

JAN 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE TRAVELERS INDEMNITY COMPANY)
OF ILLINOIS, an Illinois)
corporation,)

Plaintiff,)

vs.)

MASTERCRAFT COATINGS, INC., an)
Oklahoma corporation,)

Defendant.)

Case No. 98-CV-0462K (E) ✓

ENTERED ON DOCKET

DATE JAN 25 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW The Travelers Indemnity Company of Illinois, Plaintiff herein, and Mastercraft Coatings, Inc., Defendant herein, and pursuant to Rule 41(A)(1) of the Federal Rules of Civil Procedure do stipulate to the dismissal of the above styled and numbered cause, and all claims and counterclaims asserted therein, with prejudice to the refileing thereof.

Respectfully submitted,



Phil R. Richards, OBA #10457
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(918) 585-2394

ATTORNEYS FOR PLAINTIFF
TRAVELERS INDEMNITY COMPANY OF ILLINOIS



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(918) 587-8300

ATTORNEY FOR DEFENDANT
MASTERCRAFT COATINGS, INC.



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

FILED

JAN 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHERRI EDWARDS, GERALDINE)
NASH and DERYLE BURKS,)
)
Plaintiffs,)

vs.)

Case No. 98-CV-0869-K (J) ✓

AMR CORPORATION, AMERICAN)
AIRLINES, INC. and THE SABRE)
GROUP, INC.,)

ENTERED ON DOCKET

DATE JAN 25 1999

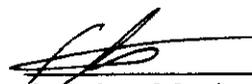
Defendants.)

**STIPULATION OF DISMISSAL WITH PREJUDICE
OF DEFENDANT AMR CORPORATION**

Pursuant to Fed. R. Civ. P. 41, Plaintiffs and Defendants hereby stipulate to the dismissal, with prejudice, of the claims of the following Plaintiffs as against the following Defendant.

All Plaintiffs, including Sherri Edwards, Geraldine Nash and Deryle Burks, dismiss all their claims as against Defendant AMR Corporation, with prejudice.

Martin & Associates, P.C.
Attorney for Plaintiffs

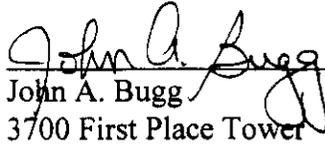

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Attorneys for Defendants,
AMR CORPORATION,
AMERICAN AIRLINES, INC. and
THE SABRE GROUP, INC.

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

FILED

JAN 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RUFORD HENDERSON, et al.,)

)

)

Plaintiffs,)

)

vs.)

)

AMR CORPORATION, AMERICAN)

)

AIRLINES, INC. and THE SABRE)

)

GROUP, INC.,)

)

Defendants.)

Case No. 97-CV-457-K (E) /

ENTERED ON DOCKET

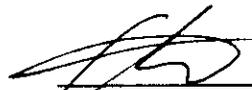
DATE JAN 25 1999

**STIPULATION OF DISMISSAL WITH PREJUDICE
OF DEFENDANT AMR CORPORATION**

Pursuant to Fed. R. Civ. P. 41, Plaintiffs and Defendants hereby stipulate to the dismissal, with prejudice, of the claims of the following Plaintiffs as against the following Defendant.

All Plaintiffs, including Ruford Henderson, Lavana Abair, Marie Bontemps, Barbara Elliott, Opal Harris, Melvy Haynes, Deborah Holt, Gwendolyn Jones, Helen Perkins, G. A. (Ann) Nero, Ann Watson, Kathy Wells and Michelle Payne Langford, dismiss all their claims as against Defendant AMR Corporation, with prejudice.

Martin & Associates, P.C.
Attorney for Plaintiffs



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DAVID R. CORDELL, OBA #11272
JOHN A. BUGG, OBA #13665

OF COUNSEL:

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(918) 586-8547 (Facsimile)

Attorneys for Defendants,
AMR CORPORATION,
AMERICAN AIRLINES, INC. and
THE SABRE GROUP, INC.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JERRY D. BAKER,
SSN: 448-68-8404

Plaintiff,

v.

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

Defendant.

No. 97-CV-540-J

ENTERED ON DOCKET

DATE JAN 25 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 22nd 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.

18

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on February 13, 1975, and was 20 years old at the time of the hearing before the ALJ. [R. at 36].

At the hearing, Plaintiff testified that he was currently employed and worked for 40 hours per week driving a forklift and scraping trays at a mushroom plant. [R. at 38-39].

Plaintiff's left leg was amputated, above the knee, when he was fifteen years old, after Plaintiff was involved in an accident. Plaintiff testified that he could stand or walk for 30 - 45 minutes, that he could walk for 200 feet, and that he could sit for 30 - 40 minutes. [R. at 39]. Plaintiff stated that his amputated leg causes sores in relation to his prosthesis, and that he sometimes is forced to rely on his wheelchair or crutches. [R. at 44].

A Residual Functional Capacity Assessment from January 27, 1993 indicated Plaintiff could occasionally lift 20 pounds, frequently lift 10 pounds, stand or walk for two to four hours in an eight hour day, and sit for approximately six hours in an eight hour day. [R. at 69]. A Residual Functional Capacity Assessment completed November 3, 1994, indicated Plaintiff could occasionally lift ten pounds, frequently lift five to ten pounds, walk for approximately six hours on smooth surfaces, and sit for approximately six hours out of an eight hour day. [R. at 93].

In his activity report dated June 21, 1994, Plaintiff indicated that he mowed the yard approximately two times each month, that he fished approximately two times each month, and that he drove on a daily basis. [R. at 131].

In an August 21, 1992 orthopedic examination, Plaintiff reported that he could walk "upward [of] 2 miles at a time with minimal difficulty." [R. at 325].

Plaintiff's medications list, dated November 17, 1995, indicated that he took Tylenol for headaches. [R. at 351].

In May Plaintiff saw his doctor with complaints of back strain. Plaintiff's doctor restricted Plaintiff to light duty work on May 15, 1995, and returned Plaintiff to regular work on May 30, 1995. [R. at 354, 356].

Plaintiff visited his doctor in October of 1995 in relation to a wrist sprain. Plaintiff's doctor, on November 10, 1995, Plaintiff's doctor noted that Plaintiff should be restricted to light duty. On November 20, 1995 Plaintiff was returned to work without restriction. [R. at 366].

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

^{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).

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

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

III. THE ALJ'S DECISION

The ALJ noted that Plaintiff's prior application for benefits was denied March 12, 1993, and was not further pursued. The ALJ determined that no evidentiary basis existed for reopening the March 12, 1993 determination and therefore that period was *res judicata*. The ALJ concluded that the beginning date for Plaintiff's current application for benefits was March 13, 1993.

^{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."

The ALJ noted that Plaintiff had, for the past seven months prior to the hearing, performed substantial gainful activity in his job as a fork lift driver and cleaner at a mushroom plant. [R. at 17]. The ALJ's second finding was that Plaintiff was not disabled because Plaintiff was performing substantial gainful activity. [R. at 20]. The ALJ proceeded to make additional determinations pursuant to Step Four and Step Five of the sequential evaluation proceeding.

The ALJ observed that prior to this work, Plaintiff had not engaged in substantial gainful activity. The ALJ concluded that from March 13, 1993 until beginning work, Plaintiff could, at the least, perform a full range of unskilled sedentary work, with the restriction of working in a protected environment due to cold intolerance. [R. at 21]. The ALJ found that a significant number of jobs existed in the national economy which Plaintiff could perform, and concluded that Plaintiff was not disabled. [R. at 21].

IV. REVIEW

SUBSTANTIAL GAINFUL ACTIVITY

At the hearing before the ALJ Plaintiff testified that he was working full-time, and that he had been engaged in full-time work for approximately seven months prior to the hearing in December 1995. [R. at 38]. An individual who is capable of performing substantial gainful activity is not disabled. See 20 C.F.R. § 404.1520 ("If you are doing substantial gainful activity, we will determine that you are not disabled."). Plaintiff does not further challenge the ALJ's finding that he was engaged

in substantial gainful activity and therefore was not disabled. The Court concludes that the ALJ's decision that Plaintiff was engaged in substantial gainful activity and therefore was not disabled is supported by substantial evidence.

PLAINTIFF'S IMPAIRMENTS

Plaintiff suggests, however, that Plaintiff was disabled from the period of time after Plaintiff's last disability determination (March 13, 1993) until Plaintiff began working in May or June of 1995. The ALJ's order is not absolutely clear. However, the Court considers Plaintiff's argument that he was disabled from March 1993 until May or June of 1995, and that the ALJ erred in concluding that Plaintiff was not disabled during this time period.

Plaintiff asserts that the ALJ failed to properly evaluate each of Plaintiff's impairments and failed to include all of Plaintiff's impairments in a hypothetical question to the vocational expert. Plaintiff notes that he has difficulty hearing and problems with shoulder dislocation. Plaintiff asserts that the ALJ's failure to properly evaluate and include these impairments is error.

Plaintiff's application for disability noted only that he had a left leg amputation and was unable to sit or walk for long periods of time. [R. at 116, 122]. Plaintiff did not list, as impairments, hearing difficulty or difficulty with his shoulder. At the hearing before the ALJ, the ALJ asked, "As far as I can tell about the only problem, real problem that you have is that you are missing, what your right leg, left leg?" Plaintiff answered, "Yes."

With regard to the alleged shoulder dislocation, Plaintiff does not assert that the shoulder poses any specific limitations. At the hearing before the ALJ, Plaintiff testified that he had no problems lifting anything. [R. at 40].

The social security examiner noted that Plaintiff had a "mild" hearing loss. [R. at 335]. Plaintiff did not list the hearing loss as one of his limitations.

The ALJ additionally noted that Plaintiff's current employment in substantial gainful activity indicated that Plaintiff's limitations did not interfere with Plaintiff's ability to work.

RELIANCE ON GRIDS AND/OR INADEQUATE VOCATIONAL TESTIMONY

Plaintiff asserts that the ALJ erred in relying on the Grids because the ALJ concluded Plaintiff had a prosthesis and was subject to an environmental limitation of not working in cold weather. The ALJ did rely, in part, on the Grids. However, the ALJ additionally consulted a vocational expert. The following exchange took place between the ALJ and the vocational expert.

Q: The Commissioner of Social Security recommend [sic] that some 200 unskilled sedentary jobs [sic] in the economy. Is there any reason why a person claimant's age and education, and let's [sic] just say that they have work experience, but who is missing a leg to the point where they can't to anything but sedentary work. Couldn't do such sedentary unskilled jobs?

A: Is there any reason?

Q: Yeah.

A: I can't think of any reason a person with a prosthesis wouldn't be able to do sedentary work.

Q: Okay. If we put a further qualification in there that they'd have to work in a protected environment because cold weather creates a pain problem. Can you give me some estimate as to what percentage of these jobs might be lost because of that requirement?

A: I'd say ten to 20 percent of them probably would be lost because of that requirement. A small percentage. Sedentary work.

[R. at 47-49].

Generally, the vocational expert testified that she could think of no vocational limitations created due to an individual wearing a prosthesis.^{6/} The vocational expert additionally testified that if such an individual could not work in cold weather, the individual would be incapable of performing approximately ten to twenty percent of the available sedentary jobs. Therefore, in accordance with the testimony of the vocational expert, according to the limitations presented by the ALJ, Plaintiff can perform a full range of work in the sedentary category limited by ten to twenty percent due to an environmental restriction. This constitutes substantial evidence that Plaintiff can perform a substantial majority of the work in the sedentary category.

Certainly the ALJ could have done a better job with the vocational expert at specifically identifying Plaintiff's limitations and eliciting specific testimony as to jobs Plaintiff was capable of performing. However, under the facts of this case, the Court concludes that the ALJ's finding that Plaintiff was not disabled is supported by substantial evidence.

^{6/} The ALJ found no additional limitations were imposed by Plaintiff due to his wearing of the prosthesis. Plaintiff does not challenge this finding.

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

Dated this 22 day of January 1999.

A handwritten signature in cursive script, appearing to read "Sam A. Joyner". The signature is written in black ink and is positioned above the printed name and title.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RONNIE L. YOUNG,
SSN: 446-48-2833

Plaintiff,

v.

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

Defendant.

No. 97-CV-453-J

ENTERED ON DOCKET
DATE JAN 25 1999

JUDGMENT

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

It is so ordered this 22nd 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 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RONNIE L. YOUNG,
SSN: 446-48-2833

Plaintiff,

v.

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

Defendant.

No. 97-CV-453-J

ENTERED ON DOCKET
DATE JAN 25 1999

ORDER^{2/}

Plaintiff, Ronnie L. Young, 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) Plaintiff meets a Listing, (2) the ALJ's residual functional capacity evaluation of Plaintiff is not supported by substantial evidence, and (3) the ALJ's findings at Step Four are incomplete. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

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

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

^{3/} Administrative Law Judge Richard J. Kallsnick (hereafter "ALJ") concluded that Plaintiff was not disabled on September 6, 1995. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on March 13, 1997. [R. at 5].

I. PLAINTIFF'S BACKGROUND

Plaintiff was born May 22, 1945, and was 50 years old at the time of the hearing before the ALJ. [R. at 29]. Plaintiff completed high school. Plaintiff was in the military from July 10, 1967 until February 13, 1970. [R. at 29]. Plaintiff additionally worked as a security guard, as a bell ringer, and at Otasco.

Plaintiff testified that he experienced no notable side effects from his medications. [R. at 32]. Plaintiff stated that he constantly suffered from back pain, from left knee pain, from pain on his left side, right side, and hips. [R. at 33]. In his application for social security Plaintiff wrote that he had stomach problems. [R. at 56]. Plaintiff is 5'9" and weighs approximately 340 pounds. Plaintiff testified that he could lift only ten pounds and that bending was a strain. [R. at 35]. According to Plaintiff he can walk approximately four blocks. [R. at 40].

A Residual Functional Capacity Assessment on May 20, 1993, indicated that Plaintiff could lift 50 pounds occasionally, 25 pounds frequently, stand or walk for six out of eight hours in a day, and push/pull an unlimited amount. [R. at 66]. Similar findings were reported in a Residual Functional Capacity Assessment dated August 4, 1994. [R. at 104].

In his application for disability insurance, Plaintiff noted that he helped with cooking and cleaning for approximately six to seven hours each day, that he used to walk approximately 45 minutes each night, and that he drove his car approximately ten to twelve hours each week. [R. at 140].

A social security disability examination completed July 24, 1994 noted that Plaintiff suffered from chronic obesity but had good range of motion in all his major joints, excellent grip strength, and normal gait. [R. at 163].

A lumbar X-ray indicated minimal scoliosis but no other abnormality. [R. at 165].

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

^{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).

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^{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

^{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."

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. REVIEW

EVALUATION OF THE LISTINGS

Plaintiff asserts that the ALJ is required to determine whether or not he meets a Listing and explain his decision. Plaintiff references Listing 9.09A which is for obesity. Plaintiff states that he meets the requirements of obesity with a "history of pain and limitation of motion in any weight bearing joint or the lumbosacral spine (on physical examination) associated with findings on medically acceptable imaging techniques of arthritis in the affected joint or lumbosacral spine. . . ." Plaintiff notes that his examination by Dan E. Calhoun, M.D. indicated Plaintiff was 69 ½ inches tall and 350 pounds, which meets the first part of the Listing. Plaintiff additionally states that if he has a limitation of motion in a weight bearing joint or in the lumbosacral spine he is disabled under the Listings. Plaintiff refers to a report received by the disability determination division from Dr. Calhoun where he stated that he considered

90 degrees flexion of the back to be "normal" range of motion as opposed to "full." Plaintiff argues that if he is only "normal" and not "full range of motion" that he must have some limitation, and therefore he meets a Listing.

At step three of the sequential evaluation process, a claimant's impairment is compared to the Listings (20 C.F.R. Pt. 404, Subpt. P, App. 1). If the impairment is equal or medically equivalent to an impairment in the Listings, the claimant is presumed disabled. A plaintiff has the burden of proving that a Listing has been equaled or met. Yuckert, 482 U.S. at 140-42; Williams, 844 F.2d at 750-51. In his decision, the ALJ is "required to discuss the evidence and explain why he found that [the claimant] was not disabled at step three." Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996).

The Court does not give a great deal of credence to Plaintiff's argument. Nevertheless, the ALJ, in this case, provided only a general reference to the Listings and a conclusory opinion that nothing in the record reflected that Plaintiff met the Listings. Because the Court is reversing for other reasons, on remand, the ALJ should further explore the Listings argument posed by Plaintiff.

RESIDUAL FUNCTIONAL CAPACITY

Plaintiff asserts that the ALJ did not apply the correct legal standard in evaluating Plaintiff's pain and in concluding that Plaintiff had the ability to perform the requisite standing and walking for light work. Plaintiff states that the ALJ discredited the medical evidence rather than evaluating Plaintiff's subjective complaints of pain.

Plaintiff additionally asserts that the ALJ failed to comply with Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995). Finally, Plaintiff states that no specific medical evidence supports the ALJ's conclusion that Plaintiff can perform the prolonged standing and walking required of light work.

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

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

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

The ALJ noted that the record contained very little objective evidence to support Plaintiff's findings. Contrary to Plaintiff's assertion, the Court reads the ALJ's opinion as suggesting that Plaintiff cannot meet the first step of Luna. If the first step of Luna

is not met, the ALJ is not required to evaluate the Plaintiff's subjective complaints of pain. Regardless, the ALJ additionally evaluates the Plaintiff's complaints of pain.

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.

In this case, the ALJ discounted Plaintiff's credibility based on the level of Plaintiff's activities, the absence of any restrictions placed on Plaintiff's, Plaintiff's testimony regarding his medications, Plaintiff's reported activities, and the lack of strong pain medication. Although the ALJ's analysis could have provided additional detail, the Court concludes that it is sufficient in accordance with Kepler.

Finally, Plaintiff suggests that nothing in the record supports a conclusion that Plaintiff can perform the standing and walking requirements of light work. At a minimum, however, the record contains two RFC evaluations which support the ALJ's conclusion that Plaintiff can perform the requisite walking and standing of light work.

STEP FOUR EVALUATION

Plaintiff asserts that the ALJ made his Step Four analysis without making the required point by point comparison outlined by the Tenth Circuit Court of Appeals in Henrie v. U.S. Department of Health and Human Services, 13 F.3d 359 (10th Cir. 1993). Plaintiff states that the ALJ improperly allowed the vocational expert witness to conclude that Plaintiff is capable of performing his past work as a security guard and driver and that this was not sufficient.

Social Security Regulation 82-62 requires an ALJ to develop the record with respect to a claimant's past relevant work.

The decision as to whether the claimant retains the functional capacity to perform past work which has current relevance has far-reaching implications and must be developed and explained fully in the disability decision.

. . . .
[D]etailed information about strength, endurance, manipulative ability, mental demands and other job requirements must be obtained as appropriate. This information will be derived from a detailed description of the work obtained from the claimant, employer, or other informed source. Information concerning job titles, dates work was performed, rate of compensation, tools and machines used, knowledge required, the extent of supervision and independent judgment required, and a description of tasks and responsibilities will permit a

judgment as to the skill level and the current relevance of the individual's work experience.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982). The ALJ must make specific factual findings detailing how the requirements of claimant's past relevant work fit the claimant's current limitations. The ALJ's findings must contain:

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

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994); Henrie v. United States Dep't of Health & Human Services, 13 F.3d 359, 361 (10th Cir. 1993).

In addition, the Tenth Circuit Court of Appeals has specifically frowned upon the delegation of this duty to the vocational expert. In Winfrey v. Chater, 92 F.3d 1017, (10th Cir. 1996), the Circuit considered whether the requirements of Step Four may be fulfilled by posing questions to the vocational expert.

Having failed to complete phase two appropriately, the ALJ was unable to make the necessary findings at phase three about plaintiff's ability to meet the mental demands of his past relevant work despite his mental impairments. The Secretary glosses over the absence of the required ALJ findings, by relying on the testimony of the VE [vocational expert] that plaintiff could meet the mental demands of his past relevant work, given the mental limitations found by the ALJ. This practice of delegating to a VE many of the ALJ's fact finding responsibilities at step four appears to be of increasing prevalence and is to be discouraged.

At step five of the sequential analysis, an ALJ may relate the claimant's impairments to a VE and then ask the VE whether, in his opinion, there are any jobs in the national

economy that the claimant can perform. This approach, which requires the VE to make his own evaluation of the mental and physical demands of various jobs and of the claimant's ability to meet those demands despite the enumerated limitations, is acceptable at step five because the scope of potential jobs is so broad.

At step four, however, the scope of jobs is limited to those that qualify as the claimant's past relevant work. Therefore, it is feasible at this step for the ALJ to make specific findings about the mental and physical demands of the jobs at issue and to evaluate the claimant's ability to meet those demands. Requiring the ALJ to make specific findings on the record at each phase of the step four analysis provides for meaningful judicial review. When, as here, the ALJ makes findings only about the claimant's limitations, and the remainder of the step four assessment takes place in the VE's head, we are left with nothing to review.

We are not suggesting, as has the Fourth Circuit, see Smith v. Bowen, 837 F.2d 635, 637 (4th Cir.1987), that the ALJ may not rely on VE testimony in making the necessary findings at step four. As SSR 82-62, and SSR 82-61, Soc. Sec. Rep. Serv., Rulings 1975-1982, 836, indicate, a VE may supply information to the ALJ at step four about the demands of the claimant's past relevant work. Id. at 811-12, 838. For example, if the ALJ determines that the claimant's mental impairment affects his ability to concentrate, the ALJ may ask the VE for information about the level of concentration necessary to perform the claimant's past relevant work. The VE's role in supplying vocational information at step four is much more limited than his role at step five, where he is called upon to give his expert opinion about the claimant's ability to perform work in the national economy. Therefore, while the ALJ may rely on information supplied by the VE at step four, the ALJ himself must make the required findings on the record, including his own evaluation of the claimant's ability to perform his past relevant work.

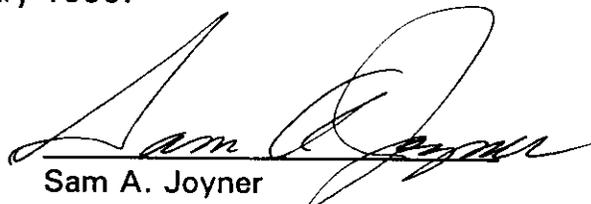
Id. at 1025 (emphasis added).

In this case, the ALJ's opinion does not outline Plaintiff's past relevant work or proceed through the three-step process outlined in the Social Security Regulations and Henrie. Rather the ALJ observes that the vocational expert "was presented a series of facts based upon the claimant's condition as it is outlined in the record and in this decision. The vocational expert was also familiar with the claimant's past work history." [R. at 18]. As the ALJ notes, the vocational expert concluded that Plaintiff could return to his past relevant work. However, as outlined above, this is not the correct procedure at Step Four. The Court concludes that the ALJ's decision at Step Four is therefore not supported by substantial evidence.

In the hearing before the ALJ, the ALJ made additional inquiries of the vocational expert regarding whether or not the Plaintiff could perform other work in the economy. These inquiries could be sufficient to support a finding at Step Five that Plaintiff was not disabled. However, the Court declines to reach this issue. The ALJ included no finding on Step Five in his decision, and neither party has addressed this potential issue.

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

Dated this 22 day of January 1999.


Sam A. Joyner
United States Magistrate Judge

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

F I L E D

JAN 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL W. CATO,)
)
Petitioner,)
)
vs.)
)
RITA MAXWELL,)
)
Respondent.)

Case No. 96-CV-429-H v

ENTERED ON DOCKET
DATE JAN 21 1999

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.

IT IS SO ORDERED.

This 21ST day of JANUARY, 1999.



Sven Erik Holmes
United States District Judge

274

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

F I L E D

JAN 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL W. CATO,)
)
 Petitioner,)
)
 vs.)
)
 RITA MAXWELL,)
)
 Respondent.)

Case No. 96-CV-429-H ✓

ENTERED ON DOCKET
JAN 22 1999
DATE _____

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, appearing *pro se* and currently in the custody of the Oklahoma Department of Corrections, challenges his conviction entered in Tulsa County District Court, Case No. CRF-91-3407. Respondent has filed a Rule 5 response (#20) to Petitioner's Amended Petition to which Petitioner has replied (#22). For the reasons discussed below, the Court concludes that this petition should be denied.

BACKGROUND

On March 11, 1992, Petitioner was convicted by a jury of Assault with a Dangerous Weapon, After Former Conviction of Two or More Felonies, in Tulsa County District Court, Case No. CRF-91-3407, and received a sentence of twenty (20) years imprisonment. At trial, Petitioner was represented by attorney Bencile H. Williams, Jr. Petitioner appealed his conviction, represented on appeal by attorney Lendell S. Blosser. In his appellate brief, filed January 26, 1994, Petitioner argued that (1) the trial court erred in instructing that a vehicle was a dangerous weapon, *per se*; (2)

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the trial court erred in giving an instruction on flight; and (3) he was deprived of a fair trial as a result of the introduction of other crimes evidence without proper notice (#20, Ex. A). On June 29, 1995, the Oklahoma Court of Criminal Appeals affirmed the judgment and sentence in a summary opinion (#20, Ex. C).

Appearing *pro se*, Petitioner sought post-conviction relief, arguing that (1) he was denied effective assistance of appellate counsel; and (2) based on Flores v. State, 896 P.2d 558 (Okla. Crim. App. 1995), he was denied a fair trial by the trial court's erroneous use of a modified jury instruction. On October 13, 1995, the trial court denied post-conviction relief (#20, Ex. E), finding Petitioner's Flores claim based on the modified jury instruction to be procedurally barred and that appellate counsel did not provide ineffective assistance of counsel by failing to raise the claim on appeal. Petitioner filed a post-conviction appeal in the Oklahoma Court of Criminal Appeals. On February 28, 1996, that court affirmed the denial of post-conviction relief finding Petitioner's Flores claim to be procedurally barred as a result of Petitioner's failure to raise the claims on direct appeal. The appellate court also affirmed the trial court's finding that Petitioner had not been deprived of effective assistance of appellate counsel. (#20, Ex. G).

Petitioner filed his original § 2254 petition for writ of habeas corpus on May 15, 1996. On August 18, 1997, after receiving leave of Court, Petitioner filed his amended petition (#16) alleging the following grounds of error: (1) based on Flores, the trial court gave erroneous jury instructions; (2) ineffective assistance of trial and appellate counsel in allowing the erroneous instruction at trial and in failing to raise the issue on appeal; (3) the trial court erred by instructing the jury that a vehicle was a dangerous weapon; (4) the trial court erred by giving the jury a flight instruction; and (5) Petitioner was denied a fair trial by the introduction of other crimes evidence without proper notice.

ANALYSIS

A. Application of AEDPA

Petitioner filed his original habeas petition on May 15, 1996, about three weeks after the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). Therefore, the Court reviews this petition under the amended provisions of 28 U.S.C. § 2254. See Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2068 (1997).

B. Exhaustion

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by either showing (a) the state's appellate court has had an opportunity to rule on the same claim presented in federal court, or (b) there is an absence of available State corrective process or circumstances exist that render such process ineffective to protect the rights of the applicant. 28 U.S.C. § 2254 (b); see also White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). The exhaustion doctrine is "'principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings.'" Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994) (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)).

In her response to the amended petition, Respondent states that "the petitioner has exhausted his state court remedies for the purposes of federal habeas corpus review." (#20 at 2). However,

after a careful review of the record, the Court finds that Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c) as to all of his claims with the exception of his ineffective assistance of trial counsel claim. Although Petitioner did argue in his application for post-conviction relief that his appellate counsel provided ineffective assistance, he never presented his allegation of ineffective assistance of trial counsel to the state courts. Pursuant to § 2254(b)(3), a State or its representative shall not be deemed to have waived the exhaustion requirement unless the requirement is expressly waived. In this case, counsel for Respondent did not expressly waive the exhaustion requirement. Nonetheless, this Court may deny a claim on the merits notwithstanding a petitioner's failure to exhaust state remedies. 28 U.S.C. § 2254(b)(2). As discussed in Section D below, Petitioner's ineffective assistance of trial counsel claim should be denied on the merits.

C. Petitioner's first claim is procedurally barred

The doctrine of procedural default prohibits a federal court from considering specific habeas claims where the state's highest court declined to reach the merits of those claims on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

Applying these principles to the instant case, the Court concludes that Petitioner's first claim, that he was denied a fair trial by the inclusion of "presumed to be not guilty" language in a jury instruction, is barred by the procedural default doctrine. The Oklahoma Court of Criminal Appeals' procedural bar as applied to Petitioner's claim first presented in his state application for post-conviction relief was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently applied a procedural bar and has denied such claims unless the petitioner provides "sufficient reason" for his failure to raise the claim earlier. Moore v. State, 889 P.2d 1253 (Okla. Crim. App. 1995).

Because of his procedural default, this Court may not consider Petitioner's first claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The "cause" standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The "fundamental miscarriage of justice" exception requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause by alleging his appellate counsel provided ineffective assistance in failing to raise this claim on direct appeal. Ineffective assistance of counsel may serve

as "cause" excusing a procedural bar, Murray v. Carrier, 477 U.S. at 488, and to establish ineffective assistance of counsel a petitioner must show that his counsel's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984). There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Id. at 688. In making this determination, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id., at 690. To establish the prejudice prong of the Strickland test, Petitioner must show that the allegedly deficient performance prejudiced the defense; namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 694. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689.

Petitioner claims in this case that his appellate counsel provided ineffective assistance in failing to argue on appeal that the language "presumed to be not guilty" found in the modified jury instruction rendered the instruction unconstitutional. After careful review of the record, the Court concludes that appellate counsel's failure to raise this claim does not rise to a deficient performance under Strickland and does not, therefore, constitute constitutionally ineffective assistance of counsel.

Petitioner's challenge to the jury instruction is based on Flores v. State, 896 P.2d 558, 562 (Okla. Crim. App. 1995) (holding that an instruction substituting "presumed not guilty" for "presumed innocent" violates the constitution by depriving a defendant of the presumption of innocence). In Petitioner's case, several dates are significant to the resolution of this claim. The Oklahoma Court of Criminal Appeals decided Flores on January 24, 1995, and denied rehearing on

June 27, 1995. Petitioner was convicted March 11, 1992, almost three (3) years before Flores. Petitioner's appellate counsel filed his brief on appeal on January 26, 1994, more than one year before Flores. The Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction on June 29, 1995, only two (2) days after denying rehearing in the Flores case. Thus, the record clearly establishes that Petitioner's appeal had been perfected and submitted at the time that the Flores opinion was issued. Counsel is not ineffective for failing to anticipate arguments or appellate issues which are based on decisions issued after the appeal was submitted. See Lilly v. Gilmore, 988 F.2d 783, 786 (7th Cir. 1993). Thus, this Court finds that appellate counsel's failure to raise the Flores issue on direct appeal does not represent an unreasonable omission under Strickland. Therefore, the Court concludes that because Petitioner has failed to show that his appellate counsel's failure to raise this claim on direct appeal constitutes ineffective assistance of appellate counsel, he has failed to demonstrate "cause" for his failure to challenge the "presumed to be not guilty" language in the jury instruction on direct appeal.

Petitioner's only other means of gaining federal habeas review of this claim is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). Petitioner does not claim that he is actually innocent of the underlying crime. Therefore, the fundamental miscarriage of justice exception has no applicability to this case.

Because Petitioner has failed to demonstrate "cause and prejudice" or a "fundamental miscarriage of justice," the Court concludes his first claim is procedurally barred and should be denied on that basis.

D. Petitioner's ineffective assistance of counsel claims (number 2) are without merit

Petitioner asserts as his second claim that he received ineffective assistance of trial¹ and appellate counsel. As discussed above, to establish ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, id. at 694. Failure to establish either prong of the Strickland standard will result in denial of relief. Id. at 696. In the instant case, Petitioner fails to satisfy the Strickland standard as to either claim.

As discussed above, appellate counsel's failure to raise the Flores claim on direct appeal does not constitute ineffective assistance of counsel. For the same reason, trial counsel did not provide ineffective assistance in failing to object to the modified instruction at trial. Trial counsel does not provide ineffective assistance for failing to anticipate arguments which first receive recognition only after the trial is complete. See Lilly v. Gilmore, 988 F.2d at 786 (7th Cir. 1993) (stating that "[t]he Sixth Amendment does not require counsel to forecast changes or advances in the law, or to press meritless arguments before a court"). The Court concludes that Petitioner's ineffective assistance of trial and appellate counsel claims are without merit and that habeas corpus relief on these claims should be denied.

¹As discussed in Part A above, Petitioner has not presented his claim of ineffective assistance of trial counsel to the Oklahoma Court of Criminal Appeals. Therefore, his claim would be unexhausted since he could file another application for post-conviction relief, although such action would be arguably futile. However, this Court may deny a claim on the merits notwithstanding Petitioner's failure to exhaust state remedies. 28 U.S.C. § 2254(b)(2).

E. Petitioner's claims raised on direct appeal (claims numbered 3, 4 and 5) provide no basis for relief under 28 U.S.C. § 2254(d)

The habeas corpus statute, as amended by the AEDPA, provides that:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Each of Petitioner's claims numbered 3, 4 and 5 was considered on the merits and rejected by the Oklahoma Court of Criminal Appeals on direct appeal. Therefore, § 2254(d) guides this Court's analysis of those claims. For the reasons discussed below, each claim should be denied.

1. Petitioner's third and fourth claims concern jury instructions, matters of state law

In his third claim, Petitioner asserts that the trial court erred by instructing the jury that a vehicle was a dangerous weapon. As his fourth claim, Petitioner argues that the trial court erred by giving the jury a flight instruction. Both of these claims challenge the propriety of a jury instruction which are based on state law. Because these claims involve interpretation of state law, they are not appropriate for federal habeas corpus review unless the error has resulted in a fundamentally unfair trial. Estelle v. McGuire, 502 U.S. 62 (1991). In the instant case, Petitioner argues only that the modified instruction containing the "presumed to be not guilty" language deprived him of a fair trial. See #22 at 5-7. He fails to demonstrate that the instructions complained of in his third and fourth

claims deprived him of a constitutional right. Furthermore, he has not shown this Court how the state appellate court's conclusions "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). After careful review of the record, this Court finds nothing to indicate that the state court's rejection of these claims meets the § 2254(d) standard and concludes that these claims cannot serve as a basis for relief under § 2254.

2. Admission of other crimes evidence

Petitioner also claims he was denied a fair trial by the introduction of other crimes evidence without proper notice. However, Petitioner again fails to inform this Court of how the Oklahoma Court of Criminal Appeals' rejection of this claim on direct appeal "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). After careful review of the record, this Court finds nothing to indicate that the state court's conclusion meets the § 2254(d) standard. Therefore, this claim cannot serve as a basis for relief under § 2254.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States and that the petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied**.

IT IS SO ORDERED.

This 21st day of JANUARY, 1999.



Sven Erik Holmes
United States District Judge

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

RENALDO HAROLD WASHINGTON,)
)
Petitioner,)
)
vs.)
)
KEN KLINGLER,)
)
Respondent.)

ENTERED ON DOCKET

DATE JAN 22 1999

Case No. 96-CV-554-H ✓

F I L E D

JAN 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

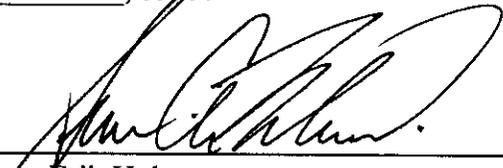
JUDGMENT

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.

IT IS SO ORDERED.

This 21st day of JANUARY, 1999.



Sven Erik Holmes
United States District Judge

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

RENALDO HAROLD WASHINGTON,)
)
Petitioner,)
)
vs.)
)
KEN KLINGLER,)
)
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ENTERED ON DOCKET

DATE JAN 22 1999

Case No. 96-CV-554-H ✓

F I L E D

JAN 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, appearing *pro se* and currently in the custody of the Oklahoma Department of Corrections, challenges his conviction entered in Tulsa County District Court, Case No. CRF-83-2848. Respondent has filed a Rule 5 response (#6) to which Petitioner has replied (#16). For the reasons discussed below, the Court concludes that this petition should be denied.

BACKGROUND

On May 31, 1985, Petitioner was convicted by a jury of Rape in the First Degree, After Former Conviction of a Felony, in Tulsa County District Court, Case No. CRF-83-2848, and received a sentence of 222 years imprisonment. At trial, Petitioner was represented by attorney Martin Hart. Petitioner appealed his conviction, represented on appeal by attorney Johnie O'Neal. In his appellate brief, filed June 10, 1985, Petitioner argued that (1) the trial court committed fundamental error in denying his motion to dismiss based on police coercion of a possible defense witness, (2) the trial court erred in allowing hearsay evidence over his objections, and (3) he was

deprived of a fair trial as a result of improper comments by the prosecutor (#6, attachment to Ex. A). On December 17, 1986, the Oklahoma Court of Criminal Appeals affirmed the judgment and sentence in an unpublished opinion (#6, Ex. A).

Appearing *pro se*, Petitioner sought post-conviction relief, arguing that (1) he was denied effective assistance of appellate counsel, (2) he was denied due process and equal protection of the law by the State's use of peremptory challenges to remove prospective minority jurors, (3) he was denied a fast and speedy trial, (4) he was denied effective assistance of trial counsel, and (5) his claims were not procedurally barred. On October 5, 1995, the trial court denied post-conviction relief (#6, attachment to Ex. B), finding Petitioner's claims to be procedurally barred and that appellate counsel did not provide ineffective assistance of counsel by failing to raise these claims on appeal. The trial court addressed the merits of Petitioner's ineffective assistance of trial counsel claim and found the claim failed to overcome the first tier of the test defined in Strickland v. Washington, 466 U.S. 668 (1984). The trial court also concluded that appellate counsel "was reasonably competent." (#6, attachment to Ex. B). Petitioner appealed to the Oklahoma Court of Criminal Appeals. On January 16, 1996, that court affirmed the denial of post-conviction relief finding all of the issues raised by Petitioner, with the single exception of his ineffective assistance of appellate counsel claim, were procedurally barred as a result of Petitioner's failure to raise the claims on direct appeal. The appellate court also affirmed the trial court's finding that Petitioner had not been deprived of effective assistance of appellate counsel. (#6, Ex. B).

Petitioner filed the instant § 2254 petition for writ of habeas corpus on June 20, 1996, alleging the following grounds of error: (1) the trial court erred in failing to dismiss the case due to the State's destruction of evidence, to wit: the testimony of witness Charlotte Liggins as a result of

improper line-up procedure; (2) the trial court erred in allowing hearsay evidence over Petitioner's objection; (3) Petitioner was denied a fair trial due to the prosecutor's improper comments, (4) ineffective assistance of appellate counsel; (5) Petitioner was denied due process and equal protection of the law by the State's use of peremptory challenges to remove prospective minority jurors; (6) denial of a fast and speedy trial; and (7) ineffective assistance of trial counsel.

ANALYSIS

As a preliminary matter, the Court finds, after a careful review of the record, that Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Coleman v. Thompson, 501 U.S. 722, 732 (1991); Rose v. Lundy, 455 U.S. 509 (1982).

A. Application of AEDPA

Petitioner filed this habeas petition on June 20, 1996, almost two months after the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). Therefore, the Court reviews this petition under the amended provisions of 28 U.S.C. § 2254. See Lindh v. Murphy, 117 S.Ct. 2059, 2068 (1997); Richmond v. Embry, 122 F.3d 866, 870 (10th Cir. 1997), cert. denied 118 S.Ct. 1065 (1998). Contrary to Petitioner's assertions, this case does not involve the retroactive application of the AEDPA, because Petitioner's petition was not pending on the effective date of the AEDPA's amendments to § 2254.

In his response to the petition, Respondent argues that this petition is time-barred under the 1-year statute of limitations imposed by the AEDPA. See 28 U.S.C. § 2244(d). Section 2244(d), as amended by the AEDPA provides that:

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

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

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

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

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

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

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, have been afforded a one-year grace period within which to file for federal habeas corpus relief.

In the instant case, nothing in the record before the Court indicates Petitioner filed a petition

for *certiorari* in the United States Supreme Court. Therefore, his conviction became final on or about March 17, 1987, or 90 days after the Oklahoma Court of Criminal Appeals affirmed his conviction. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994). Therefore, his conviction became final before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Petitioner filed his petition on June 20, 1996, well within the one-year grace period. Simmonds, 111 F.3d at 744-46. Therefore, the Court finds that this petition is not time-barred.

B. Petitioner's claims raised on direct appeal (claims numbered 1, 2 and 3) provide no basis for relief under 28 U.S.C. § 2254(d)

The habeas corpus statute, as amended by the AEDPA, provides that:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Each of Petitioner's claims numbered 1, 2 and 3 was considered on the merits by the Oklahoma Court of Criminal Appeals on direct appeal. Therefore, § 2254(d) guides this Court's analysis of those claims. For the reasons discussed below, each claim should be denied.

1. Destruction of "exculpatory" evidence

Petitioner claims that during a pre-trial line-up, police coerced a witness, a fifteen-year old girl who claimed to have seen the rape victim and a man together near the time of and in the vicinity

of the rape, into making a tainted identification of Petitioner thereby destroying her credibility as a potential defense witness. Because the witness had indicated before the line-up that she was not sure whether she could identify the man she had seen with the victim, Petitioner alleges that the police effectively destroyed exculpatory evidence by coercing the witness during the line-up. Petitioner presented this claim to the Oklahoma Court of Criminal Appeals on direct appeal. That court rejected Petitioner's argument, stating that:

We fail to see how the appellant was prejudiced by this contention. We first note that the witness in question was not called by the prosecution. Secondly, the defense made no effort to call the witness and secure her testimony. Finally, the defense has failed to show how such testimony or evidence was exculpatory. We refuse to make a finding of error from a silent record. Accordingly, the appellant's assignment of error is without merit.

(#6, Ex. A at 2). In the instant case, Petitioner has merely adopted his direct appeal brief in support of this argument. He has not shown this Court how the state court's findings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Furthermore, after careful review of the record, this Court finds nothing to indicate that the state court's conclusion meets the § 2254(d) standard. Therefore, this claim cannot serve as a basis for relief under § 2254.

2. Admission of hearsay evidence

Petitioner claims the trial court erred in admitting hearsay testimony. Petitioner again cites to his brief filed on direct appeal in the Oklahoma Court of Criminal Appeals to support this claim.

After considering the merits of this claim, the state appellate court ruled that the hearsay statements Petitioner complained of were not admitted to prove the truth of the matter asserted and that the questioning of the witness, the victim's mother, was proper under Oklahoma law. (#6, Ex. A at 2). In the instant habeas corpus action, Petitioner has failed to demonstrate to this Court how the state court's ruling "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). Furthermore, after careful review of the record, this Court finds nothing to indicate that the state court's conclusion meets the § 2254(d) standard. Therefore, this claim cannot serve as a basis for relief under § 2254.

3. Improper comments by the prosecutor

Petitioner claims that during his trial, the prosecutor made numerous prejudicial comments and once again cites only to his direct appeal brief to support his claim. After considering the merits of this claim, the state appellate court ruled that "the prosecutor's comments regarding [the definitions of reasonable doubt, presumption of innocence, and burden of proof] were well within the bounds of propriety. The other comments the appellant now objects to were met with a contemporaneous objection at trial, followed by an admonition to the jury. The prejudicial effect of such comments was thereby cured." (#6, Ex. A at 3 (citation omitted)). In the instant habeas corpus action, Petitioner has failed to demonstrate to this Court how the state court's ruling "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). Furthermore, after careful review of the record, this Court finds nothing to indicate that the state

court's conclusion meets the § 2254(d) standard. Therefore, this claim cannot serve as a basis for relief under § 2254.

C. Petitioner's claims numbered 5 and 6 are procedurally barred

The doctrine of procedural default prohibits a federal court from considering specific habeas claims where the state's highest court declined to reach the merits of those claims on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

Applying these principles to the instant case, the Court concludes that Petitioner's claims (5) and (6) are barred by the procedural default doctrine. The Oklahoma Court of Criminal Appeals' procedural bar as applied to Petitioner's claims as presented in his state application for post-conviction relief was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently applied a procedural bar and has denied such claims unless the petitioner provides "sufficient reason" for his failure to raise the claim earlier. Moore v. State, 889 P.2d 1253 (Okla. Crim. App. 1995).

Because of his procedural default, this Court may not consider Petitioner's fifth and sixth claims unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The "cause" standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The "fundamental miscarriage of justice" exception requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause by alleging his appellate counsel provided ineffective assistance in failing to raise these claims on direct appeal. Ineffective assistance of counsel may serve as "cause" excusing a procedural bar, Murray v. Carrier, 477 U.S. at 488, and to establish ineffective assistance of counsel a petitioner must show that his counsel's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984). There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Id. at 688. In making this determination, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id., at 690. To establish the prejudice prong of the Strickland test, Petitioner must show that the allegedly deficient performance prejudiced the defense; namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have

been different." Strickland, 466 U.S. at 694. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689.

Petitioner claims in this case that his appellate counsel provided ineffective assistance in failing to argue on appeal that his right to due process and equal protection of the law was violated by the State's use of peremptory challenges to remove potential minority jurors and that his right to a speedy trial was violated. After careful review of the record, the Court concludes that appellate counsel's failure to raise these claims does not rise to a deficient performance under Strickland and does not, therefore, constitute constitutionally ineffective assistance of counsel.

Petitioner's challenge to the jury selection process is based on the Supreme Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986) (holding that a defendant may establish a prima facie case of discriminatory jury selection based solely on evidence of the prosecutor's exercise of peremptory challenges at trial). In Petitioner's case, several dates are significant to the resolution of this claim. The Supreme Court decided Batson on April 30, 1986. Petitioner was convicted May 31, 1985, almost eleven (11) months before Batson. Petitioner's appellate counsel filed his brief on appeal on June 10, 1985, more than ten (10) months before Batson. The Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction on December 17, 1986, more than seven (7) months after Batson. Thus, the Batson decision was issued during the pendency of Petitioner's direct appeal, but after Petitioner filed his appellate brief. The Supreme Court has held that "Batson v. Kentucky is an explicit and substantial break with prior precedent." Allen v. Hardy, 478 U.S. 255, 258 (1986). It is well established that counsel's failure to anticipate a change in existing law is not ineffective assistance of counsel. See Johnson v. Armontrout, 923 F.2d 107, 108 (8th Cir. 1991). Thus, this

Court finds that appellate counsel's failure to raise the Batson challenge on direct appeal does not represent an unreasonable omission under Strickland. Furthermore, counsel's failure to supplement his appellate brief with a Batson argument did not fall below the deferential standard of reasonableness established in Strickland. See Johnson, 923 F.2d at 108 n.3. Therefore, the Court concludes that because Petitioner has failed to show that his appellate counsel's failure to raise this claim on direct appeal constitutes ineffective assistance of appellate counsel, he has failed to demonstrate "cause" for his failure to raise the jury selection issue on direct appeal.

Similarly, the Court finds that appellate counsel's failure to raise the speedy trial claim on direct appeal does not constitute constitutionally ineffective assistance of counsel. Petitioner has submitted no evidence, and the Court finds none in the record, indicating that he suffered prejudice as a result of the postponement of his trial. See Wingo v. Barker, 407 U.S. 514 (1972) (defendant must be prejudiced by delay in commencement of trial before finding a violation of right to speedy trial). Consequently, there is nothing in the record to suggest a reasonable probability that, but for counsel's failure to raise the claim on appeal, the result of the appeal would have been different. See Strickland, 466 U.S. at 694. Therefore, the Court finds appellate counsel did not provide ineffective assistance in failing to raise this claim on direct appeal. As a result, Petitioner has failed to demonstrate "cause" to excuse the procedural default of his speedy trial claim.

Petitioner's only other means of gaining federal habeas review of these claims is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). Petitioner does state in his reply to Respondent's response that "[h]e has maintained his innocence through this ordeal." However, to satisfy this narrow exception to procedural bar, Petitioner must do more than make an

unsupported assertion of factual innocence. See Klein v. Neal, 45 F.3d 1395, 1400 (10th Cir. 1995); Brecheen v. Reynolds, 41 F.3d 1343, 1353 (10th Cir. 1994). He must present evidence sufficient to undermine this Court's confidence in the outcome of the trial. See Schlup v. Delo, 513 U.S. 298, 316 (1995). Petitioner in the instant case offers no evidence to support his claim of innocence. The Court finds Petitioner's unsupported claim insufficient to undermine confidence in the outcome of the trial and concludes that Petitioner has failed to make the showing necessary to overcome the procedural bar.

Because Petitioner has failed to demonstrate "cause and prejudice" or a "fundamental miscarriage of justice," the Court concludes his fifth and sixth claims are procedurally barred and should be denied on that basis.

D. Petitioner's ineffective assistance of counsel claims (numbers 4 and 7) are without merit

Petitioner asserts as his fourth claim that he received ineffective assistance of appellate counsel and as his seventh claim that he received ineffective assistance of trial counsel.¹ As discussed above, to establish ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second,

¹Petitioner first presented his claim of ineffective assistance of trial counsel to the Oklahoma Court of Criminal Appeals on post-conviction appeal. That court imposed a procedural bar on Petitioner's claim based on his failure to raise the claim on direct appeal. In the instant action, Respondent does not raise the procedural bar defense and instead argues that Petitioner's claim should be denied because it is without merit. As a result, Respondent has waived the procedural bar defense as to this claim. Although this Court may raise the defense *sua sponte*, see Hardiman v. Reynolds, 971 F.2d 500, 503-05 (10th Cir. 1992) (holding that because the state procedural default doctrine substantially implicates important values that transcend concerns of the parties, a court may raise the defense *sua sponte*), the Court declines to do so in this case since the claim involved is ineffective assistance of trial counsel.

he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, *id.* at 694. Failure to establish either prong of the Strickland standard will result in denial of relief. *Id.* at 696. In the instant case, Petitioner fails to satisfy the Strickland standard as to either claim.

1. Ineffective assistance of appellate counsel

In his petition, Petitioner states that appellate counsel "refused to present claims requested by Petitioner and failed to contact and visit petitioner." The Court assumes that the omitted claims Petitioner complains of are his challenge to the use of peremptory challenges to remove minority jurors and his claim that his right to a speedy trial was violated. However, as discussed above, Petitioner failed to satisfy the Strickland standard for ineffective assistance of counsel as to these claims. Therefore, Petitioner's appellate counsel did not provide ineffective assistance in failing to raise these claims on direct appeal.

Petitioner also claims that appellate counsel provided ineffective assistance because he "failed to contact and visit Petitioner." As discussed in part C, above, to establish the prejudice prong of the Strickland test, Petitioner must show that the allegedly deficient performance prejudiced the defense; namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 694. In the instant case, Petitioner has failed to demonstrate a reasonable probability that had his appellate counsel contacted and visited him, the results of the appeal would have been different. As a result, Petitioner has not satisfied the prejudice prong of Strickland and the Court concludes his appellate counsel provided constitutionally effective assistance.

2. Ineffective assistance of trial counsel

As his seventh ground of error, Petitioner argues that his trial counsel provided ineffective assistance of counsel. In support of this claim, Petitioner states that trial counsel failed to investigate and prepare for jury trial, failed to confer with Petitioner prior to and during trial, failed to contact and interview witnesses and failed to prepare and file motions. With one exception, discussed below, Petitioner fails to identify what his counsel failed to investigate, what witnesses he failed to contact, and what motions he failed to file. After reviewing the trial transcript provided by Respondent, the Court finds defense counsel's performance was not deficient, in fact, counsel's performance was commendable, and that Petitioner's conclusory allegations concerning his trial counsel's performance fail to satisfy the performance prong of the Strickland standard.

Petitioner does state in his reply to Respondent's response that his counsel failed to "conduct an independent investigation of blood and saliva samples voluntarily supplied by Petitioner and samples (from 'rape kit') supplied by the victim." A review of the trial transcript reveals that a forensic chemist employed by the City of Tulsa and assigned to the Tulsa Police Department testified at length concerning the results of testing on blood and saliva samples from both the victim and Petitioner. (Tr. Trans. at 331-342). Those test results indicated that the donor of the sperm and semen found in the victim's vagina after the rape was a "non-secretor." While both the victim and Petitioner were "non-secretors," the witness testified that positive identification of the rapist was not possible based on those samples. (Tr. Trans. at 337-38). However, Petitioner could not be eliminated as the rapist based on the test results.

Petitioner offers no authority supporting his contention that his counsel's failure to conduct an independent investigation of the blood and saliva samples constitutes ineffective assistance of

counsel. Nor does he explain how the results of an independent investigation could have benefitted his case. He does not complain that the police department chemist did not act in good faith or in accord with her normal procedures. The Court concludes that trial counsel's performance in this regard did not fall outside the "wide range of reasonable professional assistance [that] . . . might be considered sound trial strategy." Brecheen v. Reynolds, 41 F.3d 1343, 1365 (10th Cir. 1994) (citations omitted). The Court concludes that Petitioner's ineffective assistance of trial counsel claim is without merit and that habeas corpus relief on this claim should be denied.

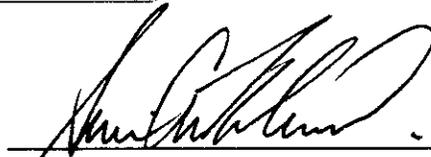
CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States and that the petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied**.

IT IS SO ORDERED.

This 21st day of JANUARY, 1999.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHNNY M. SUNDAY,)
)
Plaintiff,)
)
v.)
)
MICROAGE INFOSYSTEMS SERVICES,)
an Oklahoma corporation; TIMOTHY RABBIT)
and CANDIE PAPER, individuals,)
)
Defendants.)

98-CV-717-H(E)

ENTERED ON DOCKET
DATE JAN 22 1999

FILED
JAN 21 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the Motion of Defendants Microage Infosystems Services ("Microage"), Timothy Rabbit ("Mr. Rabbit"), and Candie Paper ("Ms. Paper") to Dismiss or, in the Alternative, to Stay Proceedings and Compel Arbitration filed December 2, 1998 (Docket # 6). For the reasons expressed herein, the Court concludes that the motion should be granted on the basis that Plaintiff has not exhausted administrative remedies available under Title VII.

The following facts are undisputed for purposes of the instant motion. Plaintiff was terminated from his position with Defendant Microage on April 3, 1998 due to his alleged sexual harassment of Ms. Paper. In response, Mr. Sunday filed a charge of discrimination with the Oklahoma Human Rights Commission ("OHRC") alleging discrimination on the basis of his sex. Thereafter, Mr. Sunday requested the OHRC terminate its proceedings and requested that the EEOC issue to him a Notice of Right to Sue as required pursuant to 42 U.S.C. § 2000e-5(f)(1). Upon receipt of the order terminating proceedings issued by the OHRC, Mr. Sunday filed this suit on September 18, 1998, alleging violations of Title VII of the Civil Rights Act of 1964

("Title VII") and several state law claims arising from his termination. In his Complaint, Plaintiff alleged that he obtained a Notice of Right to Sue, but did not attach such document to his Complaint. Thereafter, Plaintiff filed with this Court a document entitled "Supplement to Complaint" to which he appended the order terminating proceedings issued by the OHRC. In his response to Defendants' motion, Mr. Sunday admits that he had not received a Notice of Right to Sue from the EEOC at the time he filed his Complaint, and that as of his most recent communication with this Court, has not yet received such Notice of Right to Sue.

It is settled law in this Circuit that a plaintiff must obtain a Notice of Right to Sue from the EEOC before filing suit in federal court. See 42 U.S.C. § 2000e-5(f)(1); Yellow Freight System v. Donnelly, 494 U.S. 820, 825 (1990); Witt v. Roadway Express, 136 F.2d 1424, 1429 (10th Cir.), cert. denied, 119 S. Ct. 188 (1998). Defendants note that "there appears to be some confusion in the Tenth Circuit as to whether the requirement of an EEOC filing . . . is a jurisdictional prerequisite to maintaining suit under Title VII." Defendants' Opening Brief in Support of Motion to Dismiss, at 5 (comparing Jones v. Runyon, 91 F.3d 1398, 1399-1400 (10th Cir. 1996) (noting Tenth Circuit "has referred to the requirement of an EEOC filing . . . as a jurisdictional requirement) and Biester v. Midwest Health Servs. Inc., 77 F.3d 1264, 1267 (10th Cir. 1996) (holding 90-day period for filing suit following EEOC disposition "is not jurisdictional but in the nature of a statute of limitations" and is "subject to waiver, estoppel, and equitable tolling.")). The issue before this Court, however, is not whether Plaintiff has filed with the EEOC, but whether the EEOC has provided Plaintiff notice that it has concluded its investigation. If it has not, Plaintiff's failure to append a Notice of Right to Sue to his Complaint simply indicates that he has failed to exhaust the administrative procedures required before filing

a Title VII claim, an issue which Defendants have fully preserved and which the Tenth Circuit recognizes as grounds for dismissal of a Title VII claim. See Jones v. Runyon, 91 F.3d 1398, 1400 n.1 (10th Cir. 1996), cert. denied, 117 S. Ct. 1243 (1997).

Plaintiff urges this Court to treat Defendants' Motion to Dismiss as a Motion for Summary Judgment and provide him with additional discovery opportunities so he may respond. The Court notes, however, that Plaintiff has admitted he has not received a Notice of Right to Sue from the EEOC. Thus, even were the Court to convert the motion to one for summary judgment, Plaintiff's admission of this material fact would support this Court's conclusion.

For the foregoing reasons, the Court concludes that Defendants' Motion to Dismiss or, in the Alternative, to Stay Proceedings and Compel Arbitration filed December 2, 1998 (Docket # 6) is granted on the basis that Plaintiff has not exhausted administrative remedies available under Title VII. The Court declines to exercise jurisdiction over Plaintiff's state law claims, the federal claim being dismissed. See 28 U.S.C. § 1367(c)(1). Plaintiff's claims are dismissed without prejudice. All other arguments and motions pending are hereby deemed moot.

IT IS SO ORDERED.

This 21st day of January, 1999.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

CHARLES L. DENNIS,
SSN: 444-66-4176

Plaintiff,

v.

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

Defendant.

JAN 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-CV-909-J

ENTERED ON DOCKET

DATE JAN 22 1999

ORDER^{2/}

Plaintiff, Charles L. Dennis, 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, contrary to case law, the ALJ did not rely on specific evidence in the record to support the ALJ's conclusion that Plaintiff could perform light work. For the reasons discussed below, the Court **REVERSES** the Commissioner's decision.

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

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

^{3/} Administrative Law Judge Larry C. Marcy (hereafter "ALJ") concluded that Plaintiff was not disabled on August 5, 1996. [R. at 13]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on July 30, 1997. [R. at 3].

I. PLAINTIFF'S BACKGROUND

Plaintiff was born July 17, 1964, and was 31 years old at the time of the decision by the ALJ. [R. at 781]. Plaintiff testified that he could no longer work due to constant pain in his back, legs, neck, and shoulders. [R. at 184]. Plaintiff stated that he could not reach above his shoulder on his left side, that he could not stand for over thirty minutes, that he could not sit for longer than thirty minutes, and that he could not lift over thirty pounds. [R. at 194].

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

^{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).

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^{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

^{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."

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 although Plaintiff could not return to her past relevant work, she could perform a substantial number of jobs in the national economy. The ALJ based his decision, in part, on the testimony of a vocational expert.

IV. REVIEW

Plaintiff asserts that the ALJ improperly concluded that Plaintiff could perform the sitting and standing requirements of light work. Plaintiff notes that one of his treating physicians, in 1995, concluded that Plaintiff should be able to return to work, but that Plaintiff was injured on two separate occasions after the opinion of this treating physician was given. Plaintiff observes that after his two injuries he was given permanent partial impairments of 12% and 24.5%, and that none of his treating physicians have stated that he could perform the requisite sitting and standing

requirements. Plaintiff additionally notes that although one of his physicians stated that Plaintiff could return to work "as he feels comfortable," this statement does not equate to evidence in the record that Plaintiff can perform the requirements of light work.

In Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993), the Tenth Circuit court of Appeals noted that, at Step Five, the burden of proof was on the Commissioner and consequently an ALJ should rely on evidence in the record in making his conclusions.

The ALJ determined that Ms. Thompson retained the RFC to do sedentary work. This finding must be supported by substantial evidence. It appears not to be supported by any evidence at all, however. . . . In making his finding that Ms. Thompson could do the full range of sedentary work, the ALJ relied on the absence of contraindication in the medical records. The absence of evidence is not evidence. The ALJ's reliance on an omission effectively shifts the burden back to the claimant. It is not her burden, however, to prove she cannot work at any level lower than her past relevant work; it is the Secretary's burden to prove that she can.

Id. at 1491. Plaintiff's medical records are not as sparse as the medical records in Thompson. However, the Court concludes that the record does not contain substantial evidence to support the conclusion of the ALJ that Plaintiff can perform the sitting and standing requirements of sedentary work.

The medical record does not contain substantial evidence to support the ALJ's conclusion that Plaintiff could sit or stand for the requisite number of hours to perform sedentary work. The Court additionally notes that nothing in the medical record

suggests that Plaintiff is unable to perform sedentary work. However, as outlined by the Tenth Circuit, the "absence of evidence is not evidence." This Court has previously affirmed decisions by the ALJ when the record contained a Residual Functional Capacity Assessment completed by a physician which provided information on the sitting and standing capabilities of the claimant based on the record. In addition, the Court has affirmed ALJ decisions where the ALJ referred the Plaintiff to a consultative examiner and obtained information from the consultative examiner regarding the sitting and standing capabilities of the claimant. On remand, the ALJ should obtain the information necessary to support an RFC assessment of Plaintiff.

Accordingly, the Commissioner's decision is **REVERSED** and remanded for further proceedings consistent with this opinion.

Dated this 20 day of January 1999.

A handwritten signature in black ink, appearing to read "Sam A. Joyner", written in a cursive style.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

CHARLES L. DENNIS,
SSN: 444-66-4176

Plaintiff,

v.

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

Defendant.

JAN 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-CV-909-J

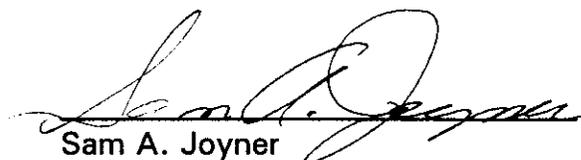
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DATE JAN 22 1999

JUDGMENT

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

It is so ordered this 20th 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.

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

FILED

JAN 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IRENE M. LEWIS, an)
individual,)
Plaintiff,)

vs.)

Case No.: 98-C-201-H(M)

UNITED INSURANCE COMPANY OF)
AMERICA, a foreign insurance)
corporation,)

Defendant.)

ENTERED ON DOCKET

DATE JAN 23 1999

ORDER OF DISMISSAL WITH PREJUDICE

Based upon the Stipulation for Dismissal with Prejudice signed by all parties, and filed on November 18, 1998, the Court hereby dismisses the above-styled and numbered cause of action with prejudice.

 1/20/99
UNITED STATES DISTRICT COURT JUDGE

20

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

VONNA SIMPSON,)
)
Plaintiff,)
)
vs.)
)
WAL-MART STORES, INC.,)
)
)
)
Defendant.)

No. 98-CV-235-K ✓

ENTERED ON DOCKET
DATE 1/22/99

FILED
JAN 21 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action came on for jury trial, the Honorable Terry C. Kern, Chief District Judge, presiding. The jury returned a verdict finding plaintiff suffered damages in the amount of \$100,000, but also finding that plaintiff committed contributory negligence in the amount of 49%. Pursuant to Oklahoma law, the verdict is accordingly reduced.

IT IS THEREFORE ORDERED that the Plaintiff Vonna Simpson recover of the Defendant Wal-Mart Stores, Inc. the sum of \$51,000.00, with interest thereon at the rate provided by law.

ORDERED this 21 day of January, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

THEODORE K. OWENS,

Defendant.

)
)
)
)
) No. 98CV0854B(E)
)
)
)
)

ENTERED ON DOCKET
JAN 22 1999

DEFAULT JUDGMENT

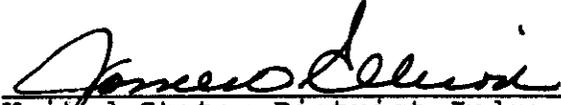
This matter comes on for consideration this 20th day of January, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Theodore K. Owens, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Theodore K. Owens, was served with Summons and Complaint on November 10, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Theodore K. Owens, for the principal amount of \$4,905.96, plus accrued interest of \$1,881.30, plus administrative charges in the amount of \$87.00, plus interest thereafter at the rate of 3 percent per annum

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until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.545 percent per annum until paid, plus costs of this action.


United States District Judge
for Thomas R. Brett

Submitted By:


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

LFR/11f

52

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

FILED

JAN 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENSERCH CORPORATION,)
a Texas corporation,)
)
Plaintiff,)

v.)

Case No. 98-CV-¹⁹⁶~~916~~H (EA)

CNA INSURANCE COMPANIES, INC.,)
a Delaware corporation, and CONTINENTAL)
CASUALTY COMPANY, an Illinois corporation)
)
Defendant.)

ENTERED ON DOCKET
DATE JAN 21 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff and the Defendant, pursuant to Fed. R. Civ. P. 41(a)(ii),
and pursuant to the terms of a settlement agreement reached between the parties hereby
Jointly Stipulate to the Dismissal With Prejudice of the above-captioned matter.

BLAKE K. CHAMPLIN, OBA No. 11788
JAMIE TAYLOR BOYD, OBA No. 13659



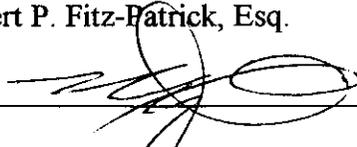
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201 West Fifth Street, Suite 201
Tulsa, Oklahoma 74103
(918) 582-1720

Attorneys for Plaintiff

CLT

Robert P. Fitz-Patrick, Esq.

By


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P.O. Box 2619
Tulsa, OK 74101-2619

and

Mark W. Peck, Esq.
OLSON CORTNER & MCNABOE
444 S. Flower Street
20th Floor
Los Angeles, CA 90071

Attorneys for Defendant

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Veterans Affairs,)
)
Plaintiff,)

v.)

THE UNKNOWN HEIRS, EXECUTORS,)
ADMINISTRATORS, DEVISEES,)
TRUSTEES, SUCCESSORS AND)
ASSIGNS OF JAMES W. JOICE)
aka James Walter Joice, DECEASED;)
DEBORAH JOICE aka Deborah J. Joice)
nka Deborah J. Hudson;)
SPOUSE, if any, of DEBORAH J. HUDSON;)
JAMES CARROLL JOICE;)
SPOUSE, if any, OF JAMES CARROLL JOICE;)
DEBERA DEANN JOICE;)
SPOUSE, if any, OF DEBERA DEANN JOICE;)
CATHY SUE JOICE;)
SPOUSE, if any, OF CATHY SUE JOICE;)
MALINDA ANN JOICE;)
SPOUSE, if any, OF MALINDA ANN JOICE;)
VICKIE LEONA JOICE PARRISH;)
SPOUSE, if any, OF VICKIE LEONA)
JOICE PARRISH;)
STATE OF OKLAHOMA *ex rel.*)
Oklahoma Tax Commission;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
)
Defendants.)

F I L E D

JAN 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE JAN 21 1999

CIVIL ACTION NO. 97-CV-14-H

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 20th day of January, 1999, there comes on for hearing before the
Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States
Marshal for the Northern District of Oklahoma on November 30, 1998, pursuant to an Order of Sale dated July 16,
1998, of the following described property located in Tulsa County, Oklahoma:

Lot Two (2), Block Two (2), ARK RIDGE ESTATES to the County of Tulsa, an Addition to the City of Jenks, State of Oklahoma, according to the Recorded Plat thereof.

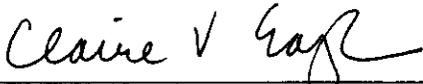
Appearing for the United States of America is Wyn Dee Baker, Assistant United States Attorney. Notice was given the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of James W. Joice aka James Walter Joice, Deceased; Spouse, if any, of James Carroll Joice; and Spouse, if any, of Malinda Ann Joice, by publication; Defendants, Deborah Joice aka Deborah J. Joice nka Deborah J. Hudson; Spouse of Deborah J. Hudson who is one and the same person as Gary L. Hudson; James Carroll Joice; Debera Deann Joice aka Debra DeeAnn Joice Stewart; Spouse of Debera Deann Joice aka Debra DeeAnn Joice Stewart who is one and the same person as Curtis Stewart; Cathy Sue Joice aka Cathy Sue Joice Wood; Spouse of Cathy Sue Joice aka Cathy Sue Joice Wood who is one and the same person as Johnny Wood; Malinda Ann Joice; Vickie Leona Joice Parrish; Spouse of Vickie Leona Joice Parrish who is one and the same person as Thurman D. Parrish, by mail; Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, through Kim D. Ashley, Assistant General Counsel; and Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assisant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Jenks Journal, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and

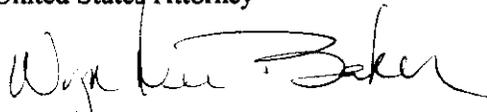
that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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

Report and Recommendation of United States Magistrate Judge
Case No. 97-CV-14-H (Joice)

WDB:css

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

SALAHUDDIN AHMAD,

Plaintiff,

v.

VALMONT INDUSTRIES, INC.,

Defendant.

ENTERED ON DOCKET

DATE JAN 21 1999

No. 97-CV-1128-K ✓

FILED

JAN 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised that the parties to this action have failed to continue to actively litigate this matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that further litigation is necessary.

ORDERED this 20 day of January, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JAN 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PAUL J. BECHEN,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner of the Social)
Security Administration,)
)
Defendant.)

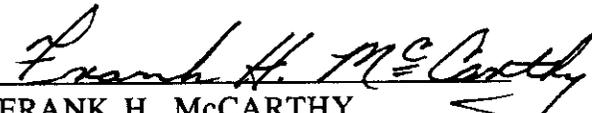
Case No. 98-CV-528-M

ENTERED ON DOCKET
JAN 21 1999
DATE _____

ORDER

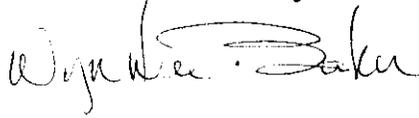
Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to 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 19th day of JAN. 1999.


FRANK H. McCARTHY
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in cursive script that reads "Wyn Dee Baker". The signature is written in black ink and is positioned below the typed name.

WYN DEE BAKER, OBA #465
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

F I L E D

JAN 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PAUL J. BECHEN,)
)
Plaintiff,)

v.)

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

Defendant.)

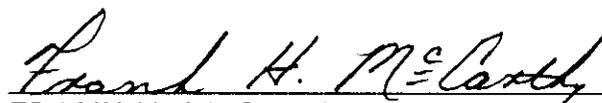
CASE NO. 98-CV-528-M ✓

ENTERED ON DOCKET

DATE JAN 21 1999

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 19th day of JAN, 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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