

F I L E D

FEB 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

MELANIE HAMRICK,)
)
Plaintiff,)
)
vs.)
)
ST. JOHN'S MEDICAL CENTER,)
)
Defendant,)

Case No. 98-C-198-E

ENTERED ON DOCKET
FEB 26 1999
DATE _____

J U D G M E N T

In accord with the Order filed this date sustaining the Defendants' Motions for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, St. John's Hospital, and against the Plaintiff, Melanie Hamrick. Plaintiff shall take nothing of her claim.

DATED, THIS ²¹26 DAY OF FEBRUARY, 1999.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

F I L E D

FEB 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MELANIE HAMRICK,)
)
 Plaintiff,)
)
 vs.)
)
 ST. JOHN'S MEDICAL CENTER,)
)
 Defendant,)

Case No. 98-C-198-E ✓

ENTERED ON DOCKET
DATE: FEB 26 1999

ORDER

Now before the Court is the Motion for Summary Judgment (docket # 14) of the Defendant, St. John's Medical Center.

Melanie Hamrick brings this action against her previous employer, St. John's Hospital, alleging age and disability discrimination in violation of the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) when she was unable to find a "suitable" job with St. John after she had been off for approximately seven months recovering from back surgery. She claims that St. John failed to reasonable accommodate her limitations which resulted from back surgery, and that she was terminated, at least in part because of her age. St. John seeks summary judgment on the age discrimination claim, arguing that her claim is barred by her failure to file a charge alleging age discrimination, and because she cannot establish the elements of an age discrimination claim, in particular, that she was replaced by a person younger than she is. St. John seeks summary on the disability discrimination claim arguing that the EEOC never issued a Notice of Right-to-Sue, and that it did not terminate her or fail to accommodate her in violation of the ADA.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine

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issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). "The mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to create a dispute of fact that is 'genuine'; an issue of material fact is genuine only if the nonmovant presents facts such that a reasonable jury could find in favor of the nonmovant." Lawmaster v. Ward, 125 F.3d 1341, 11347 (10th Cir. 1997)/

Age Discrimination Claim

Although St. John makes two arguments regarding summary judgment on plaintiff's age discrimination claim, Hamrick, in her response, fails to address this claim in any manner whatsoever, apparently conceding the argument on this claim. Nonetheless, the Court has reviewed the argument, and the underlying documentation on plaintiff's age discrimination claim with the EEOC, and concludes that nothing in the charge or the accompanying affidavits raises an age discrimination claim. Accordingly, plaintiff has failed to satisfy one of the required pre-requisites to an ADEA

lawsuit, and summary judgment is appropriate on this claim. Aronson v. Gressly, 961 F.2d 907, 911 (10th Cir. 1992).

Disability Discrimination Claim

Under the requirements of the ADA, a plaintiff must receive a Notice of Right-to-Sue from the EEOC and bring an action within 90 days of receiving that Notice. 42 U.S.C. §2000e-5(f)(1), Movement for Opportunity and Equality v. General Motors Corp., 622 F.2d 1235 (7th Cir. 1980). The issue here is whether Hamrick received a Notice of Right-to Sue from the EEOC on her ADA claim. The parties have stipulated that the EEOC does not have any record of having sent a Notice of Right-to-Sue, and that the only documentation that the EEOC has in its file is the initial paperwork provided by plaintiff and the December 19, 1997 letter to Hamrick requesting more information. Ms. Hamrick also testified in her deposition that she does not have any record of having received a Notice of Right-to-Sue, that she does not know whether she received one, and that she did not provide any more information in response to the December 19, 1997 letter.

Hamrick attempts to avoid summary judgment by relying on her affidavit, drafted approximately seven months prior to her deposition, wherein she states that she "received a Notice of Right to Sue letter from (sic) the end of December 1997, granting [her] permission to sue the Defendant in federal court." Taking into account the stipulations of the parties and plaintiff's burden of raising a genuine issue of material fact, the Court finds that the statement in the affidavit is insufficient to defeat the motion for summary judgment.

Defendant's Motion for Summary Judgment (docket #14) is granted.

IT IS SO ORDERED THIS 26th DAY OF FEBRUARY, 1999.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

F I L E D

FEB 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JESSE B. SAMPSON,
444-52-5144

Plaintiff,

vs.

Case No. 97-CV-513-M

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

ENTERED ON DOCKET
DATE FEB 26 1999

ORDER

Plaintiff, Jesse B. Sampson, seeks judicial review of that part of a decision of the Commissioner of the Social Security Administration which denied Social Security disability benefits prior to August 1, 1992. 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 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 would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff's application for Supplemental Security Income was protectively filed April 28, 1992, and his application for Disability Insurance Benefits was filed May 6, 1992. These applications were denied and appealed to district court. The district court reversed the denial and remanded the case to the Social Security Administration for further consideration of Plaintiff's limited pulmonary function and mental abilities in conjunction with his ability to perform work. On remand, a hearing was held before an Administrative Law Judge ("ALJ"). By decision dated March 29, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on May 30, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Plaintiff was born August 2, 1942, and was 54 years old at the time of the hearing. He has a 8th grade education and formerly worked as an oil field worker and carpenter. He claims to have been unable to work since March 31, 1985, as a result of back pain, pulmonary disease, mental, sleep, and heart problems. The ALJ determined that based on Plaintiff's age, limited education, work experience, and physical limitations, the Vocational-Medical Guidelines ("grids"), Appendix 2, Subpart

P, Regulations No. 4, Rule 201.10, dictate a finding that Plaintiff has been disabled since August 1, 1992, when he turned 50 years of age. The ALJ found that before that date Plaintiff was capable of performing sedentary work. Based on the grids the ALJ determined that Plaintiff was not disabled prior to August 1, 1992. 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).

Following a hearing held October 10, 1990, an earlier application for benefits was denied and not reopened. Accordingly, the period prior to October 10, 1990, was not before the ALJ. Plaintiff's insured status expired March 31, 1991, therefore the period of time subsequent to that date is not relevant to a determination of whether Plaintiff is entitled to Disability Insurance Benefits (Title II). 42 U.S.C. § 423(d)(1)(A). Since Plaintiff is only appealing the part of the decision denying him Title II benefits, the time-frame relevant to this appeal is the five and a half months between October 10, 1990, and March 31, 1991.

Plaintiff asserts that the ALJ erred in failing to consider his mental disorder prior to August 1, 1992, as a non exertional limitation that would preclude reliance on the grids to deny benefits. The ALJ found that the record does not demonstrate that Plaintiff has a medically determinable mental impairment. The Court concludes that the record contains substantial evidence supporting the ALJ's conclusion concerning Plaintiff's mental status and therefore affirms the Commissioner's denial of benefits.

Plaintiff was seen at Ozark Counseling Services on several occasions from April 30, 1990, to October 24, 1991, for treatment of a sleep disorder. [R. 152-156; 285-299]. He underwent a mental status examination in April 1990 when he presented for treatment. The exam disclosed an estimated intellectual capacity in the low normal range, no evidence of psychotic thought process or behavior, with insight and judgment within the normal range. [R. 156]. Ozark Counseling records indicate that by October 1990 Plaintiff was of the opinion that his hypersomnia was controlled, with adjustment of prescribed medication. Plaintiff had regular appointments at Ozark Counseling from April to December, 1990. Thereafter, he presented for an appointment at the clinic on February 21, 1991, and not again until his final appointment at the clinic on October 24, 1991, when he was seen by a different doctor who noted that he suspected an atypical depression.

The record contains no other mention of psychiatric or psychological problems until a consultative examination was performed by psychiatrist, Vanessa Werlla, M.D. on October 8, 1992, well after the date Plaintiff was last insured for Title II benefits. [R. 278-282]. Dr. Werlla stated that psychiatrically speaking, Plaintiff's primary diagnosis was a personality disorder with prominent antisocial and paranoid features. [R. 281]. She did not comment as to how long this disorder may have existed. During the relevant dates, between October 10, 1990, and March 31, 1991, there is no indication that Plaintiff suffered from a mental impairment that would impact his ability to perform work. The ALJ's conclusion that Plaintiff did not demonstrate a medically determinable mental impairment is supported by the record.

Plaintiff argues that his police record including 1964 and 1965 convictions for assault with a deadly/dangerous weapon, resisting arrest, and assault and battery show a man with a history of becoming violent quickly and actually harming or seeking to harm others. The ALJ did not err in failing to discuss this evidence, decades outside the relevant time frame.

Plaintiff also argues that the testimony of the medical expert, Dr. Harvey, establishes that Plaintiff suffered a mental impairment in 1990 and 1991. Plaintiff quotes Dr. Harvey's statement that "we know the he has [sic] having psychiatric difficulties as far back as 1990-1991," and concludes that the ALJ erred in omitting a mental disorder as a non-exertional impairment. Taken in context, Dr. Harvey's testimony supports the ALJ's conclusion that the records do not demonstrate the existence of a mental impairment during the relevant time frame. Based on his review of the medical records, Dr. Harvey testified:

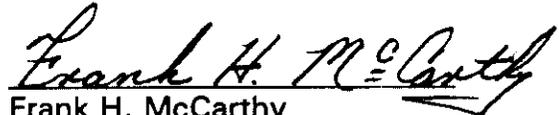
[I]n addition to Dr. Werl[ia]'s consultative examination, that he had records of being seen at the Ozark Counseling Service in 4-19-90 to 10-24-91, and they tell about the problems that he had with his third wife and mother-in-law, and his unhappy early life as a teenager, drug use and confinement to penitentiary, and we know he did work after that, after being in the penitentiary as a carpenter and in the oil field. The Ozark Counseling Service note have to do mainly with drug treatment of his hypersomnolence or possible narcolepsy. The onset of the personality disorder, it would be hard to determine, in other words, from those notes. The - What I am doing here is groping for an onset date. We just don't have the records showing a diagnosis of a personality disorder before the examination Dr. Werl[ia] on 10-08-92, but we know he was having psychiatric difficulties as far back as 1990-1991, but they don't really

make that kind of a diagnosis at the Ozark Counseling Center. [emphasis supplied].

[R. 404]. In his own words, the status of the medical records left Dr. Harvey "groping" for an onset date for existence of a personality disorder. Even in his "groping" Dr. Harvey was not able to come up with one. The Court rejects Plaintiff allegation of error.

The Court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts. The Court further finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled prior to August 1, 1992, is AFFIRMED

SO ORDERED this 23rd Day of February, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of Rural Housing Service,
formerly Farmers Home Administration,

Plaintiff,

v.

RICHARD L. HOWARD;
MARY I. HOWARD;
COUNTY TREASURER, Pawnee County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Pawnee County, Oklahoma,

Defendants.

FILED

FEB 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE FEB 26 1999

CIVIL ACTION NO. 98-CV-0375-K (J)

ORDER OF SALE

UNITED STATES OF AMERICA TO: U.S. Marshal for the
Northern District of Oklahoma

On February 5, 1999, the United States of America recovered judgment in rem
against the Defendants, Richard L. Howard and Mary I. Howard, in the above-styled action to
enforce a mortgage lien upon the following described property:

Lots Fifteen (15), Sixteen (16), Seventeen (17), Eighteen
(18), and Nineteen (19), in Block Twelve (12), in the
ORIGINAL TOWN of Terlton, in Pawnee County, State of
Oklahoma, according to the recorded plat thereof, subject to
all valid outstanding easements, rights-of-way, mineral leases,
mineral reservations, mineral conveyances, and protective or
restrictive covenants of record.

The amount of the judgment is the sum of \$36,733.26, plus accrued interest in
the amount of \$4,087.31 as of October 22, 1997, plus interest accruing thereafter at the rate of
8.75 percent per annum or \$8.8060 per day until judgment, plus interest thereafter at the

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CJT

current legal rate of 4.584 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 other advances. The judgment further provides that the mortgage on the above-described property is foreclosed, and that all Defendants and all persons claiming under them are barred from claiming any right, title, interest, and equity in the property. If Defendants, Richard L. Howard and Mary I. Howard, should fail to satisfy the in rem judgment to the Plaintiff, the judgment provides 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 the property according to Plaintiff's election with or without appraisal and to apply the proceeds to the payment of the costs of the sale; the judgment of Defendants, County Treasurer and Board of County Commissioners, Pawnee County, Oklahoma; and the Plaintiff's judgment. Any residue is to be paid to the Court Clerk to await further order of this Court.

THEREFORE, this is to command you to proceed according to law, to advertise and sell, with appraisal, the above-described real property and apply the proceeds thereof as directed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Northern District of Oklahoma, in my office in the City of Tulsa, Oklahoma, on the 26th day of February, 1999.

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

By K. Rains
Deputy

Order of Sale
Case No. 98-CV-0375-K (J) (Howard)
CDM:cas

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

Phil Lombardi, Clerk -2-

By _____
Deputy







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mbf:kw
02-24-99

FILED

FEB 24 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

FIRST MARINE INSURANCE COM-)
PANY, a Missouri Corporation)

Plaintiff,)

v.)

Case No.: 98 CV 560K (M) ✓

- 1) JAMES W. COULANDER,)
- 2) BEVERLY COULANDER,)
- 3) STILLWATER NATIONAL BANK,)
- 4) WILLIAM B. GADDIS, JR.,)
- 5) JAMES W. LEE,)
- 6) BERNADINE KAY JOHNSON,)

Defendants.)

ENTERED ON DOCKET

FEB 25 1999

DATE _____

STIPULATION FOR ORDER OF DISMISSAL
AS TO DEFENDANT BERNADINE KAY JOHNSON ONLY

Pursuant to Federal Rules of Civil Procedure 41(a)(2) the Plaintiff First Marine Insurance Company and the Defendant Bernadine Kay Johnson hereby stipulate that all claims and counter-claims between these parties only may be dismissed with prejudice.

In the companion case pending in state court, the Defendant Bernadine Kay Johnson has entered into a settlement, part of which involves the dismissal of her Counterclaim for personal injury damages. As such, the Defendant Bernadine Kay Johnson no longer has any interest in any part of the First Marine Insurance Company policy proceeds.

WHEREFORE, First Marine Insurance Company and Defendant Bernadine Kay Johnson jointly request that the Court sign the attached Order of Dismissal of the Defendant Bernadine Kay Johnson only.

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Respectfully submitted,

BY:


THOMAS E. BAKER, OBA #11054
MICHELLE BAUER FOLKS, OBA #16983
DANIEL, BAKER & HOWARD
2431 East 51st Street, Suite 306
Tulsa, Oklahoma 74105
(918) 749-5988

Attorneys for Plaintiff
First Marine Insurance Company

AND


MICHAEL C. TAYLOR
1718 S. Cheyenne Ave.
Tulsa, OK 74119

Attorney for Defendant Bernadine Kay
Johnson

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing instrument was deposited in the U.S. Mail this 24, day of February, 1999, addressed to Everett Bennett, Esq., P.O. Box 799, Tulsa, OK 74101, J. Gregory LaFavers, Esq., 5314 S. Yale, Ste. 310, Tulsa, OK 74135, and William J. Baker, Esq., P.O. Box 668, Stillwater, OK 74076 with proper postage thereon fully prepaid.


MICHELLE B. FOLKS

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

FILED

FEB 25 1999 *AL*

JAMIE D. YOUNG,)
)
 Plaintiff,)
)
 v.)
)
 EQUI-TRANS ALUMINUM TRAILERS, INC.,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-970-H ✓

ENTERED ON DOCKET
DATE FEB 25 1999

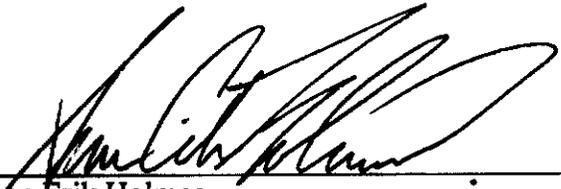
ADMINISTRATIVE CLOSING ORDER

Defendant having filed its petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

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

IT IS SO ORDERED.

This 24TH day of February, 1999.



Sven Erik Holmes
United States District Judge

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

FILED
FEB 24 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DUJUAN TANZELL REED,)
)
Petitioner,)
)
vs.)
)
RON WARD,)
)
Respondent.)

Case No. 98-CV-128-B (J)

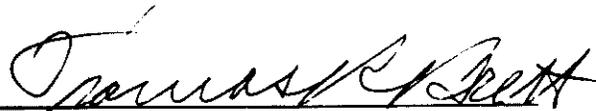
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DATE FEB 25 1999

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed with prejudice as barred by the statute of limitations.

SO ORDERED THIS 24th day of Feb., 1999.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

requested relief on December 18, 1996. (#10, Ex. C). In response to Petitioner's amended post-conviction application, the trial court issued its Order, on January 17, 1997, denying Petitioner's "Second Application for Post-Conviction relief."¹ (#10, Ex. D). On January 16, 1997, Petitioner filed a post-conviction appeal in the Oklahoma Court of Criminal Appeals where the denial of post-conviction relief was affirmed on February 28, 1997. (#10, Ex. E). Petitioner filed the instant federal petition for writ of habeas corpus on February 17, 1998 (#1).

ANALYSIS

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

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

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

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

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

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

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

¹See #10, Ex. E n. 1.

28 U.S.C. § 2244(d). In general, the limitations period begins to run from the date on which a prisoner's conviction becomes final. Also, the limitations period is tolled or suspended during the pendency of a properly filed state application for post-conviction relief. § 2244(d)(2).

Application of the provisions of § 2244(d) to the instant case leads to the conclusion that this habeas petition was filed after the expiration of the one-year limitations period. Because Petitioner failed to perfect a direct appeal, his conviction became final on September 27, 1996, after expiration of the ten day period within which Petitioner could give notice of his intent to appeal his conviction and sentence. See Rule 2.5(A), *Rules of the Court of Criminal Appeals* (providing that a defendant must file with the trial court clerk a notice of intent to appeal and designation of record within ten (10) days of the date the Judgment and Sentence is imposed in open court). Therefore, his conviction became final after enactment of the AEDPA. As a result, his one-year limitations clock began to run on September 27, 1996, and, absent a tolling event, a federal petition for writ of habeas corpus filed after September 27, 1997, would be untimely.

However, Petitioner did seek post-conviction relief during the one-year period. Therefore, pursuant to § 2244(d)(2), the limitations period is suspended during the time Petitioner had "a properly filed application for State post-conviction or other collateral review" pending in the state courts. Petitioner filed his application for post-conviction relief on December 12, 1996, or 289 days prior to his September 27, 1997, federal habeas corpus filing deadline. Once the state courts concluded review of his "properly filed" post-conviction applications, Petitioner would have to file his federal habeas petition within 289 days to be timely. The Oklahoma Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief on February 28, 1997. Thus, Petitioner's federal petition had to be filed within 289 days of February 28, 1997, or by December 14, 1997, to be timely. Petitioner did not file his petition until February 17, 1998, more than two (2) months

beyond the deadline. Therefore, this petition should be dismissed unless Petitioner demonstrates that the limitations period should be tolled.

In his objection to Respondent's motion to dismiss (#11), Petitioner indicates that "while trying to properly prepare his writ of habeas corpus [he] was given very limited access to the law library here at the Oklahoma State Penitentiary (sic)." In addition, Petitioner claims that during the one-year limitations period, he was placed in restrictive housing at three (3) different prisons and asserts that prison records from August 1997 to December 1997 would demonstrate that he was in restrictive housing during the last two months of the limitations period. As a result, Petitioner claims that preparation of the instant petition was hindered.² In his supplemental brief (#12), Petitioner concedes that his petition "was filed late," and also states that he "was totally unaware that a statute (sic) of limitation existed on the habeas (sic) corpus petition" but that he tried to file his petition within a "reasonable time."

Although § 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling, Miller v. Marr, ¹⁴¹ ~~141~~ F.3d 976, 978 (10th Cir. 1998) (indicating equitable tolling principles apply only where a prisoner has diligently pursued federal habeas claims), the Court is not persuaded by Petitioner's attempts to justify his late filing. The one year time period afforded by § 2244(d) gives prisoners sufficient time to prepare and file a federal petition and leaves room for the inevitable delays resulting from lockdowns, restrictive housing and interruptions in research and writing due to often unpredictable library access. Even if Petitioner were in restrictive housing for the last two

²To the extent Petitioner argues his case falls within § 2244(d)(1)(B), which provides that the one-year limitations period commences on the "date on which an 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 Action," the Court finds the argument to be without merit. Petitioner has failed to demonstrate that his placement in restrictive housing violated the Constitution or laws of the United States and he has not shown that his placement actually impeded his efforts to file his petition.

months of the limitations period, he offers no explanation for his failure to pursue diligently habeas relief during the six (6) months after the Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief and before his alleged period of restrictive housing. Furthermore, Petitioner's placement in restrictive housing can be considered an expected part of prison life and does not constitute an exceptional circumstance. See Davis v. Johnson, 158 F.3d 806, 811 (5th Cir.1998) (one-year limitation period of AEDPA will be equitably tolled only "in rare and exceptional circumstances"). As a result, equitable tolling is not justified under these facts. Id.; see also Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618-19 (3d Cir.1998) (equitable tolling applies only where prisoner has diligently pursued claims but has in some "extraordinary way" been prevented from asserting rights). In addition, neither Petitioner's *pro se* status nor his unfamiliarity with the law is sufficient cause to excuse his untimeliness. See, e.g., Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir.1991) (cause and prejudice standard applies to *pro se* prisoner's lack of awareness and training on legal issues); Saahir v. Collins, 956 F.2d 115, 118 (5th Cir.1992) (actual knowledge of legal issues not required by *pro se* petitioner). Therefore, the Court declines to excuse Petitioner's untimely filing and concludes Respondent's motion to dismiss should be granted.

CONCLUSION

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

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#9) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED THIS 24 day of Feb., 1999.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

FEB 24 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LORI SMALLWOOD,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES DEPARTMENT OF THE)
 ARMY,)
)
 Defendant,)

Case No. 98-C-208-E

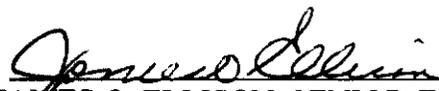
ENTERED ON DOCKET
FEB 25 1999
DATE _____

ORDER

Now before the Court is the Special Appearance, Suggestion of Improper Service, and Request for Dismissal (docket # 2) of the Defendant, the United States Department of the Army.

Defendant originally filed this motion to dismiss, arguing that service was not achieved appropriately, pursuant to Fed.R.Civ.P. 4(i), in that the United States Attorney's Office has never been served, and that dismissal is also required by Fed.R.Civ.P. 4(m) because service was not accomplished within 120 days of the filing of the action in district court. Plaintiff has failed to respond to this motion. The Court has examined the record, and finds no proof of proper service. Dismissal is therefore appropriate pursuant Fed.R.Civ.P. 4(i) and 4(m).

IT IS SO ORDERED THIS 24TH DAY OF FEBRUARY, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

4

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

FILED

FEB 25 1999

CLARENCE EDWARD JACKSON,)
)
 Plaintiff,)
 vs.)
)
 MARVIN T. RUNYON, POSTMASTER)
 GENERAL OF THE UNITED STATES,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-38-BU

ENTERED ON DOCKET

DATE FEB 25 1999

ADMINISTRATIVE CLOSING ORDER

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

If the parties have not reopened this case within 45 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 25th day of February, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

LINDA K. FERGUSON,
SSN: 443-66-8121,

PLAINTIFF,

vs.

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

DEFENDANT.

FEB 24 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE No. 98-CV-137-M

ENTERED ON DOCKET

DATE FEB 24 1999

ORDER

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

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

¹ Plaintiff's February 17, 1994 application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held March 19, 1996. By decision dated April 5, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on December 16, 1997. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

(11)

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 May 2, 1960 and was 35 years old at the time of the hearing. [R. 27, 59]. She claims to have been unable to work since February 16, 1991 due to back pain, pain and numbness in her hands and feet, headache, hiatal hernia and depression. [R. 59, 105, 121].

The ALJ determined that Plaintiff has a severe impairment consisting of occasional low back pain but that she retained the residual functional capacity (RFC) to perform the full range of sedentary work, subject to occasional back pain. [R.17]. He determined that Plaintiff is unable to return to her past relevant work (PRW) but found that occupations exist in the economy in significant numbers that she can perform with her RFC and found Plaintiff was not disabled as defined by the Social Security Act. [R. 17-19]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to properly consider treating physicians' records; (2) failed to conduct a proper credibility analysis; (3) failed to properly consider evidence of her mental impairment; (4) failed to present the vocational expert with an appropriate hypothetical; and (5) failed to shift the burden of proof properly at step five.

For the following reasons, the Court finds it necessary to reverse and remand this claim to the Commissioner to reassess Plaintiff's mental condition.

Plaintiff included depression as one of her impairments in her application for benefits and her request for reconsideration.² [R. 105, 122, 134]. A Psychiatric Review Technique form (PRT) was completed by Carolyn Goodrich, Ph.D., a medical consultant for the administration, on April 11, 1994. [R. 65-74]. The PRT indicated evidence of an anxiety related disorder was present but the impairment was categorized as "not severe." [R. 65, 69]. At the hearing, a claim for depression and "some anxiety type of symptoms" was clearly asserted. [R. 30, 37, 41, 42, 54]. Finally, the ALJ acknowledged that Plaintiff claimed depression as an impairment in his decision. [R. 14, 16].

The medical record contains a note by Robert C. Harris, M.D., dated December 9, 1991, that after an extended discussion with Plaintiff about depression associated with pain, he had decided to try anti-depressants and physical therapy rather than

² Plaintiff used the terms "depression" and "nerves" interchangeably when describing her mental problems.

narcotics for treatment. [R. 213]. He prescribed Prozac, to be used daily.³ *id.* Also included in the medical portion of the record are hand-written notes by Ronald Harold English, M.D., who prescribed Xanax on July 11, 1992, for what he assessed was "anxiety neurosis."⁴ [R. 195]. Refills of Xanax for Plaintiff are recorded periodically in Dr. English's notes from October 1992 through April 17, 1995, which is the last and most recent medical note in the record. [R. 182-195, 231-232].

In his decision, after discussing the medical records and Plaintiff's credibility, the ALJ said:

The claimant was diagnosed with anxiety on 4 occasions, but this diagnosis did not continue after June 13, 1994, and there are no other recorded complaints or treatment for a mental impairment. In view of the medical evidence and the claimant's substantially diminished credibility, there is no basis for finding that the claimant has a mental impairment. Further, I noted carefully that the claimant alleged depression in her testimony, only after prompting by her attorney, and, inconsistently, Dr. English's medical notes show anxiety, not depression.

[R. 17].

It is not clear what evidence the ALJ relied upon in concluding that Plaintiff's diagnosis of anxiety somehow expired after June 13, 1994. There is no such report by any treating physician in the record. And, contrary to the ALJ's statement, Xanax was prescribed by Dr. English at least four more times after June 13, 1994 and three

³ Prozac is an anti-depressant, indicated for treatment of depression. *Physician's Desk Reference*, 49th Ed. 1995, p. 943.

⁴ Xanax: indicated for management of anxiety disorder, "[a]nxiety associated with depression is responsive to Xanax." *Physician's Desk Reference*, 49th Ed. 1995, p. 2589.

times in 1995 before the medical portion of the record ends. [R. 182-195, 231-232]. It is reasonable to conclude that the diagnosis continued if the treatment prescribed for the condition continued. Furthermore, it is disingenuous for the ALJ to cite Dr. English's diagnosis of anxiety as contradictory of Plaintiff's claim of depression as there is no evidence that the two conditions are mutually exclusive. It is also disingenuous to say Plaintiff only mentioned depression after "prompting by her attorney" when Plaintiff had been alleging depression since the filing of her application for benefits.

There is ample evidence in the record that both anxiety and depression were diagnosed and treated by medical care providers. There is also evidence offered by way of testimony by Plaintiff's husband and mother that changes in Plaintiff's behavior and emotional status were noted. [R. 51, 54]. The ALJ did not address this evidence in his decision. "[I]t is well settled that administrative agencies must give reasons for their decisions." *Reyes v. Bowen*, 845 F.2d 242, 244 (10th Cir.1988). The ALJ is required to discuss the evidence and explain why he found Plaintiff not disabled. See *Clifton v. Chater*, 79 F.3d 1007 (10th Cir. 1996). Without any of the required findings, the Court cannot evaluate the factual and legal correctness of the ALJ's decision. See *Winfrey*, 92 F.3d at 1023.

Since the record contained evidence of a mental impairment that allegedly prevented Plaintiff from working, the Commissioner was required to follow the procedure for evaluating the potential mental impairment set forth in the regulations and to document the procedure accordingly. The procedure for evaluation of a mental

impairment is outlined at 20 C.F.R. § 1520a. In this case, the ALJ did not evaluate Plaintiff's mental impairment beyond the conclusory statement cited above. His determination that Plaintiff does not have a mental impairment was based upon misinterpretation of the medical evidence. And, although the ALJ's decision indicated he considered Plaintiff's allegations of pain and determined her subjective complaints were not credible, he did not explain why the evidence led him to find not credible Plaintiff's allegations regarding her mental impairments. See *Kepler v. Chater*, 68 F.3d 387 (10th Cir. 1995). On remand, the ALJ should link his credibility findings to substantial evidence in the record.

If, on remand, the ALJ determines a mental impairment exists, he must then indicate whether certain medical findings which have been found especially relevant to the ability to work are present or absent and follow the procedure proscribed by 20 C.F.R. § 1520a(d) (An ALJ must attach to his decision a Psychiatric Review Technique form (PRT) detailing his assessment of the claimant's level of mental impairment).

The case is, therefore, REVERSED AND REMANDED to the Commissioner for proper consideration of Plaintiff's potential mental impairment. Because the ALJ's reconsideration of all the evidence upon remand will likely moot some or all of Plaintiff's current challenges, the remaining contentions are not addressed here.

SO ORDERED this 24th day of Feb., 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

FEB 24 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 FEB 24 1999

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge filed on January 27, 1999, in this 42 U.S.C. § 1983 civil rights action. The Magistrate Judge recommends that pursuant to 28 U.S.C. § 1406(a), this case should be dismissed without prejudice because of improper venue. None of the parties has filed an objection to the Report.

Having reviewed the Report and the facts of this case, and pursuant to Fed. R. Civ. P 72(b) and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed.

ACCORDINGLY, IT IS HEREBY ORDERED that the Report and Recommendation of the Magistrate Judge (Docket #3) is **adopted and affirmed** and this action is **dismissed without prejudice** because of improper venue.

SO ORDERED THIS 24th day of FEBRUARY, 1999.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

4

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB 23 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 FEB 24 1999

DEFAULT JUDGMENT

The Court, having determined that entry of default judgment against defendant is appropriate, hereby orders, adjudges, and decrees:

That Saint Francis Hospital have and hereby receives judgment in its favor and against defendant Lynn Montgomery, M.D., in the amount of \$359,755.61, with costs thereon, plus pre-judgment interest at the rate of 18% per annum from July 31, 1997 to date, and with post-judgment interest thereon pursuant to 28 U.S.C. § 1961, for which execution may immediately issue.

ORDERED this 23rd day of February, 1999.


H. DALE COOK
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB 23 1999 *SP*

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

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-1006-C (E) ✓

ENTERED ON DOCKET

DATE FEB 24 1999

ORDER

On January 26, 1999, Magistrate Judge Claire V. Eagan entered a Report and Recommendation, recommending that default judgment be entered against defendant. No objection has been filed to the Report and Recommendation and the ten-day time limit of Fed. R. Civ. P. 72(b) has run. The Court has also independently reviewed the Report and Recommendation and sees no reason to modify or reject the findings and recommendations therein.

The Report and Recommendation is adopted as entered. It is the Order of the Court that plaintiff's 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.

ORDERED this 22nd day of February, 1999.


H. DALE COOK,
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CYNTHIA FILION,
SSN: 444-58-3650,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0268-EA ✓

ENTERED ON DOCKET

FEB 23 1999

DATE _____

JUDGMENT

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

IT IS SO ORDERED this 23rd day of February 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

21

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

FILED

FEB 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN RE:

EMMETT W. NICK and
DEANNA R. NICK,

Debtors,

OZARK FINANCIAL SERVICES, INC.,

Appellant,

vs.

EMMETT W. NICK and
DEANNA R. NICK,

Appellees.

Case No. 98-CV-236-E(M)

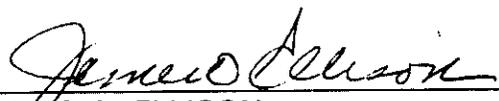
ENTERED ON DOCKET

DATE FEB 22 1999

JUDGMENT

This Court entered an Order on the 9th day of Feb, 1999,
adopting the Report and Recommendation of the United States Magistrate Judge to
affirm the Decision of the Bankruptcy Court for the Northern District of Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is
hereby entered for Appellees and against Appellant on this 19th day of
Feb, 1999.



JAMES O. ELLISON
U.S. DISTRICT COURT SENIOR JUDGE

9

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

FILED

FEB 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN RE:

EMMETT W. NICK and
DEANNA R. NICK,

Debtors,

OZARK FINANCIAL SERVICES, INC.,

Appellant,

vs.

EMMETT W. NICK and
DEANNA R. NICK,

Appellees.

Case No. 98-CV-236-E(M)

ENTERED ON DOCKET
DATE FEB 22 1999

ORDER

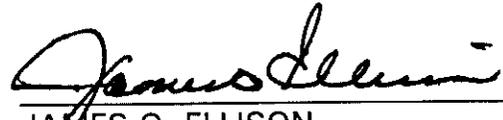
On December 7, 1998, the assigned United States Magistrate Judge entered a Report recommending that the Bankruptcy Court decision denying OFS' motion for administrative expense in the underlying bankruptcy case be affirmed. In accordance with 28 U.S.C. § 636(b) and Fed.R.Civ.P. 72(b), the parties were advised that failure to file objections within ten days following service of the magistrate's report would constitute waiver of the right to appeal from any judgment based upon the factual findings and legal issues addressed in the magistrate's report.

There being no objection, the Court adopts the factual findings and legal conclusions contained in the Magistrate's Report and Recommendation filed December 31, 1998. [Dkt. 7]. The decision of the Bankruptcy Court of the Northern District of

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Oklahoma is hereby AFFIRMED as outlined in the Magistrate Judge's Report and Recommendation.

SO ORDERED this 19th day of Feb, 1999.



JAMES O. ELLISON
U.S. DISTRICT COURT SENIOR JUDGE

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

FILED

FEB 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NICHOLAS AMENDOLARA,)
)
Plaintiff,)
)
vs.)
)
JAMES EARP, Delaware County Sheriff,)
)
Defendant.)

No. 98-CV-873-B (E) ✓

ENTERED ON DOCKET

DATE FEB 22 1999

ORDER

On November 17, 1998, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983 along with a motion for leave to proceed *in forma pauperis*. By order entered December 8, 1998, the Court directed Plaintiff to cure deficiencies in his motion for leave to proceed *in forma pauperis*. Plaintiff was advised that this action could not proceed unless he supplemented his motion by providing the Required Certification, signed by an appropriate jail official, and the necessary trust fund account statement for the 6-month period preceding the filing of the complaint. In addition, Plaintiff was directed to submit a summons for service of the complaint on the named defendant. The Court advised Plaintiff that these deficiencies were to be cured by January 5, 1999, and that "[f]ailure to comply . . . may result in dismissal of this action without prejudice and without further notice." However, to date, Plaintiff has not supplemented his *in forma pauperis* motion as directed nor has he shown cause in writing for his failure to do so. Also, Plaintiff has not submitted the summons as directed. Further, no correspondence from the Court to Plaintiff has been returned.

Because Plaintiff has failed to cure the deficiencies identified in the Court's Order of December 8, 1998, the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's civil rights complaint is **dismissed without prejudice** for lack of prosecution.

SO ORDERED THIS 19th day of Feb., 1999.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

Law

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
RECEIVED

FEB 22 1999 *AC*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES AVIATION CO.,)
an Oklahoma corporation,)

Plaintiff,)

vs.)

BOSSERMAN AVIATION EQUIPMENT,)
INC., an Ohio corporation,)

Defendant.)

Case No. 99-CV-0010H (J) ✓

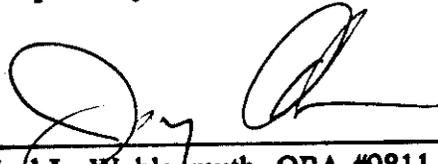
ENTERED ON DOCKET

DATE FEB 22 1999

NOTICE OF DISMISSAL

Plaintiff, United States Aviation Co., pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby dismisses this proceeding without prejudice to the refileing of the same.

Respectfully submitted,



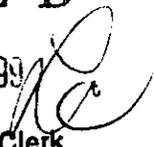
Joel L. Wohlgemuth, OBA #9811
R. Jay Chandler, OBA #1603
NORMAN WOHLGEMUTH CHANDLER & DOWDELL
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 583-7571
(918) 584-7846 (Facsimile)

**Attorneys for Plaintiff,
United States Aviation Co.**

file

F I L E D

FEB 22 1999



Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

DANIEL PEACE,)
)
Plaintiff,)
)
v.)
)
NABORS DRILLING, USA, INC.,)
)
Defendant.)

Case No. 98-CV-814 E (J) ✓

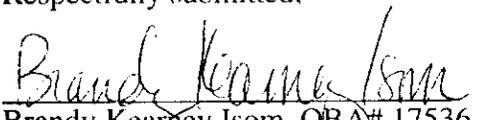
ENTERED ON DOCKET

DATE FEB 22 1999

STIPULATED DISMISSAL WITH PREJUDICE

Plaintiff, DANIEL PEACE, by and through his counsel of record, Brandy Kearney Isom, of Armstrong, Hensley & Lowe, comes before this Court with Defendant, NABORS DRILLING USA, INC., by and through its counsel of record, Mike Lauderdale, of McAfee & Taft, to stipulate a dismissal of any and all claims and causes of action in the above styled action with prejudice.

Respectfully submitted,



Brandy Kearney Isom, OBA# 17536
ARMSTRONG HENSLEY & LOWE
1401 S. Cheyenne
Tulsa, OK 74119
(918) 582-2500
(918) 583-1755 facsimile
ATTORNEY FOR PLAINTIFF

AND



Michael F. Lauderdale
MCAFEE & TAFT
Tenth Floor, Two Leadership Square
211 N. Robinson
Oklahoma City, OK 73102-7101
(405) 235-9621
(405) 235-0439
ATTORNEY FOR DEFENDANT

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CJ
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FILED

FEB 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JULIE COOK,)
)
 PLAINTIFF,)
)
 V.)
)
 MIDWESTERN OFFICE PRODUCTS,)
 d/b/a SCOTT RICE,)
)
 DEFENDANT.)

CASE NO. 98-C-160-B

ENTERED ON DOCKET

DATE FEB 23 1999

JUDGMENT

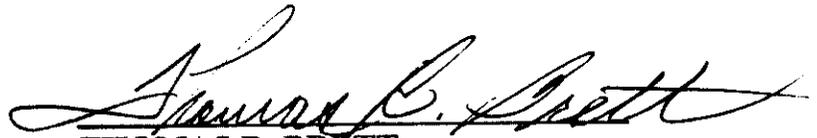
This civil action was tried to a jury, Honorable Thomas R. Brett, District Judge, presiding, and a jury verdict was returned in favor of the Plaintiff on February 19, 1999. The jury concluded the Plaintiff, Julie Cook, was entitled to money damages for unpaid wages under the Oklahoma Protection of Labor Act; further, the jury concluded under Title VII there was pregnancy discrimination but no gender discrimination or constructive discharge under Title VII. The jury, sitting in an advisory capacity, awarded no back pay, front pay was not an issue, and awarded no punitive damages. The Court concludes the jury's verdict was both fair and reasonable.

IT IS THEREFORE ORDERED AND ADJUDGED, based upon the verdict of the jury, that Plaintiff, Julie Cook, recover from the Defendant, Midwestern

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Office Products, d/b/a Scott Rice, the sum of \$23,305.04 (\$11,652.52 x 2 as liquidated damages) on her claim for unpaid wages under the Oklahoma Protection of Labor Act, plus the sum of \$25,000 on her claim under Title VII for compensatory damages, for a total recovery of \$48,305.04. Post-judgment interest is awarded thereon at the rate of 4.584 percent from the date hereon, as provided by law, and the Plaintiff is awarded costs of the action upon timely application pursuant to ND L.R. 54.1 and a reasonable attorney's fee upon timely application pursuant to ND L.R. 54.2.

Dated this 22nd day of February, 1999.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett", written in black ink.

**THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE**

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

FILED

FEB 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CONRAD K. NOLAND,)
)
Petitioner,)
)
vs.)
)
WARDEN TOM C. MARTIN,)
)
Respondent.)

Case No. 98-CV-297-B (E)

ENTERED ON DOCKET

DATE FEB 23 1999

JUDGMENT

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

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

SO ORDERED THIS 22nd day of Feb., 1999.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

9

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

FILED
FEB 22 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CONRAD K. NOLAND,)
)
 Petitioner,)
)
 vs.)
)
 WARDEN TOM C. MARTIN,)
)
 Respondent.)

Case No. 98-CV-297-B (E)

ORDER

Before the Court are Respondent's motion to dismiss petition for writ of habeas corpus as time barred by the statute of limitations (Docket #4) and Petitioner's motion for docket information (#8). Petitioner has filed a response to the motion to dismiss and an objection to the entry of appearance filed by the Assistant Attorney General¹ (#6). Respondent's motion is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition was not timely filed and Respondent's motion to dismiss should be granted. Petitioner's motion for docket information should be denied as moot.

BACKGROUND

On July 3, 1990, Petitioner entered a plea of *nolo contendere* in Tulsa County District Court, Case Nos. CF-90-875, Count I, Possession of Stolen Vehicle; Count II, Possession of Firearm While

¹Petitioner objects to the entry of appearance by the Assistant Attorney General arguing that the Attorney General's Office is not authorized to represent Warden Tom C. Martin because he is a private person employed at Great Plains Correctional Facility, a private institution. However, as noted by counsel for Respondent in the brief in support of motion to dismiss (#5 n. 1), the proper Respondent in this action is James Saffle, Director of the Oklahoma Department of Corrections, the state officer having custody of Petitioner pursuant to a contract between the private facility and the Oklahoma Department of Corrections. Because the Attorney General is authorized to represent Director Saffle, Petitioner's objection is without merit.

in Commission of a Felony; and CF-90-876, Unlawful Possession of a Firearm, AFCF (#1, Ex. C). He was sentenced to twenty-five (25) years imprisonment on each count, to be served concurrently with his convictions in Tulsa County Case Nos. CF-90-1407 and CF-90-1854, but consecutively with his parole revocation in Case No. CRF-76-2827 (#1, Exs. D, E and F). Judgments and Sentences were filed on July 11, 1990. (#1, Exs. D, E and F). Petitioner did not file a Motion to Withdraw his plea or otherwise perfect a direct appeal. On June 16, 1994, Petitioner filed an application for post-conviction relief in Tulsa County District Court. (#1, Ex. G). That court denied the requested relief on August 4, 1994. (#1, Ex. H). Petitioner filed a post-conviction appeal in the Oklahoma Court of Criminal Appeals where the trial court's denial of post-conviction relief was affirmed on October 3, 1994 (#1, Ex. J). Petitioner filed a second application for post-conviction relief on February 24, 1997. (#1, Ex. K). On March 24, 1997, the state trial court denied the requested relief. (#1, Ex. L). Petitioner appealed, and on May 20, 1997, the Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief. (#1, Ex. N). Petitioner filed the instant petition for writ of habeas corpus on April 20, 1998 (#1).

ANALYSIS

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

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

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

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

by such State actions;

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

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

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

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, have been afforded a one-year grace period within which to file for federal habeas corpus relief.

The Tenth Circuit Court of Appeals has also ruled that the tolling provision of 28 U.S.C. § 2244(d)(2) applies to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). Therefore, the one-year grace period is tolled during time spent pursuing properly filed state applications for post-conviction relief.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Because Petitioner failed to move to withdraw his *nolo contendere* plea or to otherwise perfect a direct appeal following entry of the Judgment and

Sentence on his plea, his conviction became final ten (10) days after entry of his Judgment and Sentence, or on July 13, 1990. See Rule 4.2, *Rules of the Court of Criminal Appeals* (requiring the defendant to file an application to withdraw guilty plea within ten (10) days from the date of the pronouncement of the Judgment and Sentence in order to commence an appeal from any conviction of a plea of guilty). Therefore, Petitioner's 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. Under Simmonds, 111 F.3d at 746, Petitioner had until April 23, 1997, to submit a timely petition for writ of habeas corpus. However, on February 24, 1997, or 59 days before the filing deadline, Petitioner filed his second application for post-conviction relief. Pursuant to § 2244(d)(2), the running of the limitations period was tolled or suspended during the pendency of this second post-conviction application. Hoggro, 150 F.3d at 1226. Once the Oklahoma Court of Criminal Appeals entered its order, on May 20, 1997, terminating his post-conviction appeal, the limitations clock again began to run and Petitioner had the remaining 59 days, or until July 18, 1997, to submit his federal petition for writ of habeas corpus. Petitioner filed his petition on April 20, 1998, well past the July 18, 1997 deadline.

In his response to the motion to dismiss, Petitioner argues that his petition is not time-barred by the AEDPA because it was filed within one year of May 20, 1997, the date of the Court of Criminal Appeals' disposition of his second post-conviction appeal. However, the final disposition of a post-conviction application does not trigger the commencement of the limitations period. Instead, the limitations period typically begins to run when the challenged conviction becomes final by the conclusion of direct review. 28 U.S.C. § 2244(d)(1)(A). As discussed above, Petitioner's conviction in this case became final long before enactment of the AEDPA. As a result, his

limitations period began to run on April 24, 1996, the date of the AEDPA's enactment. Furthermore, pursuant to § 2244(d)(2), the pendency of a properly filed post-conviction application tolls or suspends the running of the period; the conclusion of a post-conviction proceeding does not trigger the commencement of the limitations period as urged by Petitioner. Therefore, Petitioner's argument must be rejected and the Court concludes that the petition for writ of habeas corpus is untimely. Respondent's motion to dismiss this petition as time-barred should be granted.

CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year grace period as defined in United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997), Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted. The petition for writ of habeas corpus should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#4) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.
3. Petitioner's motion for docket information (#8) is **denied as moot**.

SO ORDERED THIS 22nd day of Feb., 1999.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

F I L E D

FEB 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**BIZJET INTERNATIONAL SALES &
SUPPORT, INC.** an Oklahoma corporation,

Plaintiff,

vs.

GORDON AIR MANAGEMENT CORP.,
an Ohio corporation; and **AGG AIRCRAFT
SALES & LEASING, INC.,**

Defendants.

Case No. 98-CV-0243-B (E)

ENTERED ON DOCKET
DATE FEB 23 1999

JUDGMENT

This case came on for hearing before this Court. The plaintiff appears by its counsel, Thomas M. Ladner of Norman Wohlgemuth Chandler & Dowdell. The defendant AGG Aircraft Sales & Leasing, Inc. ("AGG Aircraft") appears by its counsel, Chris L. Rhodes, III, and Andrew L. Richardson of Rhodes, Hieronymus, Jones, Tucker & Gable. After reviewing the pleadings on file and being advised by counsel that the parties have agreed to the entry of this Judgment, the Court finds as follows:

1. The parties have agreed to the entry of this judgment as a means of settling their dispute.
2. The Court has subject matter jurisdiction over this dispute and personal jurisdiction over AGG Aircraft.
3. AGG Aircraft is indebted to the plaintiff in the amount of \$19,429.57 for material provided and services performed and plaintiff is entitled to judgment against defendant for this amount.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment should be and hereby is entered in favor of BizJet International Sales & Support, Inc. against

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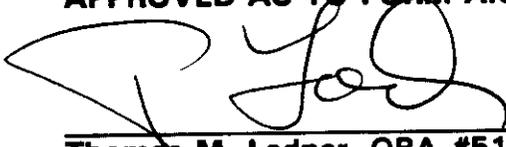
AGG Aircraft in the amount of \$19,429.57 and interest at the rate of nine percent (9%) per annum on that amount from December 1, 1998 until the amount of the judgment is satisfied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each party shall bear its own attorneys' fees, costs and expenses.

DATED this 22nd day of Feb., 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT COURT JUDGE

APPROVED AS TO FORM AND CONTENT:



Thomas M. Ladner, OBA #5161
NORMAN WOHLGEMUTH CHANDLER & DOWDELL
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 583-7571

ATTORNEYS FOR PLAINTIFF,
BIZJET INTERNATIONAL SALES & SUPPORT, INC.



Chris L. Rhodes, III, OBA #7528
Andrew L. Richardson, OBA #16298
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400 ONEOK Plaza
100 West 5th Street
P.O. Box 21100
Tulsa, Oklahoma 74121
(918) 582-1173

ATTORNEYS FOR DEFENDANT,
AGG AIRCRAFT SALES & LEASING, INC.

bl.gord.igmt/mdc

F I L E D

FEB 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff,

v.

DOUGLAS B. FRIEND, et al.,

Defendants.

ENTERED ON DOCKET

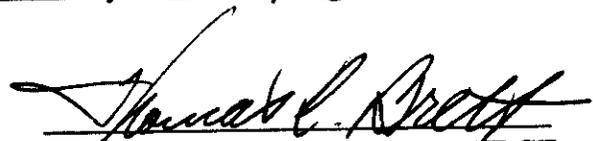
DATE FEB 23 1999

) CIVIL ACTION NO. 98-CV-0710-B (J) ✓

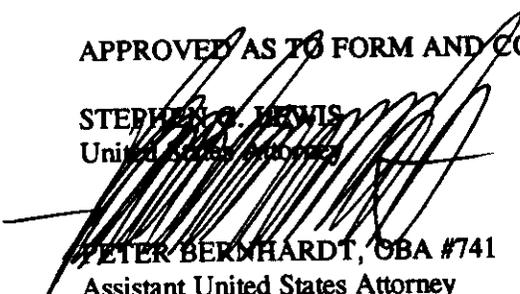
ADMINISTRATIVE CLOSING ORDER

The Court has reviewed the Motion Requesting Administrative Closing filed by Plaintiff, United States of America. Having done so, the Court concludes that this matter should be administratively closed during the pendency of the reinstatement payments. It is therefore **ORDERED** that the Clerk administratively close this action pending the resolution of the reinstatement payments. The Plaintiff is directed to notify the Court of the resolution of the reinstatement payments by September 15, 1999, or this action shall be deemed dismissed without prejudice.

IT IS SO ORDERED this 22 day of Feb., 1999.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:


STEPHEN G. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

PB:css

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

FILED

FEB 24 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES LEE GABLE,)
)
Petitioner,)
)
vs.)
)
RITA MAXWELL,)
)
Respondent.)

Case No. 97-CV-1004-H (J)

ENTERED ON DOCKET

DATE **FEB 24 1999**

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed with prejudice as barred by the statute of limitations.

IT IS SO ORDERED.

This 23rd day of FEBRUARY, 1999.


Sven Erik Holmes
United States District Judge

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

CHARLES LEE GABLE,

Petitioner,

vs.

RITA MAXWELL,

Respondent.

ENTERED ON DOCKET

DATE **FEB 24 1999**

Case No. 97-CV-1004-H (J) ✓

FILED

FEB 24 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Respondent's motion to dismiss petition for writ of habeas corpus as barred by statute of limitations (Docket #7). Petitioner, a state inmate appearing *pro se*, has filed a response to the motion to dismiss and supporting brief (#10) and an application to supplement his response to Respondent's motion to dismiss (#12). Respondent's motion to dismiss is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that Petitioner's application to supplement his response should be granted. Nonetheless, the petition is not timely filed and Respondent's motion to dismiss should be granted.

BACKGROUND

On March 27, 1996, Petitioner was sentenced to ten (10) year imprisonment after pleading guilty to Felonious Possession of Firearm, AFCF, and Possession of Drug Paraphernalia, Misdemeanor, in Tulsa County District Court, Case No. CF-95-5920. (#1, Attachment to Petition). Petitioner failed to withdraw his guilty plea or to otherwise perfect a direct appeal.

Petitioner filed an application for post-conviction relief in the state trial court on March 20,

1997 (#1, Attachment to Petition). That court denied relief on July 18, 1997. (#1, Attachment to Petition). Petitioner filed his petition in error in the Oklahoma Court of Criminal Appeals on August 27, 1997 (#1, Attachment to Petition). On September 12, 1997, the appellate court dismissed the appeal as untimely pursuant to Rule 5.2(C)(2), *Rules of the Court of Criminal Appeals* (#1, Attachment to Petition). Petitioner filed the instant federal petition for writ of habeas corpus on November 10, 1997 (#1).

ANALYSIS

In his application to supplement his response to Respondent's motion to dismiss, Petitioner seeks leave to provide a copy of a state trial court order, signed July 18, 1997 and filed of record on July 21, 1997, allowing the State to file a response to Petitioner's application for post-conviction relief out of time (#12, Ex. A). The Court finds Petitioner's application to supplement should be granted.

As stated above, Respondent seeks dismissal of this petition based on the AEDPA, enacted April 24, 1996, which established a one-year limitations period for habeas corpus petitions as follows:

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

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

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

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

to cases on collateral review; or

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

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

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's conviction becomes 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, were afforded a one-year grace period within which to file for federal habeas corpus relief.

The Tenth Circuit Court of Appeals has also ruled that the tolling provision of 28 U.S.C. § 2244(d)(2) applies to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). Therefore, the one-year grace period is tolled during time spent pursuing properly filed state post-conviction relief.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Because Petitioner failed to file a motion to withdraw his guilty plea after the March 27, 1996 pronouncement his Judgment and Sentence, his conviction became final ten (10) days later, or on April 8, 1996. See Rule 4.2(A), *Rules of the Court of Criminal Appeals* (requiring the defendant to file an application to withdraw guilty plea within ten (10) days from the date of the pronouncement of the Judgement and Sentence in order to

commence an appeal from any conviction on a plea of guilty). Therefore, his conviction became final approximately two (2) weeks 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. Simmonds, 111 F.3d at 746.

Petitioner filed his federal petition on November 10, 1997, or 566 days after April 24, 1996. However, the time during the grace period when Petitioner had "a properly filed application for State post-conviction or other collateral review" pending should be subtracted from this 566 days. Thus, the 120 days from March 20, 1997 (when Petitioner filed his application for post-conviction relief in the state trial court) to July 18, 1997 (when the state district court denied post-conviction relief) should not be counted.¹ The resulting elapsed time on Petitioner's limitations period is 446 days, well beyond the one-year limit.

In his response to the motion to dismiss (#10), Petitioner argues that in this case, application of the limitations bar would be unfair for several reasons. Petitioner implies that his untimeliness was attributable to delays in the state courts. He also complains that his post-conviction appeal was rejected as untimely by the Oklahoma Court of Criminal Appeals because of that court's failure to accept the "mail box rule."² (#10 at 5). Petitioner also indicates that he was "prevented from asserting these issues by the facts of his confinement, failure of defense counsel to offer pertinent information as to a need for a direct appeal, and his total lack of access to an adequate law

¹The Court will not count the additional time during which Petitioner appealed the denial of his application for post-conviction relief because that appeal was dismissed by the Oklahoma Court of Criminal Appeals as untimely. Section 2244(d)(2) requires a court to subtract time only for the period when the petitioner's "properly filed" post-conviction application is being pursued. See 28 U.S.C. § 2244(d)(2); Hoggro, 150 F.3d at 1226-27 n. 4.

²The Court notes that even if Petitioner were credited with the time his post-conviction appeal was pending, the instant action would nonetheless be untimely.

library prior to his arrival at the Jess Dunn Correctional Center." (#10 at 7). Lastly, in his supplemented response (#12), Petitioner accuses the state trial court of "unfounded acts." Petitioner bases his accusation on the filing date of the State's response to his application for post-conviction relief. The State was granted leave to file the response out of time on July 18, 1997, the same date the trial court denied Petitioner's post-conviction application. (#12, Ex. A).

Although § 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling, Miller v. Marr, 1441 F.3d 976, 978 (10th Cir. 1998) (indicating equitable tolling principles apply only where a prisoner has diligently pursued federal habeas claims), the Court is not persuaded by Petitioner's attempts to justify his late filing. Petitioner offers no explanation for his delay in seeking post-conviction relief and the Court finds Petitioner's lack of diligence in pursuing these claims precludes equitable tolling in this case. See Davis v. Johnson, 158 F.3d 806, 811 (5th Cir.1998) (one-year limitation period of AEDPA will be equitably tolled only "in rare and exceptional circumstances"); Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618-19 (3d Cir.1998) (equitable tolling applies only where prisoner has diligently pursued claims but has in some "extraordinary way" been prevented from asserting rights). In addition, neither Petitioner's *pro se* status nor his unfamiliarity with the law is sufficient cause to excuse his untimeliness. See, e.g., Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir.1991) (cause and prejudice standard applies to *pro se* prisoner's lack of awareness and training on legal issues); Saahir v. Collins, 956 F.2d 115, 118 (5th Cir.1992) (actual knowledge of legal issues not required by *pro se* petitioner). Therefore, the Court declines to excuse Petitioner's untimely filing and concludes Respondent's motion to dismiss should be granted.

CONCLUSION

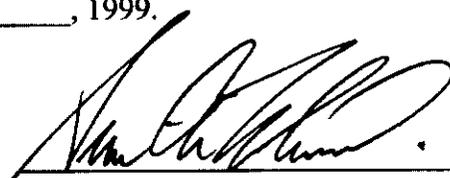
Because Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period, Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's motion to supplement his response (#12) is **granted**.
2. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#7) is **granted**.
3. The petition for writ of habeas corpus is **dismissed with prejudice**.

IT IS SO ORDERED.

This 23RD day of FEBRUARY, 1999.



Sven Erik Holmes
United States District Judge

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

SUNSOLUTION, INC.; SUNDANCE
REHABILITATION CORP.,

Plaintiffs,

v.

KEYSTONE REHABILITATION
SERVICES, INC. d/b/a KEYSTONE
REHABILITATION SERVICES,

Defendant.

ENTERED ON DOCKET

DATE **FEB 24 1999**

Case No. 98-CV-821-H ✓

FILED

FEB 24 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

Defendant having filed its petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

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

IT IS SO ORDERED.

This 23rd day of February, 1999.


Sven Erik Holmes
United States District Judge

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ENTERED ON DOCKET

DATE FEB 24 1999

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SHELLY K. PIKE,)
Plaintiff,)
)
vs.)
)
KENNETH S. APEL, Commissioner)
Social Security Administration,)
Defendant.)

FEB 23 1999 *SA*

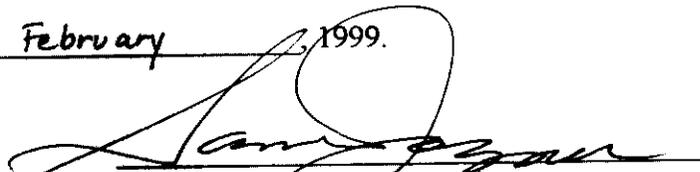
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-⁵¹²~~382~~-J ✓

ORDER OF DISMISSAL WITHOUT PREJUDICE

Having considered the *Stipulation of Dismissal* submitted by the parties herein, IT IS
HEREBY ORDERED that the *Complaint* of the Plaintiff filed on July 23, 1998, is hereby
dismissed.

Dated this 23rd day of February, 1999.


United States Magistrate Judge

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

ENTERED ON DOCKET

DATE FEB 24 1999

TYRONE GRAY,)
Plaintiff,)
vs.)
RON PALMER and MICHAEL GRIFFIN,)
Defendants.)

Case No. 98-CV-816-K (J) ✓

FILED

FEB 23 1999 SAC

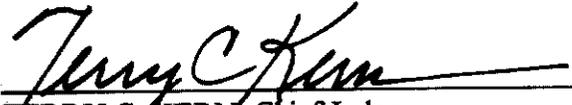
ORDER

Phil Lombardi, Clerk
U.S. DISTRICT COURT

On October 20, 1998, Plaintiff, a prisoner appearing *pro se*, filed the instant civil rights complaint and a motion for leave to proceed *in forma pauperis*. Pursuant to 28 U.S.C. §1915(b)(1), the Court granted Plaintiff's motion and directed him to pay an initial partial filing fee of \$8.00 by January 22, 1999. (#4) Thereafter, the Clerk of the Court mailed a copy of the Court's order to Plaintiff at his last known address. However, on January 12, 1999, mail addressed to Plaintiff was returned and marked "NOT IN CUSTODY." As of the date of this order, Plaintiff has neither paid the \$8.00 initial partial filing fee or shown cause for his failure to do so, nor has he notified the Court of his change of address. The Court, therefore, finds that the civil rights complaint should be dismissed without prejudice for failure to prosecute.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's civil rights complaint is dismissed without prejudice for failure to prosecute.

SO ORDERED this 23 day of February, 1999.


TERRY C. KERN, Chief Judge
United States District Court

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
JOHNNY L. DODSON,)
)
)
Defendant.)

ENTERED ON DOCKET

DATE FEB 24 1999

No. 98-CV-635-K ✓

FILED

FEB 23 1999 *[Signature]*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of the plaintiff for summary judgment filed January 19, 1999. The defendant has not filed a response to the motion within 15 days. Pursuant to Local Civil Rule 7.1(C), the Court may deem the motion confessed. The Court has also independently reviewed the record, and finds entry of judgment to be appropriate.

The record reflects that defendant has defaulted on three separate promissory notes reflecting federally-insured student loans. The record, viewed in the light most favorable to defendant, does not demonstrate a genuine issue of material fact as to liability or amount.

It is the Order of the Court that the motion of the plaintiff for summary judgment (#3) is hereby GRANTED.

ORDERED this 23 day of February, 1999.

[Signature]
TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

DARRYL ANDRIAN BULLOCK,)
)
) Plaintiff,)
)
) vs.)
)
) TULSA COUNTY SHERIFF'S DEPT.;)
) STANLEY GLANZ, Sheriff;)
) BILL THOMPSON, UnderSheriff;)
) RED WAKEFIELD, Major;)
) TULSA CITY/COUNTY JAIL; and)
) GREG TURLEY, Captain,)
) Defendants.)

No. 98-CV-767-K (E)

ENTERED ON DOCKET
DATE FEB 24 1999

FILED
FEB 23 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT
ORDER

On October 7, 1998, Plaintiff, a prisoner appearing *pro se*, filed the instant civil rights complaint and a motion for leave to proceed *in forma pauperis*. Pursuant to 28 U.S.C. §1915(b)(1), the Court granted Plaintiff's motion and directed Plaintiff to pay an initial partial filing fee of \$6.80 by November 23, 1998. Thereafter, Plaintiff sought and received an extension of the November deadline in which to pay the initial partial filing fee. By order dated November 30, 1998 (#5), Plaintiff's deadline for payment of the \$6.80 initial partial filing fee was extended to December 31, 1998. As of the date of this order, Plaintiff has neither paid the \$6.80 initial partial filing fee nor has he shown cause for his failure to do so. Therefore, the Court finds that the civil rights complaint should be dismissed without prejudice for failure to prosecute.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's civil rights complaint is dismissed without prejudice for failure to prosecute.

SO ORDERED this 23 day of February, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

PERRY LEE JONES, JR.,)
)
 Plaintiff,)
)
 vs.)
)
 TULSA COUNTY DISTRICT COURT,)
 et al.,)
)
 Defendants.)

ENTERED ON DOCKET
DATE FEB 23 1999

No. 99-CV-0027-K (M) ✓

FILED
FEB 23 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge filed on February 1, 1999, in this 42 U.S.C. § 1983 civil rights action. The Magistrate Judge recommends that pursuant to 28 U.S.C. § 1915A, this case should be dismissed because it seeks monetary relief from a defendant who is immune from such relief, and fails to state a claim upon which relief can be granted. None of the parties has filed an objection to the Report.

Having reviewed the Report and the facts of this case, and pursuant to Fed. R. Civ. P 72(b) and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed.

ACCORDINGLY, IT IS HEREBY ORDERED that the Report and Recommendation of the Magistrate Judge (Docket #3) is **adopted and affirmed** and this action is **dismissed without prejudice**. The Clerk is directed to "flag" this dismissal as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).

SO ORDERED THIS 23 day of February, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

CHARLES L. BOYD,)
)
 Plaintiff,)
 vs.)
)
 PUBLIC DEFENDER'S OFFICE,)
)
 Defendants.)

ENTERED ON DOCKET

DATE FEB 23 1999

No. 96-CV-1124-K (M) ✓

F I L E D

FEB 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

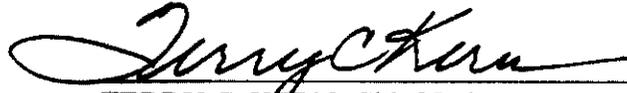
On December 5, 1996, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983 along with a motion for leave to proceed *in forma pauperis*. Thereafter, on January 2, 1997, Plaintiff filed a motion to dismiss the case and transfer the filings to case no. 96-CV-1108-BU. By order entered January 16, 1997, the Court denied Plaintiff leave to proceed *in forma pauperis* and informed Plaintiff that because "he has had at least three actions in the courts of the United States dismissed as frivolous (see 28 U.S.C. 1915(g)),” Plaintiff must pay the full filing fee within thirty days or risk dismissal. (#7). Subsequently, the Court issued its order on September 25, 1997, denying Plaintiff's motion to dismiss and transfer all filings (#5, #6) as moot. As of this date, Plaintiff has failed to pay the required fee, nor has any correspondence from the Court to Plaintiff has been returned.

Because Plaintiff has not paid the filing fee in compliance with the Court's Order of January 16, 1997, the Court finds that this action may not proceed and should be dismissed without prejudice for failure to prosecute.

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ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's civil rights Complaint is
dismissed without prejudice for lack of prosecution.

SO ORDERED this 23 day of February, 1999.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM WICKHAM)
SSN: 444-58-1753,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner,)
Social Security Administration,¹)
)
Defendant.)

F I L E D

FEB 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-0527-H (E)

ENTERED ON DOCKET
DATE FEB 22 1999

REPORT AND RECOMMENDATION

Claimant, William Wickham, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of Social Security ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.² By minute order dated February 4, 1998, this case was referred to the undersigned for all further proceedings in accordance with her jurisdiction

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 March 18, 1992, claimant applied for disability benefits under Title II (42 U.S.C. § 401 *et seq.*), and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 *et seq.*). Claimant's application for benefits was denied in its entirety initially (October 20, 1992) and on reconsideration (December 29, 1992). A hearing before Administrative Law Judge Richard J. Kallsnick (ALJ) was held July 6, 1993, in Tulsa, Oklahoma. By decision dated September 16, 1993, the ALJ found that claimant was not disabled at any time through the date of the decision. The Appeals Council denied review of the ALJ's findings on April 15, 1994. Claimant filed an action for review in this District, and on January 3, 1996, the case was remanded for analysis of the mental and physical demands of claimant's past work and for further development of the record. The case was remanded by the Appeals Council to the ALJ, and a supplemental hearing was held by the ALJ on July 31, 1996, in Tulsa, Oklahoma. By decision dated August 23, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. On March 28, 1997, the Appeals Council declined to assume jurisdiction. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.984(b)(2), 416.1484(b)(2).

pursuant to the Federal Rules of Civil Procedure. For the reasons discussed below, the undersigned recommends that the District Court **AFFIRM** the Commissioner's decision.

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

³ Step one requires 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 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. A claimant suffering from a listed impairment or impairments “medically equivalent” to a listed impairment is 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 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 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.

substantial evidence; and, second, whether the correct legal standards were applied. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991).

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

Claimant was born on October 26, 1954, and was 38 years old at the time of his first administrative hearing in this matter. He was 41 years old at the time of the second administrative hearing. He has a high school education and one or two semesters of college. Claimant has worked as a car salesman, and has performed advertising, public relations, design and production work for a clothing designer. He has also worked in marketing and design for an engineering company that manufactured safety equipment and products for the oil and gas industry. Claimant alleges an inability

to work beginning in February 20, 1990 due to injuries sustained in an automobile accident.⁴ He claims that he was unable to work because of spinal problems, back problems, neck problems, headaches, fatigue, problems with thinking and memory, pain, and limited mobility. The date he was last insured, for purposes of Title II, was December 31, 1995, but he returned to work on November 4, 1994 as a car salesman and he has requested a closed period of disability from February 20, 1990 through that date.⁵

III. REVIEW

The ALJ made his decision at the fourth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform work-related activities except for work involving lifting over 50 pounds occasionally and 25 pounds frequently. The ALJ concluded that he could perform his past relevant work as a car salesman, production coordinator, and

⁴ There is confusion in the record as to whether the injuries were sustained in a single vehicle accident, and, if so, the date of the accident. At the hearing on July 31, 1996, claimant testified that he was involved in three accidents beginning in February 1990 (R. 275-76, 285-86), but in the first hearing, he testified that a July 25, 1990 accident caused his injuries. (R. 49) His attorney also represented, in his November 22, 1993 appeal of the ALJ's September 16, 1993 decision, that the accident occurred on July 25, 1990. (R. 7-9) In claimant's disability report, he claimed that his first injury occurred and his condition first bothered him on July 25, 1990, but he also stated that his condition finally made him stop working on February 20, 1990. (R. 126) Nonetheless, he represented to doctors that he sustained his injuries on July 25, 1990 (R. 157, 215) or July 23, 1991. (R. 166, 171, 173, 175, 177, 179, 342) In his August 23, 1996 decision, the ALJ simply referred to three accidents (R. 253), and he deems the alleged period of disability to be February 20, 1990 through November 4, 1990. (R. 257) His attorney represented, in his September 26, 1996 letter to the Appeals Council, that claimant suffered injuries from three accidents in 1990 and 1991. (R. 241) Since the undersigned recommends that the ALJ's decision denying disability benefits and supplemental income be affirmed, the ALJ's determination as to the disability period need not be clarified at this time.

⁵ There is also confusion in the record as to whether claimant returned to work on November 4, 1994 or November 6, 1994. Compare R. 241 (September 27, 1996 Letter from Paul F. McTighe, Jr. to Appeals Council) and R. 249, 250 (August 23, 1996 Decision) with R. 267, 270 (July 31, 1996 Hearing Transcript) and R. 257 (August 23, 1996 Decision).

engineering and manufacturing design worker. Having concluded that claimant could perform his past relevant work, the ALJ concluded that he was not disabled under the Social Security Act.

Claimant alleges as error that the ALJ: (1) “failed to properly consider the evidence of the claimant’s mental impairment when accessing [sic] his residual functional capacity”; and (2) failed “to recognize the effect of his mental impairment on his ability to perform his past relevant work during the time period prior to November 1994.” (Claimant’s Brief, Docket # 9 (hereinafter “Cl. Br.”), at 3) Specifically, the claimant contests the findings that the ALJ made on a Psychiatric Review Technique (“PRT”) form, and he claims that the ALJ ignored the findings of the Commissioner’s staff psychologist, Ron Smallwood, Ph. D., as well as the testimony of the vocational expert with regard to claimant’s mental condition during the relevant time period. (Id.)

The PRT Forms

The Tenth Circuit requires an ALJ to follow the procedures in 20 C.F.R. § 404.1520a (and 20 C.F.R. § 416.920a for Supplemental Security Income) when he or she evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey v. Chater, 92 F.3d 1017, 1024 (10th Cir. 1996); Cruse v. United States Dep’t of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedures include the completion of a PRT form that the ALJ must attach to a written decision in which he or she discusses the evidence upon which the conclusions expressed on the form are based. Winfrey, 92 F.3d at 1024; Cruse, 49 F.3d at 617-18; see also Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994).

On August 23, 1996, the ALJ completed the PRT form at issue. (R. 259-61) He found that claimant had a personality disorder with narcissistic features which (1) caused slight restriction of claimant’s activities of daily living; (2) caused slight difficulty in maintaining social functioning; (3)

seldom resulted in deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner; and (4) never involved episodes of deterioration or decompensation in work or work-like settings which caused claimant to withdraw from that situation or to experience exacerbation of signs and symptoms. (Id.) Claimant argues that this assessment ignores the findings of Dr. Smallwood.

Dr. Smallwood completed a PRT form almost four years earlier, on October 13, 1992. (R. 83-89) He, too, found that claimant had a personality disorder, and he found that the disorder (1) caused no restriction of claimant's activities of daily living; (2) caused slight difficulty in maintaining social functioning; (3) seldom resulted in deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner; and (4) never involved episodes of deterioration or decompensation in work or work-like settings which caused claimant to withdraw from that situation or to experience exacerbation of signs and symptoms. (Id.) Thus, the ALJ's assessment is consistent with that of Dr. Smallwood.

It appears that claimant has confused Dr. Smallwood with Stephen J. Miller, Ph. D., who completed a PRT form on December 28, 1992 when claimant's disability claim was reconsidered. (See Cl. Br. at 2) Dr. Miller found that claimant had an affective disorder as well as a personality disorder. Claimant's affective disorder manifested itself, in Dr. Miller's opinion, by sleep disturbance, psychomotor agitation or retardation, and difficulty concentrating or thinking. (R. 103) Dr. Miller described claimant's personality disorder as "narcissistic type" that (1) caused moderate restriction of claimant's activities of daily living; (2) caused moderate difficulty in maintaining social functioning; (3) often resulted in deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner; and (4) never involved episodes of deterioration or decompensation in work

or work-like settings which caused claimant to withdraw from that situation or to experience exacerbation of signs and symptoms. (R. 104-05) Claimant argues that this PRT form supports a finding of significant mental impairment.

In an effort to demonstrate that claimant had a significant mental impairment which adversely affected his ability to work, claimant relies on the examination of Vanessa Werlla, M.D. (See Cl. Br. at 2) Claimant points to various statements by Dr. Werlla which indicate that, during the examination, claimant appeared anxious and had difficulty concentrating. (R. 222-23) Dr. Werlla diagnosed claimant as having a personality disorder with narcissistic features and an adjustment disorder with mixed disturbance of emotions. (R. 223) However, claimant fails to acknowledge that Dr. Werlla also reported that he denied having any hallucinations, suicidal or paranoid ideation, and he had made no suicidal attempts. He was alert and oriented to time and place, he made good eye contact, and he was spontaneous in speech with good rate and rhythm. He did not demonstrate any overt psychotic symptoms, and Dr. Werlla deemed his intellectual functioning as average. He had not been under the care of a psychiatrist on a regular basis, and he had never been hospitalized for mental health problems. He did not take any psychiatric medications. (R. 220-23) Dr. Werlla attributed his difficulty with concentration and memory to be a "product of his anxiety about the interview." (R. at 223)

The ALJ referred to Dr. Werlla's October 1, 1992 evaluation in his decision. (R. 252-55) He mentioned Dr. Werlla's observation that claimant revealed no overt psychotic symptoms, although claimant displayed some difficulty with concentration. His decision also incorporates her remarks that claimant's overall intellectual style seemed average, he had limited insight into the nature of his problems, and he demonstrated fair judgment. (R. 223) The ALJ commented that claimant had not

received on-going mental health treatment and had not been prescribed psychotropic medications. (R. 254) The ALJ acknowledged Dr. Werlla's diagnosis (R. 252-54) and noted her remark that "I would raise the question in my mind of some secondary gain, as he does have a claim pending against the Yellow Cab Company, although he definitely minimizes this as part of his presentation today." (R. 223)

The ALJ also considered Dr. Cullen Mancuso's April 13, 1992 response to a request for information. (R. 252, 254) Dr. Mancuso reported that claimant's mental status was normal and that claimant had been referred to a neurosurgeon who could find no objective basis for his complaint. Dr. Mancuso stated that "Mr. Wickham is either malingering or suffering from somatoform disorder." (R. 192). The ALJ recited claimant's testimony with regard to his allegations of mental impairment, and found: "The undersigned is persuaded that claimant's personality disorder is mild, and would not affect his ability to perform work-related activities." (R. 254-55) The ALJ properly followed the procedures set forth in the regulations, completed the PRT form as required, and discussed the evidence as it related to his conclusions. The undersigned recommends that the Court find that the ALJ did not ignore the Commissioner's staff psychologists' findings, and properly considered the evidence of mental impairment.

The Vocational Expert Testimony

Claimant contends the ALJ also ignored the testimony of the vocational expert with regard to claimant's mental impairments. However, the ALJ posed three hypothetical questions to the vocational expert, the first of which involved assumptions that an individual could perform medium, light and sedentary work although the individual suffered mild to moderate and occasional chronic pain and took over-the-counter medications. The first hypothetical also assumed that the individual

had been diagnosed with somatoform, adjustment and personality disorders, but those disorders did not involve any work-related limitations. Given those assumptions, among others that described claimant's age education and abilities, the vocational expert testified that the hypothetical individual could return to his past work in automobile sales, production coordination for a clothing designer, and engineering manufacturing design. (R. 311-12)

The ALJ then altered the hypothetical to include assumptions that (1) the person could perform simple tasks only; (2) that he would not be able to tolerate or should have minimal contact with the public; and (3) that he would be able to relate adequately with supervisors and co-workers for work-related purposes only. In that instance, the vocational expert testified that the individual could not perform the same past relevant work, but other jobs existed in the national or regional economy that he could perform. (R. 314-15) Finally, the ALJ modified the hypothetical "to assume that the testimony of the claimant as given at the hearing is found to be credible and substantially verified by third party medical evidence which is a part of the record and without any significant contradictions. . . ." (R. 315-16) Given the assumptions of this third hypothetical, the vocational expert testified that the individual could not perform any work. (R. 316) Claimant contends that the vocational expert's testimony thus establishes that a person with the limitations set forth by the agency's own staff psychologist would not be able to perform claimant's past work and that claimant's alleged mental limitations would preclude performance of all other work. (Cl. Br. at 4)

In essence, claimant faults the ALJ for relying on the vocational expert's testimony in response to the first hypothetical, and not the second or third. As set forth above, the vocational expert testified in response to the second and third hypothetical questions that a person with the limitations set forth by Dr. Miller would not be able to perform claimant's past work (although he

could perform other work) and a person with claimant's alleged mental impairments would not be able to work at all. In the August 23, 1996 decision, the ALJ took into account claimant's testimony as to various problems he claimed to have suffered as a result of his injuries, including depression, fatigue, memory loss, nervousness, inability to interact with people and loss of confidence. (R. 254) However, he gave more credence to the testimony of the vocational expert (in response to the ALJ's first hypothetical question) that claimant could return to his past relevant work, given his vocational background and RFC. (R. 256) He did not rely upon the testimony of the vocational expert which included the various problems to which claimant testified.

In forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). In the first hypothetical to the vocational expert, the ALJ included all three of claimant's mental disorders and thus corrected the error discussed in the prior magistrate's report and recommendation (R. 322-26) adopted by the District Court. (R. 320) It was only when the vocational expert was asked to assume impairments that the ALJ properly deemed unsubstantiated that the expert found claimant could not perform his past relevant work. This testimony, based on unsubstantiated assumptions contained in the second and third hypothetical questions, was not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993).

RFC and Past Relevant Work

In making his determination at the fourth step of the sequential evaluation process, an ALJ is required to: (1) assess the nature and extent of claimant's physical and mental limitations to determine claimant's RFC for work activity on a regular and continuing basis, supported by

substantial evidence from the record; (2) make findings regarding the physical and mental demands of claimant's past relevant work (either as claimant actually performed that work or as is customarily performed in national economy), based on factual information regarding those work demands which bear on medically established limitations; and (3) make findings about claimant's ability to meet the physical and mental demands of that past relevant work. Winfrey v. Chater, 92 F.3d 1017, 1023-26 (10th Cir. 1996).⁶ This matter was previously remanded by the District Court because the ALJ failed to properly perform this analysis, and, in particular, failed to make specific findings as to the physical and mental demands of claimant's past relevant work.

On remand, the ALJ was careful to question the claimant and the vocational expert as to these demands of claimant's past work as a car salesman, a production coordinator for a clothing designer, and as a design worker for an engineering and manufacturing company. (See R. 270-76, 300-02, 305, 311) When he made findings in his decision of August 23, 1996 (R. 256-57), the ALJ specifically noted the vocational expert's testimony that these jobs were skilled and classified as light in exertion, although some aspects of the production work could have been classified as medium in exertion. (R. 256) He also relied upon the vocational report completed by claimant. (R. 120-25)

In addition to the physical demands of each job, the ALJ determined that claimant's job as an automobile salesman required knowledge of automobile manufacturing, completion of forms for financing, and the ability to negotiate. Claimant's job as a production coordinator required that he take care of all the elements necessary to advertise a particular line of clothing; his work in

⁶ Although the ALJ issued his decision in 1995, and Winfrey was not decided until 1996, Winfrey was a restatement of existing law, incorporating Social Security regulations and rulings, and the Tenth Circuit decisions in Henrie v. U.S. Dep't of Health & Human Servs., 13 F.3d 359 (10th Cir. 1993), and Washington v. Shalala, 37 F.3d 1437 (10th Cir. 1994).

engineering and manufacturing design required design of equipment, calling on clients, and knowledge of drafting tools. (R. 256) Thus, the ALJ was careful “to obtain a precise description of the particular job duties which are likely to produce tension and anxiety . . . ,” as he is required to do where a mental impairment is involved. Winfrey, 92 F.3d at 1024 (quoting S.S.R. 82-62, 1975-1982 Rulings, Soc. Sec. Rep. Serv., 809, 812 (West 1983)).

The ALJ also made the necessary findings when he evaluated claimant’s ability to meet the physical and mental demands of claimant’s past relevant work. As part of a step four analysis, a vocational expert may supply information to the ALJ about the demands of claimant’s past relevant work, and it is not error for the ALJ to rely on this information from the vocational expert as long as the ALJ proceeds to make the required findings on the record, including his own evaluation of claimant’s ability to perform his past relevant work. Winfrey, 92 F.3d at 1025. The ALJ obtained information from the vocational expert as to the demands of the claimant’s past relevant work and relied upon that information, but he also made the required findings on the record and specifically included claimant’s alleged mental impairments as part of his evaluation. (R. 256-57) On remand, the ALJ decision at the fourth step of the sequential analysis was supported by substantial evidence, and the correct legal standards were applied.

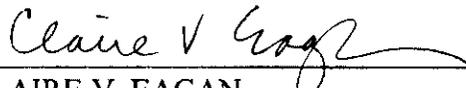
IV. CONCLUSION

Based upon the foregoing, the undersigned recommends that the District Court **AFFIRM** the decision of the Commissioner denying disability benefits to claimant.

V. 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).

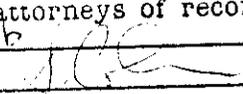
DATED this 22nd day of February, 1999.



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 of the parties hereto by mailing the same to them or to their attorneys of record on the 22 Day of Feb, 1999.



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 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 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. A claimant suffering from a listed impairment or impairments "medically equivalent" to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If 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 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

Claimant was born on June 29, 1961, and was 34 years old at the time of his first administrative hearing in this matter. He has a high school education and two years of college. He also served in the United States Coast Guard for two-and-a-half years. Claimant has worked as a security guard, hospital porter, dark room technician, and mattress maker. He alleges an inability to work beginning on December 1, 1987 due to injuries sustained in several automobile accidents.⁴ He claims to have suffered from post-traumatic stress disorder, somatization disorder, degenerative joint disease of the right hip status post acetabulum reconstruction, spina bifida occulta, asthma, and temporomandibular joint disease (TJD). In more common terms, his claims to have had lower back problems, pain in his right hip, his hand, and his jaw, as well as arthritis, headaches, depression, weakness, fatigue, sleep disturbance and nervousness.

⁴ The first accident occurred in 1981. (See R. 39)

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform a wide range of sedentary work. In particular, he determined that claimant had the RFC to perform the physical exertional and nonexertional requirements of work except for lifting more than 25 pounds, carrying more than 10 pounds, walking more than 20 minutes, standing more than 15 minutes, sitting more than 45 minutes, bending, stooping, and climbing. (R. 21-22) The ALJ also found 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. Thus, the ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision. (R. 22)

IV. REVIEW

Relevant Period

Claimant protectively filed prior applications for disability benefits and supplemental security income benefits on March 2, 1989, alleging disability beginning December 7, 1987. (R. 86) The Social Security Administration denied claimant's applications on June 20, 1989. (R. 95, 99) Claimant did not appeal these denials. Although claimant did not specifically request reopening of the prior applications, he alleges that he satisfied the earnings requirements for wage earners through at least December 1, 1987, that he became unable to work on that date, and that he has established his entitlement to Social Security Benefits as of that date. (Complaint, Docket #1, at 2-4)

The ALJ analyzed the adjudicative effect of the prior denials and claimant's failure to appeal those denials. He applied the doctrine of administrative finality, and expressly found no basis to

reopen the prior determinations under the provisions of 20 C.F.R. §§ 404.988, 404989, 416.1488, or 416.1489. (R. 14) This finding is not reviewable by this Court absent a valid Constitutional claim. Califano v. Sanders, 430 U.S. 99, 108-09 (1977); Nelson v. Sec'y of Health & Human Services, 927 F.2d 1109, 1111 (10th Cir. 1990). The Court finds that claimant has failed to demonstrate that the ALJ's exercise of regulatory discretion violated claimant's Constitutional rights. This finding of the ALJ is, therefore, not reviewable by this Court. Disability claims for the period on or before June 20, 1989 are barred. Thus, the relevant period for this application commences June 21, 1989. **Alternate Sitting and Standing**

Claimant objects to the determination of the ALJ because "the jobs listed by the vocational expert do not permit a 'sit-stand option'." (Claimant's Brief ("Cl. Br."), Docket #9, at 2) At the April 26, 1996 hearing, the vocational expert testified that a person with the limitations that the ALJ found applicable to claimant could perform sedentary work, and the expert listed the jobs in the national and regional economies which such person could perform -- order clerk, cashier, and information clerk. (R. 81-82) The vocational expert testified that a person performing duties in those positions would not be able to sit and stand at will, but they could move around to a certain extent. (R. 84) Claimant argues that this testimony precludes the ALJ's determination that claimant's RFC permitted him to perform a full range of sedentary work. Claimant reasons that the regulations require the ability to periodically alternate between sitting and standing if a claimant can sit for no more than forty-five minutes at a time. He also relies upon the consultative examiner's opinion (see R. 113) that claimant must alternate sitting and standing if he is required to sit for six hours in an eight-hour work day.

Claimant's reasoning and conclusions are flawed. First, the ALJ did not determine that claimant could perform a *full* range of sedentary work; he determined that claimant could perform a *wide* range of sedentary work (R. 21), which he is permitted to do under Social Security Ruling 83-12, 1983-1991 Rulings, Soc. Sec. Rep. Serv. 36 (West 1992). Social Security Ruling 83-12 does not require that, as claimant contends, "[i]n order to fully perform sedentary work with a limitation of sitting for only forty-five (45) minutes at a time, [claimant] must periodically alternate between sitting and standing." (Cl. Br. at 2) The ruling provides:

In some disability claims, the medical facts lead to an assessment of RFC which is compatible with the performance of either sedentary or light work except that the person must alternate periods of sitting and standing. The individual may be able to sit for a time, but must then get up and stand or walk for awhile before returning to sitting. Such an individual is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work (and for the relatively few light jobs which are performed primarily in a seated position) or the prolonged standing or walking contemplated for most light work. (Persons who can adjust to any need to vary sitting and standing by doing so at breaks, lunch periods, etc., would still be able to perform a defined range of work.)

There are some jobs in the national economy -- typically professional and managerial ones -- in which a person can sit or stand with a degree of choice. If an individual had such a job and is still capable of performing it, or is capable of transferring work skills to such jobs, he or she would not be found disabled. However, most jobs have ongoing work processes which demand that a worker be in a certain place or posture for at least a certain length of time to accomplish a certain task. Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will. In cases of unusual limitation of ability to sit or stand, a [vocational expert] should be consulted to clarify the implications of the occupational base.

Id. at 39-40.

On cross-examination by claimant's attorney, the vocational expert testified that the referenced jobs (which the ALJ ultimately determined claimant could perform) would not permit claimant to alternately sit and stand "at will," but that claimant "could probably move around to a certain extent." (R. 84) However, the vocational expert did not testify, and the ALJ did not find, that

claimant must be able to alternate between sitting and standing “at will,” or that the jobs claimant could perform would require him to sit for more than forty-five minutes at a time. Being unable to alternately sit and stand “at will” is not the same as being unable to alternately sit and stand at all. Nor does it mean that claimant cannot perform these jobs. It is unreasonable to assume that an order clerk, a cashier, or an information clerk would be required to sit for six straight hours without a break, or even for forty-five minutes without changing positions. It is also unreasonable to assume that a person in those positions could not perform his duties in either position, sitting or standing, or that claimant would be unable to negotiate with potential employers so that he could alternately sit and stand.

The consultative examiner’s opinion, upon which claimant relies, is not inconsistent with the vocational expert’s testimony or the ALJ’s determination. The consultative examiner specified that claimant could sit (with normal breaks) for a total of about six hours in an eight-hour day even though he must periodically alternate sitting and standing to relieve pain or discomfort. (R. 113) Notably, the consultative examiner believed that claimant could sit for up to two hours at a time. (R. 114) The record reflects that another doctor, Noman Khan, M.D., reached the same conclusion. (See R. 272) By comparison, the ALJ determined that claimant could sit for no more than forty-five minutes at a time. (R. 21-22)

The ALJ did not err in determining claimant’s functional limitations or in finding that claimant could perform a wide range of sedentary work. The vocational expert’s testimony does not require a contrary result. Social Security Ruling 83-12 does not direct a finding of disability based on the need to alternate sitting and standing. It requires that a vocational expert be consulted if the need to alternate sitting and standing places a claimant between exertional categories. If that is done, as it

was here, there is no legal error. Kelley v. Chater, 62 F.3d 335, 338 (10th Cir. 1995); see also Soliz v. Chater, 82 F.3d 373, 375 (10th Cir. 1996).

V. CONCLUSION

Claimant does not challenge the determination of the ALJ other than to claim that he erred in finding that claimant could perform jobs that would not permit him to sit and stand at will. The ALJ applied the correct legal standards, and the decision of the ALJ is amply supported by substantial evidence in the record. Accordingly, the ALJ's decision is **AFFIRMED**.

DATED this 22nd day of February, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN HAMILL,
SSN: 547-37-5759,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 97-CV-0437-EA

ENTERED ON DOCKET

DATE FEB 22 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 February 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

FILED

FEB 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Appellant,)
)
 vs.)
)
 GARY M. KROLL, BARBARA KROLL,)
)
 Appellees,)
)
 IN THE MATTER OF:)
 GARY M. KROLL, BARBARA KROLL,)
)
 Debtors.)

No. 98-C-269-E (E) ✓
Appeal from the United States
Bankruptcy Court
Case No. 97-02003 (R)

ENTERED ON DOCKET
DATE FEB 22 1999

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 30 days that settlement has not been completed and further litigation is necessary.

ORDERED this 18th day of February, 1999.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

FEB 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GILBERT R. SUITER,)
)
Plaintiff,)
)
v.)
)
MITCHELL MOTOR COACH SALES, INC.,)
et al.,)
Defendants.)

Case No. 93-CV-815-H

ENTERED ON DOCKET

DATE Feb 22 1999

ORDER

This matter comes before the Court pursuant to the Plaintiff's Response to the Court's Order filed January 26, 1999 wherein the Plaintiff represents to the Court that Plaintiff has no objection to dismissal of the action against Norma Desbien with prejudice and termination of this proceeding in its entirety so long as each party bears its own costs and attorney fees.

Accordingly, for good cause shown, Plaintiff's claims against Norma Desbien are dismissed with prejudice, and this matter is terminated in its entirety. Each party is hereby directed to bear its own costs and attorney fees.

IT IS SO ORDERED.

This 19TH day of February, 1999.



Sven Erik Holmes
United States District Judge

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