

12

In the United States District Court
For the Northern District of Oklahoma

Melodee Ann Mills,
Plaintiff,
vs.
Southwestern Wire Cloth, Inc.
Defendant.

FILED

APR 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98 CV 480- H (J)

ENTERED ON DOCKET

DATE APR 30 1999

Stipulation of Dismissal with Prejudice

The parties hereby stipulate that this case be dismissed with prejudice.

Each party to bear her/its own attorneys' fees and costs.

Respectfully submitted,



Melodee Ann Mills, Plaintiff



Scott Scroggs OBA # 16889 (or) Jeff Nix
OBA #6688
Nix & Scroggs
601 S. Boulder, Suite 610
Tulsa, Oklahoma 74119

and/or

Matthew A.P. Schumacher OBA # 10468
323 W. Broadway, Suite 301
Muskogee, OK 74402-2242

ATTORNEYS FOR PLAINTIFF

Southwestern Wire Cloth, Inc.

By: *Randall J. Schatz*

Title: *Chief Financial Officer*

J. Daniel Morgan

J. Daniel Morgan, OBA #10550

GABLE & GOTWALS

Suite 1000 – Oneok Plaza

100 West Fifth Street

Tulsa, OK 741103-4219

Telephone: (918) 588-7882

Fax: (918) 588-7873

ATTORNEY FOR DEFENDANT

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

EOD 4/30/99

LERROY AUSTIN HANCOCK,)
)
 Plaintiff,)
)
 vs.)
)
 JAMES SAFFLE, et al.,)
)
 Defendants.)

No. 95-CV-66-K

F I L E D

APR 30 1999 *AL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon Plaintiff's request for injunctive relief. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff is not entitled to injunctive relief and judgment is hereby entered for Defendants and against Plaintiff.

SO ORDERED THIS 30 day of April, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

EOD 4/30/99

LEROY AUSTIN HANCOCK,)
)
Plaintiff,)
)
vs.)
)
JAMES SAFFLE, et al.,)
)
Defendants.)

No. 95-CV-66-K

FILED

APR 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

The only issue before the Court in this 42 U.S.C. § 1983 action is whether Plaintiff, a Jewish prisoner in state custody, is entitled to injunctive relief as a result of Defendants' alleged violations of Plaintiff's right to exercise his religion freely, as protected by the First Amendment and made applicable to the states by the Fourteenth Amendment. The Court has appointed counsel to represent Plaintiff who is currently incarcerated at Mack Alford Correctional Center ("MACC"), an Oklahoma Department of Corrections ("DOC") medium security facility. Plaintiff complains that "he has not been permitted to wear religious head coverings in the meal room of [MACC]; he has been denied kosher meals; he is only allowed kosher food to be sent to him by the Aleph Institute once a year; and there is no specifically designated area that he and the other Jewish inmates . . . may use for regular prayers and religious meetings." (#46 at 1). Plaintiff also states that "injunctive relief is the only recourse to preclude the inappropriate differing standards being applied at different correctional facilities. In particular, this is true in regard to the Mack Alford facility where the Plaintiff is presently incarcerated." (#46 at 7). On April 15, 1998, the Court directed Defendants to brief the issues raised by Plaintiff's challenges to his free exercise rights in light of the standards enunciated

53

in Turner v. Safley, 482 U.S. 78, 89-90 (1987). Defendants have now submitted their supplemental brief (#52) to which Plaintiff has responded (#s 53 and 54).

ANALYSIS

A. Injunctive Relief

As stated by the Court previously (#45), when considering injunctive relief, a federal court must find, as an initial matter, that a constitutional violation exists. Al-Alamin v. Gramley, 926 F.2d 680, 683 (7th Cir. 1991); see also Swann V. Charlotte-Mecklenburg Bd. of Educ., 501 U.S. 1, 16 (1971). When there is no continuing violation of federal law, injunctive relief is not part of a federal court's remedial powers. Al-Alamin, 926 F.2d at 683; see also Green v. Mansour, 474 U.S. 64, 71 (1985). The Court finds that, for the reasons discussed below, Plaintiff has not demonstrated a continuing violation of federal law and, therefore, he is not entitled to injunctive relief in this matter.

Furthermore, the Court declines to require DOC to provide the same religious accommodations or to impose uniform restrictions at each of its facilities. Current DOC regulations emphasize that "it is important that [DOC] not endorse a particular religious belief over another and maintains a neutral position relative to all religious beliefs. All religious activities will be conducted in a manner which is consistent with available resources and requirements of facility security, safety, and health." (#52, OP-030112, Page 1). Thus, DOC's religious programs policy recognizes the significance of inmates' First Amendment rights while allowing for flexibility required due to the variance in security levels among Oklahoma prisons. As stated in Al-Alamin, 926 F.2d at 688, "it is not the prerogative of the federal courts to

micromanage the penal system of a state." Also, to the extent Plaintiff is requesting the entry of an injunction to insure that no further restrictions on his First Amendment rights will be imposed should he again be transferred to a different DOC facility, the Court finds such request should be denied as too speculative to demonstrate a reasonable expectation that he will be subjected to unconstitutional restrictions in the future. See Wiggins v. Rushen, 760 F.2d 1009, 1010-11 (9th Cir. 1984).

B. Standard for reviewing Free Exercise claims

The initial inquiry in a free exercise claim is whether the plaintiff's beliefs are religious in nature, and whether those religious beliefs are sincerely held. United States v. Seeger, 380 U.S. 163, 183-84 (1965); Snyder v. Murray City Corp., 124 F.3d 1349, 1352 (10th Cir. 1997). In this case, it is undisputed that Plaintiff is sincere in his religious beliefs.

Federal courts must recognize valid constitutional claims of prison inmates. Turner v. Safley, 482 U.S. 78, 84 (1987). However, "maintaining institutional security and preserving internal discipline are essential goals that may require limitation or retraction of the retained constitutional rights. Bell v. Wolfish, 441 U.S. 520, 546 (1979). In Turner, the Court stated:

Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.

Turner, 482 U.S. at 84-85.

When Plaintiff originally filed his complaint, the legal standards governing these issues

were found in the Religious Freedom Restoration Act ("RFRA"). However, as a result of the Supreme Court's decision in City of Boerne v. Flores, 117 S.Ct. 2157, 2172 (1997) (finding RFRA to be unconstitutional), the Court looks to Turner v. Safley, 482 U.S. 78 (1987) for the legal standard governing this inquiry. See also Mosier v. Maynard, 937 F.2d 1521 (10th Cir. 1991). In Turner, the Court held that a prison regulation which burdens an inmate's constitutional rights is valid if the regulation is reasonably related to legitimate penological interests. Id. at 89. The relevant factors to be used to determine the reasonableness of the regulation at issue are: (1) whether there is a valid rational connection between the prison regulation and the legitimate government interest put forward to justify it; (2) whether alternative means of exercising the right remain open to prison inmates; (3) the impact the accommodation of the asserted constitutional right will have on other inmates and guards, and on the allocation of prison resources generally; and (4) whether there is an absence of ready alternatives that fully accommodate the prisoner's rights at de minimis costs to valid penological interests. The existence of "obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." Id. at 89-90.

The Court will examine each of Plaintiff's claims to determine whether the imposed restriction is reasonably related to a legitimate penological interest.

C. Plaintiff's claims

1. Religious head wear

Plaintiff complains that at MACC he is not allowed to wear his yarmulke at mealtimes. When he was incarcerated at Northeastern Oklahoma Correctional Center, a DOC minimum

security facility, he was allowed to wear his yarmulke at all times. Defendants argue that the purposes of the MACC religious head wear policy, prohibiting the wearing of hats, including religious head wear, while eating, are to promote the rehabilitation process and to maintain internal security. Defendants state that the policy helps inmates

begin to understand that appearances are an important part of being a functioning integrated member of society as well as to attempt to get them to accept discipline and to make self-discipline and respect for others a part of their daily lives. Additionally, the reason that all inmates are expected to remove their hats in the dining area is to insure that no inmate be perceived by other inmates as receiving preferential treatment by the prison staff thereby causing other inmates to violate the dress code, insure disruptions do not occur in an area where large numbers of inmates are gathered at one time and reduce the opportunity and amount of time staff and inmates spend in a confrontational situation in the dining area when staff enforce the dress code.

(#52, Affidavit of Bobby Boone, Warden at MACC). Both rehabilitation and the maintenance of internal security are legitimate penological interests. See O'Lone v. Estate of Shabazz, 482 U.S. 342, 348, 353 (1987) (recognizing security concerns, crime deterrence and prisoner rehabilitation as valid penological objectives). Plaintiff disputes the asserted justification for the rule. He argues that the DOC has effectively abrogated its responsibility in regard to protecting the wearing of religious head gear, a central tenet to Orthodox Jewishness, by allowing each penitentiary to impose any rules desired concerning head gear policy.

Applying the Turner factors to Plaintiff's head wear claim, the Court finds that the MACC headwear policy is a reasonable means of accomplishing legitimate penological interests. First, the record reveals a valid, rational connection between the policy and DOC's interest in maintaining internal security; the restriction seeks to prevent disruptions attributable to perceived preferential treatment while promoting rehabilitation. The policy may not be perfectly effective in

accomplishing that goal, but the law requires **only a rational connection** between the policy and the institution's interest in maintaining internal security. Second, Plaintiff retains an alternative means of exercising his constitutional rights, **in that he may wear his yarmulke in his cell and while attending services**. Third, in light of the legitimate security concerns described above, allowing Plaintiff to wear his yarmulke **while restricting other headwear worn by other inmates in the dining area** would impact guards, other inmates, and the allocation of prison resources. Finally, the record suggests no alternative to the policy that would fully accommodate Plaintiff's free exercise right involving the wearing of his yarmulke, short of allowing Plaintiff to wear his yarmulke at all times.

2. *Provision of a kosher diet*

Defendants concede that DOC does **not prepare meals for Jewish inmates in kosher kitchens**. According to Defendants, **"the cost of building and supplying a separate kitchen for each facility would cost an astronomical amount of money."** (#52 at 5). In addition, Defendants contend that provision of a special kitchen for preparation of kosher foods would again be perceived by other inmates as preferential treatment for the Jewish inmates. The perception of preferential treatment **"can cause serious security concerns which would endanger the lives and safety of not only other inmates but also staff."** (#52 at 5).

However, Defendants assert that Jewish inmates at MACC are provided a non-pork diet and are not forced to eat any food which offends their religious tenets. They contend that the modified diet available at MACC should satisfy any religious requirement of Plaintiff in this case. Defendants also note that numerous kosher items are available for purchase from the prison

canteen. Furthermore, records provided by Defendants indicate that Plaintiff has purchased for his consumption a number of non-kosher items in spite of the availability of comparable kosher items. (#52 at 4 and attachments).

In response, Plaintiff argues that Defendants misperceive his request concerning a kosher diet. According to Plaintiff, a "semi-kosher" diet could be provided by setting aside an area in the facility's kitchen for the purpose of providing a "dairy diet" which does not contain any meat. (#53 at 3-4). Plaintiff describes efforts currently being made to have dairy meals prepared for Jewish prisoners in the Oklahoma prison system. See Affidavit of Alan Kerby, #54, Ex. A. Plaintiff attempts to discredit Defendants' argument that provision of special diets could lead to security concerns due to the perception of preferential treatment by other inmates by asserting that "very few prisoners [] want to give up their meat diets and would probably welcome others who did not partake in the meat portion of the diet as generally served to prisoners." (#53 at 4).

Applying the Turner factors to Plaintiff's kosher diet claim, the Court finds that Defendant's policy is a reasonable means of accomplishing legitimate penological interests at MACC. First, the record reveals a valid, rational connection between the present policy and DOC's interest in maintaining internal security; the restriction seeks to prevent disruptions attributable to perceived preferential treatment.¹ As emphasized *supra*, the law requires only a rational connection between the policy and the institution's interest in maintaining internal security. Second, Plaintiff retains an alternative means of exercising his constitutional rights, in that he may supplement his diet by purchasing kosher items from the MACC canteen. Third, the

¹Plaintiff's argument that other prisoners would welcome the increase in available meat fails to address Defendants' concerns regarding other prisoners' perception of preferential treatment given to Jewish prisoners.

prison officials have identified a legitimate concern involving the allocation of prison resources necessary to meet Plaintiff's kosher diet requests. Finally, although Plaintiff suggests the semi-kosher "dairy diet" as a reasonable alternative accommodation, he fails to provide data to support his contention that the dairy diet could be provided at a de minimis cost to valid penological interests.

3. *Restrictions on outside sources providing kosher food*

Plaintiff complains that he is not allowed to receive pre-packaged kosher food sent from outside sources on a regular basis and that restraint unnecessarily infringes on his First Amendment rights. Defendants indicate that each inmate at MACC is allowed to receive one food package per year from a source outside the prison. According to Defendants, this policy is justified based on (1) the need to avoid preferential treatment or the perception of preferential treatment given to any one group, and (2) the detrimental impact on allocation of prison resources resulting from prison staff being required to search the additional incoming food packages. (#52 at 6). Plaintiff responds that prepacked kosher foods have been permitted at many of the prisons in Oklahoma without imposition of undue burden on prison administration.

Applying the Turner factors to Plaintiff's claim based on this restriction on outside sources of kosher food, the Court finds that Defendant's policy is a reasonable means of accomplishing legitimate penological interests at MACC. First, the record reveals a valid, rational connection between the policy and DOC's interest in maintaining internal security in that the restriction seeks to prevent disruptions attributable to perceived preferential treatment. Second, Plaintiff retains an alternative means of exercising his constitutional rights, as discussed above, in that he has kosher

food available for purchase from the canteen. Third, in light of the legitimate security concerns described above, allowing Plaintiff to receive additional packages of food from outside sources would necessarily impact guards, other inmates, and the allocation of prison resources.² Finally, the record suggests no alternative to the policy that would fully accommodate Plaintiff's free exercise right at de minimis cost to valid penological interests.

4. *Failure to provide a separate designated area for prayers and religious meetings*

Lastly, Plaintiff complains that MACC officials have failed to provide a specifically designated area where he and other Jewish inmates may gather for regular prayers and religious meetings (#46 at 1). Defendants claim that MACC does provide a designated area for any prisoner, including Jewish prisoners, to use for prayer and other religious meetings. However, all religious groups must use the same area. (#52 at 7). In contrast to Defendants' response, Plaintiff states that there is no area for Jewish prisoners to pray at MACC. Plaintiff also states that "[t]here has been an area of prayer by other prisoners, but Jewish prisoners have not been permitted to use that area." (#53 at 5). According to Plaintiff, the Chaplain at MACC is currently endeavoring to find a location for such prayer. (#53 at 5).

In his affidavit provided in support of Defendants' supplemental response, Warden Boone states that:

[a]ll groups who wish to participate in a gathering of a religious nature are permitted to use the space which is available in the prison. Due to the limited

²Plaintiff argues that because there are not many Jewish prisoners at MACC, Defendants' concerns over increased staffing requirements necessary to handle the additional food packages are not well-founded. However, Plaintiff fails to address Defendants' observation that if Plaintiff were allowed to receive additional food packages, other prisoners would demand the same treatment.

space available at the prison no group has a special designated area which only that group is permitted to use to the exclusion of all others and at the current time the chapel, the programs area and the visiting area are utilized for inmates to gather and conduct their religious services. The reason for not providing special designated areas to each religion is due to the limited space and the need to accommodate all religious. All groups are expected to share the available space. Again there is a need to prevent the appearance that one group is get (sic) preferential treatment because they have been given a special area unto themselves and the problems that arise from other inmates due to those perceptions.

(#52, Affidavit of Bobby Boone, ¶ 4). The need to allocate scarce prison resources fairly and security concerns are the penological concerns identified for the refusal to provide a separate area for Jewish prisoners to gather for prayer at MACC.

Applying the Turner factors to Plaintiff's instant claim, the Court finds that Defendants' policy is a reasonable means of accomplishing legitimate penological interests at MACC. First, the record reveals a valid, rational connection between the policy and DOC's interest in allocating prison resources and maintaining internal security; the restriction seeks to prevent disruptions attributable to perceived preferential treatment. Second, Plaintiff retains an alternative means of exercising his constitutional rights, in that he may pray in his cell. Third, based on the Warden's assertion that space is limited at MACC, requiring prison officials to provide a separate prayer area for the Jewish prisoners would necessarily impact the allocation of prison resources. Finally, the record suggests no alternative to the policy that would fully accommodate Plaintiff's free exercise right at de minimis cost to valid penological interests.

As discussed above, DOC's religious accommodation policies are based on legitimate institutional needs and objectives. Although the religious rights Plaintiff seeks to exercise are important, his rights are infringed upon only to the extent accommodation would unreasonably impact legitimate penological concerns. According to Defendants, DOC's limited fiscal

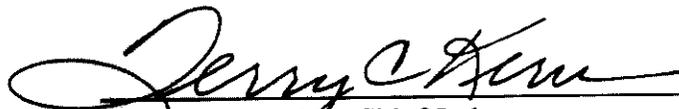
capability, limited plant space, and limited personnel combine to prevent full accommodation of Plaintiff's religious requests. (#17). "All of these inadequacies are at least indirectly tied to the great problem of the heavily overcrowded prisons of the Department of Corrections. Not only is the Department of Corrections struggling to maintain space for all convicted criminals, but DOC is also struggling to maintain order and peace among the overcrowded prisons" (#17 at 5). The Court concludes that DOC's conduct is proper under the Constitution.

CONCLUSION

Plaintiff has failed to demonstrate, under the standards enunciated in Turner v. Safley, 482 U.S. 78 (1987), that the restrictions imposed at MACC are not reasonably related to legitimate penological interests. Therefore, there is no continuing violation of federal law and Plaintiff's request for an injunction should be denied. This action should be dismissed.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's request for injunctive relief is **denied** and this action is **dismissed**.

SO ORDERED THIS 30 day of April, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

SHERRI EDWARDS, GERALDINE)
NASH and DERYLE BURKS,)
)
Plaintiffs,)
)
vs.)
)
AMR CORPORATION, AMERICAN)
AIRLINES, INC. and the SABRE)
GROUP, INC.,)
)
Defendants.)

ENTERED ON DOCKET
DATE APR 30 1999
No. 98-CV-869-K ✓

FILED

APR 30 1999 SA

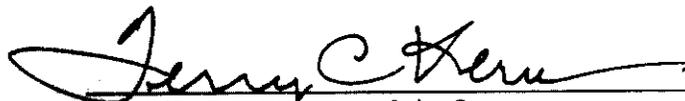
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant American Airlines, Inc. and against the Plaintiffs. Judgment is hereby entered for the Defendant the SABRE Group, Inc. as to plaintiffs Geraldine Nash and Deryle Burks. The claims of plaintiff Sherri Edwards against defendant the SABRE Group, Inc., are hereby dismissed with prejudice.

ORDERED THIS 30 DAY OF APRIL, 1999.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

SHERRI EDWARDS, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 AMR CORPORATION, et al.,)
)
 Defendants.)

No. 98-CV-869-K

ENTERED ON DOCKET
DATE APR 30 1999

FILED

APR 30 1999 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court are various dispositive motions of the defendants SABRE Group, Inc. and American Airlines, Inc. Plaintiffs Sherri Edwards, Geraldine Nash and Deryle Burks commenced this action in state court. Defendants AMR Corporation, American Airlines, Inc. and the SABRE Group, Inc., removed the action to this Court. On January 22, 1999, a stipulation of dismissal was filed between plaintiffs and AMR Corporation. The remaining two defendants now seek dismissal or summary judgment.

The SABRE Group seeks dismissal against plaintiff Geraldine Nash on two grounds: (1) Nash failed to file suit within ninety days after receiving her right-to-sue letter; (2) there is no private right of action under 25 O.S. §1101 et seq., for race, sex or age discrimination.

In response, Nash concedes that she received her notice of right to sue in May, 1998, and that this action was not commenced in state court until October 14, 1998. Nash argues that she was aware of pending action involving similar claims, Henderson, et al.

v. AMR, et al., 97-CV-457-K, in which plaintiffs (through the same counsel) were contemplating class certification. Ultimately, plaintiffs in Henderson elected not to seek class certification on August 31, 1998. Nash argues that under the doctrine of equitable tolling, she should be granted ninety days from August 31, 1998 in which to file her individual claim.

Under 42 U.S.C. §2000e-5(f)(1) a complainant has ninety days in which to file suit after receipt of an EEOC right-to-sue letter. The ninety day limitation is not jurisdictional, but is a requirement that, like a statute of limitation, is subject to waiver, estoppel and equitable tolling. Jarrett v. U.S. Sprint Communications Co., 22 F.3d 256, 259-260 (10th Cir.), cert. denied, 513 U.S. 951 (1994). However, in the Tenth Circuit, a Title VII time limit is tolled only if there has been active deception of the claimant regarding procedural requirements. Witt v. Roadway Express, 136 F.3d 1424, 1430 (10th Cir.1998). Nash has made no such assertion here. Her claim against the SABRE Group is time-barred.

As to Nash's second claim, she concedes that there is no private right of action for racial discrimination under 25 O.S. §1101 (Plaintiff Nash's Response at 2). See Williams v. Dub Ross Co., 895 P.2d 1344, 1346 (Okla.Ct.App.1995). Nash contends that she is alleging a public policy tort such as recognized in Burk v. K-Mart Corp., 770 P.2d 24 (Okla.1989). First, it appears Oklahoma decisions have limited the public policy tort to instances of wrongful discharge, and Nash has not been discharged. Second, Marshall v. OK Rental & Leasing, Inc., 939 P.2d 1116 (Okla.1997),

the Supreme Court of Oklahoma held that no public policy tort exists when statutory remedies are adequate. Id. at 1122. The fact that Nash has permitted her Title VII remedy to lapse does not render the remedy inadequate. Summary judgment is appropriate as to Nash's state law claim against the SABRE Group as well.

Defendant American Airlines, Inc. also moves for summary judgment against Nash on the same two grounds. The Court finds the same reasoning applies and judgment is appropriate. American also raises a third ground, i.e., that Nash did not name American as a respondent in her EEOC charge. Nash concedes she did not, but argues there is an "identity of interest" between American Airlines and the SABRE Group such that the naming of one constitutes the naming of both. There is district court authority for this proposition, but Nash has presented no evidence of an identity of interest. A mere assertion in a brief is not sufficient to overcome a motion for summary judgment.

As to plaintiff Edwards, the SABRE Group has moved for dismissal or summary judgment. In a response filed January 12, 1999, Edwards has conceded that she was not employed by the SABRE Group and states her willingness to execute a stipulation of dismissal. No such stipulation was ever filed. The Court will dismiss Edwards' claims against the SABRE Group.

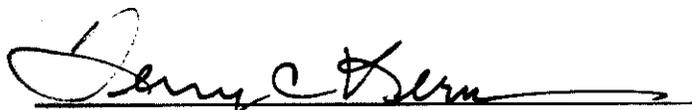
Defendant American Airlines, Inc., moves for dismissal or summary judgment as to Edwards on the identical grounds as it so moved against plaintiff Nash. Edwards has raised identical arguments in response. Therefore, for the reasons previously

recited, the Court finds summary judgment is appropriate.

Finally, both defendants have moved for dismissal or summary judgment against plaintiff Deryle Burks. The first grounds are the ones previously discussed of (1) failure to commence an action within 90 days and (2) failure to state a claim under the Oklahoma anti-discrimination statutes. The Court adopts its previous rationale. Defendants both raise an additional ground, i.e., that plaintiff has failed to exhaust administrative remedies because his administrative charge was dismissed by the EEOC for failure to cooperate. Plaintiff has responded with an affidavit stating that he did cooperate and does not understand why the EEOC took the action it did. Regarding failure to exhaust administrative remedies, this Court must take the administrative record as it stands. In this instance the record reflects that remedies have not been properly exhausted.

It is the Order of the Court that the motions of the defendants (##2, 6) to dismiss or for summary judgment are hereby GRANTED. All other motions are declared moot.

ORDERED this 30 day of April, 1999.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

APR 29 1999 *53*

SAMUEL A. LANE,
447-54-0633

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiff,

vs.

Case No. 98-CV-381-M ✓

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

ENTERED ON DOCKET

DATE APR 30 1999

Defendant.

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this
29th Day of April, 1999.

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

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

F I L E D

APR 29 1999 *SL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SAMUEL A. LANE,
447-54-0633

Plaintiff,

vs.

Case No. 98-CV-381-M ✓

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE APR 30 1999

ORDER

Plaintiff, Samuel A. Lane, 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 than a preponderance, and is such relevant evidence as a reasonable mind might

¹ Plaintiff's May 16, 1994, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held January 3, 1996. By decision dated January 12, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 20, 1998. 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.

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 & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

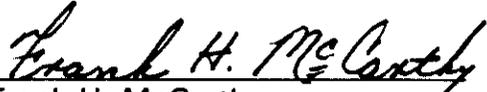
Plaintiff was awarded benefits as a result of vision problems. The ALJ determined the onset date of the disability to be April 5, 1994, which was the date of Plaintiff's first medical examination establishing a vision problem. Plaintiff claims an onset date of June 16, 1993, and argues that the ALJ failed to follow Social Security Ruling 83-20 in determining the onset date for a disability of nontraumatic origin.

SSR 83-20 is a Program Policy Statement which addresses the procedure for determining onset of disability. *1983-1991 Soc.Sec.Rep.Ser.* 49. SSR 83-20 instructs that in some cases, considering the nature of the impairment, the date of onset may be inferred to have occurred before the first recorded medical examination. According to SSR 83-20, the onset date should be set on the date when it is most reasonable to conclude from the evidence that the impairment was sufficiently severe to prevent the individual from working. For cases of disability of nontraumatic origin, the factors to be considered in setting the onset date are: (1) the applicant's

allegations; (2) work history; and (3) medical and other evidence. However, the inferred date must have a legitimate medical basis and SSR 83-20 advises that the ALJ should call on the services of a medical advisor when onset must be inferred.

In setting the onset date in this case, the ALJ did not discuss SSR 83-20, explain why an onset date could not be reasonably inferred from the evidence, or explain why the services of a medical advisor were not employed. The decision therefore fails to demonstrate that the correct legal standards were applied. The case is REVERSED and REMANDED for further proceedings.

SO ORDERED this 29th Day of April, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

APR 29 1999 *SR*

JULIA WHITETREE,)
SSN: 447-48-0528,)
)
PLAINTIFF,)
)
vs.)
)
KENNETH S. APFEL, Commissioner,)
Social Security Administration,)
)
DEFENDANT.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 98-CV-461-H (M) ✓

ENTERED ON DOCKET

DATE APR 30 1999

REPORT AND RECOMMENDATION

Plaintiff, Julia Whitetree, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.¹ The matter has been referred to the undersigned United States Magistrate Judge for report and recommendation.

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

¹ Plaintiff's January 5, 1995 applications for disability benefits were denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held February 27, 1996. By decision dated April 17, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on May 1, 1998. 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.

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 Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born August 30, 1947, and was 48 years old at the time of the administrative hearing. [R. 41, 292]. She has a high school education and formerly worked as a molding press operator. [R. 80-82, 293]. Plaintiff claims to be disabled due to pain in her back, neck, shoulders, arms, elbows, hands and fingers and a depressive disorder.² [R. 298-299, 311]. The ALJ determined that Plaintiff was unable to lift and carry more than 20 pounds occasionally or more than 10 pounds on a regular basis or perform tasks requiring repetitive overhead reaching. Based upon the testimony of a vocational expert (VE), the ALJ found that Plaintiff's past work as a molding press operator as she described it or as it is customarily performed in the general economy was precluded by her limitations. [R. 28, 320-321]. He determined, however, based upon the VE's testimony, that work exists in significant numbers in the economy which Plaintiff can perform with those restrictions. [R. 28, 321]. The

² Plaintiff does not contest the ALJ's findings regarding her depression. Therefore, the court will address only those issues related to the physical impairments claimed by Plaintiff.

case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ failed to conduct an appropriate credibility analysis and that his residual functional capacity (RFC) assessment is inconsistent with Plaintiff's treating physician's opinion. For the following reasons, the court recommends the decision of the ALJ and the denial of benefits by the Commissioner be affirmed.

Medical Background

Records from the Indian Health Center in Miami, Oklahoma, reveal that between August 6, 1993 and February 1995, Plaintiff was thought to have tennis elbow or left shoulder impingement [R. 161], elbow tendinitis [R. 159, 166, 171, 173, 184, 177] and was tested for lupus [R. 112] which was negative [R. 110]. On February 27, 1995, possible fibromyalgia³ was suspected. [R. 114]. On March 22, 1995, multiple tender points were identified and fibromyalgia was assessed. [R. 110]. Exercise was encouraged and NSAIDs⁴ were continued.⁵ *Id.* A record dated June 30, 1995

³ Chronic pain in the muscles and soft tissues surrounding joints, *Taber's Cyclopedic Medical Dictionary*, 17th Ed. 1993, p. 738.

⁴ Nonsteroidal anti-inflammatory drugs, *Taber's Cyclopedic Medical Dictionary*, 17th Ed. 1993, p. 1323.

⁵ Plaintiff had been previously prescribed NSAIDs by another treating physician, Dr. Sisler.

indicates low back pain was gradually improving. [R. 247]. Exacerbation of Fibromyalgia was noted on August 30, 1995. [R. 243].

On January 25, 1994, Jerry Sisler, M.D. reported that he did not have a "specific diagnosis" after examining Plaintiff and comparing x-rays with those taken a year earlier. [R. 202-203]. He recommended Plaintiff remain off work for a month, rest a week to ten days before initiating a mild exercise program and he prescribed Daypro.⁶ Physical therapy and an antidepressant were prescribed February 3, 1994. [R. 203]. On February 17, 1994, Plaintiff informed Dr. Sisler she was not working and had "no immediate plans for return to work until she feels improved." [R. 200]. After a thorough examination and additional x-rays on March 1, 1994, Dr. Sisler wrote:

There are ongoing myofascial type of symptoms involving both upper extremities and tending to migrate from one point to the other. In addition, there is some discomfort in the interscapular thoracic area.

The physical examination has shown generalized tenderness of the neck, upper back, shoulders and elbows although they tend to focus on the lateral aspect of the left elbow; Today the symptoms has moved to the right elbow. In addition, there is tenderness in the left supraclavicular area. The range of motion of the neck and all joints in the upper extremities are normal.

In spite of treatments with medications, rest, physical therapy, she continues to complain. We have thoroughly examined the areas of complaint. We have obtained x-rays and lab studies. It is my belief she should make plans to return to work. I see no reason to continue with indefinite treatment.

⁶ Daypro is a nonsteroidal anti-inflammatory drug, NSAID, *Physician's Desk Reference*, 49th Ed. 1995, p. 2314.

She is released to return to work on March 11, 1994.

[R. 199].

On March 31, 1994, Dr. Sisler wrote: "She indicates that after I released her to return to 'light duty', she found there was no light duty available at her work. She has therefore remained off work." [R. 198]. On April 14, 1994, Dr. Sisler again spoke with Plaintiff about "change to 'light duty' jobs. She says there is no light duty available." [R. 197].

Dr. Sisler evaluated Plaintiff's condition for workers' compensation benefits on April 18, 1994. [R. 195-196]. He again stated that he had not been able to objectively demonstrate a specific diagnosis and believed "this is a chronic myofascitis associated with symptoms of chronic depression." [R. 195]. His opinion was:

- * Maximum benefit from medical benefit has been achieved.
- * She is not qualified to engage in heavy duty activities of her normal job. These duties are repetitive and specifically aggravated the current complaints.
- * She is qualified to engage in work of moderate nature. If [t]his type of work cannot be forthcoming from her present employer she should be assisted in finding suitable employment.

Id.

Evaluations for workers' compensation purposes were performed by Griffith C. Miller, M.D., on May 14, 1994, and Casey Truett, M.D., on December 14, 1994. [R. 188-189, 225-230, 218-223]. They appeared to agree that Plaintiff's problems were caused by long-term repetitive motion with her upper extremities. They rated her for

permanent partial disability ranging from 94% to the body as a whole to 37% to the body as a whole and 4% to the right hand.

Credibility Analysis

Plaintiff contends that the ALJ improperly evaluated her credibility regarding her subjective complaints. The court concludes that the ALJ's credibility assessment was adequately linked to substantial evidence in the record and met the requirements set forth in *Kepler v. Chater*, 68 F.3d 387, 390-91 (10th Cir.1995)

Essentially, Plaintiff requests the court to reweigh the evidence. This it cannot do. *Kelley v. Chater*, 62 F.3d 335, 337 (10th Cir. 1995). "To determine whether a claimant's pain is disabling, the [Commissioner] is entitled to examine the medical record and evaluate a claimant's credibility. Moreover, a claimant's subjective complaint of pain is by itself insufficient to establish disability." *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). Also see: *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley*, p. 587.

Plaintiff asserts her symptomatology is consistent with the medical evidence. She insists her complaints of severe problems with her arms and hands were continual and consistent and that there is no evidence to support the ALJ's finding that she should be believed only to the extent that she has problems reaching overhead. Contrary to Plaintiff's argument, the ALJ did not find Plaintiff's allegations of pain totally not credible, but, rather, that Plaintiff exaggerates her symptoms as to the extent of her inability to perform work activities. In his decision, the ALJ discussed

Plaintiff's own testimony concerning her daily activities and limitations, the medications she takes on a regular basis, and the inconsistencies between Plaintiff's testimony and the medical record. Based on that evaluation, the ALJ concluded that, although Plaintiff does experience pain, the pain does not preclude all work activity. [R. 28]. *Gossett v. Bowen*, 862 F.2d 802, 807 (10th Cir. 1988)(the inability to work pain-free is not a sufficient reason to find a claimant disabled). The court finds there is sufficient evidence in the record to support the ALJ's finding in this regard.

To bolster her claim that the medical evidence supports her claims of disabling pain rather than the conclusion reached by the ALJ, Plaintiff referred to certain medical treatment notes in the record. One is an examination conducted by Stephen J. Eichert, D.O., on December 8, 1993. [R. 188-189]. Dr. Eichert reported "evidence of Intrinsic Shoulder Pathology on the left and bilaterally Humeral Epicondylitis." *Id.* He recommended orthopedic evaluation in view of Plaintiff's poor response to anti-inflammatory drugs. *Id.* Plaintiff's characterization of this report as "repeatedly notes pain and problems with the claimant's arm, elbows and shoulders" is misleading. This was a one-time examination conducted before Plaintiff stopped working on January 21, 1994.

The Baptist Regional Health Center notes referred to by Plaintiff are the physical therapist's treatment notes which reflect Plaintiff's complaints and history taken on February 4, 1994 and which chronicle her ultrasound, massage, hot packs, hyperextension exercise and treadmill sessions through February 28, 1994. [R. 213-216]. These notes indicate that Plaintiff tolerated the treatment well, that they were

of some benefit, and that she was discharged from that program when she stopped attending. [R. 200, 214].

The remaining records cited by Plaintiff do report complaints from Plaintiff to other medical examiners. However, those complaints are included in the history taken by the evaluators and do not reflect actual clinical studies or observations of the examiners themselves.

The court does not imply that Plaintiff did not experience any pain. The medical records do reflect frequent complaints by Plaintiff to her treating physicians at the Indian Health Center and to Dr. Sisler, that she experienced pain. And, as correctly stated by Plaintiff, the ALJ is required to properly consider and evaluate plaintiff's testimony regarding her pain. Subjective complaints of pain must be evaluated in light of plaintiff's credibility and the medical evidence. *Brown v. Bowen*, 801 F.2d 361, 362-63 (10th Cir.1986); *Broadbent v. Harris*, 698 F.2d 407, 413 (10th Cir.1983). Plaintiff established that she suffers from a pain-producing impairment. Therefore, the ALJ was required to consider her complaints of pain by evaluating her use of pain medication, her attempts (medical or nonmedical) to obtain relief, the frequency of her medical contacts, and the nature of her daily activities as well as subjective measures of credibility including the consistency or compatibility of nonmedical testimony with the objective medical evidence. See *Kepler*, 68 F.3d at 391.

Plaintiff testified that the pain "starts from my fingers clear down to my toes, but my fingers and my hands hurt, and my arms, and my elbows, and my shoulders, and my neck, my back --" [R. 292]. She testified that she can't hardly lift anything

and can't hardly move anything. [R. 293]. She claimed she can't sit very long, can't hardly bend over. [R. 299]. She said the pain in the back felt like a "needle going in" all in the back of her neck on the sides and, when asked if it was more of a stiffness than a pain, answered: "Oh, it's a pain, but it's stiff, too." [R. 299]. She testified that if she tried to lift a gallon of milk, her arms would feel weak and shaky. [R. 305]. Walking, she said, hurt her knees and feet. [R. 305]. Plaintiff also claimed pain in her back after standing in one spot for 15 or 20 minutes. [R. 306]. When asked if she had difficulties sitting for a period of time, she responded "I just get -- I'll just have to get up, because I feel like all stiff, you know. I'll have to get up." [R. 307]. Plaintiff testified she could dress, shower, wash her hair, but it made her tired and she had to rest about 20 minutes afterward. [R. 309]. Plaintiff admitted she had been released to return to work but stated that she didn't because she wasn't any better then than when she went in there [to see Dr. Sisler]. [R. 315].

Plaintiff also described her daily activities, including washing dishes [R. 301], vacuuming [R. 302], watching TV and reading [R. 304], and, "making those carpet-type things" using a big needle for 20 minutes at a time. *Id.* Daily activities reported by Plaintiff on her disability report on January 5, 1995, included cooking two meals a day, washing dishes, one load of laundry per day, shopping when necessary, watching TV about ten hours a day, reading, going to basket ball games. [R.87, 98, 101]. Plaintiff also claimed her husband helped her with household chores but acknowledged that he is disabled and receiving Social Security benefits. [R. 310-311].

There is also conflicting evidence in the medical record that lends support for the ALJ's finding. Plaintiff testified she suffered "still more" swelling in her hands since her release to return to work by Dr. Sisler. [R. 316]. Yet, hand swelling was not mentioned in the medical records, except in the history given Dr. Eichert on December 8, 1993 [R. 188] and "hands slightly puffy" notation was made at the Indian Health Center in August 1995 [R. 243]. Hand swelling, however, was specifically denied in the treatment notes of Dr. Sisler. [R. 197, 198]. And, while the workers' compensation examiners noted some differing degrees of limited range of motion due to pain in the neck, shoulders and elbows, Plaintiff's treating physician recorded normal range of motion tests throughout his four month treatment period. Nor are there any reports by medical care providers or examiners that Plaintiff ever complained of pain "clear down to [her] toes" or inability to walk because of pain in her knees and feet.

Because the court concludes that there is sufficient evidence in the record to support the ALJ's credibility findings and that the ALJ properly linked his credibility findings to the record, there is no reason to deviate from the general rule to accord deference to the ALJ's credibility determination, see *James v. Chater*, 96F.3d 1341, 1342 (10th Cir. 1996)(witness credibility is province of Commissioner whose judgment is entitled to considerable deference).

Residual Functional Capacity (RFC)

Plaintiff contends the RFC determination by the ALJ is not supported by the evidence because it includes a limitation for light work with restrictions against only

repetitive overhead reaching, which is inconsistent with the VE's testimony regarding the demands of her past work and the opinion of Plaintiff's treating physician.

It is true that the hypothetical question posed to the VE by the ALJ specified a restriction against "any repetitive overhead reaching with either -- with either arm, either upper extremity." [R. 320]. However, the VE corrected that restriction with her answer:

A I don't think her past relevant work would require repetitive overhead reaching, but it did require repetitive reaching --

Q Okay.

A -- mostly in front --

Q All right, and that probably should be precluded, then --

A Yeah.

Q -- under those circumstances. All right. If you're using the same hypothetical, Miss Mallon, could you identify any jobs for which labor could be performed by such an individual, and if so, I would ask you to identify the particular jobs and their numbers existing in the national and/or regional economy?

A Okay. Sedentary jobs would be: Sedentary order clerk; there's 304,000 sedentary order clerks in the national economy, and 13,000 in this region of Texas, Arkansas, Oklahoma, and Louisiana. There's sedentary cashier; there's 121,000 of those in the national economy, and 15,000 in the region.

Q Now, these are unskilled?

A Yes. Or just barely semi-skilled, the cashier. There's light food service work; there's 321,000 of those in the national economy, and 40,000 in the region. And there's light stock and inventory clerk; there's 304,000 of those in the national economy and 38,000 in the region.

[R. 321]. Because the VE clearly understood that Plaintiff's restrictions included no repetitive reaching not just no repetitive **overhead** reaching, the court finds the ALJ's error in his hypothetical question to the VE and in his decision was of no consequence and did not affect the final determination. While Plaintiff contends significant limitations of reaching or handling **may eliminate** a large number of occupations a person could otherwise do [Plaintiff's Brief, p. 4], she does not contend that the jobs listed by the VE are precluded by a no repetitive reaching limitation. Therefore, the court finds the ALJ's error in Finding No. 5 of his decision is harmless. Because sufficient evidence is present in the record to sustain the ALJ's decision at Step Five, there is no requirement that the case be remanded solely for ministerial corrections.⁷

Plaintiff further argues that the restriction against only repetitive overhead reaching is inconsistent with Dr. Sisler's opinion, which should carry controlling weight. [Plaintiff's Brief, p. 4]. Dr. Sisler's restriction against Plaintiff performing repetitive reaching as required by her past work, was included in the VE's response concerning jobs Plaintiff can perform. A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments including the claimant's symptoms, diagnosis and prognosis, and any physical and mental restrictions. See 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). The Secretary will give controlling weight to that type of opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial

⁷ See, e.g. *Wilson v. Sullivan*, 930 F.2d 36, 1991 WL 35284 (10th Cir. 1991)(Unpublished Decision).

evidence in the record. §§ 404.1527(d)(2), 416.927(d)(2). The court agrees that the opinion of Dr. Sisler is entitled to controlling weight. *Id.*; *Castellano*, 26 F.3d at 1029. The court finds that the ALJ properly considered and weighed the treating physician's report, including his opinion that Plaintiff was capable of performing other work, and entered his decision accordingly.

Conclusion

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 undersigned United States Magistrate Judge RECOMMENDS that the decision of the Commissioner finding Plaintiff not disabled be AFFIRMED.

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

DATED this 29th Day of APRIL, 1999.


FRANK H. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each the parties hereto by mailing the same to them or to their attorneys of record on the 30 Day of April, 1999.

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

FILED

APR 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LEO HISE and JACK ISCH,)
individually and as representatives)
of a class of others similarly situated,)
)
Plaintiffs,)

vs.)

No. 98-CV-947-C ✓

PHILIP MORRIS INC. (a Virginia Corp.),)
R. J. REYNOLDS TOBACCO CO. (a New)
Jersey Corp.), BROWN & WILLIAMSON)
TOBACCO CORP. (a Delaware Corp.),)
LORILLARD TOBACCO CO. (a Delaware)
Corp.), and THE LIGGETT GROUP d/b/a)
LIGGETT AND MYERS TOBACCO CO.)
(a Delaware Corp.),)
)
Defendants.)

ENTERED ON DOCKET
DATE APR 30 1999

JUDGMENT

This matter came before the Court for consideration of the motions for summary judgment filed by defendants, on plaintiffs' causes of action alleging a violation of the federal antitrust laws and their constitutional rights. The issues having been duly considered by the Court, and a decision having been rendered in favor of defendants in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment is entered for defendants and against plaintiffs on all of plaintiffs' claims.

IT IS SO ORDERED this 29th day of April, 1999.



H. DALE COOK
United States District Judge

57

C

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

FILED

APR 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LEO HISE and JACK ISCH,)
individually and as representatives)
of a class of others similarly situated,)

Plaintiffs,)

vs.)

No. 98-CV-947-C ✓

PHILIP MORRIS INC. (a Virginia Corp.),)
R. J. REYNOLDS TOBACCO CO. (a New)
Jersey Corp.), BROWN & WILLIAMSON)
TOBACCO CORP. (a Delaware Corp.),)
LORILLARD TOBACCO CO. (a Delaware)
Corp.), and THE LIGGETT GROUP d/b/a)
LIGGETT AND MYERS TOBACCO CO.)
(a Delaware Corp.),)

Defendants.)

ENTERED ON DOCKET
DATE APR 30 1999

ORDER

Pending before the Court are the motions for summary judgment filed by defendants, pursuant to Rule 56 of the Federal Rules of Civil Procedure.¹

On December 15, 1998, plaintiffs filed the present action, purportedly on behalf of themselves and a class consisting of an estimated 40 million consumers of defendants' tobacco products, pursuant to Rule 23.² Plaintiffs allege in their Complaint that defendants have engaged in, and are currently engaging in, certain unlawful activities arising out of, and related to, defendants' performance of a settlement agreement which they entered into with more than 40 states, and plaintiffs allege that such unlawful activities have caused, and are currently causing, harm to them. Specifically, plaintiffs allege

¹ Defendants, Philip Morris, R. J. Reynolds, Brown & Williamson, and Lorillard filed their motion jointly, which defendant, Liggett, subsequently adopted in its separate motion.

² The Court declines plaintiffs' invitation to treat the present action as a class action under Rule 23.

56

that, subsequent to entering into a settlement with the settling states, defendants have jointly, and unlawfully, agreed to raise tobacco prices in order to pay the costs of the settlement, in violation of federal antitrust laws.³ Plaintiffs further allege that defendants' action in so raising tobacco prices amounts to a deprivation of plaintiffs' property interest without due process of law, in violation of plaintiffs' constitutional rights. Plaintiffs also allege that the parties to the settlement agreement have presumed to assume regulations and governance over the manufacture, interstate trade and consumption of tobacco products, presumably in violation of the Constitution.

Defendants have not answered plaintiffs' Complaint, but they filed motions to dismiss on February 1, 1999, and February 5. Because the Court was asked to consider materials outside the pleadings, the Court converted defendants' motions to dismiss into motions for summary judgment on March 17, and the Court gave defendants 15 days in which to supplement their motions. The Court additionally gave plaintiffs 15 days thereafter in which to supplement their response. The parties have filed their supplemental papers, and defendants' present motions are now ripe for ruling.

Facts

The following material facts are undisputed.⁴ At various times preceding the institution of the present action, more than 40 states, including Oklahoma, filed lawsuits against numerous tobacco companies and manufactures, including the defendants herein. The states filed the suits for the purposes of furthering their policies regarding public health and reducing underage consumption of

³ Plaintiffs represent in their response brief to defendants' present motions that the first count of their Complaint alleges an unlawful collusion between the Attorneys General of the various settling states and defendants to fix prices of tobacco products. Plaintiffs allege that the settlement agreement is nothing more than a sham designed to assess damages or taxes against the consumers of tobacco products.

⁴ These facts are cited in defendants' brief in support of their motion and in their exhibit accompanying their motion. Plaintiffs do not contest these facts.

tobacco products, and the states requested monetary, equitable and injunctive relief.⁵ Desiring to avoid the enormous expense and delay inherent in such litigation, the states and tobacco companies agreed to enter into negotiations with the aim of settling their various disputes. Ultimately, the negotiations succeeded, and in November 1998, the tobacco producing and manufacturing defendants, including the defendants herein, entered into a Master Settlement Agreement (MSA) with the plaintiff states. The MSA is designed to achieve for the settling states funding for the advancement of public health, the implementation of tobacco-related health measures, and funding for a national foundation dedicated to reducing underage consumption of tobacco products. The MSA contains detailed formulas governing the timing and amounts payable by the tobacco companies to each of the settling states, and the implementation of the MSA is to be overseen by the National Association of Attorneys General.

On November 23, 1998, the State of Oklahoma, through its Attorney General, agreed to the MSA, and on December 1, 1998, the District Court for Cleveland County entered a uniform Consent Decree and Final Judgment, approving the MSA and dismissing Oklahoma's claims. The District Court specifically found that entering into the MSA is in the best interests of the State of Oklahoma. The MSA was attached to the Consent Decree and Final Judgment, and filed therewith.⁶ Subsequent

⁵ The MSA states that,

the Settling States that have commenced litigation have sought to obtain equitable relief and damages under state laws, including consumer protection and/or antitrust laws, in order to further the Settling States' policies regarding public health, including policies adopted to achieve a significant reduction in smoking by Youth. . . . Settling State officials believe that entry into this Agreement and uniform consent decrees with the tobacco industry is necessary in order to further the Settling States' policies designed to reduce Youth smoking, to promote the public health and to secure monetary payments to the Settling States.

⁶ Plaintiffs, in their response brief, claim that the term "Master Settlement Agreement" is misleading, as the MSA is merely an offer to settle pending claims for damages on an annual basis. However, because the settling states, including Oklahoma, specifically agreed to the MSA and incorporated it into their Consent Decree and Final Judgments, which were then accepted and entered

to entering into the MSA, defendants raised the price of their tobacco products, presumably to cover the costs of the settlement.

Standard of Review

In considering a motion for summary judgment, the Court “has no real discretion in determining whether to grant summary judgment.” U.S. v. Gammache, 713 F.2d 588, 594 (10th Cir.1983). The Court must view the pleadings and documentary evidence in the light most favorable to the nonmovant, Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 527-28 (10th Cir.1994), and summary judgment is only appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). “A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Akin v. Ashland Chemical Co., 156 F.3d 1030, 1034 (10th Cir. 1998). “[T]he moving party carries the burden of showing beyond a reasonable doubt that it is entitled to summary judgment.” Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991) (quoting Ewing v. Amoco Oil Co., 823 F.2d 1432, 1437 (10th Cir.1987)). However, once the moving party meets its burden, the burden then shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter. Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir.1991). The “party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (citations omitted).

Discussion

by the respective state courts in which the lawsuits were pending, the MSA clearly constitutes the actual settlement agreement between the several settling states and the tobacco companies.

The Court is satisfied that defendants' activities, in negotiating the MSA with the several settling states and achieving a settlement agreement with those states, are protected under the Noerr-Pennington doctrine as conduct incidental to litigation. See Lemelson v. Bendix Corp., 104 F.R.D. 13, 18 (D.De. 1984) (defendants have a right to take joint legal action in response to a common problem, and their joint defense, standing alone, cannot provide any basis for antitrust liability). The Court agrees with defendants that the doctrine would surely ring hollow if it failed to encompass private entities who, after having been sued by one or more states for similar conduct, jointly petition the states in order to achieve a mutually acceptable settlement, designed to reduce the amount of time and expense involved in defending the action. Under the doctrine, the fact that the private defendants' motives are selfish is irrelevant, City of Columbia, 499 U.S. at 380, and so too is the fact that the result may have anti-competitive consequences. See Greenwood Utilities Comm'n v. Mississippi Power Co., 751 F.2d 1484, 1497 (5th Cir.1985) (The Noerr-Pennington doctrine "allows individuals or businesses to petition the government, free of the threat of antitrust liability, for action that may have anticompetitive consequences. Noerr-Pennington protection is grounded on the theory that the right to petition guaranteed by the First Amendment extends to petitions for selfish, even anticompetitive ends.").

The Court finds that the actions of defendants in negotiating and executing the MSA fall within the recognition that "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose," City of Columbia, at 380 (quoting Pennington, 381 U.S. at 670), and the Court therefore concludes that the concerted effort by defendants to influence public officials, i.e., the states' Attorneys General, to accept a settlement in exchange for dismissing the numerous lawsuits pending against defendants is among the activities protected by the Noerr-Pennington doctrine. Further, although plaintiffs' Complaint labels the MSA as a "sham", the Court finds no evidence which even

Upon a careful review of plaintiffs' Complaint, defendants' and plaintiffs' submissions in relation to defendants' motions for summary, and the relevant law, the Court is convinced that defendants have shown, beyond a reasonable doubt, that they are entitled to summary judgment, even at this early stage in the proceedings. Because the Complaint and the allegations contained therein must fail as a matter of law, the Court sees no reason to burden defendants with the additional time and expense involved in proceeding to discovery.

With respect to plaintiffs' first claim, alleging a violation of Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, the Court agrees with defendants that the Noerr-Pennington doctrine and the Illinois Brick indirect purchaser rule preclude recovery of damages here. The Noerr-Pennington doctrine, based on the Supreme Court's decisions in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers of America v. Pennington, 381 U.S. 657 (1965), holds generally that a private entity's right to petition the government, including the judiciary, is immune from federal antitrust claims, regardless of any anti-competitive intent or consequences, unless such conduct or action is a "sham." See also City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 379-380 (1991) ("federal antitrust laws . . . do not regulate the conduct of private individuals in seeking anticompetitive action from the government [and] Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose"); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (the right to petition extends to all departments of the government, including the courts). "The 'sham' exception to Noerr encompasses situations in which persons use the governmental process – as opposed to the outcome of that process – as an anticompetitive weapon . . . , [and a] 'sham' situation involves a defendant whose activities are 'not genuinely aimed at procuring favorable government action' at all." City of Columbia, 499 U.S. at 380 (citations omitted).

Defendants argue that, to the extent plaintiffs claim that defendants violated the antitrust laws by negotiating and entering into the MSA, such activity is protected under the Noerr-Pennington doctrine

as conduct incidental to litigation. Defendants assert that, subsequent to being sued by over 40 states in the respective state courts, they entered into the MSA to compromise these lawsuits. Defendants contend that the MSA represents defendants' joint defense of the state actions, and, once the MSA was approved by the various states, the MSA represents the product of defendants' petitioning of the settling states and the judiciary. Defendants further argue that the MSA is protected as a contract with government officials. Defendants point to plaintiffs' concession that the MSA was a compromise agreement reached between defendants and the several states that had initiated lawsuits against defendants. Defendants therefore maintain that both the negotiation phase and the resulting agreement with the states fall within the protections afforded by the Noerr-Pennington doctrine.

Plaintiffs counter that the Noerr-Pennington doctrine does not apply here because the MSA amounts to a "tax" upon consumers of tobacco products, and plaintiffs list several reasons why they believe that the MSA constitutes a tax. Plaintiffs further contend that the states lacked the authority to levy such a tax. Strikingly absent from plaintiffs' argument on this issue, however, is any citation to any authority whatsoever. In contrast to the abundance of authority supporting defendants' arguments, plaintiffs apparently cannot cite to any supporting their theory.⁷ Plaintiffs additionally argue that the settling states and defendants lack the authority to assess and collect damages against plaintiffs. Plaintiffs base this claim on the fact that the MSA assessment was intended to be collected from them in the form of higher prices on tobacco products. Again, however, plaintiffs cite to no supporting authority.⁸

⁷ At most, plaintiffs cite to the constitutions of the United States and Oklahoma. However, these citations do not address the issues presented herein, and they do not support plaintiffs' arguments.

⁸ Plaintiffs also contend that Due Process requires notice and an opportunity to be heard before one can be deprived of his property. The Court will address this argument below.

Zenith Radio Corp., 475 U.S. 574, 588 (1986) (to survive a motion for summary judgment, a plaintiff alleging a violation of § 1 of the Sherman Act must present evidence that tends to exclude the possibility that the alleged conspirators acted independently).

Plaintiffs' second claim is that defendants' action in raising prices of tobacco products amounts to a deprivation of plaintiffs' property interest without due process of law, in violation of plaintiffs' constitutional rights. Plaintiffs specifically allege that they have been "deprived of a property interest without due process of law contrary to the due process mandate of the U.S. [Constitution] . . . , because the 'damages' paid to States by Defendants under the 'settlement agreement' contract are being assessed against Plaintiffs without Plaintiffs being made parties to the actions previously filed in the separate States." The frivolity of this allegation is plain from its face, and plaintiffs support it with the citation to no relevant authority. By entering into the MSA, the settling states and defendants did not deprive plaintiffs of any property interest in violation of Due Process. Indeed, plaintiffs clearly have no recognized property interest in paying a certain sum to a retailer to purchase a tobacco product. Further, the "damages" allegedly assessed in the MSA are not assessed against plaintiffs. The sums agreed to under the MSA, rather, are assessed against, and payable by, defendants. The fact that defendants intended to pass such losses on to the consumers of their products is simply a reality of business. When a particular manufacturer is found liable for creating a certain risk which harms a consumer, it is not at all odd for the manufacturer to seek to cover its losses by increasing the price of its product, thereby passing the loss on to the ultimate consumer. From the Court's experience, this is a common practice. If plaintiffs were to succeed here, then every time a manufacturer is held liable, or agrees to settle a dispute, and thereafter increases the price of its product in order to cover the damages it is required to pay, all consumers of its product could bring an action alleging a due process

remotely suggests that defendants intended to use the MSA as an anti-competitive weapon to exclude or harass competitors.

Defendants additionally argue that, as indirect purchasers of tobacco products, plaintiffs do not have standing to assert a federal antitrust claim for damages. For this argument, defendants rely on the Supreme Court's decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), which held that,

indirect purchasers do not have standing to recover damages resulting from antitrust violations. The Court, reiterating the rationale of Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), stated that the judicial procedures and economic theory required in claims tracing antitrust injuries from the producers to ultimate consumer were too complicated to warrant granting standing to indirect plaintiffs. Illinois Brick, 431 U.S. at 737-43. . . . The Court implied that by limiting standing to direct purchasers, the Court hoped to insure aggressive and efficient enforcement of suits against antitrust violations. Id. at 745-47." Emerson, Voluntary Restraint Agreements and Democratic Decisionmaking, 31 Va.J.Int'l.L. 281, n.131 (1991).

See also Sports Racing Services, Inc. v. Sports Car Club of America, Inc., 131 F.3d 874, 889 (10th Cir. 1997) ("The Illinois Brick rule selects the better plaintiff between two possible types of plaintiffs -- direct purchasers and indirect purchasers. The Court chose the direct purchaser primarily to simplify damages determinations and limit the possibility of multiple recovery against the defendant."). Defendants argue that, since plaintiffs do not allege that they are direct purchasers of defendants' tobacco products, they lack standing to recover damages here.⁹

Plaintiffs argue that Illinois Brick is inapplicable because this case "involves an industry-wide increase in cost by way of an excise." Plaintiffs contend that but for the assessment of the MSA, tobacco products would be sold at the present prices less the MSA assessment. Plaintiffs also argue that the indirect purchaser rule does not apply to requests for injunctive relief.

⁹ Defendants represent that they do not sell their tobacco products to ultimate consumers, such as plaintiffs, but only to distributors. Further, plaintiffs do not allege that they purchase tobacco products directly from defendants.

The Court agrees with the position taken by defendants. Illinois Brick and its progeny make clear that only direct purchasers, and no others in the chain of manufacture and distribution, have standing to bring an action for damages under the federal antitrust laws.¹⁰ See Kansas v. Utilicorp United, Inc. 497 U.S. 199 (1990) (reaffirming Illinois Brick direct purchaser rule). Plaintiffs' attempts to distinguish this case lack merit, and the Court concludes that, as indirect purchasers of tobacco products, Illinois Brick bars their claim for damages here.¹¹

Notwithstanding the above discussion, however, the Court recognizes that although plaintiffs' Complaint seems to be directed almost entirely at the MSA,¹² plaintiffs are essentially attacking the increase in prices of defendants' tobacco products which occurred after the execution of the MSA. While the Court has concluded that the negotiation and ultimate execution of the MSA are protected activities under the Noerr-Pennington doctrine, this does not address the allegation that defendants conspired to set a price for their products following execution of the MSA. Of course, the Court does not believe that defendants were free at any time, either prior to or after execution of the MSA, to enter into a conspiracy to fix tobacco prices. See SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 962 (10th Cir. 1994) (Section 1 of the Sherman Act forbids agreements in restraint of trade, and price-fixing agreements, being devoid of redeeming competitive rationales, are per se illegal). However, construing plaintiffs' first claim as alleging a conspiracy to fix tobacco prices either during the negotiation phase of the MSA or after the MSA was executed, the Court concludes that the claim must fail.

¹⁰ Certain limited exceptions to the direct purchaser rule have been recognized, none of which apply here. In re Wyoming Tight Sands Antitrust Cases, 866 F.2d 1286, 1290 (10th Cir. 1989).

¹¹ As the Court found and concluded above, Plaintiffs' claims for both damages and injunctive relief with respect to the negotiation and execution of the MSA are barred by the Noerr-Pennington doctrine.

¹² In their response brief to defendants' present motions, plaintiffs state that it is their "position . . . that the terms of the [MSA] are unlawful and prohibited."

First, Illinois Brick, supra, bars plaintiffs' claim for damages even if defendants did, in fact, conspire to fix prices following the execution of the MSA. Second, regarding plaintiffs' claim for injunctive relief, which defendants concede is not precluded by Illinois Brick, the Court agrees with defendants that plaintiffs failed to adequately plead a price-fixing conspiracy. Indeed, plaintiffs' Complaint contains the very type of bare bones allegation of a price-fixing conspiracy that the Tenth Circuit has held to be insufficient to state an antitrust claim.¹³ TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1026 (10th Cir. 1992). Further, even construing plaintiffs' response to defendants' present motions as presenting additional factual allegations in support of their claim, plaintiffs allege, at most, and without any corroborating evidence, that defendants jointly determined, along with the various Attorneys General of the settling states, that the costs of the MSA could be, and would be, passed along to the consumers,¹⁴ and plaintiffs allege that defendants announced to their wholesalers and retailers prior to the execution of the MSA that they would be increasing the prices of their tobacco products because of the settlement. However, nowhere do plaintiffs suggest that defendants actually conspired to fix tobacco at a certain price or price range. Nor is there any direct evidence that defendants jointly agreed that any or all of them would increase the prices of their respective tobacco products to cover the costs of the settlement.

Additionally, plaintiffs have not offered sufficient circumstantial evidence of an illegal agreement to survive defendants' summary judgment motions. Merely because defendants may have acknowledged amongst themselves their otherwise independent decisions to increase the price of their

¹³ Plaintiffs merely allege in their Complaint that "Defendants have raised the prices of their tobacco products in order to pay the costs of the 'settlement agreement' contract which restrains trade. These price increases were made by the Defendants, each in collusion with the other in restraint of trade in violation of the anti-trust laws of the United States."

¹⁴ Defendants specifically represent to the Court that no provision in the MSA required them to increase tobacco prices, and plaintiffs have not pointed to any such provision.

respective tobacco products by an indeterminate amount following execution of the MSA to cover the costs of the settlement, and simply because defendants did, in fact, raise their prices to one degree or another following execution of the settlement,¹⁵ it does not necessarily follow that defendants thereby violated § 1 of the Sherman Act. As the Court notes below, it makes perfect economic and business sense for manufacturers and producers, when assessed an enormous liability arising out of a harm caused by their products, to seek to pass along and spread the loss to the ultimate consumer by raising the prices of their products, and it would have indeed been a strange business decision for each defendant to not have increased the price of its tobacco products following execution of the MSA.

Plaintiffs have therefore shown, at most, that defendants entered into a uniform settlement with several states and subsequently raised the prices of their tobacco products. However, “[a]mbiguous conduct that is as consistent with permissible competition as with illegal conspiracy does not by itself support an inference of antitrust conspiracy under Sherman Act section 1.” Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publications, Inc., 63 F.3d 1540, 1556 (10th Cir. 1995). While parallel behavior may contribute to a finding of antitrust conspiracy, it is insufficient, in and of itself, to prove a conspiracy. Cayman Exploration Corp. v. United Gas Pipeline Co., 873 F.2d 1357, 1361 (10th Cir. 1989). It appears to the Court that defendants, in raising the prices of their respective tobacco products, acted independently of each other out of a legitimate and reasonable business interest of passing the costs of the settlement on to the ultimate consumer, and plaintiffs presented no evidence tending to exclude this possibility.¹⁶ See Matsushita Elec. Indus. Co., Ltd. v.

¹⁵ Plaintiffs do not allege that each defendant raised the price of its tobacco products in an amount equal to that of every other defendant following execution of the MSA.

¹⁶ The Court agrees with defendants that “the most rational inference from [plaintiffs’] alleged facts is that the economic burdens imposed on each of the manufacturers under the MSA caused or contributed to each defendant’s independent decision to raise prices.”

violation. The absurdity of such a result is plain. Since plaintiffs have no recognized or cognizable property interest in paying an expected amount for tobacco products, this claim must fail.¹⁷

In their third claim, plaintiffs allege that the parties to the settlement agreement have presumed to assume regulations and governance over the manufacture, interstate trade and consumption of tobacco products. This claim is presumably based on the United States Constitution, but the claim does not point to a violation of any specific law. In their response brief to defendants' present motions, however, plaintiffs attempt to clarify this claim. Citing Article I, § 10 of the Constitution, Plaintiffs allege that the parties to the MSA formed an unlawful confederation, arguing that the parties created a de facto government by entering into and executing the MSA. Plaintiffs cite no authority for their extraordinary claim, and the Court finds and concludes that this claim is plainly frivolous.

Accordingly, the Court hereby GRANTS defendants' motions for summary judgment. All other pending motions filed in this case are hereby rendered MOOT by entry of this Order.¹⁸

IT IS SO ORDERED this 29th day of April, 1999.


H. DALE COOK
United States District Judge

¹⁷ The Court further notes that plaintiffs failed to adequately allege state action.

¹⁸ Plaintiffs' counsel, Bill Sellers, filed a motion and complaint on April 19, 1999, seeking to have all parties to the MSA taken into custody by the United States Marshal Service and charged with fraud and conspiracy to steal money from the people, presumably consumers of tobacco products. This motion and complaint is utterly frivolous.

Lewis

FILED

APR 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 HERSCHELL BOYD,)
)
 Defendant.)

Case No. 99CV0136B(M)

ENTERED ON DOCKET

DATE APR 30 1999

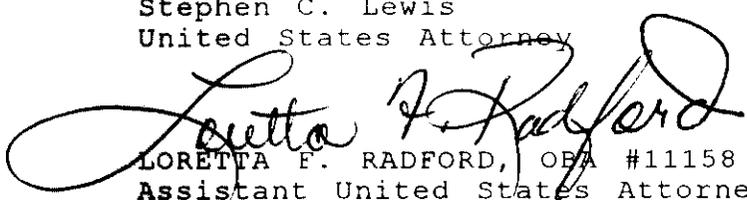
NOTICE OF DISMISSAL

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

Dated this 29th day of April, 1999.

UNITED STATES OF AMERICA

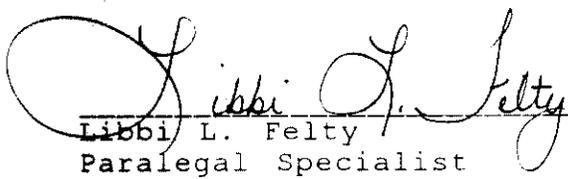
Stephen C. Lewis
United States Attorney



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

CERTIFICATE OF SERVICE

This is to certify that on the 29th day of April, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Herschell Boyd, 1901 E. 50th St., Tulsa, OK 74130.


Libbi L. Felty
Paralegal Specialist

2

C/D

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

FILED

APR 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JONI JOYNER, as Personal Representative and next of
friend of Charles Otis Joyner, deceased, and
individually,

Plaintiff,

vs.

FUJI HEAVY INDUSTRIES LTD. OF JAPAN and
SUBARU OF AMERICA, INC.

Defendants.

No. 98-CV485-C(M)

ENTERED ON DOCKET
APR 30 1999
DATE _____

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 29th day of April, 1999, the above matter comes on to
be heard upon the written Stipulation For Order Of Dismissal With Prejudice. The Court, having
received the Stipulation For Order Of Dismissal With Prejudice, finds that the Stipulation For Order
Of Dismissal With Prejudice should be **GRANTED**.

IT IS SO ORDERED.



UNITED STATES DISTRICT COURT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

UK
2099

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

FRANK MAX MILLER, an)
individual,)
)
Plaintiff,)

vs.)

BOARD OF COUNTY)
COMMISSIONERS OF THE)
COUNTY OF ROGERS, STATE)
OF OKLAHOMA, a political)
subdivision of the State of)
Oklahoma, DON MORGAN,)
individually and as an officer)
and employee of Rogers County,)
State of Oklahoma, JERRY,)
PRATHER, in his official capacity)
as Sheriff of Rogers County, State of)
Oklahoma, DON BORDWINE,)
individually and as an officer and)
employee of Rogers County, State of)
Oklahoma, YUBA HEAT TRANSFER,)
a division of CONNELL LIMITED)
PARTNERSHIP, a Delaware)
Limited Partnership, LUKE HELM,)
individually and as an employee of)
Yuba Heat Transfer, a division of)
CONNELL LIMITED PARTNERSHIP,)
a Delaware Limited Partnership,)
and STAND-BY OF OKLAHOMA,)
INC., a Colorado corporation,)
)
Defendants.)

FILED
APR 29 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 97-CV 990 C (J)

ENTERED ON DOCKET
DATE APR 30 1999

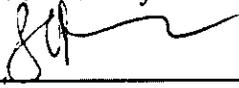
ORDER OF DISMISSAL WITHOUT PREJUDICE

Defendant Stand-By of Oklahoma, Inc. is hereby dismissed without prejudice to
refiling.


UNITED STATES DISTRICT COURT JUDGE

600

Submitted by:



SEAN H. MCKEE, OBA #14277
WOODSTOCK, MCKEE & MCARTOR
1518 S. Cheyenne
Tulsa, Oklahoma 74119
(918) 583-1511
(918) 585-2099

RANDY A. RANKIN OBA # 7414
1515 S. Denver
Tulsa, Oklahoma 74119
(918) 599-8118
ATTORNEYS FOR PLAINTIFF

UK
4/20/99

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

FRANK MAX MILLER, an)
individual,)
)
Plaintiff,)

vs.)

BOARD OF COUNTY)
COMMISSIONERS OF THE)
COUNTY OF ROGERS, STATE)
OF OKLAHOMA, a political)
subdivision of the State of)
Oklahoma, DON MORGAN,)
individually and as an officer)
and employee of Rogers County,)
State of Oklahoma, BUCK JOHNSON,)
individually and as)
an officer and employee of)
Rogers County, State of)
Oklahoma, DON BORDWINE,)
individually and as an officer and)
employee of Rogers County, State of)
Oklahoma, YUBA HEAT TRANSFER,)
a partner of CONNELL LIMITED)
PARTNERSHIP, a North Dakota)
Limited Partnership, LUKE HELM,)
individually and as an employee of)
Yuba Heat Transfer, a partner of)
CONNELL LIMITED PARTNERSHIP,)
a North Dakota Limited Partnership,)
and STAND-BY OF OKLAHOMA,)
INC., a Colorado corporation,)
)
Defendants.)

FILED

APR 29 1999

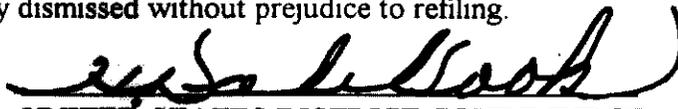
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 97-CV 990 C (J)

ENTERED ON DOCKET
DATE APR 30 1999

ORDER OF DISMISSAL WITHOUT PREJUDICE

Defendant Buck Johnson, individually and as an officer and employee of the County of
Rogers, State of Oklahoma is hereby dismissed without prejudice to refileing.


UNITED STATES DISTRICT COURT JUDGE

59

Submitted by:



SEAN H. MCKEE, OBA #14277
WOODSTOCK, MCKEE & MCARTOR

1518 S. Cheyenne

Tulsa, Oklahoma 74119

(918) 583-1511

(918) 585-2099

RANDY A. RANKIN OBA # 7414

1515 S. Denver

Tulsa, Oklahoma 74119

(918) 599-8118

ATTORNEYS FOR PLAINTIFF

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

FILED
RECEIVED

APR 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHANNON L. CROW)
an individual,)
Plaintiff,)
)
vs.)
OKLAHOMA OFFSET, INC.,)
An Oklahoma corporation,)
)
Defendant.)

Case No. 98 CV-0012K ✓
Judge Kern

ENTERED ON DOCKET

DATE ~~APR 28 1999~~

APR 30 1999

STIPULATION OF DISMISSAL

It is hereby stipulated and agreed by Shannon L. Crow, Plaintiff, by and through Darrell L. Moore, her attorney, and Offset Oklahoma, Inc., Defendant, by and through Susan E. Major, its attorney, that the above-entitled action be dismissed with prejudice. The parties have agreed to bear their own costs and attorneys fees and not to attempt to shift the burden of such costs and fees to the opposing party through the federal rules of civil procedure, or through state or federal cost or fee shifting laws.

It is agreed that the Court is to retain jurisdiction over the parties for purposes of determining any dispute relating to the agreements reached between the parties resulting in this dismissal.

Entered this 27th day of April, 1999.

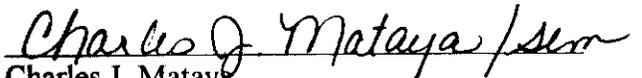
Respectfully submitted,

Darrell L. Moore, OBA # 6332
Melody Huckaby, OBA# 17648
J. RALPH MOORE, P.C.
Attorneys at Law

P.O. Box 368
Pryor, Oklahoma 74362
(918) 825-8332

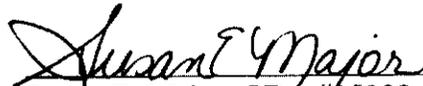
ATTORNEY FOR THE PLAINTIFF,
SHANNON L. CROW

BOULT CUMMINGS CONNER & BERRY, PLC


Charles J. Mataya

BOULT CUMMINGS CONNERS & BERRY, PLC
414 Union Street, Suite 1600
Nashville, Tennessee 37219
Phone: (615) 244-2582
Fax: (615) 252-6380

And



Susan E. Major, OBA #15298
23 West 4th Street, Suite 900
Tulsa, Oklahoma 74103
(918)582-1400
Fax: (918)583-4230

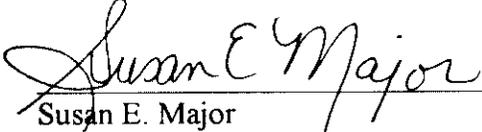
ATTORNEYS FOR DEFENDANT
OKLAHOMA OFFSET, INC.

CERTIFICATE OF SERVICE

I, Susan E. Major, do hereby certify that on the 30th day of April 1999, I did mail a true and correct copy of the above and foregoing pleading to the following:

Darrell L. Moore, OBA # 6332
J. RALPH MOORE, P.C.
Attorneys at Law
P.O. Box 368
Pryor, Oklahoma 74362

via first class mail with sufficient postage thereon fully prepaid.



Susan E. Major

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

FILED

APR 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RUFORD HENDERSON, et al.,)

Plaintiffs,)

vs.)

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

Defendants.)

Case No. 97-CV-457-K (E) ✓

ENTERED ON DOCKET

DATE APR 29 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.P. 41(a)(1), Plaintiff Gwendolyn Jones and Defendants The SABRE Group, Inc., American Airlines, Inc. and AMR Corporation (collectively "Defendants") by and through their attorneys of record, hereby jointly stipulate to the dismissal of the above-styled action, with prejudice, each party to bear their own costs and attorneys' fees incurred herein.

MARTIN & ASSOCIATES

By: _____

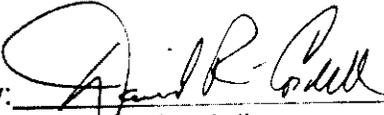
Charles Fox
MARTIN & ASSOCIATES
403 S. Cheyenne Avenue
Tulsa, Oklahoma 74103
(918) 587-9000

Attorneys for Plaintiffs

127

CJT

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

By: 

David R. Cordell
CONNER & WINTERS
3700 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103-4344
(918) 586-5711
(918) 586-8547 (facsimile)

OF COUNSEL:

CONNER & WINTERS
3700 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103-4344

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

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

F I L E D

APR 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHRISTINE CHAPPELL,)
SSN: 486-42-8965,)

Plaintiff,)

v.)

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

Defendant.)

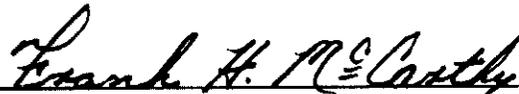
CASE NO. 98-CV-446-MV

ENTERED ON DOCKET

DATE APR 29 1999

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 28th day of APRIL, 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

APR 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHRISTINE CHAPPELL,
486-42-8965

Plaintiff,

vs.

Case No. 98-CV-446-M ✓

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE APR 29 1999

ORDER

Plaintiff, Christine Chappell, 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 January 8, 1996, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held September 17, 1996. By decision dated October 21, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 31, 1998. 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.

9

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 & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born March 8, 1938, and was 58 years old at the time of the hearing. She has a completed 5th grade and formerly worked as a cook and as a home health provider. She claims to have been unable to work since July 1, 1994, as a result of pain associated with residuals from a motor vehicle accident, esophageal stricture, hypertension and back pain. The ALJ determined that although Plaintiff is unable to perform her past relevant work, she is able to perform light work reduced by her inability to perform work requiring repetitive overhead reaching; repetitive extreme rotation, flexion, or extension of the neck; climbing of ladders, ropes or scaffolds; or more than occasional stooping, crouching or bending. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether

a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the credibility analysis performed by the ALJ was erroneous and the ALJ failed to make appropriate findings concerning the transferability of Plaintiff's skills.

Plaintiff contends that the ALJ's credibility determination was not sufficiently linked to substantial evidence in the record. While the ALJ's decision might have been organized more clearly on this issue, a close reading of his decision shows that he disbelieved Plaintiff's allegations of disabling pain based on a variety of factors. The ALJ noted: Plaintiff's reliance on Advil rather than prescription medication for pain relief; her activities such as household chores, cooking, quilting, and embroidery; the medical evidence which demonstrates no loss of range of motion of the cervical spine, no loss of muscle mass or motor strength and no sensory deficit. Taking this information into account the ALJ concluded that although Plaintiff experiences pain, it is not of such severity so as to preclude all types of work.

The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R.

416.929(c)(3), and Social Security Ruling 96-7p, and appropriately applied the evidence to those guidelines. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Commissioner and the courts.

Based on vocational expert testimony, the ALJ found that Plaintiff has transferable skills to a significant number of light level jobs; specifically short order cook, salad maker and food assembly. [R. 17]. At 58 years old, Plaintiff is considered a person of advanced age under the applicable regulations. 20 C.F.R. § 404.1563(d). The regulations specify that a person of advanced age may be disabled if he/she cannot do medium work, unless he/she has skills that can be transferred to less demanding work. *Id.* . § 201.00(f).

Plaintiff argues that the ALJ's decision should be reversed because 20 C.F.R. Pt. 404, Subpt. P., App. 2 § § 201.00(e) and 202.00(c) indicate that acquired work skills must be readily transferable to other skilled or semiskilled work and the ALJ failed to discuss how readily transferable Plaintiff's skills were to the work identified. Section 201.00(e) is not applicable because it refers specifically to situations where the claimant's capability is limited to sedentary work and the ALJ did not find that Plaintiff was limited to sedentary work but could perform light work with some limitations. Section 202.00(c) states:

[F]or individuals of advanced age who can no longer perform vocationally relevant past work and who have a history of unskilled work experience, or who have only skills that are not readily transferable to a significant range

of semi-skilled or skilled work that is within the individual's functional capacity, . . . the limitations in vocational adaptability represented by functional restriction to light work warrant an finding of disabled. [emphasis supplied].

To be disabled under this rule, Plaintiff would have to be without skills that are readily transferable to semi-skilled or skilled work.

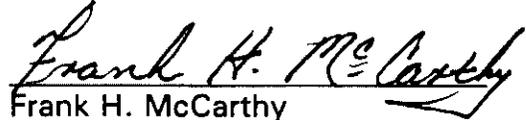
Social Security Ruling 82-41 is a program policy statement which clarifies how the concept of transferability is used in disability evaluation. As relevant to this case, SSR 82-41 instructs that when the issue of transferability of skills must be decided, the acquired work skills must be identified, and specific occupations to which the acquired work skills are transferable must be cited in the ALJ's decision.

The vocational expert testified that Plaintiff had skills related to her cooking experience that would be transferable to short order cook, food assembly and salad maker. [R. 173, 177]. It is clear from Plaintiff's testimony that she previously performed a full range of kitchen and food preparation activities in her job as a cook and the jobs identified by the vocational expert included tasks and use of equipment that would logically have been subsumed in Plaintiff's past work as a cook in a hospital. However, the ALJ did not follow the dictates of SSR 82-41 and did not identify the acquired work skills in the denial decision. Consequently the court is required to remand the case for compliance with the SSR 82-41.

In remanding this case, the Court does not dictate the result, nor does it suggest that the record is insufficient. Rather, remand is ordered to assure that the Commissioner's own rules are followed in reaching a decision.

The decision of the Commissioner is REVERSED and the case REMANDED for further proceedings in conformity with this order.

SO ORDERED this 28th Day of April, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

THREE PARCELS OF REAL
PROPERTY KNOWN
RESPECTIVELY AS:

6913 East Newton Place,
6914 East Newton Place,
6920 East Latimer Place,
WITH ALL BUILDINGS,
APPURTENANCES, AND
IMPROVEMENTS THEREON;

All in the City of Tulsa,
Tulsa County, State of
Oklahoma,

Defendants.

Civil Action No. 97-CV-0306-K ✓

FILED

APR 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE APR 29 1999

**JUDGMENT OF FORFEITURE AS TO 6914 EAST NEWTON PLACE
AND 6920 EAST LATIMER PLACE, TULSA, OKLAHOMA**

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture as to two defendant real properties and all entities and/or persons interested in the two defendant real property, the Court finds as follows:

The verified Complaint for Forfeiture *In Rem* was filed in this action on the 2nd day of April, 1997, alleging that the defendant real properties were subject to forfeiture to 21 U.S.C. § 881, because 6914 East Newton Place and 6920 East Latimer Place, Tulsa, Oklahoma are properties used, or intended to be used, in any manner or part, to

45

commit or to facilitate the commission of a violation of the drug control laws of the United States, and pursuant to 21 U.S.C. § 881(a)(6), 6914 East Newton Place and 6920 East Latimer Place, Tulsa, Oklahoma are properties which were furnished, or were intended to be furnished, by any person in exchange for a controlled substance, or were purchased with proceeds traceable to such an exchange.

Warrant of Arrest and Notice *In Rem* was issued on the 10th day of April 1997, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant real property and for publication in the Northern District of Oklahoma.

Warrant of Arrest and Notice *In Rem* was issued on the 10th day of April 1997, by the Clerk of this Court to the United States Marshal for the Northern District of Texas for publication in the Northern District of Texas.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture *In Rem* and the Warrant of Arrest and Notice *In Rem* on the defendant real properties on May 14, 1997.

Romualdo Cordoba, Teresa Cordoba, Maria Arroyo, Jose Luis Arroyo, Norma Jean Camp, Miguel Anjel Jaramillo, and Dennis Semler, Tulsa County Treasurer, were determined to be the known individuals with possible standing to file a claim to the defendant real properties, and, therefore the only individuals to be served with process in this action.

All persons and/or entities interested in the defendant real property were required to file their claims herein within ten (10) days after service upon them of the Warrant of

Arrest and Notice *In Rem*, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No claims or answers have been filed of record in this action with the Clerk of the Court, in respect to the defendant real property, and no persons or entities have plead or otherwise defended in this suit as to said defendant real property, save and except Romualdo Cordoba, Teresa Cordoba, Maria Arroyo, Jose Luis Arroyo and Dennis Semler, County Treasurer of Tulsa County, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, upon information and belief, default exists as to the defendant real property and all persons and/or entities interested therein, save and except Romualdo Cordoba, Teresa Cordoba, Maria Arroyo, Jose Luis Arroyo and Dennis Semler, County Treasurer of Tulsa County.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant real property was located, on June 12, 19 and 26, 1997. Proof of Publication was filed July 25, 1997.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Daily Commercial Record, a newspaper of general circulation in the district where one of the potential claimants lived, on June 3, 10 and 17, 1997. Proof of Publication was filed February 22, 1999.

A Stipulation of Partial Dismissal was filed herein on August 26, 1997, dismissing

the defendant real property located at 6913 East Newton Place, Tulsa, Oklahoma.

The Court entered an Order on November 20, 1998, striking the claim of Romualdo Cordoba for previously having been waived as part of a plea agreement in 94-CR-27-B.

The Court entered an Order on November 19, 1998, granting the Government's Motion for Partial Summary Judgment as to the claims of Teresa Cordoba, Maria Arroyo and Jose Luis Arroyo, and further finding that "Claimants have offered nothing in support of their contention that the ownership was innocent."

The Court entered judgment on November 20, 1998, that the Government may seize the properties located at 6914 East Newton Place and 6920 East Latimer Place, Tulsa, Oklahoma, pursuant to 21 U.S.C. §§ 881(a)(6) & (&).

Claimants filed a Motion for Reconsideration of Order Granting Partial Summary Judgment (#32) Entered on Docket 11/23/98. The Court entered an Order January 5, 1999, denying the motion for reconsideration.

The Tulsa County Treasurer has disclaimed any right, title or interest in the defendant properties by Answer filed May 22, 1997.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant real properties:

- a) Lot Three (3), Block Four (4), HUFFMAN HEIGHTS ADDITION to Dawson, Oklahoma, now an Addition to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded Plat thereof; and all buildings, appurtenances, and improvements thereon,

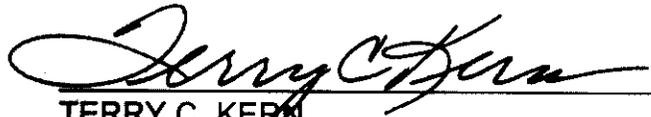
also known as 6914 East Newton Place, Tulsa, Oklahoma 74115.

- b) The South Half of the Southwest Quarter of the Southeast Quarter of the Northwest Quarter (S/2 SW/4 SE/4 NW/4) of Section Thirty-five (35), Township Twenty (20) North, Range Thirteen (13) East of the Indian Base and Meridian, County of Tulsa, State of Oklahoma, according to the U. S. Government Survey thereof, and all buildings, appurtenances, and improvements thereon, LESS all of SUN VALLEY 4TH ADDITION, a Subdivision in the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded Plat thereof,

also known as 6920 East Latimer Place, Tulsa, Oklahoma.

be, and they hereby are, forfeited to the United States of America for disposition according to law.

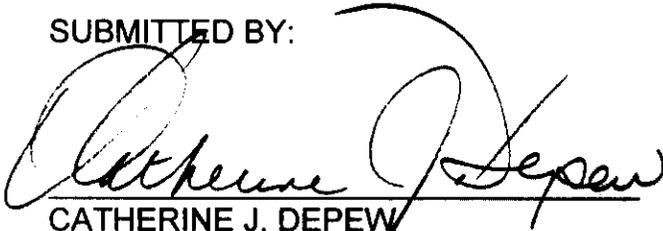
Entered this 28 day of April, 1999.



TERRY C. KERN

Chief Judge of the United States District Court
for the Northern District of Oklahoma

SUBMITTED BY:



CATHERINE J. DEPEW

Assistant United States Attorney

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

F I L E D

TOMMY JENKINS,
SSN: 550-62-0900,

Plaintiff,

v.

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

Defendant.

CASE NO. 97-CV-1037-M ✓

APR 29 1999 *SK*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE APR 29 1999

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 29th day of APRIL, 1999.

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

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

F I L E D

TOMMY JENKINS,
550-62-0900

Plaintiff,

vs.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

Case No. 97-CV-1037-M

APR 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE APR 29 1999

ORDER

Plaintiff, Tommy Jenkins, seeks judicial review of a decision of the Commissioner of the Social Security Administration terminating disability benefits previously awarded under Title II (42 U.S.C. § 401, et seq) of the Social Security Act. In accordance with 28 U.S.C. § 636(c)(1) & (3), the parties have consented to proceed before a United States Magistrate Judge.

Background

On February 8, 1990, an Administrative Law Judge (ALJ) awarded Plaintiff disability benefits, finding he met the disability requirements as of June 21, 1988, the date on which Plaintiff suffered a re-injury to his back. [Dkt. 45]. Based on medical evidence which showed decreased motor strength in both upper and lower extremities; bilateral grip strength 75% of normal; and a marked decrease in manual dexterity in terms of both fine and gross movements, the ALJ determined that Plaintiff was unable to perform the full range of sedentary work due to limitations on lifting, bilateral manual dexterity, and decreased concentration due to pain. [R. 47].

On December 27, 1994, the Social Security Administration notified Plaintiff that he was no longer disabled and that benefits would cease. [R. 73]. Plaintiff appealed that decision, and after development of additional medical evidence and hearing, on May 10, 1996, the ALJ issued a decision finding that Plaintiff's residual functional capacity had improved sufficient to perform a full range of light work subject to only occasional bending or stooping and a grip decreased by 50%. [R. 12]. Based on the testimony of a vocational expert, the ALJ determined that there are a significant number of light and sedentary jobs in the national economy that Plaintiff could perform with these limitations.

Plaintiff's Assertions

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence and that rather than improving, Plaintiff's condition has deteriorated. Specifically, Plaintiff argues that the ALJ: (1) posed inaccurate hypothetical questions to the vocational expert; (2) failed to properly analyze his pain and credibility; (3) failed to adequately develop the record; and (4) cut off Plaintiff's testimony.

Medical Improvement Standard

The Commissioner has enacted regulations that specify how a determination to terminate benefits is to be made. 20 C.F.R. § 404.1594 instructs that the Commissioner must determine if there has been any medical improvement in the claimant's impairments and, if so, whether the medical improvement is related to the ability to work. Medical improvement is defined as a decrease in the medical severity of an impairment, based on changes/improvements in the symptoms, signs and/or

laboratory findings associated with the impairment, as compared to the most recent favorable medical decision that the claimant was disabled. 20 C.F.R. § 404.1594(b)(1). Once it has been determined that medical improvement has occurred, the Commissioner must consider whether the improvement is related to the ability to do work. That is, the improvement must result in an increase in the functional capacity to do work. If the medical improvement increases the claimant's ability to do work, the Commissioner must determine whether the claimant has the ability to engage in substantial gainful activity. 20 C.F.R. § 404.1594.

In the decision finding Plaintiff disabled as of June 21, 1988, the ALJ found that due to Plaintiff's chronic cervical strain, he was prevented from lifting 10 pounds on a frequent basis. Neurologic examination demonstrated motor strength decreased in both upper and lower extremities, grip strength bilaterally was only 75% of normal, and Plaintiff had a marked decrease in gross and fine manual dexterity. [R. 47]. These findings provide the point of comparison for determining whether medical improvement has occurred.

Since Plaintiff had not been treated by a doctor since 1989 [R. 77], the medical findings relative to the disability termination were developed by means of consultative examinations. Plaintiff was examined on November 21, 1994, by David B. Dean, M.D., who reported that he observed Plaintiff moved frequently while he was seated and stood for relief of pain. He reported Plaintiff's grip was full in both hands; fine motor movements were intact; and there was no sensory deficit. Dr. Dean also found

limitation of the range of motion of the lumbar and cervical spine due to pain, straight leg raising was positive, and gait was safe and stable, but halting. [R. 130].

On February 7, 1995, Plaintiff secured an examination by Dan E. Calhoun, M.D., who conducted the consultative examination in 1989 when Plaintiff obtained his favorable disability determination. Dr. Calhoun found Plaintiff had markedly decreased range of motion in the neck, marked tenderness to palpation over the trapezius muscles and over the posterior cervical muscles, and tenderness to palpation over the lumbar spine. [R. 137]. He found normal muscle mass and tone in the extremities. Plaintiff could not make a good fist with either hand, and therefore had markedly decreased grip strength, although it was better in the right hand. His gait was reported to be somewhat shuffling, with a limp in the left leg. [R. 138].

In light of the differences of opinion between doctors Dean and Calhoun, the Commissioner ordered another consultative examination. Plaintiff was seen by Dr. Beau C. Jennings, on March 31, 1995. Dr. Jennings found that although Plaintiff held his hands in peculiar positions throughout the examination, he could use his hands in a normal fashion when dressing, undressing and manipulating small objects. [R. 141]. Plaintiff was able to touch his fingers to his thumbs bilaterally; he exhibited a fine tremor at times, other times a coarse tremor, and at other times no tremor. Dr. Jennings attempted to measure Plaintiff's grip strength on the Dynamometer. Plaintiff squeezed to 30 pounds on the right, 80 pounds on the left. Good muscle tone was observed and Dr. Jennings noted that Plaintiff's forearms and upper arms were well muscled and equal in circumference. He reported that cervical range of motion

appeared normal during the course of the exam, but when Plaintiff was asked to actively put his neck through ranges of motion, he moved his neck only a few degrees in each direction. According to Dr. Jennings, the same was true of the shoulders and he felt that "[e]ffort was obviously very poor." [R. 142]. Dr. Jennings reported very minimal range of motion of the lumbar spine, and also that poor effort was given. Heel-toe gait was normal and straight leg raising was negative sitting and supine. [R. 142]. Dr. Jennings concluded "There was no objective evidence to substantiate many of his subjective complaints." [R. 143].

The record also contains an August 4, 1995, narrative report of an initial chiropractic consultation by Donald H. Higgins, D.C. Dr. Higgins set forth Plaintiff's complaints and provided a list of tests that he states were positive or abnormal, including decreased cervical and lumbar range of motion. [R. 145-47].

The medical evidence is contradictory. The consultative records procured by Plaintiff indicate no medical improvement, whereas the consultative records procured by the Commissioner demonstrate improvement. 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 & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992). Applying this standard the court affirms the ALJ's decision.

Although there is conflicting evidence, the court finds there is substantial evidence to support the ALJ's finding that Plaintiff has experienced medical improvement and that the improvement is related to his ability to do work. At the February 1990 point of comparison, Plaintiff had decreased motor strength in both upper and lower extremities which the ALJ found prevented him from lifting even ten pounds on a frequent basis. In connection with the current decision, Plaintiff testified he can lift twenty pounds from a table. [R. 32]. Doctors Dean and Jennings noted Plaintiff had good muscle tone and strength of his arms. [R. 128, 142]. Dr. Jennings reported Plaintiff's arms and hands were "well muscled." [R. 142]. Despite giving poor effort on examination, Plaintiff's grip strength was objectively recorded at 30 lbs right and 80 lbs left.

At the February 1990 point of comparison, Plaintiff had a marked decrease in gross and fine manual dexterity. [R. 47]. There is substantial evidence to support a finding of improvement in manual dexterity. Dr. Dean reported fine motor movements

of both hands to be intact. [R. 130]. Dr. Jennings observed Plaintiff was able to use his hands in a normal fashion when dressing, undressing, and manipulating small objects. [R. 141]. He also found Plaintiff was able to touch his fingers to his thumbs on both hands. [R. 142].

It is within the province of the ALJ to resolve conflicting medical evidence. *Eggleston v. Bowen*, 851 F.2d 1244, 1247 (10th Cir. 1994). The observations of Plaintiff's consultative physician, Dr. Calhoun, and those of Dr. Dean were in clear conflict. The Commissioner appropriately ordered another consultative examination to help resolve the conflict. *Hawkins v. Chater*, 113 F.3d 1162, 1166 (10th Cir. 1997) (consultative examination is required where there is direct conflict in medical record, or where medical evidence in the record is inconclusive). The court finds that the ALJ appropriately resolved the conflicting medical records.

The court rejects Plaintiff's argument that Dr. Jennings' report was flawed and that the ALJ's reliance on it was error. According to Plaintiff, Dr. Jennings did not record objective physical findings of muscular atrophy or joint swellings, note range of motion, whether the range of motion was painful, or whether he found muscle tenderness or spasm. Plaintiff alleges that Dr. Jennings' found no objective evidence to substantiate subjective complaints because his report is biased and conclusory. It is not for the court to determine the weight to give each consultative examination.

Hypothetical Question

Plaintiff claims that the hypothetical question posed to the vocational expert was incomplete in that it failed to include all of his limitations. *Hargis v. Sullivan*, 945

F.2d 1482, 1292 (10th Cir. 1991) provides that "testimony elicited by hypothetical questions that do not relate with precision all the claimants' impairments cannot constitute substantial evidence to support the [Commissioner's] decision." However, in posing a hypothetical question, an ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). Based on the medical record and his credibility determination, the ALJ omitted the inability to walk, sit or stand, the need to lie on a hot blanket throughout the day, and the inability to manipulate objects from his hypothetical question. The court finds that the restrictions expressed by the ALJ in the hypothetical posed to the vocational expert and upon which the disability determination is based, are supported by substantial evidence. Accordingly, the Court finds that the ALJ's hypothetical questions to the vocational expert and his reliance upon the vocational expert's testimony in his decision were proper and in accordance with established legal standards.

Pain and Credibility

The ALJ correctly applied the appropriate standards in the evaluation of Plaintiff's pain and credibility. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ noted that despite Plaintiff's claims of disabling pain, he takes only over the-counter pain

relievers, the infrequency of medical treatment, and that Plaintiff gave poor effort on physical examination. As "the individual optimally positioned to observe and assess witness credibility," the ALJ's credibility assessment is entitled to considerable deference. *Casias v. Secretary of Health and Human Servs.*, 933 F.2d 799, 801 (10th Cir. 1991). The Court finds that the ALJ sufficiently set forth reasons, supported by evidence in the record, for his credibility determination.

Development of the Record and Missing Exhibits

A list of exhibits is appended to the February 8, 1990, decision awarding benefits. [R. 50]. The list includes Exhibit 22 (Progress records by Pryor Chiropractic Clinic for the period June 24, 1988, through July 12, 1988-5 pages); Exhibit 25 (Progress records by Central States Orthopaedic and Sports Medicine Center for the period July 19, 1988, through July 28, 1988-2pages); Exhibit 27 (Progress Records by Don Hawkins, M.D. dated July 19, 1988, through August 18, 1988-8pages); and Exhibit 28 (Medical Report by Don Calhoun, M.D. dated August 22, 1989-2 pages). While these exhibits which pre-date the February 8, 1990, disability award are not in the record, Plaintiff has not explained why their absence should provide a basis for reversal, and the court finds none.

Plaintiff claims that the ALJ cut off his testimony, but the hearing transcript demonstrates that Plaintiff had ample opportunity to testify. He was asked: to explain why he believes he is unable to work [R. 24]; to describe his past work experience [R. 25-26]; to describe his daily activities [R. 29]; to describe his pain [R. 35];and was

twice asked whether there was anything else that he would like to tell the ALJ, at which point he disputed Dr. Dean's findings and argued his case [R. 36-37; 41-42]. The court finds that the ALJ did not fail in his duty to develop the record.

Conclusion

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 termination of benefits and therefore AFFIRMS the Commissioner's decision.

SO ORDERED this 29th Day of April, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

Am

FILED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

APR 29 1999 SA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DEBBIE REDMAN,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98CV0971K(J)

ENTERED ON DOCKET
DATE APR 29 1999

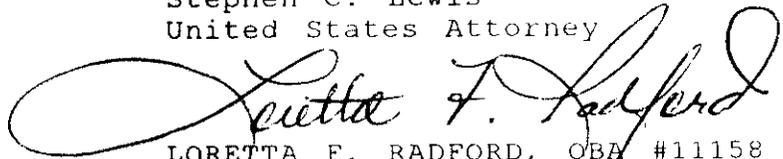
NOTICE OF DISMISSAL

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

Dated this 29th day of April, 1999.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney



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

CERTIFICATE OF SERVICE

This is to certify that on the 29th day of April, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Debbie Redman, 2539 88th Street, Tulsa, OK 74137.



Libbi L. Felty
Paralegal Specialist

Handwritten mark

FILED

APR 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 TOMMY W. STARR,)
)
 Defendant.)

Case No. 99CV0065K(E)

ENTERED ON DOCKET
APR 29 1999
DATE _____

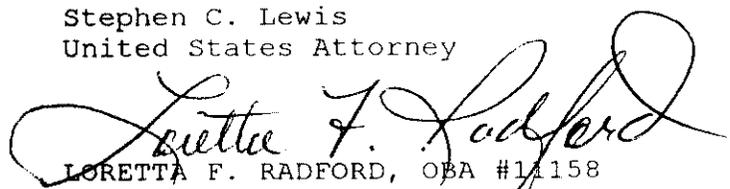
NOTICE OF DISMISSAL

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

Dated this 29th day of April, 1999.

UNITED STATES OF AMERICA

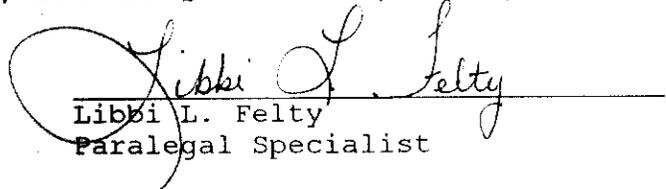
Stephen C. Lewis
United States Attorney



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

CERTIFICATE OF SERVICE

This is to certify that on the 29th day of April, 1999, a
true and correct copy of the foregoing was mailed, postage prepaid
thereon, to: Tommy W. Starr, 2640 N. Quaker Ave., Tulsa, OK 74106.



Libbi L. Felty
Paralegal Specialist

Handwritten mark

Handwritten mark

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

JAMES RALPH WHITSELL, JR.,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
)
)
)
 Defendant.)

ENTERED ON DOCKET
DATE APR 29 1999

No. 98-CV-614-K ✓

F I L E D

APR 28 1999 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the Motion to Dismiss of Defendant, United States of America (Docket #9), pursuant to Fed. R. Civ. P. 12(b)(1)(2), (4), (5), and (6).

This action was filed by the Plaintiff on August 17, 1998. Pursuant to *Fed. R. Civ. P. 4(m)*, the Plaintiff had one hundred and twenty days (120) to serve the United States with a copy of the summons and the complaint. The record shows that the United States was not served until April 12, 1999, clearly beyond the time allowed by the Federal Rules.

Because the Plaintiff has not shown good cause for failure to serve, the Court finds that the Motion to Dismiss must be granted **WITHOUT PREJUDICE** pursuant to *Fed. R. Civ. P. 4(m)* and *Fed. R. Civ. P. 12(b)(4) and 12(b)(5)*.

ORDERED THIS 28 DAY OF APRIL, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

24

statutory rate of 4.730% from the date hereon and costs of the action if timely applied for under N.D.L.R. 54.1.

IT IS FURTHER ORDERED that the Plaintiff, RAYMOND POLLARD AKA SAM MCCLAIN, recover of the Defendants, DONNA KASTNING and BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OSAGE, the sum of \$3,500 in actual damages with interest thereon at the statutory rate of 4.730% from the date hereon and costs of the action if timely applied for under N.D.L.R. 54.1.

IT IS FURTHER ORDERED that the Plaintiff, RAYMOND POLLARD AKA SAM MCCLAIN, recover of the Defendant, DONNA KASTNING, the sum of \$5,000.00 in punitive damages with interest thereon at the statutory rate of 4.730% from the date hereon and costs of the action if timely applied for under N.D.L.R. 54.1.

IT IS FURTHER ORDERED that the Plaintiffs, MARY BIG ELK and RAYMOND POLLARD AKA SAM MCCLAIN, take nothing from the Defendants, DAN HIVELY and WES PENLAND, that the action be dismissed on the merits as to these named Defendants, and that these named Defendants recover of the Plaintiffs their costs of action (without attorneys fees) if timely applied for under N.D.L.R. 54.1.

IT IS FURTHER ORDERED that Plaintiffs recover attorneys fees as prevailing parties against Defendants DONNA KASTNING and BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OSAGE, if timely applied for under N.D.L.R. 54.2.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

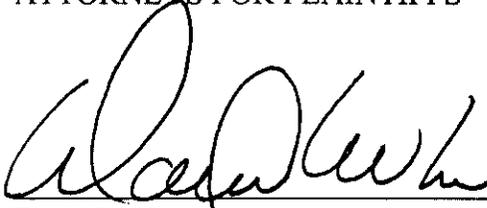
Approved as to form:



D. Michael McBride, III, OBA No. 15431
SNEED LANG, P.C.
2300 Williams Center Tower II
Two West Second Street
Tulsa, OK 74103-3136
Telephone: (918) 583-3145
Telefax: (918) 582-0410

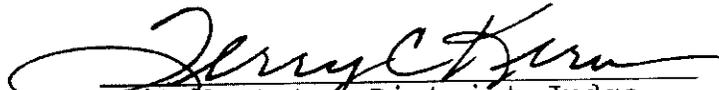
&

Micheal Salem, OBA No. 7876
Salem Law Offices
111 North Peters Ave., Suite 100
Norman, OK 73069-7235
(405) 366-1234
Fax: (405) 366-8329
ATTORNEYS FOR PLAINTIFFS

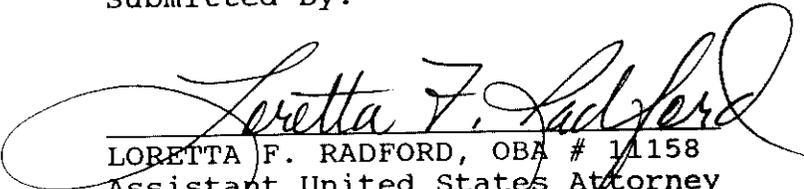


David W. Lee
Ambre C. Gooch
Lee & Gooch, P.C.
5500 N. Western, Suite 101C
Oklahoma City, OK 73118-4011
ATTORNEYS FOR DEFENDANTS

interest per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.73% percent per annum until paid, plus costs of this action.

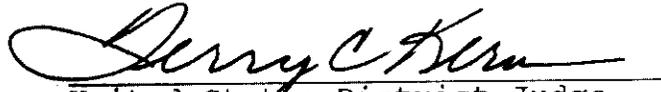

United States District Judge

Submitted By:

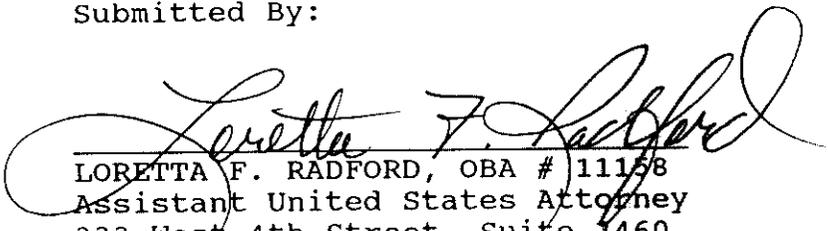

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

LFR/llf

annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.732 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

LFR/llf

702.96142
BC:dw
4/9/99

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

FILED

APR 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RUSSELL POPE, SR. and)
DARNIE POPE, husband and wife,)
)
Plaintiffs,)
)
v.)
)
FARMERS INSURANCE COMPANY, INC.,)
)
Defendant.)

96 CV 940K ✓

ENTERED ON DOCKET

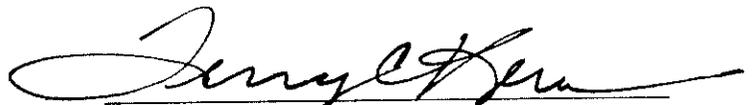
DATE APR 28 1999

~~APR 29 1999~~

ORDER

NOW ON THIS 27 day of April, 1999, there comes on for hearing the Application for Order of Dismissal With Prejudice of plaintiffs' cause. The Court finds that a settlement has been reached by the parties and that this case should be dismissed with prejudice.

IT IS SO ORDERED.


DISTRICT JUDGE

159.92
iiland.dwp
EDM/bh
4/23/99

FILED

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

APR 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SIDNEY RONNELL IILAND,)

Plaintiff,)

vs.)

ZYGMUNT POMIOTLO,)
BUDRECK TRUCK LINES, INC., and)
GREAT WEST CASUALTY COMPANY,)

Defendants.)

Case No. 98CV508 K (J)

ENTERED ON DOCKET
DATE APR 28 1999

DISMISSAL WITHOUT PREJUDICE
(JOINT STIPULATION)

The plaintiff, Sidney Ronnell Iiland, by and through his attorney of record, Stan K. Bearden of The Ash Law Firm, and the defendants and their attorney, Earl D. Mills of The Mills Law Firm, hereby jointly dismiss without prejudice the above-styled case without prejudice.

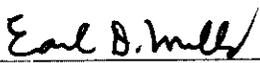
Respectfully submitted,

THE ASH LAW FIRM

By: 
Stan K. Bearden, OBA #13654
2500 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 599-001
ATTORNEY FOR THE PLAINTIFF

Respectfully submitted,

THE MILLS LAW FIRM

By: 
Earl D. Mills, OBA #6238
One Leadership Square, Suite 500
211 North Robinson
Oklahoma City, Oklahoma 73102
(405) 239-2501
ATTORNEY FOR THE DEFENDANTS

CIT

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

F I L E D

EUDORA B. McANALLY,
SSN: 236-58-5217,

Plaintiff,

v.

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

Defendant.

CASE NO. 98-CV-441-M ✓

ENTERED ON DOCKET
DATE APR 28 1999

APR 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 22nd day of APRIL, 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

EUDORA B. McANALLY,
236-58-5217

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-441-M

APR 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

APR 28 1999

DATE _____

ORDER

Plaintiff, Eudora B. McAnally, 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

¹ Plaintiff's November 23, 1992, protectively filed application for disability benefits was denied and the denial was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held December 9, 1993, the Appeals Council vacated the decision and remanded the case for further proceedings. A second hearing was held April 12, 1996. By decision dated May 6, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on May 12, 1998. 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.

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 & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born January 3, 1939, and was 57 years old at the time of the hearing. She has a 12 grade education and formerly worked as an office worker and counter person at an automotive parts store. She claims to have been unable to work since June 21, 1992, as a result of pain caused by deterioration of the spinal cushion between the last vertebrae and tail bone. The ALJ determined that although Plaintiff was unable to perform her past relevant work, she was capable of performing light work activity that would allow her to alternate sitting and standing. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that: (1) the ALJ erred in concluding that she had skills transferable to three of the jobs cited by the vocational expert; and (2) the Commissioner failed to meet his burden to prove that she retained the capacity to perform the demands of a light, semi-skilled file clerk or other alternative work. The Court concludes that the record contains substantial evidence supporting the ALJ's denial of benefits in this case, and therefore affirms the Commissioner's denial of benefits.

Based on vocational expert testimony, the ALJ found that Plaintiff has skills, such as general basic clerical skills that are transferable to semi-skilled and light jobs. [R. 25, 27]. At 55 years old, Plaintiff is considered a person of advanced age under the applicable regulations. 20 C.F.R. § 404.1563(d). The regulations specify that a person of advanced age may be disabled if he/she cannot do medium work, unless he/she has skills that can be transferred to less demanding work. *Id.* In addition, where a claimant is of advanced age, skills are not considered transferable to sedentary work unless the ALJ finds there is very little vocational adjustment required in terms of tools, work processes, work settings, or the industry. 20 C.F.R. Pt. 404, Subpt. P., App. 2 § 201.00(f).

Plaintiff argues that the ALJ's decision should be reversed because several of the jobs identified by the vocational expert were sedentary and the ALJ did not make a finding as to the level of vocational adjustment. However, Plaintiff acknowledged

that one position identified by the vocational expert, that of light file clerk, meets the regulatory criteria. The job of light file clerk represents work that is within Plaintiff's capabilities and which comports with the Commissioner's regulations concerning the transferability of skills for persons of advanced age. Consequently, the court finds no error on this point.

Plaintiff claims that the record does not support the ALJ's finding that she could perform the work of a light semi-skilled file clerk because the ALJ failed to include any limitations on stooping and crouching or any limitations concerning her cervical impairment in the hypothetical question asked of the vocational expert. *Hargis v. Sullivan*, 945 F.2d 1482, 1292 (10th Cir. 1991) provides that "testimony elicited by hypothetical questions that do not relate with precision all the claimants' impairments cannot constitute substantial evidence to support the [Commissioner's] decision." However, in posing a hypothetical question, an ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990).

According to Plaintiff, the ALJ should have included a limitation related to her cervical impairment. According to Plaintiff, the medical evidence demonstrates that she has difficulty with her neck "and was prescribed a cervical collar which she wore for an extended period of time." [Dkt. 5, p. 4.]. On July 12, 1994, Dr. Wilson diagnosed Plaintiff with acute torticollis for which he prescribed use of a soft cervical collar while ambulatory. On July 15, 1994, Dr. Wilson reported that the torticollis was improved. By July 19, 1994, Plaintiff was "much better" and had a good range of

motion. [Dkt. 194-95]. The record contains no other mention of the cervical collar. On April 26, 1995, Plaintiff was seen by orthopedic surgeon, Dr. Boone, concerning complaint of cervical pain. On examination, he found Plaintiff had full range of motion of both shoulders, a moderate amount of tenderness in the posterior cervical spine, and near full range of motion of the cervical spine, but some pain with full flexion. Plaintiff was instructed in some cervical isometric exercises. [R. 203]. In November 1994, cervical x-rays reflected degenerative changes in the lower cervical spine. [R. 266]. However, the record contains no evidence of any continuing functional limitation related to Plaintiff's cervical impairment. Accordingly, the court finds no error resulted from the ALJ's failure to attribute any limitation to Plaintiff's cervical impairment.

Plaintiff argues that she is unable to perform the occupation of file clerk because, according to the Dictionary of Occupational Titles (DOT), that job requires occasional crouching and stooping which she claims to be unable to do. The medical evidence contains conflicting reports concerning Plaintiff's ability to bend. On January 6, 1993, Plaintiff was able to flex forward to the level of the knees before experiencing pain. [R. 122]. On November 8, 1994, Dr. Boone found that Plaintiff could forward flex to her distal shins and extend past neutral, however extension past neutral increased her complaints of pain. She was instructed in flexion exercises. [R. 200-201]. On October 26, 1995, a consultative examiner found Plaintiff's flexion limited to 20 degrees and lateral bending was limited to 5 degrees. [R. 211]. It is within the province of the ALJ to resolve conflicting medical evidence. *Eggleston v.*

Bowen, 851 F.2d 1244, 1247 (10th Cir. 1994). The ALJ accurately noted the medical evidence and appropriately resolved the conflicting evidence, taking note of Plaintiff's activities, medications and other credibility factors.

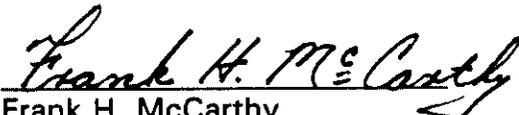
Plaintiff also argues that reliance on the job of light mail clerk is erroneous because the Commissioner has not met the burden of proving she can do such work on a regular and continuing basis. In support of this assertion, Plaintiff has cited *Thompson v. Sullivan*, 987 F.2d 1482 (10th Cir. 1993) where the Court ruled that the ALJ could not rely on an absence of evidence to satisfy the Commissioner's burden at step five. This case is unlike *Thompson* where the ALJ had "no evidence upon which to make a finding as to RFC" and thus relied on "the absence of contradiction in the medical records." *Thompson*, 987 F.2d at 1491. [emphasis omitted]. Rather, this case is one in which the relevant medical evidence does not support Plaintiff's claim of an inability to work. The ALJ accurately noted that the record does not reflect a medically determinable impairment that would necessitate that the claimant lie in a recliner most of the day. [R. 24].

There is no merit to Plaintiff's contention that the ALJ overlooked the medical evidence concerning Plaintiff's gait and her use of a cane. The ALJ accurately outlined the medical evidence and observed that the medical evidence does not reflect that an assistive device was considered medically necessary by any of her treating sources. [R. 24].

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 is AFFIRMED.

SO ORDERED this 22nd Day of April, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 27 1999 *AL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LYNDA McINTYRE,)
)
) Plaintiff(s),)
)
)
 vs.)
)
) GENERAL AMERICAN LIFE INSURANCE)
) COMPANY,)
)
) Defendant(s).)

Case No. 98-CV-848-K(J) ✓

ENTERED ON DOCKET
DATE APR 28 1999

ORDER DISMISSING ACTION^{1/}

Plaintiff's action was removed from state court to this court on November 6, 1998. [Doc. No. 1-1]. On March 10, 1999, Defendant filed a Motion to Compel Discovery. [Doc. No. 8-1]. Defendant noted that Defendant's First Interrogatories and Request for Production of Documents were served on Plaintiff on December 17, 1998, and that Defendant had received no responses, no answers, no objections, and no requests for an extension of time. [Doc. No. 8-1] at 1. Defendant claimed to have suffered prejudice due to Plaintiff's lack of response because the final exchange of witnesses was April 5, 1999, and discovery cutoff deadline is May 28, 1999.

Defendant's Motion was set for hearing on April 13, 1999. On April 12, 1999, Plaintiff filed a Response. Plaintiff's counsel asserted that discovery responses were forwarded to Plaintiff on December 18, 1998, but that Plaintiff claimed not to have

^{1/} Plaintiff and Defendant signed a partial consent to proceed before United States Magistrate Judge on April 15, 1999. The Consent specified and the parties acknowledged that the sanction of dismissal could be entered as a result of the parties' consent. [Doc. No. 14-1].

received the responses. Plaintiff's attorney contacted Plaintiff in February, and Plaintiff agreed to pick up the discovery requests at Plaintiff's office. Plaintiff's attorney states that Plaintiff never came to his office. Plaintiff's attorney represented that, despite several additional attempts to contact Plaintiff, Plaintiff's attorney had been unable to contact her.^{2/}

At the April 13, 1999 hearing, Plaintiff's attorney informed the Court that he had been unable, despite several attempts, to obtain his client's cooperation in discovery. The Court informed Plaintiff's attorney that, in accordance with the Federal Rules of Civil Procedure, sanctions may be entered by the Court for the failure to respond to discovery requests, and that available sanctions included dismissal of the action.

The Court entered an Order on April 13, 1999. [Doc. No. 13-1]. Plaintiff was ordered to comply with Defendant's discovery requests within seven days of the date of the Order. [Doc. No. 13-1]. Plaintiff was advised that "failure of Plaintiff to respond to Defendant's discovery requests will render Plaintiff's action subject to dismissal without additional notice by the Court." [Doc. No. 13-1].

Fed. R. Civ. Pro. 37(b)(2)(C) permits a Court to issue an order dismissing an action if a party fails to obey an order to provide or permit discovery. In Ehrenhaus v. Reynolds, 965 F.2d 916 (10th Cir. 1992), the Tenth Circuit recognized the discretionary power of the court to dismiss an action for violation of a discovery order

^{2/} Plaintiff's attorney requested, by motion filed April 6, 1999, permission to withdraw as attorney of record for Plaintiff. This motion has not, at this time, been addressed by the Court.

and noted the following factors for the court's consideration in whether to issue the dismissal order.

Before choosing dismissal as a just sanction, a court should ordinarily consider a number of factors, including: (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; . . . (3) the culpability of the litigant, (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance, and (5) the efficacy of lesser sanctions.

Id. at 921 (citations omitted).

Degree of Prejudice

In this case, although Plaintiff initially filed this action in state court, Plaintiff has done nothing since the filing of the action. Defendant notes that Defendant prepared the case management plan. The scheduling deadlines in this case require a final exchange of witnesses by April 5, 1999. This exchange apparently did not occur due to Plaintiff's failure to respond to discovery. Discovery is to be completed by May 28, 1999, dispositive motions filed by June 11, 1999, and deposition designations by June 11, 1999. Due to Plaintiff's failure to provide any responses to discovery, Defendant will be unable to meet these deadlines.^{3/}

^{3/} The Court recognizes that these deadlines may be extended. However, Plaintiff has shown no inclination to respond to discovery requests, and thus the extension of deadlines to accommodate a non-responsive Plaintiff seems pointless.

Interference with the Judicial Process

Certainly the failure of Plaintiff to cooperate in discovery interferes with the judicial process. In addition, counsel for Plaintiff has informed the Court of his inability to secure his client's cooperation. The Court entered a separate Order, ordering Plaintiff to respond to Defendant's discovery requests. The Court contacted attorneys for both Plaintiff and Defendant on or about April 23, 1999, and was informed that Plaintiff had not responded to the discovery requests. Plaintiff has evidently chosen not to participate in her lawsuit.

Culpability of the Party

Plaintiff's attorney has been unable to secure discovery responses from his client although Plaintiff's attorney has made several attempts to obtain responses. The Court interprets Plaintiff's actions as willful.

Whether the Party was Warned of Potential of Dismissal

The sanction of dismissal was discussed by the parties with the Court at the April 13, 1999 hearing. The Court's April 13, 1999 Order informed the parties that failure to comply could result in a dismissal of the action without additional notice. The partial consent to proceed before Magistrate Judge, which was signed by the parties, specifically indicated that the sanction of dismissal could be imposed. The Court concludes that the parties were aware of the possibility of dismissal.

Propriety of Other Sanctions

Plaintiff's actions suggest that Plaintiff is not interested in further pursuing her litigation. The Court could entertain other possible sanctions. However, in this case,

due to Plaintiff's actions, Defendant has been obtained no discovery. The other options suggested by Defendant include permitting the litigation to continue but denying the introduction of any evidence by Plaintiff. However, this Court sees little need for incurring additional attorneys fees if Plaintiff is not pursuing her claim. Consequently, under the facts and circumstances as presented, the Court concludes that the just result is a dismissal of Plaintiff's action.

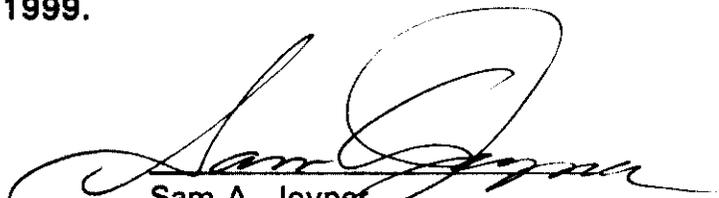
The Court therefore dismisses Plaintiff's action.

Defendant has requested an award of costs and attorneys fees, upon application. The Court refers Defendant to the following Tenth Circuit cases: Turnbull v. Wilcken, 893 F.2d 256 (10th Cir. 1990); In re Baker, 744 F.2d 1438 (10th Cir. 1984). Defendant may pursue whatever motions Defendant believes appropriate.

Plaintiff's action is hereby **DISMISSED** pursuant to Federal Rules of Civil Procedure 37(b)(2) and 41(b).

IT IS SO ORDERED.

Dated this 27th day of April 1999.


Sam A. Joyner
United States Magistrate Judge

FILED

APR 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

LISA RANSOM, an individual,)
and AMBER RANSOM, a minor)
child, by and through her)
natural mother and next friend,)
Lisa Ransom,)

Plaintiffs,)

vs.)

BOARD OF COUNTY)
COMMISSIONERS OF THE)
COUNTY OF WAGONER,)
STATE OF OKLAHOMA, a political)
subdivision of the State)
of Oklahoma, LANCE)
CHISUM, individually and)
as an officer and employee of)
Wagoner County, State of)
Oklahoma, ELMER SHEPHERD,)
individually and as a former officer)
and employee of Wagoner County,)
State of Oklahoma, RUDY)
BRIGGS, as an officer and employee of)
Wagoner County, State of Oklahoma,)
and BRIAN SCOTT GORDON,)
an individual,)

Defendants.)

ENTERED ON DOCKET
DATE APR 28 1999

Case No. 97-CV-718 E (M)

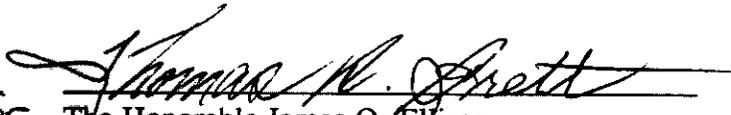
ORDER DIRECTING CLERK TO ADMINISTRATIVELY CLOSE CASE

Comes on before the Court this 27th day of Apr., 1999, the Joint Motion
of Plaintiffs Lisa Ransom and Amber Ransom, and Defendant Brian Scott Gordon, requesting this
Court, pursuant to N.D. LR 41, to direct the clerk to close this case administratively, subject to

49

reopening for good cause. The Court having reviewed the parties' Joint Motion, and for good cause shown, finds that it should be granted.

IT IS THEREFORE ORDERED, pursuant to N.D. LR 41, that the clerk is hereby directed to close this case administratively, subject to reopening only upon a reversal of this Court's ruling granting summary judgment against all Defendants except Brian Scott Gordon, which would allow Plaintiffs to proceed against any of Defendants Board of County Commissioners of the County of Wagoner, State of Oklahoma, Lance Chisum, Elmer Shepherd, or Rudy Briggs.


for The Honorable James O. Ellison
UNITED STATES DISTRICT COURT JUDGE

Submitted by:

SEAN H. MCKEE, OBA #14277
KEITH O. MCARTOR, OBA #14091
WOODSTOCK, MCKEE & MCARTOR
1518 S. Cheyenne
Tulsa, Oklahoma 74119
(918) 583-1511
(918) 585-2099
ATTORNEYS FOR PLAINTIFFS

JOHN STREET, OBA # 8690
406 S. Boulder, Suite 600,
Tulsa, Oklahoma 74103
(918) 587-8500
ATTORNEY FOR DEFENDANT
BRIAN SCOTT GORDON

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

APR 27 1999

UNITED STATES OF AMERICA,)
)
Plaintiff,)
vs.)
)
BRENDA K. RATLIFF; et al.,)
)
Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-343-BU

ENTERED ON DOCKET

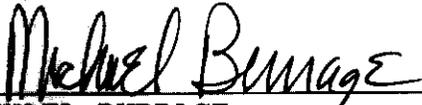
DATE APR 28 1999

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 120 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 27 day of April, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

Jan

FILED

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

APR 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JENNIFER LYNN SHAW, an individual,)
)
Plaintiff,)
)
vs.)
)
TOTAL DISTRIBUTORS SUPPLY)
CORPORATION, a corporation,)
)
Defendant.)

Case No. 98 CV-0643BU(M)

ENTERED ON DOCKET
DATE APR 28 1999

JOINT STIPULATION OF DISMISSAL

Pursuant to Fed. R. Civ. P. 41(a)(1), the parties hereto hereby stipulate that the above styled action should be dismissed in its entirety with prejudice, each party to bear its own costs and attorneys fees.

RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS

By: Karen E. Langdon
Karen E. Langdon
Mark W. Schilling
502 West Sixth Street
Tulsa, Oklahoma 74119-1010

Attorneys for Plaintiff, Jennifer Lynn Shaw

DOERNER, SAUNDERS, DANIEL &
ANDERSON, L.L.P.

By: Rebecca M. Fowler
Rebecca M. Fowler
320 South Boston Avenue, Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for Defendant, Total Distributors Supply
Corporation

27

CIT

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.) CASE NO. 99CV0178K(E)
)
 BETTY J. BAKER a.k.a.)
 BETTY J. PEARSON,)
)
 Defendant.)

ENTERED ON DOCKET
DATE APR 27 1999

FILED

APR 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AGREED JUDGMENT AND ORDER OF PAYMENT

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

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

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

3. The defendant hereby agrees to the entry of Judgment in the principal amounts of \$3,135.58 and \$2,834.28, plus accrued interest of \$2,095.39 and \$1,745.35, plus interest thereafter at the rates of 9.13% and 8% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the legal rate 4.75% until paid, plus costs of this action, until paid in full.

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

(a) Beginning on or before the first day of May, 1999, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$60.00, and a like sum on or before the first day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

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

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

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

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

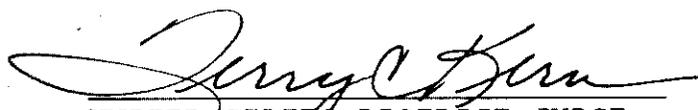
5. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

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

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

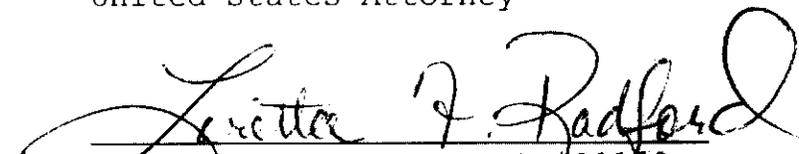
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Betty J.

Baker a.k.a. Betty J. Pearson, in the principal amounts of \$3,135.58 and \$2,834.28, plus accrued interest in the amounts of \$2,095.39 and \$1,745.35, plus interest at the rates of 9.13% and 8% until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate of 4.732 percent per annum until paid, plus the costs of this action.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney


LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney


BETTY J. BAKER
a.k.a. BETTY J. PEARSON

LFR/11f

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN L. McCORMACK,)
SSN: 444-56-6564,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 97-CV-750-EA

ENTERED ON DOCKET
APR 27 1999

DATE _____

ORDER

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

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 October 5, 1994, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.). Claimant's application for benefits was denied in its entirety initially (December 13, 1994), and on reconsideration (February 23, 1995). A hearing before Administrative Law Judge Leslie S. Hauger, Jr. (ALJ) was held March 5, 1996, in Tulsa, Oklahoma. By decision dated March 18, 1996, the ALJ found that claimant was disabled for a closed period of disability from April 27, 1993 until June 6, 1995 (the date claimant was last insured for disability benefits under Title II), but not thereafter. On June 12, 1997, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981.

Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled after the closed period. For the reasons discussed below, the Court **AFFIRMS** 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

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.

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

Claimant was born on December 8, 1953, and was 42 years old at the time of the administrative hearing in this matter. He has a high school education and vocational training as an auto mechanic. He has also completed an apprenticeship as a bricklayer. Claimant has worked as a brick and block layer and construction laborer. He alleges an inability to work beginning on or about April 27, 1993, due to back, neck and shoulder problems with accompanying headaches, limited mobility, and pain in his back, neck, shoulder, and arm.

Claimant has had three surgeries since 1992. He sustained a low back injury and had his first surgery, and “extensive decompressive laminectomy and fusion of this lumbar spine,” in March 1992. (R. 86, 145, 164) He returned to work sometime after December 28, 1992, until he injured his neck and back at work on April 27, 1993. (R. 87, 145, 160) Claimant attempted to continue working, but discontinued work on May 13, 1993. (Id.) He underwent his second surgery, for a herniated disk,

on June 7, 1993. (R. 90, 97-100) the surgery involved “extensive neurosurgical decompression, orthopedic stabilization of the cervical spine.” (R. 92)

He was admitted to hospitals on February 10, March 11, April 21, April 27, May 3, and May 19, 1994, for various examinations and x-rays. (R. 107-10, 114-16, 118, 120, 124-26, 137-39) He was treated for “positional headache, thought to be spinal in nature” on April 29, 1994. (R. 123) On June 6, 1994, claimant underwent his third surgery, described as “posterior cervical decompression and fusion with segmental stabilization and fixation,” using plates and screws on the same area of the claimant’s spine as the 1993 surgery. (R. 127, 129-36)

III. DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ found that plaintiff was disabled for a closed period of disability beginning April 27, 1993 and continuing until June 6, 1995, but that, as of June 6, 1995, claimant had the residual functional capacity (RFC) to perform the requirements of sedentary jobs such as assembly work, surveillance system monitor, and cashier. (R. 17-19) The ALJ made his decision at the fifth step of the sequential evaluation process. He specifically found that claimant had the RFC to perform a full range of sedentary work (as defined in 20 C.F.R. § 404.1567) of an unskilled nature (as defined in 20 C.F.R. § 404.1568) subject to some intermittent mild pain in the neck. (R. 19) The ALJ concluded that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his

RFC, age, education, and work experience. The ALJ thus concluded that claimant was not disabled from June 6, 1995 through the date of the decision. (R. 19-20)

IV. REVIEW

Claimant maintains that his disabling condition continued past June 6 1995, and that the ALJ's findings concerning claimant's ability to perform sedentary work after that date are not supported by substantial evidence. Claimant challenges the ALJ's findings that claimant lacked credibility, and he asserts that the ALJ's questions to the vocational expert were improper.

RFC Assessment

Sedentary work is defined as involving the lifting of no more than ten pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. It involves sitting for about 6 hours of an 8-hour workday, and it occasionally requires a certain amount of walking and standing necessary to carry out job duties. 20 C.F.R. § 404.1567(a) (1997). "Occasionally" means that it occurs from very little up to one-third of the time, and totals no more than 2 hours of an 8-hour workday. Social Security Ruling 96-9p. Claimant testified that he can lift a 12-pack of pop (approximately 10 pounds), walk (with some difficulty), stand for 30-40 minutes at a time, and sit for 10-15 minutes without moving around. (R. 26I) He can reach overhead, but he has trouble looking up. (R. 26T) He has a driver's license and drove to the hearing. (R. 26E) He also drives three miles per day to pick up his step-daughter from school. (R. 26P-26Q) His daily activities involve reading the paper, watching television and napping. He sits in a recliner most of the time

or he lies in bed. Sometimes he helps his wife with cooking, dusting and laundry. (R. 26H) The ALJ reported this testimony in his decision of March 18, 1996. (R. 15)⁴

As the Commissioner points out, Benjamin G. Benner, M.D. (one of claimant's treating physicians and surgeons) determined that claimant was making satisfactory progress in the months following his surgery in June 1994. (R. 142-44) A little more than a year later, Donnie L. Hawkins, M.D. (another one of claimant's treating physicians and surgeons) determined that claimant had "done well" since the surgery, although he had experienced some intermittent pain. At this "follow-up visit," Dr. Hawkins reported that claimant had pain and some tenderness in his neck and pain radiating into his right arm and shoulder, but his reflexes were normal and his strength was well-maintained. His range of motion showed "slight" limitations, and x-rays showed some spondylosis at the C5-C6 region of his spine. However, Dr. Hawkins stated that "C6-7 region is well-fused." (R. 190) Thus, the ALJ's estimate that "a fusion normally requires only about a year recovery period" (R. 17) was correct, and claimant's objection to it is misplaced. Dr. Hawkins prescribed some medication to be taken on an occasional basis" and other medication to be taken once a day "with gastric precautions." (R. 191)

In December 1995, claimant presented again for a follow-up evaluation, complaining of headaches, pain in his neck, and radiating pain in his shoulders. Dr. Hawkins reported that claimant had done well until the summer when the pain recurred. He recommended additional consultation with Dr. Benner to determine if additional surgery was necessary. (R. 192) Dr. Hawkins did not opine that claimant's condition was disabling or that claimant had a "pain causing impairment," as

⁴ Claimant also testified that he fishes occasionally (R. 26M), although the ALJ did not mention this testimony in his decision. Claimant also testified that he occasionally goes to a movie with his family (R. 26N), and he dresses himself. (R. 26R)

claimant contends. (Mem. Br., Docket # 7, at 3.) The Court finds that the ALJ's assessment of claimant's RFC was properly supported by the record.

Pain/Credibility

The framework for the proper analysis of evidence of allegedly disabling pain was set forth by the Tenth Circuit in Luna v. Bowen, 834 F.2d 161, 163-64 (10th Cir. 1987). That analysis requires the court to consider:

(1) whether Claimant established a pain-producing impairment by objective medical evidence; (2) if so, whether there is a "loose nexus" between the proven impairment and the Claimant's subjective allegations of pain; and (3) if so, whether, considering all the evidence, both objective and subjective, Claimant's pain is in fact disabling.

Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992); accord Kepler v. Chater, 68 F.3d 387, 390 (10th Cir. 1995). The factors that an ALJ should consider when determining the credibility of subjective complaints of pain include, but are not limited to, "the levels of medication and their effectiveness, the extensiveness of attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence." Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991) (quoting Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988)); accord Luna, 834 F.2d at 165-66 (citations omitted).

The ALJ fully considered claimant's subjective complaints of disabling pain. In so doing, he specifically referenced the criteria set forth in 20 C.F.R. § 404.1529 and the criteria set forth in Luna. He analyzed the relevant factors to determine the weight to be given claimant's subjective allegations of pain, and, as required by Kepler, the ALJ made express findings as to the credibility

of claimant's objective complaints of disabling pain, with an explanation of why specific evidence relevant to each factor led to the conclusion that claimant's subjective complaints were not fully credible. (R. 16) He specifically discussed the nature, location, onset, duration, frequency, radiation, and intensity of any pain; precipitating and aggravating factors; claimant's medications and their side effects; treatment other than medication for the relief of pain; claimant's functional restrictions; and claimant's daily activities. (Id.) The ALJ acknowledged that claimant experiences some pain and restrictions in his range of motion, but found that claimant's allegations were not fully credible because of the "objective findings, or lack thereof, by treating and examining physicians, the lack of medication for severe pain, the frequency of treatments by physicians and the lack of discomfort shown by the claimant at the hearing." (R. 17)

Credibility determinations made by an ALJ are generally entitled to great deference. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence." Diaz, 898 F.2d at 777. Considering all the evidence, both objective and subjective, this Court finds that the ALJ did not err in concluding--and demonstrating by specific and substantial evidence--that claimant's complaints of pain were not fully credible. The record supports the ALJ's conclusion that claimant could perform sedentary work activities despite his pain.

VE Testimony

The vocational expert testified as to specific sedentary jobs available to persons with the residual functional capacity and pain that the ALJ adjudged claimant to have. The ALJ asked the vocational expert to assume that a man who is 42 years of age had the same education and past work

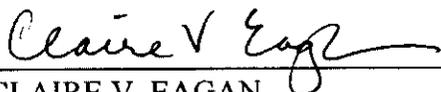
experience of the claimant and the residual functional capacity to perform sedentary work, subject to some intermittent mild pain in his neck, shoulders and arm. He then asked if such a person would be able to do any work that exists in the economy. (R. 26T-26U) Claimant contends that this hypothetical question did not include all of claimant's "true" limitations and thus, the answer could not serve as a basis for establishing the Commissioner's burden of proof. (Mem. Br., Docket # 7, at 5.)

The Tenth Circuit has addressed this issue numerous times in a variety of ways, and it has consistently held that such hypothetical questions are not improper where there is substantial evidence to support the assumption upon which the vocational expert was asked to base his opinion. See, e.g., Jordan v. Heckler, 835 F.2d 1314, 1316 (10th Cir. 1987) (ALJ's failure to include pain factor in hypotheticals was not inappropriate because sufficient evidence was lacking that plaintiff's pain prohibited him from performing light or sedentary work); Brown v. Bowen, 801 F.2d 361, 363 (10th Cir. 1986) (ALJ's decision was not undermined by the fact that the ALJ may have asked hypothetical questions of the vocational expert which did not fully itemize all the disabilities claimed by the worker). Thus, 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). The ALJ's questions to the vocational expert were not improper.

V. CONCLUSION

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

DATED this 26th day of April, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

WINDSWEPT PACIFIC ENTERTAINMENT)
CO. d/b/a FULL KEEL MUSIC CO.,)
RICK HALL MUSIC, INC., TEXAS)
WEDGE MUSIC, JAZZ BIRD MUSIC,)
WB MUSIC CORP., HAMSTEIN MUSIC)
COMPANY, MORGANACTIVE SONGS, INC.,)
and POOKIE BEAR MUSIC,)

Plaintiffs,)

v.)

DON G. ALLAN and DONNA ALLAN)
d/b/a BLACK HAWK LOUNGE,)

Defendants.)

FILED

APR 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-929-K(JN)

ENTERED ON DOCKET

DATE APR 27 1999

JUDGMENT BY DEFAULT

NOW on this 22 day of April, 1999, the Court having carefully considered Plaintiffs' Motion for Default Judgment, and having thoroughly reviewed the materials on file herein, including the Brief in Support thereof, the Affidavit of Brenda Barnhill, the Clerk's Entry of Default entered on February 17, 1999, and the other papers and pleadings comprising the record herein, and being otherwise sufficiently advised;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment by Default be, and hereby is, entered in favor of Plaintiffs and against Defendants Don G. Allan and Donna Allan d/b/a Black Hawk Lounge, jointly and severally (collectively "Defendants");

IT IS FURTHER ORDERED that the Defendants and all persons acting under their direction, control, permission or authority be enjoined and restrained from publicly performing any and all copyrighted musical compositions in the ASCAP

repertory without permission, and from causing or permitting the said compositions to be publicly performed at the Black Hawk Lounge in West Siloam Springs, Oklahoma or any other place owned, operated, or conducted by Defendants, and from aiding and abetting the public performance of said compositions in any such place, unless Defendants shall have previously obtained permission to give such performances either directly from the Plaintiffs or the copyright owners whose compositions are involved or by license from ASCAP obtained in advance.

IT IS FURTHER ORDERED AND ADJUDGED, in recognition of Defendants' willful and deliberate infringing conduct, that Plaintiffs, et al. be, and they hereby are, awarded judgment, against Defendants, jointly and severally, in and for the following amounts:

A. The sum of \$ 12,500 as statutory damages for infringement of copyright by unauthorized public performance of the five (5) copyrighted musical compositions in suit, at the rate of \$ 2,500 per infringement, and;

B. Pursuant to 17 U.S.C. §505, the Plaintiffs are entitled to recover their costs from the defendants, including a reasonable attorney's fee. In accordance with N.D. LR's 54.1 and 54.2, Plaintiffs' counsel are directed to submit a Bill of Costs and an Application to Determine Amount of Attorney's Fee within fourteen (14) days of the entry of this Judgment.

C. Post-judgment interest at the rate(s) specified in 12 O.S. § 727 until this judgment is paid in full.

The Clerk is directed forthwith to send notice of entry of this Judgment by Default, by ordinary mail, to counsel for the Plaintiffs and to the Defendants at the same addresses at which Defendants were originally served with the summons and complaint herein.

This is a final and appealable judgment with respect to the matters referred to herein and there is no just cause for delay.

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

A handwritten signature in cursive script, appearing to read "Jerry L. ...", is written over a horizontal line. Below the line, the text "UNITED STATES DISTRICT JUDGE" is printed in a serif font.
UNITED STATES DISTRICT JUDGE

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

FILED

APR 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
FORTY-FOUR THOUSAND AND)
NO/100 DOLLARS (\$44,000.00))
IN UNITED STATES CURRENCY,)
)
Defendant.)

CIVIL ACTION NO. 96-CV-883-B

ENTERED ON DOCKET
DATE APR 27 1999

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture by Default as to the defendant \$44,000.00 in United States currency and all entities and/or persons interested in the \$44,000.00 defendant currency, the Court finds as follows:

The verified Complaint for Forfeiture *In Rem* was filed in this action on the 26th day of September, 1996, alleging that the defendant currency was subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6), because it was furnished or intended to be furnished in exchange for a controlled substance, or is proceeds traceable to such an exchange, or is money used, or intended to be used, to facilitate a violation of Title 21 of the United States Code and subject to seizure and forfeiture to the United States of America.

Warrant of Arrest and Notice *In Rem* was issued on the 1st day of October 1996, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant currency and for publication in the

Northern District of Oklahoma.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture *In Rem* and the Warrant of Arrest and Notice *In Rem* on the \$44,000.00 defendant currency on December 10, 1996.

Anna Plata, Luis Plata, and Luz Maria Durango, a/k/a Paz Maria Durango and Luz Mary Durango, were determined to be the only known individuals with possible standing to file a claim to the defendant currency, and, therefore the only individuals to be served with process in this action.

The United States Marshals Service for the Northern District of Oklahoma was unable to obtain service of process upon Luis Plata and Anna Plata, both of whom had resided at 4907 South 72nd East Avenue, Apartment A, Tulsa, Oklahoma 74135. Upon attempting service at their last known residence, 4907 South 72nd East Avenue, Tulsa, Oklahoma, a Deputy United States Marshal was told by the management at this apartment complex that both Luis and Anna Plata had fled the country. Service as to both Luis and Anna Plata was returned as unexecuted.

Luis Plata was indicted on charges of Conspiracy to Possess with Intent to Distribute Heroin and Distribution of Heroin, a violation of 21 U.S.C. § 846, 841(a)(1) on March 5, 1996. A warrant for the arrest of Luis Plata was issued. On April 20, 1999, the United States Attorney's Office verified with the United States Marshals Service for the Northern District of Oklahoma that the warrant is outstanding and that Luis Plata remains a fugitive on those charges. (See Declaration of Assistant United States Attorney Catherine J. Depew and the JNCIC report attached thereto.)

Anna Plata was subsequently located and filed her claim and answer herein. Thereafter, she executed a Stipulation for Forfeiture which provided that Fourteen Thousand Dollars (\$14,000) of the defendant currency be forfeited by agreement and stipulation to the United States, and the sum of Thirty Thousand Dollars (\$30,000) of the defendant currency be returned to Claimant Anna Plata.

Service for Maria Durango, a/k/a Luz Maria Durango and Paz Maria Durango, was sent to the Eastern District of New York to be served upon her, but before service could be obtained an Order of Judicial Deportation was issued for Luz Mary Durango, a/k/a Luz Maria Durango and Paz Maria Durango, on December 4, 1996, pursuant to having been convicted in the United States District Court for the Eastern District of New York of the offense of transmitting or attempting to transmit funds derived from narcotics trafficking from the United States to Columbia for the period from October 1 to November 14, 1995, in violation of Title 18, § 1956(2)(2)(B)(i) of the United States Code, in Case No. 95 CR 1118 (JBW). The defendant waived any and all forms of relief from deportation. Plaintiff was, therefore, unable to obtain service upon potential claimant Luz Maria Durango, a/k/a Luz Mary Durango and Paz Maria Durango. A copy of the Order of Judicial Deportation of Luz Maria Durango is attached to Declaration of Assistant U. S. Attorney Catherine J. Depew on file herein.

USMS 285s reflecting the inability to obtain service on potential claimants Luis Plata and Luz Maria Durango, a/k/a Luz Mary Durango and Paz Maria Durango are on file herein.

All persons and/or entities interested in the defendant currency were required to file

their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice *In Rem*, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No claims or answers have been filed of record in this action with the Clerk of the Court, in respect to the defendant currency, and no persons or entities have plead or otherwise defended in this suit as to said defendant currency, save and except Anna Plata, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, upon information and belief, default exists as to \$44,000.00 of the defendant currency, and all persons and/or entities interested therein, save and except Anna Plata, who filed her claim and answer herein, and subsequently executed and filed a Stipulation for Forfeiture herein on April 13, 1999.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant vehicle was located, on January 9, 16, and 23, 1997. Proof of Publication was filed February 4, 1997.

The United States Attorney's office gave public notice of this action and arrest to all persons and entities by advertisement in the Miami Daily Business Review, Miami, Dade County Florida, a newspaper of general circulation in the district where Anna Plata resides, on April 24, May 1, and 8, 1998. Proof of Publication was filed May 14, 1998.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-

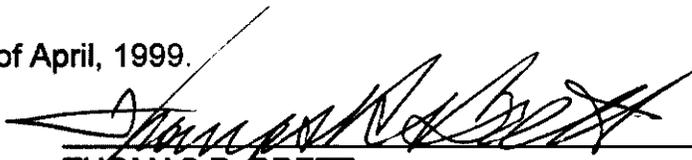
described defendant currency:

**THE SUM OF FOURTEEN THOUSAND AND NO/100
DOLLARS (\$14,000.00) IN UNITED STATES CURRENCY,**

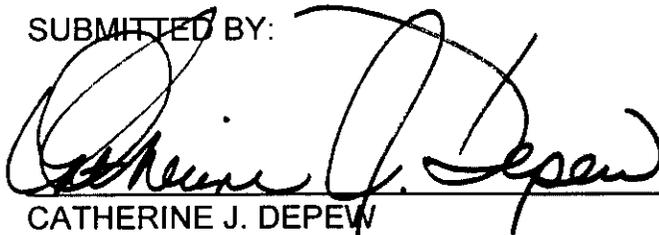
be, and it hereby is, forfeited to the United States of America for disposition according to law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the sum of Thirty Thousand Dollars and 00/100 (\$30,000.00) of the defendant currency be returned to Claimant, Anna Plata, by delivering, mailing, or otherwise releasing it to her attorney of record, James C. Linger, 1710 South Boston Avenue, Tulsa, OK 74119-4810.

Entered this 26th day of April, 1999.


THOMAS R. BRETT
Senior United States District Judge for the
Northern District of Oklahoma

SUBMITTED BY:



CATHERINE J. DEPEW
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, OK 74103-3809
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOHN WESLEY SHERROD,

Plaintiff,

vs.

LARRY OATES, Delaware County, Oklahoma
District Judge, *et al.*,

Defendants.

ENTERED ON DOCKET

DATE APR 27 1999

Case No. 99-CV-219-K(J)

F I L E D

APR 26 1999

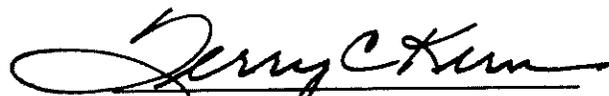
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On April 2, 1999, Plaintiff's pleadings were found to be deficient and he was ordered to take the following actions by April 16, 1999: (1) complete a Petition For a Writ of Habeas Corpus and file it with this Court, and (2) pay the \$5.00 filing fee or file an Application for Leave to Proceed *In Forma Pauperis* which contains a completed statement of institutional accounts. Plaintiff has not complied with either of these requirements. Consequently, this case is **DISMISSED WITHOUT PREJUDICE** due to Plaintiff's failure to comply with this Court's April 2, 1999 order

IT IS SO ORDERED.

Dated this 26 day of April 1999.



Terry C. Kern
United States District Judge

4

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

KRISTJA J. FALVO, et al.,)
)
)
Plaintiffs,)
)
vs.)
)
OWASSO INDEPENDENT SCHOOL)
DISTRICT NO. I-011, et al.,)
)
Defendants.)

No. 98-C-765-K

ENTERED ON DOCKET

DATE APR 27 1999

FILED

APR 26 1999 *SL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendants Owasso Independent School District No. I-011, Dale Johnson, Lynn Johnson, Rick Thomas, and Does 1 through 50, and against the Plaintiffs Kristja J. Falvo, Elizabeth Pletan, Philip Pletan and Erica Pletan.

ORDERED THIS DAY OF 23 APRIL, 1999


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

KRISTJA J. FALVO, et al.,)
)
Plaintiffs,)
)
vs.)
)
OWASSO INDEPENDENT SCHOOL)
DISTRICT NO. I-011, et al.,)
)
)
Defendants.)

No. 98-C-765-K

ENTERED ON DOCKET

DATE APR 27 1999

FILED

APR 26 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court are the cross-motions of the parties for summary judgment. Plaintiffs have brought this action seeking damages and a declaratory judgment that the defendants have violated their rights under both the Fourteenth Amendment and the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g. The Court has previously denied plaintiffs' motion for temporary restraining order. The Court hereby incorporates by reference the findings of fact made in the Court's order of October 16, 1998.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c) F.R.Cv.P. When applying this standard, the Court views the evidence and draws reasonable inferences therefrom in the light most favorable to the

nonmoving party. Byers v. City of Albuquerque, 150 F.3d 1271, 1274 (10th Cir.1998).

Plaintiffs (Kristja J. Falvo and her minor children, Elizabeth Pletan, Philip Pletan and Erica Pletan, contend that the grading practice utilized by some teachers at the Owasso School District, by which students exchange papers and grade each others' work as the teacher goes over the answers, is improper under the law. Plaintiffs also object to the practice of some teachers of permitting students to announce their grades aloud after their papers have been graded and returned.

FERPA provides in pertinent part that an educational agency or institution "which has a policy or practice of permitting the release of educational records. . . of students without the written consent of their parents" is in violation of FERPA. 20 U.S.C. §1232g(b) (1). This provision contains certain qualifications and exceptions which are not applicable here. FERPA defines "education records" as "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. §1232g(a) (4) (A). See also 34 C.F.R. §99.3.

Defendants place principal reliance upon a declaration under penalty of perjury executed by LeRoy S. Rooker. Mr. Rooker is the Director of the Family Policy Compliance Office ("FPCO") within the United States Department of Education. In the declaration, Mr. Rooker states that the current position of the FPCO on the issue of

students grading other students' papers is accurately reflected in a letter date-stamped July 15, 1993, from Mr. Rooker to Mr. Wallace N. Raupp, II. This letter was introduced into evidence before this Court during the hearing on motion for temporary restraining order. In the letter, Mr. Rooker opines that FERPA does not prohibit teachers from allowing one student to grade the paper of another student, or from calling out the grade in class.

The Secretary of Education has been delegated by Congress with the task of enforcing FERPA. 20 U.S.C. §1232g(f). "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985).

The rationale of the Rooker letter is that grades on interim tests and homework assignments are not "maintained" by an educational agency or institution at the point of grading. Plaintiffs object that such an interpretation is contrary to congressional intent, because Congress has defined the word "maintain" in another statute as including any collection or use of the material. 5 U.S.C. §552a(a)(3). Plaintiffs describe this separate statutory scheme, the Privacy Act, as "FERPA's sister statute", and apparently seek to incorporate that Act's definition into FERPA.

In the absence of definition within the statute, statutory terms are to be construed in accordance with their ordinary meaning. Underwood v. Wilson, 151 F.3d 292, 295 (5th Cir.1998).

The term "maintain" is not defined in FERPA; therefore, the ordinary meaning of "preserve" or "retain" is appropriate. If Congress wished to incorporate into FERPA the special definition given "maintain" in the Privacy Act, Congress knew how to do so. There is no authority holding that the Privacy Act and FERPA are to be construed in pari materia, and the Court declines to do so. In sum, the Court finds deference is due the Department of Education's interpretation of FERPA because it is reasonable and does not conflict with the expressed intent of Congress¹. Plaintiffs' claim under FERPA fails.

Plaintiffs also bring a separate claim grounded in the Constitution itself. It is established that there is a constitutional right to privacy in preventing disclosure by the government of personal matters. F.E.R. v. Valdez, 58 F.3d 1530, 1535 (10th Cir.1995). In resolving such a claim, the Tenth Circuit has established a three-part balancing test. The Court must consider (1) if the party asserting the right has a legitimate expectation of privacy, (2) if disclosure serves a compelling state interest, and (3) if disclosure can be made in the least intrusive manner. Flanagan v. Munger, 890 F.2d 1557, 1570 (10th Cir.1989).

The Flanagan court affirmed a district court's grant of

¹The plaintiff has submitted three affidavits by experts, which argue for a contrary interpretation of FERPA. The Court finds that these largely take the form of expressing opinions as to what the law should be, and do not raise a genuine issue of material fact in this case. Further, as defendants note, one of the experts, Professor Friedman, has written an article in which he concedes that FERPA as written "probably" does not prohibit the public announcement of grades in the classroom. (Defendants' Exhibit B).

summary judgment against a plaintiff on the first prong of the test. The court stated that there is no absolute right to privacy in the content of personnel files, but only "highly personal information" is protected. Id. The court found the items under review were not "highly personal" because they dealt only with the plaintiffs' work as police officers. Similarly, the interim tests and homework assignments deal with a student's performance qua student. In this Court's view, they are not "highly personal" matters worthy of constitutional protection.

In any event, students are given the option of having their grade related in confidence. Moreover, as this Court has previously found, students do not grade 9-week exams given at the Owasso Public Schools. No revelation is made of a letter grade on a report card or from a student's permanent transcript. Having found that the plaintiffs do not have a legitimate expectation of privacy in the items in question, the Court need not address the remaining two prongs of the balancing test. However, the Court wishes to state that it would be hard-pressed to find that this grading practice at the Owasso School District is supported by a compelling state interest. The record reflects that many teachers, even in this immediate geographical area, do not employ the student grading method. Therefore, a showing stronger than merely pronouncing "education" as a compelling state interest would have to be made before it could be demonstrated to this Court's satisfaction that the grading method under review could not undergo modification while still properly educating students. The issue

before the Court is whether a constitutional violation has occurred under these facts, and the Court finds it has not.

In the alternative, defendants have argued that they are entitled to summary judgment based upon qualified immunity. The Court disagrees. Because the rights of privacy under FERPA and the Fourteenth Amendment were clearly established at the time of the alleged violations, the defendants are not entitled to qualified immunity. See Mick v. Brewer, 76 F.3d 1127, 1134 (10th Cir.1996). This is a distinct issue from whether a violation in fact took place, which the Court has already discussed.

Plaintiffs also have pending a motion for class certification. The Court elected to address the merits initially. Because the Court has found that the named plaintiffs have failed to present a claim which survives summary judgment, no ruling on class certification is necessary.

It is the Order of the Court that the motion of the plaintiffs for partial summary judgment (#16) is hereby DENIED. The cross-motion of the defendants for summary judgment (#20) is hereby GRANTED. The motion of the plaintiffs for class certification (#12) is hereby DENIED as moot.

ORDERED this 23 day of April, 1999.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

102

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

FILED

APR 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JONI JOYNER, as Personal Representative and next of
friend of Charles Otis Joyner, deceased, and
individually,

Plaintiff,

vs.

FUJI HEAVY INDUSTRIES LTD. OF JAPAN and
SUBARU OF AMERICA, INC.

Defendants.

No. 98-CV485-C(M)

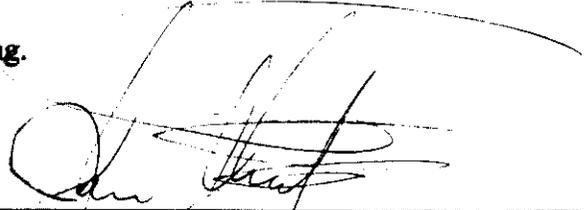
ENTERED ON DOCKET

DATE **APR 27 1999**

STIPULATION FOR ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.P. 41, Joni Joyner, as Personal Representative and next of friend of Charles Otis Joyner, deceased, and individually (hereinafter referred to as "Plaintiff"), and Fuji Heavy Industries Ltd. of Japan and Subaru of America, Inc. (hereinafter referred to as "Defendants"), stipulate that this matter should be dismissed with prejudice to its refiling.

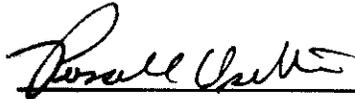
WHEREFORE, Plaintiff and Defendants pray that this Honorable Court enter an Order dismissing this matter with prejudice as to refiling.



JOHN M. THETFORD, OBA #12892
The Stipe Law Firm
P.O. Box 701110
Tulsa, Oklahoma 74170-1110
Telephone: 918/749-0749
Facsimile: 918/747-0751

33

015



RUSSELL USELTON, OBA #10146

E. CLYDE KIRK, OBA #10572

The Stipe Law Firm

P.O. Box 1368

McAlester, Oklahoma 74502

Telephone: 918/423-0421

Facsimile: 918/423-0266

ATTORNEYS FOR PLAINTIFFS



BERT M. JONES, OBA #4750

ANDREW L. RICHARDSON, OBA #16298

Rhodes, Hieronymus, Jones, Tucker

& Gable, P.L.L.C.

P.O. Box 21100

Tulsa, Oklahoma 74121-1100

Telephone: 918/582-1173

Facsimile: 918/592-3390

ATTORNEYS FOR DEFENDANTS

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

F I L E D

APR 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

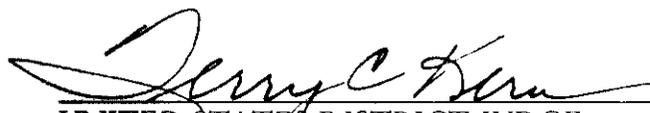
TULSA GAS TECHNOLOGIES, INC.,)
)
Plaintiff,)
)
vs.)
)
BAX GLOBAL, INC.,)
)
Defendant.)

Case No. 99-CV-0207K (J)

ENTERED ON DOCKET
DATE APR 26 1999

ORDER OF DISMISSAL WITHOUT PREJUDICE

NOW on this 21 day of April, 1999, it appearing to the Court that
pursuant to Fed. R. Civ. P. 41, this case is herewith dismissed without prejudice.


UNITED STATES DISTRICT JUDGE

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

FILED

APR 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAKA, Inc., an Oklahoma Corporation,)

Plaintiff,)

vs.)

Case No. 98-CV-905 BU (M) ✓

SHOWCASE NEW ENGLAND, INC.)

a Connecticut Corporation; and)

DAN GREENHALGH, an)

individual,)

Defendants.)

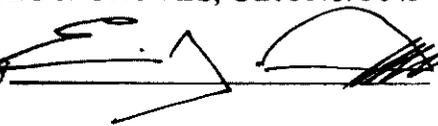
ENTERED ON DOCKET
DATE APR 26 1999

STIPULATION OF MUTUAL DISMISSAL WITH PREJUDICE

Pursuant to Fed. R. Civ. P. 41(a)(1)(ii), the Plaintiff and the Defendants each hereby stipulate to the dismissal, with prejudice, of all claims and counterclaims made in the above-referenced matter, each party to bear its own costs and expenses.

Respectfully submitted,

ERIC J. GROVES, OBA No. 3643

By 

GROVES & TAGUE

201 Robert S. Kerr

Suite # 901

Oklahoma City, Oklahoma 74103

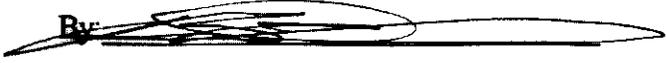
(405) 236-5303

Attorneys for the Plaintiff

9

98

BLAKE K. CHAMPLIN, OBA No. 11788
JAMIE TAYLOR BOYD, OBA No. 13659

By: 

SHIPLEY, JENNINGS & CHAMPLIN, P.C.
201 West Fifth Street, Suite 400
Tulsa, Oklahoma 74103
(918) 582-1720

Attorneys for Defendants

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

FILED

APR 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHONDA DENISE JENKINS, an individual,)
)
Plaintiff,)
)
v.)
)
ARCADIA FINANCIAL LTD., a Minnesota)
corporation doing business in Oklahoma,)
)
Defendant.)

Case No. 98-CV-589 H (J) ✓

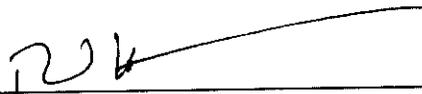
ENTERED ON DOCKET

DATE APR 26 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

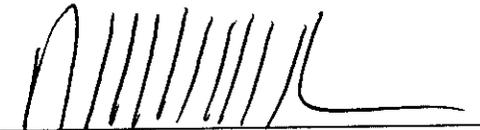
Pursuant to Rule 41 of the Federal Rules of Civil Procedure, the parties hereby stipulate to the dismissal with prejudice of all claims asserted in this litigation.

Respectfully submitted,



David Humphreys, OBA #12346
Humphreys Wallace Humphreys
1724 East 15th Street
Tulsa, Oklahoma 74104
(918) 747-5300

Attorneys for Plaintiff
Shonda Denise Jenkins



Roger K. Eldredge, OBA #15003
Norman Wohlgenuth Chandler & Dowdell
2900 Mid-Continent Tower
Tulsa, Oklahoma 74104
(918) 583-7571

Attorneys for Defendant
Arcadia Financial Ltd.

015

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

ENTERED ON DOCKET
DATE APR 26 1999

RONNIE DEAN ROUTH,
Plaintiff,
vs.
AMERICAN STATES INSURANCE,
Defendant.

Case No. 98-CV-0564H (E)

FILED

APR 22 1999 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER BASED ON STIPULATION FOR
DISMISSAL WITH PREJUDICE

NOW COMES Plaintiff, RONNIE DEAN ROUTH, by and through his attorney Kort A. BeSore of the law firm of BESORE & HUNT, to dismiss with prejudice the above-entitled cause in accordance with a stipulation between the parties, by their respective attorneys, filed herein, in which it is stipulated that the cause has been fully compromised and settled.

IT IS THEREFORE ORDERED by the Court that the above-entitled cause be and the same hereby is dismissed with prejudice, without costs, all costs having been fully paid and the cause having been fully compromised and settled.

DATED this 22ND day of APRIL, 1999.


UNITED STATES DISTRICT JUDGE

20

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

FILED

APR 22 1999 *SL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RUFORD HENDERSON, et al.,)

Plaintiffs,)

vs.)

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

Defendants.)

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

ENTERED ON DOCKET

DATE APR 26 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.P. 41(a)(1), Plaintiff Michele Payne Langford and Defendants The SABRE Group, Inc., American Airlines, Inc. and AMR Corporation (collectively "Defendants") by and through their attorneys of record, hereby jointly stipulate to the dismissal of the above-styled action, with prejudice, each party to bear their own costs and attorneys' fees incurred herein.

MARTIN & ASSOCIATES

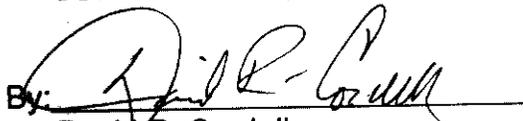
By: 

Charles M. Fox
MARTIN & ASSOCIATES
403 S. Cheyenne Avenue
Tulsa, Oklahoma 74103
(918) 587-9000

Attorneys for Plaintiffs

123

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

By: 

David R. Cordell
CONNER & WINTERS
3700 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103-4344
(918) 586-5711
(918) 586-8547 (facsimile)

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

OF COUNSEL:

CONNER & WINTERS
3700 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103-4344

*over
4-21-99*

F I L E D

APR 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JULIE COOK, an individual)
)
Plaintiff,)
)
vs.)
)
MIDWESTERN OFFICE PRODUCTS,)
a corporation, d/b/a SCOTT RICE)
)
Defendant.)

Case No. 98-CV-0160B(J)

ENTERED ON DOCKET

DATE APR 26 1999

**STIPULATION AND FINAL ORDER
AWARDING ATTORNEY FEES**

COMES NOW for hearing, on this 15th day of April, 1999, the matter of Plaintiff's Motion For Attorney Fees filed on March 8, 1999 in the captioned case pursuant to N.D.L.R. 54.2. Counsel for Defendant and Counsel for Plaintiff have entered their stipulation that attorney fees in this case of \$55,000.00 are fair and reasonable under the Lodestar method.

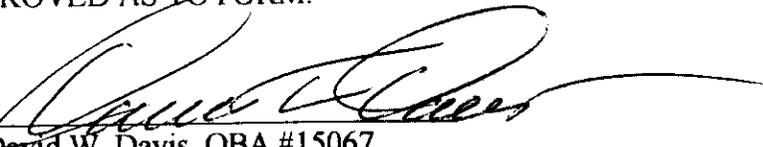
THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED, Plaintiff's Motion for Attorney fees having been timely filed, is granted and the Court finds that \$55,000.00 is a fair and reasonable award and amount for Attorney fees and enters this order for Defendant to pay attorney fees to Plaintiff in the amount of \$55,000.00.

Thomas P. Britt
UNITED STATES DISTRICT COURT JUDGE

114

APPROVED AS TO FORM:

BY:


David W. Davis, OBA #15067

406 S. Boulder

Suite 416

Tulsa, Oklahoma 74103

918-592-2007

ATTORNEY FOR PLAINTIFF, JULIE COOK

BY:


Steven A. Broussard, OBA #12582

William D. Fisher, OBA #17621

Hall, Estill, Hardwick, Gable, Golden & Nelson

320 S. Boston

Suite 400

Tulsa, Oklahoma 74103

ATTORNEYS FOR DEFENDANT, MIDWESTERN
OFFICE PRODUCTS, INC., d/b/a Scott Rice

FILED

APR 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

ROBERT HOWARD,)

Plaintiff,)

v.)

No. 98-C-20-B

OKLAHOMA FIXTURE COMPANY,)

Defendant.)

ENTERED ON DOCKET

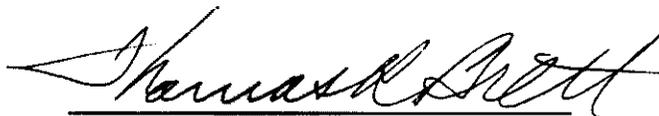
DATE ~~APR 26 1999~~

JUDGMENT

This case came on for jury trial from April 21 through April 23, 1999. After deliberation, the jury entered its verdict in favor of Defendant Oklahoma Fixture Company and against Plaintiff Robert Howard on plaintiff's claim under the Family and Medical Leave Act, 29 U.S.C. §2615(a). Judgment therefore is hereby entered in favor of Defendant Oklahoma Fixture Company and against Plaintiff Robert Howard.

Costs are assessed against Plaintiff Robert Howard, if timely applied for under Local Rule 54.1. The parties are to pay their respective attorneys' fees.

DATED this 23rd day of April, 1999.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

APR 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GILBERT L. WORDEN,

Plaintiff,

v.

DEPARTMENT OF HUMAN SERVICES
OF THE STATE OF OKLAHOMA,

Defendant.

No. 98-CV-424 C (M)

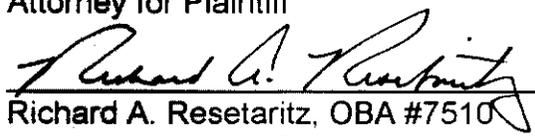
DATE **APR 23 1999**

STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to F.R. Civ. P. 41(a)(1), Plaintiff Gilbert L. Worden and Defendant Oklahoma Department of Human Services stipulate that the above captioned case be dismissed, with prejudice to refiling, with each party to bear its own costs and attorney fees.



Jack Marwood Short, OBA #8208
1709 Utica Square, Suite 230
Tulsa, OK 74114-1420
Tele & Fax: (918) 744-8000
Attorney for Plaintiff



Richard A. Resetaritz, OBA #7510
Assistant General Counsel
Department of Human Services
Sequoyah Memorial Office Building
P. O. Box 25352
Oklahoma City, Oklahoma 73125
(405) 521-3638; Fax: 521-6816
Attorneys for Defendant

Law

*mail
C/W
C/A*

74

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

ELIAS VENTURES, INC.)
d/b/a FREEWAY 100)
INTERNATIONAL,)

Plaintiff,)

vs.)

DAVID REISS and AFFINITY)
MANAGEMENT SERVICES, LTD.)
a United Kingdom corporation,)

Defendants.)

ENTERED ON DOCKET
DATE 4-23-99

No. 98-CV-550-K

F I L E D

APR 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court is the Motion to Dismiss of Defendant David Reiss (#6) and the Motion to Dismiss of Defendant Affinity Management Services (#4) pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. Both Defendants (hereinafter, collectively "Defendants") contend this Court lacks personal jurisdiction over them, because neither Defendant has sufficient minimum contacts with the State of Oklahoma.

I. Standard for Motion to Dismiss- Personal Jurisdiction:

In order to obtain personal jurisdiction over a nonresident defendant in a diversity action, a plaintiff must show that jurisdiction is proper under the laws of the forum state and that the exercise of jurisdiction does not offend the due process clause of the Fourteenth Amendment. Rambo v. American So. Ins. Co., 839 F.2d 1415, 1416 (10th Cir. 1988). In Oklahoma, jurisdiction may be exercised on any basis consistent with the Constitution of Oklahoma and the constitution of the

United States. Okla. Stat. tit. 12, §2004(F). Because Okla. Stat. tit. 12, §2004(F) extends jurisdiction to the limit of the United States Constitution, the court's "only concern is whether ... maintenance of the suit... would... offend the due process clause of the Fourteenth Amendment." Kuenzle v. HTM Sport-Und Freizeitgerate, AG, 102 F.3d 453, 455 (10th Cir. 1996) (Wyoming long-arm statute) (quoting Shanks v Westland Equi. & Parts. Co., 668 F.2d 1165, 1167 (10th Cir. 1982)).

Personal jurisdiction is proper under the Fourteenth Amendment if a nonresident has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 342-43 (1940)). The minimum contacts standard may be satisfied in either of two ways. Twierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1532 (10th Cir. 1996). First, a court may exercise specific jurisdiction if a "defendant has 'purposely directed' his activities at residents of the forum... and the litigation results from the alleged injuries that 'arise out of or relate to those activities.'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S.Ct. 2174, 2181-82 (1985) (citations omitted). Second, a court may exercise general jurisdiction where the defendant's contacts with the forum state, while not rising to the level of traditional notions of presence in the forum state, are nonetheless "continuous and systematic." Twierweiler, 90 F.3d at 1533 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416, 104 S.Ct. 1868, 1873 (1984)). Where "[g]eneral jurisdiction lies... the state may exercise personal jurisdiction over the defendant, even if the suit is unrelated to the defendant's contacts with the state." Kuenzle, 102 F.3d at 456 (quoting Twierweiler, 90 F.3d at 15533).

The plaintiff bears the burden of establishing personal jurisdiction over a defendant. Rambo,

839 F.2d at 1417. When a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits or other written materials, the plaintiff needs only make a prima facie showing that personal jurisdiction exists. *Id.* The allegations contained in the complaint are initially accepted as true, but if challenged, the plaintiff has the duty to support the allegations with competent proof. *Pytlik v. Professional Resources, Ltd.*, 887 F.2d 1371, 1376 (10th Cir. 1989). "Factual disputes at this initial stage must be resolved in plaintiff's favor when the parties submit conflicting affidavits," but affidavits in support of or opposing motions to dismiss for lack of jurisdiction must comply with the requirements of Rule 56(e), Fed.R.Civ.P.; that is, they must be based on personal knowledge, set forth such facts as would be admissible into evidence, and show affirmatively that the affiant is competent to testify to the matters stated. *FDIC v. Oaklawn Apartments*, 959 F.2d 170, 174-75 n. 6 (10th Cir. 1992).

II. Discussion

On June 30, 1998, Elias Ventures, Inc. ("Elias") filed its Petition seeking damages against Reiss and Affinity Management Services Ltd. ("Defendants") for alleged fraud and misrepresentations made in the procurement of a service agreement, as well as alleged slander and libel committed in connection with certain aspects of the Agreement. Now before the Court is Defendants Motion for Dismissal for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2).

Affinity is a United Kingdom corporation, having its principal place of business at 49 Shaftsbury Way, Twickenham, Mddx TW2, 5RW, England. Reiss, an individual, is a citizen of the State of Texas, and is a sales agent for Affinity. Neither Affinity nor Reiss maintains a regular place of business in Oklahoma. Neither Affinity nor Reiss maintains bank accounts, assets or real property

in the State of Oklahoma, nor do they pay taxes or file tax returns in the State of Oklahoma. Neither has a phone listing in any Oklahoma phone book, or has ever advertised in any publication of general circulation or by way of radio or television in such a manner as to target or otherwise be available to Oklahoma residents. Reiss and Affinity have never solicited business or conducted business in the State of Oklahoma.

Eli Masso, president of Elias, called Reiss in Texas to solicit business. Masso subsequently traveled to Dallas, Texas to discuss a possible European venture. Beyond that meeting, Masso and Reiss met several times in Europe to discuss and finalize details of the European venture. Reiss admits having traveled to Oklahoma twice, but argues that both purposes were independent of this matter. Affinity asserts Reiss' trips to Oklahoma were beyond the scope of his duty as an agent to Affinity. No one other than Reiss has dealt with the Plaintiff on behalf of Affinity.

The Defendants contend, first, that this case should be dismissed as to Affinity because the Plaintiff signed a valid forum selection clause requiring jurisdiction to be London, England. Defendants also argue that this case must be dismissed as to both Defendants, Affinity and Reiss, because this Court does not have personal jurisdiction over them. Because this case can be decided on the issue of personal jurisdiction, this Court will not reach the issue of the forum selection clause.

It is the Plaintiff's burden to demonstrate personal jurisdiction over a defendant. Rambo, 839 F.2d at 1417. In support of personal jurisdiction, the Plaintiff argues that Reiss acted on behalf of Affinity on his business trips to Oklahoma. Although Plaintiff concedes that Reiss discussed business matters for the corporation, Affinity Memberships, Inc.,¹ of which Reiss is the president

¹Affinity Memberships, Inc., is not a party to this lawsuit. It is a corporation separate and distinct from Affinity Management Services, Ltd., and is owned by Defendant Reiss.

and owner, Plaintiff contends that matters relevant to this lawsuit were discussed, "apparently on behalf of Defendant Affinity." Plaintiff also relies on the fact that Affinity and the Plaintiff exchanged correspondence to and from the state of Oklahoma. Plaintiff contacted Affinity from Oklahoma on behalf of Freeway 100 Europe Ltd. via mail, but those dealings related specifically to a "Service Contract" which is not at issue in this lawsuit.²

In its briefing, Plaintiff does not specifically indicate whether the Court may assert general or specific personal jurisdiction over the Defendants. Plaintiff has proffered nothing which would support a finding of general jurisdiction. The affidavit testimony of Eli Masso, Plaintiff's current president, is insufficient to do so. His statements do not comprise sufficient evidence to satisfy the "general jurisdiction" standard.

As to specific jurisdiction, there is also insufficient evidence for a prima facie case. Mr. Masso's testimony that "during the two trips to Oklahoma to which Reiss admits in his Affidavit, although Reiss discussed business matters for the related corporation, Affinity Memberships, Inc., Reiss also negotiated and discussed business matters relevant to this lawsuit with Plaintiff" is insufficient to meet the requirements of the due process clause. The contract at issue in this lawsuit was not negotiated and executed in Oklahoma. The only instrument arising from the Oklahoma contacts, the Service Contract, is not at issue in this lawsuit. And in regard to letters sent to and from

²The Court notes that the Plaintiff has attempted to use the "Service Contract" as a basis for establishing personal jurisdiction over the Defendants while disavowing any obligation under such contract in relation to the forum selection clause. Plaintiff states: "This is not an action on the Service Contract and Plaintiff is not a party to the Service Contract. Therefore, the choice of jurisdiction and venue clause in the Service Contract has no relevance to this law suit and should not be enforced by this Court." *Plaintiff's Response to Defendant Affinity Management's Motion to Dismiss* at 4.

Oklahoma in negotiation of the Service Contract, it is well-established that letters are not necessarily sufficient in themselves to establish minimum contacts. Far West Capital, Inc. v. Towne, 46 F.3d 1071, 1077 (10th Cir. 1995). The exercise of jurisdiction depends on the nature of those contacts. Rambo, 839 F.2d at 1418. The proper focus for these contacts is whether they represent an effort by the defendant to "purposefully avail itself of the privilege of conducting activities within the forum state." In his affidavit, Mr. Masso does not elaborate on the exact nature of the cited correspondence. He merely testifies that "[Defendant] sent invoices, payment demands, letters and other information to Plaintiff in Oklahoma." The Court concludes that these generalized communications by Defendants are not sufficient to establish minimum contacts. Accordingly, the Court concludes that it may not properly exercise specific jurisdiction over Defendants.

III. Conclusion

It is hereby ordered, the Motion to Dismiss of Defendant Affinity (#4) and the Motion to Dismiss of Defendant Reiss (#6) are hereby **GRANTED**. This action is **DISMISSED WITHOUT PREJUDICE**. All other pending motions are hereby MOOT.

ORDERED this 21 day of April, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

JANICE DOE, by Next Friend Sally Doe;)
SALLY DOE and SAM DOE, as parents)
of Janice Doe,)

Plaintiffs,)

v.)

INDEPENDENT SCHOOL DISTRICT)
NO. 9 OF TULSA COUNTY,)
OKLAHOMA (UNION PUBLIC)
SCHOOLS),)

Defendant.)

ENTERED ON DOCKET

DATE APR 23 1999

Case No. 96-CV-613-H ✓

FILED

APR 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court on Defendant's Motion for Summary Judgment filed July 23, 1998 (Docket # 58). The Court duly considered the issues and rendered a decision in accordance with the order filed on March 31, 1999.

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

IT IS SO ORDERED.

This 22ND day of April, 1999.



Sven Erik Holmes
United States District Judge

828

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

PROVIDENT LIFE AND ACCIDENT)
INSURANCE CO.; and, SOUTHWEST)
AIRLINES FUNDED WELFARE)
BENEFITS PLAN, a Texas corporation,)

Plaintiffs,)

vs.)

CONNIE MARTIN, as guardian and next)
friend of SHANE F. MARTIN,)

Defendant.)

ENTERED ON DOCKET
DATE APR 23 1999

Case No. 98-CV-103H(E) /

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

ORDER

Now on this 9th day of April 1999, the Defendant Connie Martin's Application for Attorney's Fees comes on for hearing. Plaintiff is represented through counsel, Kent Webb. Defendant is represented through counsel, David Humphreys. After hearing oral argument, having reviewed the papers in the Court file, and being fully advised in the premises, the Court finds as follows:

1. That the Court has considered the five factors articulated in Eaves v. Penn, 587 F.2nd 453, 465 (10th Cir. 1978) in determining whether to grant an order of attorney's fees to Defendant, Connie Martin.

2. The Court is satisfied that Defendant Connie Martin has met the criteria for an award of attorney's fees in the Court's discretion as provided by 29 U.S.C. § 1132(g)(1).

3. The Court determines that the services rendered by counsel for Connie Martin were reasonable and necessary and that the hourly rates charged by counsel for Connie Martin were reasonable under the circumstances.

4. The Court therefore grants Defendant Connie Martin's application for attorney's fees and costs.

5. Defendant Connie Martin shall recover from Plaintiff the sum of \$7,303.25 in attorney's fees.

IT IS SO ORDERED.



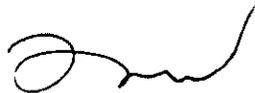
HONORABLE SVEN ERICK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:



David Humphreys, OBA # 12346
Tanya Humphreys, OBA # 15021
1724 East Fifteenth Street
Tulsa, Oklahoma 74104
(918) 747-5300

ATTORNEYS FOR DEFENDANT



Richard White, OBA # 9549
Kent Webb, OBA # /6466
111 West 5th St., Suite 510
Tulsa, Oklahoma 74103-4259
(918) 582-7888

ATTORNEY FOR THE PLAINTIFF

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

LISA COOKSON,)
)
Plaintiff,)
)
v.)
)
AIRBORNE FREIGHT)
CORPORATION, d/b/a)
AIRBORNE EXPRESS,)
)
Defendant.)

ENTERED ON DOCKET

DATE APR 23 1999

97-CV-583-H ✓

FILED

APR 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for a trial by jury on April 12-13, 1999. On April 13, 1999, the jury returned its verdict finding Plaintiff Lisa Cookson was not an employee of Defendant Airborne Freight Corporation d/b/a Airborne Express for purposes of Title VII of the Civil Rights Act of 1964.

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

IT IS SO ORDERED.

This 22ND day of April, 1999.


Sven Erik Holmes
United States District Judge

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

F I L E D

JACKSON NOFIRE,)
SSN: 446-48-1717,)

Plaintiff,)

v.)

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

Defendant.)

APR 21 1999 *SL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 98-CV-11-M ✓

ENTERED ON DOCKET

DATE 4-23-99

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 21ST day of APRIL, 1999.

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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

APR 21 1999 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JACKSON NOFIRE,)
SSN: 446-48-1717,)
)
PLAINTIFF,)
)
vs.)
)
KENNETH S. APFEL,)
Commissioner of the Social)
Security Administration,)
)
DEFENDANT.)

CASE No. 98-CV-11-M ✓

ENTERED ON DOCKET
DATE APR 23 1999

ORDER

Plaintiff, Jackson Nofire, 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 the undersigned 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 January 24, 1995 application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held March 6, 1996. By decision dated May 13, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on November 3, 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.

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 February 8, 1947 and was 49 years old at the time of the hearing. [R. 379]. He claims to have been unable to work since June 18, 1994 due to back pain associated with an on-the-job injury he sustained that date and knee pain and vision problems associated with injuries sustained in a car accident in August 1995. [R. 385-386, 397].

The ALJ determined that Plaintiff has a severe impairment consisting of osteoarthritis but that he retained the residual functional capacity (RFC) to perform his past relevant work (PRW) of poultry process worker and found that Plaintiff was not disabled as defined by the Social Security Act. [R. 19]. The case was thus decided at step four of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the ALJ's decision is not supported by substantial evidence. Specifically, he asserts the ALJ erred by: 1) not considering all Plaintiff's impairments; 2) presenting the Vocational Expert (VE) with incomplete hypothetical questions; and 3) failing to perform a proper pain analysis.

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

Plaintiff's First Statement of Error

Plaintiff claims the evidence of his disability is "overwhelming" and that the ALJ reached his conclusion that Plaintiff is not disabled by failing to consider all Plaintiff's impairments. [Plaintiff's Brief, p. 4]. The Court disagrees. The evidence relied upon by the ALJ as the basis for his decision is neither overwhelmed by other evidence nor mere conclusion. Basically, Plaintiff is dissatisfied with the weight given the evidence by the ALJ. Plaintiff essentially asks the Court to reweigh the evidence. This it cannot do. *Kelley v. Chater*, 62 F.3d 335, 337 (10th Cir. 1995). As to Plaintiff's claim that the ALJ failed to consider all his impairments, review of the ALJ's decision reveals that he considered Plaintiff's allegations of heart trouble, double vision, back pain, knee pain and cough syncope.² The ALJ's decision reflects that he gave full consideration to the medical evidence, including the report by Plaintiff's treating physician, O.R. Nunley, Jr., M.D., in November 1994, that he and Dr. Debout had concluded Plaintiff would not be able to do heavy work in the future and that he had encouraged Plaintiff

² Cough (tussive) syncope: brief loss of consciousness associated with vigorous and explosive paroxysms of coughing, usually seen in men. *Physician's Desk Reference*, 49th Ed. 1995, p.1622.

to go to vocational rehabilitation for job training. [R. 15, 112]. The ALJ also discussed Plaintiff's right knee injury and subsequent treatment, including Plaintiff's release from treatment on January 4, 1996, after Dr. Kupchn determined there were "absolutely no problems with his knee" as well as Plaintiff's statement to Dr. Kupchn on February 20, 1996 that his knee was "feeling as good as it did before his injury." [R. 15, 17, 365, 366]. The ALJ noted Plaintiff had been seen in the emergency room on April 8, 1996, when he reported his legs "gave out" but that he had not had surgery or required an assistive device to ambulate. [R. 17]. Plaintiff's testimony that his knees hurt to bend but that his doctor had told him to bend his knees for exercise and that he squats to pick up something on the floor was also considered by the ALJ as reflected in his assessment of Plaintiff's RFC which included limitations on bending, crouching and stooping. [R. 17].

Likewise, the ALJ's decision demonstrates that he reviewed and considered the evidence regarding Plaintiff's visual problems and past heart surgery. [R. 16-17]. Plaintiff's claim that the ALJ did not question him or his witness about his chest pain is factually inaccurate. At the hearing, the ALJ questioned Plaintiff specifically about references in the medical record of congestive heart failure, pneumonia and chronic cardiomegaly. [R. 394]. Plaintiff testified he had been monitored and "checked out" for congestive heart failure, that the pneumonia had been taken care of and the heart problems had been resolved, except for pain once in a while which he didn't even mention to his doctors. [R. 394-395]. The ALJ also explored Plaintiff's complaints of

vision problems, finding that those problems are mild and treatable and have no affect on Plaintiff's ability to work. [R. 17, 397-398].

Plaintiff complains that the ALJ did not "consider" his headaches. However, Plaintiff did not list headache as an impairment either on his applications for benefits or at the hearing, even after being asked by the ALJ at the conclusion of his testimony, whether all his ailments had been covered. [R. 85, 396-397]. Plaintiff points to one page in the medical record where occasional headache was noted, [R. 243], another page which indicates Plaintiff reported headache after his motor vehicle accident, [R. 248-249], and a one-time report of tension headache in the treatment records of the Hastings Indian Hospital, [R. 323]. As Plaintiff presented no evidence that he suffered headache so severe as to be disabling, the ALJ was not required to consider the impact of a headache impairment. *Taylor v. Heckler*, 765 F.2d 872, 876 (9th Cir.1985)(ALJ not obligated to accept as true, Plaintiff's subjective complaints that are not accompanied by medical evidence). Such complaints may be disregarded if they are unsupported by clinical findings. *Maounis v. Heckler*, 738 F.2d 1032, 1034 (9th Cir.1984); *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986).

The same is true of Plaintiff's tussive syncope condition. He was hospitalized for injuries sustained in a motor vehicle accident which was reported to have followed a "coughing episode." [R. 131-132]. Tussive syncope was diagnosed after a neurological examination. After an MRI of the head to rule out lesion on the brain stem was performed, there is no indication that any of Plaintiff's physicians considered this condition significant enough to warrant further medical procedures. [R. 136-137]. Nor

did Plaintiff list the condition as impairing his ability to work on his disability report or at the hearing. [R. 85-99].

At the hearing, Plaintiff testified that his pain and inability to walk and bend were the reasons he was unable to work. [R. 393]. When asked whether there was anything else about his condition that had not been covered, Plaintiff discussed his vision problems and no others. [R. 397-398]. The ALJ properly considered Plaintiff's impairments, assessed his RFC in accordance with his review of all the evidence and determined Plaintiff's limitations did not preclude him from engaging in his past work as a poultry processor. The determination is supported by substantial evidence in the record.

Plaintiff's Second Statement of Error

Plaintiff contends that the ALJ did not include all of Plaintiff's complaints in the questions he posed to the VE, rendering his reliance upon the VE's testimony as a basis for his determination improper. Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, in posing a hypothetical question, the ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990).

It is clear in this case, that the ALJ did not accept as true Plaintiff's allegations of problems with motion of the neck and hands, double vision, chest pain, headaches and cough syncope to the extent alleged. As discussed above, the ALJ's RFC

assessment is supported by the record. The ALJ presented the VE with hypothetical questions which properly set forth impairments which were accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). Thus, the ALJ's reliance upon the VE's testimony in finding Plaintiff not disabled was proper.

Plaintiff's Third Statement of Error

Plaintiff contends the ALJ failed to perform a proper pain analysis. Again, the Court disagrees. The ALJ considered Plaintiff's allegations of pain and concluded that Plaintiff does indeed experience a degree of pain. [R. 17, 18]. He concluded, however, that although the pain experienced by Plaintiff is limiting, it is not severe enough to preclude all types of work. The mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." *Gossett v. Bowen*, 862 F.2d 802, 807 (10th Cir. 1988). The ALJ limited Plaintiff's ability to work in accordance with his finding and determined Plaintiff's limitations did not preclude him from engaging in his past work as poultry processor. The medical records support the finding of the ALJ that Plaintiff has the residual functional capacity to perform work-related activities except for work involving lifting over 10 pounds frequently or 20 pounds occasionally and with more than occasional bending, stooping and crouching. None of Plaintiff's treating physicians suggested that Plaintiff was disabled or completely impaired by pain. Rather, Plaintiff's treating physicians agreed that Plaintiff was limited in his ability to do the heavy work he had done previously, but none stated that he was unable to engage in any gainful activity. The ALJ considered this

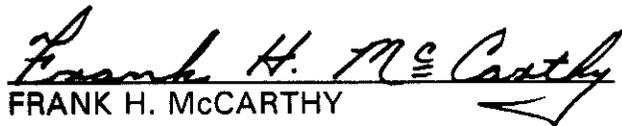
evidence, as well as Plaintiff's daily activities and the other evidence and correctly determined that Plaintiff's pain does not prevent him from performing any work.

The determination is supported by substantial evidence in the record. The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987), *Kepler v. Chater*, 68 F.3d 387 (10th Cir. 1995), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929, and Social Security Ruling 95-5p and appropriately applied the evidence to those guidelines. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Commissioner and the courts.

Conclusion

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

Dated this 21ST day of APRIL, 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

VIRGINIA BALDRIDGE,)
)
 Plaintiff,)
)
 vs.)
)
 INTEGRATED HEALTH)
 SERVICES, INC.,)
)
 Defendants.)

ENTERED ON DOCKET

DATE APR 23 1999

Case No. 98 CV 0464 H (J)

FILED

APR 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

UPON the Joint Stipulation for Dismissal With Prejudice filed herein by the parties, it is hereby,

ORDERED, that this case is dismissed with prejudice, each party to bear his or its own costs, expenses and attorneys' fees.

DATED: This 22ND of April, 1999.


United States District Judge

Submitted by:

Leslie C. Rinn, OBA # 12160
HALL, ESTILL, HARDWICK, GABLE
GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103
(918) 594-0400

6

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

FILED
APR 21 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE TRAVELERS INDEMNITY §
OF ILLINOIS, As Subrogee of §
DON'S FLOOR COVERING, INC., §
DON'S FLOOR COVERING, INC. §
and JAMES LAMBETH, INC. §

Plaintiffs, §

vs. §

UNION PACIFIC RAILROAD COMPANY, §
As Successor-In-Interest To The §
Missouri Pacific Railroad §
Company And Missouri-Kansas-Texas §
Railroad Company §

Defendant. §

Civil Action No. 97-CV-851-B /

ENTERED ON DOCKET
DATE APR 22 1999

ORDER TO DISMISS WITH PREJUDICE

AND NOW, this 21ST day of Apr., 1999, it is hereby ordered
that the above-captioned matter is dismissed with prejudice.


JUDGE THOMAS R. BRETT

43

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

JOHN ROBERT DEMOS, JR.)
)
Plaintiff,)
)
vs.)
)
JOHN DOE/DIRECTOR of SAMUEL)
NOBLE ROBERTS FOUNDATION,)
)
Defendant.)

No. 98-CV-348 K (E)

ENTERED ON DOCKET
DATE 4-22-99

F I L E D

APR 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

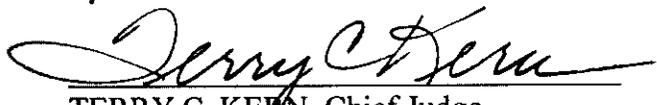
ORDER

Plaintiff, a prisoner incarcerated at the Washington State Penitentiary, filed a complaint, entitled "Impairment of Contract Claim," along with a "Declaration and Application to Proceed *in forma pauperis*" on May 11, 1998. The Court denied Plaintiff's motion to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(g). By Order entered March 17, 1999 (#7), the Court informed Plaintiff that he could not proceed with this action unless he paid in full the \$150.00 filing fee on or before April 16, 1999. Plaintiff was also advised that failure to pay the filing fee as directed would result in the dismissal of this action without prejudice.

To date, Plaintiff has not paid the filing fee as ordered. Therefore, the Court concludes this action should be dismissed without prejudice for lack of prosecution.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is dismissed without prejudice for lack of prosecution.

SO ORDERED THIS 21 day of April, 1999.


TERRY C. KEEN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

APR 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANTHONY WAYNE STEWART,)
)
Petitioner,)
)
vs.)
)
STEVE HARGETT,)
)
Respondent.)

Case No. 97-CV-431-E (M) ✓

ENTERED ON DOCKET

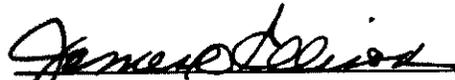
DATE APR 22 1999

JUDGMENT

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

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

SO ORDERED THIS 21st day of April, 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

APR 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANTHONY WAYNE STEWART,)

Petitioner,)

vs.)

STEVE HARGETT,)

Respondent.)

Case No. 97-CV-431-E (M) ✓

ENTERED ON DOCKET

DATE APR 22 1999

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, appearing *pro se*, paid the filing fee to commence this action on May 1, 1997. Respondent has filed a response to the only remaining issue in this case (#13).¹ Petitioner has filed a motion for summary judgment (#14) and a reply to Respondent's response (#15). As more fully set out below the Court concludes that this petition should be denied.

As a preliminary matter, the Court finds Petitioner's motion for summary judgment should be denied. Petitioner premises his motion on the allegation that Respondent failed to comply with this Court's Order, entered September 29, 1998, directing Respondent to file his response to the remaining issue raised in the petition within thirty (30) days of the entry of the Order. After reviewing the record, the Court finds Petitioner's motion to be without merit. Respondent filed a timely response on October 29, 1998. Petitioner is not entitled to summary judgment.

¹By Order dated September 28, 1998 (#12), the Court found the other issue raised by Petitioner in the instant petition, that his due process and equal protection rights had been violated by the state district court's refusal to provide a copy of the trial record at state's expense, had been rendered moot by the state district court's decision to grant Petitioner's motion for trial records at public expense.

BACKGROUND

In his petition for writ of habeas corpus, Petitioner challenges his Judgment and Sentence entered March 29, 1995, in Tulsa County District Court, Case No. CF-94-1464. Petitioner was convicted by a jury of First Degree Murder and received a sentence of life imprisonment. On direct appeal, the Oklahoma Court of Criminal Appeals affirmed the judgement and sentence in an unpublished summary opinion dated May 14, 1996. One of the claims considered and rejected by the state appellate court was the claim raised in the instant petition, that the evidence was insufficient to sustain Petitioner's conviction.

Petitioner was convicted of the March 19, 1994 murder of Leon Hudson. According to the testimony of the medical examiner, Hudson died as a result of "asphyxiation by a ligature strangulation." (Trans. at 205). At least two witnesses testified that Hudson had just received his federal income tax refund and had several one hundred dollar bills in his possession on the day of the murder. (Trans. at 24 and 38). Eye witness Darby Dodson testified that while he, Petitioner and Hudson were at the Trapeze, a bar located in Tulsa, Oklahoma, Petitioner told him that Hudson "had a great deal of money on him and that we needed to take it away from him or get it away from him sometime, somehow." (Trans. at 50). The murder occurred after Petitioner, Dodson and Hudson left the Trapeze in Dodson's car. Dodson was driving, Petitioner was in the back seat, and the victim, Hudson, was in the front passenger seat. (Trans. at 53). According to Dodson, Petitioner held a tightly twisted belt around Hudson's neck for 20-30 minutes. (Trans. at 72-73). During that time, Dodson drove to a rural location in Rogers County, Oklahoma, where Hudson's body was left by the roadside. Dodson testified that Petitioner took Hudson's wallet and a roll of quarters from Hudson's pockets before pushing the body out of the car. (Trans. at 69).

Petitioner testified in his own defense at trial. (Trans. at 274-340). Although he admitted placing the belt around Hudson, he testified that he took that action in an effort to restrain Hudson who had become combative after Petitioner accused him of stealing tip money from one of the waitresses at the Trapeze. (Trans. at 296-300). Petitioner testified that he never intended to kill Hudson. (Trans. at 336).

ANALYSIS

Respondent concedes, and this Court finds, that Petitioner meets the exhaustion requirements under the law. 28 U.S.C. § 2254(b). The Court also finds that an evidentiary hearing is not necessary because Petitioner has not demonstrated that the claim before the Court relies on either a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, or a factual predicate that could not have been previously discovered through the exercise of due diligence and that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found Petitioner guilty of the underlying offense. 28 U.S.C. § 2254(e)(2).

The Antiterrorism and Effective Death Penalty Act (“AEDPA”), enacted April 24, 1996, amended the standard of review in habeas corpus cases as follows:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). As stated above, **Petitioner** raised his challenge to the sufficiency of the evidence on direct appeal. After considering the merits of the claim, the Oklahoma Court of Criminal Appeals rejected the challenge and affirmed **Petitioner's** conviction. Thus, the § 2254(d) standard of review governs this Court's review of **Petitioner's** claim.

After careful review of the record in **this case**, including the trial transcript, the Court finds **Petitioner** has failed to demonstrate that the decision of the Oklahoma Court of Criminal Appeals was contrary to clearly established federal law as set forth by the Supreme Court or that there was an unreasonable application of Supreme Court law to the facts of this case. Sufficiency of the evidence claims are evaluated based on the following standard established by the Supreme Court:

. . . the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.

Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (citations omitted). Although the Oklahoma Court of Criminal Appeals did not provide a detailed analysis of **Petitioner's** claims, the summary opinion does state that "[a]fter thorough consideration of these propositions and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we have determined

that neither reversal nor modification is required under the law and evidence." The Oklahoma Court of Criminal Appeals applies the Jackson standard in evaluating challenges to the sufficiency of the evidence. See, e.g., Davis v. State, 916 P.2d 251 (Okla. Crim. App. 1996); Brown v. State, 871 P2d 56 (Okla. Crim. App. 1994); Allen v. State, 862 P.2d 487 (Okla. Crim. App. 1993). Under § 2254(d), Petitioner must demonstrate that in rejecting his challenge to the sufficiency of the evidence, the Oklahoma Court of Criminal Appeals decision was an unreasonable application of Jackson or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In evaluating the evidence presented at trial, the Court does not weigh conflicting evidence or consider witness credibility. Wingfield v. Massie, 122 F.3d 1329, 1332 (10th Cir. 1997); Messer v. Roberts, 74 F.3d 1009, 1013 (10th Cir. 1996). Instead, the Court must view the evidence in the "light most favorable to the prosecution," Jackson, 443 U.S. at 319, and "accept the jury's resolution of the evidence as long as it is within the bounds of reason." Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir. 1993).

Petitioner claims that "no trier of the fact could have found that the petitioner harbored a specific intent to kill, which resulted in a fundamental miscarriage (sic) of justice." (#1). He bases his claim on alleged inconsistencies in the testimony of witness Darby Dodson and on the testimony of the medical examiner, Dr. Ronald F. Distefano. Petitioner alleges that during one point in his testimony, Dodson stated that Petitioner held the belt around the victim's neck for 20-30 minutes and then later testified the "he did not know if the belt was around Hudson's neck continuously for that 20-30 minutes." (#1, citing to Trans. at 73 and 102). Petitioner also alleges that Dodson testified inconsistently concerning whether or not Petitioner ever got out of the car when Hudson's

body was removed from the car. (#1, citing to Trans. at 68-70, 52, 90, 301). As to the medical examiner's testimony, Petitioner contends ~~the~~ testimony creates an issue as to the cause of death. (#1, citing to Trans. at 188-269).

Under Oklahoma law, "a person commits murder in the first degree when that person unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof." Okla. Stat. tit. 21, § 701.7(A). The Court liberally construes Petitioner's claim as an assertion that the cited inconsistencies in Dodson's testimony and the medical examiner's testimony negate the element of intent required for a jury to convict an accused of first degree murder. See Haines v. Kerner, 404 U.S. 519, 520 (1972) (requiring a Court to construe liberally pleadings filed by a *pro se* litigant). However, after reviewing the trial transcript, the Court finds that Dodson's testimony was not inconsistent. Furthermore, the challenged testimony, even if inconsistent, would not negate a finding of intent in light of other testimony presented at trial. Other witnesses corroborated Dodson's testimony that Hudson was carrying several one hundred dollar bills on the day of the murder. Furthermore, Dodson's testimony concerning Petitioner's use of a belt to asphyxiate Hudson was corroborated by the testimony of William Goree, a detective in the Tulsa Police Department, and by the testimony of the medical examiner. Goree testified that a few days after the murder, he placed a "body mike" on Dodson. (Trans. at 348). He heard Petitioner tell Dodson that he held the belt around the victim's neck from where Dodson saw him put it around the victim until they dropped the victim's body off on a gravel road in Rogers County, Oklahoma, and that he held it "fucking tight." (Trans. at 350). Also, the medical examiner testified that he observed ligature marks, or "distinct purplish colored parallel

markings encircling the [victim's] neck." (Trans. at 201). Based on all the testimony and evidence presented at trial, the Court finds the jury could reasonably have found beyond a reasonable doubt that Petitioner did intend to kill the victim.

As to Petitioner's challenge to the medical examiner's testimony, a review of the trial transcript reveals that the medical examiner unequivocally testified that the victim died "as a result of asphyxiation by a ligature strangulation." (Trans. at 205). Contrary to the Petitioner's argument, Dr. Distefano's testimony did not create an issue as to the cause of death. Even if Hudson died as a result of cardiac arrhythmia, it is clear from the medical examiner's testimony that the ligature placed around Hudson's neck nonetheless caused his death. Furthermore, the testimony cited by Petitioner would not negate a finding of intent in light of other testimony presented at trial, as discussed above.

After carefully reviewing the trial transcript, and in the light most favorable to the prosecution, the Court finds there was sufficient evidence from which a reasonable jury could have inferred that Petitioner committed the murder with the intent necessary to establish first degree murder. Thus, Petitioner has failed to satisfy the § 2254(d) standard and his petition for writ of habeas corpus should be denied.

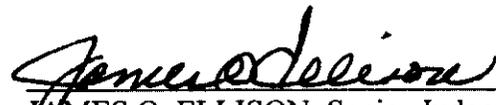
CONCLUSION

Petitioner has failed to demonstrate that he is in custody in violation of the Constitution or laws of the United States. Therefore, the petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's motion for summary judgment (#14) is **denied**.
2. The petition for writ of habeas corpus is **denied**.

SO ORDERED THIS 21st day of April, 1999.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

How

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

APR 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VIRGINIA BALDRIDGE,)

Plaintiff,)

vs.)

INTEGRATED HEALTH)
SERVICES, INC.,)

Defendants.)

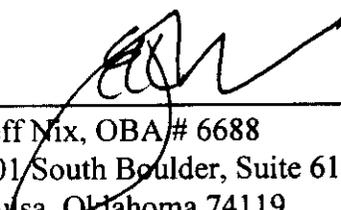
Case No. 98 CV 0464 H (J)

ENTERED ON DOCKET

DATE 4/21/99

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The Plaintiff, Virginia Baldrige, and the Defendant, Integrated Health Services, Inc., hereby stipulate to the dismissal of this case with prejudice, each party to bear his or its own costs, expenses and attorneys' fees.



Jeff Mix, OBA # 6688
601 South Boulder, Suite 610
Tulsa, Oklahoma 74119
(918) 587-3193

ATTORNEY FOR PLAINTIFF



Leslie C. Rinn, OBA # 12160
HALL, ESTILL, HARDWICK, GABLE
GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103
(918) 594-0400

ATTORNEYS FOR DEFENDANT

12

05

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

FILED

APR 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SAMSON RESOURCES COMPANY)
)
Plaintiff,)
)
vs.)
)
EXXON CORPORATION)
)
Defendant.)

Case No. 98-CV-0163-H (M)

ENTERED ON DOCKET

DATE 4/21/99

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Samson Resources Company, and Defendant, Exxon Corporation, stipulate to the dismissal of the claims and counterclaims asserted in the referenced litigation with prejudice to the refiling of the same. Each party shall bear its own attorneys' fees and costs.

Dated this 20th day of April, 1999.

Michael E. Smith

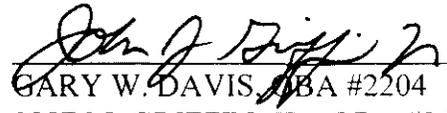
ROBERT N. BARNES
MICHAEL E. SMITH
ROBERT D. MCCUTCHEON

-Of The Firm-
BARNES, SMITH & LEWIS, P.C.
701 N.W. 63rd Street, Suite 500
Oklahoma City, OK 73116
Fax: (405) 843-0790

ATTORNEYS FOR PLAINTIFF
SAMSON RESOURCES COMPANY

18

mail
CIS
C/N



GARY W. DAVIS, OBA #2204

JOHN J. GRIFFIN, JR., OBA #3613

L. MARK WALKER, OBA #10508

-Of the Firm -

CROWE & DUNLEVY

A Professional Corporation

1800 Mid-America Tower

20 North Broadway

Oklahoma City, Oklahoma 73102

(405) 235-7700

ATTORNEYS FOR DEFENDANT

EXXON CORPORATION

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Plaintiff,

v.

DEAN MCDANIEL;
LEOLA MCDANIEL;
BANK OF OKLAHOMA;
COUNTY TREASURER, Creek County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Creek County, Oklahoma,

Defendants.

ENTERED ON CLERK'S

DATE 4/21/99

CIVIL ACTION NO. 99-CV-0285-K (M)

NOTICE OF DISMISSAL

The Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney, hereby gives notice that this action is dismissed without prejudice pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure. The Plaintiff would further advise the Court that Plaintiff was unaware that Defendant, Dean McDaniel, had filed a Chapter 7 Bankruptcy on April 15, 1999, having received notice of the bankruptcy on April 21, 1999, as shown on the attached Notice of Chapter 7 Bankruptcy Case.

UNITED STATES OF AMERICA

STEPHEN C. LEWIS
United States Attorney

CATHRYN D. MCCLANAHAN, OBA #014853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 21st day of April, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to:

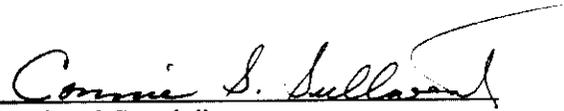
Dean McDaniel
4219 West 82nd Street
Tulsa, OK 74132

Leola McDaniel
4219 West 82nd Street
Tulsa, OK 74132

Bank of Oklahoma
Service Agent: Frederic Dorwart, Esq.
124 East 4th
Tulsa, OK 74103

County Treasurer
Dessa Hammontree
Creek County Courthouse
Sapulpa, OK 74066

Board of County Commissioners
Betty Rentz, County Clerk
Creek County Courthouse
Sapulpa, OK 74066


Paralegal Specialist

Notice of Dismissal
Case No. 99-CV-0285-K (M) (McDaniel)

CDM:css

UNITED STATES BANKRUPTCY COURT
Northern District of Oklahoma

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on 04/15/99.

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address): MCDANIEL, DEAN 4219 W. 82ND STREET TULSA, OK 74132	RECEIVED APR 21 1999
--	-----------------------------

Case Number: 99-01469	Social Security/Taxpayer ID Nos.: 448-54-0955
--------------------------	--

Attorney for Debtor(s) (name and address): JONATHAN E. SHOOK JONATHAN E. SHOOK, PLLC 2121 S. COLUMBIA, SUITE 302 TULSA, OK 74114 Telephone number: (918) 744-0833	Bankruptcy Trustee (name and address): STEVEN W. SOULE HALL, ESTILL, HARDWICK, GABLE, ET AL 320 S BOSTON AVE, STE 400 TULSA, OK 74103-3708 Telephone number: (918) 594-0400
--	--

Meeting of Creditors:

Date: **May 20, 1999** Time: **10:00 a.m.**
 Location: **The Federal Building, 224 S. Boulder Avenue, Rm. B04 Tulsa, OK 74103**

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Debts:
July 19, 1999

Deadline to Object to Exemptions:
Thirty (30) days after the *conclusion* of the meeting of creditors.

Appointment of Trustee:

The United States Trustee has appointed the named Trustee to serve in the Debtor(s) estate under the Trustee's blanket bond, effective the date of this notice, pursuant to 11 U.S.C. Sections 322 and 701, and Bankruptcy Rule 2008.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Please Do Not File A Proof of Claim Unless You Receive a Notice To Do So.

Address of the Bankruptcy Clerk's Office: United States Bankruptcy Clerk 224 S Boulder Ave, 1st Floor Tulsa, OK 74103 Telephone number: 918-581-7181	FILED BY THE COURT ON April 15, 1999 Timothy R. Walbridge, Clerk, U.S. Bankruptcy Court Northern District of Oklahoma
---	--

Hours Open: 8:30am-4:30pm	Date: April 15, 1999
------------------------------	-------------------------

F I L E D

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

APR 20 1999 *[Signature]*

CHARLES F. POST,)
)
) **Plaintiff,**)
)
) **v.**)
)
) **KENNETH S. APFEL,**)
) **Commissioner, Social**)
) **Security Administration,**)
)
) **Defendant.**)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-586-EA ✓

ENTERED ON DOCKET

DATE APR 21 1999

ORDER

On March 15, 1999, this Court remanded this case to the Commissioner for further administrative action. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of \$2,032.75 for attorney fees and \$150.00 in costs for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of \$2,032.75 and \$150.00 in costs for a total award of \$2,182.75 under EAJA. If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 20th day of April 1999.

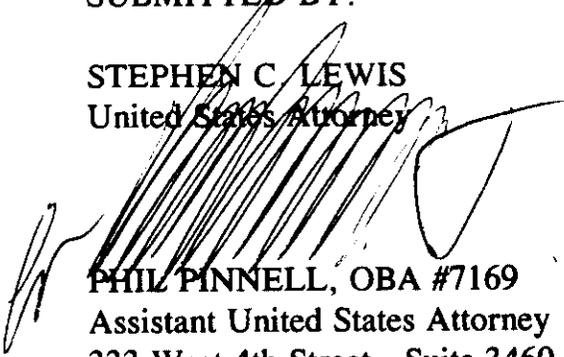
16

Claire V. Eagan

CLAIRE V. EAGAN
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street., Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

W

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

FILED

BRIAN EPPERSON,

Plaintiff,

vs.

MID-CENTURY INSURANCE
COMPANY,

Defendant.

APR 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-0124-B (J)

ENTERED ON DOCKET
APR 21 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, Brian Epperson, and the Defendant, Mid-Century Insurance Company, and pursuant to Rule 41 in the Federal Rules of Civil Procedure hereby stipulates to dismiss the above captioned matter with prejudice to any refiling as the parties have settled all issues.

Respectfully submitted,

By Joseph P. Clark, Jr.
JOSEPH P. CLARK, JR.
Attorney for the Plaintiff

By Dennis King
DENNIS KING
Attorney for the Defendant

5

CTJ

CERTIFICATE OF MAILING

I, JOSEPH F. CLARK, JR., hereby certify that on the ^{20th} day of April, 1999, I mailed a true and correct copy of the above and foregoing instrument with proper postage thereon fully prepaid to:

Mr. Dennis King
Attorney at Law
603 Expressway Tower
2431 East 51st Street
Tulsa, Oklahoma 74105-6033



JOSEPH F. CLARK, JR.

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

F I L E D

APR 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FRANKLIN DAGGS,)
)
Plaintiff,)

v.)
)

Case No. 96CV-967B

ALEXANDER & ALEXANDER, INC.)
(Oklahoma); ALEXANDER &)
ALEXANDER SERVICES, INC.; AON)
GROUP, INC.; ALEXANDER &)
ALEXANDER, INC.; AON RISK)
SERVICES, INC.; ALEXANDER &)
ALEXANDER PENSION PLAN; AON)
PENSION PLAN; ALEXANDER &)
ALEXANDER THRIFT PLAN; and)
AON SAVINGS PLAN,)
)
Defendants.)

ENTERED ON DOCKET
DATE **APR 21 1999**

ORDER OF DISMISSAL WITH PREJUDICE

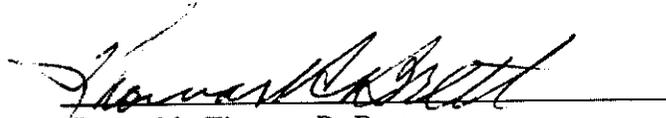
NOW on this 20th day of April, 1999, the Court has for its consideration the Stipulation for Dismissal With Prejudice jointly filed in the above-styled and numbered cause by Plaintiff and Defendants. Based upon the representations and requests of the parties as set forth in the foregoing stipulation, it is:

ORDERED that Plaintiff's Cause of Action under the Americans with Disabilities Act (ADA) as contained within Plaintiff's Second Amendment to Third Amended Complaint and claims for relief against Defendants is hereby dismissed with prejudice.

106

IT IS FURTHER ORDERED that each party shall bear its own costs and attorney fees.

IT IS SO ORDERED.


Honorable Thomas R. Brett

David L. Sobel OBA #8444
Leblang, Clay, Sobel & Ashbaugh
7615 East 63rd Place, Suite 200
Tulsa, Oklahoma 74133
(918) 254-1414

Attorneys for Plaintiff

J. Patrick Cremin OBA #2013
William D. Fisher OBA #17621
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON
320 S. Boston Avenue, Suite 400
Tulsa, OK 74103-3708
(918) 594-0400

Attorneys for Defendants