

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

MAY 07 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONNA LOWE,)
)
 Plaintiff,)
)
 vs.)
)
 TOWN OF FAIRLAND,)
 Oklahoma, a Municipal Corporation;)
 et al,)
 Defendants.)

No. 96-C-0066-K ✓

ENTERED ON DOCKET
DATE MAY 10 1999

**JOINT STIPULATION OF DISMISSAL
OF DEFENDANTS BEVERLY HILL, DON JONES, SHIRLEY MANGOLD
AND LORETTA VINYARD**

Pursuant to Fed.R.Civ.Proc. 41(a)(1) the plaintiff and defendants' jointly stipulate that the defendants Beverly Hill, Don Jones, Shirley Mangold and Loretta Vinyard are and shall be dismissed with prejudice, with each party to bear its on costs and attorneys fees.

Dated this 7th day of May, 1999.


D. Gregory Bledsoe, OBA #0874
1717 S. Cheyenne
Tulsa, Oklahoma 74119-3828

and
Ronald Main
Ronald Main, P.C.
2800 Center, Suit 821
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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 5-10-99

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

CIVIL ACTION NO. 98-CV-211-K ✓

PROCEEDS FROM THE SALE OF)
REAL PROPERTY KNOWN AS:)
8908 EAST 74TH STREET SOUTH,)
TULSA, OKLAHOMA, IN THE)
AMOUNT OF SEVENTEEN)
THOUSAND FIVE HUNDRED TWO)
DOLLARS AND 95/100 (\$17,502.95))

Defendants.)

F I L E D

MAY 07 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT OF FORFEITURE

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

The verified Complaint for Forfeiture *In Rem* was filed in this action on the 17th day of March, 1998, alleging that the defendant properties were subject to seizure and forfeiture pursuant to 18 U.S.C. § 981(a)(1)(4), because they are properties which were involved in a transaction or attempted transaction in violation of 18 U.S.C. §§ 1956 or 1957, or are properties traceable to such proceeds and pursuant to 18 U.S.C. § 1955 because the defendant properties were used in an illegal gambling business in violation of 18 U.S.C. § 1955..

A Warrant of Arrest and Notice *In Rem* was issued on the 20th day of March, 1998, by the Clerk of this Court to the United States Marshal for the Northern District of

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Oklahoma for the seizure and arrest of the defendant properties and for publication of notice of arrest and seizure once a week for three consecutive weeks in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, 8545 East 41st Street, Tulsa, Oklahoma, a newspaper of general circulation in the district in which this action is pending and in which the defendant properties are located, and further providing that the United States Marshals Service personally serve the defendant properties and all known potential owners thereof with a copy of the Complaint for Forfeiture *In Rem* and Warrant of Arrest and Notice *In Rem*, and that immediately upon the arrest and seizure of the defendant properties the United States Marshals Service take custody of the defendant properties and retain the same in its possession until the further order of this Court.

The United States Marshals Service served a copy of the Complaint for Forfeiture *In Rem*, the Warrant of Arrest and Notice *In Rem*, and the Order on the defendant properties as follows, to-wit:

- A. Proceeds from the sale of Real Property Known as 8908 East 74th Street South, Tulsa, Oklahoma, in the amount of Seventeen Thousand Five Hundred Two Dollars and 95/100 (\$17,502.95);
Served June 5, 1998
- B. Proceeds, Including Accrued Interest, if any, of Boatmen's National Bank of Oklahoma Account #13-1500-285300 in the name of Joseph Edward Spaulding;
Served June 5, 1998
- C. Proceeds, including accrued interest, if any, in Prudential Annuity Contract Account #98 512 810 in the name of Joseph Edward Spaulding;
Served June 5, 1998
- D. One 1995 20' Crownliner 200 Deck Boat HIN

- ##JTC21713E595 and One 1995 Tandem Axle Boat Trailer, VIN #4TBBT2026SK001049;
Served June 5, 1998
- E. One 1990 Lexus LS400 4 Door Automobile VIN #JT8UF11E4L0038608;
Served June 5, 1998
- F. One 1995 Chevrolet Silverado 1500 Pickup Truck, VIN #2GCEC19K9S1216878;
Served June 5, 1998
- G. One RCA Big Screen TV with Surround Sound System;
Served April 27, 1999
- H. One Magnavox 13" color TV, Serial Number 8043409;
Served April 26, 1999
- I. One Magnavox 27" color TV, Serial Number 39993174;
Served April 26, 1999
- J. One Panasonic VCR, Serial Number I35A24976;
Served April 26, 1999
- K. One Xerox Copier, Serial Number 001906;
Served April 26, 1999
- L. One GBC Shredmaster Personal Shredder 91S, Serial Number GL05141;
Served April 26, 1999
- M. The sum of Six Thousand Seven Hundred Eighty-Four Dollars in United States Currency.
Served June 5, 1998.

JOSEPH EDWARD SPAULDING was determined to be the only potential claimant in this action with possible standing to file a claim to the defendant properties. JOSEPH EDWARD SPAULDING filed his Notice of Claim to the defendant properties on April 30, 1998. JOSEPH EDWARD SPAULDING executed and filed his Stipulation for Forfeiture

on March 31, 1999.

USMS 285 reflecting the service upon the defendant properties is on file herein. The Claim and Stipulation for Forfeiture of JOSEPH EDWARD SPAULDING is on file herein.

All persons or entities interested in the defendant properties 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 other persons or entities upon whom service was effected more than thirty (30) days ago have filed a Claim, Answer, or other response or defense herein, save and except JOSEPH EDWARD SPAULDING who filed his claim herein.

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 properties is located, on May 28, June 4 and 11, 1998. Proof of Publication was filed June 22, 1998.

No other claims in respect to the defendant properties have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant properties, save and except JOSEPH EDWARD SPAULDING, who filed his Claim and his Stipulation for Forfeiture herein, and the time for presenting claims and answers, or other pleadings, has expired.

That the plaintiff, the United States of America, and the claimant, JOSEPH EDWARD SPAULDING, entered into a Stipulation for Forfeiture of the defendant properties. The Stipulation was filed herein March 31, 1999, wherein JOSEPH EDWARD SPAULDING stipulated to the forfeiture of the defendant properties pursuant to 18 U.S.C. § 981(a)(1)(A) because they are properties involved in transactions or attempted transactions in violation of 18 U.S.C. §§ 1956 or 1957, or are properties traceable thereto, and/or because they are properties used in an illegal gambling business in violation of 18 U.S.C. § 1955.

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

- A. Proceeds from the sale of Real Property Known as 8908 East 74th Street South, Tulsa, Oklahoma, in the amount of Seventeen Thousand Five Hundred Two Dollars and 95/100 (\$17,502.95);
- B. Proceeds, Including Accrued Interest, if any, of Boatmen's National Bank of Oklahoma Account #13-1500-285300 in the name of Joseph Edward Spaulding;
- C. Proceeds, including accrued interest, if any, in Prudential Annuity Contract Account #98 512 810 in the name of Joseph Edward Spaulding;
- D. One 1995 20' Crownliner 200 Deck Boat HIN ##JTC21713E595 and One 1995 Tandem Axle Boat Trailer, VIN #4TBBT2026SK001049;
- E. One 1990 Lexus LS400 4 Door Automobile VIN #JT8UF11E4L0038608;
- F. One 1995 Chevrolet Silverado 1500 Pickup Truck, VIN #2GCEC19K9S1216878;

- G. One RCA Big Screen TV with Surround Sound System;
- H. One Magnavox 13" color TV, Serial Number 8043409;
- I. One Magnavox 27" color TV, Serial Number 39993174;
- J. One Panasonic VCR, Serial Number I35A24976;
- K. One Xerox Copier, Serial Number 001906;
- L. One GBC Shredmaster Personal Shredder 91S, Serial Number GL05141;
- M. The sum of Six Thousand Seven Hundred Eighty-Four Dollars in United States Currency.

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

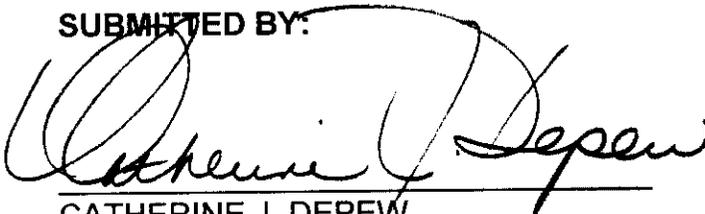
Entered this 6 day of May 1999.



TERRY C. KERN

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

SUBMITTED BY:



CATHERINE J. DEPEY
Assistant United States Attorney

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

JIMMIE C. CARL,
SSN: 440-40-1673

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

No. 98-CV-504-K

ENTERED ON DOCKET

DATE 5-10-99

FILED
MAY 07 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On March 30, 1999, Magistrate Judge Joyner entered his Report and Recommendation regarding the Plaintiff's appeal of the decision of the Commissioner denying Social Security benefits. The Magistrate Judge recommended the Commissioner's decision be reversed and remanded for further proceedings. No objection has been filed to the Report and Recommendation and the ten-day time limit of Rule 72(b) F.R.Cv.P. has passed. Additionally, through an independent inquiry, this Court has reviewed the Report and Recommendation and sees no reason to modify it. The Report and Recommendation of Magistrate Judge Joyner (#8) will be adopted.

It is the Order of the Court that the Decision of the Commissioner denying Social Security benefits is hereby REVERSED AND REMANDED for further proceedings. This Order constitutes a final order in 98-CV-504-K.

ORDERED this 6 day of May, 1999.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

MAY -7 1999

HAROLD DICKERSON
SSN: 222-38-2651,

Plaintiff,

v.

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

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-545-EA

ENTERED ON DOCKET
DATE 5-10-99

JUDGMENT

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

It is so ordered this 7th day of May 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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).

FILED
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MAY -7 1999

Phil Lombardi, Clerk
 U.S. DISTRICT COURT

HAROLD DICKERSON)
 SSN: 222-38-2651,)
)
 Plaintiff,)
)
 v.)
)
KENNETH S. APFEL, Commissioner,)
Social Security Administration,¹)
)
 Defendant.)

Case No. 97-CV-545-EA

ORDER

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

Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **REVERSES** the Commissioner’s decision and **REMANDS** for further proceedings.

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 December 22, 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 (March 10, 1995), and on reconsideration (May 1, 1995). A hearing before Administrative Law Judge Leslie S. Hauger (ALJ) was held May 1, 1996, in Tulsa, Oklahoma. By decision dated May 15, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. On April 2, 1997, the Appeals Council denied review of the ALJ’s findings. Thus, the decision of the ALJ represents the Commissioner’s final decision for purposes of further appeal. 20 C.F.R. § 404.981.

I. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

Disability under the Social Security Act is defined as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment” 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his “physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy” *Id.*, § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. *See* 20 C.F.R. § 404.1520.³

Judicial review of the Commissioner’s determination is limited in scope by 42 U.S.C. § 405(g). This Court’s review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. *Hargis v. Sullivan*, 945 F.2d 1482, 1486 (10th Cir. 1991). 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

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.

as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The search for adequate evidence does not allow the court to substitute its discretion for that of the agency. Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981). Nevertheless, the court must review the record as a whole, and “the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

II. CLAIMANT’S BACKGROUND

Claimant was born on September 26, 1953, and was 42 years old at the time of the administrative hearing in this matter. He has a high school education, and he attended college on an “on and off basis” from 1979 through 1994. (R. 221) Claimant has worked as baggage clerk, medical records clerk, stock clerk and security guard. (R. 247-48) He was on active duty with the United States Air Force from September 1992 until May 1993 as a fuels systems specialist. (R. 223, 246) Claimant alleges an inability to work beginning February 15, 1993 (R. 229) due to an eye disorder. (R. 225-26, 233) He also claims that he suffers from chronic back pain (R. 227, 234-35), foot problems, limited mobility (R. 228-29), depression, anxiety, and mood swings (R. 229, 235-37).

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the RFC to perform a full range of light work subject to “little close vision or work in bright light.” (R. 19) That light work included jobs as a security guard, a gate tender, a janitor, and a hand packager. He also determined that claimant could perform sedentary work as a gate tender and hand packager. (R. 17) Thus, the ALJ found that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional

economies that he could perform, based on his residual functional capacity (RFC), age, education, and work experience. The ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision.

IV. REVIEW

Claimant asserts as error (1) the ALJ's findings concerning claimant's residual functional capacity; (2) the ALJ's findings regarding claimant's credibility; and (3) the ALJ's reliance on the vocational expert's response to an incomplete hypothetical question.

RFC Assessment

Physical Limitations

Claimant alleges problems with his eyesight, his back, and his feet. The ALJ credited the allegations regarding claimant's eyesight and his back, but not his feet. The ALJ noted the medical diagnosis and treatment for claimant's eye problems (R. 14, 109-44, 175, 203), and he adjusted his RFC assessment to account for claimant's dry eyes, trouble with near vision, and difficulty with bright lights. (R. 16) The ALJ also noted the medical records indicating claimant's complaints of lower back pain, and the diagnosis and treatment for it. (R. 155-156, 192, 200-02) Although the ALJ did not find claimant's allegations of back pain fully credible (see discussion below), he found that claimant was impaired by "occasional low back pain and eye problems, and such impairments

are severe enough to reduce the claimant's ability to work." (R. 18) There is no medical evidence in the record relating to claimant's alleged foot problems.⁴

Despite claimant's impairments, the ALJ concluded that claimant could perform light and sedentary work activities. Light work involves lifting no more than twenty pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds. 20 C.F.R. §§ 404.1567(b), 416.967(b). "Frequent" means occurring from one-third to two-thirds of the time, and may involve standing or walking for a total of approximately 6 hours of an 8-hour workday. Alternatively, it may involve sitting most of the time but with some pushing and pulling of arm-hand or leg-foot controls. Social Security Ruling 83-10, 1983 WL 31251 (S.S.A.). 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); 416.967(b). "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 83-10, 1983 WL 31251 (S.S.A.); see also Social Security Ruling 96-9p, 1996 WL 374185 (S.S.A.)

Claimant testified that he could lift 25 to 30 pounds, stand for 15 minutes, walk for 20 minutes; and sit for 30 minutes without having to change his position. (R. 231-32) The vocational expert testified that, if claimant's testimony was verifiable and credible, claimant would not have

⁴ Claimant also alleged that the ALJ failed to mention or give any weight to claimant's 40% disability rating by the Veteran's Administration. (Memo. Br. at 4) However, as the Commissioner points out, the ALJ did consider it (R. 14), but he was not required to give it "great" weight. See Baca v. Department of Health and Human Servs., 5 F.3d 476, 480 (10th Cir. 1993). Further, claimant provided no evidence to corroborate his testimony (R. 239-40) with any objective evidence that the Veteran's Administration rated him 40% disabled. Uncorroborated subjective evidence is insufficient to establish disability. See Diaz, 898 F.2d at 777.

the stamina to work an 8-hour workday and there would not be any positions in the general economy that claimant could perform. (R. 251) The ALJ did not specifically address whether and how claimant could stand, walk or sit for 6 hours of an 8-hour workday despite claimant's lower back pain. Instead, he proceeded to assess claimant's credibility, and he ultimately concluded that claimant could perform light and sedentary work even though he found that claimant was impaired by occasional low back problems. The ALJ's method of analysis is confusing because his assessment of claimant's physical limitations is not linked to his RFC analysis.⁵ While the ALJ's analysis may not technically constitute legal error, it may have contributed to the ALJ's improper determination that other jobs existed in significant numbers in the national and regional economies that claimant could perform, as discussed below.

Mental Limitations

Similarly, the ALJ's assessment of the nature and extent of claimant's mental limitations does not constitute legal error, but it could have been more complete. The ALJ acknowledged claimant's testimony concerning claimant's alleged depression. (R.14) He also acknowledged the medical evidence indicating that claimant complained of depression and anxiety in 1992 (R. 193-94), but the ALJ noted that there was no evidence of any follow-up. (R. 14) The ALJ also noted that claimant was evaluated by a psychologist for the State of Oklahoma Disability Determination

⁵ This does not mean that any consultative examination was necessary, as claimant suggests (Memo. Br., Docket # 11, at 4). Claimant did not show the need for any consultative examination, pursuant to 20 C.F.R. §§ 404.1512, 404.1519a, 416.917 or 416.919a. Generally, a consultative examination is necessary where the medical evidence is unavailable, or some "conflict, inconsistency, ambiguity or insufficiency in the evidence must be resolved. . . ." 20 C.F.R. §§ 404.1519a(B)(4); 416.919a(b)(4). Consultative examinations are not necessary to "verify" impairments, as claimant contends (Memo. Br., Docket # 11, at 4), especially where claimant's counsel did not request a consultative examination and the need for one is not clearly established in the record. Hawkins v. Chater, 113 F.3d 1162, 1167-68 (10th Cir. 1997).

Division in January 1995. (R. 166-70) The ALJ concluded that there was no evidence of depression and anxiety other than the “episode” in 1992.⁶ (R.16) He also remarked that there was no evidence of the source of any antidepressive medication, and claimant did not seek treatment for mental problems. (Id.)

The Tenth Circuit requires an ALJ to follow the procedures in 20 C.F.R. § 404.1520a when he or she evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey v. Chater, 92 F.3d 1017, 1024 (10th Cir. 1996); Cruse v. United States Dep’t of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedure first requires the ALJ to determine the presence or absence of certain medical findings pertaining to claimant’s ability to work. Next, the ALJ is to evaluate the degree of functional loss resulting from claimant’s impairment. The ALJ must then complete a Psychiatric Review Technique (“PRT”) form and attach it to a written decision in which he or she discusses the evidence upon which the conclusions expressed on the form are based. Winfrey, 92 F.3d at 1024; Cruse, 49 F.3d at 617-18; see also Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994).

Although the ALJ did not complete a PRT form, a staff psychologist employed by the Commissioner prepared a PRT form in March 1995 as part of the initial disability determination. (R. 34-42) The psychologist found that claimant had no medically determinable impairment or disorders associated with claimant’s allegations of depression and anxiety. The ALJ similarly found “little

⁶ The record indicates that claimant was evaluated for psychological problems in October 1987 (R. 98-102) and February 1989 (R. 103-06). However, these evaluations, like the 1992 evaluation, occurred prior to the date of claimant alleges that he became disabled (February 15, 1993). Further, after claimant missed two therapy sessions that he requested from the Veterans Administration in 1990, a VA psychologist indicated his initial impression that claimant was malingering, that claimant’s “thinking has a quality of diffuse distrust, and that he may have characterological involvement.” (R. 107)

objective evidence to substantiate [claimant's] exertional or mental limitations.” (R. 16) The ALJ is not required to complete a PRT form or otherwise follow the regulatory procedures for evaluating mental impairments where the record contains no evidence of a mental impairment that prevents a claimant from working. Andrade v. Secretary of Health & Human Services, 985 F.2d 1045, 1048 (10th Cir. 1993).

Claimant failed to present “some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision requiring further investigation.” See Hawkins v. Chater, 113 F.3d 1162, 1167 (10th Cir. 1997) (citation omitted). Thus, he failed to sufficiently raise the issue. Id. Although the better practice would have been for the ALJ to complete a PRT form himself, the ALJ did not fail to properly assess the nature and extent of claimant's mental limitations.

Credibility Analysis

Claimant argues that the ALJ's findings regarding claimant's credibility are not based on substantial evidence (Mem. Br., Docket # 11, at 2.) He specifically asserts that the ALJ failed to consider many of the factors for evaluating credibility. Claimant alleges that he has persistently sought relief for his problems; he has been willing to attempt any treatment prescribed; he has had regular contact with his physicians (R. 239); his daily activities do not equate with the ability to engage in substantial gainful activity (R. 241-42); and psychological factors affect him (R. 166-70). Claimant also faults the ALJ for failing to properly link his credibility findings to the evidence, as required by Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995).

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, 68 F.3d at 390. 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).

In his written opinion, the ALJ **specifically** referenced the criteria set forth in 20 C.F.R. § 404.1529 and Tenth Circuit case law for **evaluating** a claimant’s allegations of pain. The ALJ acknowledged that claimant has some **problems** with his eyesight, but found that claimant’s allegations of pain were “not fully **credible because**, but not limited to, the objective findings, or the 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. 15-16) The ALJ’s **specific credibility** analysis consists of the following statement:

claimant's credibility is substantially diminished because he testified that he applied to several businesses for work, though he says he cannot work. He alleges back pain since 1989, but continued to work, was on active duty in the Air Force, and went to college subsequent to such time. While he was on duty in the Air Force he had free medical treatment available, but there are only occasional complaints of back pain. His x-rays were negative in 1995. His medications are not for the severe pain he alleges. He complains of flat feet since birth, but there is no indication of flat feet in the medical evidence, and it is doubtful he would have been in the Air Force had such been found. Despite his claim of severe pain, he was comfortable during the hearing and exhibited no pain influenced behavior. Though the claimant has alleged some depression and anxiety, there is no evidence of such except for a single episode in 1992. Although he alleges he takes some antidepressive medication, there is no evidence of the source of such medications, and he states that he has not sought any treatment for mental problems. His statements alone are not evidence of any mental impairment. Based upon the above, the undersigned finds little objective evidence to substantiate his exertional or mental limitations.

(R. 16) While this statement commingles the ALJ's credibility, pain and RFC assessments, the Court is reluctant to hold that it constitutes legal error.

The ALJ analyzed 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. (R. 15-16) His explanation of why specific evidence relevant to each factor led to the conclusion that claimant's subjective complaints were not fully credible leaves much to be desired, but it is sufficient. 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. Although the ALJ's opinion might have been "better and more thorough," see Daniels v. Apfel, 154 F.3d 1129, 1136 (10th Cir. 1998), this Court finds that the ALJ did not err in concluding that claimant's complaints of pain were not entirely credible.

Vocational Expert Testimony

Finally, claimant contends that the ALJ failed to properly elicit vocational evidence establishing the availability of alternative jobs. (Mem. Br., Docket # 11, at 3.) He specifically contends that the ALJ failed to include all of the claimant's true limitations in the question he posed to the vocational expert. The limitations that should have been included in the inquiry, according to claimant, include his impairments regarding pain, sitting, standing, walking, lifting and low level of frustration tolerance. (Id. at 5; see R. 169)

The ALJ asked the vocational expert to assume that the person about whom she would testify had the "residual functional capacity to perform both light and sedentary type work, as defined in the regulations, subject to little close vision work. . . . and/or a little working in bright light." (R. 248) The ALJ did not include in the hypothetical question any reference to his finding that "[c]laimant is impaired by occasional low back pain . . . severe enough to reduce the claimant's ability to work." (R. 18) Thus, his request that the vocational expert assume that claimant could perform both light and sedentary type work (instead of stating the impairment) begs the question, or, alternatively, assumes the answer. A hypothetical question that assumes its own answer is improper. See Simonson v. Schweiker, 699 F.2d 426, 430 (8th Cir. 1983).

In the Tenth Circuit, an ALJ need only include impairments in a hypothetical to a vocational expert 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). However, "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) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th

Cir. 1990)). The ALJ's failure to include claimant's low back pain in his hypothetical question to the vocational expert necessitates a remand.

On remand, the ALJ should also reconsider whether there are a significant number of jobs in the regional or national economy that claimant can perform despite claimant's impairments. The ALJ considered a post-hearing memorandum in which claimant's attorney argued that the exertional level of janitorial and hand-packaging jobs is "medium" under the Dictionary of Occupational Titles ("DOT") -- not "light" as the vocational expert testified. (R. 17, 204-12) Claimant's attorney maintained that claimant could not perform jobs at the medium exertional level, nor could claimant perform work as a security guard or gate tender because a significant number of those jobs would require claimant to work in bright light. Claimant asserts that the number of jobs thus eliminated is unknown because the vocational expert failed to reduce the number of security or gate-keeping jobs by the number that would require claimant to work in bright light. Accordingly, claimant argues, these jobs should not be considered for purposes of denying benefits to claimant. (R. 204-05)

The ALJ acknowledged these arguments, but reasoned that the ALJ is entitled to take notice of sources other than the DOT, including the testimony of vocational experts. See 20 C.F.R. § 404.1566(d)(1). He found several tasks at the light exertional level as set forth in the DOT that could be performed by janitors/cleaners and hand packagers. He also noted that the security guard and gate tender positions were *representative examples* of jobs described by the vocational expert as jobs the claimant could perform at the light exertional level. The ALJ reasoned that, as to these two positions, claimant could wear sunglasses to alleviate problems with bright light, and he assumed

that the vocational expert took the “bright light” limitation into account when she gave her testimony. (R. 17)

The ALJ’s explanations for his decisions regarding claimant’s vocational aptitude are unsatisfactory. His stated preference for the testimony of the vocational expert over the DOT classifications is particularly troublesome because the vocational expert’s testimony was based, at least in part, on the DOT classifications, but the expert was clearly mistaken as to the exertional level required for janitorial and hand packaging positions. Even if claimant could perform some of the tasks of a janitor or hand packager, claimant could not get a job, or keep it, if he cannot perform all of the tasks required. The ALJ’s rationalization that the security guard and gate tender were merely examples of jobs that claimant could perform does not assist the Commissioner in meeting his burden to establish at step five that work, i.e. actual jobs, exist in significant numbers in the national economy which claimant--taking into account his age, education, work experience, and RFC--can perform. The ALJ’s suggestion that claimant could use sunglasses to alleviate problems with bright light does not adequately address the seriousness of claimant’s impairment.⁷

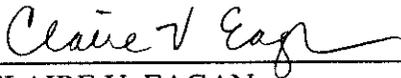
In summary, the ALJ’s question to the vocational expert was not proper, the vocational expert’s testimony was not accurate, and the ALJ’s attempt to redress her testimony was not effective. Since the ALJ erred in concluding that there are a significant number of jobs in the regional or national economy that claimant can perform despite claimant’s impairments, this matter must be remanded for further development of the record.

⁷ Claimant also contends that the ALJ’s assessment of claimant’s RFC is flawed because the security guard position requires occasional near acuity, and claimant does not have occasional near acuity (Memo. Br. at 5). The ALJ did not discuss whether or how claimant’s trouble with near vision would affect claimant’s ability to perform work as a security guard, but claimant’s attorney did not raise the issue at the hearing or in her letter to the ALJ. (R. 204-05)

VI. CONCLUSION

The errors that occurred in this matter in connection with the vocational expert's testimony lead the Court to conclude that the Commissioner's decision was not supported by substantial evidence, and the correct legal standards were not applied. In remanding this case, the Court does not dictate the result. The ALJ's decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. This remand "simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case." Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988). The decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

DATED this 7th day of May, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

WINDSWEEP 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,)

MAY 07 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiffs,)

v.)

Case No. 98-CV-0929K (J)

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

ENTERED ON DOCKET

DATE MAY 10 1999

Defendants.)

ORDER AND SUPPLEMENTAL JUDGMENT

The above cause comes before the Court for consideration of the Plaintiffs' Motion for Supplemental Judgment for Attorney's Fees filed on or about May 6, 1999. The Court, being fully advised in the premises, finds:

1. Judgment by Default was filed herein against the defendants on April 26, 1999. In such Judgment this Court made a finding that plaintiffs are entitled to attorney's fees pursuant to 17 U.S.C §505.

2. In their Motion, plaintiffs seek attorney's fees in the amount of \$1,890.00. The Court finds that the Affidavit of counsel submitted in support of the Motion is sufficient to satisfy the standards set forth in Ramos v. Lamb, 713 F.2d 546 (10th Cir. 1983), and that a hearing on the award of attorney's fees is not necessary.

3. The Court further finds that the amount of the requested fees is reasonable given the record herein. Therefore, the Court finds that the plaintiffs' Motion should be, and the same hereby is, granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that a Supplemental Judgment be and the same hereby is entered in favor of the plaintiffs and against the defendants, Don G. Allan and Donna Allan, jointly and severally, in the amount of \$ 1,890⁰⁰.

IT IS SO ORDERED this 7 day of May, 1999.

/s/ TERRY G. ...

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

GERALD B. ELLIS, WILLIAM H. NOBLE,)
MICHAEL ELLIS, ROBERT LUELLEN,)
as Trustees of the OKLAHOMA)
OPERATING ENGINEERS WELFARE)
PLAN; OKLAHOMA OPERATING)
ENGINEERS WELFARE PLAN; DISTRICT 2)
JOINT APPRENTICESHIP & TRAINING)
COMMITTEE OF THE INTERNATIONAL)
UNION OF OPERATING ENGINEERS)
LOCAL 627; CENTRAL PENSION FUND)
OF THE INTERNATIONAL UNION OF)
OPERATING ENGINEERS AND)
PARTICIPATING EMPLOYERS; LOCAL)
UNION NO. 627 OF THE INTERNATIONAL)
UNION OF OPERATING ENGINEERS,)

Plaintiffs,)

v.)

INTERSTATE BUILDERS, INC.,)

Defendant.)

F I L E D

MAY 6 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE MAY 10 1999

Case No. 98 CV 0912H (E) ✓

JOURNAL ENTRY OF DEFAULT JUDGMENT

NOW, on this 6TH day of MAY, 1999, the above-entitled cause comes on before me, the undersigned Judge of the above-entitled Court. Plaintiffs, Gerald B. Ellis, William H. Noble, Michael Ellis, Robert Luellen, as Trustees of and for Oklahoma Operating Engineers Welfare Plan; the Oklahoma Operating Engineers Welfare Plan; the District 2 Joint Apprenticeship & Training Committee of the International Union of Operating Engineers Local 627; the Central Pension Fund of the International Union of Operating Engineers and Participating Employers; and Local Union 627 of the International Union of Operating Engineers, represented and having entered its appearance

by its counsel, Kelly F. Monaghan of Holloway & Monaghan, and the Defendant, Interstate Builders, Inc., having been lawfully served with Summons in this case and failing to enter its appearance or file an Answer within the statutorily prescribed period. Whereupon, the Court, having examined the court files herein and after due deliberations thereon, finds as follows:

The Court finds that on December 2, 1998, Plaintiffs filed their Complaint in the above-entitled and numbered cause with the Court Clerk, requesting judgment against Defendant for specific sums set forth therein, plus penalties, interest, attorney's fees, audit fees, and court costs.

The Court further finds that on December 4, 1998, Defendant was served with Summons and the Complaint by serving Lovita Napier, Registered Service Agent for Interstate Builders Inc., by certified mail, return receipt requested, restricted delivery, as evidenced by the Return of Summons filed in this cause of action with the Court Clerk indicating that proper service had been made on the Defendant.

The Court further finds that on March 19, 1999, Plaintiffs filed their Amended Complaint in the above-entitled and numbered cause with the Court Clerk, requesting judgment against Defendant for specific sums set forth therein, plus penalties, interest, attorney's fees, audit fees, and court costs.

The Court further finds that on March 20, 1999, Defendant was served with the Amended Complaint by serving Lovita Napier, Registered Service Agent for Interstate Builders Inc., by certified mail, return receipt requested, restricted delivery.

The Court further finds that the Clerk of this Court entered default in this matter on February 17, 1999.

The Court further finds that the **allegations** contained in the Plaintiff's Complaint and Amended Complaint are taken as true and correct, and that it is hereby granted judgment against Defendant as hereinafter set forth.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, Interstate Builders Inc., was lawfully served with Summons in this cause and has not made an appearance and, therefore, is in default.

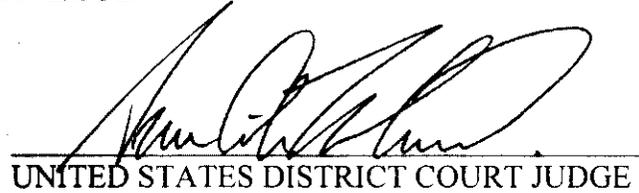
IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, Interstate Builders, Inc. was lawfully served with the Amended Complaint and has not made an appearance nor answered the same and, therefore, is in default.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Plaintiffs be granted judgment in its favor and against Defendant, Interstate Builders Inc. as follows:

1. Under the First Cause of Action: in the principal amount of \$4,834.64, plus interest as allowed by law, and audit fees of \$1,178.45;
2. Under the Second Cause of Action: interest and liquidated damages for the months of July and August 1998 in the amount of \$1,346.26, together with interest at the rate of eight percent (8%) per annum, as provided in the Plan documents;
3. Under the Third Cause of Action: for contributions due and owing the months of September, October, November and December 1998, and January and February 1999 in the amount of \$31,830.80, plus interest at the rate of eight percent (8%) per annum, as provided in the Plan documents, liquidated damages in the amount of \$3,183.08, as provided in the Plan documents;
4. Attorney fees of \$1,215.25 and costs of \$218.60, incurred in by Plaintiffs in this case.

The total amount of the judgment is \$43,807.08, with interest thereon.

ALL FOR WHICH LET EXECUTION ISSUE.



UNITED STATES DISTRICT COURT JUDGE

Kelly F. Monaghan OBA #11681
Holloway & Monaghan
4111 South Darlington, Suite 1100
Tulsa, Oklahoma 74135
(918) 627-6202
ATTORNEY FOR PLAINTIFFS

J:\oklaoperating\interstatebuilders\journalentry.jdg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE MAY 10 1999

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 DONNIE G. LOCKHART,)
)
 Defendant.)

No. 99CV0067H(M) ✓

FILED
MAY 6 1999

Paul Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

The Plaintiff's Application for Default Judgment comes on for hearing this 6TH day of MAY, 1999. The Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Donnie G. Lockhart, appears not. The Court finds that pursuant to Rule 55 of the Federal Rules of Civil Procedure, notice of the hearing was given to the Defendant.

The Court gave due consideration to the pleadings and documents filed in support of the plaintiff's Complaint. The Court finds the plaintiff is entitled to judgment from its review of the supporting documentation.

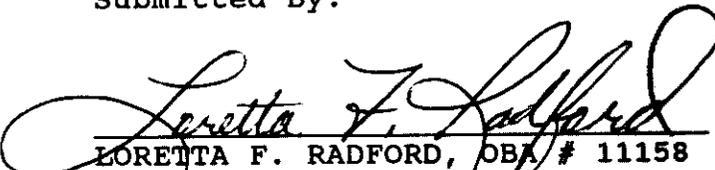
The Court being fully advised and having examined the court file finds that Defendant, Donnie G. Lockhart, was served with Summons and Complaint on January 25, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered

by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Donnie G. Lockhart, for the principal amounts of \$2,783.11 and \$2,219.54, plus accrued interest of \$1,611.76 and \$1,615.11, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.727 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

ORIGINAL

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

BOK FINANCIAL CORPORATION,)
petitioner)

v.)

THE UNITED STATES AND)
A. DOUGLAS MELAMED,)
respondents)

No. 99-CV-0305E (E)

FILED ON DOCKET
MAY 07 1999

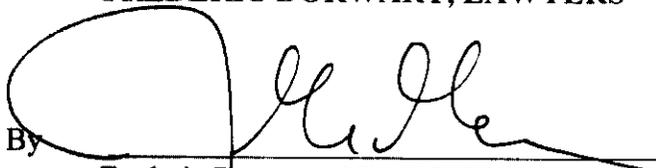
FILED
MAY 6 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DISMISSAL OF PETITION

Comes now BOK Financial Corporation and dismisses its Petition for Order Modifying or Setting Aside Civil Investigative Demand. No answer or motion for summary judgment has been filed by either respondent in this case. This dismissal is filed pursuant to F.R.C.P., Rule 41(a)(1).

FREDERIC DORWART, LAWYERS

By 

Frederic Dorwart, OBA #2436
J. Michael Medina, OBA #6113
Old City Hall
124 East Fourth Street
Tulsa, Oklahoma 74103
(918) 583-9922

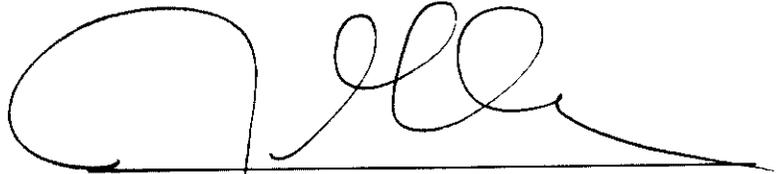
Attorneys for BOK Financial Corporation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of May, 1999, a true and correct copy of the foregoing document was deposited in the United States mail in Tulsa, Oklahoma, with first class postage fully prepaid thereon, addressed to the following:

Angela Y. Ting
United States Department of Justice
Anti-Trust Division Litigation II
City Center Building
1401 H. Street, Northwest, Suite 3000
Washington, D.C. 20530

Stephen C. Lewis
U.S. Attorney
333 W. 4th Street, Suite 3460
Tulsa, OK 74103

A handwritten signature in black ink, appearing to read "J. Michael Medina", written over a horizontal line.

J. Michael Medina

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

FILED

MAY 06 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EVERETTE B. CALDWELL,)
)
Plaintiff,)

Case No. 98CV-0634BU(M)

vs.)

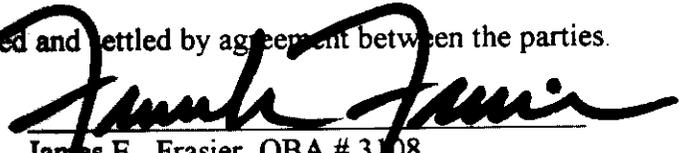
SUNBELT COATING, INC. OF)
OKLAHOMA, an Oklahoma)
corporation,)
)
Defendant.)

ENTERED ON DOCKET

DATE 5-7-99

STIPULATION FOR DISMISSAL WITH PREJUDICE

The Plaintiff and Defendant stipulate that the Complaint and the action may be dismissed with prejudice to the bringing of another action upon the same cause or causes for the reason that all issues existing in the action have been compromised and settled by agreement between the parties.



James E. Frasier, OBA # 3108
Frank W. Frasier, OBA #19864
1700 Southwest Blvd, Suite 100
P.O. Box 799
Tulsa, OK 74101
ATTORNEY FOR PLAINTIFF



R. Casey Cooper, OBA #1897
Of BOESCHE, McDERMOTT & ESKRIDGE
800 Oneok Plaza, 100 W. 5th St.
Tulsa, Oklahoma 74103
(918) 583-1777 Telephone
ATTORNEYS FOR DEFENDANT
SUNBELT COATING, INC.

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

FILED
MAY 06 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NATIONSBANC INVESTMENTS, INC.,)
)
Plaintiff,)
)
vs.)
)
STEVE MCELROY and MERRILL LYNCH,)
PIERCE, FENNER & SMITH, INC.)
)
Defendants.)

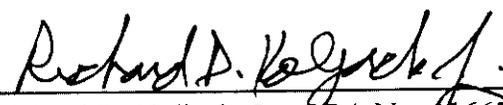
No. 99-CV-0249B (M)

FILED ON DOCKET
MAY 06 1999

NOTICE OF DISMISSAL WITH PREJUDICE

The Plaintiff, NationsBanc Investments, Inc., files this Notice of Dismissal with Prejudice pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure. Plaintiff advises the Court that the parties have settled their controversy. Plaintiff is entitled to dismiss this action by filing a notice of dismissal because neither of the Defendants have filed an answer or motion for summary judgment.

WHEREFORE, Plaintiff hereby dismisses this action with prejudice pursuant to Federal Rule 41(a)(1)(i).


Richard D. Koljack, Jr., OBA No. 01662
GABLE & GOTWALS
2000 NationsBank Center
15 West Sixth Street
Tulsa, Oklahoma 74119-5447
(918) 582-9201

*Attorneys for Plaintiff,
NationsBanc Investments, Inc.*

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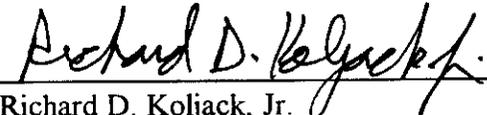
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CERTIFICATE OF MAILING

I hereby certify that on the 6th day of May, 1999, a true and correct copy of the above and foregoing pleading was mailed, with proper postage thereon fully prepaid, to:

J. Patrick Cremin
Donald L. Kahl, Esq.
Hall, Estill, Hardwick,
Gable, Golden & Nelson
320 South Boston, Suite 400
Tulsa, OK 74103-3708

J. Douglas Mann
Andrea R. Kunkel, Esq.
Rosenstein, Fist & Ringold
525 South Main, Suite 700
Tulsa, OK 74103-4508


Richard D. Koljack, Jr.

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

FILED
MAY - 5 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
DARRELL L. BOLTON; MAUREEN L.)
BOLTON; COMMERCIAL FEDERAL)
MORTGAGE CORPORATION,)
a Nebraska corporation;)
NATIONSBANK, a nationally)
chartered banking institution;)
and FORD MOTOR CREDIT COMPANY,)
a Delaware corporation,)
)
Defendants.)

Civil No. 98-CV-351B (M)

ENTERED FOR RECORD

DATE MAY 06 1999

DEFAULT JUDGMENT

Judgment by default is hereby entered pursuant to Fed. R. Civ. P. 55 against defendant Ford Motor Credit Company based upon failure to answer or otherwise defend, and it is further ADJUDGED and DETERMINED that Ford Motor Credit Company has no interest in the residential real property having the street address of 5844 South 92nd East Avenue, Tulsa, Oklahoma, 74145, and having the following legal description:

Lot Fifteen (15), Block Two (2),
WOODLAND VIEW PARK 4TH, an Addition
to the City of Tulsa, Tulsa County,
State of Oklahoma, according to the
recorded Amended Plat thereof.

Dated this 4th day of May, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing UNITED STATES' MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANT FORD MOTOR CREDIT COMPANY AND BRIEF IN SUPPORT and proposed judgment has been made upon the following by depositing a copy in the United States mail, postage prepaid, this 3rd day of May, 1999:

Jack L. McNulty
Thomas M. Affeldt
SAVAGE, O'DONNELL, McNULTY
& AFFELDT
600 Petroleum Club Building
601 South Boulder
Tulsa, Oklahoma 74119-1333
ATTORNEYS FOR DEFENDANTS DARRELL
L. BOLTON and MAUREEN L. BOLTON

Don J. Timberlake
James P. Cates
BAER & TIMBERLAKE, P.C.
5901 N. Western Avenue
Suite 300
Oklahoma City, Oklahoma 73118
ATTORNEYS FOR DEFENDANT
COMMERCIAL FEDERAL MORTGAGE
CORPORATION

Kevin Blaney
JONES & BLANEY
204 North Robinson
1200 City Place
Post Office Box 757
Oklahoma City, Oklahoma 73101
ATTORNEYS FOR DEFENDANT
NATIONSBANK, N.A.



JEFFREY S. SWYERS OBA # 16317
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 7238
Ben Franklin Station
Washington, D.C. 20044

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

LINDSEY K. SPRINGER,)
)
Plaintiff,)
)
vs.)
)
HUSTLER MAGAZINE, a foreign)
corporation and LFP, INC., a foreign)
corporation,)
)
Defendants.)

ENTERED ON DOCKET

DATE MAY 06 1999

No. 98-CV-740-K /

F I L E D

MAY 05 1999 *AL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

J U D G M E N T

This matter came before the Court for consideration of the Defendant's Motion for Summary Judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant LFP, Inc.,¹ and against the Plaintiff Lindsey K. Springer.

ORDERED this 4 day of May, 1999.


TERRY C. KEEN, Chief
UNITED STATES DISTRICT JUDGE

¹The Court held in the Order filed contemporaneously herewith that Hustler Magazine is not a proper Defendant in this action, and cannot be sued. Thus, this Judgment releases any remaining claims against Hustler Magazine as well.

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

LINDSEY K. SPRINGER,)
)
Plaintiff,)
)
vs.)
)
HUSTLER MAGAZINE, a foreign)
corporation and LFP, INC., a foreign)
corporation,)
)
Defendants.)

ENTERED ON DOCKET

DATE MAY 06 1999

No. 98-CV-740-K

F I L E D

MAY 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the Defendant LFP, Inc.'s Motion for Summary Judgment (#38) pursuant to Fed.R.Civ.P. 56.

I. Statement of the Case:

The Plaintiff, Lindsey K. Springer, filed this breach of contract action against LFP, Inc. and Hustler Magazine alleging that they made an offer or reward for information regarding the assassination of President John F. Kennedy. On or about February 21, 1978, a publication titled *L.A. Free Press* contained the following "Reward":

Because I believe there are many untapped witnesses to the events of the assassination, and many who have knowledge of those who participated in the conspiracy, I am personally guaranteeing a \$1,000,000 reward for information leading to the arrest and conviction of anyone involved in the planning or execution of President Kennedy's murder, or for information which makes it possible for the truth to come out.

-Larry Flynt

The *L.A. Free Press* makes no reference to Hustler Magazine or LFP, Inc. in this "offer."

46

In January, 1984, Hustler Magazine published a photocopy of the cover of the *L.A. Free Press* advertising as follows:

ACTUAL COVER OF PUBLICATION. THIS IS A ONE - TIME SPECIAL EDITION, FIRST PUBLISHED ON THE 21ST DAY OF FEBRUARY OF 1978, 13 DAYS BEFORE LARRY FLYNT WAS SHOT DURING AN OBSCENITY TRIAL IN LAWRENCEVILLE, GEORGIA.

COMING SOON TO NEWSSTANDS EVERYWHERE! (Emphasis in original).

The Defendant contends that the offer to which the Plaintiff refers, if made at all, was made by the *L.A. Free Press*. Thus, the Plaintiff cannot state a *prima facie* claim of breach of contract against LFP, Inc., and LFP, Inc. is entitled to summary judgment as a matter of law.

Summary Judgment Standard:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P.* 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992). Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. Thomas v. Internat'l Business Machines, 48 F.3d 478, 485 (10th Cir. 1995).

Discussion:

Pursuant to Oklahoma law, to state a claim for breach of contract, a plaintiff must establish: (1) the formation of a contract between plaintiff and defendant; (2) the defendant breached the contract; and (3) the plaintiff suffered damages as a direct result of that breach. The plaintiff carries the burden of establishing an offer, acceptance, and consideration. Horton Ins. Agency v. Robinson, 824 P.2d 397 (Okla. Ct. App. 1991).

First, this Court agrees with Defendant's argument that Plaintiff clearly cannot sue Hustler Magazine. Hustler Magazine is a trade name and not a legal entity which can sue or be sued. LFP, Inc. has submitted to this Court a certified copy of the Statement of Ownership, Management, and circulation, filed with the United States Postal Service pursuant to 39 C.F.R. §111.1. A certified Statement of Ownership is clearly admissible. *Fed.R.Evid.* 803(6). Hustler Magazine is not an appropriate Defendant and cannot be sued in this action. Summary judgment as to Hustler Magazine is granted.

As to Defendant LFP, Inc., the Defendant argues that the Plaintiff has altogether failed to establish that any offer was made by LFP, Inc. for information on the Kennedy assassination. This Court agrees. The undisputed evidence establishes that the offer upon which the Plaintiff bases his breach of contract claim against LFP, Inc. was made by a publication titled *L.A. Free Press*.¹ That publication makes no reference or mention whatsoever of LFP, Inc. or Hustler Magazine.

Furthermore, Hustler Magazine's publication of the cover of the *L.A. Free Press* in 1984 does not constitute a republication of the offer. Hustler only published the cover of the *L.A. Free Press*,

¹Plaintiff's Response to the Motion for Summary Judgment also implies that Plaintiff relied on the movie, The People v. Larry Flynt, in support of his argument that there was, indeed, an offer of \$1,000,000 from Hustler Magazine.

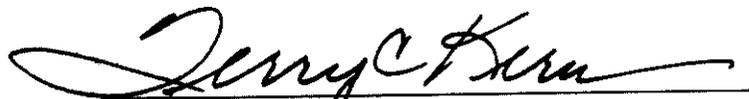
and made no reference to or mention of the alleged offer or reward upon which the Plaintiff relies for his breach of contract claim against LFP, Inc.

This Court finds that the Plaintiff has failed to prove a *prima facie* case of breach of contract against LFP, Inc. To the extent that any offer exists for information on the Kennedy assassination, there is no evidence before the Court to support the argument that the offer was made by LFP, Inc., Summary judgment in favor of LFP, Inc., is therefore appropriate.

Conclusion:

It is the Order of the Court that the Defendant LFP, Inc.'s Motion for Summary Judgment (#38) is hereby GRANTED. All remaining motions are hereby DENIED as moot. This case is terminated.

ORDERED this 4 day of May, 1999.



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

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VLG/mlr/9900221
2/22/99

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

ANGELA SIPES,

Plaintiff,

and

DELANE HOLLAND-WENTZ,
MYCHELLE RENEE TULK,
NAOMI E. BLOOD, SANDRA E.
FREEZE, BARBARA ANN CRUSSEL,
LAVENIA MAY TAYLOR
ANN ROTH, JOYCE LUTZ,
DIANA M. RUBIN, PATRICE B.
MCGUIRE AND DAVID H. MCGUIRE,
LISA ANN KEIRSEY & WILLIAM,
TOM KEIRSEY,

Plaintiffs in Intervention,

vs.

AESTHETECH CORPORATION, et al.

Defendants.

FILED

MAY 06 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

MAY 06 1999

No. 92-C-1013E

STIPULATION FOR DISMISSAL WITH PREJUDICE

Plaintiff, Angela Sipes, and Plaintiffs in Intervention, Delane Holland-Wentz, Mychelle Renee Tulk, Mychelle Renee Tulk, Naomi E. Blood, Sandra E. Freeze, Barbara Ann Crussel, Lavenia May Taylor, Lorrie Ann Roth, Joyce Lutz, Diana M. Rubin, Patrice B. McGuire and David H. McGuire, Lisa Ann Keirsey & William Tom Keirsey, and each of them, by and through their attorney of record, Mark Hutton, and Defendants, Nusil Technology, Inc. formerly McGhan Nusil Corporation, by and through their attorney of record Larry D. Ottaway, pursuant to Fed.R.Civ.P. 41(a)(1), stipulate and agree that Plaintiff and Intervening Plaintiffs'

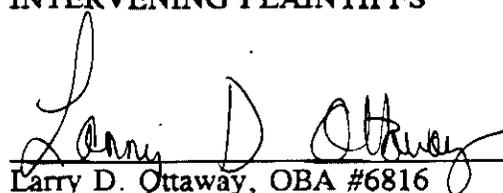
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C10

claims against Nusil Technology, Inc. formerly McGhan Nusil Corporation, should be and hereby are dismissed with prejudice. This Stipulation includes only the Defendant, Plaintiff and Intervening Plaintiffs specifically reserve all other claims in this lawsuit.



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ATTORNEYS FOR PLAINTIFF AND
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Oklahoma City, Oklahoma 73102
ATTORNEYS FOR DEFENDANT MCGHAN
NUSIL CORPORATION

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

F I L E D

MAY - 4 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARLISA CAMERER, an individual, and)
SHELDON MITCHELL, an individual,)
)
Plaintiffs,)
)
vs.)
)
THE LOEWEN GROUP INC.,)
a foreign corporation,)
)
Defendant.)

No. 99-C-92-B (J)

ENTERED ON DOCKET
DATE MAY 05 1999

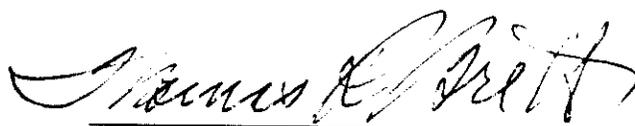
ORDER

Before the Court is the Motion to Sever and to Transfer filed by Defendant, The Loewen Group, Inc. ("Loewen") (Docket No. 12). Plaintiff Marlisa Camerer ("Camerer") and Sheldon Mitchell ("Mitchell") bring claims against their former employer Loewen for violations of Title VII, defamation and intentional infliction of emotional distress. Loewen seeks to sever the parties asserting that their claims do not arise from a common transaction or occurrence and there is no common questions of law and fact as Camerer's Title VII claim asserts constructive discharge and sexual harassment, while Mitchell's Title VII claim alleges retaliatory discharge and religious discrimination. Based on improper venue in this Court, Loewen also seeks to transfer Camerer's claims to the Western District of Oklahoma and Mitchell's claims to the Southern District of Texas. Plaintiffs agree that venue is not proper here but assert venue is proper for both plaintiffs in the Western District of Oklahoma "because unlawful employment practices were committed in the Western District,

employment records relevant to the unlawful employment practices are maintained and administered in the Western District, and Mitchell would have worked in the Western District but for the unlawful employment practices.” *Plaintiffs’ Brief in Opposition to Defendant’s Motion to Sever and to Transfer*, p. 2. Plaintiffs however object to Loewen’s motion to sever plaintiffs’ claims and to transfer Mitchell’s claims to the Southern District of Texas.

From the facts presented in the record the Court concludes venue is proper in the Western District of Oklahoma regarding both the Camerer and Mitchell claims. Therefore, the Court transfers the case to the Western District of Oklahoma. Any decision to sever the Plaintiffs’ claims for trial remains for the transferee court.

IT IS SO ORDERED, this 4th day of May, 1999.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED
MAY 4 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

FRANK MAX MILLER,)
an individual,)
)
Plaintiff,)
)
vs.)
)
BOARD OF COUNTY COMMISSIONERS)
OF THE COUNTY OF ROGERS, STATE OF)
OKLAHOMA, et al.,)
)
Defendants.)

No. 97-C-990-C

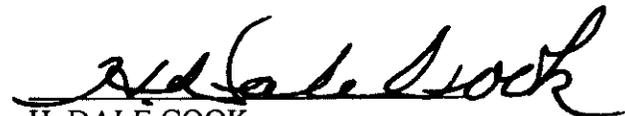
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JUDGMENT

This matter came before the Court for consideration of the motion for summary judgment filed by defendants, Don Morgan and Don Bordwine, on plaintiff's cause of action alleging a deprivation of his civil rights, under 42 U.S.C. § 1983. The issues having been duly considered by the Court, and a decision having been rendered in favor of defendants, Morgan and Bordwine, in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment is entered for defendants, Morgan and Bordwine, and against plaintiff on plaintiff's § 1983 claim.

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


H. DALE COOK
United States District Judge

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

F I L E D

MAY 4 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FRANK MAX MILLER,)
an individual,)
)
Plaintiff,)
)
vs.)
)
BOARD OF COUNTY COMMISSIONERS)
OF THE COUNTY OF ROGERS, STATE OF)
OKLAHOMA, et al.,)
)
Defendants.)

No. 97-C-990-C ✓

ENTERED ON DOCKET

DATE MAY 05 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 November 3, 1997, plaintiff, Frank Miller, filed the present action,² alleging numerous causes of action against defendants,³ arising out of his arrest for felonious assault. Specifically, Miller alleges a civil rights violation under 42 U.S.C. § 1983,⁴ and state law causes of action for false imprisonment and intentional infliction of emotional distress, against defendants, Don Morgan and Don Bordwine. Miller additionally alleges false arrest, malicious prosecution and intentional

¹ Defendants, Yuba Heat Transfer and Luke Helm, filed their motion for summary judgment on November 2, 1998, and defendants, Don Morgan and Don Bordwine, filed their motion on December 4, 1998.

² Miller filed an amended Complaint on May 6, 1998.

³ The Court is advised that the following defendants have been dismissed from this action: Board of County Commissioners of Rogers County, Jerry Prather, in his official capacity as Sheriff of Rogers County, Stand-By of Oklahoma, Inc., and Buck Johnson. Thus, the only remaining defendants are Bordwine, Morgan, Helm and Yuba.

⁴ The § 1983 cause of action is the sole federal claim.

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infliction of emotional distress against defendants, Yuba Heat Transfer and Luke Helm, and Miller alleges slander per se against Yuba.

In November 1998, Helm and Yuba filed their motion for summary judgment, and in December 1998, Bordwine and Morgan filed their separate motion for summary judgment. Also in December, Miller filed a belated request seeking permission to take the deposition of a key witness, Chester Fugate, and submit it for the Court's consideration. The Court granted Miller's request, and Fugate's deposition was subsequently noticed and filed. The Court set defendants' summary judgment motions for a hearing, which was held on April 19, 1999. At the conclusion of the hearing, the Court permitted the parties additional time in which to file designations and counter-designations from Fugate's deposition. All materials regarding defendants' motions for summary judgment have now been submitted, and the matter is ripe for ruling.

Facts

The following facts are related to Miller's § 1983 claim against Morgan and Bordwine and are undisputed. Prior to the incident giving rise to this action, Miller was an employee of Stand-By of Oklahoma, a temporary employment agency, and he was assigned to work at Yuba in October, 1996. Approximately one month later, Yuba terminated Miller's services on November 1, 1996.⁵ In the early morning hours of November 3, 1996, Chester Fugate, a security guard employed by The Wackenhut Corporation and assigned to Yuba, was confronted by an unknown man. The man appeared intoxicated and agitated, and he began to verbally abuse Fugate. The man complained that Yuba took his job and destroyed him and his family. When Fugate turned the man away, he struck Fugate. Fugate fought his assailant, and the assailant fell. Fugate turned and proceeded to his guard

⁵ An affidavit filed by Miller's supervisor at Yuba cites unsatisfactory performance as the reason for Miller's termination.

house to call the authorities when the assailant brandished a firearm and again threatened Fugate. While attempting to negotiate with the assailant, Fugate managed to secure himself inside his guard house and call the police. The assailant then left.

Officer Shane Reynolds, a deputy sheriff for Rogers County, and another deputy were the first responders to the scene. Reynolds met with Fugate and took his statement. Fugate informed Reynolds that the assailant was driving a small, red car, possibly a 280-Z. Fugate also reported to Reynolds that the assailant complained of recently being fired by Yuba and that he (the assailant) wanted to kill everyone working at Yuba. Fugate reported the attack and ensuing fight, and he advised that the assailant had threatened him with a weapon.⁶

Luke Helm, who is head of security for Yuba, was contacted by telephone following the incident. Fugate reported to Helm that he had been attacked by a former employee. Helm arrived at Yuba at approximately 6:00 a.m., and Fugate further advised Helm that the assailant was agitated because of being terminated by Yuba. Fugate also provided Yuba personnel with a description of the vehicle which the assailant drove. Yuba, acting through Helm, reported to the Rogers County Sheriff's Department on November 4, 1996, that Miller was the only person who had recently been

⁶ The parties dispute whether Fugate provided a physical description of his assailant following the attack. Fugate testified in his deposition that he did provide a physical description to Reynolds and Helm, describing the man as between 6' and 6'2", slim, medium build, muscular chest, with shoulder-length, curly, sandy brown hair. However, Reynolds testified by affidavit that no physical description was provided to him. Further, Helm testified by affidavit that Fugate described the assailant as 5'8", and husky with a thick chest. Miller testified by affidavit that he is 5'8", has short, dark brown, straight hair, and does not have a slender waist or muscular chest. He further testified that, at the time of his arrest, he had no cuts or bruises on his face. In any event, this factual dispute is not material to the Court's ruling on the § 1983 claim.

terminated, that the vehicle the assailant drove matched Miller's,⁷ and the physical description of the assailant also matched Miller.⁸

Don Morgan, a deputy sheriff for Rogers County, was assigned to investigate the case. Morgan met with Yuba personnel and received statements prepared by Fugate and Helm. Based on the information provided to him, along with the information provided by the deputies who had responded to Fugate's emergency call, it appeared to Morgan that Miller was the assailant. Morgan executed an affidavit for warrant for Miller's arrest, and presented it to Judge David Box, a special district judge for Rogers County. Upon finding probable cause to believe that Miller was the assailant, Judge Box issued a warrant for Miller's arrest. The warrant commanded the Sheriff to arrest Miller and bring him before Judge Box to answer the charge. Miller was arrested on Wednesday, November 6, 1996.

Following his arrest, on November 9, Miller's brother, Wayne Ford, approached Fugate at Yuba and presented a picture of Miller. After viewing the picture, Fugate advised Ford that Miller was not that assailant. Thereafter, Fugate and Ford went to the Rogers County Courthouse to notify the authorities that Miller had not attacked him. Fugate and Ford met Officer Don Bordwine in the parking lot of the courthouse. Because it was Sunday, they were told to return on a workday. The following Monday was a holiday, and Fugate was unable to speak with the authorities until Tuesday, November 12, at which time he met with the undersheriff.⁹ The next day, Fugate spoke with

⁷ At the time of the incident, Miller was driving a red Datsun 280Z.

⁸ As noted, the physical description provided to Helm by Fugate is disputed.

⁹ The name of the undersheriff has not been provided.

Morgan, who promptly arranged a line-up. The line-up was conducted on that same day, and, although Miller was placed in the line-up, Fugate did not identify him as the assailant.

Two days after the line-up was conducted, on Friday, November 15, a hearing was held before Judge Box.¹⁰ Fugate testified, under oath, that Miller was not the man who had attacked him. The prosecutor asked Fugate whether his testimony was the result of a threat, coercion or a bribe. Fugate answered in the negative, maintained his insistence that Miller was not the assailant, and the prosecutor moved to dismiss the case. The judge ordered the case dismissed and Miller discharged. Miller was released.

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).

¹⁰ Miller’s counsel states that this was not a regularly scheduled criminal hearing. It appears that the hearing was held to test Fugate’s assertions under oath and to determine whether Miller was, in fact, the assailant. During the opening remarks to the court, the prosecutor stated that, “We have a case that’s pending regarding Miller and I would like to put on some testimony before I ask the Court to dismiss it. . . . I would like to put Mr. Chester Fugate on the witness stand . . .” Based on these remarks, it is clear that the underlying purpose of the hearing was to have the case against Miller dismissed.

“‘[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

The Court will first consider Morgan and Bordwine’s motion for summary judgment. As noted, the § 1983 claim against them is the sole federal claim alleged in the Complaint. With respect to this claim, Morgan and Bordwine argue that they did not deprive Miller of any constitutional right. They contend that Miller’s arrest and ensuing detention satisfied the requirements of the Fourth and Fourteenth Amendments, i.e., Miller was arrested pursuant to a constitutionally valid arrest warrant, and he was legally detained pursuant to that warrant. Morgan and Bordwine additionally assert a claim of qualified immunity and quasi-judicial immunity.¹¹ Miller counters that Helm and Yuba wrongfully, and without probable cause, reported to Rogers County officials that Miller had attacked Fugate. Miller argues that three days after his arrest, Fugate determined that Miller was not the assailant, and made this fact known to the appropriate officials, as well as Yuba.

¹¹ Because the Court is satisfied that Morgan and Bordwine did not deprive Miller of any constitutional right, the Court need not address their claims of qualified and quasi-judicial immunity.

Miller contends that, even after being advised of his innocence by the victim, Morgan and Bordwine wrongfully continued to detain him for a period of five days. Thus, Miller argues that Morgan and Bordwine are liable under § 1983 because, after being informed of Miller's innocence, they failed to take prompt action to secure Miller's release.

Section 1983 imposes civil liability only upon one who, under color of law, subjects, or causes to be subjected, any person to the deprivation of any rights, privileges or immunities secured by the Constitution and laws. "The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" Baker v. McCollan, 443 U.S. 137, 140 (1979). To raise a constitutional claim, Miller must assert "that the defendants [1] acted under color of state law [2] to deprive him of a constitutional right." Northington v. Jackson, 973 F.2d 1518, 1523 (10th Cir. 1992). See also Wyatt v. Cole, 504 U.S. 158, 161 (1992) (purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails). In the present case, there is no dispute that Morgan and Bordwine were acting under the color of state law in detaining Miller. The only issue, therefore, is whether Miller has been deprived of a right secured by the Constitution and laws. For the following reasons, the Court concludes that Morgan and Bordwine did not deprive Miller of his constitutional rights.

The undisputed facts reveal that Miller was arrested on November 6, 1996, pursuant to a valid warrant.¹² Fugate was first approached by Miller's brother on November 9, and determined, for the first time, that Miller was not the one who had attacked him. The next day, on Sunday, November 10, Fugate went to speak with Rogers County officials, and met with Bordwine in the

¹² Miller concedes that the arrest warrant was valid, and he makes no attack on the warrant.

parking lot of the courthouse. Fugate was told to return on a workday. However, the following Monday was a holiday, and Fugate was therefore unable to speak with any official until Tuesday, November 12. At that time, he spoke with the undersheriff of Rogers County. On Wednesday, November 13, Fugate returned to the Sheriff's Office, and spoke with Morgan. A line-up was conducted that same day, at which time Fugate did not identify Miller as the attacker. An otherwise unscheduled hearing was then arranged before Judge Box, which was held on Friday, November 15. At the close of the hearing, Miller was ordered released, and he was, in fact, released.

At the summary judgment hearing before this Court, Miller's counsel was asked to describe the conduct of Bordwine and Morgan that deprived Miller of his constitutional rights. Miller's counsel responded that Bordwine and Morgan failed to act promptly when confronted with evidence of Miller's innocence. Miller's counsel argued that Bordwine could have immediately sought to have Miller released by attempting to locate Judge Box on Sunday, November 10, when Fugate met Bordwine in the parking lot of the Rogers County Courthouse. Miller's counsel further argued that Morgan could have immediately sought out Judge Box on Wednesday, November 13, after Fugate failed to identify Miller as his attacker during the line-up. Miller's counsel admitted that neither Morgan or Bordwine had the power or authority to release Miller without an order from Judge Box. Miller's allegation is merely that Morgan and Bordwine failed to promptly seek Miller's release.¹³

By making his current argument, however, Miller demonstrates his lack of familiarity with the judicial process. When, after an arrest pursuant to a valid warrant, a victim approaches the authorities and advises that the arrestee is not the perpetrator of the criminal act, the authorities are

¹³ It is not clear to the Court why Miller only selected Bordwine and Morgan as defendants herein. It appears that Fugate also advised others in the Sheriff's Office, including the undersheriff, of Miller's innocence. In any event, from the evidence presented, the Court finds that no member of the Sheriff's Office deprived Miller of his constitutional rights.

not then required to secure the arrestee's immediate release. Rather, it is only sensible for the authorities to attempt to determine whether the victim may have been threatened, coerced, or bribed to make his statement,¹⁴ and the authorities would surely seek to confirm the victim's assertion through a line-up. After assuring themselves that the victim's statement is credible or irrefutable, the authorities do not necessarily have the power to then release the arrestee without judicial authorization. Indeed, the arrest warrant commanded the Sheriff's Office to arrest Miller, detain him and bring him before Judge Box, and Miller recognizes that neither Morgan nor Bordwine had the authority to release him without an order from Judge Box. Thus, even though Fugate insisted prior to the court hearing that Miller was not the assailant, the deputies were under court order not to release him, but to bring him before Judge Box. This is precisely what they did.

Miller's reliance on Baker, supra, is misplaced. In that case, an arrest warrant was intended for the plaintiff's brother, but the warrant was issued in the plaintiff's name. Pursuant to the warrant, the plaintiff was arrested, over his protest, and he was detained for three days. The plaintiff brought a § 1983 claim against the sheriff, arguing that the sheriff failed to investigate the matter after the plaintiff's arrest. The Supreme Court noted that these facts may state a cause of action under state tort law, but they are insufficient to state a claim under § 1983, since the detention was not unconstitutional. Id., 443 U.S. at 142, 146. The Court said that § "1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. . . . [F]alse imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official." Id. at 146. The Supreme Court noted that the

¹⁴ During the hearing on this matter before this Court, there was some argument that Morgan and Bordwine suspected that Fugate may have been bribed or coerced.

plaintiff was arrested pursuant to a valid **warrant**, which adhered to constitutional requirements, and further noted that, as here, the plaintiff's § 1983 claim was based solely on the sheriff's actions after the plaintiff was arrested. Id. at 143. The Court stated, "Obviously, one in respondent's position could not be detained indefinitely in the **face** of repeated protests of innocence even though the warrant under which he was arrested and **detained** met the standards of the Fourth Amendment. For the Constitution likewise guarantees an **accused** the right to a speedy trial, and invocation of the speedy trial right need not await indictment or other formal charge; arrest pursuant to probable cause is itself sufficient." Id. at 144.

The Supreme Court then *assumed* that following arrest and prior to trial, mere detention pursuant to a valid warrant but in the **face of repeated** protests of innocence will after a lapse of a certain amount of time deprive the **accused of liberty** without due process. Id. Miller takes this assumption and makes it the holding of the Court. The Supreme Court instead held that due process does not require that every conceivable **step be taken** to eliminate the possibility of convicting an innocent person. Id. at 145. The Court further said that,

Given the requirements that **arrest be made** only on probable cause and that one detained be accorded a **speedy trial**, we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is **based on mistaken identity** or a defense such as lack of requisite intent. Nor is the **official charged** with maintaining custody of the accused named in the warrant **required** by the Constitution to perform an error-free investigation of such a claim. **The ultimate determination** of such claims of innocence is placed in the hands of **the judge and the jury**. Id. at 145-146.

See also, Romero v. Fay, 45 F.3d 1472, 1481 (10th Cir. 1995) (police officers' refusal to release plaintiff when he maintained his **innocence does not exhibit deliberate or reckless intent** to falsely imprison him, since the **judicial system represents** the proper forum in which to determine the innocence of an arrestee).

Baker resolves the § 1983 claim here. Miller was arrested pursuant to a valid warrant, and he does not contest the warrant or argue that the warrant was not based on probable cause. There is no indication that Morgan or Bordwine fabricated or concealed facts from the court when seeking or executing the warrant, and there is no suggestion that Morgan knew of the physical dissimilarities between the assailant and Miller when he sought to secure the warrant or lacked probable cause to believe that Miller was the assailant. Whatever claim Miller may have against Helm and Yuba for allegedly providing false information that led to his arrest, Miller does not contend that Morgan or Bordwine knew such information was false or contradicted, nor does Miller contend that Morgan or Bordwine purposely sought to secure an arrest warrant based on anything less than probable cause. Miller only attempts to base liability, with respect to Morgan and Bordwine, on actions they failed to take after Miller's arrest. However, as Baker teaches, Morgan and Bordwine were not required to ensure that Miller was actually the guilty party -- this is the duty of the court. Morgan and Bordwine acted under a warrant, authorized by a judge, directing them to arrest Miller, detain him, and bring him before the court. Morgan and Bordwine were not therefore free to release Miller once he was arrested. Pursuant to the warrant, that determination had to be made by the judge.

Moreover, Miller spent only five days in jail after Fugate began reporting the error. Of this period, two days were non-working days. Thus, Miller spent three working days in jail while Fugate's statement was investigated and arrangements could be made for an appearance before Judge Box. Additionally, there is no indication that Morgan or Bordwine purposely delayed Miller's appearance before the judge in order to make him serve additional time in jail. Morgan and Bordwine certainly have no control over the judge's docket, and November 15, two days after the line-up was conducted, may have been the earliest date on which to bring Miller before the judge.

In light of the evidence presented, the Court finds that Miller's appearance before Judge Box was reasonably prompt.

As the Supreme Court noted in Baker, Miller "was indeed deprived of his liberty for a period of days, but it was pursuant to a warrant conforming . . . to the requirements of the Fourth Amendment." Baker, 443 U.S. at 144. "The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished 'without due process of law.'" Id. at 145. The Court finds that the actions of Morgan and Bordwine were reasonable and proper under the Constitution and that Miller was not deprived of liberty without due process of law. The Court therefore concludes that Morgan and Bordwine did not deprive Miller of any constitutional right, and Miller's § 1983 claim must be resolved in their favor.

Since there is no diversity, the disposition of the § 1983 action against Morgan and Bordwine eliminates the federal claim at issue here. The Court therefore dismisses without prejudice Miller's remaining state claims. See Medina v. City of Osawatomie, 992 F.Supp. 1269, 1279 (D.Kan. 1998) (whether to exercise supplemental jurisdiction over remaining state claims is within the district court's discretion, and the court is expressly authorized to decline to exercise such jurisdiction once the court dismisses all federal claims, under 28 U.S.C. § 1367(c)(3)); Thatcher Enterprises v. Cache County Corp., 902 F.2d 1472, 1478 (10th Cir. 1990) (notions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary); Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n. 7 (1988) (when federal claims are dismissed prior to trial, the balance of factors will usually point towards declining jurisdiction over state law claims).

Accordingly, the Court hereby GRANTS defendants, Morgan and Bordwine's, motion for summary judgment with respect to Miller's § 1983 claim. The Court hereby dismisses without

prejudice the remaining state claims against defendants. All other pending motions filed in this case are hereby rendered MOOT by entry of this Order.

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

A handwritten signature in black ink, appearing to read "H. Dale Cook", written over a horizontal line.

H. DALE COOK
United States District Judge

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

FILED

MAY 4 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TRACEY MANNS)
)
Plaintiff,)
)
vs.)
)
THE CITY OF TULSA, et. al.,)
)
Defendants.)

No. 97-CV-931-B

RECEIVED ON DOCKET
MAY 05 1999

JUDGMENT

This action came on for hearing before the Court, Honorable Thomas R. Brett, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that Plaintiff, Tracey Manns, take nothing from the Defendant, City of Tulsa, and that the action be dismissed on the merits. Each party shall pay her/its own attorney fees and costs.

DATED THIS 4th DAY OF MAY, 1999 AT TULSA, OKLAHOMA.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

MAY - 4 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

TRACEY MANNS)

Plaintiff,)

vs.)

No. 97-CV-931-B

THE CITY OF TULSA, et. al.,)

Defendants.)

ENTERED ON DOCKET
MAY 05 1999

ORDER

Comes on for hearing Defendant's Motion for Summary Judgment (Docket #24),
and the Court, being fully advised, finds as follows:

BACKGROUND

Tracey Manns ("Manns") filed this action pursuant to 42 U.S.C. §1983 ("Section 1983") alleging that on October 15, 1995, the City of Tulsa ("City") violated Manns' civil rights. She alleges that Tulsa police officers erroneously executed a search warrant that had been issued on the allegation that an informant had purchased cocaine at the residence Manns shared with her husband. Manns alleges that the search which ensued resulted in the violation of her constitutional rights as follows: the search warrant was improperly obtained and her home improperly searched; Manns' property was intentionally damaged during the search; and, an illegal "body cavity" search was

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conducted on Manns. City is the only remaining defendant, the Court having granted judgment to the individually named officers on statute of limitations grounds.

Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "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." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated:

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

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts."

Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

* * *

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

Undisputed Material Facts

1. Tulsa Police Officers ("Officers") conducted a search of Manns' home during the early morning hours of October 14, 1995.
2. The Officers conducted this search by obtaining a warrant to search said premises from Judge Peter Messler, Tulsa County District Court.
3. The warrant issued after Officers produced evidence they observed a confidential informant purchase cocaine at the residence from one of the occupants of Manns' residence approximately two hours prior to the time the warrant was approved.¹

¹Manns denies any knowledge of any such buys and that she and her husband sold drugs to anyone.

4. The Officers recovered a small quantity of marijuana and other drug paraphernalia during the search of Manns' residence.

5. Manns was subsequently charged with single misdemeanor counts of "Unlawful Possession of Marijuana" and "Unlawful Possession of Paraphernalia."

6. These charges were dismissed by the State several months later.

7. The Tulsa Police Department has written policies and procedures which require police officers to conduct all searches and seizures in accordance with applicable laws.

8. Tulsa Police Department policies and procedures require all body cavity searches be conducted at a detention facility only, after approval from a lieutenant or higher, and in the presence of a same sex witness.

9. The Tulsa Police Department Training and Development Division provides instructional programs for police recruits and police officers.

10. The instructional programs provided by the Tulsa Police Department Training and Development Division are approved by the Oklahoma Council on Law Enforcement Education and Training.

11. All police recruits are required to attend and complete a basic training curriculum offered by the Tulsa Police Department Training and Development Division before they are commissioned to serve as officers of the Tulsa Police Department.

12. This basic training includes an instructional block on "search and seizure."

13. The level of instruction on “**search and seizure**” provided in this program exceeds that required by the Oklahoma Council on Law Enforcement Education and Training.

14. Tulsa Police Department Training and Development Division offers additional “in-service” courses on “**search and seizure**” to Tulsa Police Officers which may be taken to comply with the yearly in-service training requirements established by the Oklahoma Council on Law Enforcement Education and Training.

15. The level of instruction in **these in-service** courses exceeds that required by the Oklahoma Council on Law Enforcement Education and Training.

16. In addition to the forgoing, **each officer** of the Tulsa Police Department receives periodic “legal updates” prepared by the Police Department Attorney which contain information about recent “**search and seizure**” law cases.

17. All of these instructional programs were operating prior to October 14, 1995.

Arguments and Authority

City moves for summary judgment on two propositions. First, City alleges there is no evidence that a policy or custom of the City deprived Plaintiff of any constitutional right. Second, City urges there is no evidence the City failed and/or inadequately trained or supervised the officers who conducted the search.

Manns counters by asserting the **specific** policy which led to a violation of her constitutional rights was the City’s **policy on training** its officers in search and seizure.

The parties agree that municipal liability is not based upon respondeat superior. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978). The standard is twofold. First, a plaintiff **must** prove the existence of a municipal custom or policy, following which the plaintiff **must** prove a direct causal link between the custom or policy and the alleged violation. *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989). Where, as here, the **allegation** is that City failed to act by inadequately training, a plaintiff **must** demonstrate the **inaction** resulted from "deliberate indifference to the rights of the Plaintiff." *Id.* at 388. **Further**, the Tenth Circuit has held that a single incident of unconstitutional activity is **not sufficient** to impose civil rights liability on employer unless proof of the incident **includes** proof that it was caused by an existing, unconstitutional municipal policy, **which policy** can be attributed to a municipal policymaker. *Butler v. City of Norman*, 992 F.2d 1053 (10th Cir. 1993).

City has produced evidence **establishing** that it is the policy of the City that all police officers are directed to conduct **all searches** and seizures in accordance with applicable law. Viewing Plaintiff's **evidence** in a light most favorable to her, Plaintiff's testimony would establish that the **policies** were not followed in this single instance. Manns has failed to come forward with **any evidence** that there is a custom or policy within the police department which is **inconsistent** or different from the written policies on search and seizure.

City has established that it **trains all future** police in search and seizure and that

the training given exceeds that required by the state.² Updates on the law in this area are made available to officers and additional courses offered in connection with the requirements of continued certification. Plaintiff correctly states the updates and courses offered after initial training are not mandatory. Plaintiff has not demonstrated however that the required training or the failure to require training beyond that which is required and/or available resulted in a custom or policy which led to violation of her rights. Plaintiff's allegations of failure to train, even when taken as true, do not establish a deliberate indifference by City which led to violation of Manns' rights or which failed to prevent tortious conduct by the officers as required in order for the City to be liable to Manns.

Plaintiff further asserts it is possible that an officer who has undergone initial training will never have additional training in search and seizure throughout his career. This does not, however, prove "a complete lack of concern and udder [sic] indifference" on the part of the City.³

Manns offered several additional material facts in opposition to entry of summary judgment which, if true, establish she and her husband were violated by officers acting outside the stated policies of the City. In order to survive summary judgment however,

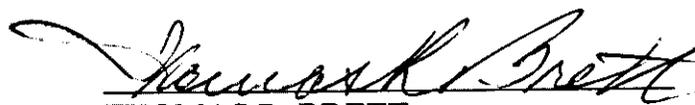
²There was no evidence presented that the state requirements were inadequate.

³In fact, as part of her argument that failure to provide continual retraining, standing alone, establishes the necessary element of indifference, Plaintiff submits the seemingly contradictory assertion that officers deal with search and seizure on a regular basis. This appears to the Court, absent evidence to the contrary, that the initial training would be continually reinforced.

Plaintiff must tie these actions to the City in a way that establishes culpability. This Plaintiff has failed to do. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427 (1985); *Board of County Commissioners of Bryan County*, 520 U.S. 397, 117 S. Ct. 1382 (1997).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Summary Judgment (Docket #24) is granted. Each party is to pay its/her attorney fees and costs.

DONE THIS 4th DAY OF MAY, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

MAY 4 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

KATHERYN S. DUKE,

Plaintiff,

vs.

PARADIGM FINANCIAL GROUP, ACCOUNT
MANAGEMENT INFORMATION, INC.,
CREDIT BUREAU OF OKLAHOMA CITY,
INC., CSC CREDIT SERVICES,
EQUIFAX CREDIT INFO and
TRANS UNION,

Defendants.

No. 98-C-459-B(E)

ENTERED ON DOCKET
DATE MAY 05 1999

ORDER

Before the Court is the Motion For Summary Judgment filed by defendant Credit Bureau of Oklahoma City, Inc., (Docket # 22), Motion For Summary Judgment filed by defendant CSC Credit Services, Incorporated ("CSC") (Docket #23), Plaintiff's Motion to Amend Second Cause of Action (Docket #33), and Plaintiff's Motion to Extend Discovery (Docket # 46), and the Court, being fully advised, finds as follows:

Plaintiff filed this action against the various named defendants, alleging violations

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of 15 U.S.C. §1681et seq. and 15 U.S.C. §1962 et seq., seeking damages for dissemination of inaccurate credit information which caused her to be denied credit.

CSC Motion for Summary Judgment

CSC moves for summary judgment pursuant to Fed. R. Civ. P. 56 and N.D. LR 56.1 on Plaintiff's claim under 15 U.S.C. §1681e(b). CSC previously moved for summary judgment on this claim and the Court denied the motion for failure of CSC to establish that the procedures stated in CSC's first motion were used in Plaintiff's case and that the procedures were in place during the relevant time frame.¹ CSC asserts it now submits evidentiary material establishing those missing elements and is therefore entitled to summary judgment.

Standard of Review

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated:

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

¹The Court granted summary judgment as to Plaintiff's §1681c(a)4 claim.

of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts."

Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

* * *

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

Statement of Undisputed Material Facts²

The following facts are undisputed:

1. CSC employs the following four-part system which assures maximum possible accuracy of the credit information about its consumers contained in the consumer credit reporting database:

a. First, creditors with whom consumers have established credit histories report that history to CSC or CSC's data processor on specially formatted and coded tapes. These tapes contain account and consumer information. Most creditors send tapes to CSC or CSC's data processor at least once every thirty days. Additionally, CSC has vendors who gather public record information and then report that information to CSC or its data processor on these specially formatted and coded tapes.

b. Second, the information provided by the creditors and public records vendors is matched with the information already contained in the consumer credit reporting database. The specially formatted computer tape goes through a process by which the information on the tape is downloaded onto the database by CSC's data processor, thereby updating or adding to the files already in the database, or creating new files where necessary. CSC's data processor uses state of the art equipment and technology to accomplish this matching process.

²The Court concludes these facts remain undisputed despite Plaintiff's statements to the contrary where Plaintiff failed to produce admissible evidence refuting same.

c. Third, the consumer is given the opportunity to have input regarding credit information contained on his/her credit report by contacting CSC and disputing the accuracy of the information listed on his/her credit report in accordance with 15 U.S.C. §1681i (a).³ When CSC receives a dispute, it reinvestigates using all the information supplied to it by both the consumer and the creditor. If the information is verified to belong to the consumer, the information is updated on the consumer's credit report. If the information is inaccurate or can no longer be verified, the information is deleted from the consumer's credit report. If the information is verified to be accurate, the consumer is provided the opportunity to have a statement regarding the information inserted into the credit report in accordance with 15 U.S.C. §1681i(b).

d. Fourth, CSC accepts manual written requests from creditors called "Universal Data Forms." Like the specially formatted tapes, the information on these manually written requests must be properly "coded" by the creditor in order to have accurate changes made on the consumer's credit report.

2. CSC's contract with furnishers of information ("creditors") requires each furnisher of information to provide accurate information to CSC.

3. In December 1996, Paradigm caused the collection of a \$2,416 debt to be listed in Plaintiff's file with CSC.

4. CSC's records indicated that the date of last activity for the collection of the

³The Court's earlier order of 12/8/98 contained a scrivener's error in that the "i" was omitted in this citation. Insofar as it is necessary for the purpose of the record, it is hereby deemed corrected.

item was March of 1993.

5. Plaintiff requested and obtained a copy of her credit report from CSC sometime after June 30, 1997.

6. Based upon information from Paradigm, CSC suppressed the collection item from Plaintiff's credit report by March, 1998, so that any credit reports obtained thereafter would not contain the collection item unless the creditor supplied more data confirming the entry.

7. On April 4, 1998, two used automobile dealers obtained Plaintiff's credit report. Neither report contained the collection item.

8. At least as early as January of 1996 and continuing to the present, CSC employed all of the aforementioned procedures.

9. CSC employed all of the aforementioned procedures in preparing Plaintiff's credit report.

In CSC's first motion for summary judgment, CSC asserted it never received notice from Plaintiff that any of the information in the credit report was inaccurate. Plaintiff countered with an affidavit stating she "filed a written report ...asking for a copy of the credit report and indicating that certain information on the report was false." CSC replied that whether Plaintiff had filed the report was irrelevant. In its renewed motion for summary judgment, CSC reasserts/maintains it was never notified that Plaintiff

disputed the credit entry but that Plaintiff merely requested a copy of her credit report.⁴

Plaintiff's second affidavit now states that the Credit Manager of Fred Jones Lincoln Mercury completed and mailed a written request to CSC asking for a copy of the credit report and indicating her name was misspelled and that the credit report listed an unpaid debt of "Paradigm," a company Plaintiff had never heard of. Plaintiff does not state she directly observed the completion and/or mailing of the form nor has she provided any documentary or testimonial evidence to support this. Her statement that the request was completed and mailed is therefore unsupported by admissible evidence. Further, 15 U.S.C. §1681i (a) requires the consumer to directly notify the agency of any dispute. The case law indicates this has not been literally interpreted to mean the consumer may not act through an agent, however, there is no authority which supports a finding that the creditor from whom consumer is seeking credit becomes the consumers agent in the event a negative credit report is given.⁵

Plaintiff states she requested the information be deleted "through the Credit Manager." She states the Credit Manager did not tell her she could make the request herself nor give her a copy of the credit report. Neither the Credit Manager nor Fred Jones

⁴Plaintiff's response brief states she "told an agent of CSSCS that she had never heard of Paradigm and that as far as she knew, did not owe them a dime." Plaintiff's affidavit does not support this statement but establishes only that she conveyed this information to the Credit Manager of Fred Jones Lincoln Mercury.

⁵In *Pinner v. Schmidt*, 805 F.2d 1258 (5th Cir. 1986), written notice was given through plaintiff's attorney.

Lincoln Mercury is named as a defendant in this action. Plaintiff states she did not receive a copy of the credit report from CSC and was never informed, in writing, of the contents of the report or who Paradigm was. She states she was told by the Credit Manager that he sent the information to CSC, which agreed to correct the spelling of her name but refused to remove the Paradigm entry. Again, no admissible evidence is submitted in support of an agency relationship or what was actually undertaken on her behalf.

Plaintiff then states that she spoke with a representative of CSC by telephone in late June or early July, 1997 but does not remember to whom she spoke. She does not state what she told the representative but simply states the representative never told her what to do to get a false entry removed nor offered to send her a copy of her credit report. Plaintiff states she finally ordered a copy of her credit report for which she had to pay but again does not say when she did this or in what context. Based upon the sentence structure of the affidavit, it appears Plaintiff requested this in the same telephone call previously referenced. Plaintiff asserts she was given the telephone number for Paradigm.

Plaintiff has established only that she requested a copy of her credit report. There is nothing in the referenced statutes which requires credit reporting agencies to provide additional information when a credit report is requested. *See Middlebrooks v. Retail Credit Co.*, 416 F.Supp. 1013, 1017-18 (N.D.Ga.1976).

Based upon the record before the Court, CSC has established it never was notified by Plaintiff that she disputed the Paradigm entry. Accordingly, any claim by Plaintiff pursuant to 15 U.S.C. §1681i would fail and CSC would be entitled to summary judgment as to those claims.

The Court notes that Plaintiff's response brief confesses that she did not adequately plead a violation of 15 U.S.C. §1681i in her Complaint and requests permission from the Court to amend to include a cause of action thereunder. Plaintiff also filed a separate motion to amend. Based upon the lateness of the request and the futility of pursuing such a claim, the Court finds the request should be denied. *See Walker v. Elbert*, 75 F.3d 592, 599 (10th Cir. 1996).

CSC's motion for summary judgment is directed to Plaintiff's claims brought pursuant to 15 U.S.C. §1681e(b) and specifically to supplying evidence of two elements found to be missing in CSC's original motion. CSC has now submitted evidence that the procedures set forth in the original motion and reiterated in the undisputed facts listed herein were in place during the time frame at issue and were specifically employed in dealing with Plaintiff's credit file. The Court must therefore examine whether Plaintiff has raised an issue of material fact regarding the reasonableness of the procedures to prevent summary judgment.⁶ A review of Plaintiff's brief establishes she has not

⁶Plaintiff states CSC has breached the provisions of §1681e(b) in not following "reasonable procedures to assure maximum possible accuracy" in updating procedures. We are not dealing with updating procedures however as that claim was not properly pled or proved.

provided any admissible evidence that the procedures used were not reasonable.

The Fair Credit Reporting Act does not impose strict liability for inaccurate entries. Plaintiff has the burden of establishing that the inaccuracy resulted from a negligent or willful failure to use reasonable procedures in preparing the report.

Sepulvado v. CSC Credit Services, Inc., 158 F.3d 890 (5th Cir.1998). To defeat a motion for summary judgment, a plaintiff “must minimally present some evidence from which a trier of fact can infer that the consumer reporting agency failed to follow reasonable procedures in preparing a credit report.” *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47, 51 (D.C.Cir. 1984).⁷

In answer to the Complaint, CSC denied the allegations directed toward it pursuant to 15 U.S.C. §1681e(b) and additionally raised CSC’s use of reasonable procedures as an affirmative defense on which CSC would normally carry the burden of proof. In this case, whether the Court considers this as a denial or an affirmative defense impacts CSC’s entitlement to summary judgment. If it is an affirmative defense, CSC has failed to establish that the procedures used are reasonable. The Court has nothing before it to establish that the reference procedures are reasonable within the industry. CSC is not required to establish this if its answer is deemed a general denial of Plaintiff’s

⁷In response to CSC’s first motion for summary judgment, Plaintiff asserted a material fact remained as to the reasonableness of CSC allowing Paradigm to become a member and of CSC’s screening process in this regard. Plaintiff has not reasserted this in response to the second summary judgment motion, adopted her prior argument or incorporated same by reference. Further, Plaintiff has failed to come forward with any evidence that would tend to establish any negligence by allowing Paradigm to be a member beyond the allegations regarding the entry at issue in this case.

Plaintiff's claim. The Court finds the majority of courts and better reasoned decisions hold that it is a general denial and that the burden of proof does not shift to defendant. *Id.* at 51.⁸ Under this analysis, CSC is entitled to summary judgment.

Credit Bureau of Oklahoma City, Inc.'s Motion For Summary Judgment

The Court next addresses Motion For Summary Judgment filed by defendant Credit Bureau of Oklahoma City, Inc. ("Credit Bureau"). Credit Bureau stands in the same position to Plaintiff as CSC, is represented by the same counsel and has now filed virtually the same brief urging summary judgment as that first filed on behalf of CSC. Credit Bureau moves for summary judgment pursuant to Fed. R. Civ. P. 56 and N.D. LR 56.1 on Plaintiff's claim under 15 U.S.C. §1681e(b) based upon Plaintiff's failure to notify Credit Bureau that information in the report was inaccurate. Credit Bureau moves for summary judgment under 15 U.S.C. §1581(a)4 because the debt listed did not antedate the credit report by more than seven years according to the information readily available on the face of the report. The standard for review is the same as referenced above.

Statement of Undisputed Material Facts⁹

The following facts are undisputed:

1. Credit Bureau employs an almost identical system to that employed by CSC

⁸Congress specifically provided for burden shifting in two sections of the referenced act but did not in §1681e(b). *See supra* note 5, for a detailed discussion of congressional intent as to burden of proof and a compilation of citations to those cases addressing the issue.

⁹The Court concludes these facts remain undisputed despite Plaintiff's statements to the contrary where Plaintiff failed to produce admissible evidence refuting same.

which assures maximum possible accuracy of the credit information about its consumers contained in the consumer credit reporting database.

a. First, creditors with whom consumers have established credit histories report that history to Credit Bureau or Credit Bureau's data processor on specially formatted and coded tapes. These tapes contain account and consumer information. Most creditors send tapes to Credit Bureau or Credit Bureau's data processor at least once every thirty days. Additionally, Credit Bureau has vendors who gather public record information and then report that information to Credit Bureau or its data processor on these specially formatted and coded tapes.

b. Second, the information provided by the creditors and public records vendors is matched with the information already contained in the consumer credit reporting database. The specially formatted computer tape goes through a process by which the information on the tape is downloaded onto the database by Credit Bureau's data processor, thereby updating or adding to the files already in the database, or creating new files where necessary. Credit Bureau's data processor uses state of the art equipment and technology to accomplish this matching process.

c. Third, the consumer is given the opportunity to have input regarding credit information contained on his/her credit report by contacting Credit Bureau and disputing the accuracy of the information listed on his/her credit report in accordance with 15 U.S.C. §1681i (a). When Credit Bureau receives a dispute, it reinvestigates

using all the information supplied to it by both the consumer and the creditor. If the information is verified to belong to the consumer, the information is updated on the consumer's credit report. If the information is inaccurate or can no longer be verified, the information is deleted from the consumer's credit report. If the information is verified to be accurate, the consumer is provided the opportunity to have a statement regarding the information inserted into the credit report in accordance with 15 U.S.C. §1681i(b).

d. Fourth, Credit Bureau accepts manual written requests from creditors called "Universal Data Forms." Like the specially formatted tapes, the information on these manually written requests must be properly "coded" by the creditor in order to have accurate changes made on the consumer's credit report.

e. Fifth, Credit Bureau is a member of Trans Union Credit Reporting System ("Trans Union"). Only companies or individuals who are authorized subscribers with Trans Union may inquire into consumers' credit histories. In order to access consumer credit information, the subscriber must provide both a security password and the subscriber's number.

2. Paradigm is a subscriber of the Merchants Association of Tampa, Florida ("Merchants Association") and, like Credit Bureau, is on the Trans Union Credit Reporting System.

3. Merchants Association entered into a contract with Paradigm and other furnishers of information which states that the furnisher of information will provide

accurate information.

4. In May of 1997, several subscribers made inquiries into information in Plaintiff's credit file.

5. Plaintiff requested and obtained a copy of her credit report from the regional office of Trans Union in Springfield, Pennsylvania on June 13, 1997.

6. Paradigm caused the collection of a \$2,416 debt ("Collection Entry") to be listed in Plaintiff's file with Credit Bureau in December of 1996. The Collection Entry also indicated that the date of last activity for the collection was February of 1993.¹⁰

7. On July 1, 1997, Credit Bureau of Tulsa received an Investigation Request Form from Plaintiff, requesting the reinvestigation of an entry regarding a tax lien from the State of Oklahoma and the addition of her Master Card with Direct Merchants Bank to her credit report. Plaintiff did not request an investigation regarding the Collection Entry reported by Paradigm. Credit Bureau of Tulsa forwarded the request to Credit Bureau in Oklahoma City. Pursuant to Plaintiff's request Credit Bureau investigated the tax lien and updated the information in her credit report. The following week, Credit Bureau mailed Plaintiff a consumer notification letter indicating the results of the reinvestigation.

8. Paradigm deleted the Collection Entry from Plaintiff's credit files in the Trans Union system on February 7, 1998.

¹⁰CSC's records indicated that the date of last activity for the collection of the item was March of 1993.

9. In April, 1998, several subscribers obtained Plaintiff's credit report. None of these reports contained the Collection Entry.

10. At no time has Plaintiff mailed to Credit Bureau an Investigation Request Form with respect to the Collection Entry reported by Paradigm.

Plaintiff responds that there exist **disputed material fact** in several areas. First, Plaintiff makes a circuitous argument that the four point system employed by Credit Bureau to assure maximum possible accuracy of credit information did not do so or Plaintiff would not have had inaccuracies in her credit report. Plaintiff again asserts the argument she raised in response to CSC's first motion for summary judgment that Credit Bureau only infers that the four point system was used in Plaintiff's credit file. However, Credit Bureau has attached the affidavit of Michael F. O'Leary, General Manager of Credit Bureau to establish this as an undisputed fact.¹¹ Plaintiff's response again confuses the requirement that credit bureaus operate under a system which assures maximum possible accuracy with one which imposes strict liability, a standard not contemplated by the statute. Further, Plaintiff comes forward with no other arguments or evidence which call Credit Bureau's system into question.

Plaintiff also reurges she made an oral request to Credit Bureau through Fred Jones Lincoln Mercury in June, 1997 and received no reply. This argument was previously

¹¹Credit Bureau did not properly cite the particular paragraphs of the affidavit in its brief however it is clear that this is established by the affidavit.

addressed and requires no further discussion except to note that Plaintiff did receive a reply to the documented written request she made to Credit Bureau concerning two other errors on her credit report.

Plaintiff urges she was told verbally by an unnamed representative of Credit Bureau that because she had already reported the information concerning Paradigm to another credit reporting bureau it was unnecessary to report it to Credit Bureau. It is this testimony which varies from that relating to CSC, in which Plaintiff attempted to establish notice to CSC of what a nonparty (Fred Jones' credit manager) said or wrote on Plaintiff's behalf, which creates a question of material fact which would preclude summary judgment as to this defendant on Plaintiff's claim of failure to reinvestigate. Plaintiff's testimony is admissible evidence which contradicts Credit Bureau's assertion that Plaintiff did not notify Credit Bureau of the Paradigm error. However, Plaintiff has not asserted a claim pursuant to 15 U.S.C. §1681i against Credit Bureau just as she had not against CSC. Whether Plaintiff gave notice to Credit Bureau and Credit Bureau failed to reinvestigate following that notice has no bearing or relevance to a finding of whether reasonable procedures were employed to assure maximum possible accuracy in the preparation of the original report pursuant to 15 U.S.C. §1681e(b).

Additionally, the Court notes that although Plaintiff moved to amend to include a cause of action pursuant to 15 U.S.C. §1681i as to CSC, which this Court has determined

to be without merit, the request to amend did not include Credit Union.

Inexplicably, Plaintiff's final argument is that Credit Union's motion is premature in that no discovery has been commenced by either party. Plaintiff rightly asserts she is entitled to discovery. However, the Court's Scheduling Order, entered by agreement of the parties on December 14, 1998, set a discovery cut-off date of April 30, 1999. On February 3, 1999, Plaintiff requested a deferral of her response to Credit Union's motion for summary judgment until the discovery cut-off date of April 30, 1999. Over Credit Union's objection, the Court granted Plaintiff's request. Plaintiff did not file a motion to extend discovery until April 30, 1999, the same day Plaintiff's response brief to summary judgment was filed.¹² That motion requests a short period of discovery following ruling on the motions for summary judgment and appears to be directed only to discovery relating to Credit Union and CSC as no other counsel are included in the statement of objection to the requested extension. Plaintiff's explanation for failure to conduct any discovery is that Plaintiff's employment has been sold and will be moved to Texas on April 30, 1999 and that this has caused Plaintiff to work overtime, rendering her unable to consult with counsel concerning discovery and depositions. In light of the parties having four and one-half months for discovery from scheduling conference and more than two months after Plaintiff sought deferral of response to summary judgment to complete

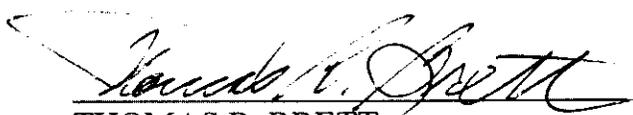
¹²Credit Union objects to this extension, however the written objection is not due until May 17, 1999.

discovery and Plaintiff's representation that no discovery has been undertaken, the Court finds no merit in the request for additional discovery time. Plaintiff's motion is therefore denied and the Court enters summary judgment in favor of Credit Union pursuant to the claims brought pursuant to 15 U.S.C. §1681e(b).

For the same reasons as stated herein for entry of summary judgment under 15 U.S.C. §1581(a)4 in favor of CSC, Credit Bureau is entitled to summary judgment under 15 U.S.C. §1581(a)4. The debt listed did not antedate the credit report by more than seven years according to the information readily available on the face of the report.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Motion For Summary Judgment filed by defendant Credit Bureau of Oklahoma City, Inc., (Docket # 22) is granted, Motion For Summary Judgment filed by defendant CSC Credit Services, Incorporated ("CSC") (Docket #23) is granted, Plaintiff's Motion to Amend Second Cause of Action (Docket #33) is denied, and Plaintiff's Motion to Extend Discovery (Docket # 46) is denied.

DATED THIS 1st DAY OF MAY, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

MAY 4 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

KATHERYN S. DUKE,)

Plaintiff,)

vs.)

PARADIGM FINANCIAL GROUP, ACCOUNT)
MANAGEMENT INFORMATION, INC.,)
CREDIT BUREAU OF OKLAHOMA CITY,)
INC., CSC CREDIT SERVICES,)
EQUIFAX CREDIT INFO and)
TRANS UNION,)

Defendants.)

No. 98-C-459-B(E)

ENTERED ON DOCKET
DATE MAY 05 1999

JUDGMENT

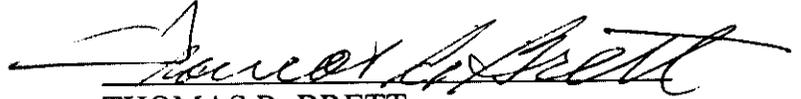
This action came on for hearing before the Court, Honorable Thomas R. Brett, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that Plaintiff, Katheryn S. Duke, take nothing from the Defendants, Credit Bureau of Oklahoma City, Inc., and CSC Credit Services, Incorporated, that the action be dismissed on the merits as to these named

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Defendants, and that the parties pay their own attorney fees and costs.

DATED THIS 4th DAY OF MAY, 1999 AT TULSA, OKLAHOMA.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett", written in black ink. The signature is fluid and extends across the width of the text below it.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

MAY 05 1999

CAROLINE D. HAGBERG,)
)
Plaintiff,)
)
vs.)
)
MIKE GOURD, an individual;)
FLUOR DANIEL, INC., d/b/a)
FLUOR DANIEL WILLIAMS BROS.,)
a foreign corporation, and)
WILLIAMS BROTHERS ENGINEERING,)
COMPANY, a foreign corporation,)
)
Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-823-B(J)

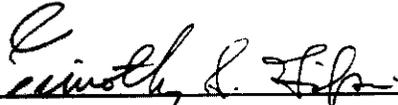
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DATE MAY 5 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties, Plaintiff Caroline D. Hagberg, and Defendants Mike Gourd, Fluor Daniel, Inc. and Williams Brothers Engineering Company, by and through their respective attorneys, and advise the Court that they have reached a mutually satisfactory settlement regarding Plaintiff's claims herein. Therefore, the parties stipulate that this action should be dismissed with prejudice with each of the parties to bear their own costs and attorneys' fees.

Dated this 28th day of April, 1999.

Respectfully submitted,



Timothy S. Gilpin, OBA #1844
115 West Third Street, Suite 400
Tulsa, Oklahoma 74103
(918) 583-7022

ATTORNEY FOR PLAINTIFF
CAROLINE D. HAGBERG

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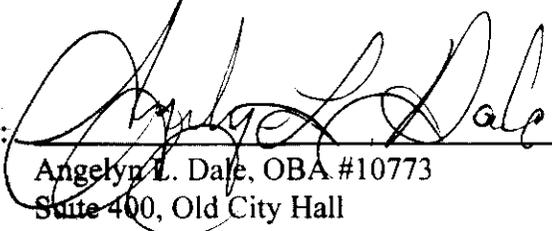
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NICHOLS, WOLFE, STAMPER, NALLY,
FALLIS & ROBERTSON, INC.

By: 

Angelyn L. Dale, OBA #10773
Suite 400, Old City Hall
124 East Fourth Street
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(918) 584-5182

ATTORNEY FOR DEFENDANT
MIKE GOURD

- And -

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

By: 

Steven A. Broussard, OBA #12582
Sarah Jane McKinney, OBA #17099
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0400

ATTORNEYS FOR DEFENDANT
WILLIAMS BROTHERS ENGINEERING COMPANY
and FLUOR DANIEL, INC.

CR

FILED

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

MAY 4 1999

HOWARD CRAWFORD,

Plaintiff,

vs.

**CITY OF HOMINY, a Municipality
in the State of Oklahoma,**

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

98-
Case No. CV 545 H (M)

**ENTERED ON DOCKET
DATE MAY 4 1999**

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The plaintiff, Howard Crawford, and the defendant, the City of Hominy, advise the court of a settlement agreement between the parties and pursuant to Rule 41(a)(1)(ii), FED. R. CIV. P., jointly stipulate that the plaintiff's action against the defendant, the City of Hominy, be dismissed with prejudice, the parties to bear their respective costs, including all attorney's fees and expenses of this litigation.

Dated this 4th day of MAY, 1999.


Howard Crawford, Plaintiff


J. Douglas Mann, OBA #5663
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 700
Tulsa, Oklahoma 74103
(918) 585-9211

Attorneys for Defendant

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 4 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SANDRA GARRETT,)

Plaintiff,)

vs.)

CROWN LIFE INSURANCE COMPANY,)

Defendant.)

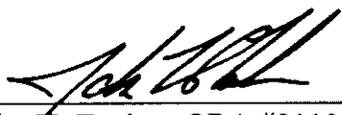
Case No. 97-CV-1134 B(M)

ENTERED ON DOCKET

DATE **MAY 4 1999**

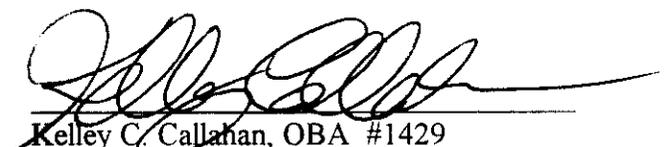
STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to Federal Rule of Civil Procedure 41(a), Plaintiff, Sandra Garrett, and Defendant, Crown Life Insurance Company hereby stipulate that the above-entitled action be dismissed with prejudice.



John H. Tucker, OBA #9110
RHODES, HIERONYMUS, JONES,
TUCKER & GABLE
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SANDRA GARRETT



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ATTORNEY FOR DEFENDANT CROWN
LIFE INSURANCE COMPANY

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CT

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

FILED

MAY 4 - 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THRIFTY RENT-A-CAR SYSTEM,)
INC., an Oklahoma corporation,)

Plaintiff,)

vs.)

ALOHA MOTORCYCLE U-DRIVE,)
INC., and BRADLEY SKINNER,)

Defendants.)

Case No. 98 CV 0744 BU(E)

ENTERED ON DOCKET

DATE MAY 04 1999

ORDER OF DISMISSAL

The Court, being fully advised and having reviewed the Motion for Dismissal, hereby orders that this case be dismissed as follows:

- (i) All claims between Thrifty Rent-A-Car System, Inc. and Bradley Skinner are hereby dismissed with prejudice; and
- (ii) The claims of Thrifty Rent-A-Car System, Inc against Aloha Motorcycle U-Drive, Inc. are dismissed without prejudice.

IT IS SO ORDERED.

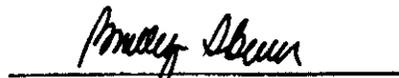

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM
AND CONTENT:



Michael J. Gibbens, OBA #3339
CROWE & DUNLEVY
321 South Boston Ave.
500 Kennedy Building
Tulsa, Oklahoma 74103
(918) 592-9800
(918) 592-9801

ATTORNEYS FOR PLAINTIFFS
THRIFTY RENT-A-CAR SYSTEM, INC.


Bradley Skinner

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

FILED

MAY - 3 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GREGORY DALE ENGLISH,)

Petitioner,)

vs.)

R. MICHAEL CODY,)

Respondent.)

Case No. 95-CV-753-B

ENTERED ON DOCKET

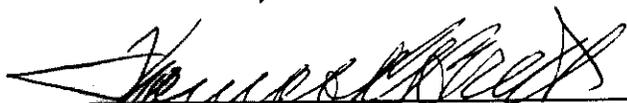
DATE MAY 04 1999

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 3rd day of May, 1999.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

F I L E D

MAY - 3 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GREGORY DALE ENGLISH,)
)
Petitioner,)
)
vs.)
)
R. MICHAEL CODY,)
)
Respondent.)

Case No. 95-CV-753-B

ENTERED ON DOCKET
DATE MAY 04 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*, is currently confined in the Oklahoma Department of Corrections. He challenges his convictions entered in Tulsa County District Court, Case Nos. CRF-88-2553 and CRF-88-2554, asserting on three (3) grounds of error. Based on the record before the Court, and as more fully set out below, the Court concludes that this petition should be denied.

BACKGROUND

Petitioner, represented at trial by retained counsel, Jim Heslet, was convicted by a jury of two counts of Robbery with Firearms, After Former Conviction of Three or More Felonies in Tulsa County District Court, Case Nos. CF-88-2553 and CF-88-2554, and received a 215 year sentence on each count, to be served consecutively. Petitioner appealed the convictions and sentences. On direct appeal, Petitioner, represented by Gloyd McCoy, an attorney with the Appellate Indigent Defender's Office, raised the following issues:

1. Mr. English was denied his sixth amendment right to confrontation by the introduction of the guilty plea transcript of Raymond Tillman.

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2. Tillman's repeated assertions of his privilege against self-incrimination and the state's reference to this were prejudicial to Mr. English.
3. The prosecutor improperly vouched for the credibility of the state's witnesses.
4. The sentences imposed are excessive.

(#4, Ex. A). On January 13, 1993, the Oklahoma Court of Criminal Appeals affirmed the judgement and sentence in an unpublished summary opinion (#4, Ex. C). Petitioner, appearing *pro se*, filed a petition for rehearing, arguing that the appellate court's opinion "overlooked a question decisive of the case," i.e., the issue raised in United States v. Gomez-Lemos, 939 F.2d 326, 333-34 (6th Cir. 1991), and that both his trial and appellate counsel provided ineffective assistance of counsel in failing to argue the issue (#4, Ex. D). On March 17, 1993, the Court of Criminal Appeals denied the petition for rehearing after considering the merits of Petitioner's claims (#4, Ex. E).

On April 4, 1995, Petitioner, appearing *pro se*, filed an application for post-conviction relief in the trial court, raising the following grounds for relief:

1. The trial court's admission of uncross-examined plea of guilty trial transcript testimony of alleged co-conspirator who refused to testify at trial, under unavailability of witness rule, violated the confrontation clause, warranting a reversal of Mr. English's convictions and sentences for a new trial. (citations omitted).
2. Failure of appellant's trial attorney, Mr. Jim Heslet to object to the U.S. v. Gomez-Lemos, 939 F.2d 326 (6th Cir. 1991) -- Douglas v. Alabama, 380 U.S. 415 (1965) progeny claims/violation in the case at bar and to preserve that error for purpose of direct appeal denied appellant English effective assistance of both trial and appellate counsel under Brecheen v. Reynolds, 41 F.3d 1343, 1363-1366 (10th Cir. 1994) progeny.
3. Unnecessarily suggestive pretrial photo identification procedures denied defendant-appellant English due process (citations omitted) warranting a new trial.
4. Failure of the appellant's trial attorney, Mr. Jim Heslet to object to the Simmons v. U.S. progeny violations . . . and to preserve and raise that error on direct appeal denied appellant English effective assistance of both trial and appellate counsel.

On May 5, 1995, the trial court denied post-conviction relief finding that the issues either had been raised on direct appeal and were barred by *res judicata*, or could have been but were not raised on direct appeal and were waived. Petitioner **appealed**, arguing that his procedural default should be excused because he received **ineffective assistance** from his trial and appellate counsel (#4, Ex. F). The Court of Criminal Appeals concluded that the only issue raised by Petitioner which was not or could not have been raised in his direct appeal was his claim that he had been deprived of effective assistance of appellate counsel. The appellate court further found that based upon the record, Petitioner's appellate counsel did not provide **ineffective** assistance. As a result, on June 21, 1995, the Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief (#4, Ex. G).

Petitioner filed the instant petition for writ of habeas corpus on August 8, 1995, alleging that:

1. Petitioner's convictions and sentences are in direct violation of Idaho v. Wright; Lee v. Illinois; Douglas v. Alabama and specifically U.S. v. Gomez-Lemos, 939 F.2d 326 (6th Cir. 1991);
2. Ineffective assistance of both trial and appellate counsel under Brecheen v. Reynolds, 41 F.3d 1343, 1363-1366 (10th Cir. 1994) and U.S. v. Galloway, 56 F.3d 1239 (10th Cir. 1995);
3. Unnecessarily suggestive pretrial photo I.D. procedures and failure of trial attorney to object to this Simmons v. U.S. claim in the case at bar violated the 6th and 14th Amendments to the United States Constitution.

(#1). Respondent filed a Rule 5 response, stating that Petitioner had exhausted his state remedies and arguing that Petitioner's claims were procedurally barred (#4). Petitioner filed a reply (#5). On August 22, 1996, this Court entered its Order (#11) finding that Petitioner's ineffective assistance of trial counsel claim was not procedurally barred and directing Respondent to address the claim on the merits. Respondent requested permission to appeal pursuant to 28 U.S.C. 1292(b). The Court granted Respondent's request. On June 30, 1998, after considering Respondent's interlocutory

appeal, the Tenth Circuit Court of Appeals defined the conditions requiring a district court to impose a procedural bar on ineffective assistance of trial counsel claims and remanded the issue in this case for further review consistent with its findings (#23). On July 29, 1998, the Court directed the parties to address the considerations relevant to the ineffective assistance of trial counsel/procedural bar issue (#24). Respondent submitted a supplemental brief in compliance with the Court's directive (#25). However, and in spite of being afforded a second opportunity to brief the issues (see September 8, 1998 Order (#27)), Petitioner has not submitted a brief as directed by the Court.

On January 28, 1999, the Court found Petitioner's confrontation clause claim was not procedurally barred and directed Respondent to brief the claim on the merits (#30). Petitioner was advised that he could submit a reply to Respondent's brief. On February 10, 1999, Respondent complied with the Court's Order by filing a supplemental response addressing Petitioner's confrontation clause claim (#31). To date, Petitioner has not filed a reply to the supplemental response.

ANALYSIS

The Court will consider each of Petitioner's claims, in the order presented by Petitioner:

A. Confrontation Clause claim is not procedurally barred but claim is without merit

On direct appeal, Petitioner's counsel argued that Petitioner was denied his 6th Amendment right to confrontation by the introduction of the guilty plea transcript of Raymond Tillman. This claim was considered on the merits and rejected by the Oklahoma Court of Criminal Appeals in its summary opinion affirming Petitioner's convictions and sentences. As stated above, Respondent initially argued that this claim is procedurally barred, but the Court has found Petitioner "fairly

presented" this claim to the Oklahoma Court of Criminal Appeals on direct appeal. Therefore, this Court is not precluded from considering the merits of this claim.

Petitioner argues that the admission of his co-defendant's guilty plea testimony at Petitioner's trial violated his Sixth Amendment right to confront and cross-examine his accuser. The Supreme Court has held that to protect a criminal defendant's Sixth Amendment and Fourteenth Amendment right to confront witnesses, hearsay evidence will be admitted against a defendant only if the government shows (1) that the witness is unavailable and (2) that the statement bears sufficient indicia of reliability. Jennings v. Maynard, 946 F.2d 1502, 1504-05 (10th Cir. 1991) (citing Ohio v. Roberts, 448 U.S. 56, 65-66 (1980)). "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Ohio v. Roberts, 448 U.S. at 66. When evidence does not meet such a hearsay exception, the Supreme Court implied that other "particularized guarantees of trustworthiness" may justify admission of the evidence. Id.

In the instant case, Petitioner does not challenge the trial court's finding that witness Tillman was unavailable to testify. Instead, the focus of his argument presented in his direct appeal brief is that Tillman's guilty plea did not bear sufficient indicia of reliability to warrant reading of the transcript into evidence. However, Respondent argues in his supplemental response that the testimony at issue in this case is distinguishable from the admissions at issue in Lee v. Illinois, 476 U.S. 530 (1986), and Douglas v. Alabama, 380 U.S. 415 (1965). In those cases, the co-defendants' admissions at issue were custodial confessions given to police authorities. In the instant case, the hearsay statement admitted by the trial court was the testimony of Petitioner's former co-defendant, Raymond Tillman, entered by Tillman under oath at his guilty plea hearing. Tillman did not exonerate himself and implicate Petitioner; instead, by entering a plea of guilty, Tillman clearly

implicated himself. Under these circumstances, the Court finds that the reliability of Tillman's statement is inferred and that the admission of the evidence did not violate the Confrontation Clause.

However, even if the admission of the uncross-examined plea hearing testimony violated the Confrontation Clause, the Court finds that the error was harmless in that it did not have a "substantial and injurious effect or influence in determining the jury's verdict." See Brecht v. Abrahamson, 507 U.S. 619 (1993) (finding that the standard established by Kotteakos v. United States, 328 U.S. 750 (1946), should be used to resolve harmless error issues). Two eyewitnesses to the robbery identified Petitioner as the person in the store with a gun who committed the crime (#29, Tr. Trans. at 136, 173). One of the witnesses stated he was "100 percent certain" of Petitioner's identity (#29, Tr. Trans. at 175). Thus, other evidence of Petitioner's guilt was substantial and the evidence admitted in the form of Tillman's testimony at his guilty plea hearing was cumulative. After reviewing the entire trial transcript, the Court concludes that to the extent the admission of Tillman's testimony violated the Confrontation Clause, the error was harmless. Habeas corpus relief on Petitioner's first claim is denied.

B. Ineffective Assistance of Counsel Claims

(1) Ineffective assistance of trial counsel claim is procedurally barred

Petitioner argues that his trial counsel provided ineffective assistance of counsel when he failed to object to the pretrial photographic lineup procedures and failed to object adequately to the trial court's admission of Raymond Tillman's testimony entered at Tillman's guilty plea hearing. Respondent asserts that this claim is procedurally barred from federal habeas corpus review due to Petitioner's procedural default of the claim in state court.

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

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

Kimmelman, Osborn, and Brecheen indicate that the Oklahoma bar will apply in

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

Id. at 1264 (citation omitted).

Applying these principles to this case on remand, the Court concludes Petitioner's ineffective assistance of trial counsel claim is barred by the procedural default doctrine. Petitioner was represented by separate counsel at trial and on direct appeal. Furthermore, Petitioner's allegations of ineffective assistance of trial counsel based on counsel's failure to object both to the pretrial lineup procedure as well as to the confrontation clause issue embrace matters in the trial record. As a result, no further fact-finding was necessary in order for the issue to be developed and raised on direct appeal. Therefore, the Court finds that in this case the procedural bar imposed by the state appellate court was an adequate ground.

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

McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause by alleging that his appellate counsel provided ineffective assistance of counsel in failing to raise a claim of ineffective assistance of trial counsel on direct appeal. To establish "cause" via an ineffective assistance of appellate counsel claim, Petitioner must satisfy the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984). See Murray v. Carrier, 477 U.S. 478, 488-89 (1986); United States v. Cook, 45 F.3d 388, 394-95 (10th Cir. 1995). The Strickland test requires a showing of both deficient performance by appellate counsel and prejudice to Petitioner as a result of the deficient performance. 466 U.S. at 687. To satisfy the deficient performance prong of the test, Petitioner must overcome a strong presumption that counsel's conduct fell within the "wide range of reasonable professional assistance [that] . . . might be considered sound trial strategy." Brecheen, 41 F.3d 1365 (citations omitted). "A claim of ineffective assistance must be reviewed from the perspective of counsel at the time and therefore may not be predicated on the distorting effects of hindsight." Id. (citations omitted). Finally, the focus of the first prong is "not what is prudent or appropriate, but only what is constitutionally compelled." Id. To establish the prejudice prong of the test, Petitioner must show that the allegedly deficient performance prejudiced the defense; namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 694. Failure to establish either prong of the Strickland standard will result in denial of relief. Id. at 696.

In the instant case, without addressing the first prong of the Strickland test, this Court finds appellate counsel's failure to raise the ineffective assistance of trial counsel claim was not ineffective assistance because Petitioner cannot demonstrate that he was prejudiced by his appellate counsel's

failure to raise the ineffective assistance of trial counsel claim on direct appeal. As discussed above, evidence of Petitioner's guilt was overwhelming and the failure of trial counsel to object to the pretrial lineup procedure and to object adequately to the introduction of co-defendant Tillman's plea hearing testimony did not prejudice Petitioner. As a result, Petitioner has not demonstrated that but for appellate counsel's failure to raise the claim on direct appeal, the result of the appeal would have been different. Petitioner has failed to demonstrate "cause" sufficient to overcome his procedural default of his ineffective assistance of trial counsel claim.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). Petitioner, however, does not claim that he is actually innocent of the crime for which he was convicted. Therefore, Petitioner's claim of ineffective assistance of trial counsel is procedurally barred and is denied on that basis.

2) Ineffective Assistance of Appellate Counsel

In affirming the state trial court's denial of post-conviction relief, the Oklahoma Court of Criminal Appeals considered Petitioner's claim of ineffective assistance of appellate counsel on the merits. That court found that "[b]ased upon the record before this Court, the evidence indicates that Petitioner was not deprived of effective assistance of appellate counsel and is not entitled to post-conviction relief." (#4, Ex. G at 2).

As discussed above, Petitioner must satisfy both prongs of the two-prong standard enunciated in Strickland, 466 U.S. 668, to succeed on an ineffective assistance of appellate counsel claim. Petitioner argues that appellate counsel provided ineffective assistance by failing to cite United

States v. Gomez-Lemos, 939 F.2d 326 (6th Cir. 1991) in support of his Confrontation Clause claim. However, the Court has found that Petitioner's Confrontation Clause claim is without merit. As a result, Petitioner cannot satisfy either the performance or the prejudice prong of the Strickland test. Appellate counsel's failure to include the citation to the Gomez-Lemos case cannot be viewed as ineffective assistance of counsel. Petitioner's request for habeas corpus relief on this ground should be denied.

C. Challenge to photo I.D. procedures is procedurally barred

Petitioner claims that unnecessarily suggestive pretrial photo identification procedures used by the Tulsa Police constituted a denial of due process. Petitioner first raised this claim in his application for post-conviction relief, having failed to raise it on direct appeal. Citing Robison v. State, 818 P.2d 1250 (Okla. Crim. App. 1991) and Okla. Stat. tit. 22, § 1086, the Oklahoma Court of Criminal Appeals imposed a procedural bar on this claim, finding that the claim could have been but was not raised on direct appeal.

The state court's procedural bar as applied to Petitioner's claim was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not but could have been raised on direct appeal. Okla. Stat. tit. 22, § 1086. Therefore, the Court finds that this claim is procedurally barred from federal habeas corpus review unless Petitioner demonstrates cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrates that failure to consider the claim will result in a fundamental miscarriage of justice.

Petitioner argues that appellate counsel's failure to raise this claim on direct appeal constitutes "cause" to excuse his procedural default. However, as discussed above, Petitioner has failed in this case to demonstrate that had appellate counsel raised the issue of the pretrial photographic lineup the results of the appeal would have been different. Strickland, 466 U.S. at 694. Therefore, appellate counsel did not provide ineffective assistance in failing to raise this claim on direct appeal and Petitioner has not shown cause to excuse his procedural default. In addition, Petitioner does not argue that he is actually innocent of the underlying offense. As a result, the Court concludes that this claim is procedurally barred and should be denied on that basis.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States.

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

SO ORDERED THIS 3rd day of May, 1999.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

FILED

MAY 4 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

IN RE:)
DURABILITY, INC.,)
)
Debtor.)
)
SCOTT P. KIRTLEY, Successor Trustee)
of the Estate of Durability, Inc.,)
)
Appellant,)
)
vs.)
)
SOVEREIGN LIFE INSURANCE)
COMPANY OF CALIFORNIA,)
)
Appellee.)

No. 98-C-232-B(J)

ENTERED ON DOCKET
DATE **MAY 04 1999**

ORDER

Before the Court is the Objection to the December 23, 1998 Report and Recommendation of Magistrate Judge Sam A. Joyner ("R&R") filed by appellants Durability, Inc. and Scott P. Kirtley, as Successor Trustee of the Estate of Durability, Inc. (hereinafter referred to as "Trustee"). (Docket No. 16). The Magistrate Judge recommends the January 28, 1997 Memorandum Opinion of the Bankruptcy Court granting summary judgment to appellee Sovereign Life Insurance Company of California ("Sovereign") be affirmed. The Court agrees.

In its Memorandum Opinion, the Bankruptcy Court found the undisputed facts established that under the terms of a policy issued by Sovereign to Durability, Inc., Policy No.

182155, on the life of Fred I. Palmer, II ("Palmer")¹, (1) a premium in the amount of \$131.75 was due on September 3, 1986; (2) the payment was subject to a 31-day grace period; (3) the premium was not paid on or before October 4, 1986, the expiration of the grace period; (4) Sovereign sent a mailgram dated November 5, 1986 to Durability, Inc. advising that the policy had lapsed but offering to reinstate the policy without evidence of Palmer's insurability if a premium payment in the amount of \$263.50 (monthly premiums due 9/3/86 and 10/3/86) was received on or before November 12, 1986; (5) as no payment was received by November 12, 1986, the offer to reinstate the policy expired; and (6) the Trustee's attempt to reinstate the policy by delivering the past due premiums to the office of Sovereign's soliciting agent, Mark Farquhar ("Farquhar") on November 19, 1986 was ineffective.² Based on these undisputed facts, the Bankruptcy Court granted summary judgment to Sovereign.

The Trustee contends that the Bankruptcy Court erred by not finding that the August 28, 1996 wire transfer of \$131.75 from the account of Richard R. Sullivan ("Sullivan"), while Sullivan was acting as receiver for Durability, Inc. was the disputed premium due September 3, 1986. Specifically, the Trustee argues that in ruling on the motion for summary judgment, the Bankruptcy Court did not consider Sullivan's February 28, 1995 affidavit attesting that, while

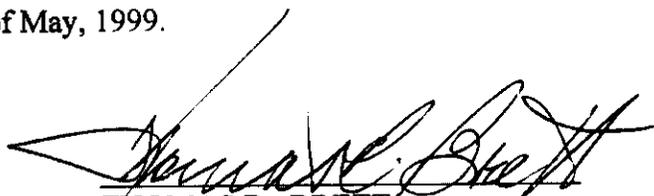
¹ Sovereign issued two life insurance policies to Durability, Inc.: the subject policy, Policy No. 182155, in the amount of \$500,000; and Policy No. 197579 in the amount of \$1,000,000. Upon receipt of proof of Palmer's death, Sovereign paid the \$1,000,000 death benefit on Policy No. 197579, but refused to pay the \$500,000 death benefit on Policy No. 182155 for failure to pay the premiums. Thus, the only policy at issue is Policy No. 182155.

² Although prior to the Bankruptcy Court's summary judgment ruling, the Trustee did not dispute the contested premium was not received on or before September 3, 1986 and that the past due premiums were not delivered to Farquhar until November 19, 1996, the Trustee changed his position in his Motion to Alter or Amend Judgment. In his post-judgment motion, the Trustee contended the September 3, 1986 payment was wire transferred on August 28, 1986 and James R. Adelman, the Trustee for Durability, Inc. from October through December 1986, delivered the past due premiums to Farquhar by November 12, 1996. Citing Adelman's affidavit in support, the Trustee sought the Bankruptcy Court's reconsideration of the issue. The Bankruptcy Court denied the motion based on the Trustee's failure to provide any ground under Fed.R.Civ.P. 59 to alter the undisputed facts upon which the court relied in granting Sovereign's motion for summary judgment.

acting as receiver for Durability, Inc. during a period of three or four months prior to the October 6, 1986 bankruptcy of Durability, Inc., he never failed to pay any life insurance premiums and was not informed by Sovereign that the premium on Policy No. 182155 had not been paid and was in default.³

The Court has reviewed the record on appeal and the R&R, as well as Appellant's Objection to the R&R and Appellee's Response, and concludes the Bankruptcy Court's decision granting summary judgment to Appellee Sovereign and denying summary judgment to Appellants, Durability, Inc. and Scott P. Kirtley, as Successor Trustee of the Estate of Durability, Inc. should be affirmed for the reasons stated in the Magistrate Judge's Report and Recommendation.

IT IS SO ORDERED, this 3rd day of May, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

³ Although the Bankruptcy Court did not specifically cite Sullivan's Affidavit in its Memorandum Order, such does not mean the affidavit was not considered. Rather, the Bankruptcy Court likely determined the Trustee's admission that the September 3, 1986 premium was paid on November 19, 1986 when the other past due premiums were paid was dispositive of the issue. The Court cannot conclude such finding was clearly erroneous. See R&R, pp. 16-18.

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 RAMON DELEON REYES,)
)
 Defendant.)

ENTERED ON DOCKET
DATE MAY 04 1999

98-CV-950-H
97-CR-151-H ✓

FILED
MAY 4 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Defendant Ramon Deleon Reyes' Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 filed December 16, 1998 (Docket # 1). For the reasons expressed herein, the Court concludes that the motion should be denied.

On December 9, 1997, Mr. Reyes pled guilty to four counts of possession of cocaine with intent to distribute and one count of distribution of one kilogram of cocaine, all in violation of 21 U.S.C. § 841(a)(1). Mr. Reyes was represented by counsel and was provided an interpreter. At that time the Court accepted Mr. Reyes' plea, and on March 17, 1998, Mr. Reyes was sentenced to 204 months imprisonment for all five counts, three years of supervised release as to counts one through four, five years of supervised release as to count five, a \$3,000 fine as to count five, and \$500 in special monetary assessments for counts one through five. The Court entered final judgment on March 23, 1998, and Mr. Reyes did not take a direct appeal. Upon receipt of Mr. Reyes' Motion to Vacate, Set Aside, or Correct Sentence, the Court directed the Government to respond, and the Government so responded on January 29, 1999.

In his Petition, Mr. Reyes first argues that his guilty plea was involuntary because he was not informed by the court or his counsel that count five of the indictment carried a mandatory minimum sentence, and that his plea was not made intelligently because the district court failed

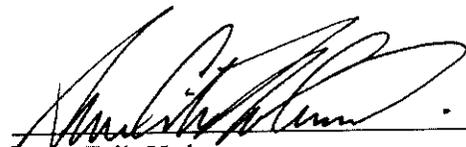
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to inform him that he could not withdraw his plea if the court did not accept the Government's recommendations. Because Mr. Reyes did not perfect a direct appeal, these claims may not be attacked on collateral review unless Mr. Reyes can demonstrate cause for the procedural default and actual prejudice from the errors asserted, or actual innocence. See Bousley v. United States, 523 U.S. 614, 623 (1998); United States v. Powell, 159 F.3d 500, 502 (10th Cir. 1998). Mr. Reyes has proffered nothing which would support such findings.

However, Mr. Reyes' claim of ineffective assistance would excuse his failure to raise these claims on direct appeal. Mr. Reyes argues that his counsel provided ineffective assistance by providing an erroneous sentence estimate. Based on a review of the record, it is clear that the Court did in fact advise Mr. Reyes of the minimum mandatory sentence required as well as informing Mr. Reyes that the Court retained final authority to impose sentence within the Sentencing Guidelines. See Change of Plea Tr. at 11, 20. Accordingly, Mr. Reyes cannot show prejudice from any inaccurate sentence prediction because the Court specifically cured any defect by counsel by providing the proper information, see Lasiter v. Thomas, 89 F.3d 699, 703 (10th Cir.), cert. denied, 117 S. Ct. 493 (1996). Since Mr. Reyes' ineffective assistance claim is without merit, his involuntariness claims are procedurally defaulted. Accordingly, Defendant Ramon Deleon Reyes' Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 filed December 16, 1998 (Docket # 1) is hereby denied.

IT IS SO ORDERED.

This 3RD day of May, 1999.


Sven Erik Holmes
United States District Judge

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

APR 30 1999

WAYNE L. FORD,)
SSN: 448-40-7705,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner,)
Social Security Administration,¹)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-0621-EA

ENTERED ON DOCKET

DATE MAY 03 1999

ORDER

Claimant, Wayne L. Ford, 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 was substituted as the defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

² On March 10, 1994, claimant applied for disability benefits under Title II (42 U.S.C. § 401 et seq.), and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant’s application for benefits was denied in its entirety initially (April 12, 1994), and on reconsideration (August 9, 1994). A hearing before Administrative Law Judge Larry C. Marcy (ALJ) was held October 10, 1995, in Tulsa, Oklahoma. By decision dated November 1, 1995, the ALJ found that claimant was not disabled at any time through the date of the decision. On May 6, 1997, the Appeals Council denied review of the ALJ’s findings. That denial was subsequently vacated on July 17, 1997, but the Appeals Council again denied claimant’s request for review. Thus, the decision of the ALJ represents the Commissioner’s final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

I. 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. CLAIMANT’S BACKGROUND

Claimant was born on May 16, 1942, and was 53 years old at the time of his administrative hearing. He has a high school education and some vocational training to perform appliance repair. The ALJ described claimant’s past relevant work experience as a concrete finisher and back hoe operator.⁴ Claimant alleges an inability to work beginning on or about March 6, 1992, due primarily to back pain. In his disability report, he described his disabling condition as back problems, severe headaches, blood pressure problems, and problems as a recovering alcoholic. (R. 147) In his request for reconsideration, claimant also claimed that his disability resulted from headaches and pain in his arms and legs. (R. 114) At the hearing, he complained of headaches (R. 48), which doctors have opined as being caused by the claimant’s back injuries. (R. 49) He also stated that he has

⁴ Claimant testified that he operated a back hoe as part of his job as a concrete refinisher, but he never had a job as a backhoe operator *per se*. (R. 69)

osteoarthritis that affects not only his back but also his hands, toes, feet, knees, and hips (R. 49), and he claimed to have shoulder pain. (R. 61)

The record indicates that claimant had alcohol problems until March 1992, when he was admitted to the hospital for alcohol poisoning. (R. 45, 279-305) He has been attending Alcoholics Anonymous meetings since that time. (R. 58) He has had one kidney removed because of cancer (R. 66-67), and he has a bad liver. It appears from the record that claimant previously filed an application for benefits on August 28, 1987 (R. 79-82), which was denied in its entirety initially (October 19, 1987) (R. 84-90), and on reconsideration (February 8, 1988). (R. 96-97) He based that application on an allegation that he was disabled due to "swelling of liver; cancer of kidney." (R. 79) There is no evidence that a hearing was held on the denial of that application, or that claimant perfected an appeal from the denial of his application.

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fifth step of the sequential evaluation process. He 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 residual functional capacity (RFC), age, education, and work experience. He specifically found that claimant had the RFC to "make a successful vocational adjustment to work which exists in significant numbers in the national economy." (R. 32) The work to which the ALJ referred includes light hand packaging, sedentary hand packaging and sedentary telemarketing. (R.32) Thus, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision. (Id.)

IV. REVIEW

Claimant failed to comply with the briefing requirement of listing each specific error relied on as set forth Court's Scheduling Order. (Docket # 3) However, he appears to challenge the ALJ's findings that (1) claimant's allegations of pain were not entirely credible; and (2) claimant could make a successful vocational adjustment to work in the national economy.

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. At the hearing, he questioned claimant about his medication and his daily activities. Claimant stated that he takes medication for the pain, but he testified that it does not help. (R. 62) He did not take his doctor's advice to "join the Arthritis Foundation and get in these heated pools" because he does not have the money. (R. 64) He also takes medicine for his blood pressure. (R. 66) Claimant also testified that he does some lawn mowing for his mother (R. 50, 56), washes his own laundry, and cooks occasionally. (R. 57) He can also run the vacuum in his house. (R. 58) He goes to the grocery store twice a week (R. 59) and occasionally drives limited distances. (R. 59) He can pick up 20 pounds, but he stated that it hurts to do so. (R. 60) He can stand for 10-20 minutes without excessive pain (R. 61), and he can sit for 20-30 minutes before he experiences excessive pain. (R. 66) He stated that he does not sleep more than two hours at a time because of the pain, and that sleep pattern affects his concentration during the day. (R. 65)

In his written opinion, the ALJ specifically referenced the criteria set forth in 20 C.F.R. § 404.1529 for evaluating a claimant's allegations of pain. He analyzed relevant factors to determine the weight to be given claimant's subjective allegations of pain, and, as required by Kepler v. Chater, 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. 29-30) The ALJ acknowledged that claimant experiences some pain and restrictions in his range of motion, but found that claimant's allegations were "not entirely credible in light of discrepancies between the claimant's assertions and information contained in the documentary reports, the reports of the treating and examining practitioners, the medical history and the findings made on examination." (R. 30)

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. Although the ALJ’s opinion might have been “better and more thorough,” see Daniels v. Apfel, 154 F.3d 1129, 1136 (10th Cir. 1998), this Court finds that the ALJ did not err in concluding that claimant’s complaints of pain were not entirely credible.

RFC Assessment

A finding of disability requires more than the inability to work without pain. Gossett v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988). The record supports the ALJ’s conclusion that claimant could perform light and sedentary work activities despite his pain. Light work involves lifting no more than twenty pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds. 20 C.F.R. §§ 404.1567(b), 416.967(b). It also requires a good deal of walking or standing. (Id.) 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); 416.967(b). “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.

In claimant's memorandum brief, he sets forth thirteen separate references to the medical records in an effort to show claimant's disability. (Memo Br., Docket # 9, at 1-2.)⁵ As the Commissioner points out, however, claimant fails to connect the various medical evidence to restrictions on working with his hands, sitting, or standing. (Resp. Br., Docket # 10, at 2.) Further, the medical evidence to which claimant refers does not support a finding of disability. For example, the June 2, 1993 consultative neurologic examination by John D. Hastings, M.D., indicates that claimant had a "basically intact neurologic examination with the exception of reflex changes in the lower extremities" which he attributed to previous diabetic neuropathy. (R. 355) Dr. Hastings stated that he did not see in claimant "any signs of active cervical or lumbar radiculopathy, thoracic disc disease, or significant peripheral neuropathy." (*Id.*) Dr. Hastings also felt that claimant could work as a major appliance repairman, and he concluded that claimant had "no neurologic disability at this time." (*Id.*) Claimant's argument that he suffers from a "cornucopia of medical conditions" that "would be likely to result" in pain (Memo. Br. at 3) may or may not be true, but the evidence does not establish that he is unable to perform at least some light and sedentary work.

As part of his RFC analysis, the ALJ also considered claimant's history of alcoholism. To establish disability based on alcoholism, a claimant must show that his alcoholism, "alone or in combination with other impairments," prevents him from engaging in any substantial gainful

⁵ One of the records to which claimant refers relates to claimant's surgeries in December 1992 for "recurring fistulas and/or hemorrhoids" (Memo. Br., Docket # 9, at 2), and claimant's attorney alluded to these medical problems in his questions to the vocational expert at claimant's hearing. (R. 74-75) However, claimant never alleged that he was disabled as a result of these problems prior to his appeal from the ALJ's decision, and his appellate counsel mentions it in her supplemental correspondence to the Appeals Council merely as part of claimant's medical problems. (R. 11) Further, as the Commissioner points out, the evidence shows that claimant did well postoperatively. (R. 333-34)

employment. See Coleman v. Chater, 58 F.3d 577, 579-80 (10th Cir. 1995) (citations omitted). Such alcoholism typically implies a loss of self-control to the extent he is unable to seek and use rehabilitation. Id. Claimant testified that he attends Alcoholics Anonymous meetings (R. 58), and the ALJ noted that claimant has been temperate since March 1992. (R. 30-31) The ALJ reasoned that claimant's temperance indicated the absence of a mental impairment affecting claimant's ability to perform light and sedentary work, and he noted the lack of medical evidence to the contrary. He found that claimant's alcoholism was in remission, and he classified it as a non-severe impairment. (Id.) He also completed a Psychiatric Review Technique ("PRT") form and attached it to his written opinion. (R. 35-37)

In this manner, the ALJ followed the procedures in 20 C.F.R. § 404.1520a (and 20 C.F.R. § 416.920a for Supplemental Security Income) for evaluating mental impairments that allegedly prevent a claimant from working. See Winfrey v. Chater, 92 F.3d 1017, 1024 (10th Cir. 1996); Cruse v. United States Dep't of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedure first requires the ALJ to determine the presence or absence of certain medical findings pertaining to claimant's ability to work. Next, the ALJ is to evaluate the degree of functional loss resulting from claimant's impairment. The ALJ must then complete a PRT form and attach it to a written decision in which he or she discusses the evidence upon which the conclusions expressed on the form are based. Winfrey, 92 F.3d at 1024; Cruse, 49 F.3d at 617-18; see also Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994). This the ALJ did.

Finally, the ALJ acknowledged that claimant was "closely approaching advanced age" (R. 32-33), but he did not otherwise discuss the impact of claimant's age, presumably because he determined that claimant could perform light work. Under the Social Security Medical-Vocational

Guidelines (the “grids”), persons approaching advanced age (age 50-54) may be significantly limited in vocational adaptability. Ordinarily, they will be deemed disabled if they are restricted to sedentary work, they can no longer perform vocationally relevant past work, and they have no transferable skills. (20 C.F.R. Pt. 404, Subpt. P, App. 2 §§ 201.00(g); 201.14). Agency regulations require consideration of whether claimant’s age “may seriously affect [his] ability to adjust to a significant number of jobs in the national economy.” 20 C.F.R. §§ 404.1563(c); 416.963(c).⁶

The ALJ did not rely exclusively on the grids, but also obtained the testimony of a vocational expert. The vocational expert testified that claimant had transferrable skills, but those required heavier physical exertion than light work. (R. 71). Thus, claimant essentially has no transferrable skills because he cannot perform his vocationally relevant past work. Nonetheless, the ALJ determined that claimant could perform light and sedentary work. After reciting the vocational expert’s testimony regarding the number of jobs available in hand packaging and telemarketing, the ALJ concluded that claimant “is capable of making a vocational adjustment” to unskilled work. (R. 32-33) While this Court has serious reservations about whether claimant could perform the specific jobs described by the vocational expert, the Court may “neither reweigh the evidence nor substitute [its] judgment for that of the agency.” Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). Claimant never alleged an impairment related to his speech patterns, and the Court is unable to find any objective evidence in the record indicating that claimant has a significant manipulative impairment affecting the use of his hands.

⁶ The Court does not deem this a “borderline situation” where claimant is within a few months or days of the next age category under the grids. See Daniels, 154 F.3d at 1133. Claimant was 53 years of age at the time of the hearing (March 10, 1995) and at the time of the ALJ’s decision (November 1, 1995). He turned 54 approximately six weeks before the date his insured status expired, June 30, 1996.

VI. CONCLUSION

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

DATED this 30th day of April, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

APR 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CARL D. STRINGFELLOW,
SSN: 550-84-4946,

Plaintiff,

v.

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

Defendant.

Case No. 97-CV-0702-BU (E) ✓

ENTERED ON DOCKET

DATE MAY 3 1999

REPORT AND RECOMMENDATION

Claimant, Carl D. Stringfellow, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of Social Security ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.² By minute order dated February 4, 1998, this case was referred to the undersigned for all further proceedings in accordance with her jurisdiction pursuant to the Federal Rules of Civil Procedure. For the reasons discussed below, the undersigned recommends that the District Court **AFFIRM** the Commissioner's decision.

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 January 12, 1995, claimant applied for disability benefits under Title II (42 U.S.C. § 401 *et seq.*). Claimant's application for benefits was denied in its entirety initially (February 22, 1995) and on reconsideration (June 29, 1995). A hearing before Administrative Law Judge Leslie S. Hauger, Jr. (ALJ) was held July 18, 1996, in Tulsa, Oklahoma. By decision dated July 30, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. On June 2, 1997, the Appeals Council declined to assume jurisdiction. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 404.984(b)(2).

I. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

Disability under the Social Security Act is defined as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment” 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his “physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy” *Id.*, § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. *See* 20 C.F.R. § 404.1520.³

Judicial review of the Commissioner’s determination is limited in scope by 42 U.S.C. § 405(g). This Court’s review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. *Hargis v. Sullivan*, 945 F.2d 1482, 1486 (10th Cir. 1991). 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

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.

as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The search for adequate evidence does not allow the court to substitute its discretion for that of the agency. Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981). Nevertheless, the court must review the record as a whole, and “the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

II. CLAIMANT’S BACKGROUND

Claimant was born October 23, 1952, and was a younger individual (age 43) at the time of the ALJ decision. He completed the tenth grade; his past relevant work was as a building maintenance worker. Claimant alleges that he became disabled March 4, 1992 (the day following an unappealed prior denial of benefits)⁴ due to right leg amputation (in 1990) and shoulder and back pain.

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform a full range of sedentary work, subject to not standing over 10 minutes, not walking over 100 yards unless using a wheelchair, not carrying over 5 pounds, and not using the left arm overhead. 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

⁴ The ALJ had in the record before him, but did not reference, a June 1993 application for benefits which was denied July 15, 1993 (and apparently unappealed). (R. 24, 215-41) The period of alleged disability is not critical if benefits are denied, as recommended herein. If benefits are awarded, however, the period would have to be re-examined.

experience. Having concluded that there were a significant number of jobs which claimant could perform, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

IV. CLAIMANT'S MEDICAL HISTORY

Claimant's relevant medical history is summarized as follows:

Claimant sustained an injury to his left shoulder at some unspecified date in the past. In November 1990, claimant underwent above-the-knee right leg amputation as a result of a motorcycle accident. (R. 132-40) He was discharged from the hospital in December 1990 to participate in physical, occupational and recreational therapy at Kaiser Rehabilitation Center. (R. 166-67) In January 1991, claimant was re-admitted to the hospital, suffering from chronic phantom limb pain. (R. 169-70) At that time, he had a well-healed incision and no significant signs of infection from the amputation. For pain, he was treated with and discontinued from narcotics, and he underwent a lumbar sympathetic block with no apparent beneficial effect. Medications eventually resulted in improvement of his pain. (Id.)

Claimant was seen by Ralph Richter, M.D., both during his January hospitalization (R. 175-76), and upon release through March 1991. (R. 240-41) He was treated for stump tenderness and pain, and sleeplessness. (Id.)

Physical therapy at Kaiser was continued through May 1991. (R. 188-94) In February 1991, claimant was fitted with a right-leg prosthesis. (R. 191) He was seen for gait training and he complained of a poor prosthetic fit. (R. 189) Claimant did not return to physical therapy after May 31, 1991, and he did not call to cancel appointments. (R. 188) A July 1991 discharge summary

states that claimant could walk distances with a single cane and could negotiate stairs, ramps, and uneven surfaces, and that physical therapy goals were met. (Id.)

Claimant was treated (and later evaluated) by Ashok Kache, M.D., a specialist in physical medicine and rehabilitation, from December 1990 to August 1994. (R. 196-205; 208-13) Relative to claimant's allegation of "stump too short or stump complications" (see Listing of Impairments § 1.10C.3), Dr. Kache noted in visits through July 1993 that claimant complained of poor prosthetic fit (of the socket), and Dr. Kache observed pistoning when claimant stood and an awkward gait and limp when claimant walked. (R. 199-203) In a July 1993 disability evaluation (presumably in connection with an application for benefits, see note 4 supra), Dr. Kache reported:

... at this time, he is reporting difficulties with the prosthesis, particularly with his fit at the upper end. This is a suction type of socket and consequently he does not wear any socks underneath the socket lining over his stump. He has gone back several times to the prosthetist without any good resolution of the symptoms. Consequently, he is able to wear the prosthesis only every other day. He tries to leave it on all day long. He seems to get some skin irritation and blisters on the upper edge of the prosthetic socket.

Examination of the right AK [~~above-knee~~] stump reveals length of about 8 inches. The patient has a prosthesis on. He seems to stand a bit lopsided in that he tends to sink down a little bit on the right side when he lays both of his feet on the ground. He walks with a distinct limp appearing to hyperextend his back while he is weight-bearing on this right leg and seems to have a slightly wider stance for balance. He demonstrated ability to take a few steps across the examination room and go back to his chair without using the cane. His gait is slow.

(R. 197-98)

In August 1994, claimant reported to Dr. Kache that he had stopped using the prosthesis because of poor fit, and he used crutches or a wheelchair. (R. 196) Dr. Kache noted, however, that "the stump is well healed without any tenderness or swelling." (Id.) Thereafter, claimant fell in the bathtub, causing severe pain in the right lower extremity. He was treated for the pain in the

emergency room of Cleveland Area Hospital on February 22, 1995, and discharged in good condition. (R. 207)

In connection with this application for benefits, Dr. Kache evaluated claimant on June 16, 1995. (R. 208-13) At that time claimant was not requiring medication, but continued to have tenderness on the inner areas of the stump. There were no breakdowns or open areas of the stump itself. (R. 208) Claimant reported “some back problems while up and around on his right leg and crutches,” and “some problems with the left shoulder in that after an injury some time back he was not able to use his shoulder as he can the right side.” (Id.) Claimant had decreased range of motion of the left shoulder, but no major pain behaviors were noticed. (Id.) Dr. Kache concluded his report by stating that claimant “is not wearing the prosthesis primarily due to fit problems.” (R. 209)

V. REVIEW

Claimant alleges that the ALJ erred in his failure to: find that claimant meets the Listing of Impairments § 1.10C.3; consider claimant’s mental impairment; and properly evaluate claimant’s subjective allegations of pain.

Listing of Impairments § 1.10C.3:

To meet this Listing, which relates to amputation of one lower extremity, claimant must show his:

[i]nability to use a prosthesis effectively, without obligatory assistive devices, due to one of the following:

...

3. Stump too short or stump complications persistent, or are expected to persist, for at least 12 months from onset

Listing of Impairments, 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.10C.3. Whether a claimant meets or equals a listed impairment is strictly a medical determination. 20 C.F.R. § 404.1526(b); Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990).

Claimant argues that he is entitled to a finding of disability at step three of the sequential analysis because he met this Listing. A Listing describes an impairment which is considered severe enough to prevent a claimant from doing any gainful activity. 20 C.F.R. § 404.1525(a).

Much like the claimant in Puckett v. Chater, 100 F.3d 730 (10th Cir. 1996), claimant alleges that the evidence shows he was unable for years to obtain a satisfactory prosthetic fit, resulting in pain and irritation to his stump and back. Id. at 732. The Commissioner argues that claimant's problems are not stump problems, as required by the Listing, but are problems with the prosthetic socket.

The Tenth Circuit in Puckett addressed the proper interpretation of Listing § 1.10C.3:

We believe Listing § 1.10 plainly requires stump complications, not problems with prosthetic fit. Under that listing the inability to effectively use a prosthesis must be due to one of four conditions: vascular disease (C.1), neurological complications (C.2), disorder of contralateral lower extremities (C.4), or the condition at issue before us: "stump too short or stump complications" (C.3). These conditions all relate to problems of the claimant's body itself. Problems with technician's ability to repair or replace a prosthesis that a claimant used satisfactorily for twenty years does not fall within the scope of the listing. In order to meet the § 1.10C.3 listing requirement, plaintiff must prove that he is unable to use a prosthesis effectively because of stump complications lasting for at least twelve months.

100 F.3d at 733.⁵ Here, as in Puckett, evidence does not show that (1) claimant has stump complications meeting the Listing; (2) claimant needed revisions to his stump at any time relevant to

⁵ The undersigned recognizes that the Ninth and Second Circuits are more inclined to find that stump complications caused by prosthetic fit may meet the Listing. DeChirico v. Callahan, 134 F.3d 1177 (2d Cir. 1998); Gamble v. Chater, 68 F.3d 319 (9th Cir. 1995). However, this Court is bound by the the decision of the Tenth Circuit in Puckett.

the instant disability determination; (3) claimant has a stump problem independent of the prosthesis fit or his overuse of the prosthesis. Id., at 733.

The evidence does show that claimant considered going to Oklahoma City to obtain a better socket (R. 199), but there is no evidence that he ever went. The record also shows that he voluntarily gave up his prosthesis for crutches. (R. 208) There is no medical evidence that claimant's stump was too short or that any complications impaired claimant's use of it. In short, claimant's impairment was "not attended by specific clinical or laboratory findings that met or equaled the Listings's criteria." See Sweeney v. Apfel, 1998 WL 526579 (D. Md. Jan. 23, 1998). Substantial evidence supports the finding that claimant's condition did not meet the Listing, and the ALJ's finding was not contrary to law.

Mental Impairment

Claimant alleges that the ALJ failed to consider claimant's allegations of mental impairment. Upon review of the record, it appears that the mental impairment claimant alleges is related to his depression, frustration, stress, "phantom" pain, and use of narcotic medications as a result of having his leg amputated. (R. 115, 169, 170, 177, 198, 240, 241) Such behavior would appear to be expected when a person loses a limb. However, claimant's doctors opined that he had "adjusted mentally to the situation" and that claimant's pain was not accompanied by any "psychological overlay or malingering attitude." (R. 175) Claimant's psychological condition improved as the months passed after his accident. (R. 202) (See R. 196-97, 207-13). A reviewing consultant completed a Psychiatric Review Technique ("PRT") form in February 1992 in which he determined that claimant had no medically determinable mental impairment. (R. 57-65) Further, the phantom

pain claimant experienced was intermittent and nonsevere (R. 200) and appears to have subsided completely after July 1993. (See R. 196-97, 207-13)

Claimant specifically faults the ALJ for not having a psychologist or psychiatrist complete the medical portion of the case review. The Tenth Circuit requires an ALJ to follow the procedures in 20 C.F.R. § 404.1520a when he or she evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey v. Chater, 92 F.3d 1017, 1024 (10th Cir. 1996); Cruse v. United States Dep't of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedure first requires the ALJ to determine the presence or absence of certain medical findings pertaining to claimant's ability to work. Next, the ALJ is to evaluate the degree of functional loss resulting from claimant's impairment. The ALJ must then complete a PRT form and attach it to a written decision in which he or she discusses the evidence upon which the conclusions expressed on the form are based. Winfrey, 92 F.3d at 1024; Cruse, 49 F.3d at 617-18; see also Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994).

However, the ALJ is not required to follow the regulatory procedures for evaluating mental impairments where the record contains no evidence of a mental impairment that prevents a claimant from working. Andrade v. Secretary of Health & Human Services, 985 F.2d 10445, 1048 (10th Cir. 1993). Thus, claimant has not sufficiently raised the issue. See Hawkins v. Chater, 113 F.3d 1162, 1167 (10th Cir. 1997). Since claimant has failed to present "some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision requiring further investigation," id., the ALJ did not fail to properly assess the nature and extent of claimant's mental limitations.

Pain/Credibility

Nor did the ALJ fail to properly evaluate claimant's subjective allegations of pain. 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, 416.929 and the criteria set forth in Luna v. Bowen. He analyzed the relevant factors to determine the weight to be given claimant's subjective allegations of pain, and, as required by Kepler v. Chater, the ALJ made express findings as to the credibility of claimant's objective complaints of disabling pain, with an explanation of why

specific evidence led to the conclusion that claimant's subjective complaints were not fully credible. (R. 15-16) He noted that claimant takes only non-prescription medication; has not sought treatment for his alleged back pain; never alleged severe pain to any treating physician; complained only once about his left shoulder, and never complained about his right shoulder. (R. 15) 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. 14)

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.

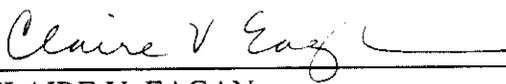
VI. CONCLUSION

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

VII. OBJECTIONS

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

DATED this 30th day of April, 1999



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 3rd Day of May, 1999.
C. Portillo, Deputy Clerk

KV: FS 27

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

FILED

UNITED STATES OF AMERICA,

Plaintiff,

v.

THOMAS L. STUESSY,

Defendant.

ENTERED ON DOCKET APR 30

DATE MAY 3 1999 Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil No. 98-CV-0664K (J) ✓

FILED

APR 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATED JUDGMENT

The United States and Thomas L. Stuessy stipulate that judgment may be entered in favor of the United States against Thomas L. Stuessy for the unpaid assessed balances of federal income tax and related interest and penalties set forth below:

Tax Year	Assessment Date	Amount Assessed ^{1/}	Unpaid Assessed Balance ^{2/}
1988	10/03/94	\$17,778.00 (T)	
	10/03/94	\$ 1,136.00 (P1)	
	10/03/94	\$ 4,445.00 (P2)	
	10/03/94	\$14,025.81 (I)	
(continued...)	10/30/95	\$ 16.00 (F)	

1/ For purposes of this chart, T = tax; P1 = estimated tax penalty; P2 = delinquency penalty; P3 = failure to pay tax penalty; P4 = miscellaneous penalty; I = interest; F = fees and costs; R = refund; and C = credits and payments.

2/ These amounts include the unpaid balance of assessed penalties and interest. They do not include additional penalties, interest, or other statutory additions accruing after the dates on which the assessments were made.

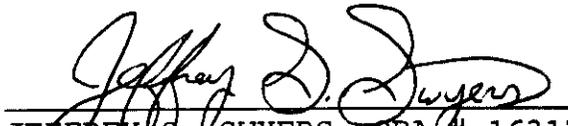
(...continued) 1988	4/11/97	\$ 2,820.52 (R)	
		(\$21,433.67) (C)	\$18,787.66
1989	10/03/94	\$17,803.00 (T)	
	10/03/94	\$ 408.32 (P1)	
	10/03/94	\$ 1,659.25 (P2)	
	10/03/94	\$10,143.96 (I)	
		(\$13,898.58) (C)	\$16,115.95
1990	10/03/94	\$43,050.00 (T)	
	10/03/94	\$ 1,537.35 (P1)	
	10/03/94	\$ 3,370.25 (P2)	
	10/03/94	\$12,640.78 (I)	
		(\$30,212.39) (C)	\$30,385.99
1991	10/03/94	\$27,513.00 (T)	
	10/03/94	\$ 1,103.78 (P1)	
	10/03/94	\$ 4,828.25 (P2)	
	10/03/94	\$ 6,459.39 (I)	
		(\$8,200.00) (C)	\$31,704.42
1992	10/03/94	\$28,013.00 (T)	
	10/03/94	\$ 1,066.91 (P1)	
	10/03/94	\$ 6,091.50 (P2)	
	10/03/94	\$ 3,714.94 (I)	
(continued...)		(\$3,987.00) (C)	\$34,899.35

(...continued) 1993	12/30/96	\$ 393.00 (T)	
	12/30/96	\$ 64.85 (P3)	
	12/30/96	\$ 100.00 (P2)	
	12/30/96	\$ 131.97 (I)	
	10/20/97	\$ 15.72 (P3)	
	3/02/98	\$ 2,363.00 (P2)	
	3/02/98	\$ 1,892.00 (P4)	
	3/02/98	\$ 9,459.00 (T)	\$14,419.54
1994	10/07/96	\$ 2,304.00 (T)	
	10/07/96	\$ 22.00 (P1)	
	10/07/96	\$ 518.40 (P2)	
	10/07/96	\$ 207.36 (P3)	
	10/07/96	\$ 400.81 (I)	
	2/17/97	\$ 16.00 (F)	\$ 3,468.57
1995	10/07/96	\$ 3,708.00 (T)	
	10/07/96	\$ 202.00 (P1)	
	10/07/96	\$ 667.44 (P2)	
	10/07/96	\$ 111.24 (P3)	
	10/07/96	\$ 182.90 (I)	
		(\$ 78.40) (C)	\$ 4,793.18
1996	10/06/97	\$ 9,527.00 (T)	
	10/06/97	\$ 219.00 (P1)	
	10/06/97	\$ 276.81 (P3)	
	10/06/97	\$ 404.44 (I)	
(continued...)		(\$ 300.00) (C)	\$10,127.25

(...continued)			
TOTAL UNPAID ASSESSED BALANCE			\$164,701.91

plus all penalties accruing under law after the dates of assessment, plus interest accruing after the dates of assessment pursuant to 26 U.S.C. § 6601, 6621, and 6622, and 28 U.S.C. § 1961(c) until paid.

The United States and Thomas L. Stuessy further stipulate that judgment may be entered determining that on the dates of the assessments listed above, federal tax liens arose and attached to all property and rights to property then belonging to or subsequently acquired by Thomas L. Stuessy.

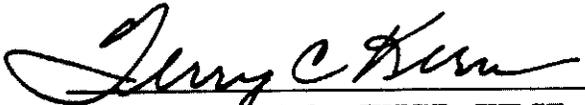


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 Telephone: (918) 252-1782
Defendant, Pro Se

IT IS 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

ENTERED ON DOCKET

DATE MAY 3 1999

RICHARD D. BLACKBURN,)
)
 Plaintiff,)
)
 vs.)
)
 WILLIAM J. HENDERSON, Postmaster)
 General of the United States,)
)
)
 Defendant.)

No. 98-CV-324-K ✓

FILED

APR 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the Defendants' Motion to Dismiss (#7-1) and to Strike Portions of the ad damnum Clause of Complaint (#7-2), as well as Defendants' Motion to Dismiss Defendants Owen and Dickerson (#8-1).

Applicable Standard

A court may dismiss a complaint for failure to state a claim only if it is clear that the plaintiff can prove no set of facts in support of her claim entitling her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584, 586 (10th Cir. 1994). For purposes of making this determination, a court must "accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Ramirez*, 41 F.3d at 586; *Meade v. Grubbs*, 926 F.2d 994, 997 (10th Cir. 1991). Additionally, granting a motion to dismiss is a harsh remedy which must be "cautiously

studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice.” *Morgan v. City of Rawlins*, 792 F.2d 975, 978 (10th Cir. 1986).

Discussion

To establish a claim under the ADA, the Plaintiff must demonstrate that: (1) he is a disabled person within the meaning of the ADA; (2) he is qualified, i.e., able to perform the essential functions of the job, with or without reasonable accommodation (which he must describe); and (3) the United States Postal Service (“USPS”) discriminated against him in its employment decision (the job application procedure and/or hiring and promotion process) because of his alleged disability. See *Siemon v. AT&T Corp.*, 117 F.3d 1173, 1175 (10th Cir.1997); *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir.1995).

Taking all Plaintiff's allegations in his Amended Complaint as true, as is required, the Court finds that the Plaintiff has failed to establish that he is "qualified" for the position which he seeks, and that the USPS refused to hire him due to his alleged disability, a “minor” back injury. Furthermore, Plaintiff has not alleged facts sufficient for this Court to conclude that Plaintiff's back injury qualifies him as an "individual with a disability" within the meaning of the ADA. *Sutton v. United Airlines*, 130 F.3d 893, 897 (10th Cir. 1997). He has not alleged that his back injury restricts any “major life activity.”

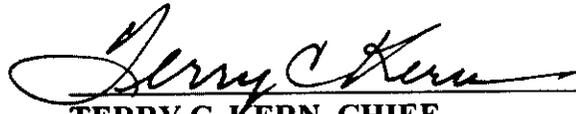
The Court finds that the Plaintiff has failed to adequately plead facts sufficient to sustain a claim pursuant to the ADA. However, because the Plaintiff has specifically requested leave to amend his Complaint to correct fatal flaws, the Plaintiff will be granted 15 days from the date of this Order in which to amend his Complaint. Therefore, the Defendants' Motion to Dismiss (#7-1) is

DENIED in part.

As to Defendants' Motion to Strike Portions of the ad damnum Clause of Complaint (#7-2) the request will be GRANTED. Plaintiff has conceded that he made an improper request for punitive damages, and agrees that the demand should be stricken. In addition, pursuant to Defendants' request and Plaintiff's agreement therein, Defendants' Motion to Dismiss Defendants Owen and Dickerson as Defendants is hereby GRANTED (#8-1).

The Plaintiff is hereby ordered to Amend his Complaint to comply with the Tenth Circuit's pleading requirements for claims brought under the ADA. Plaintiff is granted until the 28 day of May, 1999 to amend.

ORDERED THIS 30 DAY OF APRIL, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 03 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HAROLD L. HURLEY,
SSN: 447-36-1032)

Plaintiff,)

v.)

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

Defendant.)

No. 98-CV-384-J ✓

ENTERED ON DOCKET
DATE MAY 3 1999

ORDER^{1/}

Plaintiff, Harold L. Harley, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because (1) the ALJ's conclusion that Plaintiff had the residual functional capacity ("RFC") to perform the full range of light work was not supported by substantial evidence, and (2) the ALJ improperly relied on the Grids. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

^{1/} This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

^{2/} Administrative Law Judge Jeffrey S. Wolfe (hereafter "ALJ") concluded that Plaintiff was not disabled by decision dated March 20, 1996. [R. at 11]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on March 20, 1998. [R. at 4].

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I. PLAINTIFF'S BACKGROUND

In Plaintiff's Disability Report, Plaintiff indicated that his condition began bothering him in May of 1986. Plaintiff noted that on some days he could not work a full eight hours due to his pain. [R. at 68].

Plaintiff was evaluated by Armen Marouk, D.O., on April 27, 1993. [R. at 84]. Dr. Marouk noted that Plaintiff complained of intermittent low back pain which Plaintiff relieved by forward bending or squatting. Plaintiff also complained of burning in his left thigh and sore knees. [R. at 84]. Plaintiff told the doctor that "at times, when on a tractor for a long time, it may precipitate low back aching and hurting of [my] knees. . . ." [R. at 84]. The doctor noted that Plaintiff had no abnormality of gait and was able to heel and toe walk without difficulty. [R. at 85]. In addition, Plaintiff performed full squats without difficulty, and forward bending was not limited. [R. at 85]. The doctor concluded that Plaintiff had no evidence of nerve compression and recommended conservative management. [R. at 85].

On June 20, 1994, Plaintiff indicated that his back pain was worse in the morning and that sometimes when he got on his tractor or brushhog the pain "loosened up" and he was able to get around better during the day." [R. at 99]. On July 25, 1994, Plaintiff informed his doctor that he had been working since his previous visit due to trees and sheds being blown down and the necessity of rebuilding them. [R. at 97].

On September 12, 1994, Plaintiff indicated that his back had been feeling better and that he had traveled to Hawaii with his wife. [R. at 95].

Plaintiff's sons wrote that they recalled Plaintiff having difficulty unloading his tractor, that he took Ibuprofen, and that he had shown visible signs of pain as early as 1987. [R. at 148].

On February 14, 1996, James D. McKay, D.O., wrote that he first saw Plaintiff in January of 1995. Plaintiff's "primary diagnosis is that of generalized osteoarthritis with joint pain and loss of motion in multiple joints of symmetrical fashion. Further history revealed that Mr. Hurley had been treated by Dr. Russell in the late 80s for this problem. He also described seeing a Dr. Day in orthopedic consultation for a spinal evaluation, who related osteoarthritis of his lower spine in 1977. His family doctor, Dr. Turnbull, also had apparently diagnosed osteoarthritis in the mid-70's." [R. at 152].

Tom F. Russell, D.O., wrote on February 19, 1996, that Plaintiff was treated for acute lumbar strain in 1982, but that Plaintiff did not respond to muscle relaxants. Plaintiff was given anti-inflammatories, and responded to them. Plaintiff additionally complained of neck pain, and was prescribed Motrin. "It was felt that Mr. Hurley had symptoms of arthritis due to his lack of response to the muscle relaxants and manipulative therapy. He appeared to have a more rapid response and relieve [sic] of pain to the anti-inflammatory. I assume that with the lower back pain and cervical pain that this represents osteoarthritis." [R. at 153].

At the hearing before the ALJ on February 21, 1996, Plaintiff testified that he was born November 6, 1938, and was fifty-seven years old. [R. at 161]. According to Plaintiff, he completed the ninth grade. [R. at 161].

Plaintiff stated that he had arthritis in his knees, hips, and elbows, and that his neck sometimes "locked up." [R. at 169]. According to Plaintiff, beginning in 1988, although he tried to work, he experienced so much pain that he dropped his saw. [R. at 170]. Plaintiff testified that on a good day he could sit up to an hour, and that although he could pick up five to ten pounds, he would probably drop it. [R. at 173]. Plaintiff believed he could walk for approximately ten minutes, but that he would experience pain. [R. at 183]. Plaintiff noted that during 1988, although he would sometimes work on a tractor, he did so for only fifteen minutes at a time. [R. at 181].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{3/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

^{3/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

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

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

42 U.S.C. § 423(d)(2)(A).

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

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

"The finding of the Secretary^{4/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

III. THE ALJ'S DECISION

The ALJ noted that Plaintiff had a "severe impairment" at Step Two, and did not meet a Listing at Step Three. The ALJ noted that Plaintiff's medical record prior to December 31, 1989 indicated conservative treatment for hypertension, cervical strain, and a swollen left elbow from February through May of 1988. [R. at 16]. The ALJ additionally noted that the record contained an approximate two year gap from May

^{4/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

11, 1988 until April 10, 1990. [R. at 16]. The ALJ noted that this gap cast doubt on Plaintiff's testimony that he was disabled prior to 1989.

The ALJ noted that although Plaintiff was treated for cervical strains in 1982, his work activity record indicated that he was capable of performing heavy work activities until at least December 1987. [R. at 16]. The ALJ observed that two of Plaintiff's physicians indicated that Plaintiff probably had osteoarthritis as early as the 1980's, but that neither physician placed limitations on Plaintiff as a result of his osteoarthritis prior to his date of last insured which was December 31, 1989. [R. at 17]. The ALJ noted that Plaintiff had no evidence of a herniated disc, that Plaintiff did not complain of radicular pain, and that nothing indicated that his cervical strains did not improve. [R. at 17]. The ALJ concluded that Plaintiff could perform the lifting, walking, and standing requirements of light work prior to December 31, 1989. [R. at 17].

Based on his conclusion that Plaintiff could perform light work, the ALJ determined that although Plaintiff could not return to his past relevant work, based on the Grids, Plaintiff was not disabled. [R. at 17, 18].

IV. REVIEW

The difficulty presented by this case is due to Plaintiff's insured status. Plaintiff is insured only through December 31, 1989. Therefore, to be eligible for social security benefits, Plaintiff must be disabled, in accordance with the Social Security regulations, prior to December 31, 1989. Plaintiff's medical records prior to the expiration of his insured status are sparse. The hearing before the ALJ occurred on

February 21, 1996, and as the ALJ noted, Plaintiff's testimony as to his "current" (that is 1996) impairments was relevant only to the degree that it indicated that Plaintiff had such impairments prior to 1989. In addition, Plaintiff's treating physicians and medical records are, predominantly, dated after 1989. Therefore, evaluating and determining whether or not Plaintiff was disabled prior to the expiration of his insured status is difficult given Plaintiff's submitted medical records.

PLAINTIFF'S RFC -- LIGHT WORK ACTIVITY

Plaintiff asserts that the record does not contain substantial evidence to support the decision of the ALJ that Plaintiff can perform the physical requirements of light work. Plaintiff asserts that he was diagnosed with osetoarthritis and suffered with this condition prior to the expiration of his insured status in December of 1989. Plaintiff notes that the Commissioner has the "burden of proof" at Step Five, and that the Commissioner did not meet this burden because the record does not contain substantial evidence that Plaintiff can perform the requirements of light work. Plaintiff refers the Court to Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993).

In Thompson, the ALJ concluded that Plaintiff could perform a full range of sedentary work. The Tenth Circuit Court of Appeals noted that the ALJ's conclusion "appears not to be supported by any evidence at all." 987 F.2d at 1490.

In making his finding that Ms. Thompson could do the full range of sedentary work, the ALJ relied on the absence of contraindication in the medical records. The absence of evidence is not evidence. The ALJ's reliance on an omission effectively shifts the burden back to the claimant. It is not her burden, however, to prove she cannot work at

any level lower than her past relevant work; it is the Secretary's burden to prove that she can.

Granted, Ms. Thompson's medical records are inconclusive; after all, she discontinued treatment while Dr. Nardone was still trying to pin down a diagnosis. The ALJ, however, finding no evidence upon which to make a finding as to RFC, should have exercised his discretionary power to order a consultative examination of Ms. Thompson to determine her capabilities.

Thompson, 987 F.2d at 1491 (citations omitted).

Plaintiff's medical record, as noted above, contains few definitive records for the time period prior to the expiration of Plaintiff's insured status. Certainly, Plaintiff has the burden of establishing the existence of disability, and the burden of proving that he cannot return to his past relevant work. However, if the Plaintiff meets this burden, the burden then shifts to the Commissioner to prove that the claimant retains the ability to perform an alternative work activity which exists in significant numbers in the national economy. See, e.g., Channel v. Heckler, 747 F.2d 577 (10th Cir. 1984).

In this case, the ALJ concluded Plaintiff could perform a full range of light work. Although a finding that Plaintiff can perform a full range of light work is not inconsistent with the somewhat barren medical record, the finding is also not affirmatively supported by the medical record. The ALJ is correct that Plaintiff's physicians did not place restrictions on him which would prohibit the performance of light work. However, Plaintiff's physicians also did not affirmatively state what Plaintiff was capable of doing. The record contains nothing suggesting the amount of weight Plaintiff can lift, the amount of time Plaintiff can either sit, stand or walk, or

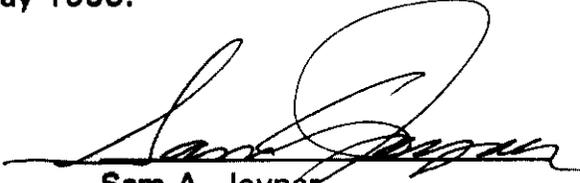
any other similar physical capabilities. Lacking such information, the ALJ should have referred Plaintiff to a consultative examiner to assess Plaintiff's physical capabilities prior to the expiration of his insured status.^{5/} Or, in the alternative, Plaintiff's medical records could have been evaluated by a physician, with the physician rendering an opinion, based on the records, of whether Plaintiff was capable of performing light work prior to the expiration of his insured status. Regardless, the record does not currently contain substantial evidence to support a conclusion that Plaintiff can perform the physical demands of light work.

V. CONCLUSION

Because the conclusion of the ALJ that Plaintiff was capable of performing the physical demands of light work activity are not supported by substantial evidence, the Court concludes that this action should be reversed and remanded to the Commissioner.

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

Dated this 3 day of May 1999.


Sam A. Joyner
United States Magistrate Judge

^{5/} The Court recognizes that the passage of time could make such an evaluation difficult.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 03 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HAROLD L. HURLEY,
SSN: 447-36-1032

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

No. 98-CV-384-J ✓

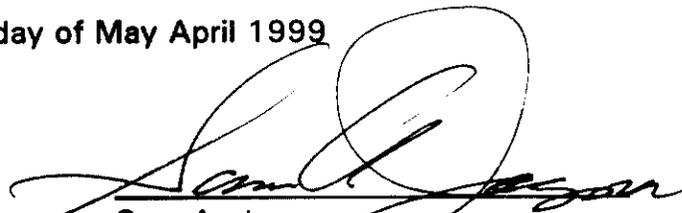
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DATE MAY 3 1999

JUDGMENT

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

It is so ordered this 3rd day of May April 1999



Sam A. Joyner
United States Magistrate Judge

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

FILED

MAY 3 1999

PHIL COMPTON, Clerk
U.S. DISTRICT COURT

BARBARA STARR SCOTT, and)
WOODROW WILSON,)

Plaintiffs,)

vs.)

Case No.: 99 C 156 (B) EA

CHARLIE ADDINGTON,)

JOEL THOMPSON,)

BOB LEWANDOWSKI,)

MARK McCULLOUGH,)

JOE BYRD, BOB POWELL)

THE HOUSING AUTHORITY OF)

THE CHEROKEE NATION BOARD)

COMMISSIONERS in their personal)

and Official Capacities Composed of)

SAM ED BUSH, STANLEY JOE)

CRITTENDEN, ALEYENE HOGNER,)

NICK LAY, BILLY HEATH (as)

successor to NICK LAY), and MELVINA)

SHOTPOUCH and JOHN DOE(S),)

Defendants not yet known,)

Defendants.)

Senior Judge Thomas R. Brett

ENTERED ON DOCKET
5-3-99
DATE APR 30 1999

(formerly 99 CV 0161B (E))

PLAINTIFF BARBARA STARR SCOTT'S
DISMISSAL WITHOUT PREJUDICE
OF CERTAIN CLAIMS IN FIRST AMENDED COMPLAINT

COMES NOW Plaintiff Barbara Starr Scott, through her lawyers Sneed Lang, P.C., to dismiss without prejudice the following claims from her *First Amended Complaint*: the Ninth cause of action under 42 U.S.C. § 1985, Violation of Civil Rights, and the Tenth cause of action under 42 U.S.C. § 1986.

CERTIFICATE OF SERVICE

I, D. Michael McBride III, hereby certify that on this, the 3rd day of May, 1999, I deposited in the United States Mail, with proper postage thereon affixed, a true and exact copy of the above and foregoing *Plaintiff Barbara Starr Scott's Dismissal Without Prejudice of Certain Claims in First Amended Complaint* to the following counsel of record:

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D. MICHAEL McBRIDE III

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Respectfully submitted,
SNEED LANG, P.C.

By: *Mike McBride*

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**LAWYERS FOR PLAINTIFF
BARBARA STARR SCOTT**

11

ENTERED ON DOCKET
DATE MAY 3 1999

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

JANE ANN SPANGLER, individually and as)
Guardian for WHITNEY PAGE SPANGLER)
and JESSICA LANE SPANGLER,)
)
Plaintiff,)
)
vs.)
)
UNUM LIFE INSURANCE COMPANY)
OF AMERICA,)
)
Defendant.)

FILED
MAY 3 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-702 BU(J) ✓

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The parties hereby jointly stipulate for the dismissal of this cause with prejudice. The parties are to bear their own respective attorneys' fees and costs.



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C/T