

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
IN OPEN COURT

JUN 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Veterans Affairs,)
)
Plaintiff,)
v.)
)
ERIN D. NICHOLS, a single person;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
DATE JUN 18 1999

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

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 16th day of June, 1999, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on May 17, 1999, pursuant to an Order of Sale dated February 12, 1999, of the following described property located in Tulsa County, Oklahoma:

Lot Nineteen (19), Block One (1), MAPLEWOOD THIRD ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

Appearing for the United States of America is Phil Pinnell, Assistant United States Attorney. Notice was given the Defendants, Erin D. Nichols, a single person; and County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

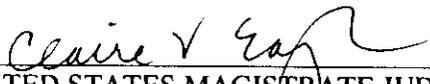
The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to

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the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

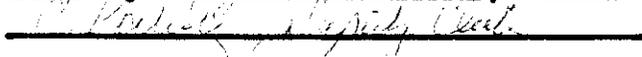


PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATION 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

18th Day of June, 1999.



Report and Recommendation of United States Magistrate Judge
Case No. 98-CV-0885-BU (E) (Nichols)

PP:css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
IN OPEN COURT

JUN 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Housing and Urban)
Development,)

Plaintiff,)

v.)

MUHAMMAD ALMANSUR;)
BETH STRANGE aka Beth Almansur;)
VELMAR ALMANSUR;)
UNKNOWN SPOUSE, if any, OF)
VELMAR ALMANSUR;)
BRANDY CHASE OWNERS ASSOCIATION, INC.)

COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)

Defendants.)

ENTERED ON DOCKET

DATE JUN 18 1999

CIVIL ACTION NO. 98-CV-0310-H (E)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 16th day of June, 1999, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on May 17, 1999, pursuant to an Order of Sale dated February 26, 1999, of the following described property located in Tulsa County, Oklahoma:

THAT CERTAIN UNIT OWNERSHIP ESTATE DESIGNATED AS UNIT C-216 AND AN UNDIVIDED 1.21012833% INTEREST IN AND TO THE COMMON ELEMENTS APPERTAINING AND APPURTENANT THERETO IN BRANDY CHASE UNIT OWNERSHIP ESTATES ACCORDING TO THE DECLARATION OF UNIT OWNERSHIP ESTATES FOR BRANDY CHASE CONDOMINIUMS AT SANS SOUCI RECORDED IN BOOK 4608 AT PAGE 2 ET SEQ., THE FIRST DECLARATION OF ANNEXATION AND MERGER OF UNIT OWNERSHIP ESTATES FOR BRANDY CHASE CONDOMINIUMS AT SANS SOUCI RECORDED IN BOOK 4638 AT PAGE 2091 ET SEQ., AND THE SECOND DECLARATION OF ANNEXATION AND MERGER OF UNIT OWNERSHIP ESTATES FOR BRANDY CHASE

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CONDOMINIUMS AT SANS SOUCI RECORDED IN BOOK 4655 AT PAGE 186 ET SEQ., AND LOCATED ON A PART OF THE FOLLOWING DESCRIBED REAL PROPERTY, LOT FIFTY (50), BLOCK ONE (1), SANS SOUCI, AN ADDITION IN THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

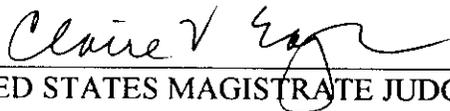
Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Muhammad Almansur and Beth Strange aka Beth Almansur, by mail; Defendants, Velmar Almansur and Unknown Spouse, if any, of Velmar Almansur, by publication; Brandy Chase Owners Association, Inc. through Edward Crossland, President, by mail; and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and

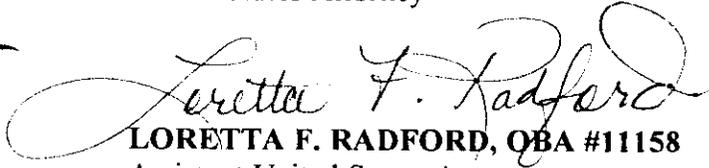
confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney


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

Report and Recommendation of United States Magistrate Judge
Case No. 98-CV-0310-II (E) (Almansur)

LFR:css

CERTIFICATION 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 18th Day of April, 1998.

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

LEWIS C. LORENZ,
Plaintiff,

v.

AMANA TOOL CORP., and ROCKLER
COMPANIES, INCORPORATED d/b/a
MINNESOTA WOODWORKERS
SUPPLY CO., d/b/a THE WOODWORKERS
STORE, a foreign corporation,
Defendants.

ENTERED ON DOCKET

DATE JUN 18 1999

Case No. 98-CV-697-H(J) ✓

FILED

JUN 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

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

IT IS SO ORDERED.

This 17TH day of June, 1999.



Sven Erik Holmes
United States District Judge

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127-99
6-17-99

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

CRAIG A. McDANIEL,

Plaintiff,

vs.

PMT SERVICES, INC., U.S.
BANKCARD CENTER, MARTIN
HOWE ASSOCIATES, JAMES
JUSTICE, and DANIEL
FURNISH,

Defendants.

ENTERED ON DOCKET

DATE JUN 18 1999

Case No. 98 CV 0930H(J) ✓

FILED

JUN 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

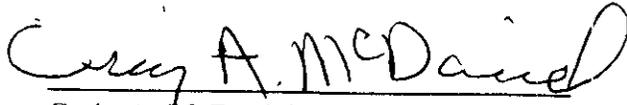
**AGREED ORDER AND STIPULATION OF
DISMISSAL WITH PREJUDICE**

Pursuant to Federal Rule of Civil Procedure 41, upon agreement of the Plaintiff, Craig A. McDaniel ("Plaintiff") and the Defendants, PMT Services, Inc., U.S. Bankcard Center, Martin Howe Associates, James Justice, and Daniel Furnish (collectively "Defendants"), and for good cause shown, it is this day ORDERED, ADJUDGED and DECREED that all claims stated in Plaintiff's Petition and Amended Petition against Defendants shall be and are hereby dismissed with prejudice. Each party will bear his or its own costs and expenses.

ENTERED this 17TH day of JUNE, 1999.


Sven Erik Holmes
United States District Judge

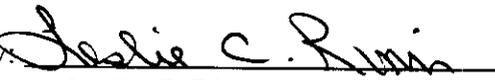
APPROVED FOR ENTRY:



Craig A. McDaniel
8106 East 31st Court
Tulsa, OK 74145

Plaintiff, Pro Se

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

By: 

Leslie C. Rinn, OBA #12160
320 South Boston, Suite 400
Tulsa, Oklahoma 74103
(918) 594-0400

WALLER LANSDEN DORTCH & DAVIS
A PROFESSIONAL LIMITED LIABILITY COMPANY
Robert E. Boston
Stephen W. Grace
Charles H. Williamson
511 Union Street, Suite 2100
Nashville, TN 37219
(615) 244-6380

Attorneys for Defendants

FILED
IN OPEN COURT

JUN 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Housing and)
Urban Development,)

Plaintiff,)

v.)

SANDRA KAY MAGILL, a single person;)

CITY OF TULSA;)

MONDRIAN MORTGAGE CORPORATION;)

COUNTY TREASURER, Tulsa County,)

Oklahoma;)

BOARD OF COUNTY COMMISSIONERS,)

Tulsa County, Oklahoma,)

Defendants.)

ENTERED ON DOCKET
JUN 18 1999

DATE _____

CIVIL ACTION NO. 98-CV-0496-BU (E) ✓

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 16th day of June, 1999, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on May 17, 1999, pursuant to an Order of Sale dated February 4, 1999, of the following described property located in Tulsa County, Oklahoma:

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

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendant, Sandra Kay Magill, a single person, by publication; Defendant, City of Tulsa, through Alan L. Jackere, Assistant City Attorney, by mail; Defendant, Mondrian Mortgage Corporation, through Christine Johnson, Vice President, by mail; Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A.

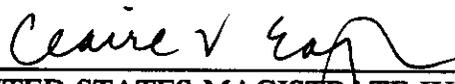
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Blakeley, Assistant District Attorney, by mail; and Purchaser, Abolghassem Behdad, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Abolghassem Behdad, 2304 West Quantico, Broken Arrow, Oklahoma 74011, telephone 918-451-0244, he being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

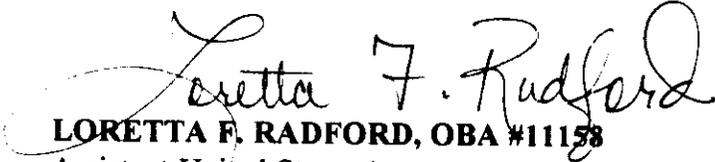
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Abolghassem Behdad, 2304 West Quantico, Broken Arrow, Oklahoma 74011, telephone 918-451-0244, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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

Report and Recommendation of United States Magistrate Judge
Case No. 98-CV-0496-BU (E) (Magill)

LFR.css

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

18th Day of June, 1999.

C. Pochillo, Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 18 1999

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

Terry Hinman, an individual and)
Susan Teenor, an individual)

Plaintiffs,)

vs.)

Metropolitan Life Insurance Company, a New)
York corporation; and Applied Automation, Inc.,)
an Oklahoma corporation,)

Defendants.)

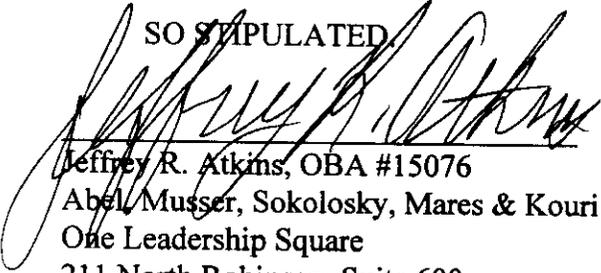
Case No. 99-CV-101 H(E) ✓

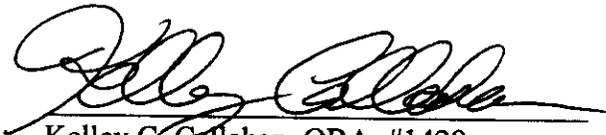
ENTERED ON DOCKET
DATE **JUN 18 1999**

STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to Federal Rule of Civil Procedure 41(a), Plaintiffs, Terry Hinman and Susan Teenor, and Defendants, Metropolitan Life Insurance Company and Applied Automation, Inc., hereby stipulate that plaintiff's Complaint and defendant Applied Automation, Inc.'s Cross-Claim be dismissed with prejudice, each party to bear their own costs and attorney's fees.

SO STIPULATED


Jeffrey R. Atkins, OBA #15076
Abel Musser, Sokolosky, Mares & Kouri
One Leadership Square
211 North Robinson, Suite 600
Oklahoma City, OK 73102
(405) 239-7046
(405) 272-1090 Fax
ATTORNEYS FOR PLAINTIFFS


Kelley C. Callahan, OBA #1429
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700
(405) 272-5217 FAX
ATTORNEY FOR DEFENDANT
METROPOLITAN LIFE INSURANCE
COMPANY

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C/S



Bruce Robinett, OBA #7667

Brewer, Worten, Robinett

P.O. Box 1066

Bartlesville, OK 74005-1066

(918) 336-4132

(918) 336-9009 Fax

ATTORNEYS FOR DEFENDANT

APPLIED AUTOMATION, INC.

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

KAREN LANDRUM,)
)
 Plaintiff,)
)
 v.)
)
 DAN BOONE,)
)
 Defendant.)

Case No. 99-C-240-C

F I L E D

JUN 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE JUN 18 1999

ORDER

Before the Court is plaintiff, Karen Landrum's, motion seeking reconsideration of the Court's prior Order dismissing the instant case for failure to respond to defendant, Dan Boone's, motion to dismiss.

As the Court noted in its prior Order dismissing this case, Landrum filed the present action on April 1, 1999, alleging a violation of the Violence Against Women Act, 42 U.S.C. § 13981, and further alleging state claims of sexual assault and battery and intentional infliction of emotional distress. The allegations stem from alleged sexual assaults perpetrated by Boone from 1972 through 1975. In May Boone filed a motion to dismiss for failure to state a claim upon which relief can be granted. Because Landrum failed to respond to Boone's motion by the response deadline, the Court deemed Boone's motion confessed and granted the relief requested.

In Landrum's present motion seeking reconsideration, Landrum's counsel states that she "mistakenly and inadvertently miscalculated the Response date, resulting in this date being placed in all of [her firm's] calendars as for June 7, 1999," when, in fact, the response deadline was June 1. Landrum's counsel also represents that defense counsel, on June 4, agreed not to oppose a motion to extend time to respond to the motion to dismiss to June 17. Landrum further argues that Boone will not

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be prejudiced if the Court were to grant her present motion to reconsider, and she contends that if the motion is denied and the case stands dismissed, she will be unduly prejudiced.

Boone responds that Landrum's motion should be denied. Boone cites Landrum's failure to timely respond to his motion to dismiss and his request for documents, and he argues that Landrum has not provided the Court with any unusual circumstances excusing the failure to respond. Boone further argues that Landrum's claims are meritless in any event.

Landrum is correct in her argument that dismissal for failure to respond is a drastic measure and should be applied only where a lesser sanction would not serve the ends of justice. Landrum's counsel's oversight caused Landrum to fail to file her response on time, and Landrum's action was subsequently dismissed as a result. While the Court expects deadlines to be met, the Court agrees with Landrum that to dismiss the case under these circumstances would unfairly prejudice Landrum. The Court therefore grants Landrum's motion to reconsider.

However, this conclusion does not end the Court's inquiry into whether the present action should be dismissed on the merits. The Court has for its consideration Boone's motion to dismiss under F.R.C.P. 12(b)(6), and Landrum has very recently filed her response. After carefully reviewing the Complaint, the motion to dismiss, and Landrum's response, the Court finds that this case must be dismissed as a matter of law. Landrum bases federal jurisdiction on a claim brought under the Violence Against Women Act (VAWA), 42 U.S.C. § 13981, and she further alleges state law claims of sexual assault and battery and intentional infliction of emotional distress. The allegations underlying these claims involve sexual assaults perpetrated by Boone from 1972 through 1975. The VAWA was enacted in 1994, and the Court is thus confronted with the purely legal question of whether the VAWA may be retroactively applied to conduct allegedly occurring approximately twenty years prior to its enactment. The Court agrees with the court in Doe v. Abbott Laboratories, 892 F.Supp. 811, 814 (E.D.La. 1995),

that the VAWA cannot be applied retroactively to cover the conduct alleged in Landrum's Complaint. Hence, Landrum's VAWA claim cannot stand.¹

Since diversity is not alleged, the dismissal of the VAWA claim eliminates the sole federal claim at issue here. The Court therefore dismisses without prejudice Landrum's remaining state claims.² 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

¹ It is also worth noting that the VAWA has been ruled unconstitutional by some courts. See e.g. Brzonkala v. Virginia Polytechnic Institute and State Univ., 169 F.3d 820 (4th Cir. 1999); Bergeron v. Bergeron, ___ F.Supp.2d ___, 1999 WL 355954 (M.D.La. 1999). But see Ericson v. Syracuse Univ., ___ F.Supp.2d ___, 1999 WL 212684 (S.D.N.Y. 1999) (finding VAWA constitutional); Liu v. Striuli, 36 F.Supp.2d 452 (D.R.I. 1999). Because the Court concludes that Landrum's claim must fail under the VAWA, the Court need not decide this thorny constitutional question.

² With respect to her state claims, the Court notes that Landrum argues in her response brief that Oklahoma's statute of repose, 12 O.S. § 95(6), is unconstitutional as applied to her. This statute provides, inter alia, that an action seeking damages for an injury suffered as a result of childhood sexual abuse must be commenced within twenty years of the victim reaching the age of eighteen. Landrum argues that the statute violates the Equal Protection Clause by discriminating against tort victims who are similarly situated and against women as a class. The Court finds these arguments indisputably meritless. The provision in question is unquestionably a valid and reasonable exercise of legislative power to limit the time in which a victim may bring suit for childhood sexual abuse. The purpose behind the provision is clear: to eliminate indefinite potential liability and to give defendants greater certainty and predictability. Further, the statute of limitations here serves the same purpose of statutes of limitations generally; it is designed to compel suit within a reasonable time in the interest of society, serving to prevent perjuries, frauds, and mistakes, and its purpose is to force a litigant to pursue every avenue of relief promptly, while evidence is fresh and witnesses available. Moreover, the outside limit imposed by the statute of twenty years after the victim reaches the age of eighteen in which to bring suit for childhood sexual abuse is clearly a reasonable amount of time in which to discover such abuse and bring an action against the perpetrator.

(1988) (when federal claims are dismissed prior to trial, the balance of factors will usually point towards declining jurisdiction over state law claims).

Accordingly, Landrum's motion to reconsider is hereby GRANTED; Boone's motion to dismiss the VAWA claim is hereby GRANTED; and Landrum's remaining state claims are hereby DISMISSED without prejudice. All other pending motions are hereby rendered MOOT by entry of this order.

IT IS SO ORDERED this 17th day of June, 1999.


H. DALE COOK
Senior United States District Judge

FILED
JUN 17 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FELICIA CHAPPELL, an individual,)
)
Plaintiff,)
)
vs.)
)
TULSA COMMUNITY COLLEGE, and)
the governing body of TULSA)
COMMUNITY COLLEGE, and DEAN)
D. VANTREASE, as President of)
TULSA COMMUNITY COLLEGE, and)
CHRISTY LYN LARSON, an individual,)
)
Defendants.)

Case No. 98-CV-0685B(J) ✓

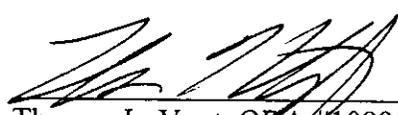
ENTERED ON DOCKET
DATE JUN 18 1999

ORDER

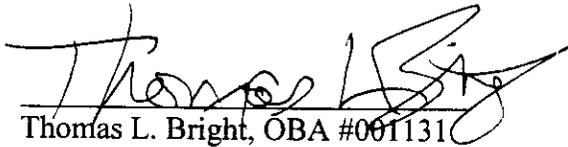
NOW on this 17 day of June, 1999, this case comes on before the Court on the Defendants' Motion for Partial Summary Judgment. For good cause shown, this Court grants summary judgment in favor of the Defendants Tulsa Community College and Christy Lyn Larson on the race discrimination and retaliation claims asserted by the Plaintiff.


HON. THOMAS R. BRETT
UNITED STATES DISTRICT COURT JUDGE

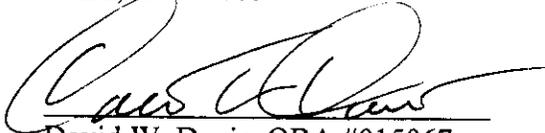
APPROVED AS TO FORM:


Thomas L. Vogt, OBA #10995
JONES, GIVENS, GOTCHER & BOGAN, P.C.
15 E. 5th Street, #3800
Tulsa, OK 74103

ATTORNEY FOR DEFENDANTS



Thomas L. Bright, OBA #001131
406 S. Boulder, Suite 406
Tulsa, OK 74103



David W. Davis, OBA #015067
406 S. Boulder, Suite 416
Tulsa, OK 74103

ATTORNEYS FOR PLAINTIFF

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

FILED

JUN 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICKEY RANDLEMAN,

Plaintiff,

vs.

HORACE MANN INSURANCE CO., and
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendants.

Case No. 99CV0119C (J)

ENTERED ON DOCKET
JUN 18 1999
DATE

**ORDER OF DISMISSAL OF DEFENDANT, STATE FARM
MUTUAL AUTOMOBILE INSURANCE COMPANY ONLY**

Upon application of the Plaintiff, RICKEY RANDLEMAN, and the Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, the Court finds that all issues between those parties only have been completely settled and compromised and the Court therefore dismisses the above entitled cause of action as to STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, only, with prejudice as to any future actions against said Defendant.

IT IS SO ORDERED this 17th day of June, 1999.



H. DALÉ COOK, District Judge for the
Northern District of Oklahoma

Prepared by:

WILLIAM F. SMITH OBA #8420
Attorney for Defendant
2642 East 21st Street, Suite 150
Tulsa, Oklahoma 74114-1739
Phone: 918-744-5657 * Fax: 918-742-1753

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

FILED

JUN 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IDG, INC., a/k/a INTERFACE DESIGN)
GROUP, INC.,)

Plaintiff,)

vs.)

CASE NO. 98-CV-406-C

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

Defendants.)

ENTERED ON DOCKET
DATE **JUN 18 1999**

JUDGMENT

This matter came before the Court for consideration of motions for summary judgment filed separately by defendants, American Airlines, Inc. and The Sabre Group, Inc., on plaintiff's claim for breach of contract. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for the defendant, American Airlines, Inc., and against the plaintiff, IDG, Inc., a/k/a Interface Design Group, Inc.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that judgment is entered for the plaintiff, IDG, Inc, a/k/a Interface Design Group, Inc., and against the defendant, Sabre Group, Inc., in the amount of \$43,744.00.

IT IS SO ORDERED this 17th of June, 1999.



H. DALE COOK
Senior, United States District Judge

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

FILED

JUN 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IDG, INC. a/k/a INTERFACE DESIGN)
GROUP, INC.,)

Plaintiff,)

vs.)

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

Defendants.)

Case No. 98-CV-406-C

ENTERED ON DOCKET

DATE JUN 18 1999

ORDER

Before the Court are two motions for summary judgment filed separately by defendants American Airlines, Inc. and The Sabre Group, Inc. The Court has previously considered and denied a summary judgment motion filed by American Airlines by order filed herein on November 19, 1998. In its first motion for summary judgment filed on October 19, 1998, American argued that it did not owe damages to IDG-OK for termination of the Agreement because American contracted with IDG-OK for the right to assign its rights and obligations under the Amended Agreement to an affiliate. American then effected an assignment of its rights and obligations to Sabre with the knowledge and consent of IDG-OK. In its recent motion for summary judgment, American contends it is not liable to IDG-OK because (1) Sabre gave notice of terminating the SuperVision license rather than the Agreement, and therefore it was not obligated in damages for failure to return the SuperVision software to IDG-OK. The obligation to return software arose only if the Agreement was terminated. (2) The Agreement required IDG to issue a supplement and invoice for each year

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in order for the license to be renewed. Because IDG did not send an invoice or supplement for 1998 no licensing fee was owed. (3) The obligation to return hardware and software would not include the eight 9240 units because these units were purchased from IDG rather than leased.

In its motion for summary judgment, Sabre contends that it does not owe damages to IDG-OK for termination of the Agreement because (1) Sabre terminated the license and not the Agreement, (2) IDG-OK was not a party to the Agreement and thus lacked standing to assert breach of the Agreement, and (3) Sabre obtained a judgment in a federal district court in Texas which is *res judicata* to the issue of liability between Sabre and IDG in the subject action.

STATEMENT OF FACTS

1. On December 7, 1989, American Airlines (American) and Interface Design Group--California, (IDG-Cal) entered into a Licensing and Maintenance Agreement, with an accompanying Addendum (Agreement). The Agreement was executed by R. Brent Johnson, as president of IDG-Cal. The Agreement granted American the right to use and maintenance of certain software and hardware provided by IDG-Cal to American. The Agreement states that IDG-Cal would offer to American licensed software and hardware when ordered by American and the order was accepted by IDG-Cal. The Agreement states that IDG-Cal would (1) furnish hardware and licensed software to American, (2) furnish optional materials to support hardware and licensed software, (3) grant American a nontransferable and nonexclusive license to use the licensed software materials, and (4) provide software and hardware maintenance services.

2. Under the Agreement, the hardware and licensed software could be ordered by American by transmitting (1) a supplement to the Agreement, signed by American, (2) a written order, signed by American, (3) or any other ordering procedure designated by IDG-Cal. IDG-Cal could accept

the order by providing American with a supplement specifying the supplemental terms applicable to the hardware and licensed software ordered.

3. The fees applicable to each software license granted and hardware maintenance were to be specified by IDG-Cal in an invoice that was to accompany the supplement. The fees were an annual charge.

4. Under the Agreement, the licenses granted were nontransferable. American was prohibited from selling, assigning, subleasing, or otherwise transferring the software without IDG-Cal's prior consent.

5. The Agreement licensed the software known as SuperVision. The SuperVision software was used in conjunction with hardware called 9240's. The 9240's were microcode embedded with the SuperVision software.

6. The terms of the Agreement became effective on the date it was accepted by IDG-Cal. It was to remain in effect until terminated by American or IDG-Cal upon 90 days written notice to become effective on the next anniversary date or by either party upon material breach of the Agreement and upon failure to cure the breach.

7. In the event any license granted was terminated as provided under the terms of the Agreement, or in the event American suspended use of the equipment under circumstances indicating an abandonment of the license to use the software, American was to immediately return to IDG the originals and all copies of the software. If American was unable to return the originals or copies of the software, American was to furnish IDG-Cal within 20 days a Certificate of Discontinuation, certifying that the software had been destroyed.

8. In the event of termination of the Agreement by material breach American was required to return all licensed software and hardware materials. Notice of discontinuation of any licensed software terminated the license but was not to be considered as termination of the Agreement unless specifically stated.

9. In the mid-1980's, R. Brent Johnson operated under the business name of Interface Design Group, a California partnership. In 1988, Johnson incorporated IDG-Cal. In 1991, Johnson reincorporated IDG, Inc., as an Oklahoma Corporation (IDG-OK). The purpose of the subsequent incorporation was to relocate the California business to Tulsa, Oklahoma in order to be in close proximity to American's computer center. In January 1993, the California corporation became inactive and all business was conducted through IDG-OK.

10. In June 1991, American obtained a quote from IDG for the purchase of a 9240 console manager. IDG priced the 9240s at \$29,500. American subsequently issued a purchase order for two 9240 units at \$29,500 each.

11. In 1992, American rented four additional 9240's from IDG. IDG offered American a purchase option for these 9240's. American subsequently accepted IDG's offer to purchase additional 9240's and IDG invoiced American for four 9240's at a unit price of \$21,117. American purchased a total of eight units from IDG. IDG provided American a "rental credit" for the 9240 units that were previously under lease.

12. On May 16, 1994, American and IDG-OK entered into an Amended Agreement. The Amended Agreement was executed by R. Brent Johnson on behalf of IDG, as an Oklahoma corporation.

13. Under the Amended Agreement, American was granted the right to assign any and all of its rights and obligations under the Agreement to (1) any affiliate, or (2) any company that succeeded or that was an affiliate of any company that succeeded to substantially all of American's information technology, provided that the successor agreed in writing to be bound by the provisions of the Agreement, as amended.

14. On July 1, 1996, American transferred its rights and obligations under the Agreement to The Sabre Group, Inc. (Sabre) and Sabre agreed in writing to be bound by the terms of the Agreement. American gave notice to IDG-OK of the assignment of American's rights and obligations under the Agreement to Sabre.

15. In 1997, Sabre held the license for the SuperVision software. Sabre had eight 9240's in its possession. For 1997, Sabre paid \$131,240 to IDG, in advance, for use of the SuperVision software and \$43,200, in advance, for the license and use of microcode software and for maintenance of the hardware and software.

16. On October 27, 1997, Sabre sent written notice to IDG-OK of cancellation of SuperVision III maintenance which was to expire effective December 31, 1997.

17. IDG accepted this written notice as cancellation of the Agreement, including the SuperVision software, license and maintenance. After receipt of the October 27, 1997, cancellation notice, IDG-OK attempted to persuade Sabre not to terminate the Agreement.

18. After October 27, 1997, Sabre did not order any software, hardware or maintenance from IDG-OK. IDG-OK did not send an invoice or a supplement to Sabre or American for a 1998 licensing or maintenance fee.

19. On March 24, 1998, when it became obvious to IDG-OK that Sabre was terminating the Agreement or that the Agreement had expired, IDG-OK made written demand on Sabre for the return of the hardware and software. IDG-OK sent follow-up letters demanding return of the SuperVision software and the 9240 units on April 22, 1998 and on April 27, 1998.

20. On May 8, 1998, IDG-OK instituted this action against American in Tulsa District Court. The case was removed to this court on June 8, 1998. In the Third Amended Complaint, IDG-OK seeks against American and Sabre (1) damages for breach of contract in failing to timely pay the 1998 fees for use of software and hardware pursuant to the Agreement, in the amount of \$174,440, (2) alternatively damages for the wrongful control and possession of IDG-OK's property as a back-up/standby system from January, 1998 until returned without payment of fees and (3) alternatively in quantum meruit for the reasonable value of the use and possession of IDG's property wrongfully retained by American and Sabre.

21. In June 1998, Sabre instituted a proceeding against IDG in the District Court of Tarrant County, Texas, captioned *The Sabre Group, Inc. v. Interface Design Group, Inc., Global Interface Solutions, Inc., and R. Brent Johnson*, Case No., 96-174295-98. The defendants removed the case to the U.S. District Court for the Northern District of Texas in Ft. Worth.

22. In its complaint in the Texas case, Sabre sought declaratory judgment (1) that IDG had acknowledged that Sabre was the proper party to the Agreement, and/or ratified the assignment from American to Sabre by allowing Sabre to cancel the SuperVision maintenance, by accepting payments from Sabre and by general course of conduct, and (2) that Sabre through its predecessor in interest, American, had purchased the 9240's rather than having leased the hardware, and that Sabre is not contractually obligated to return the eight units to IDG.

23. On July 21, 1998, Sabre returned certain of the SuperVision software to IDG-OK. However, Sabre did not return the 9240's or the SuperVision software which was embedded in the 9240's.

24. On September 9, 1998, Sabre returned the eight 9240 units to IDG-OK.

25. On January 22, 1999, the U.S. District Court in Texas entered an order and judgment in favor of Sabre (1) granting Sabre the relief requested in its complaint, (2) finding that the defendants did not have any claim against Sabre based upon the facts alleged in the complaint, and (3) concluding that Sabre had no debt or other obligation to the defendants based on the facts and circumstances shown in the complaint for declaratory relief.

STANDARD FOR SUMMARY JUDGMENT

Under Rule 56 F.R.Cv.P. summary judgment is appropriate if the pleadings, affidavits and exhibits show that 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 (1986). A genuine issue of material fact exists only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

CONCLUSIONS OF LAW

For the reasons stated below, the Court *sua sponte* reconsiders that portion of its order of November 19, 1998, denying summary judgment to American Airlines, and grants summary judgment in favor of American against IDG. In addition, the Court finds that The Sabre Group's motion for summary judgment should be denied.

1. After careful review of the pleadings, exhibits and applicable law, the Court *sua sponte* reconsiders its order of November 19, 1998 and finds in favor of American Airlines on its motion

for summary judgment filed October 19, 1998. In so doing, the Court finds that IDG consented through the Amended Agreement to allow American to assign both its rights and obligations under the Agreement to any affiliate of American's. American subsequently exercised that right and by written contract assigned both its rights and obligations under the Agreement to Sabre. Sabre accepted the assignment of American's rights and obligations. IDG received notice of the assignment and accepted Sabre as the obligor under the Agreement. American's assignment of its obligations under the Agreement became legally effective upon IDG's consent as evidenced by the Amended Agreement with American, acquiescence in the assignment, and course of conduct with Sabre. *See, generally Waverly Productions, Inc. v. RKO General, Inc.*, 32 Cal.Rptr.73 (Cal.App. 1963). Accordingly, the Court finds that American is relieved of any liability under the Agreement with IDG.

2. IDG-OK is a proper party to this action and has standing to sue under the Agreement. IDG-OK is the successor in interest to IDG-Cal. R. Brent Johnson was the principal officer, president and shareholder in IDG-Cal and retained those positions when he reincorporated IDG as an Oklahoma corporation and allowed IDG-Cal to be inactive. Through its course of dealings with IDG-OK and R. Brent Johnson, both American and Sabre accepted IDG-OK as the successor in interest to IDG-Cal. American and Sabre are estopped from denying standing of IDG-OK in this action.

3. On October 27, 1997, Sabre gave notice of termination of the software maintenance agreement with IDG-OK. IDG interpreted the notice as termination of the entire Licensing and Maintenance Agreement. The parties' subsequent conduct evidenced mutual consent to terminate the Agreement. Although the Agreement provides that termination or expiration of the Licensing

and Maintenance Agreement could only be upon 90 days notice and effective on the next anniversary date, it is clear that as of March 24, 1998, the parties had mutually agreed to modify the Agreement and terminate it upon their mutual consent. Sabre and IDG acquiesced in termination of the Licensing and Maintenance Agreement by their statements, written correspondence, acts and conduct. After December 31, 1997, IDG did not invoice Sabre for use or maintenance of software. By letter dated March 24, 1998, IDG made demand upon Sabre for return of the software and hardware previously furnished. This letter is evidence of IDG's acceptance of termination of the Agreement.

4. Sabre was under no obligation to return the eight 9240's to IDG. These eight units were purchased from IDG rather than leased. There is no evidence that the embedded software could be extracted from the hardware purchased by Sabre and IDG has made no such claim in this action.

5. On January 22, 1999, Sabre received a judgment in its favor from the U.S. District Court for the Northern District of Texas which evolves out of the same 1989 Licensing and Maintenance Agreement subject to this action, and includes the same parties. By the terms of the judgment entered, there is a finding that (1) Sabre purchased, rather than leased the eight 9240's involved in this action, (2) Sabre has no debts or other obligations to IDG and R. Brent Johnson under the claims made in the Texas action. The Court finds and concludes that the judgment arising in the Texas action is *res judicata* to any identical claim asserted herein.

6. In addition to the judgment entered in the Texas action, the Court finds and concludes herein that (1) Sabre did not breach the Licensing and Maintenance Agreement. After Sabre gave notice of termination of the maintenance on the SuperVision software, IDG treated it as a termination of the Agreement by demanding return of the hardware and software, and by failing to

invoice Sabre for any license fees for 1998. (2) Sabre was not in wrongful control of IDG's property. Sabre purchased the eight 9240 units and therefore Sabre was not under a legal obligation to return the units. Upon demand by IDG, Sabre terminated any future use of the SuperVision software as evidenced by Sabre's failure to request any software or hardware maintenance for 1998. However, Sabre failed to return any copies of the SuperVision software until July 21, 1998. There is no indication that the parties mutually agreed to modify the provision in the Agreement which required immediate return of the software upon termination of the Agreement. Accordingly, although IDG's conduct evidences termination of the Agreement, IDG is entitled to any loss of profits which can be established by Sabre's retention of copies of the SuperVision software after IDG's demand for its return. In *Navarro v. Jeffries*, 5 Cal.Rptr. 435 (Cal.App.1960), the court held that the appropriate measure of damages is lost profits. "The party who voluntarily and wrongfully puts an end to a contract, and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay, fairly incurred." *Id.* at 461. In this instance, IDG is entitled to recover the cost of the software license from March 24, 1998 until July 21, 1998, as representing the time frame that Sabre failed to meet IDG's demand to return copies of the licensed software. IDG indicated that the annual fee for the software was \$131,240 or \$10,936 per month. IDG is entitled to judgment in quantum meruit in the sum of \$43,744.

Accordingly, it is the finding and conclusion of the Court that summary judgment is granted in favor of defendant American Airlines, Inc and against IDG-OK.

It is the further finding and conclusion of the Court that Sabre's motion for summary judgment against IDG is denied. Sabre is liable to IDG in quantum meruit for the unreasonable retention of copies of the SuperVision software after such time as IDG made demand for its return.

IDG is awarded judgment against Sabre in the sum of \$43,744. All other claims made by IDG as against Sabre are denied.

It is the further finding and conclusion of the Court that all parties are responsible for their respective attorney fees incurred herein and costs of this action.

IT IS SO ORDERED this 17th day of June, 1999.



H. DALE COOK
Senior U. S. District Judge

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

FILED

JUN 17 1999 *SL*

BENNY LEE PRIDE,)
)
 Petitioner,)
)
 vs.)
)
 BOBBY BOONE,)
)
 Respondent.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-411-K *J*

ENTERED ON DOCKET

DATE JUN 18 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 16 day of June, 1999.

Terry C. Kern
TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

JUN 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BENNY LEE PRIDE,)
)
Petitioner,)
)
vs.)
)
BOBBY BOONE,)
)
Respondent.)

Case No. 97-CV-411-K

ENTERED ON DOCKET
DATE JUN 18 1999

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently in the custody of the Oklahoma Department of Corrections, challenges his conviction in Tulsa County District Court, Case No. CRF-91-274. Respondent has filed a Rule 5 response (Docket #13) to which Petitioner has replied (#14). As more fully set out below the Court finds that this petition should be denied.

BACKGROUND

On July 23, 1993, Petitioner, a passenger in a pickup truck, was involved in an altercation with another motorist, Richard Gibbs, on the shoulder of U.S. Highway 75 in Tulsa, Oklahoma. As a result of the altercation, Richard Gibbs died of multiple blunt trauma injuries to the head inflicted by Petitioner and his co-defendant.

On November 7-9, 1994, Petitioner was tried and found guilty by a jury of Murder in the Second Degree in Tulsa County District Court, Case No. CRF-91-274. The trial was held before the Honorable Jay Dalton. See Trans., Vol. I. After returning its verdict of guilty, the jury witnessed

the defendant in handcuffs. As a result, the trial court dismissed the jurors and sustained a motion for mistrial as to the second stage proceedings only, and left the jury verdict in tact. See Trans., Vol. II at 2. After a separate second stage sentencing trial, held March 8, 1995 before the Honorable E. R. (Ned) Turnbull, Petitioner was sentenced to four hundred (400) years imprisonment. See Trans., Vol. III. On April 12, 1996, the Oklahoma Court of Criminal Appeals affirmed the judgement and sentence in an unpublished summary opinion (#13, Ex. C).

Petitioner filed the instant petition for writ of habeas corpus on April 28, 1997 (#1), raising the following claims:

- (1) The trial court erred in overruling the admission of defense evidence;
- (2) The sentencing stage was fatally marred where the State failed to present the evidence admitted in the guilt stage, and even failed to present a prima facie case; and
- (3) The Legal Instructions in the Punishment Stage lacked any description of the elements to be found by the Jury.

In his Response, Respondent urges that the petition should be denied as a matter of law because Petitioner fails to cite any legal authority to support his claim. Respondent also asserts that each of Petitioner's claims lacks merit. In his reply to Respondent's response, Petitioner indicates his intent to rely on the legal argument provided by his attorney on direct appeal in support of his instant habeas corpus claims. Petitioner also provides citation to Supreme Court cases which he claims support his contention that he is entitled to the issuance of the writ of habeas corpus.

DISCUSSION

A. Exhaustion

Petitioner's claims in this action were raised on direct appeal as reflected by Petitioner's stated intent to rely on legal argument provided to the Oklahoma Court of Criminal Appeals by his attorney on direct appeal. Therefore, the Court finds that Petitioner meets the exhaustion requirements under the law. 28 U.S.C. § 2254(b). The Court also finds that an evidentiary hearing is not necessary because Petitioner did not seek an evidentiary hearing in state court and has not demonstrated that the claims now before the Court rely on either a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, or a factual predicate that could not have been previously discovered through the exercise of due diligence. 28 U.S.C. § 2254(e)(2)(A). Petitioner has also failed to demonstrate that the facts underlying the claims would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found Petitioner guilty of the underlying offense. 28 U.S.C. § 2254(e)(2)(B).

B. Standard of Review

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), enacted April 24, 1996, amended the standard of review in habeas corpus cases. The habeas corpus statute now provides that:

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

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

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

28 U.S.C. § 2254(d). As stated above, Petitioner raised each of his instant claims on direct appeal. (See #13, Ex. A). The Oklahoma Court of Criminal Appeals considered the claims on the merits and, after considering the record on appeal, determined that "neither reversal nor modification is required under the law and evidence." (#13, Ex. C). As a result, unless the Court of Criminal Appeals's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," this Court must deny the requested habeas relief. 28 U.S.C. § 2254(d).

C. None of Petitioner's claims satisfies the § 2254(d) standard

After careful review of the record in this case, including the first and second stage transcripts, the Court finds that the decision of the Oklahoma Court of Criminal Appeals was neither contrary to clearly established federal law as set forth by the Supreme Court nor involved an unreasonable application of Supreme Court law to the facts of this case. The Court will address each of Petitioner's claims separately.

1. Claim 1: Evidentiary ruling denied Petitioner his right to present a defense

During the guilt/innocence stage of trial, Petitioner sought to present evidence that during the altercation beside the highway, the victim was combative and wielded a weapon, a metal pipe. After the state rested, the trial court conducted a hearing in chambers on the State's oral motion in limine concerning the introduction of the metal pipe into evidence along with the testimony of a police officer who claimed the metal pipe had been turned over by counsel for Petitioner's co-

defendant the day after the homicide. The trial court sustained the motion in limine, finding that because the pipe could not be linked to the scene of the homicide, it lacked probative value. (Trans., Vol. I at 165-66, 170). Petitioner argues that the trial court's evidentiary ruling prevented him from presenting a defense in violation of the 5th, 6th and 14th Amendments.

On federal habeas corpus review, this Court is concerned only with whether federal constitutional rights were infringed. This Court cannot "grant habeas relief on state court evidentiary rulings 'unless they rendered the trial so fundamentally unfair as to constitute a denial of federal constitutional rights.'" Cummings v. Evans, 161 F.3d 610, 618 (10th Cir.1998) (quoting Duvall v. Reynolds, 139 F.3d 768, 789 (10th Cir.1997); see also Estelle v. McGuire, 502 U.S. 62, 75 (1991) (severely prejudicial evidentiary errors may violate due process); Hatch v. State, 58 F.3d 1447, 1468 (10th Cir. 1995); Brinlee v. Crisp, 608 F.2d 839, 850 (10th Cir. 1979).

After reviewing the record in this case, including the trial transcript, the Court concludes that the trial court's refusal to allow admission of the metal pipe and the police officer's testimony did not render Petitioner's trial fundamentally unfair. Petitioner relies on Washington v. Texas, 388 U.S. 14 (1967) and Chambers v. Mississippi, 410 U.S. 284 (1973) for the proposition that he has a due process right to a fair opportunity to defend against the State's charges. Petitioner is correct that he does have the right to present a defense. However, the trial court's evidentiary ruling did not prevent the presentation of a defense in this case. In fact, the defense elicited, during the cross-examination of one of the state's witnesses, that the victim was combative and may have been armed with a metal pipe during the highway altercation. See Trans., Vol. I at 110-111. Therefore, the trial court's evidentiary ruling did not preclude the development of a defense and did not render Petitioner's trial fundamentally unfair. "In a habeas action, the inquiry is not whether the state court has properly

applied its own rules of evidence, but whether errors of constitutional magnitude have been committed. The State court is the final arbiter of state rules, and [this Court] must uphold its ruling unless the state evidentiary rule itself denies defendants due process." Hopkinson v. Shillinger, 866 F.2d 1185, 1197 n.7 (10th Cir. 1989), *overruled on other grounds*, Sawyer v. Smith, 497 U.S. 227 (1990). Habeas corpus relief on this ground must be denied.

2. *Claim 2: Second stage procedures were fundamentally unfair*

In his reply to Respondent's response, Petitioner indicates his intent to "stand[] on his direct appeal proposition III." (#14). Although Respondent briefed Petitioner's second claim based on the argument presented in "Proposition IV" of the direct appeal brief, the Court finds that both proposition III and IV relate to the second stage proceeding and each is without merit. In "Proposition III" of his direct appeal brief, Petitioner argued that he was denied his statutory right to have his sentence determined by the same jury that determined guilt. (#13, Ex. A). In his reply, Petitioner indicates he "has Supreme Court law to support" his contention that he is entitled to have the same jury in both the guilt and the sentencing phases of his trial, but he fails to cite his authority. Instead, he relies on the proposition that he is entitled to a fundamentally fair trial and cites to Hicks v. Oklahoma, 447 U.S. 343 (1980).

This issue arises as a result of an allegedly erroneous application of state law. See Okla. Stat. tit. 22, § 926, cited in Petitioner's direct appeal brief, #13, Ex. A at 15. This Court does not consider allegations of error premised on state law unless the error rendered the trial fundamentally unfair. In the instant case, while Petitioner is correct that he is entitled to a fundamentally fair trial, the fact that a different jury considered sentencing issues did not render his trial fundamentally unfair. After reviewing the trial and sentencing transcripts, the Court finds that the empaneling of a different jury

for the sentencing phase of trial did not render Petitioner's trial fundamentally unfair. The Oklahoma Court of Criminal Appeals's rejection of this ground on direct appeal is not inconsistent with Supreme Court precedent and habeas corpus relief on this ground should be denied.

To the extent Petitioner challenges the sufficiency of the evidence presented by the state during the second stage proceedings, see #1, a claim identified in Petitioner's direct appeal brief as "proposition IV," the Court finds the claim to be without merit. Sufficient evidence exists to support a conviction if any rational trier would accept the evidence as establishing each essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). In reviewing a sufficiency claim, the court must not weigh conflicting evidence or consider witness credibility. United States v. Davis, 965 F.2d 804, 811 (10th Cir. 1992). Instead the Court must view the evidence in the light most favorable to the prosecution, Jackson, 443 U.S. at 319, and "accept the jury's resolution of the evidence as long as it is within the bounds of reason." Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir.1993).

Petitioner had already been found guilty of Second Degree Murder by the jury which heard the evidence presented during the guilt/innocence stage of the proceedings. During the second stage proceeding, the state's concern was to present evidence related to sentencing issues. The state presented evidence reflecting the nature of the crime committed and evidence of Petitioner's prior felony convictions. After reviewing the record, the Court finds sufficient evidence was presented during the sentencing stage to justify the jury's recommended sentence and its conclusion that Petitioner had two or more prior felony convictions. The Oklahoma Court of Criminal Appeals's rejection of this claim is not inconsistent with Supreme Court precedent and habeas corpus relief on this ground should be denied.

3. *Claim 3: Jury instructions during second stage were improper*

In his third and final claim, Petitioner alleges that the jury instructions given during the sentencing phase failed to identify the elements of the crime in violation of the 6th and 14th Amendments. Petitioner states in his reply that he relies on the legal argument presented in "proposition V" of his direct appeal brief. (#14). On direct appeal, Petitioner claimed that the jury instructions numbered 4, 5 and 6 failed to "spell out" the elements necessary to find that Petitioner had the prior felony convictions identified in the second page of the information. After liberally construing Petitioner's argument asserted in his reply, Haines v. Kerner, 404 U.S. 519 (1972), the Court finds Petitioner implies that resolution of this claim by the Oklahoma Court of Criminal Appeals conflicts with the Supreme Court's holding in In re Winship, 397 U.S. 358, 364 (1970) (stating "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

A habeas corpus petitioner "bears a 'great burden . . . when [he] seeks to collaterally attack a state court judgment based on an erroneous jury instruction.'" Lujan v. Tansy, 2 F.3d 1031, 1035 (10th Cir. 1993) (quoting Hunter v. New Mexico, 916 F.2d 595, 598 (10th Cir. 1990)). As discussed above, federal habeas corpus relief is not available for alleged errors of state law, and this Court examines only "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). Moreover, it is well established that "[h]abeas proceedings may not be used to set aside a state conviction on the basis of erroneous jury instructions unless the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial

in the constitutional sense." Shafer v. Stratton, 906 F.2d 506, 508 (10th Cir. 1990) (quoting Brinlee v. Crisp, 608 F.2d 839, 854 (10th Cir. 1979)).

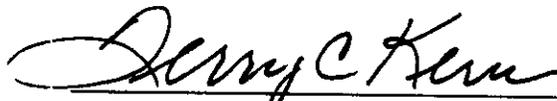
After carefully reviewing the record in this case, including the sentencing transcript and the jury instructions provided during the second stage proceedings (#13, Ex. D), the Court finds the jury instructions as a whole provided guidance and instruction to the jury on the elements necessary to find Petitioner had two or more prior felony convictions. See United States v. Coppola, 486 F.2d 882, 884-85 (10th Cir. 1973); York v. Page, 433 F.2d 941, 942 (10th Cir. 1970). No fundamental unfairness sufficient to set aside Petitioner's conviction occurred. Accordingly, habeas corpus relief on Petitioner's third ground must be denied:

CONCLUSION

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

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's petition for writ of habeas corpus is **denied**.

SO ORDERED THIS 16 day of June, 1999.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

JUN 18 1999 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99-CV-454-K

DWIGHT FITZGERALD, on behalf of)
the PEOPLE OF BROKEN ARROW,)
)
Plaintiff,)
)
vs.)
)
CITY OF BROKEN ARROW, OKLAHOMA)
)
)
Defendant.)

ENTERED ON DOCKET
DATE JUN 18 1999

ORDER

This matter came before the Court upon the filing of the above styled case by Plaintiff Dwight Fitzgerald on behalf of the Citizens of the City of Broken Arrow, requesting a hearing for preliminary injunction, which this Court will treat as a motion for a temporary restraining order. Upon review of the Plaintiff's motion, the Court concludes that a hearing in this matter is not necessary, and finds as follows.

The Plaintiff, Dwight Fitzgerald, on behalf of the Citizens of the City of Broken Arrow, moves this Court to "stop the city from installing speed bumps on city streets." Plaintiff alleges jurisdiction exists because the claim arises "under the Constitution doctrine of separation of powers."

The City of Broken Arrow has filed an answer and admitted to the venue of the Court, but denies the existence of an actual federal question. Additionally, the City does not contest the identity of Dwight Fitzgerald as a citizen of the City of Broken Arrow, but denies that he may lawfully represent the People of Broken Arrow in any representative capacity. No class action has been certified, nor has the Plaintiff taken steps to initiate the certification process.

The Court finds that it lacks jurisdiction over Plaintiff's claims. No federal question jurisdiction has been properly alleged. See 28 U.S.C. §1331. The Constitutional doctrine of separation of powers does not give rise to a claim for injunctive relief in the City's decision to build speed bumps. The principle of separation of powers is not enforceable against the states as a matter of federal constitutional law. Sweezy v. New Hampshire, 354 U.S. 234, 77 S.Ct. 1203 (1957). Thus, this Court finds that Plaintiff's separation of powers claim is not a federal claim, and federal jurisdiction is not available. See May v. Supreme Court of Colorado, 508 F.2d 136 (10th Cir. 1974).

Additionally, the Plaintiff lacks standing to sue the City in his individual capacity. The United States Supreme Court has articulated the necessary requirements for a plaintiff to demonstrate standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992). First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Id. at 560-61, 112 S.Ct. 2130 (internal quotations and citations omitted). The party invoking federal jurisdiction bears the burden of establishing these elements and of coming forward with evidence of specific facts which prove standing. Id. at 561, 112 S.Ct. 2130. The Plaintiff has not established standing to bring this action in his individual capacity, as he is not a resident of the immediate area of the speed bumps, and has not plead any injury whatsoever arising from the City's actions.

Furthermore, the Plaintiff lacks standing to bring this suit on behalf of the citizens of Broken

Arrow. Notwithstanding the fact that this case has not been certified for class action, the Plaintiff may not sue on behalf of others where he himself has not been injured. "[T]o satisfy Article III's case or controversy requirement, a litigant in federal court is required to establish its own injury in fact." National Council for Improved Health v. Shalala, 122 F.3d 878, 882 (10th Cir.1997). Although a given action may cause harm to third persons, "a litigant may invoke only its own constitutional rights and may not assert rights of others not before the court." Id. See Bear Lodge Multiple Use Association v. Babbitt, 1999 WL 261624 (10th Cir. 1999).

For the foregoing reasons, Plaintiff's Motion for Preliminary Injunction (#1), interpreted by this Court as a motion for temporary restraining order, is hereby DENIED. Plaintiff's claim is hereby DISMISSED WITHOUT PREJUDICE. Plaintiff is granted leave of the Court to refile this action upon curing procedural defects.

ORDERED this 16 day of June, 1999.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

JUN 18 1999 *SA*

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

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-504-K(J) ✓

ENTERED ON DOCKET
JUN 18 1999
DATE _____

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 18 th day of June 1999.


TERRY C. KERN
UNITED STATES DISTRICT COURT CHIEF JUDGE

MT ✓
6-14-99

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
BRENDA K. RATLIFF; THE BRENDA)
K. RATLIFF LIVING TRUST; THE FIRST)
NATIONAL BANK AND TRUST COMPANY OF)
VINITA, as Trustee of the Brenda K. Ratliff Living)
Trust; BRENDA K. RATLIFF, as Trustee of the)
Brenda K. Ratliff Living Trust; and THE FIRST)
NATIONAL BANK AND TRUST COMPANY OF)
VINITA, BY AND THROUGH ITS PRESIDENT,)
DON YARGER, as the Personal Representative for)
the Estate of Harry W. Ratliff,)
)
Defendants.)

ENTERED ON DOCKET

DATE JUN 17 1999

Civil No.98-CV-0343BU(M)

FILED

JUN 16 1999

Phil Lombardi, Clerk,
U.S. DISTRICT COURT

**STIPULATION OF PARTIAL JUDGMENT AGAINST THE FIRST NATIONAL BANK
AND TRUST COMPANY OF VINITA**

In accordance with the Court's December 29, 1998 Order granting partial summary judgment in favor of the United States and against the Estate of Harry W. Ratliff, the United States and the First National Bank and Trust Company of Vinita hereby stipulate and agree that partial judgment be and is hereby entered in favor of the United States and against the Estate of Harry W. Ratliff in the amount of \$350,490.81, plus statutory additions after the December 27, 1995 assessment date (including, without limitation, interest and penalties), less any payments and/or credits applied to such tax liabilities since December 27, 1995. Defendant, the First National Bank and Trust Company of Vinita, also stipulates and agrees that it disclaims any interest in the real property that is described in the United States' Complaint and which is the

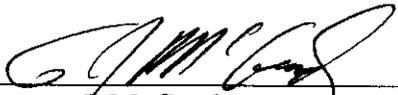
subject of this lawsuit.

This the ~~3rd~~ day of June, 1999.



Lawrence A. Casper
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044

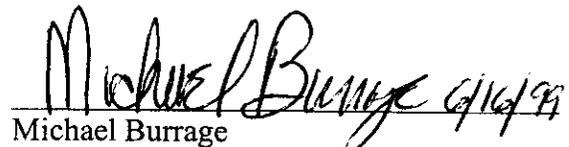
ATTORNEYS FOR UNITED STATES



Thomas J. McGeady
Logan & Lowry, LLP
101 South Wilson Street
P.O. Box 558
Vinita, OK 74301-0558

ATTORNEYS FOR THE FIRST NATIONAL
BANK AND TRUST COMPANY OF VINITA

Judgment is hereby entered against the Estate of Harry W. Ratliff in accordance with the foregoing stipulation.



Michael Burrage
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
CHARLES D. HUNERYAGER,)
)
Defendant.)

Case No. 99CV0137B(J)

ENTERED ON DOCKET
DATE JUN 16 1999

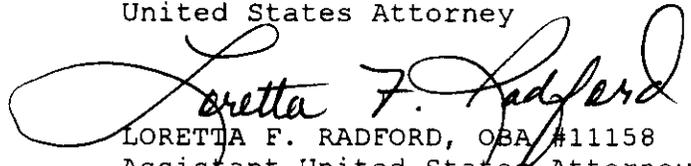
NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis,
United States Attorney for the Northern District of Oklahoma, Plaintiff
herein, through Loretta F. Radford, Assistant United States Attorney,
and hereby gives notice of its dismissal, pursuant to Rule 41, Federal
Rules of Civil Procedure, of this action with prejudice.

Dated this 16th day of June, 1999.

UNITED STATES OF AMERICA

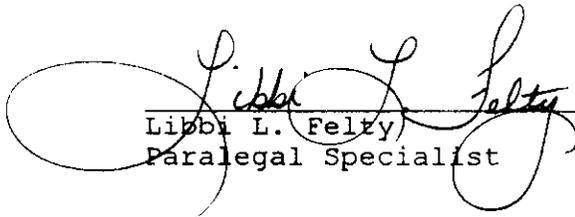
Stephen C. Lewis
United States Attorney



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

CERTIFICATE OF SERVICE

This is to certify that on the 16th day of June, 1999, a
true and correct copy of the foregoing was mailed, postage prepaid
thereon, to: Charles D. Huneryager, c/o Jeff Mayo, 502 W. 6th St.,
Tulsa, OK 74119.



Libbi L. Felty
Paralegal Specialist

CIT

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

JUN 15 1999

GEORGE E. CAMPBELL
SSN: 427-96-5456,

Plaintiff,

v.

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

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-0640-EA

ENTERED ON DOCKET
DATE JUN 16 1999

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 15th day of June 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).

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

JUN 15 1999

GEORGE E. CAMPBELL
SSN: 427-96-5456,

Plaintiff,

v.

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

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-0640-EA

ENTERED ON DOCKET

DATE JUN 16 1999

ORDER

Claimant, George E. Campbell, 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** and **REMANDS** 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 November 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 (January 26, 1995), and on reconsideration (April 10, 1995). A hearing before Administrative Law Judge James D. Jordan (ALJ) was held April 8, 1996, in Tulsa, Oklahoma. By decision dated June 13, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. On May 19, 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, 416.1481.

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. *Hawkins v. Chater*, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted). The term substantial evidence has been interpreted by the U.S. Supreme Court to require “more than a mere scintilla. It means such

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. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

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 Court may not reweigh the evidence nor substitute its discretion for that of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). 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); see also Casias, 933 F.2d at 800-01.

II. CLAIMANT’S BACKGROUND AND MEDICAL HISTORY

Claimant was born on June 15, 1946, and was 50 years old at the time of the administrative hearing in this matter. He has a high school education and two years of college studying liberal arts. Claimant worked in a machine shop, operating lathes and presses, reading blue prints and shop drawings, and making computations. Claimant alleges an inability to work beginning February 8, 1991, due to stress, leg cramps, coughing attacks, difficulty breathing, pain in the wrists, back, knees, and ankles, low energy, depression, and hiatal hernia. (Complaint, Docket # 1, at ¶ 5.) Claimant also testified that he has anxiety, constant diarrhea, and he has problems sleeping. (R. 54, 58-59)

Claimant contends that, while he was employed in California, he was shot in the leg with a nail gun by his boss on February 8, 1991, and that is what triggered his disability. (R. 44, 110) Cathy Goodman, Ph.D., certified that claimant had “adjustment disorder with mixed emotional features” from February 13, 1991. (R. 172) She estimated that his disability would end on March 27, 1991. (Id.) On February 14, 1991, claimant filed for disability insurance benefits in California because “work too stressful, intimidation [sic] violence.” (R. 171) He then filed a workers’ compensation claim in May 1994, claiming that stresses on the job caused injury to “his back, neck,

stress and strain, emotion [sic], cardiovascular system, gastro-intestinal, respiratory, inhalation of substances and any other medical condition mentioned in the file.” (R. 111, 114) The claims were settled. (R. 111-16)

Claimant moved to Oklahoma in March 1991. (R. 45) On July 20, 1992, claimant went to the emergency room at Hillcrest Medical Center. He complained of right groin and hip pain, fever and chills. He was discharged on July 22, 1992 with a diagnosis of right groin cellulitis, hypertension, mild anemia and “absent left tympanic membrane” in his ear. (R. 137) Upon admission, he informed the medical staff that he owned a flea market and works there daily. He also admitted that he smoked one pack of cigarettes and drank one pint of ethanol per day for many years. He reported no cough, chest pain, or other type of respiratory complaints. He also denied any diarrhea. (R. 139-41, 154) Claimant was “strongly encouraged” upon discharge from Hillcrest on July 26, 1992, to cease his alcohol consumption and to follow up with Alcoholics Anonymous. (R. 138) However, the Social Security Administration interviewer noted “alcohol smell at 9:00 A.M.” when she completed claimant’s disability report on November 10, 1994. (R. 124)

Two consulting physicians examined claimant in January 1995. Claimant told Dan E. Calhoun, M.D., that he had to stop working because of “stress” related to “mind games” and because of a poor working environment that caused him to cough while he was on the job. (R. 161) Dr. Calhoun’s assessment was:

1. Chronic obstructive pulmonary disease secondary to 30 pack/year history of smoking, with mild clubbing and chronic cough, which is exacerbated by certain work environments. Treatment with appropriate bronchodilators would probably improve his ability to work in these environments, and would be aided by the use of a mask within these environments.
2. Mild ventral hernia -- benign and of little consequence.
3. “Stress” on the job -- of unknown significance.

(R. 162)

Ronald C. Passmore, M.D., performed a psychiatric examination of claimant on January 18, 1995. Dr. Passmore utilized the multi-axial system set forth in American Psychiatric Assoc., Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), (4th ed. 1994). Axis I refers to Clinical Syndrome, Axis II to Developmental Disorders, Axis III to Physical Disorders and Conditions, Axis IV to Severity of Psychosocial Stressors, and Axis V to Global Assessment of Functioning (GAF). Id. At Axis I, Dr. Passmore reported that claimant showed “some evidence of depression, which I suspect is more situational than anything. It appears to be mild to moderate, and I think would respond to medication. I suggested he talk to the people at the clinic about this, and he is planning to do that.” (R. 165) At Axis V, Dr. Passmore reported that claimant’s “adjustment” was “fair.” Dr. Passmore failed to assign a GAF score, or to describe claimant’s functioning according to the descriptions in the GAF table. (Id.) Claimant told Dr. Passmore that he did not work because of a bad experience on the job four years prior, when his 22-year-old boss shot him with a blow gun and kept him working in closed areas without ventilation. (R. 164) He also reported sleep problems, poor appetite, suicidal thoughts, high blood pressure, alcohol abuse and homelessness. (Id.) Nonetheless, he had never seen a psychiatrist, he no longer had suicidal thoughts, he was not hearing voices, he did not exercise, he did not take blood pressure medicine, his talk was good, and he had no looseness of association, flight of ideas, hallucinations or delusions. (R. 164-65)

Records from Morton Comprehensive Health Services, Inc. from December 1994 and January 1995 indicate that claimant had his blood pressure taken (R. 168), some fluid was moved from claimant’s pelvis (R. 187), claimant had an alcohol problem in the past (R. 190), and claimant

required dental treatment for "gross decay" of his teeth. (R. 194-95) The Tulsa City-County Health Department also reported a negative chest x-ray in December 1994. Records from the Pawnee County Health Department from August 21-29, 1995, indicate that claimant had a cough, loss of appetite, cold sweats nightly, intermittent nausea and vomiting. (R. 174) He stated that he smoked 20 cigarettes per day and drank a pint of whisky per day. (R. 174) He also reported diarrhea and feelings of despair and hopelessness. (R. 180) Mycobacteriology analysis of his sputum was negative. (R. 177, 178)

Claimant testified that he cannot work because of stress, cramping, feeling "closed in," and coughing. (R. 49) He stated that his stress is related to the "bad experience he had on that one job" when his supervisor shot him in the leg with a nail gun. (R. 49) Since he has been in Oklahoma, his stress is related to not being able to work. (R. 50) He has seen a psychiatrist or psychologist three times for his anxiety and depression. (R. 50, 55) He also claims to have weekly thoughts of suicide. (R. 59) He has lost about 35 pounds due to poor appetite or depression. (R. 60) He has anxiety and feelings of hopelessness every day, and he is a loner. (R. 62)

He claims that his leg cramps started about three years ago, and they wake him during the night. (R. 51, 59) He has not seen a doctor for the cramping. (R. 52.) He also testified that his coughing became a problem about three years ago. He "had it checked" at the Pawnee Clinic, but "it came back negative" and he was not treated for it. (R. 52-53) He claims that his coughing causes shortness of breath and prevents him from walking for more than a quarter of a mile. (R. 52-53, 55) He attributes his wrist problem to a bike accident he had five months prior to the hearing in 1996. (R. 53-54) He has not sought treatment for his wrist problem. (R. 54) Following the time he was in the hospital at Hillcrest for hip problems, he used a crutch for about three months. (Id.) He claims

that he cannot stand for more than five minutes, and he cannot sit for more than 20 minutes. (R. 55) He contends that he cannot lift more than 15 -20 pounds without pain. (R. 56, 61) He asserts that he can no longer work with intricate tools because of pain in his wrists. (R. 61)

He is not currently taking any prescription medications, although he did until his prescription ran out in October 1995. (R. 56) He takes over-the-counter medications now. (R. 56, 185) His doctor informed him in July 1990 that the membrane in his left ear has a hole in it, but he did not have the recommended operation because he was afraid of the operation. (R. 56-57) He alleges that he has constant pain in his back "in the kidney area." (R. 57) He stated that he had been suffering from constant diarrhea for about two years, and he took Pepto-Bismol for it. (R. 58) He also stated that he was "pretty sure" he had arthritis in his knees and ankles, causing them to ache on a daily basis. (R. 59) He claims that his energy level is low. (R. 60)

Claimant testified that he had a driver's license but he allowed it to expire in July 1995 because he did not want to drive anymore. (R. 44) He now lives in a van. (R. 46) He goes to the grocery store once a week and sometimes to church. (R. 46-47, 60) He testified that he fishes about twice a year, but sometimes twice a week in the summer. (R. 47) His daily activities include preparing his own meals, watching television, napping, and collecting cans. (R. 48) He receives about twenty-five dollars per week for the cans he collects. (R. 57) He used to sketch, but he gave that up two years prior to the hearing. (R. 60-61)

III. REVIEW

The ALJ made his decision at the second step of the sequential evaluation process. He specifically found that claimant did not have any impairments which in combination have more than a minimal effect on his ability to work, even considering his age, education, and work experience. The ALJ concluded that claimant was not under a “disability,” as defined in the Social Security Act, at any time through the date of the decision. (R. 20) Claimant asserts as error that the ALJ’s findings at step two are not based on substantial evidence. (Cl. Br., Docket # 13, at 2.)

At step two, the claimant has to the burden to demonstrate a medically severe impairment or combination of impairments that significantly limits his ability to do basic work activities. See 20 C.F.R. §§ 404.1920(c), 416.920(c); Bowen v. Yuckert, 482 U.S. 137, 146 & n. 5 (1987). Basic work activities are “the abilities and aptitudes necessary to do most jobs.” 20 C.F.R. §§ 404.1521(b), 416.921(b). Examples of basic work activities include:

- (1) Physical functions such as walking, standing, sitting, lifting, pushing pulling, reaching, carrying, or handling;
- (2) Capacities for seeing, hearing, and speaking;
- (3) Understanding, carrying out, and remembering simple instructions;
- (4) Use of judgment;
- (5) Responding appropriately to supervision, coworkers, and usual work situations; and
- (6) Dealing with changes in a routine work setting.

Id. The step two severity determination is based on medical factors alone, and “does not include consideration of such vocational factors as age, education and work experience.” Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988).

At step two, a claimant is required only to make a “de minimus showing.” Id. at 751. To determine whether the claimant’s impairments are sufficiently severe, the Commissioner must “consider the combined effect of all of the individual’s impairments without regard to whether any

such impairment, if considered separately, would be of such severity.” 42 U.S.C. § 423(d)(B); 20 C.F.R. §§ 404.1523; 416.923. The ALJ may not dismiss any of a claimant’s impairments as nonsevere and disregard them thereafter. See Soc. Sec. Rul. 96-8p, 1996 WL 374184 (S.S.A), at *5 (clarifying that the ALJ must consider both severe and nonsevere impairments when assessing residual functional capacity). If the claimant’s combined impairments are medically severe, the Commissioner must consider “the combined impact of the impairments throughout the disability determination process.” 42 U.S.C. § 423(d)(B); 20 C.F.R. §§ 404.1523, 416.923; see also Soc. Sec. Rul. 85-28, 1985 WL 56856 (S.S.A.), at *4.

In this matter, claimant has made a de minimus showing that a medically severe impairment or combination of impairments would have more than minimal effect on his ability to do basic work activities. While not all of claimant’s symptoms are established by objective medical evidence, the reports of the consulting examiners indicate that claimant does have chronic obstructive pulmonary disease (R. 162) and an affective disorder. (R. 165) Further, there is an issue as to whether claimant has chronic diarrhea. (See R. 58, 180)

The ALJ summarized claimant’s testimony, noting that claimant had not seen a doctor about his alleged leg cramps or wrist pain, and the medication he takes is over-the-counter medication. (R. 16) The ALJ also summarized the medical evidence, noting that soon after the onset of claimant’s alleged disability, claimant was evaluated and a condition interfering with his ability to work was expected to resolve by March 27, 1991. (R. 17; see R. 172) Claimant argues that his filing of a workers’ compensation claim establishes his injury and disability. (Cl. Br., Docket # 13, at 3-5.) However, that claim was settled, and the claimant’s employer explicitly denied liability or knowledge of claimant’s alleged injuries until he filed his claim. (R. 111-16)

There is no other medical evidence related to claimant's alleged impairments until July 1992, when claimant was admitted to the hospital for right groin cellulitis. Hospital records indicate claimant's "previously good health," and "feeling fine" until the morning he went to the hospital. (R. 139) Further, he was in good condition, ambulating without difficulty, and free of pain in his hip, thigh or groin area when he was discharged. (R. 137-39) There is no other documentation of any medical problems until December 1994, when his blood pressure and a chest x-ray were taken, some fluid was removed from his pelvis, and he had some dental work done. (R. 168-69, 187-96) The chest x-ray was negative. (R. 169, 196) Then, in August 1995, he was assessed with a productive cough and weight loss. The ALJ considered these medical records as evidence of claimant's ability to obtain medical treatment when necessary. (R. 18)

The ALJ also reviewed the reports of the consultative examiners. He noted that claimant was not on any prescribed medication and had not tried to obtain any vocational rehabilitation or work other than as a machinist. (Id.; R. 161) Claimant's chronic pulmonary disease was primarily attributed to claimant's smoking habit, but it was accompanied by "mild clubbing and chronic cough, which is exacerbated by certain work environments." (R. 162) Dr. Calhoun opined that treatment with bronchodilators "would probably improve claimant's ability to work. . . ." (Id.) The ALJ focused on the evidence of claimant's smoking habits as well as evidence indicating that claimant's lungs were clear and his chest x-ray was negative. (R. 18-19)

The consulting psychiatric examination revealed mild to moderate depression, which was regarded as "probably situational" and amenable to medication.⁴ (R. 165) Claimant told Dr.

⁴ Contrary to claimant's assertion, he has not shown that he is unable to afford medication. (Cl. Br., Docket # 13, at 5.) Indeed, he has shown that he has taken medication in the past, and continues to take over-the-counter medication. (See R. 56, 58, 161, 164, 185)

Passmore that he did not work because of a bad experience on the job four years prior, when his 22-year-old boss shot him with a blow gun and kept him working in closed areas without ventilation. (R. 164) He had never seen a psychiatrist, he no longer had suicidal thoughts, he was not hearing voices, he did not exercise, he did not take blood pressure medicine, his talk was good, and he had no looseness of association, flight of ideas, hallucinations or delusions. Nonetheless, he reported sleep problems, poor appetite, suicidal thoughts, high blood pressure, alcohol abuse and homelessness. (R. 164-65)

Claimant argues that, pursuant to Cruse v. United States Dept. of Health and Human Servs., 49 F.3d 614 (10th Cir. 1995), Dr. Passmore's evaluation of claimant's adjustment as "fair" is evidence of disability. (Cl. Br., Docket # 13, at 5). The consulting physicians in Cruse completed mental assessment forms that have fallen out of favor with the Tenth Circuit (not the Psychiatric Review Technique (PRT) forms currently used by ALJs and consulting physicians) in which they used the term "fair" (or "unlimited/very good," "good," or "poor or none," as appropriate) to describe a claimant's functional abilities. Cruse, 49 F.3d at 618. In that context, the Tenth Circuit held that "fair" means ability to function in this area is seriously limited but not precluded, and it is essentially the same as the term "marked" in the listing requirements of the Social Security Administration regulations. Id. "Marked" means "more than moderate, but less than extreme," and indicates a degree of limitation that will "seriously interfere with the ability to function independently, appropriately and effectively." Id. (quoting 20 C.F.R., Pt. 404, Subpt. P., App. 1, § 12.00 C).

Like the ALJ in Cruse, the ALJ in this matter apparently considered "fair" as evidence of ability. 49 F. 3d at 618. Dr. Passmore did not complete a mental assessment form or a PRT form, but his "adjustment is fair" comment at Axis V indicates that he may have been referencing the old

mental assessment forms because he did not use the GAF scale, assign a GAF score, or otherwise describe claimant's functioning according to the descriptions in the GAF table. The old forms asked for evaluations of claimant's ability to make occupational, performance and person-social adjustments. (See id.) The Tenth Circuit has held that "fair" means ability to function in this area is seriously limited but not precluded. Cruse, 49 F.3d at 618. The PRT forms ask for a rating of impairment severity that does not list "fair" among its options. The DSM-IV utilizes a GAF score. The Court is left to wonder what Dr. Passmore meant by "adjustment is fair" and how the ALJ was able to translate that assessment into a finding of no severe impairment.

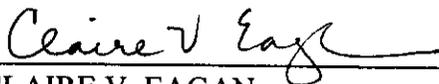
The PRT form completed by the ALJ indicates his finding that claimant's affective disorder was expected to improve with the use of medication, and claimant's substance addiction disorders were not documented as interfering with his ability to perform work-like activity. (R. 22-23) The ALJ concluded in the PRT form that claimant's restrictions of daily activity and difficulties in maintaining social functioning were no more than slight (R. 24); claimant seldom had deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner (id.); and there were no episodes of deterioration or decompensation in a work or work-like setting which caused the claimant to withdraw from such situation or to experience exacerbation of signs and symptoms (id.). Again, like the ALJ in Cruse, the ALJ in this matter failed to properly discuss in his opinion the evidence he considered in reaching the conclusions he expressed on the PRT form. (See Cruse, 49 F.3d at 618.) He repeated the conclusions indicated on the PRT form, but only generally discussed the evidence of claimant's impairment and failed to relate the evidence to his conclusions. (See id.; R. 19)

Accordingly, the Court has serious doubts as to whether there is substantial evidence to support the ALJ's conclusions based on Dr. Passmore's diagnosis. The Court is also concerned that the ALJ may not have adequately "consider[ed] the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity." 42 U.S.C. § 423(d)(B); 20 C.F.R. §§ 404.1523; 416.923. As indicated in the regulations, the Commissioner must consider "the combined impact of the impairments throughout the disability determination process" if the claimant's combined impairments are medically severe. Id.; see also Soc. Sec. Rul. 85-28, 1985 WL 56856 (S.S.A.), at *4. Given the lack of sufficient evidence to affirm the Commissioner's determination, the Court remands this matter for completion of as much of the five-step sequential evaluation analysis as appropriate.

IV. CONCLUSION

The decision of the Commissioner is not supported by substantial evidence, and the correct legal standards were not applied. 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 15th day of June, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUN 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JIMMY D. BLEVINS,
SSN: 441-44-4898,

Plaintiff,

v.

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

Defendant.

Case No. 97-CV-0623-EA

ENTERED ON DOCKET

DATE JUN 16 1999

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 15th day of June 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).

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JIMMY D. BLEVINS,
SSN: 441-44-4898,

Plaintiff,

v.

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

Defendant.

JUN 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-0623-EA

ENTERED ON DOCKET

DATE JUN 16 1999

ORDER

Claimant, Jimmy D. Blevins, 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** and **REMANDS** 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 February 8, 1995, claimant protectively filed 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 (May 3, 1995), and on reconsideration (June 14, 1995). A hearing before Administrative Law Judge Richard J. Kallsnick (ALJ) was held May 10, 1996, in Tulsa, Oklahoma. By decision dated June 27, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. On May 15, 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, 416.1481.

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. *Hawkins v. Chater*, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted). The term substantial evidence has been interpreted by the U.S. Supreme Court to require “more than a mere scintilla. It means such

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. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

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 Court may not reweigh the evidence nor substitute its discretion for that of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). 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); see also Casias, 933 F.2d at 800-01.

II. CLAIMANT’S BACKGROUND

Claimant was born on November 9, 1942. He was 53 years old at the time of the administrative hearing in this matter. He has a seventh-grade education, and he last worked as a machine (heavy equipment) operator. Claimant alleges an inability to work beginning December 15, 1994, due to pain in his lower back, neck, left arm, right hip, right ankle, and a hearing loss.

As the medical evidence in the matter indicates, claimant underwent surgery and treatment for problems with the cervical and lumbar sections of his spine from December 1994 through August 1995. However, in February 1996, claimant was involved in an automobile accident which exacerbated his problems. He subsequently participated in physical therapy without much success. His treating physician recommended more surgery. After the administrative hearing in this matter, claimant submitted an additional report from the treating physician, indicating that the physician had examined claimant again and discovered serious, additional problems related to claimant’s cervical spine. (See Motion to Add Evidence Missing from the Transcript of the Record, Docket # 8, Ex. A) In the report, the treating physician alternately stated that claimant was “temporarily totally disabled” and “completely disabled at this time.” (Id.) Claimant submitted the report to the Appeals Council

for review, and, upon finding that it was not made part of the record submitted to the District Court, moved for its inclusion. (Motion to Add Evidence, Docket # 8.) The Motion to Add Evidence Missing from the Transcript of the Record is **GRANTED**.

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 light work, although claimant's RFC was diminished by his inability to perform work with excessively loud background noises. The ALJ concluded that claimant could not perform his past relevant work, but claimant was capable of making an adjustment to work which exists in significant numbers in the national and regional economies that he could perform, based on his 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 that the ALJ: (1) misevaluated [sic] the medical evidence and claimant's testimony, and (2) erroneously discredited and disregarded the evidence and claimant's testimony. (Cl. Br., Docket # 9, at 1.) Although these allegations of error are quite general, claimant challenges, by way of example, the weight accorded by the ALJ to a chiropractor's report, the ALJ's credibility finding, and the ALJ's failure to acknowledge claimant's poverty as the reason claimant eschewed some medical procedures. Claimant also disagrees with the ALJ's assessment of claimant's inability to afford prescription pain medication, the ALJ's RFC assessment (which claimant contrasts to language from a report by his treating physician submitted to the Appeals

Council after the administrative hearing), and the hypothetical question the ALJ posed to the vocational expert.

Chiropractic Treatment

The ALJ assigned little weight to the January 25, 1995 medical report of Hugh G. McClure, D.C., the chiropractor, because Dr. McClure's evaluation was for claimant's worker's compensation claim. (R. 13) A disability determination made by another agency is not binding upon the Commissioner. 20 C.F.R. §§ 404.1504, 416.914. The record demonstrates that Dr. McClure actually wrote four reports. Three are dated January 25, 1995. In one report, Dr. McClure opined that claimant had a temporary total disability. (R. 135-40) In another, Dr. McClure evaluated claimant's hearing loss, assigning a fifty-five point seventy-five (55.75) percent binaural hearing impairment. (R. 144, 178-81) Curiously, the ALJ did assign some weight to Dr. McClure's evaluation of claimant's hearing loss. (See R. 15)

In the third report of January 25, 1995, Dr. McClure opined that claimant had twenty-eight (28) percent permanent partial impairment to claimant's right foot, due to an injury to the right ankle. (R. 142-43) The ALJ did not mention this report; nor did he mention Dr. McClure's report of March 28, 1995, in which Dr. McClure deemed claimant to have seven (7) percent permanent partial impairment to his body as a whole, due to lower limb impairment as a result of gait derangement. (R. 133, 177) The record does not indicate that Dr. McClure saw claimant after claimant's automobile accident in February 1996, and, as respondent points out, Dr. McClure did not state that claimant was unable to perform any work.

A chiropractor is not an accepted medical source under the Commissioner's regulations, see 20 C.F.R. §§ 404.1513(a), 416.913(a), and his opinion, therefore, is entitled to less weight than that

of a medical doctor. However, a chiropractor's opinion may corroborate the findings of a treating physician, see Frey v. Bowen, 816 F.2d 508, 514 (10th Cir. 1987), or a chiropractor may provide information concerning how claimant's impairment affects his ability to do work, see 20 C.F.R. §§ 404.1513(e), 416.913(e). A chiropractor's opinion by itself, however, cannot provide the objective medical evidence necessary to establish a pain-producing impairment. Thus, the ALJ did not err by disregarding Dr. McClure's reports.

Treating Physician

A treating physician's opinion, by contrast, is entitled to substantial weight unless good cause is shown for rejecting it. Goatcher v. United States Dep't of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995) (citations omitted.) The regulations provide that, although the final responsibility for determining the ultimate issue of disability is reserved to the Commissioner, 20 C.F.R. §§ 404.1527(e)(2), 416.927(e)(2), the Commissioner will give controlling weight to a treating physician's opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, id. §§ 404.1527(d)(2), 416.927(d)(2).

Claimant's treating physician, Frank J. Tomacek, M.D., performed surgery on claimant in August 1995. The procedure was termed an "anterior cervical discectomy at C4-5, C5-6 and C6-7 with C-6 carpectomy, anterior spinal fusion from C4-7 with a left iliac crest bone graft and an orion plate." (R. 192) Claimant's final discharge diagnosis was "severe cervical spondylosis from C4 to C7 with stenosis and a left C6- C7 radiculopathy and spinal cord compression." (Id.) The ALJ noted that claimant's condition improved following surgery until an automobile accident in February 1996. (R. 14) Nonetheless, post-accident x-rays showed good alignment, the plate was not loosened or

disrupted, and the fusion appeared to have taken. (R. 206) Claimant took physical therapy treatments until March 28, 1996, but he continued to experience pain. (R. 217-28)

The last report by Dr. Tomacek that the ALJ noted was a March 29, 1996 report in which Dr. Tomacek stated: "Certainly [claimant] is worse after this accident to a point where he is having a hard time functioning at any capacity." (R. 205) Nonetheless, the ALJ indicated that no physician placed any functional restrictions on claimant that would preclude light work activity. (R. 16) Instead, he focused on Dr. Tomacek's recommendation that claimant have another cervical myelogram and post-myelogram CT scan. The ALJ stated: "there is no evidence the claimant followed through with this additional testing and the record reflects the claimant's cervical spinal fusion healed without any complications." (R. 15) After a thorough analysis of claimant's allegations of disabling pain and claimant's credibility, the ALJ concluded that claimant could perform light work⁴ subject to claimant's hearing problems. He deemed claimant unable to work around excessively loud background noises. (R. 19)

After the ALJ's decision was rendered, claimant appealed to the Appeals Council and submitted a key piece of evidence: a report dated May 13, 1996. In the report, Dr. Tomacek indicates the results of a cervical myelogram. He wrote:

This myelogram shows that his fusion appears to be fine from C4 to C7. The position of the plate is also excellent and certainly shows no disruption. However, above the fusion at C3-4, there appears on the myelogram to be a large herniated disk causing cord compression, and on the CAT scan there is certainly some cervical stenosis and a bony osteophyte at this level,

⁴ 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.).

causing a narrowing of the spinal canal. Also, on the plain x-ray there appears to be some kyphosis above this fusion, and I am concerned he has some cervical instability at C3-4 with probable disrupted facets and certainly a disrupted disk above the fusion.

(Motion to Add Evidence, Docket # 8, Ex. A.) He opined that claimant was “temporarily totally disabled,” and he recommended a variety of treatments, including a collar, pain medication, surgery and fusion. He indicated that, without the surgery, claimant would be at risk for neurologic injury or compression and at high risk for chronic pain. He stated that claimant was “completely disabled at the moment,” could not perform any type of manual labor, and should not drive. (Id.)

New evidence submitted to the Appeals Council becomes part of the administrative record that the Court must consider. O’Dell v. Shalala, 44 F.3d 855, 859 (10th Cir. 1994). Pursuant to 20 C.F.R. § 404.970(b), the Appeals Council must consider evidence submitted with a request for review “if the additional evidence is (a) new, (b) material, and (c) relate[d] to the period on or before the date of the ALJ’s decision.” Box v. Shalala, 52 F.3d 168, 171 (8th Cir. 1995) (internal quote omitted); Wilkins v. Secretary, Dep’t of Health and Human Servs. 953 F.2d 93, 95-96 (4th Cir. 1991) (internal quote omitted); see also O’Dell, 44 F.3d at 858. If the Appeals Council fails to consider qualifying new evidence, the case should be remanded for further proceedings.

The May 13, 1996 report is new because “it is not duplicative or cumulative,” see Wilkins, 953 F.2d at 96, and it is material because “there is a reasonable possibility that [it] would have changed the outcome.” Id. Dr. Tomacek’s diagnosis of a C3-4 herniated disk with cord compression calls into question the ALJ’s conclusion that claimant’s cervical spinal fusion healed without any complications. Finally, the report is related to the period on or before the date of the ALJ’s decision, which was rendered June 27, 1996, although it was written three days after the administrative hearing. The report reflects continual treatment by Dr. Tomacek subsequent to the surgery he

performed in August 1995, and it follows his recommendation of March 29, 1996. The new evidence should have been considered by the Appeals Council.

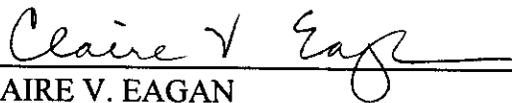
On review, the Appeals Council does not mention the new evidence but merely states that “[t]he regulations also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge’s actions, findings, or conclusion is contrary to the weight of the evidence currently of record (20 CFR 404.970 and 416.1470).” (R. 4) The Council’s failure to discuss the additional evidence, or even to reference it, indicates that the Council may not have properly considered it. See Aragon v. Apfel, No. 98-2097, 1998 WL 889400 (10th Cir. Dec. 22, 1998); Lawson v. Chater, No. 95-5155, 1996 WL 1915124 (10th Cir. April 23, 1996). The omission by the Appeals Council constitutes substantial legal error necessitating a remand for further proceedings consistent with this opinion. The court declines to reach the remaining issues on appeal, which relate to the ALJ’s assessment of claimant’s credibility, inability to afford medical treatment or medication, and RFC, as well as the hypothetical question posed by the ALJ to the vocational expert. These issues may be mooted by the proceedings or disposition or remand.

V. CONCLUSION

The Motion to Add Evidence Missing from the Transcript of the Record (Docket # 8) is **GRANTED**. The Commissioner’s denial of benefits in this matter is not supported by substantial evidence, and the correct legal standards were not applied. The ALJ’s opinion was a thorough analysis, but he did not have before him the May 13, 1996 report, and the Court cannot determine from the May 15, 1997 action of the Appeals Council whether it considered the May 13, 1996 report submitted to it as new evidence. 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 15th day of June, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

VIDEO COMMUNICATION, INC.,)

Plaintiff,)

v.)

CINEMA PROPERTIES, INC.,)
GERRY GRIGGS, NORM REVIS,)
ROBERT THURMOND and)
THEODORE F. POUND, III.,)

Defendants.)

ENTERED ON DOCKET
JUN 16 1999

DATE _____

Case No. 99-CV-034-H ✓

F I L E D

JUN 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on a motion to dismiss by Defendant Robert H. Thurmond (Docket # 8), and by Defendant Theodore F. Pound, III (Docket # 16).

Plaintiff Video Communication, Inc. ("VCI") has brought this action for declaratory judgment, interference with business relations and breach of contract.

I

This lawsuit arises out of a settlement agreement involving, among other parties, Plaintiff VCI, an Oklahoma corporation, Defendant Cinema Properties, Inc. ("CPI"), a Texas corporation, and Defendants Robert H. Thurmond and Theodore F. Pound, both residents of the state of Texas.

The facts as alleged by Plaintiff VCI are as follows: VCI is the owner and/or license holder to the distribution rights of various films (hereinafter referred to as the "VCI Library"). In mid-1994, Robert A. Blair, who was an officer of VCI and of CPI, and remains a stockholder of CPI, discussed the possibility of CPI obtaining a license of the VCI Library and purchasing certain assets of VCI. Both Defendant Thurmond and Defendant Pound were among those who owned stock as well as served as directors of CPI. Defendant Thurmond's responsibility was to

provide corporate legal counsel to CPI while Defendant Pound was responsible for raising capital for the VCI/CPI acquisition.

On August 23, 1994, VCI entered into an agreement with Target Stores, a division of One Dayton Hudson Corporation ("Target"), whereby Target agreed to purchase from VCI a minimum of 100,000 videos on a non-return basis (the "VCI/Target Agreement"). On August 31, 1994, VCI and Fortune Films, Inc. ("FFI"), an Oklahoma corporation, entered into an agreement with CPI whereby CPI purchased certain assets of VCI/FFI and VCI/FFI also licensed certain film rights to CPI (hereinafter referred to as the "VCI/CPI Agreement"). In addition, CPI was granted rights to use the names of VCI and FFI. The VCI/CPI Agreement provided that CPI's consideration for the acquisition would consist of \$500,000 due at closing, a \$2,500,000 promissory note, and assumption of certain accounts payable of VCI/FFI. The closing occurred on or about December 2, 1994, at which time CPI paid the agreed upon \$500,000 by factoring VCI's accounts receivable. CPI also executed and delivered the promissory note payable to VCI/FFI and the security agreement. Defendant Thurmond negotiated and attended the closing of the VCI/CPI Agreement in Oklahoma, while Defendant Pound conducted due diligence in Oklahoma relating to the acquisition.

On December 28, 1994 and on January 6, 1995, CPI modified the VCI/Target Agreement whereby Target was allowed to return copies of the video it purchased based upon its promise to purchase additional videos during 1995. Pursuant to the modified agreement, Target returned approximately 25,000 tapes to CPI.

In February 1995, VCI provided CPI with written notice that CPI was in default of the VCI/CPI Agreement because of its failure to pay accounts payable that were due or obtain appropriate extensions. In March 1995, VCI notified CPI that CPI failed to pay its first interest payment on the promissory note, and CPI subsequently cured this default within 30 days of receiving notice. VCI again notified CPI in June 1995, that CPI failed to pay its second interest

payment due on the promissory note, and CPI subsequently failed to make the payment within 30 days of receiving notice. After receipt of the June notice, the CPI officers reimbursed themselves for all out-of-pocket costs they had incurred. By letter dated June 8, 1995, CPI acknowledged default on the second interest payment of the promissory note, but disputed other defaults and requested additional information relating to such other defaults. VCI provided CPI with additional information by letter on June 16, 1995. On July 6, 1995, CPI issued a letter to VCI/FFI, claiming a right of set-off on grounds that VCI/FFI was in default.

On July 11 and 12, 1995, VCI engaged in self-help pursuant to the VCI/CPI Agreement and the laws of Oklahoma and, as a result, obtained possession of certain collateral from CPI. VCI/FFI also notified CPI that CPI had not cured various defaults within the prescribed period, and that VCI/FFI was therefore terminating the film rights license and accelerating the promissory note making the entire amount due. VCI/FFI also filed a complaint in Federal Court in the Northern District of Oklahoma against VCI on July 12, 1995. On July 13, 1995, in addition to notifying CPI that they had exercised their rights to conduct self-help, VCI/FFI also advised CPI that CPI's rights to use the names belonging to VCI and FFI were terminated. CPI responded the same day, claiming that termination of the license was wrongful. On July 14, 1995, CPI filed for Chapter 11 Bankruptcy protection in Houston, and this action was then transferred to the United States Bankruptcy Court for the Northern District of Oklahoma. After the bankruptcy proceedings, the Bankruptcy Court dismissed CPI, concluding that, inter alia, CPI did not have the ability to reorganize under Chapter 11. Both Defendant Thurmond and Defendant Pound, as representatives of CPI, participated in the litigation in Oklahoma.

Following the Bankruptcy Court's ruling, some of the individuals composing CPI brought causes of action in their own names, seeking to litigate the same issues adjudicated by the Bankruptcy Court. On February 28, 1997, VCI and FFI, along with other individually-named parties, entered into a settlement agreement with, Defendant CPI, Defendant Thurmond,

Defendant Pound and other parties (the "Settlement Agreement") wherein CPI expressly acknowledged and agreed as follows:

1. To release any and all claims against the VCI Group and "any and all persons and/or entities, acting by, through or in concert with them."
2. That VCI was the owner of all assets involved in the VCI/CPI Agreement, and that CPI has no right in or to such assets.
3. That CPI would return all inventory to VCI.
4. All litigation was dismissed with prejudice.

The Settlement Agreement also provided that it would be interpreted and governed by the laws of Oklahoma. Both Defendant Thurmond and Defendant Pound, as representatives of CPI, delivered the Settlement Agreement to VCI in Oklahoma.

Subsequent to entering into the Settlement Agreement, CPI brought a cause of action against Target in the United States District Court for the Southern District of Texas, alleging, inter alia, breach of the 1994 VCI/Target Agreement. As a result of CPI bringing that lawsuit, VCI has brought the instant action, alleging that CPI's claims against Target are invalid, belong to VCI, and are made for the purpose and intent of disrupting the business relations between VCI and Target.

II

Both Defendant Thurmond and Defendant Pound have moved to dismiss this action against them on the grounds that this Court lacks personal jurisdiction. With regard to whether Defendants are subject to personal jurisdiction in Oklahoma:¹

[t]he plaintiff bears the burden of establishing personal jurisdiction over the defendant. Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party.

¹ The Court applies the law of the forum state, in this case, Oklahoma, to determine whether it has jurisdiction over a nonresident defendant in a lawsuit based on diversity of citizenship. Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Co-op., 17 F.3d 1302, 1304 (10th Cir. 1994); see also Fed. R. Civ. P. 4(e).

Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1417 (10th Cir. 1988) (citations omitted).

Thus, the Court must “determine whether the plaintiff’s allegations, as supported by affidavits, make a prima facie showing of the minimum contacts necessary to establish jurisdiction over each defendant.” Id.

“The test for exercising long-arm jurisdiction in Oklahoma is to determine first whether the exercise of jurisdiction is authorized by statute and, if so, whether such exercise of jurisdiction is consistent with the constitutional requirements of due process. In Oklahoma, this two-part inquiry collapses into a single due process analysis, as the current Oklahoma long-arm statute provides that ‘[a] court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States.’” Id. at 1416 (citations omitted).

The Rambo court stated that:

[j]urisdiction over corporations may be either general or specific. Jurisdiction over a defendant in a suit arising out of or related to the defendant’s contacts with the forum state is “specific jurisdiction.” In contrast, when the suit does not arise from or relate to the defendant’s contacts with the forum and jurisdiction is based on the defendant’s presence or accumulated contacts with the forum, the court exercises “general jurisdiction.”

839 F.2d at 1418 (citations omitted); Doe v. Nat’l Med. Servs., 974 F.2d 143, 145 (10th Cir. 1992) (“Specific jurisdiction may be asserted if the defendant has ‘purposefully directed’ its activities toward the forum state, and if the lawsuit is based upon injuries which ‘arise out of’ or ‘relate to’ the defendant’s contacts with the state.”). The Supreme Court has explained that:

[j]urisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the foreign state . . . it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communication across state lines, thus obviating the need for physical presence within a state in which business is conducted. So long as a commercial actor’s efforts are “purposefully directed” toward residents of another state, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction.

Burger King, 471 U.S. at 476.

Three criteria guide the Court's determination of whether personal jurisdiction exists: (1) in relation to the plaintiff's claim, the defendants must have purposefully availed themselves of the privilege of conducting activities in Oklahoma, Henson v. Denckla, 357 U.S. 235, 253 (1958); (2) for specific jurisdiction, the cause of action must arise from the defendants' activities in Oklahoma; and (3) the acts or the consequences of the acts of the defendants must have a substantial enough connection with Oklahoma to make the exercise of jurisdiction reasonable, see LAK, Inc. v. Deer Creek Enters., 885 F.2d 1293, 1299 (6th Cir. 1989).

In addition, "[j]urisdiction over the representatives of a corporation may not be predicated on jurisdiction over the corporation itself, and jurisdiction over the individual officers and directors must be based on their individual contacts with the forum state." Ten Mile Indus. Park v. Western Plains Serv. Corp., 810 F.2d 1518, 1527 (10th Cir. 1987) (citing cases); see also Calder v. Jones, 465 U.S. 783, 790 (1984) (minimum contacts must be found as to each defendant over whom the court exercises jurisdiction in multiple defendant cases). However, a corporation may be deemed to be a mere instrumentality of its representatives and contacts with the forum state by the representatives may, as a result, be attributed to them personally if:

(1) the corporation is undercapitalized, (2) without separate books, (3) its finances are not kept separate from individual finances, individual obligations are paid by the corporation or vice versa, (4) corporate formalities are not followed, or (5) the corporation is merely a sham.

Home-Stake Prod. Co. v. Talon Petroleum, C.A., 907 F.2d 1012, 1018 (10th Cir. 1990) (citing cases).

III

Plaintiff contends that both Defendant Thurmond and Defendant Pound have sufficient contacts with Oklahoma in that they have had substantial, continuous, and regular contact with Oklahoma. Plaintiff asserts that such contacts are established by Defendants being officers and stockholders of CPI, participating in the VCI/CPI Agreement, participating in litigation in Oklahoma, delivering the Settlement Agreement in Oklahoma, and agreeing that the Settlement

Agreement would be governed by Oklahoma law. Plaintiff further contends that both Defendants have purposefully availed themselves of the benefits and protections of doing business in Oklahoma and could reasonably anticipate being haled into court since they agreed that Oklahoma law would govern the interpretation of the Settlement Agreement.

In contrast, each of Defendant Thurmond and Defendant Pound argues that his minimal contacts with Oklahoma have been exclusively in his capacity as a shareholder and officer in two different closely-held Texas corporations, and that there have been no ongoing, regular, systematic contacts with Oklahoma in a personal capacity.² Each Defendant further argues that he has never purposefully availed himself of the opportunity to personally transact business in Oklahoma.

Based upon a review of the record and applicable case law, the Court finds that there is not a sufficient basis for general or specific personal jurisdiction in Oklahoma over either Defendant Thurmond or Defendant Pound. In its Petition, Plaintiff VCI failed to allege, and the record does not indicate, that either Defendant has had any contact with Oklahoma outside of his role as a corporate representative. Instead, Plaintiff in effect argues that the acts of each Defendant carried out in Oklahoma in his corporate representative capacity should subject that defendant to jurisdiction. However, while CPI's conduct as a corporation has concededly subjected it to personal jurisdiction, this cannot be the predicate upon which jurisdiction over Defendant Thurmond and Defendant Pound can be based absent a showing that CPI was merely an instrumentality. See Ten Mile Indus. Park, 810 F.2d at 1527.

In addition, the evidence in the record taken as a whole does not establish at this point a reasonable probability that either Defendant used CPI merely as an instrumentality or shield to conduct personal activities, and that their conduct should therefore be attributed to them

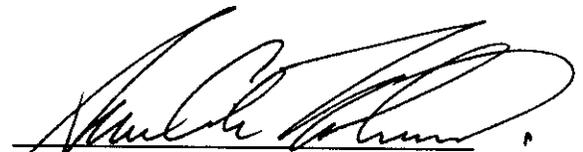
² Defendant Pound states in his brief that he has had contact with Oklahoma as attorney for the two closely-held corporations. Def. Pound's Br., at 7.

personally. Id. (citing 4 C. Wright, A. Miller & Kane, Federal Practice and Procedure, § 1069, p. 69 (1985 Supp.)); see also Home-Stake Prod. Co., 907 F.2d at 1018. Specifically, nothing in the record indicates that CPI was undercapitalized, failed to keep separate books from its principals, comingled finances, paid its principals' personal obligations, or did not adhere to corporate formalities. Further, while CPI filed for bankruptcy and allegedly reimbursed officers for out-of-pocket costs incurred in their respective representative capacities, such conduct alone does not suffice to create a reasonable probability that Defendants treated CPI as an instrumentality for personal activities. See Home-Stake Prod. Co., 907 F.2d at 1018-19. Accordingly, because neither Defendant has any contact with the forum state related to the subject matter of this action other than in their corporate or representative roles with CPI, there is no general or specific personal jurisdiction over either Defendant Thurmond or Defendant Pound in Oklahoma.

Based on the above, the motion to dismiss for lack of personal jurisdiction by each of Defendant Thurmond (Docket # 8) and Defendant Pound (Docket # 16) is hereby granted.

IT IS SO ORDERED.

This 15TH day of June, 1999.


Sven Erik Holmes
United States District Judge

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

FILED

JUN 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

National Chiropractic Mutual Insurance Company, an Iowa corporation,)

Plaintiff,)

vs.)

Ed J. Black, D.C., an individual, and Becky Burgess, an individual,)

Defendants.)

Case No. 98 CV 0605 B (E)

ENTERED ON DOCKET
JUN 16 1999
DATE _____

**JOINT STIPULATION OF
DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereto stipulate that the Plaintiff shall dismiss with prejudice this matter in its entirety.

WHEREFORE, the parties request the Court enter the Order of Dismissal with Prejudice, attached hereto as Attachment 1, and require each party to bear their respective attorney fees and costs.

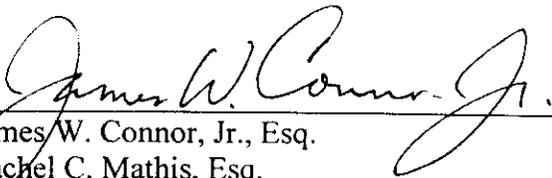
DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P.

By: _____

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Attorneys for Defendant Ed J. Black, D.C.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES J. WILSON,)

Plaintiff,)

v.)

Case No. 98 EV 880 B E

GROGG FAMILY CHILDREN)

TRUST, and STANLEY E. GROGG,)

Defendants.)

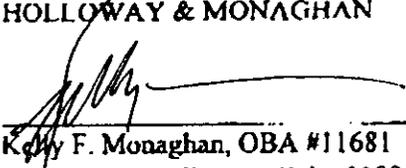
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DATE JUN 16 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

Come now Plaintiff, James J. Wilson, and Defendants Grogg Family Children Trust and Stanley E. Grogg and hereby stipulate to the dismissal with prejudice of all claims and causes of action in the above entitled cause.

HOLLOWAY & MONAGHAN



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ATTORNEY FOR PLAINTIFF

McCOLLAM & GLASSCO



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Tulsa, Oklahoma 74119-1612
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ATTORNEY FOR DEFENDANTS

J. Wilson DISMISSAL STIPULATION

C15

MT

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

JUN 15 1999 *AL*

CURTIS MAGNUSON, an individual,)
)
Plaintiff,)
vs.)
)
ESTWING MANUFACTURING)
COMPANY, INC., a Delaware)
corporation,)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-678 K(M)

ENTERED ON DOCKET
DATE JUN 15 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed. R. Civ. P. 41(a)(1)(ii), it is stipulated by plaintiff, Curtis Magnuson, and defendant, Estwing Manufacturing Company, Inc., that the above-entitled action and all of plaintiff's claims therein be dismissed *with prejudice*. It is further stipulated that each party is to bear his or its own costs and fees incurred in the action.

Respectfully submitted,

Jack G. Zurawik

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Jamie A. Stock, OBA #17144
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**Attorneys for Defendant,
Estwing Manufacturing Company, Inc.**

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C/5

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

FILED

JUN 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN RE:)
)
)
LIMITED GAMING OF AMERICA, INC.,)
)
Debtor,)
)
LIMITED GAMING OF AMERICA, INC.,)
)
Plaintiff,)
)
v.)
)
DORAN, WALTERS, ROST, SELTER, &)
WOLF, P.A. and THEODORE R. DORAN,)
LAWRENCE G. WALTERS,)
SCOTT R. ROST, MARY F. SELTER,)
AARON R. WOLFE)

No. 98-C-134-K ✓

ENTERED ON DOCKET
DATE JUN 15 1999

ORDER

Before the Court is the Defendants' Motion for Further Consideration and Relief From Order on Motion for Abstention (#49) which this Court will treat as a motion to alter or amend the Order entered by this Court on May 21, 1999, denying Defendants' Renewed Motion for Discretionary Abstention (#12).

I. Statement of Facts

Plaintiff Limited Gaming of America, Inc. (LGA) is a Chapter 11 Debtor-in-Possession in the Bankruptcy Court for the Northern District of Oklahoma. Defendant Doran, Walters, Rost, Selter, and Wolf, P.A. is a Florida law firm and the individual Defendants are attorneys with that law

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firm. Defendants represented Plaintiff prior to and during pre-bankruptcy receivership proceedings in Florida. Plaintiff alleges that during the course of representing it, the Defendants committed legal malpractice, breached fiduciary duties, and conspired to defraud it. Plaintiff claims Defendants' acts caused more than \$1,000,000 in damages. Plaintiff filed suit against Defendants in Florida state court in Volusia County, Florida alleging the same causes of action at issue in this case. Ultimately, Plaintiff failed to timely serve the Defendants, and the state court case was dismissed. Defendants contend that all of the transactions and activities which underlie Plaintiff's causes of action took place in Florida. Defendants further contend that at the time the acts of which Plaintiff complains occurred, all parties were either residents of Florida or maintained their principal place of business in Florida. Defendants assert that all of Plaintiff's causes of action are rooted in Florida state law. The parties contend that Plaintiff's causes of action are barred in Florida because the state statute of limitations has run.

Plaintiff filed its petition in the underlying bankruptcy case in February 1996. Plaintiff filed its complaint in the present action in January 1998. Plaintiff asserts that it has filed a proposed reorganization plan under chapter 11 which contemplates this litigation and that this litigation could have a substantial impact upon the asset pool available for distribution to LGA's creditors. *Pl. 's Resp. to Defs. Mot. to Abstain 2, n.1 (Pl. 's Resp.)*. Defendants assert, however, that neither LGA's proposed reorganization plan nor a competing proposed plan offered by a LGA creditor rely in any significant measure upon recovery in this adversary proceeding. All parties agree that this action is a non-core adversary proceeding under 28 U.S.C. § 157. *See Defs. ' Mot. to Abstain 5-6, Pl. 's Resp. 3.*

II. Discussion

Defendants argue that the Court must abstain from hearing this matter under the mandatory abstention provision of 28 U.S.C. § 1334(c)(2). Section 1334(c)(2) states:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c)(2). Thus, in order for mandatory abstention to apply under this section, there must be a timely motion by a party to the proceeding, and the proceeding itself must (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication; and (5) be a non-core proceeding. *See e.g. Lindsey v. Dow Chem. Co. (In re Dow Corning Corp.)*, 113 F.3d 565, 570 (6th Cir. 1997).

In denying Defendants' first motion for discretionary abstention, this Court concluded that, because there were no ongoing state proceedings, abstaining in the case would completely preclude Plaintiff from receiving a hearing on the merits of the case. At that time, this Court held:

"The Court is not unsympathetic to Defendants' argument that Plaintiff should not be permitted to allow the statute of limitations to run, then the use the lack of an alternative forum to defeat abstention. Under the facts, as known at this time, however, discretionary abstention would neither be in the interests of justice, nor would it affect comity with state courts or respect for state law. *The Court would be willing to consider a future motion for discretionary abstention should additional*

facts become available.”¹

In the Defendants’ renewed motion for abstention, they contended that they had obtained additional facts in support of their motion. On September 25, 1998, Defendants served a single Interrogatory upon Plaintiff designed to ascertain facts in support of a motion for abstention. Defendants inquired:

“Please provide the complete factual basis for LGA’s statement...that LGA’s Florida State Court action was filed and then dismissed ‘at Defendants’ request.’ If your answer to this Interrogatory is supported by any document or other tangible evidence, please identify those documents or tangible evidence.”

On November 4, 1998 Defendants received the following response from Plaintiff:

“LGA’s Florida State Court action was dismissed at Defendant’s request. Defendant’s request took the form of a Motion to Dismiss, filed by Defendants after Defendants had refused to grant LGA additional time to serve its Complaint. LGA requested additional time based on the decision of its local counsel to withdraw after the Complaint had been filed. See documents attached to Defendants’ Motion to Transfer.”

Defendants asserted in that motion that Plaintiff’s factual basis for dismissal of the Florida claim was insufficient to demonstrate that Plaintiff did not purposefully manipulate the case in an effort to forum shop. Defendants further took issue with Plaintiff’s characterization that the Florida state case was dismissed “by Defendants’ request.” That case was actually dismissed pursuant to the Defendants’ dispositive Motion to Dismiss because the Complaint was not timely served under Florida law.

In this Court’s May 21, 1999 ruling, this Court held:

Despite Defendants’ somewhat persuasive argument, *there is insufficient evidence for this Court to conclude with any certainty that the Plaintiff has attempted to*

¹Court’s Order, United States District Court for the Northern District of Oklahoma, 98-CV-134-K, August 11, 1998, pp.8-9.

forum shop. Although the Plaintiff did allow the statute of limitations to run on the state action, there were additional factors to consider, including a change of counsel and possible on-going settlement negotiations with the Defendants.

At that time, this Court determined that it would be improper to exercise discretion to abstain under Section 1334(c)(1), because there was no positive evidence that LGA was, indeed, attempting to forum shop through intentionally neglecting to litigate its case in the Florida courts, where it would most properly be maintained.

Now, once again, Defendants come forth with additional evidence in support of this motion to alter the Court's May 21, 1999, Order denying abstention. In support of this proposition, Defendants present the deposition testimony of Robert Lobato, who is currently the sole officer, director, and shareholder of Plaintiff LGA. In relevant part, Mr. Lobato testified as follows regarding LGA's Florida lawsuit against Defendants:

Q: You sued -- I say you. You or LGA sued Scott Rost, didn't you?

A: That's correct.

Q: What was that lawsuit about?

A: It was a conflict of interest lawsuit.

Q: And it was filed where, Florida?

A: It was filed in Florida.....

Q: And was that case dismissed, the case against Mr. Rost?

A: **I think we just withdrew it. We didn't file it. We didn't serve I guess is what happened. It wasn't served.**

Q: It was filed, but not served?

A: That's correct.

Q: You indicated that there was a lawsuit. In fact, I think there was a claim listed in the Bankruptcy schedules against Mr. Rost.

A: Mr. Rost.

Q: Was that settled?

A: **No. We did not serve it. We can only do so many lawsuits at one time, so –**

Q: I'm sorry?

A: **So that will be refiled.**

Q: That was my next question. Is the claim still there?

A: The claim is still there.

Throughout the course of this litigation, this Court has been open to the possibility that the Plaintiff attempted to by-pass a statute of limitations bar on this claim in Florida state court by bringing this action in the Northern District of Oklahoma. In doing so, Plaintiff has presented several theories for its failure to pursue resolution of that litigation, thus persuading this Court that discretionary abstention in this case would not be in the interests of justice. This Court has, time and again, reviewed the facts of this case, but was unable to determine with any certainty that the Plaintiff was, indeed, attempting to forum shop.

It is clear at this time, however, through Robert Lobato's testimony, that LGA's voluntary dismissal of its Florida lawsuit was not the product of an agreement with Defendants. Instead, LGA knowingly and voluntarily failed to comply with the rules for service of process in the Florida lawsuit because it could "only do so many lawsuits at one time." LGA strategically and consciously

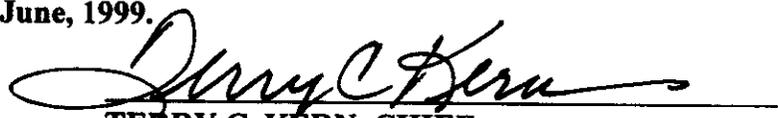
decided to direct its resources away from its prior Florida lawsuit against Defendants. Although Lobato's own testimony indicates that he knew the action must be refiled, LGA neglected to do so, and, as a result, failed to take reasonable steps to protect its own rights. LGA voluntarily abandoned its Florida lawsuit and did not refile the action within the time allowed by the statute of limitations. LGA did not move for additional time to serve its Florida Complaint, neglected to set for hearing its Motion for Withdrawal of Counsel, and neglected to set for hearing Defendants' Motion to Dismiss. It is LGA's own pattern of neglect which has resulted in the lack of a pending action in Florida. This Court will not allow LGA to benefit from its own carelessness by arguing that abstention is not proper because no alternative forum exists.

The Court also notes that the subject matter of this lawsuit has been repeatedly litigated in numerous prior actions and has consumed untold amounts of judicial resources. The complex history of this corporation and its many litigious endeavors convinces this Court that no injustice will result if this Court holds LGA accountable for its own neglect and for the consequences of its strategic litigation decisions.

III. Conclusion

It is ORDERED, the Defendants' Motion for Further Consideration and Relief From Order on Motion for Abstention (#49) is GRANTED. This Court will exercise its discretion to abstain from hearing this claim pursuant to 28 U.S.C. § 1334(c)(2). This case is hereby dismissed.

ORDERED this 14 day of June, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE JUN 15 1999

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

DENNIS HAMMOND,
an individual dba Elk River Marine,

Plaintiff,

v.

CHAMPION BOATS, INC., an
Arkansas corporation,

Defendant.

Case No. 95-CV-881E

FILED

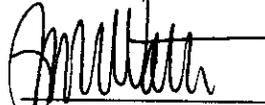
JUN 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DISMISSAL WITH PREJUDICE

Plaintiff Dennis Hammond and Defendant Champion Boats, Inc., pursuant to Federal Rule of Civil Procedure 41, hereby stipulate and agree to the dismissal with prejudice of said cause, all issues between them having now been compromised, settled, satisfied, and released. The parties agree that the Court shall retain jurisdiction to resolve any future disputes that may arise in connection with the settlement agreement executed by the parties. Each party shall bear its own costs, expenses, and attorney fees.

Respectfully submitted,



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Attorney for Plaintiff



Randall G. Vaughn, OBA #11554
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Williamson & Marlar
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Attorney for Defendant

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

FILED

JUN 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANDREA LACY,

Plaintiff,

vs.

JOE B. SCOTT,

Defendant.

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)
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No. 98-CV-355-B

ENTERED ON DOCKET
DATE JUN 14 1999

ORDER

This matter came on for a pretrial conference on today's date. Defendant Joe B. Scott has not been served. Pursuant to an oral motion by the Plaintiff Andrea Lacy, the Court dismisses this action without prejudice.

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



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

JUN 11 1999

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

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BIZJET INTERNATIONAL SALES AND)
SUPPORT, INC.,)
)
Plaintiff,)
)
vs.)
)
GORDON AIR MANAGEMENT CORP., et al,)
)
Defendant.)

Case No. 98-C-243-B

ENTERED ON DOCKET

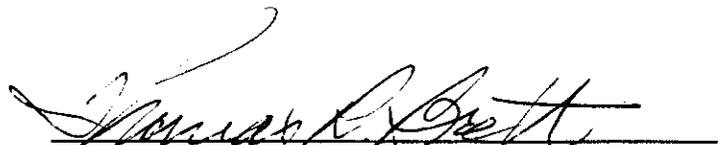
ADMINISTRATIVE CLOSING ORDER

JUN 14 1999

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

If, by 9-17-99, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 11th day of June, 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

JUN 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CLAY SADLER,)

Plaintiff,)

vs.)

THOMAS C. LANE, WILLIAM E. ERICKSON,)

O.G. THOMPSON, DANNY MELTON,)

Defendants.)

Case No. 98-C-892-E ✓

ENTERED ON DOCKET

JUN 14 1999

ORDER

Now before the Court is the Motion to Dismiss, Or In the Alternative, For Summary Judgment (Docket # 10) of the Defendant, Thomas C. Lane, the Motion to Dismiss, Or In the Alternative, For Summary Judgment (Docket # 8) of the Defendant, William E. Erickson, and the Motion to Dismiss, Or In the Alternative, For Summary Judgment (Docket # 12) of the Defendants O. G. Thompson and Danny Melton.

Sadler was the elected Mayor of the City of Beggs. His claims center around an alleged conspiracy involving Lane, City Attorney for the City of Beggs; Melton and Thompson, City Councilmen of the City of Beggs; and Erickson, Municipal Judge for the City of Beggs. He claims that Lane, Melton and Thompson conspired to have Erickson issue an Ex-Parte Order restraining him from carrying out his duties as Mayor of the City of Beggs. He asserts that the actions of defendants violated his right to equal protection, and amounted to an abuse of process and malicious prosecution.

Defendants seek dismissal or summary judgment, claiming that they are immune from suit, that plaintiff has failed to state a claim for violation of civil rights, that plaintiff has failed to meet

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the heightened pleading standard for civil rights claims against individuals, that plaintiff's claims are barred by the applicable statutes of limitations, that plaintiffs claims are barred by the release, and that venue is improper in this Court. In addition, Erickson argues that dismissal is proper because he has not been served with summons; Lane, Thompson, and Melton assert that plaintiff's claims are barred by the Eleventh Amendment; and Thompson and Melton assert that the Court lacks jurisdiction over the state law claims.

Sadler has failed to respond to any of the three motions. Although pursuant to Local Rule 7.1(C), the motions are "deemed confessed," the court must balance the failure to file a responsive pleading with the "judicial system's strong predisposition to resolve cases on their merits. . . ." Miller v. Department of Treasury, 934 F.2d 1161 (10th Cir.1991). The Court declines, under the analysis of Miller, to dismiss this matter as a sanction for failing to respond, but will instead consider on the merits the arguments raised by defendants.

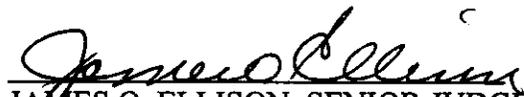
All defendants raise the issue of statute of limitations. State personal injury limitations periods are the primary guide for determining time limitations on civil rights actions. Workman v. Jordan, 32 F.3d 475, 482 (10th Cir. 1994). Under Oklahoma law, the personal injury limitation period is two years. Okla.Stat.tit.12, §95(3). That two year limitation period is applicable to civil rights claims arising in Oklahoma. Crosswhite v. Brown, 424 F.2d 495 (10th Cir. 1970). The temporary restraining order was entered on September 5, 1996, continued on September 11, 1996, and effectively dissolved by an order entered October 21, 1996. Mr. Sadler assumed the duties of Mayor on November 3, 1996. The Court finds that the November 23, 1998 filing of Mr. Sadler's civil rights claim is untimely and his claim is barred by the statute of limitations.

The limitation period for malicious prosecution is one year, Okla.Stat.tit. 12, §95(4), and for

abuse of process is two years. Okla.Stat.tit. 12, §95(3). These limitations periods run from the date the underlying proceeding was resolved in the plaintiff's favor. Reeves v. Agee, 769 P.2d 745 (Okla. 1989). These claims also are barred by the statute of limitations.

The Motions to Dismiss (Docket #'s 8, 10, and 12) are GRANTED. All other pending motions are denied as moot.

IT IS SO ORDERED THIS 10th DAY OF JUNE, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

JUN 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDA WHITE, as Personal)
Representative of the Estate)
of MARY A. WHALER, Deceased,)

Plaintiff,)

vs.)

GENERAL MOTORS CORPORATION,)

Defendant.)

Case No. 98-CV-350-B(M)
CONSOLIDATED

DARREL D. HAMIL, as Executor of)
the Estate of LOTTIE E. KNOTT,)
Deceased,)

Plaintiff,)

vs.)

GENERAL MOTORS CORPORATION,)

Defendant.)

98 CV 356-B(E)

ENTERED ON DOCKET
DATE JUN 14 1999

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 11th day of June, 1999, the above matter comes on to be heard upon the written Stipulation For Order Of Dismissal With Prejudice. The Court, having received the Stipulation For Order Of Dismissal With Prejudice, finds that the Stipulation For Order Of Dismissal With Prejudice should be **GRANTED**.



UNITED STATES DISTRICT COURT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

121/55

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
JOHNNIE NORMAN,)
)
Defendant.)

99-CV-69-H(J) ✓

ENTERED ON DOCKET
DATE JUN 14 1999

F I L E D

JUN 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

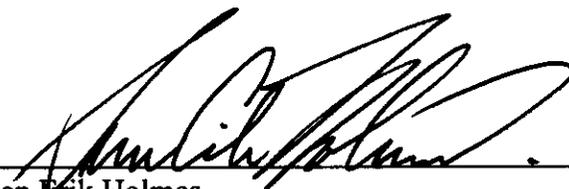
ADMINISTRATIVE CLOSING ORDER

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

The parties are ordered to notify the Court on or before October 12, 1999 as to whether this matter should be reopened or dismissed with prejudice. If the parties have not by appropriate motion reopened this matter on or before October 12, 1999, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 11TH day of June, 1999.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAY WHITE,)
)
Plaintiff,)
)
v.)
)
ASEC MANUFACTURING CO.,)
)
Defendant.)

ENTERED ON DOCKET
DATE **JUN 14 1999**
98-CV-823-H(J)

FILED

JUN 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

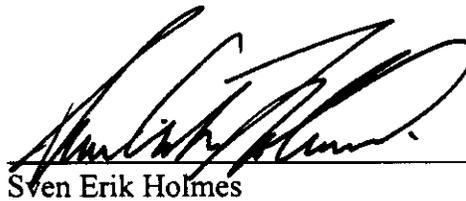
JUDGMENT

This matter came before the Court on Defendant's Motion for Summary Judgment. The Court duly considered the issues and rendered a decision in accordance with the order filed on June 11, 1999.

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

IT IS SO ORDERED.

This 12TH day of June, 1999.



Sven Erik Holmes
United States District Judge

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

JAY WHITE,)
)
Plaintiff,)
)
v.)
)
ASEC MANUFACTURING CO.,)
)
Defendant.)

ENTERED ON DOCKET

DATE **JUN 14 1999**

98-CV-823-H(J) ✓

F I L E D

JUN 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Defendant ASEC Manufacturing Company's ("ASEC's") Motion for Summary Judgment and Brief in Support filed April 30, 1999 (Docket # 6). For the reasons set forth herein, the Court finds that the motion should be granted.

I

For purposes of the instant motion, the following facts are uncontroverted:

1. ASEC is a manufacturer of emission control catalysts and has a plant located at the Port of Catoosa, Oklahoma
2. Plaintiff Jay White was employed by ASEC as a Utilities Operator.
3. Plaintiff volunteered to cover the 9:00 P.M. to 9:00 A.M. shift over the Labor Day weekend of 1997.
4. On September 1, 1997, Plaintiff clocked out without permission from his supervisor and left the plant at 1:00 A.M.
5. ASEC conducted an investigation of the incident, and on September 6, 1997, terminated Plaintiff.
6. ASEC informed Plaintiff he was being terminated because the Utilities position is a

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critical position because of the amount of control that the Utilities Operation has on the effluent from the plant, failure to properly operate the waste treatment plant can cause effluent discharges that exceed legally acceptable limits and result in large fines for the company. ASEC further indicated that in its judgment, Plaintiff made a serious error in judgment by deciding to leave the plant without consulting his supervisor, and that based on past company practice Plaintiff's actions constituted job abandonment.

7. Dale Quinn, a white male Utility Operator, was terminated on June 10, 1995, for a similar act of job abandonment.

II

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

[t]he 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 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

III

In this case arising under Title VII of the Civil Rights Act of 1964 ("Title VII"), Defendant moves for summary judgment on the grounds that Plaintiff cannot establish a prima facie case of discrimination because he cannot prove disparate treatment, and further argues that Plaintiff cannot rebut ASEC's legitimate, non-discriminatory reasons for his termination with evidence of pretext.

Title VII prohibits an employer from discharging or otherwise discriminating against an employee because of his or her race. See 42 U.S.C. § 2000e, et seq.. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court established a three-part analysis for Title VII disparate treatment claims. First, the plaintiff must establish a prima facie case of discrimination. Second, if the plaintiff establishes a prima facie case, the burden shifts to the defendant to state a legitimate nondiscriminatory reason for the workplace decision. Third, if the defendant carries this burden, the plaintiff must show that the defendant's reason was merely a pretext for discrimination. Id. at 802. However, the plaintiff always bears the ultimate burden of proving discriminatory intent by the defendant. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

To establish a prima facie case of racial discrimination, Plaintiff must prove (1) that he is a member of a protected class, (2) that he applied for and was qualified for an available position, (3) that he was discharged, and (4) that the position remained open or was filled by another person. McDonnell Douglas, 411 U.S. at 802. Plaintiff's establishment of a prima facie case creates a presumption of unlawful discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Plaintiff may alternatively establish his prima facie case of reverse race discrimination by presenting "direct evidence of discrimination, or indirect evidence sufficient to support a reasonable probability that but for the plaintiff's status, the challenged employment decision would have favored the plaintiff." Notari v. Denver Water Dep't, 971 F.2d 585, 590 (10th Cir. 1992).

Accordingly, under the McDonnell Douglas analysis, if Plaintiff establishes a prima facie case either by demonstrating the requisite background circumstances, Reynolds, 69 F.3d at 1534,

or by establishing direct or indirect evidence of discrimination, Notari, 971 F.2d at 590, Defendant then has the burden of producing evidence that it discharged him "for a legitimate, nondiscriminatory reason." Id. at 254. Defendant's burden is solely one of production: Defendant "is not required to persuade [the Court] that it actually was motivated by the asserted reason." Equal Employment Opportunity Comm'n v. Ackerman, Hood & McQueen, Inc., 758 F. Supp. 1440, 1452 (W.D. Okla. 1991), aff'd, 956 F.2d 944 (10th Cir. 1992).

Ultimately, to prevail on his claim in the instant case, Plaintiff must demonstrate "that the proffered reason was not the true reason for the employment decision," Burdine, 450 U.S. at 256, and that her race was. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993). At all times, Plaintiff retains the "ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination." Burdine, 450 U.S. at 256. However, if Plaintiff establishes a prima facie case and presents evidence that Defendant's nondiscriminatory reason was pretextual, Plaintiff has presented enough evidence to survive a motion for summary judgment. Randle v. City of Aurora, 69 F.3d 441, 452-53 (10th Cir. 1995).

Assuming arguendo, for purposes of the instant motion only, that Plaintiff has established a prima facie case of discrimination under the McDonnell Douglas framework, the Court finds that Defendant has proffered evidence that it discharged Plaintiff for the legitimate, nondiscriminatory reason of job abandonment. Defendant having produced such evidence, Plaintiff must present evidence which supports a finding that Defendant's nondiscriminatory reason for termination was pretextual to survive Defendant's motion for summary judgment. After a careful review of the record, the Court concludes that Plaintiff has presented no such evidence. In his response, Plaintiff asserts that contrary to Defendant's assertions, Plaintiff had

supervisory permission to leave the plant. In support of this assertion, however, Plaintiff relies solely on his own affidavit. The Court may not rely on the hearsay statements, see Fed. R. Civ. P. 56(e); Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1541 (10th Cir. 1995), and facts cannot be controverted by bare self-serving allegations. See Murray v. City of Sapulpa, 45 F.3d 1417, 1422 (10th Cir. 1995). Moreover, Plaintiff admitted in his deposition that Crystal Woolery, the person who allegedly gave him permission to leave the plant, was not his supervisor, and accordingly was not in a position of authority. Thus, Plaintiff has failed to provide any evidence from which a reasonable jury could find that Defendant's proffered legitimate, nondiscriminatory reason for Plaintiff's termination was unworthy of credence.

Accordingly, Defendant ASEC Manufacturing Company's ("ASEC's") Motion for Summary Judgment and Brief in Support filed April 30, 1999 (Docket # 6) is hereby granted.

IT IS SO ORDERED.

This 11th day of June, 1999.



Sven Erik Holmes
United States District Judge

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

MELVIN GREEN,)
)
Plaintiff,)
)
v.)
)
HARSCO CORPORATION, a Delaware)
corporation; and FABSCO, INC., an)
Oklahoma corporation,)
)
Defendant.)

ENTERED ON DOCKET
DATE JUN 14 1999
Case No. 98-C-352-H

FILED

JUN 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

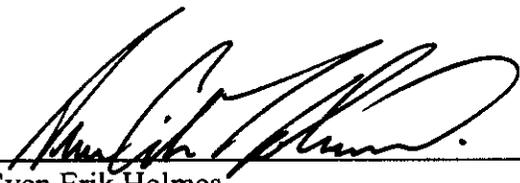
JUDGMENT

This matter came before the Court on Defendant's Motion for Summary Judgment. The Court duly considered the issues and rendered a decision in accordance with the order filed on May 4, 1999.

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

IT IS SO ORDERED.

This 11TH day of June, 1999.



Sven Erik Holmes
United States District Judge

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

MELVIN GREEN,)

Plaintiff,)

v.)

Case No. 98-C-352-H ✓

HARSCO CORPORATION, a Delaware)
corporation; and FABSCO, INC., an)
Oklahoma corporation,)

Defendant.)

F I L E D

JUN 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Plaintiff's Motion to Vacate and Remand filed May 11, 1999 (Docket # 22). In his motion, Plaintiff requests that this Court vacate its order of May 4, 1999, granting summary judgment to Defendant and remand this matter to the Creek County District Court. For the reasons expressed herein, the Court concludes the motion should be denied.

Plaintiff first suggests this Court lacks subject matter jurisdiction, arguing that Defendant failed to set forth in its removal papers that the amount in controversy exceeded the jurisdictional minimum.¹ The Court disagrees.

The Tenth Circuit has clarified the analysis which a district court should undertake in determining whether an amount in controversy is greater than \$75,000. The Tenth Circuit stated:

[t]he amount in controversy is ordinarily determined by the allegations of the complaint,

¹Although Plaintiff asserts in his motion that "at the relevant period, the amount in controversy must have exceeded \$50,000.00 exclusive of interest or court costs[.]" see Motion to Vacate and Remand at ¶ 5, Defendant correctly notes that on May 12, 1998, the date of the removal at issue, the amount in controversy must have exceeded \$75,000.00 exclusive of interest and costs. See 28 U.S.C. § 1332(a).

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

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995) (citations omitted) (emphasis in original); e.g., Hughes v. E-Z Serve Petroleum Marketing Co., 932 F. Supp. 266 (N.D. Okla. 1996) (applying Laughlin and remanding case); Barber v. Albertson's, Inc., 935 F. Supp. 1188 (N.D. Okla. 1996) (same); Martin v. Missouri Pacific R.R. Co. d/b/a Union Pacific R.R. Co., 932 F. Supp. 264 (N.D. Okla. 1996) (same); Herber v. Wal-Mart Stores, 886 F. Supp. 19, 20 (D. Wyo. 1995) (same); Homolka v. Hartford Ins.. Group, Individually and d/b/a Hartford Underwriters Ins.. Co., 953 F. Supp. 350 (N.D. Okla. 1995) (same); Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995) (same); Maxon v. Texaco Ref. & Marketing Inc., 905 F. Supp. 976 (N.D. Okla. 1995) (same).

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

Where the face of the complaint does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the

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

A review of the Notice of Removal filed by Defendant on May 12, 1998, indicates that Defendant affirmatively established the requisite amount in controversy. Defendant's Notice of Removal states that Plaintiff admitted in his response to Defendant's First Request for Admissions that his claim for damages exceeded \$75,000.00, and appended that Response to the Notice of Removal. See Notice of Removal filed May 12, 1998 (Docket # 12), ex. B.

Though Plaintiff correctly asserts that the actions of the parties cannot confer subject matter jurisdiction where it does not exist and that principles of estoppel do not apply when determining whether the Court may properly exercise jurisdiction over the subject matter at issue, see Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982), the Court finds these principles inapposite. Plaintiff admitted his claim for damages

exceeded the jurisdictional minimum. The use of estoppel would allow agreements of the parties to substitute for the basis of subject matter jurisdiction, see American Fire and Casualty Co. v. Finn, 341 U.S. 6, 17 (1951); here, Plaintiff's admission created the basis for federal subject matter jurisdiction. Thus, the Court concludes that it properly exercised jurisdiction over the Plaintiff's claim.

Plaintiff further suggests that his claim arose under the Oklahoma Workman's Compensation Act and was improperly removed to federal court. See Motion to Vacate and Remand at ¶¶ 8, 9; 28 U.S.C. § 1445(c) ("A civil action in any State court arising under the Workman's Compensation laws of such State may not be removed to any district court of the United States."). However, it is without question that Mr. Green could have filed his claim for wrongful termination in federal court on the basis of diversity jurisdiction. See generally Wiles v. Michelin North America, Inc., 1999 WL 231428 (10th Cir. 1999). Thus, the limitation on removal of claims arising under state workman's compensation acts provided in 28 U.S.C. § 1445(c) is a procedural defect, and is waived if a motion to remand is not made within thirty days of the improper removal. See 28 U.S.C. § 1447(c); Sherrod v. American Airlines, Inc., 132 F.3d 1112 (5th Cir. 1998). A review of the record reveals that Plaintiff's motion to remand, filed almost a year after removal, is unquestionably untimely. Accordingly, Plaintiff Melvin Green's Motion to Vacate and Remand filed May 11, 1999 (Docket # 22) is hereby denied.

IT IS SO ORDERED.

This 10TH day of June, 1999.


Sven Erik Holmes
United States District Judge

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

IN RE)
)
BILLY RAY CONLEY and SHERRI LORENE)
CONLEY,)
)
Debtors,)
)
State of Oklahoma, ex rel., OKLAHOMA)
EMPLOYMENT SECURITY COMMISSION,)
)
Appellant,)
)
v.)
)
)
BILLY RAY CONLEY and SHERRI LORENE)
CONLEY,)
)
Appellees.)

FILED

JUN 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-538-H(J)

ENTERED ON DOCKET

DATE JUN 14 1999

ORDER

This matter comes before the Court on the Report and Recommendation of the United States Magistrate Judge (Docket # 5) with respect to Appellant's complaint to determine dischargeability after the Bankruptcy Court had granted a discharge to the debtors. Appellant has filed an objection to the Report and Recommendation.

When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

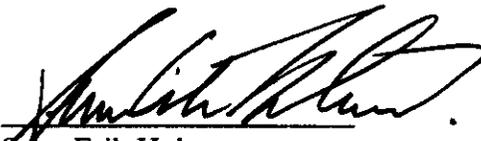
Fed. R. Civ. P. 72(b).

The Magistrate Judge recommended that the Court affirm the Bankruptcy Court's decision to dismiss Appellant's complaint as untimely upon finding that Appellant's had not overcome the rebuttable presumption that it received notice of the debtor's conversion of their case from Chapter 13 to Chapter 7. Appellant objected, claiming that all parties agree that the notice of conversion was not properly addressed and that it should not bear any burden of proving non-receipt of the notice.

Based upon a careful review of the Report and Recommendation of the Magistrate Judge and Appellant's objection, the Court finds that the Report and Recommendation to affirm the Bankruptcy Court's dismissal of Appellant's complaint (Docket # 5) should be adopted. Thus, Appellees' motions to dismiss Appellant's complaint is hereby granted.

IT IS SO ORDERED.

This 14TH day of June, 1999.


Sven Erik Holmes
United States District Judge

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

JUN 11 1999

MELISSA A. TAICLET,
440-78-7812

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiff,

vs.

Case No. 98-CV-399-M ✓

KENNETH S. APFEL, Commissioner,
Social Security Administration,

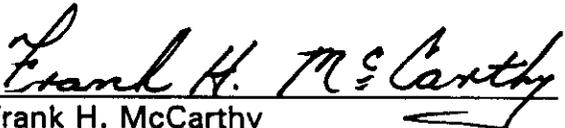
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Defendant.

DATE JUN 14 1999

JUDGMENT

Judgment is hereby entered for the Plaintiff and against Defendant. Dated this
11 Day of June, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

FILED

JUN 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MELISSA A. TAICLET,
440-78-7812

Plaintiff,

vs.

Case No. 98-CV-399-M

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE JUN 14 1999

ORDER

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

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

¹ Plaintiff's April 27, 1995, protectively filed, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held September 4, 1996. By decision dated September 27, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 31, 1998. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born April 4, 1964, and was 32 years old at the time of the hearing. She has a high school education and formerly worked as a child care worker. She claims to have been unable to work since March 22, 1995, as a result of obesity, back pain, heel pain, and depression. The ALJ determined that Plaintiff retains the residual functional capacity (RFC) to perform the demands of light work, or work which requires maximum lifting of twenty pounds and frequent lifting of ten pounds, except for tasks requiring dealing with the public or coworkers on more than a superficial basis. [R. 19]. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that: (1) the evidence demonstrates Plaintiff is not able to perform the standing and walking requirements of light work; (2) the ALJ failed to order a consultative mental examination; and (3) posed an improper hypothetical question to the vocational expert. The court finds that the ALJ's failure to order a consultative mental examination requires that the case be remanded for further proceedings.

The Commissioner has broad latitude in ordering consultative examinations. *Hawkins v. Chater*, 113 F.3d 1162, 1166 (10th Cir. 1997). "[T]he ALJ should order a consultative exam when evidence in the record establishes the reasonable possibility of the existence of a disability and the result of the consultative exam could reasonably be expected to be of material assistance in resolving the issue of disability." *Hawkins v. Chater*, 113 F.3d 1162, 1169 (10th Cir. 1997). The record demonstrates that a mental consultative examination could reasonably be expected to provide such assistance.

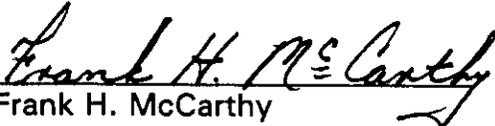
Beginning in January 1996, Plaintiff began receiving counseling at Grand Lake Mental Health Center (GLMHC). She has been diagnosed by her counselor/therapist as having "Major Depression, Recurrent, Severe, without Psychotic Features, as well as Post-Traumatic Stress Disorder." [R. 211]. According to her counselor, she is classified as "Seriously and Persistently Mentally Ill." *Id.* However, the record does not contain any examination report, treatment notes, or diagnosis by any physician or psychologist concerning Plaintiff's mental condition. The ALJ noted that Plaintiff had

received counseling by non-medical social workers, and that the counseling records document Plaintiff's fear of people, anxiety around people, poor interaction and low self esteem. [R. 15]. The ALJ accorded little weight to the assessment and diagnoses made by the counselors because the information Plaintiff provided to her counselors differed markedly from the reports Plaintiff made to other doctors and to the Social Security Administration. The counselors found that Plaintiff was isolated and unable or unwilling to relate to others. Elsewhere in the record Plaintiff has stated that she did oil paintings, latch hooked rugs, read and watched TV, shopped, attended church and visited with other churchgoers 3 times per week. [R. 120]. The ALJ found that the counselors based their opinion of the severity of Plaintiff's condition on faulty information. [R. 16].

That Plaintiff has low self esteem and is afraid of other people is consistently documented in the GLMHC notes. The counselors at GLMHC reached the conclusion that Plaintiff was "Seriously and Persistently Mentally Ill" based on regular observations of her in the context of both individual and group therapy spanning a nine-month time frame. [R. 214-266]. In view of the counselor's documented observations and their diagnosis of Plaintiff as being "Seriously and Persistently Mentally Ill," the court finds that a consultative mental examination is required to explain the GLMHC diagnosis. *See Hawkins*, 113 F.3d at 1166-67.

The Commissioner's decision is REVERSED and the case REMANDED for a consultative mental examination and further analysis in light of the results of that examination.

SO ORDERED this 11th Day of June, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

FILED

JUN 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JEWEL J. TURNER,

Plaintiff,

v.

ATLANTIS PLASTICS, INC.,

Defendant.

ENTERED ON DOCKET

DATE: **JUN 14 1999**

Case No. 98CV0674K (E)

ORDER OF DISMISSAL

IT IS HEREBY ORDERED that, pursuant to the Joint Stipulation For Dismissal With Prejudice filed by the parties hereto, the above-captioned matter is dismissed in its entirety with prejudice and without costs or attorneys' fees assessed to any party.

DATED: June 14, 1999

ENTERED:


Honorable Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

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

ENTERED ON DOCKET
DATE JUN 14 1999
98-CV-950-H
97-CR-151-H ✓

FILED
JUN 11 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

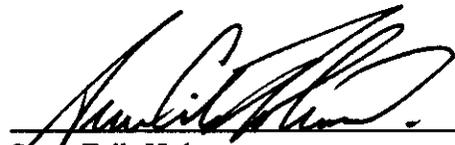
JUDGMENT

This matter came before the Court upon Defendant's motion to vacate set aside or correct sentence pursuant to 28 U.S.C. § 2255. The Court duly considered the issues and rendered a decision herein.

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

IT IS SO ORDERED.

This 10TH day of June, 1999.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

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

ENTERED ON DOCKET

DATE JUN 14 1999

98-CV-950-H

97-CR-151-H ✓

FILED

JUN 11 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Defendant Ramon Deleon Reyes' Motion for Reconsideration of the Court's order of May 4, 1999, filed May 19, 1999 (Docket # 57).

Whether to grant or deny a motion for reconsideration is committed to the Court's discretion. Hancock v. Oklahoma City, 857 F.2d 1394, 1395 (10th Cir. 1988). Generally, courts recognize three major grounds for reconsideration: 1) an intervening change in controlling law; 2) availability of new evidence; or 3) the need to correct clear error or prevent manifest injustice. Hamner v. BMY Combat Systems, 874 F. Supp. 322 (D. Kan. 1995).

In his motion, Mr. Reyes essentially reurges the arguments he raised in his original 28 U.S.C. § 2255 motion. Thus, the Court treats Mr. Reyes' motion as a request to correct clear error or prevent manifest injustice. After a thorough review of the record and authorities cited by Mr. Reyes, the Court concludes that Mr. Reyes has failed to establish that the Court's May 4, 1999 order is clearly erroneous or will work a manifest injustice. Accordingly, Defendant Ramon Deleon Reyes' Motion for Reconsideration of the Court's Order of May 4, 1999, filed May 19, 1999 (Docket # 57) is hereby denied.

IT IS SO ORDERED.

This 10TH day of June, 1999.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
) No. 98CV0972H(J) ✓
)
 PATRICIA C. DAVIS,)
)
 Defendant.)

ENTERED ON DOCKET
DATE JUN 14 1999

F I L E D

JUN 11 1999 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

The Plaintiff's Application for Default Judgment comes on for hearing this 11TH day of JUNE, 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, Patricia C. Davis, appears not. The Court finds that pursuant to Rule 55 or the Federal Rules of Civil Procedure, notice of the hearing was given to the Defendant and the Defendant failed to appear.

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, Patricia C. Davis, was served with Summons and Complaint on December 28, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by

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

FILED

DONNA LOWE,

Plaintiff,

v.

TOWN OF FAIRLAND, Oklahoma,
a Municipal Corporation,
BEVERLY HILL, DON JONES,
SHIRLEY MANGOLD, LORETTA
VINYARD, BILL PINION, RICHARD
JAMES, and WALLACE, OWENS,
LANDERS, GEE, MORROW, WILSON,
WATSON & JAMES, A Professional
Corporation,

Defendants.

No. 96-C-0066 K

JUN 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

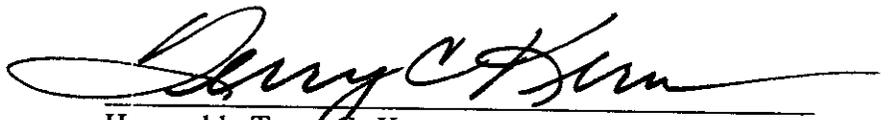
ENTERED ON DOCKET

DATE JUN 14 1999

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 14 day of June, 1999, it appearing to the Court that this matter has been compromised and settled between the Plaintiff and the remaining Defendant, Town of Fairland, and the parties have stipulated to a dismissal with prejudice of the remaining Defendant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED this action is dismissed with prejudice to the refiling of any further action. Each party to bear its own costs and attorneys' fees.



Honorable Terry C. Kern
United States District Judge

MT

F I L E D

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

JUN 14 1999 *SA*

VELVET J. THURBER,)
)
Plaintiff,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)
_____)

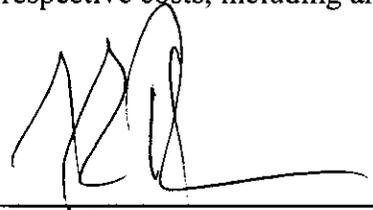
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Action No. 97-CV-529-H ✓

ENTERED ON DOCKET
DATE **JUN 14 1999**

STIPULATION FOR DISMISSAL

It is hereby stipulated that the complaint and countercomplaint in the above-entitled case be dismissed with prejudice, the parties to bear their respective costs, including any possible attorney's fees or other expenses of this litigation.



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Attorney for Plaintiff

STEPHEN C. LEWIS
United States Attorney

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Telephone: (202) 514-5229
Attorney for Defendant

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36

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES L. HARRISON,)
SSN: 440-50-9346,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner,)
Social Security Administration,¹)
)
Defendant.)

Case No. 97-CV-0526-EA ✓

ENTERED ON DOCKET

DATE JUN 14 1999

JUDGMENT

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

It is so ordered this 11th day of June 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

JUN 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JAMES L. HARRISON,)
SSN: 440-50-9346,)
))
Plaintiff,)
))
v.)
))
KENNETH S. APFEL, Commissioner,)
Social Security Administration,¹)
))
Defendant.)

Case No. 97-CV-0526-EA

ENTERED ON DOCKET
DATE **JUN 14 1999**

ORDER

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

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

² On August 10, 1995, claimant protectively filed 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 (November 8, 1995), and on reconsideration (December 8, 1995 and January 3, 1996). A hearing before Administrative Law Judge Stephen C. Calvarese (ALJ) was held May 1, 1996, in Tulsa, Oklahoma. By decision dated May 3, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. On April 4, 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, 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. CLAIMANT'S BACKGROUND

Claimant was born on October 27, 1948, and was 47 years old at the time of the administrative hearing in this matter. He has a twelfth grade education. His past relevant work is as a computer engineer/installer and computer operator. Claimant alleges an inability to work beginning October 16, 1993, due to sleep apnea, a right shoulder implant, chronic pain in his right shoulder, and weakness in his right arm, wrist, and hand.

In late 1990 and early 1991, claimant was treated for sleep apnea, a breathing disorder that interferes with a person's sleep. (R. 118-23). He had a tonsillectomy and an adenoidectomy with palatoplasty in an effort to correct the problem. (R. 131 - 32, 163, 169) On October 16, 1993, claimant was in a motorcycle accident in which he sustained injury to his right shoulder. Paul Peterson, M.D., performed surgery to replace claimant's right shoulder with a prosthetic device. (R. 124-43) Claimant's recovery included physical therapy. (R. 144-60)

II. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

Disability under the Social Security Act is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy" *Id.*, § 423(d)(2)(A). Social

Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.³

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

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. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at step four of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform the exertional demands of light work, subject to not reaching overhead with his right arm due to moderate right shoulder pain. The ALJ concluded that claimant could perform his past relevant work as a computer operator. Having concluded that claimant could perform past relevant work, 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 that the ALJ: (1) failed to properly evaluate his pain; (2) did not accord treating physician status to a physician; (3) failed to order a mental examination to document claimant's depression; (4) failed to find that claimant's sleep apnea was a severe impairment; and (5) improperly evaluated claimant's shoulder impairment.

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 consideration of:

(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, 945 F.2d at 1489 (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. He analyzed the relevant factors to determine the weight to be given claimant’s subjective allegations of pain, and, as required by Kepler, the ALJ made express findings as to the credibility of claimant’s objective complaints of disabling pain, with an explanation of why specific evidence led to the conclusion that claimant’s subjective complaints were not fully credible. (R. 16-17)

The ALJ found significant inconsistencies between claimant’s assertions and the medical record. The ALJ pointed out that the medical records documenting claimant’s grip strength were inconsistent with his statement as to the amount he could lift. The ALJ also noted that claimant’s left arm was not impaired, nor were claimant’s hands impaired as to gross or fine manipulation and gripping/grasping. (R. 18, 165) Claimant has not made an effort to reduce his smoking or his weight, two factors that affect his breathing and sleeping, nor was he compliant with the physical therapy prescribed for him after his shoulder surgery. (R. 145, 152) A failure to follow prescribed treatment is a legitimate consideration in evaluating the severity of an alleged impairment. Decker v. Chater, 86 F.3d 953, 955 (10th Cir. 1996). Claimant told his therapist that he could play pool and that his

game was improving. (R. 148-49) He also said that he could sleep on his right shoulder (R. 149), and the only problem he had was reaching overhead. (R. 145) He can still do some cooking, shopping and driving. (See R. 97, 202) Thus, claimant's testimony regarding his activities and lifestyle also failed to support his allegations of disabling pain.

It is unclear whether claimant is unable to sleep well due to his sleep apnea or his alleged shoulder pain, as noted by the ALJ. (R. 18) Claimant's statements as to the pain medication he is taking are inconclusive. He was not taking any medications in October and December 1995 (R. 163, 169), and the medications he has taken (Ibuprofen, Ultram, and Desyrel) were prescribed by George H. Tompkins, D.O., a doctor whose credibility is suspect, given that claimant did not see him until after the request for a hearing was filed. (R. 169-71, 179, 187) The ALJ noted that written statements submitted by claimant's family and friends, while credible, merely reflect their observations that the claimant has changed his lifestyle, has some pain and sleep problems, and has restricted range of motion in his right shoulder. (R. 19)

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 v. Secretary of Health and Human Servs., 898 F.2d 774, 777 (10th Cir. 1990). 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 "in light of the claimant's own description of his activities and life style, the degree of medical treatment required, discrepancies between the claimant's assertions and information contained in the documentary reports, the reports of the treating and examining

practitioners, the medical history, the findings made on examination, and the claimant's assertions concerning his ability to work." (R. 17) Considering all the evidence, both objective and subjective, the 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.

Treating Physician

Claimant faults the ALJ for not according "treating physician status" to Dr. Tompkins, who opined that claimant was disabled due to his limited range of motion, pain and sleep apnea. (R. 170-71) Dr. Tompkins prescribed and gave claimant pain medication, but claimant made only one visit, post-hearing, to see Dr. Tompkins. Under the regulations, Dr. Tompkins is not a "treating" physician.

Treating source means your own physician or psychologist who has provided you with medical treatment or evaluation and who has or has had an ongoing treatment relationship with you. . . . We will not consider a physician or psychologist to be your treating physician if your relationship with the physician or psychologist is not based on your need for treatment, but solely on your need to obtain a report in support of your claim for disability.

20 C.F.R. §§ 404.1502, 416.902 (1997).

Nonetheless, the ALJ considered Dr. Tompkins' report of December 19, 1995. He appropriately discounted Dr. Tompkins' opinion because it was conclusory and unsupported by medical evidence. In deciding not to give the assessment controlling weight, the ALJ gave specific, legitimate reasons for doing so, including: Dr. Tompkins' failure to quantify the degree of range of motion restrictions (R. 16-17); Dr. Tompkins' failure to consider the fact that claimant took no pain medication (*id.*); and claimant's failure to seek medical attention from Dr. Tompkins until after the hearing. (R. 19) The ALJ's analysis is not contrary to law.

Pursuant to regulations adopted in 1991, a treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments, including the claimant's symptoms, diagnosis and prognosis, what claimant can do despite the claimant's impairment, and any physical or mental restrictions. 20 C.F.R. § 404.1527(a)(2). The Commissioner will give controlling weight to that type of opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. Id. § 404.1527(d)(2). A treating physician may also proffer an opinion that a claimant is totally disabled. However, such an opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Commissioner. Id. § 404.1527(e)(2). Thus, Dr. Tompkins' post-hearing opinion that claimant "remains disabled for an undetermined amount of time in the future" (R. 171) is not binding on the Commissioner in making his ultimate determination of disability.

Tenth Circuit law requires that substantial weight must be given to the opinion of a treating physician unless good cause is shown for rejecting it. Goatcher v. United States Dep't. of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995) (citations omitted.) A treating physician's report may be rejected if it is brief, conclusory, and unsupported by medical evidence. Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988); see also Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). If the treating physician's opinion is to be disregarded, specific, legitimate reasons for doing so must be set forth. Eggleston v. Bowen, 851 F.2d 1244, 1246-47 (10th Cir. 1988). As set forth above, the ALJ set forth specific, legitimate reasons for disregarding Dr. Tompkins's report. Those reasons constitute good cause for rejecting the opinion. Dr. Tompkins' opinion was not well-supported by clinical and laboratory diagnostic techniques and

it is not consistent with other substantial evidence in the record. The ALJ was not required to give it controlling weight.

Mental Impairment

Claimant also alleges that the ALJ failed to order a mental examination to document claimant's depression. The ALJ noted the single instance where a consulting physician remarked that "depression is present," but reported no symptoms. (R. 164) Although claimant testified that he was depressed (R. 207), he did not allege that his depression limited him and did not seek treatment or medication for depression. Dr. Tompkins prescribed Desyrel, which may be used to treat depression, diabetic neuropathy and chronic pain. See Dorland's Illustrated Medical Dictionary 453 (28th ed. 1994). Dr. Tompkins did not mention depression in his report, but he did discuss claimant's chronic pain. (R. 169-70) The ALJ properly found that claimant has no medically determinable mental impairment. (R. 16)

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 1045, 1048 (10th Cir. 1993). Other than the comment "depression is present" by a consulting physician, and claimant's testimony, there is no evidence in the record that claimant has depression. Nor is there any evidence suggesting that his depression prevents him from working. 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.

Sleep Apnea

Claimant argues that the ALJ failed to find that claimant's sleep apnea is a severe impairment, and that the ALJ erred in describing the relationship of claimant's sleep apnea and pain. Sleep apnea is a sleep-related breathing disorder caused by "periodic cessation of respiration associated with hypoxemia and frequent arousal from sleep." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 3.00H. The regulations provide that "[n]ot all individuals with sleep apnea develop a functional impairment that affects work activity." Id. None of the medical evidence suggests that claimant's sleep apnea imposes functional restrictions that prevent claimant from engaging in gainful activity.

The ALJ acknowledged that claimant's sleep apnea may have resulted in some limitations for claimant, but he found that those limitations were not significant. He noted that claimant had sleep apnea, and corrective surgery for it, a number of years prior to the onset of his alleged disability, which, incidentally, is the date that he injured his shoulder in a motorcycle accident. (R. 16) Claimant attributes his current sleep problem not to his sleep apnea, but to pain associated with his shoulder. He testified that he can sleep in a specific position on the couch. (R. 199, 201-02) None of the doctors who treated claimant for sleep apnea suggested that his sleep apnea imposes functional restrictions. Cf. Halbrook v. Chater, 925 F. Supp. 563, 574 (N.D. Ill. 1996) (affirming denial of benefits and the ALJ's finding that sleep apnea suffered by the claimant imposed only slight limitations on his ability to work). There is no evidence in the record that claimant's sleep apnea interfered with his prior work, home or recreational activities. Claimant has failed to demonstrate that his sleep apnea is a severe impairment precluding him from performing his prior work as a computer operator.

Step Four Analysis

Finally, claimant alleges that the ALJ improperly evaluated claimant's shoulder impairment. He specifically challenges the ALJ's reasoning with regard to claimant's right hand grip strength, a consulting examiner's conclusion, the vocational expert's testimony, and the restriction in claimant's right wrist rotation. He claims that these provide evidence of functional limitations that limit claimant's ability to perform work activities, and, in particular, his prior work activities as a computer operator. (Cl. Br., Docket # 12, at 3-5.)

In making his determination at the fourth step of the sequential evaluation process, an ALJ is required to: (1) assess the nature and extent of claimant's physical and mental limitations to determine claimant's RFC for work activity on a regular and continuing basis, supported by substantial evidence from the record; (2) make findings regarding the physical and mental demands of claimant's past relevant work (either as claimant actually performed that work or as is customarily performed in national economy), based on factual information regarding those work demands which bear on medically established limitations; and (3) make findings about claimant's ability to meet the physical and mental demands of that past relevant work. Winfrey v. Chater, 92 F.3d 1017, 1023-26 (10th Cir. 1996).⁴

The ALJ's decision met these requirements. As set forth above, the ALJ accurately assessed the nature and extent of claimant's physical and mental limitations. He explicitly found that claimant retained the RFC to lift and carry 20 pounds occasionally and 10 pounds frequently, but he could not reach overhead with his right arm due to moderate right shoulder pain. (R. 22) The ALJ

⁴ Winfrey was a restatement of existing law, incorporating Social Security regulations and rulings, and the Tenth Circuit decisions in Henrie v. U.S. Dep't of Health & Human Servs., 13 F.3d 359 (10th Cir. 1993), and Washington v. Shalala, 37 F.3d 1437 (10th Cir. 1994).

also found that claimant's past work as a computer operator, as generally performed in the national economy, did not require claimant to lift more than 20 pounds or reach overhead with the right arm. (Id.) Finally, his decision included a finding that claimant's past relevant work as a computer operator did not require the performance of work functions precluded by his medically determinable impairment. (Id.)

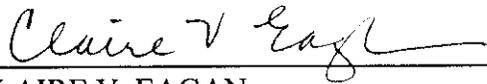
The vocational expert testified that work as a computer operator is a skilled occupation at the "light" exertional level. (R. 221) Light work involves lifting no more than twenty pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds. 20 C.F.R. §§ 404.1567(b), 416.967(b). Contrary to claimant's assertions, the vocational expert also testified that claimant could perform the work requirements of a computer operator, which does not normally require overhead reaching. (R. 223-25) Even with the observations by Dr. Tompkins as to claimant's extremities/musculoskeletal condition (R. 170) as part of the hypothetical question the ALJ posed, the vocational expert testified that claimant could perform the duties of a computer operator at the light and sedentary levels. (R. 224-25)

The consultative examiner did note the restriction in claimant's right wrist rotation, his reduced right hand grip strength, and the weakness in his right hand (R. 165). He also stated that it would be difficult for claimant to perform work activities requiring the use of the right arm (id.), but he did not state that it was impossible or specifically relate his finding to the activities of a computer operator. The ALJ, relying upon the medical evidence and the testimony of the vocational expert, properly evaluated claimant's right shoulder and arm impairment and determined, at step four of the sequential evaluation process, that claimant was not disabled.

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 11th day of June, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

KERMIT D. BROWN,)
SSN: 448-48-1130,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner,)
Social Security Administration,¹)
)
Defendant.)

JUN 11 1999 SA
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-0630-EA

ENTERED ON DOCKET
DATE JUN 14 1999

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 11th day of June 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).

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

KERMIT D. BROWN,)
SSN: 448-48-1130,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner,)
Social Security Administration,¹)
)
Defendant.)

JUN 11 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-0630-EA

ENTERED ON DOCKET
DATE JUN 14 1999

ORDER

Claimant, Kermit D. Brown, 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** and **REMANDS** 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 27, 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 (March 9, 1995), and on reconsideration (April 25, 1995). A hearing before Administrative Law Judge Larry C. Marcy (ALJ) was held March 8, 1996, in Tulsa, Oklahoma. By decision dated April 24, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. On April 30, 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. 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 AND MEDICAL HISTORY

Claimant was born on November 1, 1949, and was 46 years old at the time of the administrative hearing in this matter. He has a high school education, and vocational training in mechanics. Claimant has worked as an automobile mechanic, a truck driver, and a receiving and shipping clerk. Claimant alleges an inability to work beginning December 27, 1988,⁴ due to arm, hand and back problems, pain and limited mobility. The date claimant was last insured for disability benefits under Title II was December 31, 1993.

Claimant’s alleged disability originates primarily from a gunshot wound he sustained on December 27, 1988. Claimant was admitted to the hospital on December 28, 1988, and discharged from the hospital on December 30, 1988. (See R. 114-21, 132-33.) The injury caused a fracture of the ulnar shaft in claimant’s right arm. His treating physician, Thomas A. Marberry, M.D., noted at the time of claimant’s admission that claimant “moves his fingers well and has excellent sensation” and “[t]here is excellent sensation in the fingers and very good finger motion.” (R. 116;

⁴ Claimant originally claimed an onset date of December 27, 1989, but he requested an amended alleged onset date of December 27, 1988 at his administrative hearing, and the ALJ granted that request. (R. 43)

see also R. 133.) When claimant was discharged, Dr. Marberry indicated that claimant was “painless.” (R. 115)

When claimant returned to Dr. Marberry for a follow-up examination on January 5, 1989, Dr. Marberry reported that the wound “appears to be healing satisfactorily. Only very superficial at this stage.” (R. 133) However, on January 12, 1989, Dr. Marberry reported “whether the bone will heal or not I don’t know” (Id.) On January 30, 1989, he stated: “I think it is still too early to tell whether this will go to a delayed or formal non-union, we will have to continue to manage this.” (Id.) On March 3, 1989, and April 17, 1989, he noted that one “butterfly fragment” seemed to be fairly healed, but he was not sure that there was complete healing. He also noted the presence of “2 prominent metallic foreign bodies beneath the subcutaneous tissue & the forearm.” (R. 132) On July 5, 1989, he wrote:

He has very little pain, except with the certain movement [sic], he will get a little twinge of pain. I think there is healing of only part of the fracture. Some of the splintered area where it was shattered so much on the lateral view. Has [sic] not bridged across and I think we’ll go to a non-union, that’s why [sic] I recommended the EBI electrical stimulation. I have not recommended surgical intervention. I think this would potentially [sic] pose more problems and might be fraught with more difficulties and complications. He may have a very strong fibrous [sic] union, and that’s why he does not have many symptoms and I’ve explained this to Mr. Brown, he evidently will be checking with the representative for the EBI about obtaining the unit.

(Id.) Almost a year later, Dr. Marberry wrote a letter on July 3, 1990 “To Whom It May Concern” indicating that claimant’s forearm “has been a very difficult bone to heal” and that claimant needed an EBI unit to help stimulate bone growth and union. He also stated the possibility of future surgery to remove the metallic fragments in claimant’s arm. (R. 122) The letter seeks payment authorization for claimant’s past surgery, the EBI unit, and future surgery. (Id.)

At the administrative hearing, claimant testified that he previously applied for Social Security benefits so that he could obtain funds for his operation. He claims that he initially received no reply, and subsequent applications were delayed or denied. (R. 49-50; see also R. 7) He also claims that he applied for vocational rehabilitation, but was told that he needed a specialist to look at his arm. (R. 47; see also R. 7) He also applied to the Oklahoma Department of Health and Human Services and the University of Oklahoma Adult Medical Clinic for funds to assist him in obtaining the EBI bone stimulator. (Id.) He also unsuccessfully tried to obtain a loan so that he could pay for the EBI unit. (R. 48)

After claimant's administrative hearing, claimant obtained a letter from Gary R. Davis, M.D., in which Dr. Davis opined that claimant was "unable to perform any of the normal functions necessary to operate or to be an automechanic and to perform any heavy manual labor." (R. 134) Dr. Davis also reported decreased range of motion in claimant's right arm at the elbow, abnormal pronation and supination, diminished flexion and extension of the wrist, and the presence of "foreign bodies" under the skin of claimant's right arm. (Id.) Dr. Davis' letter also indicates that claimant "is in constant pain," had an "almost totally dysfunctional" right arm, and was "unemployable" and "totally disabled. . . ." (Id.) He also suggested that claimant was unable to afford medical treatment. (Id.) It is unclear when claimant actually saw Dr. Davis. Claimant submitted no additional medical records from Dr. Davis' office.

Claimant also claims to suffer from a lower back injury that occurred in 1977, 1978 or 1979. (R. 58-59) However, he provided no evidence other than his own testimony and no medical documentation to support this claim.

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 to perform the physical exertional and nonexertional requirements of work except for lifting over 10 pounds frequently or 20 pounds occasionally; or repetitive hand motion or fingering with the right hand (20 C.F.R. § 404.1545).” (R. 32) 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 RFC, age, education, and work experience. The ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision. (R. 32-33)

IV. REVIEW

Claimant asserts that the ALJ erred in finding: (1) at step three of the evaluation process that claimant’s arm impairment did not meet or equal Listing 1.12 (Fractures of an upper extremity) of the Listing of Impairments (20 C.F.R. Pt. 404, Subpt. P., App.1); and (2) that the Commissioner met his step five burden to prove that claimant could perform the lifting demands of light work despite his arm impairment.

At step three, a claimant suffering from a listed impairment or impairments “medically equivalent” to a listed impairment is determined to be disabled without further inquiry. In other words, if claimant has an impairment, or a combination of impairments, which meets or equals an impairment in the Listing of Impairments, claimant is disabled *per se*. 20 C.F.R. §§ 404.1511(a); 404.1520(d). Equivalence is determined “on medical evidence only.” *Id.* §§ 404.1526(b). “*Fractures of an upper extremity* with non-union of a fracture of the shaft of the humerus, radius, or ulna under continuing surgical management directed toward restoration of functional use of the

extremity and such function was not restored or expected to be restored within 12 months after onset” qualify as an impairment under Listing 1.12.

The ALJ did not provide a thorough analysis of his step three determination. His discussion at this step was brief and conclusory:

Although the claimant’s impairments are “severe” by Social Security definition, they, either singularly or in combination, do not meet or equal the severity of any impairment listed in Appendix 1 to Subpart P, Regulations No. 4. Specific emphasis has been given to Listing 1.12 - Fracture of an upper extremity. Disability, therefore cannot be established under 20 CFR 404.1520(d).”

(R. 27) The ALJ set forth no reasoning for summarily concluding that claimant did not meet Listing 1.12. Specifically, he failed to address whether claimant met the Listing 1.12 criteria: “(1) non-union of a fracture; (2) functional limitations of a 12-month duration or expected duration; and (3) continuing surgical management.” Armstead v. Chater, 892 F. Supp. 69, 74 (E.D.N.Y. 1995) (quoting Davis v. Shalala, 862 F. Supp. 1, 6 (D.D.C. 1994)). An ALJ is required to discuss the evidence and explain his or her reasons for determining that a claimant is not disabled at step three; a summary conclusion will not suffice. “Such a bare conclusion is beyond meaningful judicial review.” Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996). Thus, the Commissioner’s determination is not supported by substantial evidence, and in this posture, remand is appropriate.

Although it is for the Commissioner to determine how to proceed on remand, when a claimant’s medical sources do not give sufficient medical evidence about an impairment to determine whether the claimant is disabled, a consultative examination may be ordered. 20 C.F.R. § 404.1517. The ALJ has a duty to fully and fairly develop the record as to material issues. Baca v. Department of Health and Human Services, 5 F.3d 476, 479-80 (10th Cir. 1993). As claimant contends, this includes a duty to order consultative examinations where there is objective evidence

of an impairment but where the record is insufficient to support findings. Hawkins v. Chater, 113 F.3d 1162 (10th Cir. 1997).

When claimant left the hospital in December 1988, his arm appeared to be healing well. (R. 115, 116, 133) However, his treating physician's reports soon thereafter began to reflect doubt as to whether the fracture would become union or non-union, and as to whether continuing surgical management would be required. (R. 132-33) On July 5, 1989, Dr. Marberry recommended an electrical stimulation device to promote further healing. (R. 132) Although he did not recommend surgical intervention at that time, his July 3, 1990 letter indicates that claimant's arm had not healed satisfactorily and surgery was not ruled out. (R. 122) At the administrative hearing, claimant described his unsuccessful efforts to seek funding for treatment. (R. 47-50) A claimant is not precluded from recovering disability benefits because of failure to pursue medical treatment if the claimant cannot afford medical treatment. See Thompson v. Sullivan, 987 F.2d 1482, 1489-90 (10th Cir. 1993); Teter v. Hecker, 775 F.2d 1104, 1107 (10th Cir. 1985). Given these facts, a consultative examination could prove helpful to the ALJ's decision on remand.

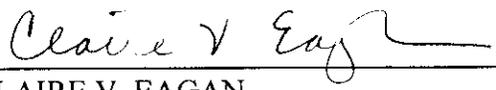
Because the Court reverses and remands for additional proceedings at step three, it is unnecessary to reach the claimant's contentions at step five. The Court notes, however, that the ALJ thoroughly discussed claimant's credibility, or lack thereof, as it relates to claimant's allegations of pain. He also dismissed the questionable medical report by Dr. Davis.

V. CONCLUSION

The ALJ's failure to discuss the evidence and explain the reasons for his conclusion at step three 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 11th day of June, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

FILED

JUN 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FLINTCO, INC., an Oklahoma Corporation,)
)
)
Plaintiff,)
)
)
vs.)
)
HEINZ BAKERY PRODUCTS, INC., a)
Delaware Corporation,)
)
Defendant.)

Case No. 98-CIV-722 B(M)

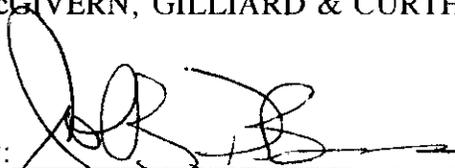
ENTERED ON DOCKET
DATE JUN 11 1999

DISMISSAL WITH PREJUDICE

COMES NOW the Defendant, Heinz Bakery Products, Inc., and herewith dismisses with prejudice the counter-claim filed by Heinz Bakery Products, Inc. on November 13, 1998, against the Plaintiff, Flintco, Inc., with prejudice as to refiling of same.

DATED this 20th day of April, 1999.

McGIVERN, GILLIARD & CURTHOYS

By: 
John B. DesBarres, OBA #12263
1515 South Boulder Avenue
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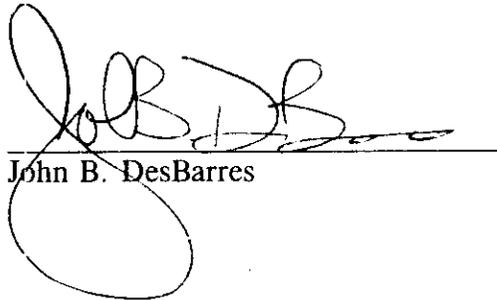
ATTORNEYS FOR DEFENDANT, Heinz Bakery Products, Inc.

epj

CERTIFICATE OF MAILING

I hereby certify that on this 20th day of April, 1999, a true and correct copy of the above and foregoing instrument was mailed, with sufficient postage fully prepaid thereon, to:

Mr. James E. Weger
Attorney at Law
15 East Fifth Street
Suite 3800
Tulsa, OK 74103



John B. DesBarres

NR

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

FLINTCO, INC.)
An Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
HEINZ BAKERY PRODUCTS, INC.,)
a foreign corporation,)
)
Defendant.)

CASE NO.98-CV-722 B(M)

ENTERED ON DOCKET

DATE JUN 11 1999

FILED
JUN 10 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff and hereby dismisses with prejudice its cause of action against the Defendant, Heinz Bakery Products, Inc. a foreign corporation.

Respectfully submitted,

JONES, GIVENS, GOTCHER & BOGAN

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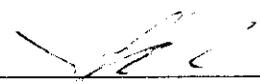
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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of ^{July} ~~May~~, 1999 I caused to be mailed in the United States Mail with postage fully prepaid thereon a true and correct copy of the above and foregoing Dismissal With Prejudice to:

John B. DesBarres, Esq.
MCGIVERN, GILLIARD & CURTHOYS
1515 South Boulder
Tulsa, OK 74101-2619



James E. Weger

MT

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

F I L E D

JUN 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDA WHITE, as Personal)
Representative of the Estate)
of MARY A. WHALER, Deceased,)
Plaintiff,)

vs.)

GENERAL MOTORS CORPORATION,)
Defendant.)

Case No. 98-CV-350-B(M) ✓
CONSOLIDATED

DARREL D. HAMIL, as Executor of)
the Estate of LOTTIE E. KNOTT,)
Deceased,)
Plaintiff,)

vs.)

GENERAL MOTORS CORPORATION,)
Defendant.)

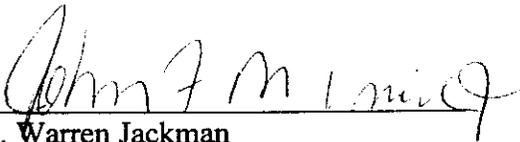
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STIPULATION FOR ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to FED.R.CIV.P. 41, Plaintiffs, Linda White, as Personal Representative of the Estate of Mary K. Whaler, Deceased, and Darrel D. Hamil, as Executor of the Estate of Lottie E. Knott, Deceased, (hereinafter referred to as "Plaintiffs"), and Defendant General Motors Corporation (hereinafter referred to as GM), stipulate that this matter should be dismissed with prejudice to its refiling.

WHEREFORE, Plaintiffs and Defendant pray that this Honorable Court enter an Order dismissing this matter with prejudice as to its refiling.

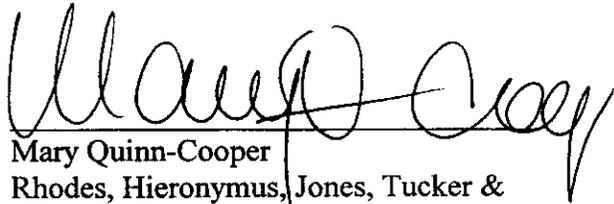


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