

FILED

JUL 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

DOUGLAS M. DEBEVETZ,
Plaintiff,
vs.
STATE FARM MUTUAL AUTOMOBILE
INSURANCE CO., et al,
Defendant.

Case No. 98-C-804-B

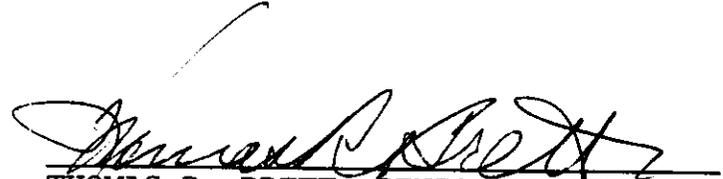
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ADMINISTRATIVE CLOSING ORDER

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.

If, by 8-27-99, 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 19th day of July, 1999.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

74

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

LEROY D. EZELL,
SSN: 432-74-8243

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

JUL 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-585-J

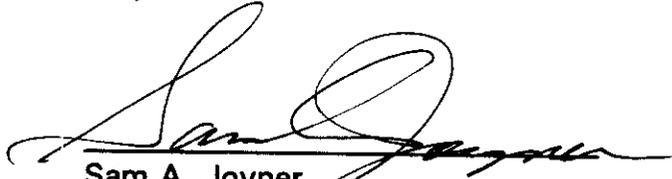
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JUDGMENT

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 19th day of July 1999.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

LEROY D. EZELL,
SSN: 432-74-8243

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

JUL 19 1999 *SL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-585-J ✓

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DATE JUL 20 1999

ORDER^{1/}

Plaintiff, Leroy D. Ezell, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because (1) the ALJ's finding that Plaintiff retained the residual functional capacity ("RFC") to perform medium work was not supported by substantial evidence, and (2) the ALJ's finding that Plaintiff could perform a substantial number of jobs was based on an incorrect legal standard. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

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

^{2/} Administrative Law Judge James D. Jordan (hereafter "ALJ") concluded that Plaintiff was not disabled by Decision dated February 24, 1997. [R. at 9]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on June 4, 1998. [R. at 5].

I. PLAINTIFF'S BACKGROUND

Plaintiff was born May 6, 1942, and was 54 years old at the time of the hearing before the ALJ. [R. at 231]. Plaintiff completed the tenth grade. [R. at 232]. Plaintiff asserts that he is disabled due to cardiac problems, complications from diabetes, and a vision impairment.

Two RFC evaluations were completed by non-examining agency physicians. Each RFC noted that Plaintiff could lift 50 pounds occasionally, 25 pounds frequently, stand or walk six hours in an eight hour day, and sit six hours in an eight hour day. [R. at 82, 97].

Plaintiff had a catheterization and bypass surgery in 1993. [R. at 109-123]. Plaintiff was discharged on May 9, 1993, with instructions to begin walking approximately ten to twelve minutes two times each day and to begin a 1,800 to 2,000 calorie diet. [R. at 109]. X-rays on May 3, 1993, showed a stable post-operative chest. [R. at 130]. By August 6, 1993, Plaintiff reported that he was walking up to three miles, three to four days each week. [R. at 209].

Plaintiff had a treadmill test on December 8, 1995. The test was continued for nine minutes, and discontinued due to dyspnea and leg fatigue. [R. at 148]. The test was interpreted as negative, with Plaintiff's "lower limit normal functional capacity for age and gender." [R. at 148].

Plaintiff was admitted to St. Francis on April 10, 1996, for complaints of chest pain. [R. at 153]. Plaintiff experienced no further chest pain after admission and was discharged the following day.

Numerous notes from physicians indicated Plaintiff's diabetes remains relatively "uncontrolled." For example, on December 13, 1994, Plaintiff's physician indicated that Plaintiff's diabetes was not controlled and that he appealed to Plaintiff to follow a stricter diet and to increase his exercise. [R. at 200]. Plaintiff saw a diabetes counselor on March 12, 1996. Plaintiff noted, at that time, that he worked from 3:00 p.m. until 11:00 p.m. as an inspector. [R. at 184].

Boerje A. Axelsson, M.D., on November 13, 1996, wrote that Plaintiff had had diabetes since 1985, and was currently experiencing difficulty with his eyes which the doctor expected to last at least twelve months. [R. at 220]. On October 16, 1996, Dr. Axelsson had reported that Plaintiff was restricted to no heavy lifting, no pushing, and no exposure to extreme heat or cold. [R. at 221].

On December 14, 1996, Jim Martin, M.D., wrote that Plaintiff had diabetic retinopathy and macular degeneration requiring ongoing treatment for his eyes, and that Plaintiff had a marked decrease in vision in his right eye. [R. at 224-25]. Dr. Martin additionally noted that Plaintiff had had a quadruple bypass and had some degree of problems with his lower extremities. [R. at 225]. Dr. Martin concluded that in his opinion, based upon the medical findings, Plaintiff was permanently disabled and unemployable and should qualify for social security benefits. [R. at 225].

An eye examination dated November 19, 1996, indicated Plaintiff's corrected vision with his right eye was 20/100 and his left eye was 20/30. [R. at 226].

Plaintiff testified that he stopped working on August 11, 1995, when the company that he worked for laid off five people. [R. at 239]. According to Plaintiff,

he likes to read; he can drive for one hour to one and one-half hours; and he mows his lawn with a riding lawn mower. [R. at 241-44].

Plaintiff believes he could sit for approximately 30 - 45 minutes, stand for approximately 30 minutes, walk perhaps one-half of a mile, and lift ten to eleven pounds. [R. at 246-254]. According to Plaintiff, Plaintiff's doctor wants him to walk approximately three miles each day, but Plaintiff testified that he is unable to walk this distance. [R. at 254]. Plaintiff testified that he had problems with his vision and had had laser surgery on December 23, 1996, to attempt to assist his vision problem. [R. at 257, 260]. According to Plaintiff, his doctor asked him to return in approximately four months because the doctor claimed he would be unable to assess the results of the surgery until that time. [R. at 257].

Dr. Krushnam Urthi testified at the hearing as a medical expert. [R. at 265]. He stated that Plaintiff should be able to lift up to 10 or 25 pounds on a daily basis. [R. at 269].

II. SOCIAL SECURITY LAW & STANDARD 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. . . .

42 U.S.C. § 423(d)(2)(A). The Commissioner has established a five-step process for the evaluation of social security claims.^{3/} See 20 C.F.R. § 404.1520.

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

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the

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

Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

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

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

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff was not disabled at Step Five of the sequential evaluation. The ALJ noted that Plaintiff had some vision difficulties after his December 23, 1996 laser surgery, but observed that Plaintiff could drive, was an avid reader, and

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

watched television. The ALJ determined that Plaintiff retained the RFC to perform medium work, with the additional limitation that Plaintiff not be exposed to extremes in temperature or heavy pushing. [R. at 19]. Based on the testimony of a vocational expert, the ALJ observed that a number of jobs existed in the national economy which Plaintiff could perform. The ALJ concluded that Plaintiff was not disabled.

IV. REVIEW

ALJ'S FINDING AND SUBSTANTIAL EVIDENCE

Plaintiff initially notes that the ALJ decided Plaintiff's case at Step Five, that Plaintiff was within a couple of months of age 55 when his insured status expired, and that, in accordance the Commissioner's regulations such a person cannot work unless he is capable of performing medium work.

Plaintiff was born May 6, 1942, and was 53 years old on August 11, 1995, the date of his "application" for social security. Plaintiff was 54 years old at the time of the hearing before the ALJ. Plaintiff was 54 years old^{5/} when the ALJ issued his decision on February 24, 1997. Plaintiff was 54 years old when his insured status expired on March 31, 1997.

Plaintiff relies on 20 C.F.R. § 404.1563(d) as supporting Plaintiff's premise that Plaintiff must be capable of performing medium work or Plaintiff is disabled. The rule referenced by Plaintiff discusses persons age 55 or over. As noted, Plaintiff was not age 55 at the time of application, the time of the decision, or the time of the expiration

^{5/} As Plaintiff points out, Plaintiff was within three months of age 55.

of his insured status. Plaintiff, who was 54 years old, is classified as a "person approaching advanced age." 20 C.F.R. § 404.1563(c). Pursuant to the Grids,^{6/} a person who can perform "light work" and is "closely approaching advanced age," and has limited or less education and no previous work experience is initially classified as "not disabled." Therefore, Plaintiff's initial premise is incorrect.^{7/}

Plaintiff additionally asserts that the ALJ's findings with respect to Plaintiff's RFC are not supported by substantial evidence. Plaintiff notes that the ALJ concluded that Plaintiff could lift 50 pounds occasionally, 25 pounds frequently, and could perform medium work. Plaintiff suggests that nothing in the record supports the ALJ's conclusions other than the RFC forms completed by two non-examining physicians:

The ALJ's conclusion has some support in the record. As noted, two non-examining physicians concluded Plaintiff could lift 50 pounds occasionally and 25 pounds frequently. However, as Plaintiff observes, the "medical expert" testifying at the hearing stated that Plaintiff could lift 10 - 25 pounds. The expert did not testify as to whether or not Plaintiff could lift 50 pounds. As noted by Plaintiff, his treating physician wrote that Plaintiff should do no "heavy lifting," but did not define "heavy." The record does contain some evidence to support the ALJ's finding. The Court additionally notes that the ALJ alternatively found that Plaintiff could perform several

^{6/} The Medical-Vocational Guidelines, commonly referred to as the "Grids," are located at 20 C.F.R. Pt. 404, Subpt. P, App. 2.

^{7/} The Court notes that Plaintiff additionally argues in Plaintiff's "second issue on appeal" that because Plaintiff is within three months of age 55, the ALJ should have considered Plaintiff to be 55. The Court addresses this argument below.

"light" and "sedentary" jobs.^{8/} Plaintiff does not challenge the ALJ's alternative findings with regard to sedentary jobs. Even if the Court were to accept Plaintiff's assertion that the record does not contain substantial evidence to support the ALJ's decision that Plaintiff can perform medium work, it certainly supports the ALJ's conclusion that Plaintiff can perform several light work jobs.

Plaintiff asserts that the ALJ committed legal error "in that he stated the 'assessment of a residual functional capacity for the claimant must and does follow the credibility of the claimant's testimony.'" Plaintiff's Brief at 4. Plaintiff notes that a credibility finding is not dispositive at Step Five. Plaintiff does not explain or elaborate upon this argument. The ALJ's RFC assessment of Plaintiff is not totally dependent upon the ALJ's assessment of Plaintiff's credibility. Certainly an ALJ should not ignore the claimant's credibility in determining the claimant's RFC. The remainder of Plaintiff's argument lacks sufficient focus to enable the Court to address it.

Plaintiff additionally asserts that the medical evidence supports Plaintiff's claim that he sustained a significant loss of visual acuity in his right eye. Plaintiff notes that the ALJ failed to include this limitation in the hypothetical question that he presented to the vocational expert.

^{8/} The ALJ's decision notes Plaintiff can perform a sedentary labor job (300 in Oklahoma, 10,000 nationally), a light hand packaging job (1,800 in Oklahoma and 192,000 nationally), sedentary assembly (1,200 in Oklahoma and 93,000 nationally), light assembly (5,800 in Oklahoma and 444,000 nationally), and a sedentary taxi starter (100 in Oklahoma and 14,000 nationally).

By letter dated November 19, 1996, Plaintiff's doctor, Dr. Wolf, reported that Plaintiff had a best corrected visual acuity of 20/100 in his right eye and 20/30 in his left eye. Dr. Wolf indicated that he recommended laser surgery, and that "it will probably be three or four months before we know what kind of effect we will get from this. . . ." At the hearing before the ALJ, which occurred on January 27, 1997, Plaintiff testified that he had had the laser surgery on December 23, 1996. [R. at 264]. Plaintiff additionally informed the ALJ that his doctor had told Plaintiff that it would be three or four months before they would know the results of the surgery.

In evaluating Plaintiff's claim of impaired vision the ALJ wrote:

He also says he still cannot see well from the right eye, despite the laser surgery he had on December 9, 1996, and on the left [eye] on December 23, 1996, be he had not returned to the doctor in the one month since.^{9/} Although he says he could barely see the judge's hand, but not the pencil in the judge's hand from where he sat, he also said that he spends a good deal of time watching TV and reading sports or mountaineering magazines. He also sees well enough to drive.

[R. at 18].

Plaintiff has the initial burden to establish an impairment which interferes with Plaintiff's ability to work. In this case, Plaintiff simply has not sufficiently met this

^{9/} Defendant notes that Plaintiff "sought no further treatment" after his laser surgery. Of course the surgery occurred in December 1996, and the doctor told Plaintiff that he would be unable to evaluate the effects of the surgery for three to four months. The hearing before the ALJ was in January 1997. Therefore, in accordance with the doctor's orders, Plaintiff was not supposed to have sought further treatment at this time. Defendant's argument fails to take into consideration the advice given to Plaintiff by his doctors. The ALJ noted that although Plaintiff's eyesight might not be 20/20, Plaintiff's activities indicated that his eyesight was not an impairment which would interfere with his ability to work. Plaintiff does not further address the ALJ's analysis. Further, as noted below, Plaintiff's argument is directed at the effect Plaintiff's visual impairment has on his ability to perform medium level jobs. As noted, the ALJ listed several alternative light level jobs which Plaintiff could perform.

burden. The ALJ noted that Plaintiff was capable of driving, watching television, and that Plaintiff claimed to be an avid reader. Based on Plaintiff's testimony, the ALJ concluded that Plaintiff's visual impairment did not interfere with Plaintiff's ability to perform substantial gainful activity. The ALJ did, additionally, include a vision limitation in the hypothetical which he presented to the vocational expert. The ALJ asked the vocational expert to exclude all jobs which required frequent or prolonged use of the right eye for fine detail. [R. at 282]. The vocational expert excluded all sedentary jobs, which leaves numerous light range work jobs which Plaintiff can perform. Plaintiff does not address the fact that the ALJ presented this limitation to the vocational expert, and Plaintiff does not otherwise explain the degree of Plaintiff's limitation. Finally, Plaintiff asserts that his visual impairment would interfere with his ability to perform the medium level jobs identified by the vocational expert and the ALJ. However, as noted above, the ALJ's opinion outlines numerous light level jobs which Plaintiff does not claim are affected by his visual impairment. The light level jobs which the ALJ found Plaintiff could perform support the ALJ's conclusion that Plaintiff is not disabled.

BORDERLINE AGE CATEGORIZATION

Plaintiff additionally asserts that he was almost 55 at the time of the hearing before the ALJ, and that the ALJ therefore erred in failing to consider the impact of his age when determining whether or not he was disabled.

The regulations do provide that the Commissioner shall "not apply these age categories mechanically in a borderline situation." 20 C.F.R. § 404.1563(a).

However, as Defendant notes, in this case, the Commissioner did not "mechanically" apply the Grids in this case, but consulted a vocational expert.^{10/} In his question to the vocational expert, the ALJ asked the expert to consider an individual who was the same age as Plaintiff. The vocational expert was present when Plaintiff was testifying. Plaintiff testified that he was born May 6, 1942. The Court must accept that the vocational expert did consider the factors which he was expressly asked by the ALJ to consider. Plaintiff does not address the fact that the ALJ was asked to consider Plaintiff's age.^{11/}

However, regardless of the ALJ's treatment (or lack of treatment) of this borderline age situation, as pointed out by Defendant, Plaintiff has waived this argument. The ALJ's decision specifically informed Plaintiff of James v. Chater, 96 F.3d 1341, 1344 (10th Cir. 1996), and warned Plaintiff that a failure to specifically identify issues in the appeal to the Appeals Council could constitute a waiver. [R. at 20-21]. Plaintiff appealed the decision of the ALJ to the Appeals Council. Plaintiff asserted, in his letter to the Appeals Council, that Plaintiff was "unable to engage in

^{10/} Plaintiff refers the Court to Daniels v. Apfel, 154 F.3d 1129 (10th Cir. 1998). In Daniels the ALJ relied solely on the Grids in determining whether the claimant was disabled. However, Daniels also notes that it is error for an ALJ to fail to consider the borderline situation. The ALJ should, pursuant to the Commission's regulations, consider the fact that the claimant is borderline, and based on the age categories determine whether or not the claimant should be considered in the "lower" age category or the next "higher" age category. As pointed out by Defendant, however, Plaintiff has waived the entire borderline category argument because Plaintiff failed to raise it in his appeal of the ALJ's decision to the Appeals Council. Therefore, although the Court is troubled by the ALJ's failure to consider the specifics of Plaintiff's age, due to Plaintiff's waiver of this argument, the Court concludes that the decision of the ALJ should be affirmed.

^{11/} The hypothetical asked the vocational expert to consider an individual who was Plaintiff's "same age." While this may not specifically outline an individual "closely approaching advanced age," which is perhaps the wording that Plaintiff wanted, the question does include Plaintiff's age limitation. Plaintiff does not address how the wording of the question does not adequately include his age.

any substantial, [sic] gainful activity due to his disabilities, consisting of heart disease, 4-vessel bypass surgery, diabetes, and eye problems. That his chest pain and leg pains are so severe that he is unable to sit or stand in the same position for any length of time and because of the constant pain." [R. at 227]. Plaintiff did not specifically assert any issues in his appeal to the Appeals Council. At best, Plaintiff raised as general issues that the ALJ failed to consider his heart disease, surgery, diabetes, and other problems in determining that Plaintiff was disabled.^{12/}

In James, the Tenth Circuit Court of Appeals noted that "[o]rdinarily issues omitted from an administrative appeal are deemed waived for purposes of subsequent judicial review." James, 96 F.3d at 1343. The Tenth Circuit concluded that this general rule should also be applied to social security disability adjudications. In James, the claimant did not file a brief at the Appeals Council level but asserted that he was disabled and entitled to benefits. The Court concluded that "[s]uch a statement was plainly inadequate to apprise the Appeals Council of the particularized points of error counsel has subsequently argued in the courts." Id.

Plaintiff concedes that this issue was not presented to the Appeals Council. However, Plaintiff asserts that the borderline age issue and Plaintiff's age at the time his insured status expired "is an open and obvious fact clearly within the Appeals Council's legally established duty to consider. . . ." Plaintiff's Reply Brief at 1. Plaintiff seems to be arguing that the borderline age issue is so obvious that the

^{12/} The Court notes that Defendant asserts the James waiver only with regard to the borderline age issue raised by Plaintiff. The Court therefore does not specifically address whether the other issues presented by Plaintiff in the appeal were adequately raised by Plaintiff in his letter to the Appeals Council.

Appeals Council had a duty to address it regardless of whether or not Plaintiff adequately raised it to the Appeals Council. Plaintiff additionally asserts that James has not yet been developed by the courts.

Plaintiff is correct that James has not yet been fully explored and developed by the Courts. However, James did note that the arguments raised by Plaintiff to the Appeals Council had to be sufficient to apprise the Appeals Council of the issue that Plaintiff was raising.

The Court concludes that the general language in the letter which Plaintiff wrote to the Appeals Council was insufficient to have apprised the Appeals Council of the borderline age issue which Plaintiff has raised in his current appeal to this Court. Plaintiff has therefore waived the assertion of this issue.

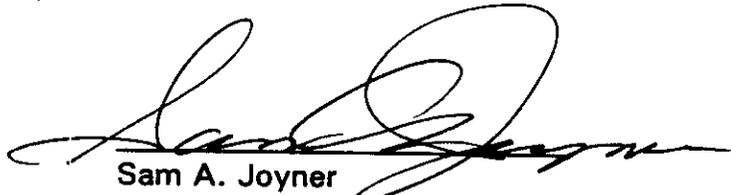
Finally Plaintiff mentions that the vocational expert's testimony is "marred" by a significant inconsistency with the DOT regarding exposure to extremes of heat. Plaintiff does not develop or explain this argument. In addition, in the hypothetical question posed to the vocational expert the ALJ included a limitation for "no heavy pushing and no exposure to extremes of heat or cold." [R. at 281]. The vocational expert testified that this limitation would eliminate from consideration Plaintiff's past relevant work, but the vocational expert provided other jobs which Plaintiff would be able to perform. Regardless, Plaintiff does not explain or develop this argument, and the Court cannot address, as an "issue on appeal" an argument which is not developed.

V. CONCLUSION

Plaintiff did not raise the borderline age issue to the Appeals Council and therefore has waived that issue pursuant to James. Although Plaintiff did discuss some vision problems in his letter to the Appeals Council, on appeal, Plaintiff states that this impairment limits his depth perception and therefore his ability to perform medium jobs. Because the ALJ additionally found that Plaintiff could perform numerous light jobs, and Plaintiff does not specify his visual acuity problem with respect to light work activity, the ALJ's decision is supported by substantial evidence that Plaintiff can perform light work.

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

Dated this 19 day of July 1999.



Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DOROTHY M. HOPPOCK,
SSN: 447-40-1579

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

F I L E D

JUL 19 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-326-J /

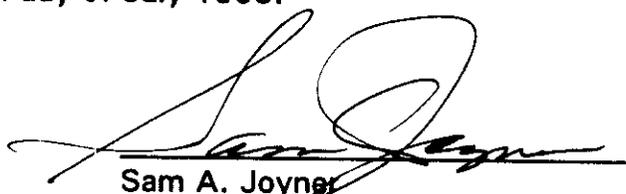
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DATE JUL 20 1999

JUDGMENT

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

It is so ordered this 19th day of July 1999.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DOROTHY M. HOPPOCK,
SSN: 447-40-1579

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

JUL 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-326-J ✓

ENTERED ON DOCKET

DATE JUL 20 1999

ORDER^{1/}

Plaintiff, Dorothy M. Hoppock, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because (1) the ALJ's RFC determination is not supported by the evidence and the ALJ ignored evidence in the record, (2) the hypothetical question presented to the vocational expert did not adequately include Plaintiff's limitations. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was 55 years old at the time of the hearing before the ALJ. [R. at 171]. Plaintiff completed high school and obtained 20 credit hours in college. [R. at

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

^{2/} Administrative Law Judge Stephen C. Calvarese (hereafter "ALJ") concluded that Plaintiff was not disabled on September 25, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on February 26, 1998. [R. at 5].

171]. Plaintiff testified that she sometimes did her dishes, but that it took approximately four hours for her to do them. [R. at 180]. Plaintiff watches television for approximately three to four hours each day. [R. at 183]. Plaintiff testified that she attends Oklahoma Pain Control in Oklahoma City two times each month, and that she relies on a friend to drive her there. [R. at 184]. Plaintiff believes that she is unable to lift even five pounds. [R. at 185].

Plaintiff was injured at work on December 1, 1993, when her manager struck her. Plaintiff's reported account of the incident varies. On January 20, 1994, John A. Karr, D.C., reported that Plaintiff related that she was speaking with a trucker when her manager hit her from behind in her mid back with his forearm and fist. Plaintiff reported that the manager hit her a second time, and that she was thrown forward but did not fall because she caught herself. [R. at 81]. Plaintiff stated that it was the end of the work day, that she was scared, and that she had a pain in her right side and stinging pain on her left side. Plaintiff indicated that she reported the incident the following day and was examined by Dr. Bumpes. [R. at 82].

On October 9, 1996, the incident was described differently to James A. Rodgers, M.D. [R. at 161]. Plaintiff related that on December 1, 1993 she was struck with a full forearm and fist twice across the middle of her back. "The second blow caused her to fly through the air, landing between two bunks with her neck extended and her arms extended behind her. She states that she was knocked unconscious, and when she gained her wits about herself, about an hour after her injury, she had some amnesia for all those events. It was shortly afterwards, that she developed significant

pain in her neck, shoulder and arms, as well as a numbness in her forearms. She also had some low back pain, where direct contact was made." [R. at 161].

Dr. Washburn reported, in June of 1996, that Plaintiff was stuck with the full forearm and fist twice, that the second blow "caused her to fly through the air about three feet," that she landed in some metal bunks and her arms were pinned behind her, and that she lost consciousness. [R. at 124]. Plaintiff reported that one hour after the injury she was still unaware of many of the details of the incident and did not know where she was. [R. at 124].

In July of 1996, Dr. Simmons reported that Plaintiff was hit by a man, flew through the air and hit another man, and bent her neck backwards. Plaintiff reported that she gained consciousness several hours later and immediately "went home for fear of her life." [R. at 138].

Dr. Sisler reported that following the incident, Plaintiff showed no evidence of bruising around her spine or trunk. [R. at 115]. His report of the incident is similar to the report by Dr. Karr and additionally notes that some reports indicated Plaintiff was given a "gentle shove." [R. at 116-17].

On March 8, 1994, James W. Zeiders, M.D., reported that Plaintiff complained of back pain relating to the December 1994 incident. He noted that Plaintiff "had few objective findings" to support her complaints of pain. [R. at 85]. He indicated that Plaintiff had some degenerative disease but that the degenerative disease did not seem to be the problem.

I get the feeling as we talk to her it is a kind of catch 22. Everything we suggest she can't afford. This pretty well includes anything from medicines to supports to exercise to so forth. One gets the idea that all she is doing is documenting the problem which will probably be used as part of the suit that she'll file against the company as she continues to remain unemployed now.

[R. at 85].

Plaintiff was examined by Ray Loffer, M.D., on April 13, 1994. He reported normal tone, strength, and bulk in all four extremities, and a normal gait. [R. at 89]. In addition, Plaintiff's back was reported as only mildly tender on exam with a normal range-of-motion on anterior and posterior and left to right. [R. at 89].

Plaintiff was examined by a social security examiner on April 19, 1995. [R. at 95]. The examiner generally noted that he found no explanation for Plaintiff's symptoms.

This lady was seen and examined for her complaint of pain in her left flank. Her previous evaluation seemed to clear her from any bony injury, fracture, or dislocation of the area involved. Her claim of hematuria was not documented by any previous medical tests. Similarly, there was some discrepancy in the severity of the blow to her back. . . . She seemed to demonstrate evidence of stiffness with the pain on passive motion of the left shoulder joint. There was also evidence to confirm the tenderness over the left flank area on palpation. This appeared to be some form of hyperesthesia. I do not have any explanation of her symptoms. I suspect that limitation in the range of motion and pain of her left shoulder could be the result of disuse.

[R. at 98].

An EMG on April 21, 1994, was interpreted as "normal" for Plaintiff's lumbosacral paraspinal muscles, her gluteus minimus, her quadriceps, medial

gastrochemius, and anterior tibialis. [R. at 104]. The EMG examiner noted "there was no evidence of radiculopathy in the left lumbosacral paraspinal muscles or the left lower extremity." [R. at 104]. The EMG did indicate "left posterior tibial neuropathy." In addition, a lower limb somatosensory evoked response indicated "normal lower limb somatosensory evoked potentials on left and right posterior tibial nerve stimulation with normal central conduction, normal peripheral conduction noted. The values for conduction velocity, while normal, were on the lower side of normal values, a finding consistent with the mildly increased Cz-L1 time and slightly prolonged L1, CZ individual component latencies." [R. at 108].

An MRI from April 28, 1994, was interpreted as normal for the thoracic spine, mild bulging at the L3-L4 and L4-L5 level but no evidence of herniated disc, with the remainder of the lumbar spine appearing normal. [R. at 113].

Plaintiff was examined on May 5, 1994, by Jerry Sisler, M.D. [R. at 115]. Dr. Sisler reported that Plaintiff rose from her chair without difficulty. Plaintiff claimed that the left upper area of her lumbar spine caused her the greatest discomfort. [R. at 116]. X-rays indicated moderately advanced degenerative disc disease at C3-4, 4-5, 5-6, and 6-7. [R. at 116]. He conclusion provides:

This lady alleges two hard blows to the left upper flank area which occurred while on the job. She reports she was "hit hard" while other reports indicated a gentle shove. In any event, there was no evidence of an ecchymosis of the back or flank and examinations by Dr. Bumpus, who treated her not long after the accident did not find signs of direct trauma.

* * * *

[T]here are other musculoskeletal findings in this patient:
*Thoracic scoliosis, mild (12 degrees), *Moderately advanced degenerative disc disease of multiple levels of the cervical spine.

[R. at 117]. Dr. Sisler concluded that Plaintiff showed no evidence of significant impairment or trauma related to the December 15, 1993 incident. He additionally noted that Plaintiff had other medical problems which could contribute to her condition. [R. at 117].

Plaintiff was examined by P.E. Washburn on June 6, 1995. [R. at 124]. Dr. Washburn reported that Plaintiff showed obvious signs of distress. [R. at 125]. He noted that Plaintiff did not have full range of motion of her neck and exhibited pain with motion. [R. at 125]. His impression was that Plaintiff had a herniated disc, and was temporarily totally disabled. [R. at 126].

Plaintiff was examined by L. Keith Simmons, D.O., on July 25, 1996. Dr. Simmons noted that Plaintiff's thoracic spine films were normal, and that an MRI of the spine indicated mild bulging at L3-4 and L4-5 with the remainder of the spine normal. [R. at 139]. Plaintiff had some decreased abduction of her left shoulder which the examiner believed was due to mechanical restriction. [R. at 140]. Plaintiff's gait, station, and coordination were all reported as within normal limits. [R. at 140]. Dr. Simmons concluded that, based on his examination, Plaintiff would have some restrictions in standing or moving, but no restrictions in standing. [R. at 141]. In addition, he reported that Plaintiff would be unable to carry or lift heavy objects. [R. at 141].

A Medical Assessment of Ability to do Work-Related Activities (Physical) was completed by Dr. Simmons. [R. at 145]. He indicated that he had insufficient information to determine how much weight Plaintiff could lift or how many hours Plaintiff could sit, stand, or walk. [R. at 145].

Plaintiff was examined by Dennis E. Karasek, M.D., on October 4, 1996. [R. at 158]. He noted that Plaintiff had an MRI in March of 1996, and that past EMG's had shown "lumbar plexopathy and radiculopathy at C-6, 6, and 7." [R. at 158]. With regard to Plaintiff's neck, he reported decreased mobility. [R. at 159]. He additionally noted decreased strength with wrist extension and flexion, and decreased grip strength. [R. at 159]. With regard to Plaintiff's back, he reported decreased range of motion throughout. [R. at 159]. He additionally reported that Plaintiff's gait was "extremely ataxic." He described Plaintiff's March 1996 MRI as indicating a flattening of the cord and severe spondylitic changes with narrowing at Cr-6 and C6-7. [R. at 159]. He additionally indicated Plaintiff should be referred to a neurosurgeon.

James A. Rogers, M.D., reviewed Plaintiff's records on October 9, 1996. He noted that the MRI and EMG and nerve conduction velocity of Plaintiff's left leg and back indicated no significant pathology. [R. at 162]. He noted that her medical history did not indicate that she had always mentioned her neck symptoms to her doctors, but that the symptoms "have always been there." [R. at 163]. He reviewed her X-rays and MRI and noted that her spinal cord was dramatically compressed at C4-5 and to some degree at C-5-6. [R. at 164]. He concluded that:

There is no question this lady had multilevel advanced cervical spondylosis, but she does have cervical stenosis to a significant degree at C4-5 and C5-6. Her current symptoms seem to be coming from her cervical spine and cervical cord, related to this compression. I, looking over all the records, tend to see how people have doubted her symptoms and doubted that any of her complaints are referable to her injury. However, I think she has a problem now that needs attention.

[R. at 164]. He recommended that Plaintiff undergo a cervical myelogram and CT scan so that he could obtain a better idea of how tight her spinal cord was. [R. at 164].

On February 27, 1997, Dr. Rodgers wrote that Plaintiff had had the myelogram and CT scan on February 17, 1997. [R. at 166]. He indicated that it showed "slight narrowing in the anterior-posterior dimensions of the spinal canal at C3-4 through C6-7. There is incomplete filing of the nerve roots bilaterally at these levels. C4-5 and C5-6, are above and beyond the other levels in their advanced degenerative changes. There is more spurring towards the right at C-5-6." [R. at 166]. He recommended that Plaintiff wear a neck collar for two to three weeks, that Plaintiff undergo physical therapy, a vigorous active exercise program for her neck, shoulder and arm muscle, strengthen her upper body and back. He noted that fusing her neck would not offer a chance of true future employability or elimination of all of her pain. [R. at 166].

A note to an X-ray dated June 7, 1995 indicates that "views of the left shoulder are limited by limited patient motion. No gross fracture or dislocation is seen." [R. at 128]. Dr. Simmons interpreted this X-ray as indicating no abnormalities. [R. at 139].

Plaintiff's medications list indicated Plaintiff was taking Tylenol with codeine^{3/} for pain and aspirin. [R. at 77]. Plaintiff's medication list dated June 25, 1996 indicated Plaintiff took Tylenol 3 or Ultram for pain. [R. at 136].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

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

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

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

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

42 U.S.C. § 423(d)(2)(A).^{4/}

^{3/} Dr. Simmons reported that Plaintiff had an "allergy" to codeine. [R. at 139].

^{4/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an

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

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

"The finding of the Secretary^{5/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence

alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

^{5/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff was not disabled at Step Five of the sequential evaluation. The ALJ noted that the Plaintiff's records indicated cervical degenerative disease with degenerative changes from C-3 to C-7, and a bulge at C5-6. [R. at 13]. The 1994 MRI indicated no herniated discs. [R. at 13]. The ALJ noted that Dr. Loffer indicated that despite Plaintiff's complaints of leg pain she had a normal exam and that a consultative examiner found Plaintiff's symptoms inconsistent and undocumented. [R. at 13].

Plaintiff was examined by Dr. Washburn on June 6, 1995, whom the ALJ noted found markedly diminished grip strength, without objective tests, and herniated discs. [R. at 14]. The ALJ did not give Dr. Washburn's findings significant weight because they were inconsistent with the findings of the other examiners.

The ALJ evaluated Plaintiff's pain and discounted it. The ALJ noted that Plaintiff has not consistently sought medical attention, that Plaintiff's use of medicines were limited, and that Plaintiff's medical records did not support her degree of pain.

The ALJ concluded that Plaintiff was capable of performing medium work^{6/} and based on the testimony of a vocational expert found that Plaintiff was not disabled.

IV. REVIEW

ALJ IGNORED EVIDENCE IN THE RECORD

Plaintiff initially asserts that the ALJ ignored evidence in the record which did not support the ALJ's evaluation of Plaintiff's RFC. Plaintiff additionally claims that the ALJ distorted evidence in the record to support his claim that Plaintiff was not disabled.

Plaintiff states that the ALJ only briefly summarized the medical records and did so in a non-chronological fashion which distorts the record. Plaintiff's medical record is fairly limited. Plaintiff's record contains reports from several physicians. However, no extended treatment reports or repeat visits are included. Plaintiff visited several doctors, and had an MRI, EMG, and other studies done. The Court has reviewed the medical record and concludes that the ALJ adequately summarized Plaintiff's records. Nothing in the case law or regulations requires the ALJ to summarize each medical exhibit submitted. In addition, as noted, Plaintiff's medical record is not lengthy, consisting of slightly less than 100 pages.

Plaintiff additionally claims that the ALJ did not provide a chronological "picture" of the progression of Plaintiff's impairment. Plaintiff notes that a 1996 MRI was interpreted as indicating degenerative disc disease and bulging discs, but that the ALJ

^{6/} Plaintiff does not specifically challenge the ALJ's findings with regard to her RFC.

discounted the report with a 1994 MRI. The wording of the ALJ's decision is troubling. Furthermore, the ALJ, other than discounting Dr. Washburn's reports, never addresses reports from doctors after 1995. The doctor's reports from 1994 and even early 1995 clearly support the ALJ's conclusion that Plaintiff was not impaired. In 1994, Plaintiff's condition was described as providing "few objective findings" to support her complaints. The doctor suspected Plaintiff of merely documenting her condition for the purpose of a lawsuit. [R. at 85]. Dr. Loffer in April of 1994 described Plaintiff as having normal gait, strength and tone and as being only mildly tender on exam. [R. at 89]. The social security examiner in April 1995 noted that he had no medical explanation for any of Plaintiff's symptoms. [R. at 98]. An EMG and MRI from April 1994 were interpreted as normal. [R. at 104].

The first contrary information was supplied by P.E. Washburn in June 1995. After an examination he was under the impression that Plaintiff had a herniated disc and was temporarily totally disabled. [R. at 126]. The ALJ discounted his conclusion because it was not supported by the medical evidence. The Court concludes that, as of at this point in the Plaintiff's record, the ALJ's conclusion is supported by substantial evidence. The EMG and MRI from 1994 had been interpreted by several doctors as "normal." Dr. Washburn supplied no additional medical information to support his contrary "impression."

However, Plaintiff was examined by several other doctors. Dr. Simmons noted that a MRI indicated mild bulging at L3-4, and that Plaintiff's left shoulder was restricted. He concluded that Plaintiff would have some restrictions in standing and

moving but none in standing. He additionally indicated that Plaintiff would be unable to lift or carry heavy objects. The ALJ discounts his opinion because he did not supply specific amounts which Plaintiff would be unable to lift or carry and did not specify the amounts of time Plaintiff would be able to sit, stand, or walk.

The difficulty with this record is created by the exhibits submitted after the decision of the ALJ in September of 1996. Obviously, since the exhibits were submitted after the decision of the ALJ, the ALJ did not address the exhibits in his opinion. However, the exhibits were included in the record, were submitted to the Appeals Council, and must be considered by this Court on appeal. See O'Dell v. Shalala, 44 F.3d 855 (10th Cir. 1994).

Dr. Karsek examined Plaintiff on October 4, 1996. He noted that a March 1996 MRI indicated radiculopathy at C-5, 6, and 7, that Plaintiff exhibited decreased mobility in her neck, that she had a decreased range of motion in her back, that she had decreased grip strength and wrist flexion, that her gait was extremely ataxic. He described her MRI as indicating flattening of the cord and showing severe spondylitic changes and suggested Plaintiff be referred to a neurosurgeon. [R. at 159]. Dr. Rogers reviewed Plaintiff's records on October 9, 1996. He reviewed her X-rays and MRI and noted that her spinal cord was dramatically compressed at Cr-5 and somewhat compressed at C5-6. [R. at 164]. He recommended a cervical myelogram and CT scan. After those were completed, in February of 1997 he wrote that Plaintiff had slight narrowing of the spinal canal at C3-4 through C6-7, spurring at C5-6, and levels C4-5 and C5-6 in advanced degenerative stages. [R. at 166].

The ALJ found that Plaintiff retained the RFC to perform medium work. One doctor noted that Plaintiff could not lift "heavy" weight but did not provide an amount of weight which Plaintiff could lift. In fact nothing in the record indicates an amount of weight which Plaintiff is capable of lifting. Each of the doctors which Plaintiff saw after 1996 indicated Plaintiff had narrowing, bulging, or decompression in her cervical spine. An MRI from 1996 and an EMG supported the findings of those doctors. The majority of this information was not available for the ALJ to review prior to the issuance of his decision. The Court concludes that, considering the additional medical evidence submitted, the decision of the Commissioner that Plaintiff could perform medium work is not supported by substantial evidence.

V. CONCLUSION

The Court concludes that based on the additional evidence submitted after the decision of the ALJ, the ALJ's conclusion that Plaintiff could perform medium work is not supported by substantial evidence.

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

Dated this 19 day of July 1999.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

GEORGE D. NEWMAN, JR.,
SSN: 458-82-9762

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

JUL 19 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-CV-509-J

ENTERED ON DOCKET

DATE JUL 20 1999

JUDGMENT

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

It is so ordered this 19th day of July 1999.



Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
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GEORGE D. NEWMAN, JR.,
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ORDER^{1/}

Plaintiff, George D. Newman, Jr., pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the decision of the Commissioner should be reversed because the ALJ erred in concluding that Plaintiff could perform simple repetitive jobs on a regular basis despite his mental impairment. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was born July 11, 1955. [R. at 108]. Plaintiff completed high school. Plaintiff does not specifically challenge the ALJ's findings with regard to his physical

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

^{2/} Administrative Law Judge Paul Harkey initially determined that Plaintiff was not disabled on March 22, 1994. [R. at 289]. Plaintiff appealed that decision to the Appeals Council and the Appeals Council remanded to the ALJ for further evaluation of Plaintiff's alleged mental impairment. Administrative Law Judge (hereafter "ALJ") Leslie S. Hauger concluded that Plaintiff was not disabled by decision dated November 3, 1995. [R. at 83]. Plaintiff again appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on March 21, 1997. [R. at 4].

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impairments. Plaintiff had back surgery and has four fused discs. Plaintiff was examined May 5, 1994. The doctor indicated that Plaintiff had a good range of motion of his neck, some evidence of degenerative disc disease, and no evidence of myelopathy or radiculopathy. [R. at 31]. The doctor suggested that Plaintiff enroll in a vocational rehabilitation program because "he is young and there are certainly a number of things he would still be able to do." [R. at 32]. Plaintiff's records contain numerous complaints of right arm numbness.

A RFC completed by A.E. Minyard on August 27, 1991, indicated Plaintiff could lift a maximum of 50 pounds, frequently lift 25 pounds, stand or walk for six hours in an eight hour day, and sit for six hours in an eight hour day. [R. at 113]. A second RFC assessment completed November 6, 1992 by Jimmy L. Breazeale, M.D. reported similar physical capabilities. [R. at 121].

On July 15, 1991, Plaintiff reported that he was unable to lift over 40 pounds, that he could mow his lawn on a riding lawn mower, and that he drove approximately five miles each day. [R. at 177]. In forms completed and turned into the Social Security Administration, Plaintiff indicated that he fed the animals, did the lawn work, cleaned the house, cooked approximately three times each day, and slept approximately 6 ½ to 8 hours each night. [R. at 180]. Plaintiff additionally noted that he reacted calmly to stress. [R. at 180].

In a supplemental questionnaire completed August 20, 1992, Plaintiff indicated that his pain and depression was increasing. [R. at 187]. Plaintiff noted that his depression made him irritable and he did not want to be around people. Plaintiff

indicated that he had not been treated for his emotional problems, but took medication from the Veterans Administration. [R. at 190]. Plaintiff indicated that he became upset and angry very easily, that he is sometimes angry several times each day, and that he "explodes with anger" when subjected to criticism. [R. at 191-92].

An examiner concluded on June 21, 1995 that Plaintiff showed "no objective evidence of disease." [R. at 334].

A Mental RFC completed by Ernest E. Denny, M.D. on November 6, 1992, indicated that Plaintiff was not significantly limited in his ability to remember locations and work-like procedures, in his ability to understand and remember short and simple instructions, in his ability to carry out short and simple instructions, in his ability to sustain an ordinary routine without special supervision, in his ability to work in coordination with others, in his ability to make simple work-related decisions, in his ability to ask simple questions, in his ability to maintain socially appropriate behavior, in his ability to respond appropriately, in his ability to be aware of normal hazards, and in his ability to travel in unfamiliar places. [R. at 129-30]. Plaintiff was rated as "moderately limited" in his ability to understand and remember detailed instructions, in his ability to carry out detailed instructions, in his ability to maintain attention and concentration for extended periods, in his ability to perform activities within a schedule, in his ability to complete a normal workday without interruption from psychologically based symptoms, in his ability to interact with the general public, in his ability to accept instructions and respond to criticism, and in his ability to get along with co-workers or peers without distracting them, in his ability to maintain socially

appropriate behavior, and in his ability to set realistic goals. [R. at 129-30]. Dr. Denny noted that his review of the record revealed that Plaintiff was able to do light chores and did some cooking and laundry, that Plaintiff was able to care for his personal needs and travel in unfamiliar places, and that Plaintiff handled light shopping and finances and occasionally visited friends. [R. at 131]. The doctor noted that Plaintiff "retains the ability to understand and follow simple, ordinary task instructions and retains the ability to interact adequately with coworkers and supervisors and retains the ability to adapt to routine working environments." [R. at 132]. Dr. Denny's report was reviewed and "affirmed as written" on February 25, 1993. [R. at 132].

A Psychiatric Review Technique ("PRT") Form was completed by Dr. Denny on November 6, 1992. [R. at 133]. He noted that Plaintiff had difficulty concentrating or thinking and had psychomotor agitation and retardation. [R. at 136]. With regard to Plaintiff's "degree of limitation," he noted that Plaintiff was moderately limited in his activities of daily living, slightly limited in maintaining social functioning, often had deficiencies of concentration, and once or twice had episodes of deterioration or decompensation at work or work-like settings. [R. at 140].

Plaintiff was examined by David T. Wells, M.D., on September 17, 1992. [R. at 243]. Plaintiff told Dr. Wells that he was depressed and angry because his wife had to support him on \$4.33 per hour. [R. at 243]. He informed Dr. Wells that he cried three to four times each week and thought of suicide. He reported that he was very hostile and angry about the status of his VA disability and his social security disability.

[R. at 243]. In addition he reported that he had no prior psychiatric problems and no difficulty with hostility or depression prior to his back injury. [R. at 243]. Dr. Wells noted that Plaintiff appeared hostile and depressed. [R. at 243]. He observed that Plaintiff's affect showed "moderate blunting but no inappropriateness." [R. at 244]. Plaintiff was described as oriented to time and person, able to perform additions and subtractions, and having decent recall and memory. [R. at 244]. In addition, "insight was good and judgement was good." [R. at 244]. The examiner concluded, "[h]is ability to complete tasks in a timely manner over a sustained period as taken from the mental status examination and reported activities is fair to poor. There have been no stress related job terminations or psychiatric hospitalizations within the past year." [R. at 244]. He concluded that Plaintiff suffered from "major depression, single, unspecified." Plaintiff's prognosis was described as "guarded." [R. at 244].

Plaintiff was examined March 10, 1995 by Minor Gordon, Ph.D. [R. at 327]. The examiner noted that Plaintiff had never been treated by a mental health professional. [R. at 327]. Based on conversation, the examiner estimated Plaintiff's level of intelligence as "average." [R. at 328]. Plaintiff denied suicidal, homicidal or phobic ideation. Plaintiff denied delusions or hallucinations. [R. at 328]. The examiner noted Plaintiff was oriented to time, person, and place, and that Plaintiff's memory, retention and recall were all reported as adequate. [R. at 328]. An I.Q. examination indicated a full-scale I.Q. of 72. [R. at 328]. The examiner noted that this placed Plaintiff in the "borderline retarded range." [R. at 328]. The examiner administered the Minnesota Multiphasic Personality Inventory exam, but noted that the

protocol was invalidated either due to Plaintiff's difficulty reading or because Plaintiff was otherwise overwhelmed with problems and therefore unable to complete the exam. [R. at 328]. The examiner reported that Plaintiff

is an individual who is now basically dependent on other people and ineffectual to his responses to personal, social, and occupational demands. He probably has difficulty being appropriately assertive. He probably has difficulty with the appropriate expression of the problematic feeling of anger. He is resentful and irritable much of the time and fears the loss of emotional control. Accordingly, he has difficulty expressing himself directly. He currently lacks meaningful involvement in his life circumstances and is simply an observer, or spectator, versus a participant. The overall clinical picture is an individual who is suffering from a major depression in addition to social withdrawal, isolation, and alienation.

[R. at 328-29]. The examiner additionally suspected that Plaintiff was addicted to his prescribed narcotics. [R. at 329]. The examiner concluded that, in his opinion, it was doubtful that Plaintiff was "capable of performing any type of routine repetitive tasks on a regular basis." [R. at 329]. The examiner completed a "medical assessment of ability to do work-related activities (mental)." He noted that Plaintiff's ability to relate to co-workers, interact with supervisors, follow simple job instructions, maintain personal appearance, related predictably in social situations, and demonstrate reliability were all "fair." "Fair" is defined as "ability to function in this area is seriously limited, but not precluded." [R. at 330]. Plaintiff's ability to follow work rules, deal with the public, use judgment with the public, deal with work stresses, function independently, maintain attention/concentration, follow complex job instruction, follow detailed job instructions, and behave in an emotionally stable manner was reported as "poor to

none." "Poor or none" is defined as "no useful ability to function in this area." [R. at 330].

Plaintiff's testimony at his hearing before the ALJ on February 8, 1994 is predominantly about his physical ailments. Plaintiff noted that he had trained for approximately three weeks in September of 1993 to be a nurses' assistant, but that he worked only three days before reinjuring his back. [R. at 355].

According to Plaintiff, he generally drives his 16 year old to school each day, returns home to do the laundry and clean the house, sometimes shops for groceries and sometimes mows the yard. Plaintiff testified that he takes a nap each day. [R. at 366].

At his second hearing before the ALJ on September 25, 1995, Plaintiff testified that he still experienced pain due to his back and acknowledged that he drove to the hearing. [R. at 377]. Plaintiff did note that he had never been treated for depression but that he did take medication. [R. at 379]. Plaintiff additionally denied thoughts about suicide, but noted that he sometimes had problems thinking or concentrating. [R. at 380].

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

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

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

42 U.S.C. § 423(d)(2)(A).^{3/}

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

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The

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

Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

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

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

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff could perform a full range of light work limited by the necessity to alternate positions at Plaintiff's discretion, and that Plaintiff could

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

perform only simple repetitive jobs due to his poor concentration and borderline intellect.

IV. REVIEW

As noted, Plaintiff does not specifically appeal the ALJ's findings with regard to Plaintiff's physical RFC. The Court has reviewed the record and finds that substantial evidence supports the decision of the ALJ that Plaintiff can physically perform the requirements of light work with an alternating sitting and standing option.

Plaintiff asserts that, considering his given physical limitations, and his limited I.Q., his mental impairment renders him disabled from performing substantial gainful activity. Plaintiff asserts that the ALJ improperly evaluated the limits of his mental impairment and that the ALJ improperly substituted his opinion for the opinions of the mental experts.

As noted above, a Mental RFC completed by Ernest E. Denny, M.D. on November 6, 1992, indicated that Plaintiff was "moderately limited" in his ability to understand and remember detailed instructions, in his ability to carry out detailed instructions, in his ability to maintain attention and concentration for extended periods, in his ability to perform activities within a schedule, in his ability to complete a normal workday without interrupts from psychologically based symptoms, in his ability to interact with the general public, in his ability to accept instructions and respond to criticism, and in his ability to get along with co-workers of peers without distracting them, in his ability to maintain socially appropriate behavior, and in his ability to set realistic goals. [R. at 129-30]. Dr. Denny noted that Plaintiff retained "the ability to

understand and follow simple, ordinary task instructions and retains the ability to interact adequately with coworkers and supervisors and retains the ability to adapt to routine working environments." [R. at 132].

A Psychiatric Review Technique ("PRT") Form was completed by Dr. Denny on November 6, 1992. [R. at 133]. He concluded that Plaintiff was moderately limited in his activities of daily living, slightly limited in maintaining social functioning, often had deficiencies of concentration, and once or twice had episodes of deterioration or decompensation. [R. at 140].

Plaintiff was examined by David T. Wells, M.D., on September 17, 1992. [R. at 243]. The examiner concluded that Plaintiff's "ability to complete tasks in a timely manner over a sustained period as taken from the mental status examination and reported activities is fair to poor." [R. at 244]. He concluded that Plaintiff suffered from "major depression, single, unspecified." Plaintiff's prognosis was described as "guarded." [R. at 244].

Plaintiff was examined March 10, 1995, by Minor Gordon, Ph.D. [R. at 327]. An I.Q. examination indicated a full-scale I.Q. of 72. [R. at 328]. The examiner noted that Plaintiff was in the "borderline retarded range." [R. at 328]. The examiner administered the Minnesota Multiphasic Personality Inventory exam, but noted that the protocol was invalidated either due to Plaintiff's difficulty reading or because Plaintiff was otherwise overwhelmed with problems and therefore unable to complete the exam. [R. at 328]. The examiner concluded that, in his opinion, it was doubtful that Plaintiff was "capable of performing any type of routine repetitive tasks on a regular

basis." [R. at 329]. The examiner completed a "medical assessment of ability to do work-related activities (mental)." He concluded that Plaintiff's abilities were all "fair" (defined as "ability to function in this area is seriously limited, but not precluded") or poor/none (defined as "no useful ability to function in this area"). [R. at 330].

Plaintiff was never treated by a psychiatrist and has never been in counseling. Nevertheless, Plaintiff alleges he is depressed. Plaintiff was initially referred to David T. Wells, M.D., who examined Plaintiff on September 17, 1992. He concluded that Plaintiff did suffer from depression and would have significant trouble performing tasks in a timely manner, and that Plaintiff's prognosis was "guarded." Plaintiff's file was evaluated by Ernest E. Denny, M.D. On November 6, 1992, Dr. Denny indicated that Plaintiff was "moderately limited" in numerous areas but that Plaintiff had the ability to perform simple and ordinary instructions. Plaintiff was then examined by a second examining doctor on March 10, 1995. [R. at 327]. Dr. Gordon noted that Plaintiff could probably not perform routine repetitive tasks on a regular basis, and indicated that all of Plaintiff's abilities were "fair" or "poor/none." [R. at 329].

Although Plaintiff was never treated for depression or any other mental impairment, Plaintiff was referred by the Social Security Administration for two consulting exams to evaluate Plaintiff's mental impairment. Both consulting examiners concluded Plaintiff suffered from depression which would affect his ability to work. In addition, Plaintiff's file was evaluated by a third doctor who also concluded that Plaintiff's ability to work was affected by his mental impairment. Therefore the only evidence in the record supports Plaintiff's claim of a mental impairment.

The ALJ addressed the opinions of the examiners in a limited manner. The following excerpts contain the complete discussion by the ALJ of Plaintiff's asserted mental impairment.

He says his depression started July 12, 1995. His only treatment for depression is medication; he does not go to counseling. His appetite is ok, but he has problems sleeping. He has no energy, but he feels good about himself. He has problems concentrating and remembering things.

[R. at 87].

On September 17, 1992, the claimant was examined by David T. Wells, M.D. He alleged depression, anger and hostility because he had not received VA or Social Security benefits. Dr. Wells found claimant to have moderate agitation with a severely depressed mood, but with no inappropriateness, no delusions or hallucinations, oriented times 3, good insight and judgment. Notwithstanding the lack of objective findings, he diagnosed claimant with Major Depression, single episode. However, no limitations were found other than being unable to complete tasks in a timely manner over a sustained period of time. The claimant alleged mental health problems on March 10, 1995, and although he had not been seen [sic] any counselors in the past, he was taking Amitriptyline. The claimant's full scale IQ was 72 and the overall picture was that of major depression with social withdrawal, isolation and alienation. The claimant would have some problems performing mental work-related activities.

[R. at 88].

There is only subjective evidence of any mental limitations, and these appear to be only related to his ability to concentrate and persist, and these may be related to his borderline IQ. There is no evidence that any mental problems creates [sic] problems in his personal or social activities, or any evidence of deterioration or decompensation. Any restrictions on activities of daily

living and social functioning are related to the claimant's personal perception of his pain and how it limits him.

Considering all of the evidence, and the criteria of SSR 88-13, I find that claimant has a residual functional capacity to perform a full range of light work subject to the ability to alternate positions at his discretion and only simple repetitive jobs due to poor concentration and borderline intellect.

[R. at 90].

Two problems are presented by the ALJ's decision. One, no evidence in the record supports the ALJ's conclusion that the sole limitation imposed by Plaintiff's alleged mental disorder is that Plaintiff can perform only simple repetitive jobs. In other words, even if the Court concludes that the ALJ adequately dealt with the opinions of the examining physicians, nothing in the record adequately supports the ALJ's conclusions. The ALJ's conclusion differs from the conclusions of the two examining physicians and does not include all of the limitations found by the consulting physician. Second, although the ALJ, in general terms, discounts some of the findings of the examining physicians, the ALJ does not deal with all of the findings of the examining physicians. Generally, the ALJ discounts the examining physicians because of their "subjective findings." As pointed out by Plaintiff, not all of the findings are solely "subjective." Furthermore, two examining physicians (one M.D. and one Ph.D.) concluded that Plaintiff had several limitations on his ability to function. The Court simply cannot completely discount their findings and replace them with the unsupported statements of the ALJ.

V. CONCLUSION

The record contains insufficient evidence to support the conclusions of the ALJ. On remand, the ALJ should further evaluate Plaintiff's alleged mental impairments and either properly discount the findings of the examining physicians, or present the impairments as determined by those physicians to a vocational expert.

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

Dated this 19 day of July 1999.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SHARON K. BARNETT,
SSN: 445-40-1238^{1/}

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{2/}

Defendant.

FILED

JUL 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-505-BU(J)

ENTERED ON DOCKET

DATE JUL 20 1999

REPORT AND RECOMMENDATION

Plaintiff, Sharon K. Bennett, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{3/} Plaintiff asserts that the Commissioner erred because (1) the ALJ ignored the medical evidence supporting Plaintiff's claims, (2) the ALJ failed to properly follow Luna, (3) did not include a hypothetical question to the vocational expert which adequately included Plaintiff's impairments, and (4) failed to consider the effect of Plaintiff's absenteeism on her

^{1/} Pursuant to N.D. LR 9.1, "[a]ny person seeking judicial review of a decision of the Secretary of Health and Human Services under § 205(g) of the Social Security Act (42 U.S.C. § 405(g)) shall provide, on the face sheet of the complaint, the social security number of the worker on whose wage record the application for benefits was filed." Plaintiff's complaint does not comply with this local rule. The Court points this out to Plaintiff's attorney for reference on future filings.

^{2/} The Court additionally notes that Defendant's attorney requested two extensions of time within which to file Defendant's response brief. Defendant was granted until March 22, 1999, to file a response. Defendant's response was not filed until March 31, 1999.

^{3/} Administrative Law Judge Richard J. Kallsnick (hereafter "ALJ") concluded that Plaintiff was not disabled on May 9, 1997. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on June 8, 1998. [R. at 6].

ability to maintain substantial gainful activity. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.^{4/}

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on October 10, 1943. [R. at 47]. Plaintiff was 52 years old at the time of her hearing before the ALJ. [R. at 301]. Plaintiff completed high school. [R. at 302]. Plaintiff claims she has been unable to work since December 25, 1995. [R. at 47]. Plaintiff is insured through September 30, 1996.

In her applications to the social security office, Plaintiff noted that she had difficulty driving her car because it had manual brakes. [R. at 68]. Plaintiff additionally noted that she was having heart problems but could not afford a heart specialist. [R. at 76]. Plaintiff claimed that cleaning a toilet was difficult, that she had to sit down to fold laundry, and that she was unable to run a sweeper. [R. at 76]. According to Plaintiff, she lives with her parents (due to her lack of income) but she is very restricted in the physical effort she can make to assist her parents. [R. at 76].

Plaintiff's medication list, completed April 24, 1997, indicated that Plaintiff was taking Quinidine and Triam for her heart, aspirin and Aleve for pain, Benedryl for allergies, and a multi-vitamin. [R. at 83].

Plaintiff was admitted on January 12, 1993 and discharged January 20, 1993. [R. at 89]. Plaintiff was treated for anemia and bronchitis. [R. at 89].

^{4/} The Court notes that Plaintiff includes a "comment to the court" section in her brief. Plaintiff explains that due to the "magnitude of the evidence," a five page brief is simply not sufficient. Plaintiff never requested permission to file a brief in excess of the page limitation. For future reference for Plaintiff, the Court notes that it has never refused a claimant additional pages in which to brief the issues, when Plaintiff has filed a motion requesting same.

On October 23, 1995, Plaintiff was examined by Ray Loffer, M.D. [R. at 123-25]. He noted that Plaintiff complained of foot numbness and dyesthesia.^{5/} He observed that Plaintiff has a recent MRI with mild bulging, no herniation, and no lateral entrapment. [R. at 123]. He additionally noted that Plaintiff drank as much as one pint of alcohol a day. He wrote that Plaintiff's main concern is her alcohol consumption. [R. at 125]. He also wrote, with regard to Plaintiff's back pain, "[e]ventually a mylogram [sic] might be of help, but with the normal MRI of [the] back and EMG of back, I am hesitant at this time to pursue such further." [R. at 125 (emphasis added)].

Plaintiff was treated by Gary W. Gibson, a chiropractor. By letter dated April 24, 1996, he wrote that he believed Plaintiff was totally disabled and would not sufficiently recover for her to be able to return to work. [R. at 129]. He noted her back pain and blood pressure. [R. at 129].

A "radiology report"^{6/} indicated that Plaintiff had had X-rays on November 15, 1994 which were "negative," and a lumbar subluxation at "-0-". [R. at 136].

Plaintiff complained that her heart had been beating stronger and that she had tightness in her chest on May 8, 1996. [R. at 141]. An ecocardiography report on May 14, 1996, was interpreted as showing no pericardial effusion. [R. at 139]. In

^{5/} Taber's Cyclopedic Medical Dictionary 590 (17th ed. 1993), defines dyesthesia as "abnormal sensations on the skin, such as experiencing a feeling of numbness, tingling, prickling, burning, or cutting pain."

^{6/} The "report" is a form. Only portions of the form are completed.

addition "no cause for reduced cardiac output" was seen on the study. [R. at 139]. On April 24, 1996, Plaintiff reported that her heart was feeling better. [R. at 144].

An April 15, 1996, an x-ray of Plaintiff's lumbosacral spine was interpreted as indicating no acute fractures or subluxations, but showing mild degenerative disc disease at L3-4. [R. at 147]. A October 3, 1995 MRI indicated a central disc bulge as opposed to herniation at the L-4 level. [R. at 176].

A RFC Assessment completed March 12, 1996, indicates Plaintiff can occasionally lift 50 pounds, frequently lift 25 pounds, stand or walk six hours in an eight hour day, and sit six hours in an eight hour day. [R. at 227]. In addition, the doctor noted that Plaintiff's pain did not further limit her RFC. The Assessment was "affirmed as written" on July 7, 1996. [R. at 234].

Plaintiff complained of some paresthesias in her legs and hands on October 9, 1997. [R. at 289]. Plaintiff complained of hand paresthesias on November 20, 1997. [R. at 287].

Plaintiff testified, at the hearing before the ALJ, that her primary impairments were her back and her feet, and that her heart sometimes bothered her. [R. at 312]. Plaintiff stated that nobody was currently treating her for her feet. [R. at 315]. According to Plaintiff she no longer drinks alcohol to control the pain, but instead takes pain pills. [R. at 316]. Plaintiff stated that she takes Aleve for the pain. [R. at 318]. Plaintiff testified that she can cook, but that she does her cooking in stages. [R. at 321]. Plaintiff additionally stated that although she does her grocery shopping, she requests that all of the heavy items be separated so that she can carry them. [R. at

317]. Plaintiff believes that she could sit for approximately 45 minutes before she would have difficulty. Plaintiff additionally testified that her hands became numb and at night sometimes three fingers would go dead. [R. at 323]. According to Plaintiff, if she is fortunate, she is able to sleep six to seven hours at night. [R. at 432]. On a scale of one to ten, Plaintiff believes that her pain is usually a five, but on occasion can be an eight. [R. at 324].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{7/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

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

^{7/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

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

42 U.S.C. § 423(d)(2)(A).

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

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

"The finding of the Secretary^{8/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to

^{8/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff has the residual functional capacity ("RFC") to perform light work, subject to limitations of only occasional stooping, bending, or crouching. The ALJ found that Plaintiff could return to her past relevant work as a sandwich assistant, a money counter, a secretary, an assembler, or a short order cook.

IV. REVIEW

ALJ IGNORED MEDICAL EVIDENCE^{9/}

Plaintiff initially asserts that the ALJ's finding with regard to Plaintiff's credibility is error and that "no reasonable mind can see it differently." Plaintiff does not provide specifics in his brief, but refers the Court to the brief previously filed by Plaintiff's representative when Plaintiff appealed from the decision of the ALJ. The previously filed brief is included in the record on appeal.

In the brief submitted to the Appeals Council, which is primarily what Plaintiff relies upon to develop Plaintiff's first argument, Plaintiff first states that the ALJ heard Plaintiff's case on April 24, 1997 and for some reason commented in his decision that Plaintiff had not seen her Nowata treating physician since "July 1997." Plaintiff suggests that the ALJ could not have known this fact because the hearing occurred in April 1997. Initially, the Court notes that the "1997" date must be a typographical error. The ALJ issued his decision on May 9, 1997. [R. at 22]. The ALJ therefore could not be referring to Plaintiff's failure to see her physicians at the Nowata County Rural Health Clinic "since July 1997," because that date had not yet occurred. [R. at 19]. However, the Nowata health records do end in July 1996. [R. at 235]. Obviously the ALJ intended the "July 1997" date to be "July 1996." This error appears to be a clearly typographical error and, upon review of the medical records and

^{9/} Plaintiff's first "issue" is over one paragraph in length. In addition, in her first issue, Plaintiff incorporates her entire brief (a nine page single-spaced brief with a 19 page attachment) which was presented to the Appeals Council and appears in the record on appeal. The Court addresses each of these arguments under the label of Plaintiff's "first issue on appeal" because that is the manner in which Plaintiff has presented the arguments to the Court.

the ALJ's decision, easily reconcilable. As such, the Court does not believe that it constitutes reversible error.

Plaintiff asserts that although the ALJ claims that he followed SSR 96-7p, the ALJ only "went through the motions" and did not specifically develop the record with regard to Plaintiff's credibility. Plaintiff asserts that the ALJ has not followed the appropriate regulations or applicable case law. Plaintiff additionally refers to Luna.

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

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

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

[T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are

peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.").

Plaintiff asserts that the ALJ quotes Luna but that the ALJ failed to follow Luna. Plaintiff claims that the ALJ's decision contains no discussion or analysis of Plaintiff's pain. The Court disagrees with Plaintiff's assertion. The ALJ does devote some of his decision to the general language and wording of Luna. The ALJ also, however, notes that Plaintiff did not complain of numbness in her arms to her treating physicians,^{10/} that Plaintiff takes only over-the-counter medications for her pain, that Plaintiff did not see her Nowata treating physicians since July 1996.^{11/} The ALJ additionally noted some of Plaintiff's activities which included some limited housework and grocery shopping. The ALJ also observed that Plaintiff's x-rays indicated only mild

^{10/} Plaintiff asserts that the ALJ is incorrect in this statement. The Court addresses this issue at page 14 of this decision.

^{11/} Note that Plaintiff also disagrees with this characterization by Plaintiff. As noted by the Court, the Court concludes that this is an obvious typographical error.

degenerative disc disease, and that her atrial fibrillation was not a problem. [R. at 17]. The ALJ noted the lack of findings by treating physicians, the lack of objective medical support for Plaintiff's complaints, the lack of medication for pain, and Plaintiff's lack of discomfort at the hearing. [R. at 18]. The ALJ observed that Plaintiff's range-of-motion was normal for her back, and that when Plaintiff was treated for a lesion on her leg she did not complain of pain in her back. [R. at 19].

The Court has fully reviewed the decision of the ALJ and concludes that it adequately complies with Luna.

Plaintiff additionally asserts that a claimant does not "have to be writhing in anguish and pain on the courtroom floor in front of the judge to be found disabled." [R. at 259]. Plaintiff is correct. However, the court cases are additionally clear that the mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment."). Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff argues that Plaintiff ignored the evidence submitted by Dr. Gary W. Gibson, D.C., one of Plaintiff's treating physicians. Dr. Gibson, a chiropractor, opined that Plaintiff was disabled. Plaintiff is incorrect in her assertion that the ALJ ignored the evidence from Dr. Gibson. The ALJ specifically stated that the evidence was

considered but that it "was given reduced weight because he did not perform the sophisticated tests performed by the claimant's treating physicians," and because it was from a chiropractor.^{12/} [R. at 19]. In addition the chiropractor based his opinion on Plaintiff's lower back pain and her pulse rate. Plaintiff was treated for her pulse rate and blood pressure by another doctor. It was not error for the ALJ to rely on that doctor's opinion of Plaintiff's condition. Plaintiff's was treated by several physicians for her back. Several of Plaintiff's doctors reported that Plaintiff had a "normal MRI" or "mild degenerative" condition. The findings of these physicians are not inconsistent with the conclusions of the ALJ. As noted by the ALJ, the chiropractor's letter lacked support from medical evidence or tests.

Plaintiff suggests that it was unfair of the ALJ to discount the chiropractor's opinion because, pursuant to Oklahoma law a chiropractor is prohibited from performing invasive tests. Plaintiff's argument is novel. However, if a chiropractor cannot perform objective tests to support his opinion, than an ALJ does not commit error by crediting the opinions of the treating physicians and the objective medical findings over the unsupported opinion testimony. Regardless, under the circumstances of this case, the Court concludes that the ALJ did not commit reversible error.

Plaintiff asserts that the ALJ obviously selected only those records which supported his decision and ignored the other numerous medical records. The Court has reviewed the entire record on appeal. As summarized and noted above, the MRIs,

^{12/} A "chiropractor" is considered "information from other sources" pursuant to the regulations. 20 C.F.R. 404.1514(e)(3).

nerve conduction studies, and x-rays suggest Plaintiff has a mild degenerative condition of her back. The tests performed on Plaintiff's heart do not indicate any obvious impairment. A completed RFC Assessment indicates Plaintiff can lift 50 pounds occasionally, 25 pounds frequently, sit for six hours in an eight hour day and stand or walk for six hours in an eight hour day. The Court concludes that the ALJ's findings are consistent with the medical records.

Plaintiff asserts that she has not alleged that she is "totally disabled," and that she does not have to prove that she is "totally disabled." Plaintiff refers the Court to an Eighth Circuit case suggesting that a claimant does not have to be bedridden to be disabled. Plaintiff's language of "totally disabled" is a bit misleading. A claimant, to qualify for social security benefits must be "totally" disabled within the meaning of the Social Security Act. Generally, if a claimant cannot perform substantial gainful activity the claimant is disabled. Plaintiff seems to suggest that evidence that a Plaintiff cooks, cleans, or shops for groceries does not constitute substantial evidence that a Plaintiff can substantial gainful activity. The Court accepts Plaintiff's premise. However, such evidence can be used to contradict a Plaintiff's testimony that she has such severe pain that certain activities are precluded. Regardless, Plaintiff does not apply this general argument to the specifics of her case.

Plaintiff asserts that the ALJ unfairly reviewed her case because he included general language indicating that each exhibit had been reviewed yet some exhibits were not specifically cited in the decision for various reasons including illegibility, duplicity, and duplicate diagnoses. [R. at 262]. The Court agrees with Plaintiff that

this language is included in numerous ALJ opinions. However, the Court does not fathom how this constitutes reversible error.^{13/}

Plaintiff states that the ALJ referenced Plaintiff's failure to complain of numbness in her arms to a treating source in evaluating her credibility. Plaintiff refers to 21 separate entries stating that the entries by the doctors support her claim.^{14/} The Court has reviewed all 21 entries referenced by Plaintiff. Nineteen of the entries refer solely to tingling of the feet, or difficulty with her bilateral lower extremities (feet). The ALJ's reference was to Plaintiff's complaints of numbness of her arms. The January 12, 1996, reference by Plaintiff does mention Plaintiff's shoulder and tingling numbness or pain. [R. at 130]. The October 23, 1995 examination notes that Plaintiff stated she had "no weakness or numbness of her hands but for certain position." Therefore, of all of the entries noted by Plaintiff, two entries suggest that Plaintiff complained of some arm, shoulder, or hand numbness. The Court cannot conclude that the ALJ erred by suggesting that Plaintiff, if she had been experiencing

^{13/} Plaintiff suggests she should not be held accountable for illegible records. The ALJ is simply stating that he cannot consider what he cannot read. The record does contain several virtually indecipherable records which appear to be referring to Plaintiff's hysterectomy. [R. at 84, 85]. Plaintiff does not suggest how this resulted in prejudice to her. Plaintiff additionally suggests that good physicians would give similar diagnoses. As the Court interprets the ALJ's language, he may not specifically cite to each of the exhibits where two or more doctors made the same diagnosis. The ALJ is not suggesting that he would ignore the doctors' opinions. The ALJ is suggesting only that he would not separately deal with each diagnosis if several doctors made the same diagnosis.

^{14/} Of course since Plaintiff merely incorporated her brief to the Appeals Council, this argument does not separately appear in Plaintiff's brief before this Court. Consequently, Plaintiff has not provided the page numbers to the Court for the entries Plaintiff is referencing. In the future, the Court would prefer that Plaintiff's counsel file a motion to exceed the page limitation so that this type of information can be provided to the Court.

such discomfort, would have complained more frequently to her treating sources.^{15/}

EVALUATION OF LUNA AND THE MEDICAL EVIDENCE

Plaintiff asserts that the ALJ erred in his credibility analysis and did not properly follow Luna. Plaintiff merely repeats those arguments which previously appeared in Plaintiff's brief to the Appeals Council and which have been addressed above. Plaintiff does not specify how the ALJ violated Luna. Plaintiff generally alleges that the ALJ ran "rough-shod over the evidence" and that the ALJ's "rationale in this case is so faulty it flies in the face of the truth of the matter." Plaintiff's Brief at 3. The Court has reviewed the medical record. The ALJ did not dismiss the evidence as suggested by Plaintiff. As noted above, several doctors noted the "normal MRI" and the "mild" degenerative disease. A RFC assessment concludes that Plaintiff could perform light work. None of Plaintiff's treating physicians^{16/} have placed limiting restrictions on her. The Court concludes that the ALJ adequately assessed and evaluated the medical record.

HYPOTHETICAL QUESTIONS TO VOCATIONAL EXPERT

Plaintiff asserts that the hypothetical question to the vocational expert did not "relate with precision" all of Plaintiff's impairments and that this failure constitutes

^{15/} The Court notes that the additionally submitted medical records indicate that Plaintiff complained in October and November 1997 of hand parathesias. [R. at 287, 289]. Plaintiff does not refer the Court to these records. The Court additionally notes, however, that Plaintiff's insured status expired on September 30, 1996. Nevertheless, the Court discounts the ALJ's reference of Plaintiff's lack of reference of hand numbness to her treating sources. However, even if the Court discounts this portion of the ALJ's decision, the Court concludes that the record still contains substantial evidence to support the ALJ's conclusion that Plaintiff is not disabled.

^{16/} As noted, Plaintiff's chiropractor did write a letter stating that he believed Plaintiff was disabled.

error. Plaintiff does not specify the impairment which the ALJ neglected to include in the hypothetical question.

The ALJ asked Plaintiff to consider a 53-year old female with a 12th grade education who had the capability of performing light or sedentary work, and could use hand controls but would be limited to occasional stooping, bending, crouching, crawling, and similar activities. The individual would experience mild to moderate pain but could remain attentive. [R. at 330]. Plaintiff does not explain how this hypothetical does not adequately include her limitations. Absent argument by Plaintiff as to exactly what the ALJ failed to include in his hypothetical question, the Court is unable to evaluate Plaintiff's argument. Regardless, the Court concludes that the ALJ adequately included each of Plaintiff's impairments and that the vocational expert testimony therefore constituted substantial evidence to support the ALJ's decision. See Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995) (an ALJ need include only those limitations in the question to the vocational expert which he properly finds are established by the evidence.); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

ABSENTEEISM

Plaintiff asserts that due to "absenteeism" she is unable to perform substantial gainful activity. Plaintiff did not present this argument to the ALJ, but did argue this at the Appeals Council level.

Initially Plaintiff claims that an individual can be absent no more than 5%. Plaintiff does not provide any support for this assertion. Plaintiff claims that she had

absences for 119 days when she was in a doctor's office, hospital, or clinic.^{17/} [R. at 261]. Plaintiff seems to suggest that each appointment translates into a complete day missed from work. The Court is unable to make this correlation. Numerous visits by Plaintiff to her doctor would not have required Plaintiff to miss a complete day of work. Certainly Plaintiff could schedule some appointments for either before or after work or during her lunch hour. The Defendant additionally notes that due to the lack of severity of Plaintiff's impairments Plaintiff does not need to visit her doctors as frequently as she has suggested. The Court declines to further evaluate an issue which was not fully developed by the record. The Court concludes that Plaintiff's argument cannot be accepted due to Plaintiff's lack of support in the record for the absenteeism rate (of 5%) and the fact that 119 doctor visits does not necessarily translate into 119 full day absences from work.^{18/}

V. RECOMMENDATION

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

VI. OBJECTIONS

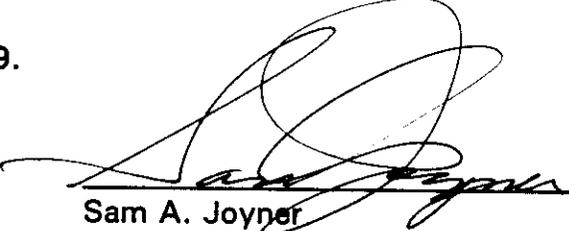
The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or

^{17/} Some of Plaintiff's doctors visits were for treatment unrelated to her alleged impairments. For example, Plaintiff had a lesion removed from her leg. This required several visits, and presumably would not have to be repeated.

^{18/} Plaintiff has projected absences (based on her doctors records) for 1992 through 1997. During a portion of this time she worked. Plaintiff could have provided information as to her actual absences to the Appeals Council.

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

Dated this 19 day of July 1999.


Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 20 Day of July, 1999.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TRACY B. WESSON,
o/b/o SUMEKO D. REX
SSN: 443-78-1042

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 97-CV-705-EA

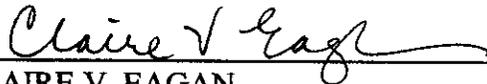
ENTERED ON DOCKET

DATE JUL 20 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 19th day of July 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

TRACY B. WESSON,
o/b/o SUMEKO D. REX
SSN: 443-78-1042

Plaintiff,

v.

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

Defendant.

JUL 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-705-EA

ENTERED ON DOCKET

DATE JUL 20 1999

ORDER

Claimant Tracy B. Wesson, on behalf of Sumeko D. Rex, a minor child, requests judicial review pursuant to 42 U.S.C. § 405(g) 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 June 24, 1994, claimant applied 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 (August 17, 1994), and on reconsideration (November 2, 1994). A hearing before Administrative Law Judge Larry C. Marcy (ALJ) was held August 17, 1995, in Tulsa, Oklahoma. By decision dated August 25, 1995, the ALJ found that claimant was not disabled at any time through the date of the decision. On June 20, 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. § 416.1481.

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

I. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

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 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.

The statutes and regulations in effect at the time of the ALJ's decision in this matter required application of a four-step evaluation process to claims for disability benefits made on behalf of a

child.³ See 42 U.S.C. § 1382c(a)(3)(A) (1994); 20 C.F.R. § 416.924(b) (1994). After the ALJ's decision, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996). This Act amended the substantive standards for the evaluation of children's disability claims. The statute currently reads:

An individual under the age of 18 shall be considered disabled for the purpose of this subchapter if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. § 1382c(a)(3)(C)(i) (Supp. 1998). The notes following the Act provide that this new standard for the evaluation of children's disability claims applies to all cases which have not been finally adjudicated as of the effective date of the Act (August 22, 1996). This includes cases in which a request for judicial review is pending. Brown et al. v. Wallace v. Callahan, 120 F.3d 1133, 1135 (10th Cir. 1997) (applying new standards to a children's disability appeal). Consequently, this new Act applies to the claimant's case.

The regulations which implement the Act provide that a claimant's impairment must meet, medically equal, or functionally equal in severity the set of criteria for an impairment listed in the

³ First, the Commissioner determined whether the minor was engaged in substantial gainful activity. If she was, the minor was considered not disabled. If the minor was not engaged in substantial gainful activity, the Commissioner then proceeded to the second step to determine whether the minor's impairment was severe. If the impairment was not severe, the minor was considered not disabled. If the minor's impairment was severe, the Commissioner then proceeded to the third step to determine whether the minor had an impairment that met or equaled the severity of one of the impairments listed at 20 C.F.R. Pt. 404, Subpt. P., App. 1 ("the Listing"). If the minor's impairment was of Listing severity, the minor was considered presumptively disabled. If the minor's impairment was not of Listing severity, the Commissioner then proceeded to the fourth step to determine whether the impairment was of "comparable severity" to an impairment that would disable an adult. 20 C.F.R. § 416.924(b)-(f).

Listing of Impairments in 20 C.F.R. Pt. 404, Subpt. P, App. 1. 20 C.F.R. § 416.924(d). The new regulations effectively eliminate step four of the analysis under the prior statute and regulations. Brown, 120 F.3d at 1135 (“In reviewing the Commissioner’s decision, therefore, we do not concern ourselves with his findings at step four of the analysis; we ask only whether his findings concerning the first three steps are supported by substantial evidence.”). At step three, an ALJ is “required to discuss the evidence and explain why he found that [claimant] was not disabled” in his written decision. Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996). However, a claimant bears the burden of proving that a Listing has been equaled or met. Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988). Accordingly, claimant is disabled under the new standard only if claimant can establish that her condition meets or equals a Listing at step three of the sequential evaluation process.

II. CLAIMANT’S BACKGROUND

Claimant was born on January 22, 1981, and was 14 years old at the time of the administrative hearing in this matter. She claims that she became disabled on February 15, 1994, due to psychological problems arising from her father’s conviction and subsequent incarceration for murdering two people. She also claims trauma arising from the subsequent death of a man who was her mother’s friend and who was a “father figure” to her after her biological father was incarcerated. Her mother’s friend died as a result of the Oklahoma City bombing in April 1995.

Claimant testified that she does not sleep in her own bedroom since her father’s arrest. She sleeps on the floor in her mother’s bedroom or in the living room. (R. 40, 50) She claims that she is afraid to go to sleep because of a recurring nightmare that wakes her about three times a week.

She describes the nightmare as one in which the two people her father killed rise up from their graves and chase her. (R. 66-68)

During the summer of 1995, she awoke at 2:00 or 4:00 o'clock in the morning and played quietly with her dog until her mother awoke, then she went back to bed around 7:00 a.m. and slept until 9:00 a.m. (R. 40, 49) Claimant stated that she likes her dog because her dog would not do anything to make her mad or sad. (R. 51) She watches television, and picks up after herself in the living room. (R. 40) She attended a week-long basketball camp in the summer, and she plays basketball at school. (R. 41-42) She also babysits. (R. 42) She regularly visits an elderly neighbor, and she spends time with her 15-year old best friend. She testified that she does not get along with other children at school because she keeps to herself a lot, but she could have more friends if she tried. (R. 43-44, 50) She goes to church. (R. 46)

She described her problem as her father's incarceration. She said she was not sad, but she felt angry and guilty about the matter. (R. 44) She loves him, and she could visit him four days a week if she wanted. She gets along with her mother, but she does not talk to anyone other than her counselor, Donna Dye, about her problems. (R. 45-46) She sees Ms. Dye at a clinic once a week, and she has seen a doctor about her problems as well. (R. 46) She takes no medication, except some over-the-counter medications that her mother gives her to help her sleep. (R. 46-47, 65) She claims that she does not laugh, talk or cry as much as she did before her father was incarcerated. (R. 47) She has chest or stomach pains about twice a month. (R. 48-49) Her counselor told her that the pain resulted because she was "holding everything in." (R. 48) She cries when her stomach hurts or if she does not feel well. (R. 51-52)

She testified that she has no problems reading, writing, or doing math (other than having to review "old notes" to remember how to add and subtract). (R. 41) She liked elementary school, and she said that she usually made A's and B's before her father was incarcerated. (R. 52) She claimed that, after his incarceration, she had one A and the rest of her grades were D's and F's. (R. 54) Before her father's incarceration, she got along with her teachers, but, afterwards, she did not like anyone, and she began to get into trouble at school for telling certain male teachers to leave her alone or to shut up. (R. 52-53) She stated that she got along fine with her female teachers until they told her what to do. (R. 53) She weighs 98 pounds, diets, and eats only one meal a day. (R. 54-55)

Claimant's mother testified that she observed a "drastic change" in claimant after the incident with her father, and that she filed for Social Security benefits to get some help for claimant. (R. 56) She has no insurance to pay for the help. (Id.) She said that her daughter was a leader, outgoing, outspoken, and sure of herself until the incident. Afterwards, claimant would not talk, and she dropped all her friends except her best friend. (R. 56-57, 62) Claimant's mother confirmed claimant's testimony about her sleeping and eating habits, as well as her "disrespect for authority," her alleged physical problems, and her recurring nightmares. (R. 58-59, 65)

Claimant's father, according to the mother, was a role model for her daughter, and claimant became very upset when they learned of his arrest. (R. 57) Claimant's mother also testified that claimant was upset and confused when a man whom claimant's mother was dating was killed in the Oklahoma City bombing. She stated that claimant was "beginning to have a relationship with another adult male that could have been, you know, was a father figure for her." (R. 60) She reported that claimant's counselor, Donna Dye, recommended anti-depressant medication and that claimant see a physician. (R. 61)

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fourth step of the sequential evaluation process applicable under the 1994 statute and regulations to claims for disability benefits on behalf of a minor child. He found that claimant had severe impairments, but none that were the same or medically equivalent to a impairment described in the Listing of Impairments. He stated: "Specific emphasis has been given to Listing 112.04 in Part B - mood disorders and in 12.03, 12.04, 12.06, and 12.07 in Part A of the Listing of Impairments." (R. 16). He explicitly referenced claimant's "depression and emotional problems." (R. 17) The Part A disorders to which the ALJ referred are schizophrenic, paranoid and other psychotic disorders (12.03); affective disorders (12.04); anxiety related disorders (12.06); and somatoform disorders (12.07). Part B specifically describes the medical criteria for evaluating impairments of children under the age of 18 where criteria in part A do not give appropriate consideration.

The ALJ also determined that claimant's impairments were not functionally equal to any listed impairment. "The medical record establishes that claimant has depression and an anxiety related disorder (post-traumatic stress) but there is no evidence that these impairments have resulted in marked restriction of age-appropriate activities of daily living or marked difficulties in maintaining age-appropriate social functioning." (R. 17) He emphasized that her activities were age-appropriate and then proceeded to discuss at length his determination at step four that claimant's impairments were not of a comparable severity to impairments that would disable an adult. (R. 17-20) He thus concluded that claimant was not under a disability as that term is defined in the Social Security Act. (R. 21)

IV. REVIEW

Claimant asserts as error that the ALJ: (1) rejected “the opinion of claimant’s treating therapist solely because it was not an opinion by a physician without calling a medical advisor to testify at the hearing”; or (2) failed “to obtain a consultative examination where there is objective evidence that the claimant’s condition had worsened since the previous consultative examination.” (Pl. Br., Docket # 7, at 1.) The Commissioner asserts that, because of the change in the law while this matter was pending, the sole issue on appeal is whether the child has an impairment that either meets or equals a listed impairment. (Def. Br., Docket # 12, at 2.) The Court will consider all three arguments.

Listings

In this matter, the ALJ identified the relevant listings. Although he did not specifically outline the relevant Listing criteria, he did address them through his discussion of the medical evidence in his step four determination. The listings identified by the ALJ were 112.04 (mood disorders) in Part B (medical criteria for the evaluation of impairments of children), and 12.03 (schizophrenic, paranoid and other psychotic disorders), 12.04 (affective disorders), 12.06 (anxiety related disorders); and 12.07 (somatoform disorders) in Part A (medical criteria for the evaluation of adults and, where appropriate, children). The regulations require the Commissioner to assess the severity of a child’s mental impairments according to the functional limitations imposed by the impairment or impairments. 20 C.F.R. Pt. 404, Subpt. P, App. 1., § 112.00(C). The Commissioner considers four functional areas for adolescents: cognitive/communicative function; social function; personal function; and concentration, persistence, or pace. *Id.*, § 112.00(C)(4).

The ALJ thoroughly analyzed and discussed all of the evidence of record. He acknowledged that claimant has an anxiety-based disorder triggered by her knowledge of her father's crime. (R. 17) However, he found no evidence that claimant had any type of cognitive, motor skills, communication, or social deficit, and no deficit in concentration, persistence, and pace. He recognized that claimant had a personal and behavioral deficit, but he did not deem it disabling. He noted that no physician had ever stated that the claimant was disabled or totally incapacitated. (R. 19) Further, the testimony of claimant and her mother as to the severity of claimant's condition was not corroborated by the objective medical evidence. (Id.)

Claimant learned of her father's legal trouble in early 1994, when she was in seventh grade. As the ALJ pointed out, claimant's grades were not A's and B's before her father's incarceration (as claimant and her mother testified). During claimant's fourth, fifth, sixth, sixth and seventh grade years, her grades were primarily B's and C's. Her only "A" grades occurred in sixth grade physical education classes. (R. 98-101) Claimant's school counselor noted claimant's problems with anger and respect during claimant's seventh and eighth grade years. (R. 102-03) She stated that claimant was an underachiever because she had the ability and no physical limitations, but she was apathetic and did not apply herself. In social situations, claimant exhibited a "polar" attitude -- either very outgoing or very apathetic. (R. 102) She remarked that claimant displayed "typical" behavior with adults that she felt were too authoritarian. (Id.) The counselor commented that claimant "does not bond easily" and "really regressed over the summer." (R. 103) While claimant's problems at school may not be desirable or even healthy, they do not evidence disability.

Claimant began attending weekly counseling sessions at the Family Mental Health Center in April 1995. She was initially diagnosed with post-traumatic stress disorder and bereavement. (R.

125-27,140-43) Donna Dye, L.P.C., was assigned to be her counselor/therapist. (R. 143) Claimant's testimony at the administrative hearing reflects the same problems that claimant discussed with Ms. Dye. However, her discussions with Ms. Dye were more detailed, for obvious reasons.

Claimant disclosed to Ms. Dye that she corresponded with her father weekly. (R. 139) She also talked about the problems she experienced at school. (R. 138) She was suspended from school for a day in May 1995. (R. 137) As examples of things that made her angry, she told about her mother not coming home when she expected and about her mother sending her report card to her father. (Id.) After her graduation from middle school, she indicated that she wanted friends to stay at her home until midnight or 1 a.m., but her mother made them leave by 10 p.m. (R. 135) Claimant's relationship to her mother appeared to improve over the summer of 1995. (R. 134) Claimant reported that her nightmares were "not as bad" and agreed to try some tasks to prevent any danger as a result of her sleepwalking. (R. 133) She agreed to stop watching horror films -- especially by herself late at night. (R. 132) Claimant became depressed again after visiting her father and after she and her mother moved in to a new house. (R. 132) Claimant expressed her fears about going to high school. (R. 130) Again, none of this evidence is inconsistent with the ALJ's findings; nor does it mandate a finding of disability.

Medical Expert

In August 1995, Ms. Dye completed a "Medical Source Statement" requested by claimant's attorney. (R. 144-48; see R. 129) She stated that claimant "evidences emotional and social disturbance related to recent traumas in her life . . . [claimant] has not expressed emotions or cried as would be expected in her circumstances. She has extreme distrust and loss of interest in normal activities." (R. 145). She rated claimant's limitation of cognition and intellectual functioning and her

interference with motor development as “slight”; her difficulties in communication as “moderate”; her difficulties in maintaining social functioning and interference with age appropriate personal-behavioral skills as “marked”; her deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner as “often”; and her episodes of deterioration or decompensation in work or school settings as “repeated (3 or more).” (R. 148) Ms. Dye also stated that claimant’s impairment lasted or could be expected to last at least 12 months. (R. 145) She recommended that claimant see a psychiatrist for testing, evaluation, and medication. (R. 147)

The ALJ specifically discounted Ms. Dye’s assessment of claimant’s mental condition because she is not an acceptable source for medical evidence pursuant to 20 C.F.R. § 416.913. (R. 19) Although she may provide information concerning how claimant’s impairment affects her ability to function independently, appropriately, and effectively in an age-appropriate manner, see 20 C.F.R. § 416.913(e), her opinion is entitled to less weight than that of a medical doctor.

If Ms. Dye were a treating physician, the Commissioner would give controlling weight to her opinion if it was well supported by clinical and laboratory diagnostic techniques and if it was not inconsistent with other substantial evidence in the record. Id. § 416.927(d)(2). In fact, Tenth Circuit law would require that substantial weight be given to her opinion unless good cause was shown for rejecting it. See Goatcher v. United States Dep’t. of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995) (citations omitted.) As set forth above, the ALJ had good cause for rejecting her opinion. He accurately noted that it was not well supported by clinical and laboratory diagnostic techniques and was not consistent with other substantial evidence in the record. (R. 20) The ALJ was not required to give it controlling weight.

Even if she could be deemed a treating physician, the final responsibility for determining the ultimate issue of disability is reserved to the Commissioner, 20 C.F.R. § 416.927(e)(2). Thus, Ms. Dye's opinion, provided at the request of claimant's attorney, was not binding on the Commissioner in making his ultimate determination of disability. The ALJ did not err by disregarding Ms. Dye's opinion.

Consultative Examination

Nor did the ALJ err by not ordering a second consultative examination by a medical doctor. George Blake, M.D., performed a consultative mental examination of claimant in August 1994. His report recounts claimant's history as claimant's mother testified at the administrative hearing, except claimant's mother stated that claimant wakes up at 8:00 a.m. on an average day and was "hard to get moving." (R. 119) She added that claimant took care of her personal hygiene and grooming and makes her bed. Claimant also prepared breakfast for the children she babysat, and she read "all the time." (*Id.*) Dr. Blake's comments are unremarkable other than his comments that claimant's attitude was defensive, her mood, somewhat frightened, and her affect, "somewhat blunted." (R. 120) He diagnosed claimant as having post-traumatic stress disorder. (*Id.*)

There was no objective evidence of a severe impairment, and no significant change in claimant's condition triggered by the death of a father figure, her mother's boyfriend of the two years preceding his death, which required a second consultative examination. The progress notes from claimant's visits to the Family Mental Health Clinic indicate that claimant's condition was the same before and after the friend's death, and claimant continued to attribute her problems to her father's incarceration. There is no indication of a change in her condition that was likely to affect her ability

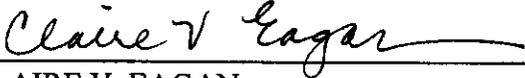
to function independently, appropriately, and effectively in an age-appropriate manner, where the current severity of her impairment was not established. See 20 C.F.R. § 416.919a(b)(5).

The ALJ has broad latitude in ordering a consultative examination. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 778 (10th Cir. 1990). "The ALJ does not have to exhaust every possible line of inquiry in an attempt to pursue every potential line of questioning. The standard is one of reasonable good judgment. The duty to develop the record is limited to 'fully and fairly develop[ing] the record as to material issues.'" Hawkins v. Chater, 113 F.3d 1162, 1168 (10th Cir. 1997) (citations omitted). Claimant failed to establish the need for a second consultative examination.

V. CONCLUSION

The Court acknowledges that claimant had some psychological problems as a result of trauma that no child should have to experience. Unfortunately for claimant, these problems do not entitle claimant to disability benefits under the applicable statute and regulations. The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is **AFFIRMED**.

DATED this th 19 day of July, 1999.

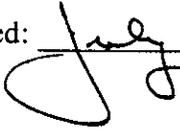


CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

the above-captioned action, as well as all claims and counterclaims associated therewith, with prejudice.

IT IS SO STIPULATED:

Dated: July 15, 1999



ROLEX WATCH U.S.A., INC.

By: John Macaluso

John Macaluso

GIBNEY, ANTHONY & FLAHERTY, LLP.

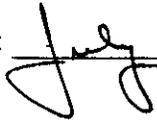
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Dated: July 16, 1999



DEAN WRIGHT JEWELERS AND DEAN
DOUGLAS WRIGHT

By: James Tilly

James Tilly

James Tilly & Associates

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Suite 2220

P.O. Box 3645

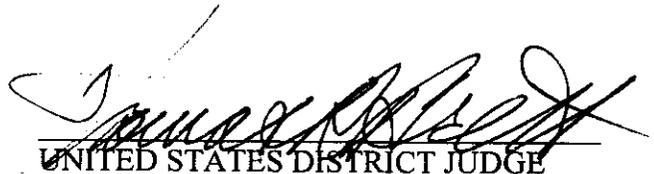
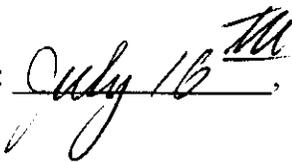
Tulsa, OK 74101-3645

Telephone: (918) 583-8868

Facsimile: (918) 584-3162

IT IS SO ORDERED.

Dated: July 16TH, 1999



UNITED STATES DISTRICT JUDGE

F I L E D

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

JUL 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BED-CHECK CORPORATION

Plaintiff,

versus

KOREGON ENTERPRISES, INC

Defendant.

Case No. 99-CV-00212 BU (B)

Judge Michael Burrage

ENTERED ON DOCKET

DATE JUL 19 1999

PLAINTIFF'S NOTICE OF DISMISSAL WITHOUT PREJUDICE

COMES NOW Plaintiff, BED-CHECK CORPORATION ("Bed-Check"), through its undersigned counsel, and hereby dismisses without prejudice, Pursuant to F.R.C.P. 41(a)(1), all claims in the above-styled lawsuit.

In support of this instant Notice of Dismissal, Plaintiff would have the Court know that dismissal without approval of the Court is appropriate because Defendant has not yet filed an answer in this case. Dismissal without prejudice is appropriate because Plaintiff has not previously dismissed an action — in any court of the United States or in any state court — based on or including any claim in the instant lawsuit.

WHEREFORE, Plaintiff respectfully requests that this Court issue an order Dismissing without Prejudice the above styled action.

Respectively submitted,



TERRY L. WATT (OBA # 16,745)
ROY C. BREEDLOVE (OBA # 1,097)
FELLERS, SNIDER, BLANKENSHIP, BAILEY
& TIPPENS, P.C.
The Kennedy Building, Suite 800
321 South Boston
Tulsa, Oklahoma 74103-3318
(918)599-0621

Attorneys for Plaintiff

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

F I L E D

JUL 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IVANIA D. LAWRENCE,)

Plaintiff,)

vs.)

No. 95-C-639 -E ✓

STATE FARM FIRE AND CASUALTY)
COMPANY,)

Defendant.)

ENTERED ON DOCKET
DATE JUL 19 1999

ADMINISTRATIVE CLOSING ORDER

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

If, within thirty (30) days of a final adjudication of the bankruptcy proceedings the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

ORDERED this 16th day of July, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

F I L E D

JUL 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

-----X

ROLEX WATCH U.S.A., INC.,

Plaintiff,

- against -

DEAN WRIGHT JEWELERS and
DEAN DOUGLAS WRIGHT,

Defendants.

-----X

CIVIL ACTION NO. 98-C-477-B(EA)

ENTERED ON DOCKET
DATE JUL 19 1999

STIPULATED PERMANENT INJUNCTION

1. Plaintiff Rolex Watch U.S.A., Inc. ("Rolex") and defendants Dean Wright Jewelers and Dean Douglas Wright ("the Wright Defendants") by and through their counsel of record, stipulate and agree to entry of a permanent injunction under Federal Rule of Civil Procedure 65, enjoining and restraining defendants, their officers, agents, servants and any persons, firms or corporations acting in concert with them from directly or indirectly:

- A. using any of the Rolex Trademarks, or any mark similar thereto, in connection with the sale of any unauthorized goods or the rendering of any unauthorized services;
- B. using any logo, trade name, or trademark which may be calculated to falsely represent or which has the effect of falsely representing that the services or products of the Wright Defendants or of third parties are sponsored by, authorized by, or in any way associated with Plaintiff;
- C. infringing upon the Rolex Trademarks;

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- D. otherwise unfairly competing with Plaintiff;
- E. falsely representing themselves as being connected with Plaintiff or sponsored by or associated with Plaintiff or engaging in any act which is likely to falsely cause the trade, retailers and/or members of the purchasing public to believe that the Wright Defendants are associated with Plaintiff. This prohibition includes, but is not limited to, the Wright Defendants' use of the words "Official" and or "Certified" in connection with the Rolex Trademarks.
- F. using any reproduction, counterfeit, copy or colorable imitation of the trademarks of Plaintiff in connection with the publicity, promotion, sale or advertising of goods sold by the Wright Defendants including, without limitation, watches and related articles bearing a copy or colorable imitation of any of Plaintiff's trademarks.

For purposes of this Stipulated Permanent Injunction, the term "Rolex Trademarks" includes, but is not limited to, the trademarks and trade names ROLEX, PRESIDENT and the Crown device, on and in connection with watches, watch bracelets and related products, and such other trademarks and trade names as may be designated by Rolex from time to time.

2. The parties further stipulate and agree that the Wright Defendants may truthfully advertise and promote the fact that Defendant Dean Douglas Wright has received training in the repair of Rolex watches, provided that such advertising and/or promotion may not use the Rolex Trademarks in a manner reasonably likely to cause the consuming public to believe that the Wright

Defendants' services are authorized, sanctioned, or sponsored by Rolex.

The parties further acknowledge that the Wright Defendants have paid for advertising in the Southwestern Bell Yellow Pages and leased a billboard containing advertisements that fall within the scope of prohibited conduct as outlined in the foregoing Paragraph. However, the parties further stipulate and agree that these advertisements shall not be subject to the terms of the injunction set forth in the preceding Paragraph 1 until such time as they expire, and in no event, later than September 1, 2000. Any subsequent renewal of such advertising will be subject to the terms of the injunction set forth in the preceding Paragraph 1.

3. Rolex agrees that Defendant Dean Douglas Wright may display within his store the original, or if the original no longer exists, a copy of the certificate evidencing the training he received by Rolex in 1971.

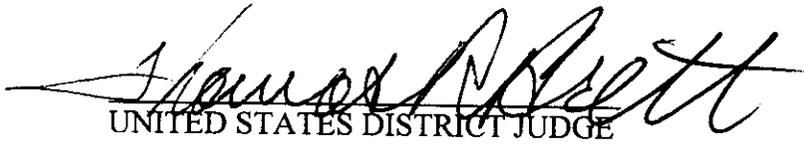
4. Rolex agrees that the Wright Defendants may use the phrases "Rolex trained" or "trained by Rolex" in their advertisements and promotional materials.

5. Rolex agrees that the Wright Defendants may use the designation "Certified Master Watchmaker" or "CMW" in their advertisements and promotional materials, provided such designation is not used in conjunction with the Rolex trademarks so as to connote any affiliation, authorization, or sponsorship between the Wright Defendants and Rolex.

6. Any act by the Wright Defendants in violation of any term or condition of this Stipulated Permanent Injunction may be considered and prosecuted as contempt of this Court. The parties stipulate and agree that this Court shall retain jurisdiction to construe, enforce or implement this Stipulated Preliminary Injunction upon application of any party.

7. This Stipulated Permanent Injunction shall be deemed to have been served upon the Wright Defendants at the time of its execution by the Court.

Signed this 16th day of July, 1999, at 2:30 .m.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND SUBSTANCE:

Defendant Dean Douglas Wright

By: Dean Douglas Wright
Dean Douglas Wright
5401 S. Sheridan Road
Suite 304
Tulsa, Oklahoma 74145-7522

THE STATE OF OKLAHOMA §
 §
COUNTY OF §

BEFORE ME, the undersigned authority, on this day personally appeared Dean Douglas Wright, a defendant in the above-styled and numbered cause, who, being by me first duly sworn, upon his oath deposed and stated that he has read and fully understands the terms and conditions of the foregoing Agreed Final Judgment and Permanent Injunction ("Judgment"); that he is legally competent to execute the Judgment; and that he is doing so voluntarily.

SUBSCRIBED AND SWORN TO BEFORE ME on this 15 day of JULY, 1999, to certify which witness my hand and seal of office.

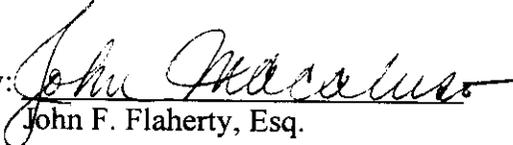
OFFICIAL STAMP:

TRACY SCHULZ
NOTARY PUBLIC IN AND FOR THE
STATE OF OKLAHOMA

TRACY SCHULZ
Printed Name of Notary Public

APPROVED AS TO FORM AND SUBSTANCE:

Plaintiff Rolex Watch U.S.A., Inc.

By: 

John F. Flaherty, Esq.

Brian W. Brokate, Esq.

John Macaluso, Esq.

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AND

James R. Webb, Esq.

Oklahoma State Bar No. 16548

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Attorneys for Plaintiff, ROLEX WATCH U.S.A., INC.

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

FILED

JUL 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARVIN SUMMERFIELD and)
ROBIN MAYES,)
)
Plaintiffs,)
)
v.)
)
MARK McCOLLOUGH, et. al.,)
)
Defendants.)

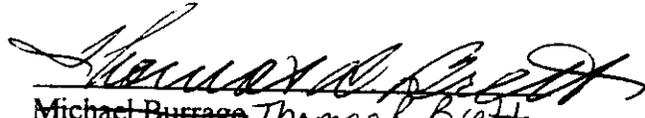
Case No. 98-CV-0328B (EA)

ENTERED ON DOCKET
DATE JUL 19 1999

ORDER

COMES NOW the Court and having considered the Motion of Robin Mayes, Plaintiff in the above styled numbered cause of action requesting Dismissal of his claims with prejudice, finds such Motion should be granted.

IT IS SO ORDERED on this 19th day of July, 1999.


~~Michael Burrage~~ Thomas R. Brett
United States District Judge

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

FILED

JUL 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LIBERTY MUTUAL INSURANCE)
COMPANY and LIBERTY MUTUAL)
FIRE INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
PIPING COMPANIES, INC.,)
)
Defendant.)

Case No. 98-CV-883-BU(E)

ENTERED ON DOCKET
DATE JUL 16 1999

ADMINISTRATIVE CLOSING ORDER

The Court has reviewed the Notice and Suggestion of Bankruptcy filed by Defendant, Piping Companies, Inc. Having done so, the Court concludes that this matter should be administratively closed during the pendency of the bankruptcy proceedings before the United States Bankruptcy Court for the District of Delaware. It is therefore ordered that the Clerk administratively terminate this action in his records pending resolution of the bankruptcy proceedings.

The parties are **DIRECTED** to notify the Court of the resolution of the bankruptcy proceedings, within ten (10) days thereafter, so that the Court may reopen this matter, if necessary, to obtain a final determination of this litigation.

ENTERED this 14th day of July, 1999.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICKEY W. SPEARS,
SSN: 444-56-1514,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 97-CV-0783-EA

ENTERED ON DOCKET

DATE **JUL 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 July 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RICKEY W. SPEARS,)
SSN: 444-56-1514,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner,)
Social Security Administration,¹)
)
Defendant.)

FILED
JUL 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-0783-EA ✓

ENTERED ON DOCKET
DATE JUL 16 1999

ORDER

Claimant, Rickey W. Spears, 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 October 15, 1993, claimant protectively filed for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's application for benefits was denied in its entirety initially (April 12, 1994), and on reconsideration (June 1, 1994). A hearing before Administrative Law Judge James D. Jordan (ALJ) was held March 10, 1995, in Tulsa, Oklahoma. By decision dated May 16, 1995, the ALJ found that claimant was not disabled at any time through the date of the decision. On July 1, 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 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”

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.

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 October 20, 1955, and was 39 years old at the time of the administrative hearing in this matter. He has a tenth grade education. Claimant worked as a laborer, a carpenter/construction worker, a mechanic trainee, a route salesman, and a night watchman.⁴ Claimant alleges an inability to work beginning October 15, 1993, due to physical problems with his back, left knee, and right foot. He also claims to suffer from mental problems described as uncontrollable rage, low self-esteem, organic mood disorder depression, explosive personality disorder, and polysubstance abuse. Claimant’s prior applications for disability and Supplemental Security Income were denied by this Court on October 20, 1992.

III. MEDICAL HISTORY OF CLAIMANT

In November 1992, claimant began treatment for mental health problems at the Creoks Medical Clinic in Sapulpa, Oklahoma. (R. 295-97) Initially, he claimed to be nervous, anxious,

⁴ In the March 10, 1995 administrative hearing, claimant testified that he had worked as common laborer in route sales for a bakery, as a roofer for Tulsa Public Schools, and as a mixer of chemicals in a chemical plant. He stated that was the only work he could remember performing within the last fifteen years. (R. 38-41) However, in the May 11, 1990 administrative hearing on his prior application, he testified as to his past work as a mechanic trainee, a carpenter, roofer, night watchman, route truck driver, welder, parts handler, tire repairman. (R. 100-09) The ALJ in the March 10, 1995 hearing expressly adopted and incorporated the prior ALJ’s decision. (R. 17)

angry, and suicidal. (R. 296-97) He appeared thereafter at Creeks for weekly individual and group counseling sessions, and he was referred to a psychiatrist. In almost every session, he discussed his efforts to obtain social security benefits. (R. 228, 231, 261-62, 268, 273-74, 278, 288-90, 294, 296, 320-21, 323, 328-229, 331, 336, 366) For example, claimant stated in January 1993, that "if he received social security benefits, everything would be better," and that he did not consider other options. (R. 290) During a visit later that month, claimant discussed the possibility of working if social security benefits were not approved. (R. 331) A clinician noted in February 1993 that claimant "is unwilling to look for appropriate work or retraining." (R. 288)

"Medication Review" notes in January 1993 indicate that claimant complained of depression, mood swings, and sometimes feeling angry. He had increased feelings of depression because his girlfriend had left him, but he denied any suicidal ideation and showed no psychotic thinking. Bill R. Evans, P.A. (apparently with approval by Joe L. Madrid, M.D.), assessed claimant as having an adjustment disorder and prescribed Elavil, Vistaril, Ativan, and Trazodone. (R. 257-61) In February 1993, Evans (with approval by M. S. Bartlett, M.D.) reported that claimant continued to have depression with anxiety in the day, but that claimant had started sleeping better since he increased claimant's Trazodone prescription. Claimant exhibited no psychotic thinking. He was directed to continue taking Trazodone and begin taking Librium and Mellaril. (R. 255-56) He reported feelings of anger and anxiety, but denied hallucinations or suicidal ideation, and his thought content was considered appropriate as of March 11, 1993. (Id.)

Later in March 1993, the Evans' mental assessment of claimant, as approved by James R. Pletcher, D.O., was changed to "impulse control disorder" and depression. (R. 254) Notes of claimant's next few visits indicate that claimant was sleeping well at night and his depression was

improving, but he continued to have feelings of anger during the day. (R. 250-53) He showed clear thinking and appropriate thought content (251-53), but "psychotic thinking" was added to his mental assessment (R. 251) and Evans observed "continued paranoid ideation. (R. 250) During this time, claimant's medications continued to be adjusted.

In May 1993, claimant exhibited a very negative attitude about his medication and showed a great deal of frustration. Evans recommended that claimant be seen for further evaluation by Dr. Pletcher. (R. 249) In group therapy, he told of an instance where he lost his temper with a man who would not pass his car for safety inspection (R. 269), and that he was angry with his former girlfriend when she left him. (R. 280) Claimant met with Dr. Pletcher on June 2, 1993. Claimant described his mood swings, anger and paranoia, and he indicated that he had stopped taking his medication. (R. 246-48) Dr. Pletcher assessed claimant as having organic mood disorder with a secondary diagnosis of explosive personality, and he set forth a treatment plan involving various medications and a blood test. (Id.)

Progress notes from Creoks Mental Health Services indicate that, during this same month, claimant admitted that he had a history of alcohol and drug abuse, but he denied any recent usage. (R. 278). Claimant reported that he was taking his medication as ordered, his sleep had improved, his appetite was good, and his depression had improved. (R. 247) Dr. Pletcher saw claimant again on June 30, 1993, and noted that claimant was angry, irritable, anxious, and paranoid. He also commented on claimant's improved medication level. (R. 245) Creoks clinician Karen Long, L.P.C., diagnosed claimant as severely and persistently mentally ill in June 1993 (R. 278), but she met with Dr. Pletcher in July 1993 to discuss claimant's diagnosis, and claimant's diagnosis was changed to "organic mood disorder, depressed" and "organic personality syndrome, explosive type." (R. 275)

Claimant reported in one therapy session in July 1993 that he became angry for no reason while he was doing yard work. (R. 276)

In August 1993, claimant reported that he had stopped taking the Trazodone because he was too sleepy in the morning and that he forgot, much of the time, to take his other medications. (R. 242-43) He continued to feel depressed but had an appetite and denied any hallucinations or suicidal thoughts. (R. 243) Dr. Pletcher reported that claimant's affect was less irritable, even though he was not taking his medicine, and, although he had some paranoia, it had improved. (R. 242) In September 1993, claimant reported that his mood swings and irritability had improved since Dr. Pletcher increased his prescription for Tegretol. Dr. Pletcher noted that claimant's affect was less irritable and that claimant denied any suicidal ideas. He continued to adjust claimant's medication. (R. 239)

Claimant reported in October 1993 that he was having difficulty going to sleep, but that once he was asleep, he slept an average of ten hours. He also stated that he appetite was good, and although he said he was always depressed, he denied any suicidal thoughts or hallucinations. (R. 237) He also reported having a temper tantrum where he almost hit his brother's friend. (R. 236) Dr. Pletcher doctor observed that claimant was less irritable although he was depressed. Claimant stated "I lost my social security evaluation," and he expressed concern about his future. (R. 236)

When claimant saw Dr. Pletcher in November 1993, he stated that he was doing better since he was taking Paxil and that he was no longer as angry and irritable. (R. 234) Dr. Pletcher reported "His mood is okay; his affect is brighter. He's able to smile now. He appears to have less irritability. He indicates he still has some depression but he feels that he's been better over the last several weeks." (Id.) In December 1993, claimant reported sleeping well, having a fair appetite, and feeling

that his depression was "much improved" although he still had some depression due his uncertainty regarding social security benefits and finances. (R. 233, 274) He also reported that his anger had diminished considerably due to the medication he was taking. (R. 274)

A comprehensive treatment plan was developed for claimant at Creoks in January 1994. A physical evaluation indicated no substance abuse. A psychological evaluation indicated claimant's adequate development, positive response to past treatment, and recognition of problems. The evaluation also indicated that claimant was able to live independently. (R. 219, 367) The staff at Creoks described his problems as depression, sleep disturbance, low self-esteem, lack of motivation, weight disturbance and isolation. (R. 220, 368). Creoks staff anticipated that claimant would need treatment for one year. His "discharge criteria" were that his symptoms of depression would be eliminated without the aid of medication. (R. 221, 369) A January 1994 medication review report indicated that claimant's depression was better, he was sleeping better, and his mood was better. (R. 227, 232) In February 1994, claimant reported that he was having no problems with his medication, and had not experienced any anger outbursts. Claimant was encouraged to walk, but he refused, claiming that he had tailbone pain. (R. 229, 330)

Progress notes from Creoks on March, 4, 1994, indicate that claimant became upset when his requests for another refill of Trazadone was not approved. He told Creoks staff that he was taking two Trazadone in order to go to sleep. Creoks staff noted that the pharmacist had filled all of claimant's medications on February 14, 1994. (R. 330; see also R. 366) In late March 1994, claimant told Dr. Pletcher that he was not sleeping well despite the Trazadone, but that he had no more problems with his anger and irritability, and he denied having any hallucinations. (R. 361) Dr. Pletcher noted that claimant's hygiene was poor, but he was able to smile, causing Dr. Pletcher to

opine that claimant's affect was markedly improved. Claimant showed no evidence of any thought disorder. (Id.)

Also in March 1994, claimant was referred to Donald R. Inbody, M.D., for a consultative psychiatric examination. Dr. Inbody reported that claimant was pleasant and cooperative, his speech was logical, coherent and sequential with no affective disturbances or association defects in thinking, and he had no psychotic symptomatology. (R. 306) Claimant displayed some sadness, but no clinical depression. Dr. Inbody's diagnostic impression was "organic mood disorder with explosive personality features, fairly well controlled with medication," depression and personality disorder "not otherwise specified," moderate psychosocial stressors and a global assessment of functioning (GAF) rating of 65. (R. 307) Claimant also confirmed that his medication had "helped a great deal" and he stated, "It's hard to get me angry anymore." (R. 305)

A Mental RFC Assessment Form, completed by Carolyn Goodrich, Ph.D., on April 7, 1994 indicated that claimant could understand and perform simple and complex tasks, interact appropriately with others at a superficial level, and adapt to a work situation. (R. 168) Dr. Goodrich assessed claimant in the following categories on the Psychiatric Review Technique ("PRT") form: 12.02: Organic Mental Disorder - psychological or behavioral abnormalities associated with a dysfunction of the brain, as evidenced by "emotional lability [sic] and impairment in impulse control" (under control with medication); 12.04: Affective Disorders - disturbance of mood, accompanied by a full or partial manic or depressive syndrome, as evidenced by depression NOS; and 12.08: Personality Disorders - inflexible and maladaptive personality traits which cause either significant impairment in social or occupational functioning or subjective distress, as evidenced by personality disorder, NOS. (R. 162-66) The impairment severity ratings showed that claimant had slight restriction of activities

of daily living; he had moderate difficulties in maintaining social functioning; he seldom had deficiencies of concentration or pace; and he never had episodes of deterioration or decompensation in work or work-like setting which caused him to withdraw from that situation or to experience exacerbation of signs and symptoms. (R. 167)

A medication review by Dr. Pletcher in April 1994, showed that claimant was alert and oriented, did not show evidence of thought disorder, had better hygiene than before, and was able to smile. Dr. Pletcher indicated that claimant's hallucinations were "evidently gone since we added the Haldol." (R. 359). Nonetheless, claimant continued to report that he felt depressed. (R. 228, 329)

In May 1994, claimant reported that he was sleeping well, his appetite was good, he felt his depression had improved, he had no suicidal thoughts or hallucinations or problems with his temper, and he was taking his medications as prescribed. (R. 358)

Subsequent reports by Dr. Pletcher in June 1994 again indicated that claimant had poor hygiene, but he stated "I just can't find any interest in it." (R. 356-57). Nonetheless, he denied any anger or irritability or hallucinations. (Id.) He reported to Creoks that he was sleeping too much. (R. 328) Claimant's July 1994 treatment plan review by Creoks staff indicated that he continued to sleep most of the day, but he was going to a rural store to talk to others, and he had been going to group therapy sessions. He had also been taking his medication. (R. 365) He told Dr. Pletcher that he had begun taking baths, and he was not as angry or irritable. Dr. Pletcher noted that claimant had no evidence of any thought disorder and "[h]e's doing much better." (R. 355)

In July 1994, Dr. Pletcher noted that claimant's liver enzymes were considerably elevated. (R. 353) When repeated enzyme studies in August also showed that claimant's liver enzymes were elevated, Dr. Pletcher became alarmed and scheduled claimant for an appointment. (R. 851) He

decided to discontinue his Tegretol prescription for claimant because of the elevated liver enzymes. Claimant admitted that he had used methamphetamines and crank since he was 21 years of age, and that he had shared needles as recently as one month before the August 10, 1994 appointment. (R. 348-49) Dr. Pletcher opined that "he does have a disability" and requested that claimant go to DHS to apply for Medicaid. (R. 349) Dr. Pletcher stated: "Once he gets Medicaid or Title XIX, then I would like for him to check himself into dual diagnostic center in Waggoner [sic], Oklahoma for treatment for both methamphetamine abuse, as well as his organic affective mood disorder." (R. 349-50) Although claimant told Dr. Pletcher that he would not use methamphetamines while he was taking medications, Dr. Pletcher indicated his skepticism and planned to have random drug tests performed on claimant. (R. 350) On August 15, 1994, claimant appeared at Creoks, where clinician Dawn Hayes, B.S., noted that claimant stated he was doing well, and he denied feeling depressed. Hayes also noted that his "affect was blunted, but he was responsive. His attendance in the depression group appears to have been beneficial." (R. 327)

On August 19, 1994, Dr. Pletcher received a call from an emergency room doctor in Sapulpa. (R. 346; see also R. 325-26) The doctor said that claimant had experienced a seizure for no apparent reason, and she requested claimant's medical history. Dr. Pletcher told her of claimant's drug use in July 1994 and opined that the drug use could be a precursor to etiology of seizures. (R. 346) He also reported that claimant's prescription for Tegretol had been discontinued due to claimant's "extremely high" liver enzyme level, and that claimant had a history of head trauma. He told the emergency room doctor of claimant's mental problems and that claimant's psychotropic medications had not been entirely discontinued because of claimant's "dual diagnosis" and claimant's indication that the

would stop using drugs and drinking alcohol. Claimant was hospitalized for observation and neurological consult. (Id.)

When Dr. Pletcher saw claimant a week later, claimant denied any methamphetamine abuse. Dr. Pletcher recommended random drug screening and a reduction in claimant's medications. He also suggested that claimant attend Narcotics Anonymous, but claimant did not indicate a willingness to do so. (R. 345) Creoks clinician Dawn Hayes also counseled claimant about his polysubstance abuse, the possibility of treatment in a dual diagnosis program, and Narcotics Anonymous. (R. 323-24) In his session with Hayes, he denied any hallucinations, drug use, or depression. (R. 323)

In a session with Dr. Pletcher in September 1994, claimant denied problems other than sleeping too much. He denied using any drugs, and his drug screen test was negative. His mood appeared to be "okay," he was no longer having significant anxiety, and he was no longer "hearing voices." (R. 342) Dr. Pletcher's assessment changed (from his July 1994 assessment) to "AXIS I - history of explosive personality with AXIS III of head trauma, also seizures. He also has a history of crank abuse, supposedly in remission." (Id.) Dr. Pletcher reduced claimant's Haldol prescription because claimant was "no longer having any psychosis. I suspect he was having some psychotic features related to the crank abuse that we did not know about." (Id.)

The next month, claimant's treatment plan at Creoks was reviewed again, and his treatment team updated his file to indicate his methamphetamine use. (R. 364) His medication review was completed by Bill Evans again, with the approval of W. John Mallgren, D.O. The review indicates that claimant stated he was having difficulty sleeping and that the Trazodone was not helpful. He denied any drug use, hallucinations or increase in depression. Claimant showed a slightly depressed affect, but he also showed clear thinking. His assessment was adjusted to "Explosive personality

disorder. History of seizure disorder. History of crank abuse.” (R. 340) On the same day, claimant spoke with Creoks clinician Dawn Hayes. She reported that he had no mood swings, and he had a bright affect, although communication was limited. He denied any drug use and any psychotic or depressive symptoms. (R. 322)

Claimant did not show for an appointment at Creoks on November 10, 1994, but he showed on November 29, 1994, because he was almost out of medicine. While there, he stated that he did not need Creoks, but he would show up for appointments when necessary for medication. He then stated that he forgets his appointments. He also said that he had been “clean” for a few months. He denied any hallucinations but said that he was sometimes depressed. (R. 321)

In December 1994, in a medication review by Bill Evans, with the approval of O. Graham Toliver, M.D., claimant showed a relaxed affect and had no evidence of any psychotic thinking or depression. Claimant said he was having difficulty going to sleep, but once he went to sleep, he was sleeping 12 to 14 hours. He denied any depression, hallucinations or irritable mood. The assessment reads: “Organic mood disorder with explosive personality with some depression; he is showing improvement.” (R. 337)

He showed up late for an appointment at Creoks in early January 1995 and reported no change in his depressive state. (R. 321) Later in January, he appeared at Creoks again. He denied any drug use or problem, and he was resistant to any suggestions for treatment “to the extent of becoming aggressive [sic].” (R. 320) He stated that he wanted to become medication free. His case manager updated his diagnosis to reflect his usage of crank. (Id.) The staff at Creoks updated claimant’s treatment plan in January, 1995. His treatment plan review indicates that he had been “somewhat non-compliant w/treatment.” (R. 363) His physical assessment again indicated adequate

psychological development, positive response to past treatment, and recognition of problems. (R. 370) His “occasional drug usage” was listed as an additional problem and his goals, objectives, and discharge criteria were updated to address that problem. (R. 371-72)

IV. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fourth step of the sequential evaluation process. He found that, although claimant had some physical and mental impairments, claimant retained the residual functional capacity (RFC) to perform work activities except for work involving more than simple instructions and the need to work alone. He also found that these limitations and claimant’s impairments did not preclude claimant’s past relevant work as a laborer and as a night watchman.

V. REVIEW

Claimant asserts as error that the ALJ: (1) made a decision regarding the severity of the claimant’s mental impairment as recorded on the PRT form which was not supported by substantial evidence; (2) made a decision at phase one of his step four analysis regarding the claimant’s mental residual functional capacity which was not supported by substantial evidence; (3) failed to perform phases two and three of his step four analysis in the manner required by law; and (4) made a decision that the claimant retained the capacity to perform the demands of his past relevant work which was not supported by substantial evidence. The second, third and fourth errors asserted by claimant are all three part of the ALJ’s step four analysis, and will be reviewed together below.

Mental Impairment

Despite the extensive medical evidence in the record regarding claimant’s mental health problems, claimant focuses on the testimony of the medical expert at his second administrative hearing. Claimant specifically challenges the ALJ’s finding that claimant “never” exhibited episodes

of deterioration or decompensation in work or work-like settings, which contrasts with the medical expert's testimony that such episodes were "marked." (See Cl. Br., Docket # 9, at 3-4.) In so doing, claimant essentially ignores the objective medical evidence submitted by his treating physicians, and he faults the ALJ for not relying on the testimony of a medical expert who never examined or treated claimant. Harold Goldman, M.D., testified as the medical expert.

Dr. Goldman referred to the PRT form categories for rating the severity of mental impairments. He could find no signs from claimant of marked difficulty with social problems, with activities of daily living, or with persistence, concentration and pace; however, he found a "marked" degree of limitation with episodes of deterioration or decompensation in work or work-like settings.

(R. 70, 73-75) His sole explanation for this finding is as follows:

That's the rage problem that we, we heard going all the way back from his, from his youth. I reviewed his whole documents when he had involvements with the law, and I think -- I think he obviously -- he had trouble explaining it, but I believe that he, his documents say -- well, for example here's a line. 4:00 on [1/20]'95, very resistant to change, to changes and suggestions of AA today. Delay treatment to the extent of becoming aggressive. [See R. 320] I mean, here his therapist says he's becoming aggressive. You're trying to find out what he does, I think when they say he's aggressive that that's something that would interfere with work or work like situations. So I would put that down as marked.

(R. 75-76)⁵ Dr. Goldman made no mention of the well-documented improvement in claimant's condition from November 1992 through January 1995. Nor did he discuss the medication that kept claimant's condition under control.

Nonetheless, he did opine that claimant neither met nor equaled one of the listings (medical disposition categories) on a PRT form. (R. 68) He explained that claimant's primary problem

⁵ Dr. Goldman's reference to claimant's involvement with the law reflect claimant's arrest and conviction in Tulsa County for second degree burglary when he was 19 years of age. (R. 84, 136-37) Claimant states that he served thirteen months in the penitentiary before he received a full pardon by the governor of Oklahoma. (Id.)

appeared to be emotional, given that the Crooks progress notes reflected claimant's suicidal ideation and anhedonia, sleep disturbance, and appetite disturbance. (R. 70) He also commented that claimant's substance addiction problem may be related to his depressive syndrome and personality disorder -- and specifically to his rage. (R. 72) Dr. Goldman stated: "Any restrictions on [claimant's] residual functional capacity as Counsel has tried to show are based on his mental inability with rage and depression and inability to get around with people. And that is a subjective thing and I can't really correlate that in." (R. 73) He thought that claimant could understand simple tasks, but not complex ones. (Id.)

The ALJ was correct to disregard Dr. Goldman's opinion to the extent Dr. Goldman found that claimant showed a marked degree of limitation with episodes of deterioration or decompensation in work or work-like settings. The Tenth Circuit requires an ALJ to follow the procedures in 20 C.F.R. § 404.1520a (and 20 C.F.R. § 416.920a for Supplemental Security Income) when he or she evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey v. Chater, 92 F.3d 1017, 1024 (10th Cir. 1996); Cruse v. United States Dep't of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedure first requires the ALJ to determine the presence or absence of certain medical findings pertaining to claimant's ability to work. Next, the ALJ is to evaluate the degree of functional loss resulting from claimant's impairment. The ALJ must then complete a PRT form and attach it to a written decision in which he or she discusses the evidence upon which the conclusions expressed on the form are based. Winfrey, 92 F.3d at 1024; Cruse, 49 F.3d at 617-18; see also Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994).

The ALJ followed these procedures. He noted that claimant did not claim or even mention depression and polysubstance abuse in his prior claim for social security benefits, although these

alleged impairments were in existence when claimant made his prior claim. (R. 17) The ALJ summarized claimant's medical records from Creoks Mental Health Center. He specifically found that claimant was in control of his consumption of drugs and alcohol, and that claimant's alcohol and the majority of his drug use occurred several years ago during the years claimant was employed. (Id.)⁶ He appropriately discounted Dr. Pletcher's statement that claimant had a disability because Dr. Pletcher made that statement in the context of his evaluation of claimant's drug use, which Dr. Pletcher was unable to detect prior to the liver enzyme blood test. (R. 18) The ALJ acknowledged Dr. Goldman's testimony that claimant's rage, anger and depression could be symptoms of drug abuse. (Id.) The ALJ relied on Dr. Inbody's opinion that claimant had no significant evidence of a mental disorder, and that those problems which claimant did have were fairly well-controlled with medication. (Id.) The ALJ noted the good results that claimant had with medications -- when claimant took them. (R. 18-19)

The ALJ properly assessed claimant's functional loss. He thoroughly evaluated claimant's alleged impairments in light of claimant's testimony and found claimant's credibility suspect in several respects. Although claimant complained of sleep problems and appetite, he testified that he had gained weight (R. 38), and that he slept for more than seven hours every day. (R. 23-24) The

⁶ Amendments to the Social Security Act provide that for disability claims pending in court or before the agency on March 29, 1996, benefits are not payable if "alcoholism or drug addiction would . . . be a contributing factor material to the Commissioner's determination that the individual is disabled." See Contract With America Advancement Act, Pub. L. No. 104-121, § 105 (b)(1), 110 Stat. 847 (1996). The ALJ rendered his decision in this matter on May 16, 1995; the Appeals Council rendered its final decision on July 1, 1997. Thus, the matter was pending before the agency on March 29, 1996. If the ALJ had concluded that claimant was disabled, his decision would clearly be reversible because alcoholism or drug addiction would have been a contributing factor material to the Commissioner's determination. However, the ALJ properly found that claimant was not disabled even under the guidelines prior to the effective date of the amendments.

medical evidence is also contrary to this claim. In February 1993, he reported that he slept better when the doctor increased his Trazodone prescription. (R. 255-56) Throughout 1993 and early 1994, claimant reported that he was sleeping well (R. 227, 232-33, 250-53, 274), or his sleep had improved and his appetite was good. (R. 237, 247) In fact, claimant reported in October 1993 that he was having difficulty going to sleep, but that once he was asleep, he slept an average of ten hours. (R. 237) It was only when the Creoks staff refused his request for a refill on his prescription for Trazadone in February 1994 that claimant told Dr. Pletcher that he was not sleeping well. (R. 330, 361, 366) In May 1994, claimant again reported that he was sleeping well and his appetite was good. (R. 358) In June, July and September 1994, claimant reported that he was sleeping too much. (R. 328, 342) Although he claimed in October 1994 that he was having difficulty sleeping (R. 340), in December 1994, he admitted that he slept 12-14 hours once he got to sleep. (R. 337)

The ALJ also evaluated claimant's allegations of mental instability and uncontrolled rage. Claimant testified that "any little thing" made him angry or depressed, but he had not hit anyone. (R. 46-50) In response to questions from his attorney, he stated that his anger flares up several times a week, but the only example he could give related to being angry occurred two years prior to the hearing when he was waiting for someone who never showed up. (R. 55-56) He said he quit his jobs because of his anger, but he admitted that his anger or rage did not keep him from working. (R. 57-58)

The treatment records indicate many instances where claimant states that he is angry or is concerned about his anger, but the only concrete examples occur in relation to his being angry that his girlfriend left him (R. 280), that someone refused to approve his car for safety inspection (R. 249, 269), and, for some unknown reason, at his brother's friend. (R. 236) He also said that he had been

in a few hard fights - one in which his left ear was cut off. (R. 296) Claimant ignores treatment records indicating numerous instances in which claimant reports that he was no longer angry (see R. 229, 234, 274, 330, 358, 361), or in which his treating physicians report that his anger had significantly subsided. (See R. 232, 234, 355) Claimant also ignores claimant's comments (as set forth in Dr. Inbody's report) that his medication had "helped a great deal" as well as his statement: "It's hard to get me angry anymore." (R. 305)

The ALJ evaluated this evidence and completed a PRT form which he attached to his decision and discussed within it. He found that the claimant's mental condition resulted in slight restrictions of activities of daily living; caused moderate difficulties in maintaining social functioning; seldom caused deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner; and never caused episodes of deterioration or decompensation in work or work-like settings which cause an individual to withdraw from the situation or to experience exacerbation of signs and symptoms. Although his findings are not fully supported by the testimony of Dr. Goldman, the medical expert who testified at hearing without examining claimant, they are fully supported by Dr. Carol Goodrich, Ph.D., who examined claimant and completed a PRT form in April 1994 (R. 162-67). Dr. Goldman's opinion was not well-reasoned or well-founded, and the ALJ was not required to give it controlling weight. See 20 C.F.R. §§ 416.927(d)(2), 416.927(e)(2), 416.927(f).

It is particularly noteworthy, as the ALJ pointed out, that claimant's first complaints of and treatment for mental problems occurred two weeks after his final denial by this Court of his earlier application for social security disability benefits. (R. 22; see R. 146-155) The ALJ also noted that the ALJ who heard claimant's first application commented on the absence of problems with either sleep patterns and/or appetite, and claimant's first complaints to Creoks were of sleep disturbance

and appetite problems. (R. 22; see R. 86) The objective evidence indicates that claimant's condition improved with medication except when claimant stopped taking his medication, used illegal drugs, or refused treatment. 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). Given the medical findings, the ALJ did not err in evaluating claimant's mental impairment. He deemed claimant limited to simple tasks and working alone, but claimant did not lack the RFC for a full range of exertional work activity. (R. 23-24)

Step Four Analysis

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).⁷ The ALJ must also "obtain a precise description of the particular job duties which are likely to produce tension and anxiety . . .," where a mental impairment is involved. Id. at 1024 (quoting S.S.R. 82-62, 1975-1982 Rulings, Soc. Sec. Rep. Serv. 809, 812 (West 1983)).

⁷ 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).

The ALJ's assessment of the nature and extent of claimant's mental limitations is supported by substantial evidence from the record, as discussed in the preceding section.⁸ As for the second and third phases of the step four analysis, the ALJ questioned claimant as to the physical and mental requirements of some of his past relevant positions. For example, with regard to claimant's job in route sales at the Rainbow Bakery, the ALJ asked: "So I would understand you'd report to the bakery and [pick] up the goods and take them around to different places and deliver the product and collect the money and bring the money back and balance your case at the end of the day, that kind of thing?" (R. 39) He queried claimant as to whether he worked alone and whether he was the foreman when he worked as a roofer in the maintenance department of Tulsa Public Schools. (R. 39-40) The ALJ asked claimant about his ability to follow instructions when he worked in a chemical plant. (R. 41) He asked if claimant supervised anyone in any of his past relevant work positions. (R. 41-42) He also inquired about the ability to handle money and the "paperwork" required in claimant's past relevant work. (R. 42) However, the ALJ failed to discuss in his written opinion any of the information he obtained from claimant in response to these questions.

Instead, the ALJ relied primarily upon the testimony of the vocational expert, who testified that claimant's past relevant work as a laborer was not precluded by claimant's non-exertional limitations, although it would require that he work around co-workers and supervisors. (R. 78) She also testified that the work of a night watchman was semiskilled, but, contrary to the ALJ's assertion, she did not state whether the work of a night watchman would require that claimant work alone. (R. 77) Nonetheless, the ALJ concluded that claimant's nonexertional limitations of performing only simple tasks and working alone would not be precluded in his past relevant work as a laborer and

⁸ Claimant has not challenged the ALJ's findings with regard to his alleged physical limitations.

night watchman, but that his other jobs as a carpenter/construction worker, route salesman, and mechanic trainee would be precluded. (R. 23) As part of a step four analysis, a vocational expert may supply information to the ALJ about the demands of claimant's past relevant work, and it is not error for the ALJ to rely on this information from the vocational expert as long as the ALJ proceeds to make the required findings on the record, including his own evaluation of claimant's ability to perform his past relevant work. Winfrey, 92 F.3d at 1025. The ALJ's written comments regarding the demands of claimant's past relevant work and claimant's ability to meet those demands do not meet the Winfrey requirements for a proper step four analysis.

As quoted in Winfrey, the regulations requires the ALJ to "obtain a precise description of the particular job duties which are likely to produce tension and anxiety, e.g., speed, precision, complexity of tasks, independent judgments, working with other people, etc., in order to determine if the claimant's mental impairment is compatible with the performance of such work." Id. at 1024 (quoting S.S.R. 82-62). Although the ALJ obtained a description of claimant's job duties as a laborer, he did not inquire into claimant's job duties as a night watchman, and he did not accurately recount the vocational expert's testimony as to each. The ALJ at the May 10, 1990 hearing (ALJ Calvarese) specifically asked claimant about the mental and physical demands of his job as a night watchman, which included some interaction with people. (R. 103) Although the ALJ in the March 10, 1995 hearing (ALJ Jordan) did not question claimant about the demands of his work as a night watchman, he adopted and incorporated the decision of ALJ Calvarese. An ALJ can base a finding of nondisability on claimant's past relevant work as it is performed in the national economy, as opposed to how claimant performed it (SSR 82-61, 1975-1982 Rulings, Soc. Sec. Rep. Serv. 836, 837-38 (West 1983)), but ALJ Jordan did not inquire as to the mental demands of claimant's past

work as a night watchman as it is performed in the national economy, and claimant testified in the 1990 hearing that it required significant interaction with people as he performed it.

As in Winfrey, the ALJ's error at phase two of the step four analysis led to error at phase three, in which the ALJ is required to determine whether claimant is able to meet the mental demands of his past relevant work despite his mental impairments. See Winfrey, 92 F.3d at 1025. The Winfrey court specifically discouraged the practice of delegating to a vocational expert many of the ALJ's fact finding responsibilities at step four. Id. The court pointed out that the ALJ's error "was compounded by the ALJ's failure to elicit sufficient information for the VE to support the ALJ's ultimate conclusion that plaintiff could return to his past relevant work as it is generally performed in the national economy." Id. The ALJ in this matter made the same error.

The ALJ thoroughly reviewed and summarized the medical evidence, or lack thereof, regarding claimant's alleged physical and mental limitations. Thus, he did assess the nature and extent of claimant's physical and mental limitations. However, he failed to make findings regarding the mental demands of claimant's past relevant work or about claimant's ability to meet the demands of that past relevant work. Nor did he obtain a precise description of the particular job duties which are likely to produce tension and anxiety. Since the ALJ found that claimant had the residual functional capacity (RFC) to perform work-related activities except for work involving more than simple instructions and the need to work alone, his omissions constitute reversible error.

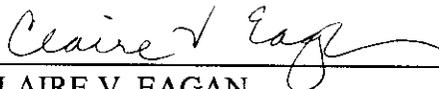
VI. CONCLUSION

The ALJ's opinion was a thorough analysis, but the correct legal standards were not applied. Specifically, the ALJ failed to perform a proper step four analysis because his decision does not contain a finding of fact as to the mental demands of the past relevant work that the ALJ found

claimant could perform, especially as to claimant's mental impairments, and it does not contain sufficient findings about claimant's ability to meet the physical and mental demands of that past relevant work. *The proceedings on remand need only address these omissions.*

If the Commissioner "failed to apply the correct legal test, there is ground for reversal apart from a lack of substantial evidence." Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993) (citation omitted). 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 July, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 ANGELA R. GARDNER,)
)
 Defendant.)

No. 99-CV-0364B /

ENTERED ON DOCKET
DATE JUL 16 1999

DEFAULT JUDGMENT

This matter comes on for consideration this 15 day of July, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through PHIL PINNELL, Assistant United States Attorney, and the Defendant, Angela R. Gardner, appearing not.

The Court being fully advised and having examined the court file finds that on May 12, 1999, Angela R. Gardner was served with Summons and Complaint. That the Defendant acknowledged service by signing a Waiver of Service of Summons on May 14, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

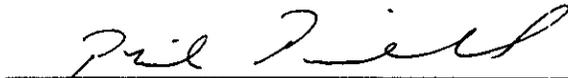
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Angela

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R. Gardner, for the principal amount of \$2,904.24 and \$2,792.31, plus accrued interest of \$1,881.74 and \$1,558.81, plus administrative charges in the amount of \$.00, plus interest thereafter at the rate of 9.13% and 8% per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.163 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

PEP/alh

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

F I L E D

JUL 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PENNWELL PUBLISHING COMPANY,)
an Oklahoma Corporation,)

Plaintiff,)

v.)

PATRICK MURPHY, an individual,)
and VICON PUBLISHING LLC,)
a New Hampshire limited liability company,)

Defendants.)

Case No. 97CV939 B (E)

ENTERED ON DOCKET
DATE JUL 16 1999

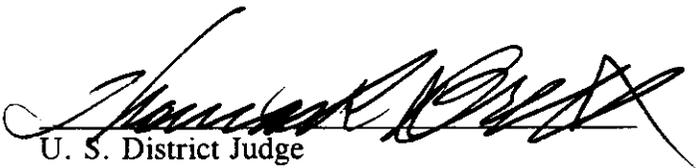
ORDER

The Court, having considered the JOINT MOTION FOR DISMISSAL WITH FULL PREJUDICE filed by all the parties in this action, and being fully advised, hereby DISMISSES the claims between Plaintiff and Defendants with prejudice and without fees or costs to any party.

Entered

Dated:

July 15, 1999



U. S. District Judge

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

FILED

JUL 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES C. ARMSTRONG,

Plaintiff,

vs.

RALSTON PURINA COMPANY, a Missouri
corporation, and PROTEIN TECHNOLOGIES
INTERNATIONAL, INC., a Delaware corporation,

Defendants.

No. 98-C-688-B(E)

ENTERED ON DOCKET
JUL 16 1999

ORDER

Before the Court are the motion for summary judgment (Docket No. 14) and motion in limine (Docket No. 23) filed by defendants Ralston Purina Company ("Ralston Purina") and Protein Technologies International, Inc. ("Protein Technologies").

I. SUMMARY JUDGMENT MOTION

A. STATEMENT OF UNDISPUTED FACTS

Plaintiff James C. Armstrong ("Armstrong") brought this action asserting claims of retaliatory discharge for filing a workers' compensation claim (pursuant to 85 O.S. §§ 5, 6 and 7), and intentional and/or negligent infliction of emotional distress against Ralston Purina and its subsidiary, Protein Technologies, Armstrong's employer at the time of his on-the-job injury.

Armstrong began working as a machine operator for Ralston Purina in Pryor, Oklahoma at its Protein Technologies Plant on June 17, 1976. On July 30, 1990 Armstrong was promoted to lead operator at Protein Technologies' waste water treatment plant. In September 1994,

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Armstrong filed a workers' compensation claim against Protein Technologies for an injury to his neck which occurred on September 2, 1994 and began receiving weekly temporary total disability("TTD") benefits. Armstrong also applied for and began to receive Installment Disability Benefits in March 1995 and is still receiving these benefits.

In May 1995, Armstrong underwent a back fusion wherein instrumentation was installed in his back. He underwent surgery again in May 1996 for neck problems which included a fusion in his cervical area. And finally, in December 1996, he underwent surgery to remove the instrumentation in his back.

In April 1998, a vocational evaluation was conducted by LDH Consultants Inc. in connection with Armstrong's workers' compensation claim which concluded that Armstrong would "have difficulty returning to all of his job duties as a waste water treatment plant operator," and recommended "light and/or possibly medium work, with some accommodations" to fit his functional capacities. If not a viable option, LDH recommended job placement assistance, on-the-job training and/or formal training.

On July 27, 1998, Armstrong's physician, Dr. James Rodgers, offered the following opinion concerning Armstrong's capacity to return to work:

I do not think that he can assume all the requirements of the Treatment Plant Supervisor-Production position, for I do not feel he should drive a 4-wheel drive tractor, a bulldozer, or operate a forklift. Most of the requirements of the job are desk type activities, but the ones that require bending, stooping and lifting, or extreme vibration will put him at risk for more problems with his neck and back.

B. SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). 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 sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

The 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 v. Zenith*, 475 U.S. 574, 585 (1986).

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 must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

C. ANALYSIS

Defendants seek summary judgment based on the following grounds: (1) Armstrong's intentional/negligent infliction of emotion distress claims are barred by the applicable statute of limitations; (2) Armstrong cannot establish and has not established a prima facie case for

intentional and/or negligent infliction of emotional distress; and (3) Armstrong's employment has not been terminated. The Court agrees that defendants are entitled to summary judgment on Armstrong's intentional/negligent infliction of emotional distress claim, but concludes genuine issues of material fact exist as to if and when Armstrong's employment was terminated which preclude summary judgment on his retaliatory discharge claim.

1. Intentional Infliction of Emotional Distress¹

Under Oklahoma law, liability for intentional infliction of emotional distress extends only to "extreme and outrageous" conduct that is "beyond all possible bounds of decency" or "utterly intolerable in a civilized community." *Eddy v. Brown*, 715 P.2d 74, 77 (Okla. 1986). Nothing short of "[e]xtraordinary transgression of the bounds of civility" will meet the extreme and outrageous conduct element of the tort. *Merrick v. Northern Natural Gas Co.*, 911 F.2d 426, 432 (10th Cir. 1990) (applying Oklahoma law). Given this high standard, the Court determines as a threshold matter whether the alleged conduct is sufficient as a matter of law. *Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1388 (10th Cir. 1991) (citing *Breeden v. League Services Corp.*, 575 P.2d 1374, 1376-78 (Okla. 1978)).

The "extreme and outrageous" conduct which Armstrong alleges consists of (1) defendants' repeated harassing phone calls while he was recovering from his three surgeries, (2) Lonnie Coate's statement to him when he tried to return to work in January 1995 - "I don't know who you think you are getting released to go to work - you don't have a job here!!", (3) the termination of his employment in March 1995, and (4) failing to tell him of his termination until

¹ In his response, Armstrong does not address defendants' argument that he cannot establish a negligent infliction of emotional distress claim, thereby conceding the argument.

1998.²

Construing this evidence in a light most favorable to Armstrong, the Court concludes it is insufficient to meet the standard of “extreme and outrageous conduct” under Oklahoma law. Accordingly, the Court grants defendants’ motion for summary judgment on Armstrong’s intentional and/or negligent infliction of emotional distress claims.³

2. Retaliatory discharge - 85 O.S. §5

Defendants also argue Armstrong cannot establish a claim of retaliatory discharge under 85 O.S. §5 because Armstrong was never terminated, and if his date of termination were March 6, 1995, as Armstrong asserts in his response, the claim is barred by the three-year statute of limitations. Armstrong disputes that his employment with Protein Technologies has not been terminated, citing the following evidence: (1) the statement made by Personnel Director, Lonnie Coate, in January 1995 that Protein Technologies did not have a job for him; (2) Protein Technologies’ payment of unused vacation pay in August 1995; and (3) Judith A Mueth’s (“Mueth”) 1998 letter and subsequent conversation which reference 3/6/95 as his termination date. Although defendants argue when viewed in context this evidence does not establish termination of Armstrong’s employment, the Court finds such sufficient to raise an issue of fact to defeat summary judgment. Further, as the date of termination is in dispute, the Court concludes defendants are not entitled to summary judgment on their statute of limitations

² Although he references these four events in his affidavit, in his deposition Armstrong only cites the conversation with Coate as the source of his emotional distress.

³ Armstrong also argues his intentional infliction of emotional distress claim is not barred by the statute of limitations as defendants’ outrageous conduct was continual and spanned from the date of his injury until 1998 when Armstrong first learned he was terminated. As the Court finds no tort of intentional infliction of emotional distress based on all the alleged outrageous conduct, the Court obviously also concludes Armstrong has failed to establish a continuing tort.

defense.

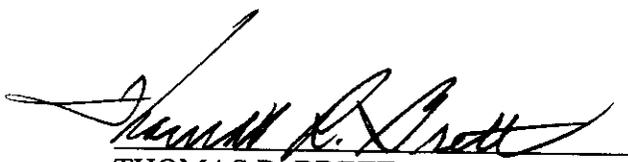
II. MOTION IN LIMINE

Defendants seek to exclude the following: (1) "events occurring prior to the applicable statute of limitations" and (2) "[a]llegations concerning Protein Technologies' light duty policy and whether light duty was provided to the Plaintiff or other employees in relationship to Plaintiff's retaliatory discharge claim." The only applicable statute of limitations which remains in this lawsuit pertains to Armstrong's retaliatory discharge claim. Given the Court's above ruling on the retaliatory discharge claim, the Court also overrules the motion in limine as to (1). As the Court finds the evidence pertaining to Protein Technologies' light duty policy and practice relevant to Armstrong's retaliatory discharge claim in this case, the Court also overrules the motion as to (2).

III. CONCLUSION

In accordance with the above, the Court grants defendants' motion for summary judgment on Armstrong's intentional and/or negligent infliction of emotional distress claim, denies the motion on Armstrong's retaliatory discharge claim under 85 O.S. §5 (Docket No. 14), and denies defendants' motion in limine (Docket No. 23).

IT IS SO ORDERED, THIS ^{15th} 15 DAY OF JULY, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

JUL 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BONNIE HAWKINS,)

Plaintiff,)

vs.)

UNUM LIFE INSURANCE COMPANY OF)
AMERICA,)

Defendant.)

No. 99-C-387-B(J) ✓

ENTERED ON DOCKET

DATE JUL 16 1999

ORDER

This matter came on for case management conference on July 15, 1999. Patricia Ledvina Himes appeared on behalf of defendant Unum Life Insurance Company of America. Although the Court entered a Minute Order on May 24, 1999 directing plaintiff Bonnie Hawkins to have new counsel enter an appearance on or before June 8, 1999, no appearance was entered on behalf of the plaintiff by June 8, 1999. Neither did counsel for plaintiff or plaintiff confer with defendant in submitting the Case Management Plan as required by Local Rule 16.1, nor did counsel for plaintiff or plaintiff attend the Case Management Conference. Accordingly, the Court dismisses plaintiff's action without prejudice for failure to prosecute her claims.

IT IS SO ORDERED, THIS 15 DAY OF JULY, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JACQUELINE CASLER,)

Plaintiff,)

vs.)

BROKEN ARROW PUBLIC SCHOOLS)

INDEPENDENT SCHOOL DISTRICT)

NO. 3 OF TULSA COUNTY,)

OKLAHOMA,)

Defendant.)

Case No.: 96CV 742E

ENTERED ON DOCKET

DATE ~~JUL 16 1999~~

ORDER GRANTING DISMISSAL WITH PREJUDICE

Before the court for consideration is the motion of Defendant to dismiss with prejudice. On May 12, 1999, the parties by and through their respective counsel of record, appeared before U.S. Magistrate Judge McCarthy to present argument pursuant to Defendant's Motion to Compel. Following oral argument of counsel, Defendant's Motion to Compel was sustained and Plaintiff was ordered to execute and submit the medical authorizations to counsel for Defendant within seven (7) days of the date of the Order. Plaintiff, by and through counsel, was specifically advised that failure to comply with the Order would result in dismissal of the case for Plaintiff's failure to cooperate in discovery and Plaintiff's failure to diligently prosecute the action. Counsel for the Defendant was ordered to advise the Court whether or not the medical authorizations were in fact submitted by the Plaintiff. If not, counsel for the Defendant was to file a motion for dismissal which would be granted by the Court. Counsel for the Defendant represents to the Court that Plaintiff has not provided the medical authorizations as requested, has failed to prosecute the case and has failed to comply with the May 12, 1999 Order.

The court FINDS that pursuant to the Order of May 12, 1999, dismissal is proper as Plaintiff

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did not provide Defendant medical authorization within the seven (7) day deadline and further FINDS that Defendant's Motion to Dismiss with Prejudice should be GRANTED.

IT IS SO ORDERED, JUDGED and DECREED.

Dated this 15TH day of July, 1999


James O. Ellison
United States District Court Judge

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

MELINDA F. LYONS,)
)
Plaintiff,)
)
vs.)
)
BANK ONE COMPANIES, INC.,)
formally known as LIBERTY BANK,)
)
Defendant.)

FILED

JUL 15 1999

No. 98-CV-835-K Phil Lombardi, Clerk
U.S. DISTRICT COURT

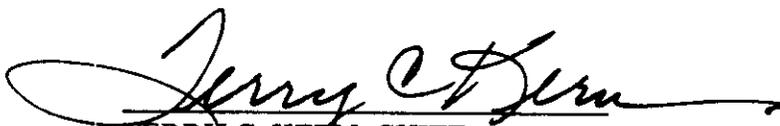
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DATE JUL 16 1999

JUDGMENT

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

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

ORDERED THIS 15 DAY OF JULY, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

MELINDA F. LYONS,)
)
Plaintiff,)
)
vs.)
)
BANK ONE COMPANIES, INC.,)
formally known as LIBERTY BANK,)
)
Defendant.)

No. 98-CV-835-K ✓

FILED
JUL 15 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE JUL 16 1999

ORDER

Before the Court is the motion of the defendant for summary judgment. Plaintiff brings this action alleging discriminatory discharge in violation of Title VII of the Civil Rights Act of 1964. Plaintiff commenced employment with defendant in 1990. Under defendant's progressive discipline policy, plaintiff had been placed in progressive stages of probation because of absenteeism. On August 19, 1997, plaintiff was on step three, which is the final stage before termination. On that date, plaintiff (who is a Native American) became involved in a verbal and physical altercation with co-employee Marcia Baccus (who is black). Through an internal investigation, defendant concluded that both employees were at fault. Baccus, who at the time had an exemplary record, was placed on step three discipline. Plaintiff, by contrast, was terminated August 21, 1997.

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

therefrom in the light most favorable to the party opposing summary judgment. Sundance Assocs., Inc. v. Reno, 139 F.3d 804, 807 (10th Cir.1998).

To establish a prima facie case of discrimination, plaintiff must show: (1) that she is within the protected class; (2) that she suffered an adverse employment action; (3) that she was qualified for the position at issue; and (4) that she was treated less favorably than others not in the protected class. See Sanchez v. Denver Public Schools, 164 F.3d 527, 531 (10th Cir.1998). Defendant contends that plaintiff has failed to establish the third prong, in view of her unsatisfactory job performance, and the fourth prong, because Baccus was not a “similarly situated” employee in view of plaintiff’s probationary status at the time of the altercation. Viewing the record in the light most favorable to plaintiff, the Court concludes that defendant’s arguments are too fact-specific to be considered in the context of a prima facie case. Plaintiff had been employed by defendant in her position for some years and was obviously deemed “qualified” for the position. Further, plaintiff was treated “less favorably” than Baccus, simply because plaintiff was terminated and Baccus was not.¹ The Court concludes plaintiff has established a prima facie case.

Establishing a prima facie case creates a presumption of discrimination that the defendant may rebut by asserting a facially nondiscriminatory reason for the termination. The plaintiff may then resist summary judgment if she can present evidence that the proffered reason was pretextual, i.e., unworthy of belief, or otherwise introduces evidence of illegal discriminatory motive. Jones v. Unisys Corp., 54 F.3d 624, 630 (10th Cir.1995). Plaintiff has not contested that defendant has stated

¹Of course, Baccus (as a minority female) was in the class of persons protected by Title VII, but plaintiff appears to be arguing that blacks were offered special treatment not provided to Native Americans. Again, the Court deems it inappropriate to resolve such an issue in the preliminary determination of whether a prima facie case has been established.

a facially legitimate non-discriminatory reason for discharge. Accordingly, the dispositive issue is the existence of a genuine issue of material fact as to pretext.

In attempting to show pretext, plaintiff has offered no direct evidence of discriminatory intent. Rather, she simply denies instigating the altercation with Baccus. Thus, plaintiff appears to be contending that defendant's investigation of the incident was inadequate. Plaintiff has offered no proof of this aside from her own denial of responsibility. The decision of the Appeal Tribunal of the Oklahoma Employment Security Commission, while declaring plaintiff eligible for unemployment benefits, nevertheless stated that "No testimony or evidence has been presented to implicate the claimant as the instigator, although it is not disputed she was the major player." (Plaintiff's Exhibit A). In the Court's view, plaintiff's status as the "major player" in the altercation was sufficient for defendant to exercise its business judgment in discharging plaintiff, whether or not she was the instigator. Plaintiff has failed to raise a genuine issue of material fact that the defendant's investigation was a sham, or that the reasons given for her discharge (and for declining to discharge Baccus) were pretextual.

It is the Order of the Court that the motion of the defendant for summary judgment (#5) is hereby GRANTED.

SO ORDERED THIS 15 DAY OF JULY, 1999.


TERRY C. KEEN, CHIEF
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DERMICO DEON WRIGHT,)
)
Petitioner,)
)
vs.)
)
REGINALD HINES,)
)
Respondent.)

No. 99-CV-184-BU (M)

ENTERED ON DOCKET

DATE JUL 16 1999

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed without prejudice to refile same, for failure to exhaust state remedies.

SO ORDERED THIS 15th day of July, 1999.


MICHAEL DURRAGE
UNITED STATES DISTRICT JUDGE

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

F I L E D

JUL 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERRELL WILLIAMSON,
SSN: 344-26-3975,

Plaintiff,

v.

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

Defendant.

CASE NO. 98-CV-460-M ✓

ENTERED ON DOCKET

DATE JUL 16 1999

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 15th day of JULY, 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

JUL 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERRELL WILLIAMSON,
344-26-3975

Plaintiff,

vs.

Case No. 98-CV-460-M ✓

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE JUL 16 1999

ORDER

Plaintiff, Terrell Williamson, 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 February 27, 1992, application for disability benefits was administratively denied and appealed to the district court. On December 14, 1995, the court issued an order reversing the denial and remanding the case for further proceedings. On remand, a hearing before an Administrative Law Judge ("ALJ") was held September 9, 1996. By decision dated October 7, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on May 18, 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 September 7, 1935, and was 50 years old at the alleged date of onset of disability. He has a high school education and formerly worked as a truck driver and fork lift operator. He claims to have been unable to work since September 7, 1985, as a result of impaired concentration, back and leg injuries, and hearing loss. Plaintiff's insured status expired December 31, 1988. Therefore the time frame under consideration was from September 7, 1985, through December 31, 1988.

The ALJ determined that although Plaintiff was unable to perform his past relevant work, he was capable of performing light work activity that would allow him to change positions from time to time. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to adequately develop the record; (2) failed to properly evaluate his credibility; and (3) ignored limitations in finding that he has the capacity to perform light work. The Court concludes that the record contains substantial evidence supporting the ALJ's denial of benefits in this case, and therefore affirms the Commissioner's denial of benefits.

Development of the Record

Plaintiff argues that the ALJ failed in his duty to develop the record because he did not obtain input from a medical expert regarding the functional significance of medical findings such as: reduced range of motion, muscle spasm, sensory deficit, motor disruption, positive straight leg raising, denervation, and decreased reflex. It is the ALJ's responsibility to make the determination as to a claimant's residual functional capacity based on all of the relevant evidence. 20 C.F.R. §§ 1545(a); 1546. Although the ALJ has the option of calling a medical advisor to assist, the cases Plaintiff cited in support of his argument do not impose a requirement to call one.

In *Bauzo v. Bowen*, 803 F.2d 917 (7th Cir. 1986), the plaintiff's treating physician stated that plaintiff's back pain caused certain functional limitations in her ability to lift, stand and walk. Despite this opinion, based solely on a consultative examiner's medical findings which did not include any assessment of her functional ability, the Appeals Council found that Plaintiff could carry up to 20 pounds and could therefore return to her past work. On appeal, the court found that the Appeals Council

had failed to take into account the requirements of plaintiff's past work and ignored many of the consultative examiner's findings. Further, given the treating physician's opinion as to plaintiff's capabilities, the court found there was no evidence to support the Appeals Council's conclusion. Although the opinion included language that the Appeals Council is not qualified to make a medical judgment about residual functional capacity based solely on bare medical findings, that comment was directed toward the Appeals Council having inappropriately disregarded the treating physician's opinion about plaintiff's functional limitations in favor of their interpretation of raw medical findings. The court did not rule that a medical advisor should have been called. *Id.* at 926.

In *Berrios v. Secretary of Health and Human Services*, 796 F.2d 574 (1st Cir. 1986), an examining orthopedic surgeon concluded that in view of clinical findings, x-rays and an electromyogram, that claimant was not able to do work requiring standing, sitting or walking for long periods of time, lifting or carrying heavy objects, pulling hand controls, using her lower extremities for controlling foot pedals, bending, squatting, kneeling or picking up objects over the shoulder level. Other evaluations were performed which contained unexplained medical terms which were not applied to any vocational criteria. Since the Appeals Council found that plaintiff could return to her past work, the court reasoned it must have rejected the orthopedic surgeon's opinion and relied upon the other medical findings. The court expressed doubt that the Appeals Council, composed of lay persons, was competent to interpret and apply the raw, technical medical data, and remanded the case for an assessment of the

plaintiff's vocational abilities in light of her physical limitations. *Id.* at 575-76. Although the court included language suggesting the appropriateness of using a medical advisor, the court did not set down a rule requiring the use of a medical advisor, nor did it require that one be consulted on remand.

In the present case, Plaintiff states that the ALJ lacks the ability to assess the various medical findings, yet he did not point the court to any specific finding he claims was misinterpreted or misunderstood and which should change the outcome of the case. Further Plaintiff has not identified any regulation or agency ruling to support his argument that the ALJ was required to call a medical advisor. The court finds that the record was adequately developed and that the ALJ was not required to consult a medical advisor.

Pain and Credibility Assessment

The court rejects Plaintiff's argument that the ALJ's decision should be reversed because the ALJ incorrectly stated the standard applicable to Plaintiff regarding pain. The ALJ stated: "The issue is not the existence of pain, but whether the pain experienced by the claimant is of sufficient severity as to preclude him from engaging in all types of work activity." According to Plaintiff, he does not have to show he cannot perform any kind of work, he is entitled to benefits if he is limited to sedentary work. Indeed, given Plaintiff's age, education, and past work experience, the Medical Vocational Guidelines ("Grids") at Appendix 2, Subpart P, Regulations No. 4, dictate that if Plaintiff is limited to sedentary work, he is considered to be disabled. However,

despite the ALJ's statement, it is clear that he did not apply an erroneous standard to Plaintiff's case.

The ALJ found that Plaintiff was able to perform light work. He acknowledged that being limited to light work, considering Plaintiff's age, education and work experience, the grids direct a finding of not disabled. [R. 339]. Rule 202.14, Appendix 2, Subpart P, Regulations No. 4. Further, many of the jobs identified by the vocational expert and incorporated into the ALJ's decision were within the light exertional category.

Plaintiff also contends that the ALJ's credibility determination was not sufficiently linked to substantial evidence in the record. While the ALJ's decision is not an example of clarity in this regard, a close reading of his decision shows that he disbelieved Plaintiff's allegations of disabling pain based on a variety of factors. He noted: Plaintiff alleged disability due to knee problems, but that x-rays of his knees done in April 1985 were within normal limits [R. 238, 336], and Plaintiff had worked for 10 years since his knee surgery; Plaintiff alleged side effects of medications, but the record reflects that he only reported side effects from blood pressure medication to his physicians; and a review of the record reveals that Plaintiff was not prescribed strong medication for continuous pain. [R. 338]. Based on its review, the court concludes that the ALJ provided a sufficient link between the evidence and his determination that Plaintiff's allegations of disabling pain were not credible. Further, the court concludes that the ALJ's pain and credibility assessment is supported by substantial evidence in the record.

RFC Determination

Plaintiff argues that the RFC determination is not supported by substantial evidence. He claims that the record contains medical findings that indicate he was unable to do the standing, walking, and stooping of light work. Plaintiff's arguments essentially ask the court to reweigh the evidence, which is not the court's role. *Casias*, 933 F.2d at 800.

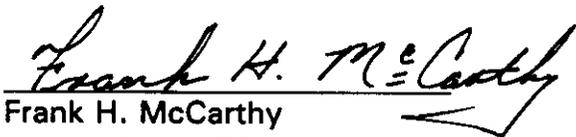
Medical records generated by the Veterans Administration Medical Center demonstrate that in February 1984, Plaintiff was diagnosed with chronic lumbosacral strain [R. 207]. In May 1984, he exhibited tenderness in the lumbar area with no spasm and no neurological deficits [R. 202]. A September 1985 x-ray of Plaintiff's lumbosacral spine was normal. [R. 302]. In April 1985, physical examination revealed mild degenerative changes in both Plaintiff's knees [R. 193], but x-rays of his knees were within normal limits [R. 238]. Medical records for the period between September 1985 and December 1988 reflect that Plaintiff was diagnosed with degenerative joint disease in his knees and chronic low back pain. Although the records contain occasional notations of reduced range of motion,² they do not reveal any continuing functional limitations attributed to these conditions during the relevant time frame, September 7, 1985, through December 31, 1988. The court finds that the ALJ's RFC determination is supported by substantial evidence in the record.

Conclusion

² 4/22/88 the physician noted reduced range of motion of the axial spine and no radicular signs [R. 166]; 2/20/87 reduced range of motion in the low back and cervical spine were noted [R. 177].

The court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts. The court further finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff was not disabled between September 7, 1985, and December 31, 1988, is AFFIRMED

SO ORDERED this 15th Day of July, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

FILED,
JUL 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRENDA MOORE (a/k/a BRENDA ROBERTS),)
CYNTHIA DUTTON, AND PENNY GUERIN,)

Plaintiffs,)

v.)

Case No. 99-CV-0187K (E) ✓

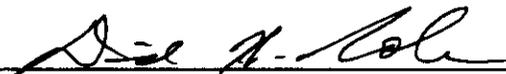
BOARD OF COUNTY COMMISSIONERS OF)
THE COUNTY OF ROGERS; ROGERS)
COUNTY SHERIFF'S DEPARTMENT; and)
EUGENE RODERIGUIZ, individually and in)
his official capacity as Deputy Sheriff of the)
County of Rogers,)

ENTERED ON DOCKET
DATE JUL 16 1999

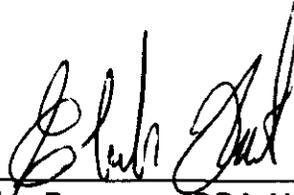
Defendants.)

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the plaintiffs, Brenda Moore, Cynthia Dutton, and Penny Guerin, and the defendants, Board of County Commissioners of Rogers County, Rogers County Sheriff's Department, and Eugene Roderiguiz, and jointly stipulate to the dismissal with prejudice of the Rogers County Sheriff's Department only.


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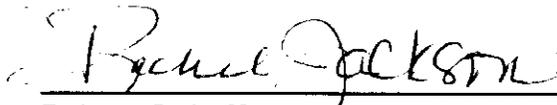
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***Attorneys for Defendants,
Board of County Commissioners of the
County of Rogers; and Rogers County
Sheriff's Department***

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

THOR K. HENRY,
SSN: 441-76-4703

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

FILED

JUL 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-396-J ✓

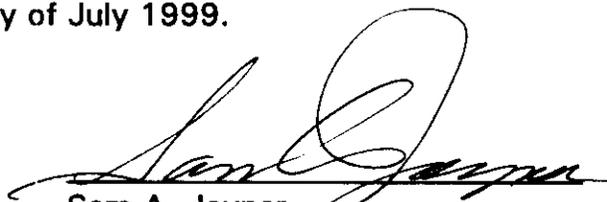
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DATE JUL 15 1999

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 14th day of July 1999.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

THOR K. HENRY,
SSN: 441-76-4703

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

FILED
JUL 14 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-396-J ✓

ENTERED ON DOCKET

DATE JUL 15 1999

ORDER^{1/}

Plaintiff, Thor K. Henry, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because (1) the ALJ's decision is not supported by substantial evidence, (2) Plaintiff's impairments are so severe that he is precluded from performing all work activity, and (3) the ALJ failed to give appropriate consideration to the opinion of the treating physician. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born March 18, 1963, and was 33 years old at the time of his hearing before the ALJ. [R. at 174]. Plaintiff completed high school, and additionally

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

^{2/} Administrative Law Judge R.J. Payne (hereafter "ALJ") concluded that Plaintiff was not disabled on November 19, 1996. [R. at 8]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on April 20, 1998. [R. at 4].

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obtained instruction in helicopter mechanics. [R. at 174-77]. Plaintiff alleges he is disabled due to problems with his wrist, his back, pain, and a mental impairment.

According to Plaintiff, he is able to sleep only two to four hours each night. [R. at 83]. Plaintiff testified that he goes to bed around midnight and arises for the day at approximately ten a.m. [R. at 208]. Plaintiff claims he is unable to sleep because of pain, and that his wife sometimes wakes him because he is screaming. [R. at 83, 153].

An RFC completed March 21, 1993, by Thurma Fiegel, M.D., indicates Plaintiff can occasionally lift 50 pounds, frequently lift 25 pounds, stand or walk six hours in an eight hour day, and sit for six hours in an eight hour day. [R. at 89]. The assessment was "affirmed as written" by a different doctor on May 28, 1996. [R. at 96]. A Psychiatric Review Technique Form was completed on May 28, 1996. It indicates Plaintiff has no medically determinable mental impairment. [R. at 97].

On April 1, 1993, one of Plaintiff's doctors indicated that Plaintiff exhibited no evidence of a herniated disk. [R. at 108]. The doctor noted that Plaintiff complained of constant aches and sharp pains. The doctor concluded that Plaintiff had a permanent impairment to the whole person of 16%. [R. at 108-109].

Plaintiff saw Richard Hastings, D.O., various times for complaints associated with his workers compensation claims and injuries. Plaintiff initially injured his back. Plaintiff was additionally injured on October 15, 1994, when he slipped and fell on a wet surface. Plaintiff fell and injured his back and right wrist. [R. at 111]. Plaintiff had a follow-up appointment with Dr. Hastings on October 24, 1994. Plaintiff

reported that he was 80% improved. [R. at 137]. Dr. Hastings noted on September 26, 1995, that Plaintiff had decreased grip strength in his right hand. Plaintiff was referred to a specialist and had arthroscopic surgery on his wrist. On October 5, 1996, one week after the arthroscopic surgery, Plaintiff reported stiffness in his wrist. Plaintiff's doctor reported that Plaintiff had no tears in his ligaments and that he would release Plaintiff in approximately one week. [R. at 140].

The record contains a very difficult to read "work status form" on Plaintiff. The form is dated July 21 or July 24, 1995, and indicated that Plaintiff can return to work July 24, 1995, with a restriction of no lifting or carrying over ten pounds. [R. at 145]. The form does not indicate whether this restriction is permanent or temporary. [R. at 145].

An MRI of Plaintiff's lumbar spine was completed and interpreted on January 2, 1996. Although Plaintiff showed some signs of disc narrowing at L2-L3, "no definite evidence for disc herniation or significant facet disease" was found. [R. at 147].

Plaintiff was given his final impairment ratings by Dr. Hastings for the purpose of his workers compensation claim on April 14, 1996. Dr. Hastings noted that Plaintiff had a permanent impairment to his right hand of 30 percent, and a whole person impairment of 26 percent. [R. at 148]. Dr. Hastings concluded that Plaintiff should undergo vocational rehabilitation to a more sedentary form of employment. [R. at 151].

At the hearing before the ALJ Plaintiff testified that he was under no current medical treatment for any problems related to his wrist or back. [R. at 192, 194-96]. Plaintiff additionally stated that he took no medications for pain and was not currently seeing a physician. [R. at 201].

Plaintiff testified that he could stand for only 15 minutes, and walk for only 15 - 20 minutes. [R. at 197-99]. According to Plaintiff he is unable to drive due to the pain, and he sometimes has to lie on a couch for 45 minutes to one hour to relieve the pain. [R. at 201]. Plaintiff testified that he did not drink or take drugs to relieve the pain. [R. at].

A social security examiner examined Plaintiff on February 29, 1996. He noted that Plaintiff complained of low back pain and the examiner suggested that an MRI would be helpful in interpreting Plaintiff's complaints. [R. at 128]. He concluded that Plaintiff appeared limited in his physical abilities.

II. SOCIAL SECURITY LAW & STANDARD 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. . . .

42 U.S.C. § 423(d)(2)(A). The Commissioner has established a five-step process for the evaluation of social security claims.^{3/} See 20 C.F.R. § 404.1520.

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

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

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

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

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

III. THE ALJ'S DECISION

The ALJ considered Plaintiff's mental impairment but concluded that it was not severe. [R. at 13]. The ALJ concluded that Plaintiff had the RFC to perform the physical and exertional requirements of light and sedentary work except for lifting more than 15 pounds, walking more than one hour at a time, standing more than one hour, sitting more than one hour, no repetitive hand motion, no more than occasional

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

stooping, bending, crouching, climbing, and mild to moderate limitation in his ability to grip with the right hand. [R. at 17]. Based on the testimony of a vocational expert the ALJ determined that numerous jobs existed which Plaintiff could perform and that Plaintiff was therefore not disabled. [R. at 17].

IV. REVIEW

APPLICATION OF JAMES

In James v. Chater 96 F.3d 1341, 1344 (10th Cir. 1996) the Tenth Circuit Court of Appeals noted that "[o]rdinarily issues omitted from an administrative appeal are deemed waived for purposes of subsequent judicial review." James, 96 F.3d at 1343. The Tenth Circuit concluded that this general rule should also be applied to social security disability adjudications. In James, the claimant did not file a brief at the Appeals Council level but asserted that he was disabled and entitled to benefits. The Court concluded that "[s]uch a statement was plainly inadequate to apprise the Appeals Council of the particularized points of error counsel has subsequently argued in the courts." Id.

In this case, the decision of the ALJ specifically informed Plaintiff of the James decision, and warned that the failure by Plaintiff to raise any specific issues could result in the waiver of that issue on appeal to the district court. [R. at 18]. In the appeal to the Appeals Council, Plaintiff states the reason for his appeal:

The ALJ decision is not supported by substantial evidence and is affected by other errors of law. Substantial evidence establishes a combination of impairments that are so severe as to be productive of symptoms that would preclude all

work activity. ALJ failed to accord proper consideration of treating physician opinion on issue of disability.

[R. at 6]. As stated, these issues are not sufficient to apprise the Appeals Council of the specific issues which Plaintiff raises in his brief. Plaintiff does, generally, raise the issue of the ALJ's evaluation of Plaintiff's treating physician.^{5/} However, the other issues raised by Plaintiff before the Appeals Council are simply too general to have preserved Plaintiff's rights with respect to the issues currently raised by Plaintiff before the District Court. Consequently, in accordance with James, Plaintiff has waived all issues with the exception of treating physician.

TREATING PHYSICIAN

Plaintiff asserts that the ALJ disregarded the treating physician's opinion. Plaintiff notes that Plaintiff's treating physician recommended vocational rehabilitation for Plaintiff so that Plaintiff could learn ". . . a more sedentary type of employment." Plaintiff claims the ALJ disregarded this opinion.

The ALJ concluded Plaintiff could do sedentary work and a narrow range of light work. Plaintiff's treating physician suggested Plaintiff should return to a "more sedentary type of employment." Presumably the physician meant that Plaintiff should return to work that was more sedentary than the work Plaintiff was performing. The type of work which the ALJ concluded Plaintiff could do certainly qualifies as more sedentary than the work Plaintiff was previously performing. The Court concludes that the treating physician's opinion is not necessarily inconsistent with the RFC attributed

^{5/} Plaintiff does not develop this argument at the Appeals Council level.

to Plaintiff by the ALJ. The ALJ additionally recognized, in his opinion, that the definitions relied upon by Plaintiff's treating physicians did not necessarily equate to the Social Security Administration definitions.

Furthermore, the ALJ's RFC for Plaintiff was fairly restrictive. The ALJ concluded that Plaintiff should not lift over 15 pounds, should not walk more than one hour at a time, should not stand more than one hour at a time, and should have no exposure to kneeling, crawling, or climbing. In addition, the ALJ concluded that Plaintiff should be exposed to no repetitive overhead reaching, and no more than occasional stooping, bending, or crouching. With respect to Plaintiff's hands, the ALJ found Plaintiff should be exposed to no repetitive hand motion, and that Plaintiff had a mild to moderate limitation in his ability to grip with the right hand. [R. at 17]. The ALJ's RFC is supported by substantial evidence in the record.

WAIVED ISSUES

The Court has concluded that Plaintiff has waived his remaining issues. However, the Court also separately addresses those issues and concludes that even if the issues had not been waived the decision of the ALJ should be affirmed.

Plaintiff notes that the social security examiner suggested that evaluation by a neurologist in conjunction with an MRI would be helpful. Plaintiff suggests that it was therefore error for the ALJ to decline to refer Plaintiff to a neurologist or require further testing. The record reflects that Plaintiff did have an MRI in January of 1996. The MRI was interpreted as showing no evidence of disc herniation or significant facet

disease. [R. at 147]. RFC assessments indicated Plaintiff could lift as much as 50 pounds frequently and 25 pounds occasionally with pain providing no additional limitation on Plaintiff's RFC. [R. at 89]. Plaintiff's treating physician indicated Plaintiff could perform a "more sedentary" type of work. [R. at 148-52]. Plaintiff testified that he took no medications for his pain. Under the circumstances presented in this case, the ALJ did not err by declining to refer Plaintiff to a neurologist.

Plaintiff asserts that he claimed that he suffered from a mental impairment which the ALJ did not properly evaluate. The procedure for the evaluation of a mental impairment is explained in 20 C.F.R. 1520a. However, a claimant has the initial burden to establish the existence of a mental impairment.

If you are not doing substantial gainful activity, we always look first at your physical or mental impairment(s) to determine whether you are disabled or blind. Your impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. A physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by your statement of symptoms.

20 C.F.R. § 404.1508. See also 20 C.F.R. § 404.1528 ("*Symptoms* are your own description of your physical or mental impairment. Your statements alone are not enough to establish that there is a physical or mental impairment.")(emphasis in original); 20 C.F.R. § 404.1514 ("We need specific medical evidence to determine whether you are disabled or blind. You are responsible for providing that evidence. . . ."); 20 C.F.R. 404.1512(a) ("In general, you have to prove to us that you are blind

or disabled."); 20 C.F.R. 404.1512(c) ("You must provide medical evidence showing that you have an impairment(s) and how severe it is during the time you say that you are disabled.").

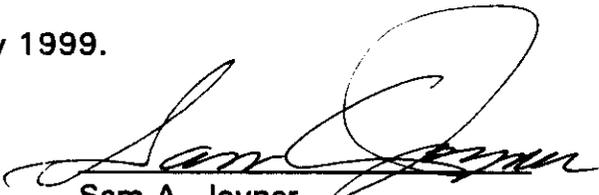
Plaintiff refers the Court to no regulations or case law which impose a burden on the ALJ to order and pay for examinations when the Plaintiff has not met the initial burden of proving the existence of an impairment. In this case, the ALJ noted that Plaintiff had visited a mental facility one time and stayed for one hour. Plaintiff submitted no other evidence to substantiate the alleged mental impairment. The record additionally contains a PRT form completed by a psychiatrist indicating that Plaintiff's alleged mental impairment was "not severe." [R. at 97]. The Court concludes that the ALJ's determination that Plaintiff did not have a severe mental impairment is supported by the record.

V. CONCLUSION

Several issues asserted by Plaintiff were waived pursuant to James. However, even if those issues had not been waived, the Court concludes that the record contains substantial evidence to support the decision of the Commissioner.

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

Dated this 14th day of July 1999.


Sam A. Joyner
United States Magistrate Judge

KK

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

FILED

JUL 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONALD R. NICHOLS, *et al.*,)
)
Plaintiffs,)
)
v.)
)
G. DAVID GORDON, *et al.*,)
)
Defendants.)

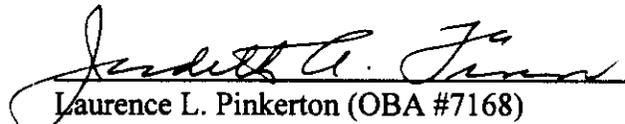
Case No. 95-C-1126H ✓

ENTERED ON DOCKET

DATE JUL 15 1999

**PLAINTIFFS' NOTICE OF DISMISSAL AS TO
DEFENDANTS, ROBERT L. MILLER AND
NORTHERN OHIO ENGINEERING CO.**

COME NOW, Donald R. Nichols and Virginia Nichols, husband and wife, Plaintiffs in the above-styled and captioned cause of action, and pursuant to Fed.R.Civ.P. 41(A)(1)(i), hereby dismiss *with prejudice* their claims against the Defendants, Robert L. Miller and Northern Ohio Engineering Co.



Laurence L. Pinkerton (OBA #7168)
Judith A. Finn (OBA #2923)
PINKERTON & FINN, P.C.
2000 First Place
15 East 5th Street
Tulsa, Oklahoma 74103-4367
(918) 587-1800
Attorneys for Plaintiffs

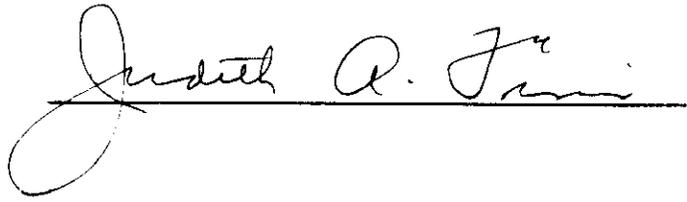
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DIB CJJ

CERTIFICATE OF SERVICE

I, Judith A. Finn, do hereby certify that on the ~~15th~~^{14th} day of July, 1999, I caused to be mailed a true and correct copy of the above and foregoing *Plaintiffs' Notice of Dismissal as to Defendants, Robert L. Miller and Northern Ohio Engineering Co.*, with proper postage thereon fully prepaid, to:

William E. King, Esq.
William E. King, P.C.
Post Office Box 309
Kemah, Texas 77565

A handwritten signature in cursive script, reading "Judith A. Finn", is written over a horizontal line.

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

FILED

JUL 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE TRUST COMPANY OF)
OKLAHOMA, personal representative)
of the estate of Jane Self, deceased)
Plaintiff,)
v.)
VIRGINIA MOSBURG,)
Defendant.)

Case No. 97-CV-1018-H

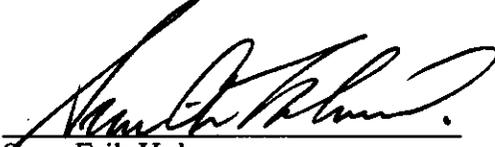
ENTERED ON DOCKET
DATE JUL 15 1999

ORDER

This matter comes before the Court pursuant to the Court's order of June 25, 1999 (Docket # 25) and Defendant Mosburg's motion to dismiss (Docket # 24). Under Local Rule 7.1(c), a party opposing a motion has fifteen days after the filing of the motion in which to respond, and failure to timely respond authorizes the Court to deem the matter confessed. Defendant Mosburg's motion to dismiss was filed on April 16, 1999. Plaintiff failed to timely respond to that motion. In its order of June 25, 1999, the Court directed Plaintiff to respond to Defendant's motion to dismiss on or before July 7, 1999, and stated that a failure to do so would result in dismissal of the case without prejudice. Plaintiff has not responded within the time specifically ordered by the Court. Therefore, the case is hereby dismissed without prejudice.

IT IS SO ORDERED.

This 14TH day of July, 1999.


Sven Erik Holmes
United States District Judge

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

FILED

JUL 14 1999 *AL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WANDA ANDERSON,)
)
 Plaintiff,)
)
 v.)
)
 GUNNEBO JOHNSON CORPORATION,)
 a corporation in the state of Oklahoma,)
)
 Defendant.)

Case No. 98-CV-0280-H ✓

ENTERED ON DOCKET

DATE JUL 15 1999

ORDER

This matter comes before the Court pursuant to the Court's minute order of June 30, 1999 and Defendant Gunnebo Johnson Corporation's ("Gunnebo's") Motion for Summary Judgment (Docket # 9). Under Local Rule 7.1(c), a party opposing a motion has fifteen days after the filing of the motion in which to respond, and failure to timely respond authorizes the Court to deem the matter confessed. Defendant Gunnebo's motion for summary judgment was filed on June 4, 1999. Plaintiff Anderson failed to timely respond to that motion. In its minute order of June 30, 1999, the Court directed Plaintiff to respond to Defendant's motion for summary judgment on or before July 13, 1999, and stated that a failure to do so would result in dismissal of the case without prejudice. Plaintiff Anderson has not responded within the time specifically ordered by the Court. Therefore, the case is hereby dismissed without prejudice.

IT IS SO ORDERED.

This 14TH day of July, 1999.



Sven Erik Holmes
United States District Judge

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

FILED

JUL 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JESSICA A. A. MOORE,)
)
Plaintiff,)
)
vs.)
)
BARRETT RESOURCES CORPORATION,)
ASSOCIATED RESOURCES, INC., AND)
BRIAN L. RICE,)
)
Defendants.)

Case No. 99-CV-0017H (J)
Hon. Sven Holmes

ENTERED ON DOCKET
DATE JUL 15 1999

**ORDER OF DISMISSAL WITH PREJUDICE OF PLAINTIFF'S COMPLAINT
AND CLAIMS AGAINST DEFENDANT BRIAN L. RICE**

Plaintiff's and Defendant Brian L. Rice's Joint Stipulation Of Dismissal with Prejudice of Plaintiff's Complaint Against Defendant Brian L. Rice is approved.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's Complaint, and all claims alleged therein, against Defendant Brian L. Rice are hereby dismissed with prejudice to refiling, with each party to bear their own respective attorney fees and costs.

DONE this 14TH day of July 1999.


UNITED STATES DISTRICT JUDGE

Danny P. Richey, OBA 10458
320 S. Boston, Suite 1119
Tulsa, Oklahoma 74103
(918) 587-7805
(918) 587-7806 - Fax

ATTORNEY FOR DEFENDANT,
BRIAN L. RICE

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

ANDREW C. CAPPIS,)
)
Plaintiff,)
)
vs.)
)
XENON, INC. d/b/a CONCESSIONS,)
)
Defendant.)

No. 98-CV-845-K

ENTERED ON DOCKET
DATE JUL 15 1999

FILED

JUL 14 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that the defendant in this action has filed for bankruptcy. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records without prejudice pending the bankruptcy proceedings involving defendant, Xenon, Inc.

The parties are directed to notify the Court of the resolution of the bankruptcy proceedings, within ten (10) days thereafter, so that the Court may re-open this matter, if necessary, to obtain a final determination of this litigation.

ORDERED this 14 day of July, 1999.



TERRY C. FERN, Chief
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DATE JUL 15 1999

FILED

JUL 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SYLVIA A. CHERRY,)
Plaintiff,)
)
vs.)
)
KENNETH S. APEL, Commissioner)
Social Security Administration,)
Defendant.)

Case No. 99-CV-192-H-(J)

ORDER OF DISMISSAL WITHOUT PREJUDICE

Having considered *Plaintiff's Motion to Dismiss Duplicate Case*, and there being no objection by Defendant, IT IS HEREBY ORDERED that the *Complaint* of the Plaintiff filed on March 14, 1999, is hereby dismissed.

Dated this 14TH day of JULY, 1999.



 United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 WILLIAM F. CRAIG,)
)
 Defendant.)

Case No. 99CV0325H(E)

ENTERED ON DOCKET

DATE JUL 14 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 Phil Pinnell, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 14th day of July, 1999.

UNITED STATES OF AMERICA

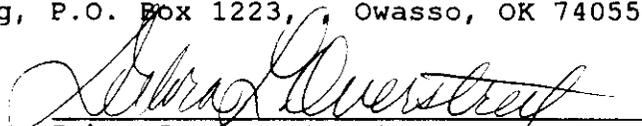
Stephen C. Lewis
United States Attorney



PHIL PINNELL, OBA #7169
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 14th day of July, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: William F. Craig, P.O. Box 1223, Owasso, OK 74055.



Debra L. Overstreet
Financial Litigation Agent

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

FILED

JUL 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHANE SPITLER, an individual, and
CAMMIE SPITLER, an individual,

Plaintiffs,

v.

Case No. 98-CV-0758H-J ✓

ADVANCED SYSTEMS, INC., a New
Jersey Corporation; ADAMATIC, A
CORPORATION, a New Jersey
Corporation; ADAM EQUIPMENT
CORPORATION, a/k/a ADAMS
EQUIPMENT INTERNATIONAL, INC.,
a New Jersey Corporation, and HOBART
CORPORATION, a Delaware
Corporation,

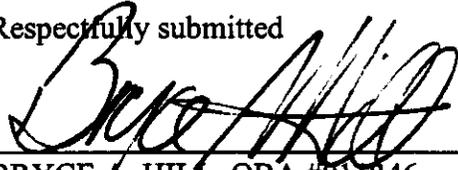
Defendants.

ENTERED ON DOCKET
DATE JUL 14 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW, the Plaintiffs, Shane Spitler and Cammie Spitler, and hereby dismiss their
claims against Defendant, Adamatic, A Corporation, **with prejudice** to their refileing.

Respectfully submitted


BRYCE A. HILL, OBA #011346
HILL & KNIGHT
717 South Houston, Suite 508
Tulsa, Oklahoma 74127
918/584-2889

and

JACK G. ZURAWIK, OBA #011588
5801 East 41st Street, Suite 300
Tulsa, OK 74135
918/664-1113

Attorneys for Plaintiffs

19

cus

APPROVED:

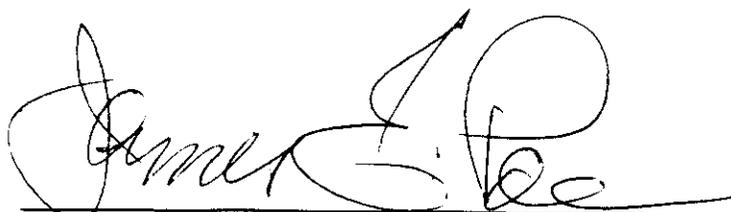

ROBERT D. TOMLINSON, OBA#009056
KRIS TED LEDFORD, OBA # 017552
McKINNEY & STRINGER, P.C.
Mid-Continent Tower
401 South Boston, Suite 2100
Tulsa, OK 74103
Telephone: 918/582-3176
Fax: 918/582-1403

and

ROBERT MONNIN, OBA #0009909
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216/566-5607

Attorneys for Defendant Adamatic, A
Corporation

APPROVED:



JAMES E. POE, OBA #007198
COVINGTON & POE
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Tulsa, OK 74103-4267
918/585-5537

and

MICHAEL EDWARDS, OBA #002644
EDWARDS & LANDERS
3030 Mid-Continent Tower
401 S. Boston
Tulsa, OK 74103-4016
918/585-5900

Attorneys for Defendant Advanced Systems,
Inc.

CERTIFICATE OF SERVICE

This is to certify that on this 14th day of July, a true and correct copy of the above and foregoing Stipulation of Dismissal with Prejudice has been mailed, postage prepaid, to:

Bryce A. Hill
717 South Houston, Suite 508
Tulsa, Oklahoma 74127
(918) 584-2889
Attorney for Plaintiffs

Jack G. Zurawik
5801 East 41st Street, Suite 300
Tulsa, Oklahoma 74135
(918) 664-1113
Attorney for Plaintiffs

James E. Poe
Covington & Poe
740 Manhattan Building
111 West Fifth Street
Tulsa, OK 74103-4267
Attorney for Defendant Advanced
Systems, Inc.

and

Michael Edwards
Edwards & Landers
3030 Mid-Continent Tower
401 South Boston Avenue
Tulsa, OK 74103-4016
Attorney for Defendant Advanced
Systems, Inc.



KRIS TED LEDFORD

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

FILED

JUL 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KATHLEEN DONICA,)
)
Plaintiff,)
)
vs.)
)
HEALTHSOUTH CORPORATION, a)
Delaware corporation,)
)
Defendant.)

Case No. 98-CV-0439H(M)

ENTERED ON DOCKET
DATE JUL 14 1999

STIPULATION OF DISMISSAL OF OPT-IN PLAINTIFF STEVEN D. DAVIS

Opt-In Plaintiff Steven D. Davis ("Davis") and Defendant HealthSouth Corporation ("HealthSouth"), pursuant to Fed.R.Civ.P. 41(a)(1)(i), hereby stipulate to the dismissal without prejudice of Davis' claims against HealthSouth in this matter, and Davis by this dismissal, effectively withdraws his name from the class in this case.

Respectfully submitted,

Duane Henry

J. Ronald Petrikin, OBA No. 7092
David H. Herrold, OBA No. 17053
CONNER & WINTERS, P.C.
15 East Fifth Street, Ste. 3700
Tulsa, Oklahoma 74103-4344
(918) 586-5711; (918) 586-8547 fax

-and-

Donald E. Herrold, OBA No. 4140
Jack N. Herrold, OBA No. 4141
HERROLD, HERROLD, SUTTON & DAVIS, P.A.
2250 East 73rd Street, Ste. 600
Tulsa, Oklahoma 74136
(918) 491-9559; (918) 491-7337 fax

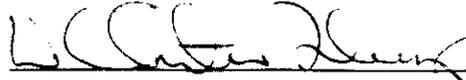
Attorneys for the Plaintiff,
KATHLEEN DONICA and those other present and
former employees of HealthSouth Corporation who
are similarly situated

MT

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-AND-



L. Traywick Duffie, Admitted *Pro Hac Vice*
W. Christopher Arbery, Admitted *Pro Hac Vice*
HUNTON & WILLIAMS
4100 NationsBank Plaza
600 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 888-4000; (404) 888-4190 *fax*

-and-

Sarah Jane McKinney, OBA No. 17099
HALL, ESTILL, HARDWICK, GABLE, GOLDEN
& NELSON, P.C.
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103
(918) 594-0439; (918) 594-0505 *fax*

Attorneys for the Defendant,
HEALTHSOUTH CORPORATION

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

FILED

JUL 13 1999 *A*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JESSICA A. MOORE,

Plaintiff,

vs.

BARRETT RESOURCES CORPORATION,
ASSOCIATED RESOURCES, INC., and
BRIAN L. RICE,

Defendants.

Case No. 99CV0017H (J) ✓
Hon. Sven Holmes

ENTERED ON DOCKET

DATE JUL 14 1999

ORDER APPROVING DISMISSAL OF DEFENDANT,
ASSOCIATED RESOURCES, INC.'S CROSS-CLAIM
AGAINST THE DEFENDANT, BARRETT RESOURCES CORPORATION

NOW on this 12TH day of July, 1999, the motion of Defendant Associated Resources, Inc. to approve its Dismissal with Prejudice of its Cross-Claim against Defendant Barrett Resources Corporation comes on for hearing. The Court after reviewing the pleadings filed in this matter and being fully advised of the premises hereby approves the Dismissal with Prejudice by Defendant Associated Resources, Inc. of its Cross-Claim against Defendant Barrett Resources Corporation is hereby approved.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that any and all claims and causes of action by and between Defendant, Associated Resources, Inc., and Defendant, Barrett Resources Corporation, be, and hereby are, dismissed with prejudice pursuant to the Stipulation of Dismissal with Prejudice of All Claims by and between Defendant, Associated Resources, Inc., and Defendant, Barrett Resources Corporation. Defendant, Associated Resources, Inc., and Defendant, Barrett Resources Corporation, are each to bear their own costs and attorneys fees.



JUDGE OF THE DISTRICT COURT

James K. Deuschle
525 South Main, Suite 209
Tulsa, OK 74103-4503
(918) 592-2280
(918) 592-2281 (Facsimile)
ATTORNEY FOR THE DEFENDANT,
ASSOCIATED RESOURCES, INC.

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

JESSICA A. MOORE,

Plaintiff,

vs.

BARRETT RESOURCES CORPORATION,
ASSOCIATED RESOURCES, INC., and
BRIAN L. RICE,

Defendants.

ENTERED ON DOCKET

DATE JUL 14 1999

Case No. 99CV0017H (J) ✓
Hon. Sven Holmes

FILED

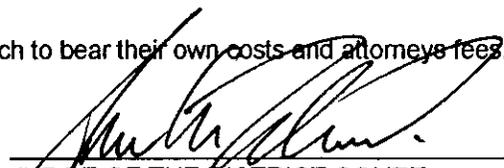
JUL 13 1999 *A*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER APPROVING DISMISSAL OF PLAINTIFF,
JESSICA A. A. MOORE'S COMPLAINT AGAINST
DEFENDANT, ASSOCIATED RESOURCES, INC.

NOW on this 12th day of July, 1999, the motion of Plaintiff, Jessica A. A. Moore, to approve her Dismissal with Prejudice of her Complaint against Defendant, Associated Resources, Inc. comes on for hearing. The Court after reviewing the pleadings filed in this matter and being fully advised of the premises hereby approves the Dismissal with Prejudice by Plaintiff, Jessica A. A. Moore, of her Complaint against Defendant, Associated Resources, Inc., is hereby approved.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that any and all claims and causes of action by and between Plaintiff, Jessica A. A. Moore, and Defendant, Associated Resources, Inc., be, and hereby are, dismissed with prejudice pursuant to the Stipulation of Dismissal with Prejudice of All Claims by and between Plaintiff, Jessica A. A. Moore, and Defendant, Associated Resources, Inc. Plaintiff, Jessica A. A. Moore, and Defendant, Associated Resources, Inc., are each to bear their own costs and attorneys fees.



JUDGE OF THE DISTRICT COURT

James K. Deuschle
525 South Main, Suite 209
Tulsa, OK 74103-4503
(918) 592-2280
(918) 592-2281 (Facsimile)
ATTORNEY FOR THE DEFENDANT,
ASSOCIATED RESOURCES, INC.

3x

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D
JUL 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
RUBY OREY,)
)
Defendant.)

No. 99CV0322BU(J) ✓

ENTERED ON DOCKET

DATE JUL 13 1999

DEFAULT JUDGMENT

This matter comes on for consideration this 12th day of JULY, 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, Ruby Orey, appearing not.

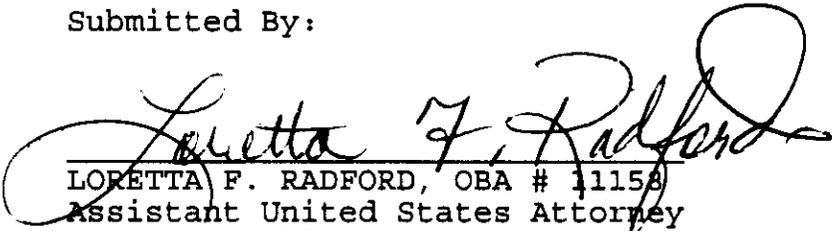
The Court being fully advised and having examined the court file finds that Defendant, Ruby Orey, was served with Summons and Complaint on April 28, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Ruby Orey, for the principal amount of \$3,026.51 and \$240.05, administrative charges of \$74.87, plus accrued interest of \$167.93

and \$9.50, plus interest thereafter at the rate of 7 and 5 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.163 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

LFR/jmo

MT

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

FILED

JUL 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RODGER CUTLER,

Plaintiff,

vs.

Case No. 98-CV-781-B

CITY OF GLENPOOL, OKLAHOMA,
LEE ODOM, JOHN DOE NO. 1,
JOHN DOE NO. 2, and JOHN DOE
NO. 3,

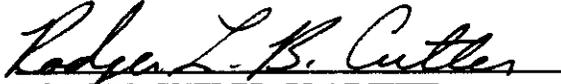
Defendants.

ENTERED ON DOCKET

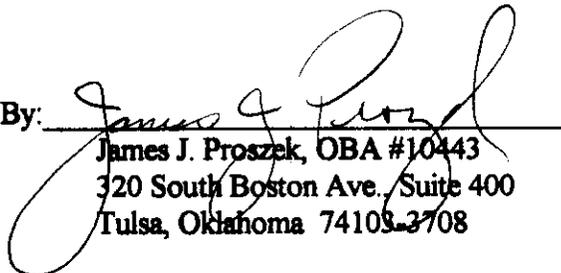
DATE JUL 13 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

All the parties to this action hereby stipulate that any and all causes of action and claims against the Defendants, City of Glenpool, Lee Odom and Robert McAtee, are hereby dismissed with prejudice.


RODGER CUTLER, PLAINTIFF

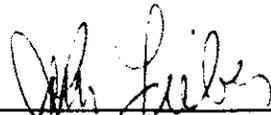
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

By: 
James J. Proszek, OBA #10443
320 South Boston Ave. Suite 400
Tulsa, Oklahoma 74103-2708
ATTORNEYS FOR PLAINTIFF

25

C/S

ELLER AND DETRICH
A Professional Corporation

BY: 
JOHN F. LIEBER, OBA #5421
2727 East 21st Street
Suite 200, Midway Building
Tulsa, Oklahoma 74114
(918) 747-8900

ATTORNEYS FOR DEFENDANTS
City of Glenpool, Lee Odom
and Robert McAtee

\\SBSERVER\ELLERDETRICH\MAG\Cutler\Stip of Dismissal.doc

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 13 1999

MARTHENIA ANDERSON)
)
 Plaintiff,)
)
 vs.)
)
 AMOCO PRODUCTION COMPANY,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-22 BU (J)

ENTERED ON DOCKET
DATE JUL 13 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW Jeff Nix, counsel for Plaintiff, Marthenia Anderson, and advises the court of a settlement agreement between the parties and requests that the above referenced case be dismissed with prejudice.



Jeff Nix OBA # 6688
Petroleum Club Building
601 S. Boulder, Ste 610
Tulsa, OK 74119
(918) 587-3193
(918) 587-3491 fax

2
7

C15

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing was mailed via the United States Postal Service with sufficient postage thereon, on this 9 day of July, 1999 to:

Kimberly L. Love
Boone, Smith, Davis, Hurst & Dickman
500 OneOk Plaza
100 West Fifth Street

Jeff Nix, Lawyer
601 S. Boulder, Ste 610
Tulsa, OK 74119
(918) 587-3193
(918) 587-3491 FAX



Jeff Nix

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID Highbarger,)
)
 Plaintiff,)
)
 vs.)
)
 STATE OF OKLAHOMA,)
)
 Defendant.)

Case No. 99-CV-0375-B (E)

ENTERED ON DOCKET

DATE JUL 13 1999

STIPULATION OF DISMISSAL

COMES NOW Jeff Nix, counsel for Plaintiff, David Highbarger, and hereby
dismisses without prejudice, the above styled cause.



Jeff Nix, OBA # 6688
Petroleum Club Building
601 South Boulder, Ste. 610
Tulsa, Oklahoma 74119
(918) 587-3193
(918) 587-3491 - fax

ATTORNEY FOR PLAINTIFF

MT



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CERTIFICATE OF MAILING

The undersigned hereby certifies that on this 12 day of July, 1999, a true and correct copy of the above and foregoing document was mailed via U. S. Mail, with proper postage prepaid thereon to:

Scott D. Boughton
Assistant Attorney General
Litigation Section
Office of Attorney General
State of Oklahoma
4545 N. Lincoln Blvd., Suite 260
Oklahoma City, Oklahoma 73105-3498



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

RANDY BUSSEY and DEBBIE
MASON, Individually and as the Parents
and Next of Kin of Heath Brandon Bussey,
Deceased,

Plaintiffs,

v.

JOHN HENSON d/b/a HENSON HORSE
TRANSPORT, TOBY L. HENSON, and
NORTHLAND INSURANCE
COMPANY, INC.,

Defendants.

FILED

JUL 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-941-K(M)

ENTERED ON DOCKET

DATE JUL 13 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW Plaintiffs Randy Bussey and Debbie Mason and Defendants, John Henson d/b/a Henson Horse Transport, Toby L. Henson, and Northland Insurance Company, Inc., through their respective counsel, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, and stipulate to the dismissal of the above-styled and numbered action, in its entirety, with prejudice, with each party to bear its own costs and attorneys' fees.

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Respectfully submitted:

WOOD & McGONIGLE, P.L.L.C.

By: Ronald D. Wood

RONALD D. WOOD, OBA #9848
HOLLY CINOCCA, OBA #16198
2727 East 21st Street, Suite 500
Tulsa, OK 74114
918/744-1213
Fax: 918/744-4026

- AND -

J. GREGORY LaFEVERS, OBA #10878
5314 South Yale, Suite 310
Tulsa, OK 74135
918/496-9258

Attorneys for Plaintiffs

Victor F. Albert

VICTOR F. ALBERT
McKINNEY & STRINGER, P.C.
101 North Robinson, Suite 1300
Oklahoma City, Oklahoma 73102
405/239-6444
Fax No. 405/239-7902

Attorneys for Defendants

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

FILED

JUL 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RUFORD HENDERSON, et al.,)
)
)
Plaintiffs,)
)
vs.)
)
AMR CORPORATION, AMERICAN)
AIRLINES, INC. and THE SABRE)
GROUP, INC.,)
)
Defendants.)

Case No. 97-CV-457-K (E) ✓

ENTERED ON DOCKET
DATE JUL 13 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

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

MARTIN & ASSOCIATES

By: _____

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

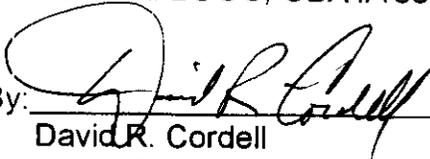
Attorneys for Plaintiffs

KLC

MA

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

By: 
David R. Cordell

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

OF COUNSEL:

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

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

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

FILED

JUL 12 1999 *SL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JERRY TAYLOR,)
)
Plaintiff,)
)
vs.)
)
OSU MEDICAL COLLEGE,)
)
Defendant.)

Case No. 98-CV-0891-BU(J)

ENTERED ON DOCKET
DATE JUL 13 1999

ORDER

NOW on this 12th day of JULY, 1999, this matter comes on for hearing pursuant to the Joint Stipulation of Dismissal and Application for Dismissal With Prejudice of the parties hereto. The Court, being fully advised in these premises, finds that the Application should be granted.

IT IS THEREFORE ORDERED that this cause is dismissed with prejudice.

Michael Bunge
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARYLAND INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
SOONER FREIGHT, INC.,)
)
Defendant.)

No. 98-C-427-B(E) ✓

ENTERED ON DOCKET

DATE JUL 13 1999

AMENDED JUDGMENT

In accord with the June 2, 1999 Order sustaining the Defendant's Motion for Summary Judgment and the July 12, 1999 Order assessing damages in the amount of \$50,000, the Court hereby enters judgment in favor of Defendant Sooner Freight, Inc. and against Plaintiff Maryland Insurance Company in the amount of \$50,000. Costs are assessed against Plaintiff if properly applied for pursuant to Local Rule 54.1. Any claim for attorney's fees must be timely filed pursuant to Local Rule 54.2.

DATED, THIS th 12 DAY OF JULY, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

25

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

FILED

JUL 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARYLAND INSURANCE COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 SOONER FREIGHT, INC.,)
)
 Defendant.)

No. 98-C-427-B(E)

ENTERED ON DOCKET

DATE JUL 13 1999

ORDER

Before the Court is the Motion for New Trial filed by plaintiff Maryland Insurance Company ("Maryland") (Docket No. 18). Maryland seeks to set aside the summary judgment entered on June 2, 1999 in favor of defendant Sooner Freight, Inc. ("Sooner") on Maryland's declaratory judgment claim.

Maryland contends the commercial general liability ("CGL") policy issued Sooner was not intended to cover damage to personal property of others in the care, custody or control of the insured regardless of the cause, and therefore, Maryland is not liable for a fire loss to personal property owned by Carapace and held in storage by bailee Sooner in a rented warehouse.¹ In the alternative, Maryland argues LIMITS OF INSURANCE (SECTION III) in the CGL policy limits Sooner's coverage for this loss to \$50,000.

¹ Maryland asserts the Building and Personal Property policy it issued Sooner covered loss for damage to the insured's own property and the property of others caused by fire. Maryland states it paid Carapace for its loss under this policy to the extent of coverage.

The CGL policy provides that Maryland will pay those sums that the policyholder becomes legally obligated to pay as damages due to "property damage" to which the insurance applies. The coverage extends to all property damage caused by an "occurrence" that takes place in the "coverage territory" and which occurs during the policy period. Subsection 2 of the policy contains various exclusions which limit the coverage provided and are listed in subparagraphs (a) through (n). In support of its position of noncoverage, Maryland relies on exclusion 2(j)(4) which states:

This insurance does not apply to:

j. "Property damage" to:

(4) Personal property in the care, custody or control of the insured.

However, this exclusion like all the exclusions under 2(c) through 2(n), is subject to the following qualification:

Exclusions c. through n. do not apply to damage by fire to premises rented to you. A separate limit of insurance applies to this coverage as described in LIMITS OF INSURANCE (SECTION III).

Although Maryland may have intended this qualification to apply only to those exclusions under 2(c) through 2(n) which pertain to "premises," it references all exclusions "c. through n.", several of which do not involve "premises." Therefore, Maryland's reading of the qualification as creating coverage only for a loss to the policyholder's rented "premises" - *i.e.*, land and/or its buildings - when that loss is caused by fire would render it meaningless as an exception to exclusion 2(j)(4) which involves only personal property, as well as exclusions 2(d) and 2(e) which involve only bodily injury. The Court must liberally construe terms of inclusion in favor of the insured and

strictly construe terms of exclusion against the insurer. *Phillips v. Estate of Greenfield*, 859 P.2d 1101, 1104 (Okla. 1993). Applying this rule of construction, the Court rejects Maryland's objection to its holding that the CGL policy provides coverage for the Carapace claims for damage to personal property resulting from a fire in the warehouse where the property was stored and which was rented by Sooner.

The Court, however, agrees with Maryland that such coverage is limited by LIMITS OF INSURANCE (SECTION III) of the policy. The above qualifying, or reaffirming provision expressly states "A separate limit of insurance applies to this coverage as described in LIMITS OF INSURANCE (SECTION III)" (emphasis added).

The limit to this coverage is the "Fire Damage Limit" set forth in Section 6:

Subject to 5. above, the Fire Damage Limit is the most we will pay under Coverage A for damages because of "property damage" to premises rented to you arising out of any on fire.

The "Fire Damage Limit" is \$50,000 for "any one fire." *Ex. E. to Maryland's Motion for New Trial (Docket No. 18)*.

For the reasons stated above and in its June 2, 1999 Order, the Court denies Maryland's motion for new trial (Docket No. 18). The Court, however, amends its earlier Order and Judgment to reflect the amount of coverage provided Sooner under the CGL policy is subject to the Fire Damage Limit under Section III of \$50,000.

IT IS SO ORDERED, THIS 12th DAY OF JULY, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED
JUL 12 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT C. VOWELL,)
)
 Plaintiff,)
)
 vs.)
)
 WITMER, INC., d/b/a WOODCRAFT)
 FURNITURE, and EDWARD)
 BRUBAKER,)
)
 Defendants.)

Case No. 99 CV 0368 E (M)

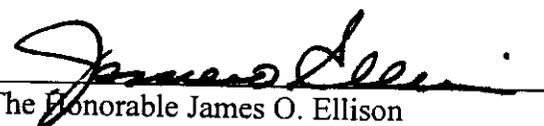
ENTERED ON DOCKET
JUL 13 1999

DISMISSAL WITH PREJUDICE

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

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

DATED: This 12th day of July, 1999.


The Honorable James O. Ellison
United States District Judge

Approved as to form:

BULLOCK & BULLOCK
Louis W. Bullock, OBA #1305
320 South Boston, Suite 718
Tulsa, Oklahoma 74103-3783
(918) 584-2001

**HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.**
J. Patrick Cremin, OBA #2013
320 South Boston, Suite 400
Tulsa, Oklahoma 74103
(918) 594-0400

RICHARDS & ASSOCIATES
Phil R. Richards, OBA #10457
9 East 4th Street, Suite 910
Tulsa, Oklahoma 74103
(918) 585-2394

F I L E D

JUL 8 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JAMES E. JOHNSTON,)
)
Petitioner,)
)
vs.)
)
TWYLA SNIDER, Warden,)
)
Respondent.)

No. 99-CV-473 C (J)

ENTERED ON DOCKET

DATE JUL 13 1999

ORDER REQUIRING RESPONDENT TO SHOW CAUSE

On June 21, 1999, Petitioner, appearing *pro se*, submitted a 28 U.S.C. § 2254 petition for writ of habeas corpus (#1), a brief in support of his petition (#2), and a motion for leave to proceed *in forma pauperis* (#3). Petitioner also submitted the \$5.00 filing fee. Because Petitioner has paid the filing fee required to commence this action, the Court finds the motion for leave to proceed *in forma pauperis* has been rendered moot.

Respondent is directed to prepare her response pursuant to Rule 5 of the Rules Governing § 2254 Habeas Corpus Cases. That rule states:

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts...are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcript as the answering party deems relevant. The court may on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment

or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

As an alternative to filing a Rule 5 answer, Respondent may file a motion to dismiss based upon alleged nonexhaustion, abuse of the writ pursuant to 28 U.S.C. § 2244, failure to comply with the 1-year limitations period, or lack of jurisdiction. If Respondent files a motion to dismiss based upon alleged nonexhaustion, and if Petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of Petitioner's brief on appeal and of the opinion of the appellate court, if any, should be filed by Respondent with the motion to dismiss. If Respondent files a motion to dismiss based upon alleged untimeliness, Respondent should file with the motion copies of all documents demonstrating relevant dates of any state court proceedings pursued by Petitioner.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Petitioner's motion for leave to proceed *in forma pauperis* (#3) is **denied as moot**.
- (2) The Clerk shall **mail** a copy of the petition (#1) and the brief in support (#2) to the Oklahoma Attorney General and to Petitioner. See Local Rule 9.3(B).
- (3) Respondent shall **show cause** why the writ should not issue and **file** a response to the petition for a writ of habeas corpus within thirty (30) days from the date of entry of this order. Extensions of time will be granted for good cause only. See Rule 4, Rules Governing § 2254 Cases.
- (4) Petitioner may file a **reply brief** within thirty (30) days after the filing of Respondent's response. If Respondent files a motion to dismiss, Petitioner has fifteen (15) days from the

filing date of the motion to respond. Failure to respond may result in the automatic dismissal of this action. See Local Rule 7.1 for the Northern District of Oklahoma.

SO ORDERED THIS 8th day of July, 1999.



H. DALE COOK
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE JUL 13 1999

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

v.)

JOHN P. BETANOFF aka John Betanoff,)
RACHIDA C. BETANOFF aka Rachida Betanoff,)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
)
Defendants.)

FILED

JUL 12 1999 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

) CIVIL ACTION NO. 99-CV-0188-BU (E)

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 12th day of JULY, 1999.

Michael Bunge
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

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

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

FILED

JUL 09 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD D. BLACKBURN,

Plaintiff,

vs.

WILLIAM J. HENDERSON, Postmaster
General of the United States,

Defendant.

No. 98-CV-324-K ✓

ENTERED ON DOCKET

DATE JUL 12 1999

ORDER

Before the Court is Defendant's Motion to Dismiss For Failure to Serve or, Alternatively, For Duplicative Filing (#15) and the Motion by Plaintiff to Consolidate Cases (#21). The above styled action was filed by the Plaintiff on May 1, 1998. On October 7, 1998, Plaintiff filed a separate case (98-CV-776) which Plaintiff contends included an action based upon a different EEOC Complaint and separate wrongs committed by the Defendant. The Defendant filed a Motion to Dismiss case 98-CV-776 based on improper service. After an Order dismissing 98-CV-776 had been issued, the Court realized that service had been executed properly in that case, and, at Defendant's request, the dismissal of 98-CV-776 was vacated. Now, Defendant moves this Court to dismiss the above styled case, 98-CV-324, pursuant to *Fed.R.Civ.P. 4(m) and 4(i)* on the grounds that Defendant was not properly served. Alternatively, Defendant asks this Court to dismiss 98-CV-324 for duplicative filing.

The case law clearly establishes that the requirement of 4(i) must be complied with and that

the government has a right to insist on proper service. Prisco v. Frank, 929 F.2d 603, 604 (11th Cir.1991) (holding that when the plaintiff has failed to properly serve the United States Attorney, the complaint must be dismissed). Pursuant to *Fed.R.Civ.P. 4(m)*, the Plaintiff had one hundred and twenty days (120) to serve the United States with a copy of the summons and the complaint. Only in the event that a plaintiff shows good cause for the failure to serve the proper defendant shall the district court extend the time for service. *Fed.R.Civ.P. 4(m)*. Most often “good cause” is present when a plaintiff appears *pro se* and is unfamiliar with the Federal Rules of Civil Procedure. Espinoza v. United States, 52 F.3d 838 (10th Cir. 1995) (holding that *pro se* plaintiff was allowed an extension of the 120 day specification of Rule 4(m)). The Plaintiff herein has been represented by counsel throughout the course of this litigation.

There is no doubt that service in the above styled case was improper, and Plaintiff offers no explanation for the failure to effect proper service. In fact, Plaintiff’s Response to this Motion reads: “The Plaintiff acknowledges that service in 98-CV-324-K was insufficient under Rule 4(i).” There is no reason to explore this issue further. Defendant’s request for dismissal based on improper service is meritorious, and is corroborated and conceded by the Plaintiff. The Plaintiff has offered to this Court absolutely no explanation for the procedural failure, and it appears clear that Plaintiff has relied on the active status of 98-CV-776 to maintain his pending claims before the Court.

In light of Plaintiff’s abandonment of 98-CV-324, the Plaintiff now urges the Court to consolidate the factual and legal issues presented in 98-CV-324 into 98-CV-776 pursuant to *Fed.R.Civ.P. 42(a)*. Plaintiff argues that consolidation is an appropriate action, would be in the best interests of judicial economy, and would give the Defendant an opportunity to answer all of the combined claims.

Defendant asserts that the Complaint in 98-CV-776 was not answered timely because Plaintiff has, all along, represented to the Defendant that the two cases were, in fact, consolidated.¹ Further, Defendant argues that the cases should not be consolidated because consolidation is merely the Plaintiff's final attempt to get around the Federal procedural requirements for maintaining a lawsuit. Defendant correctly asserts that under the Plaintiff's consolidation effort, one could file a complaint, fail to serve it, file a second complaint, serve it appropriately, and then ask for consolidation, thereby preserving all claims for adjudication although the procedural requirements have not been followed. The Defendant contends and this Court agrees: "This round about way of curing any service defect would render procedural rules a nullity."

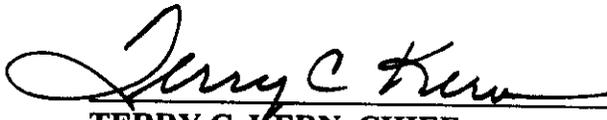
The Court finds that the cases should not be consolidated. Consolidation under *Fed. R. Civ. P.* 42(a) is reserved for circumstances where there are two or more cases pending before a Court which share identity of parties, commonalities in factual and legal issues, and where both cases are scheduled for trial. Such is not the case here. Plaintiff has abandoned his claims filed in case 98-CV-324 by failing to timely serve the Defendant, and has provided this Court with no reasonable explanation for that failure. Because the first filed case is subject to dismissal, consolidation is inappropriate. The Court has broad discretion to make a determination on a motion to consolidate. Shump v. Balka, 574 F.2d 1341 (10th Cir. 1978).

In conclusion, the Court finds that the Plaintiff has failed to effect proper service on the

¹The Plaintiff has treated these cases as consolidated throughout the course of this litigation, and Plaintiff's actions have certainly given the Defendant that impression. For example, the Defendant filed its motion to dismiss in 98-CV-324 on April 1, 1999, but Plaintiff's response to that motion, filed April 19, 1999, was submitted in case 98-CV-776. Additionally, Plaintiff's counsel prepared a joint case management plan for 98-CV-324 on January 4, 1999, which was styled as "98-CV-776 formerly 98-CV-324."

Defendant in the above styled case, and Plaintiff has conceded that failure and declined to present an argument to demonstrate "good cause." Therefore, Defendant's Motion to Dismiss (#15) is GRANTED. Additionally, Plaintiff has improperly invoked *Fed.R.Civ.P. 42(a)*; therefore, Plaintiff's Motion for Consolidation (#21) is hereby DENIED. All other pending motions are hereby declared MOOT.

ORDERED THIS 9 DAY OF JULY, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

F I L E D

JUL 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES RIMER,)
)
Petitioner,)
)
vs.)
)
RON CHAMPION, Warden,)
)
Respondent.)

No. 99-CV-520-E (E)

ENTERED ON DOCKET

DATE JUL 12 1999

ORDER OF TRANSFER

Petitioner, a state prisoner appearing pro se, has submitted for filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and a motion for leave to proceed in forma pauperis.

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

In the instant case, Petitioner was convicted in Pottawatomie County District Court. Pottawatomie County is located within the jurisdictional territory of the United States District Court for the Western District of Oklahoma. 28 U.S.C. § 116(c). Petitioner is currently incarcerated at a state correctional facility in Osage County, Oklahoma. Osage County is located within the jurisdictional territory of the United States District Court for the Northern District of Oklahoma. 28

U.S.C. § 116(a). Although jurisdiction is concurrent in this case, because Petitioner challenges his conviction entered by the Pottawatomie County District Court, the Court finds the most convenient forum for judicial review of the issues raised in this petition would be the Western District of Oklahoma where any necessary records and witnesses would most likely be available. Therefore, this Court concludes that, in the furtherance of justice, this matter should be transferred to the United States District Court for the Western District of Oklahoma.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's application for a writ of habeas corpus (doc.#1) and Petitioner's motion for leave to proceed in forma pauperis (doc. #2) are **transferred** to the United States District Court for the Western District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d).

SO ORDERED THIS 9th day of July, 1999.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiffs,)

v.)

L. F. DOWNEY CONSTRUCTION INC.,)

Defendant.)

ENTERED ON DOCKET
DATE JUL 12 1999

FILED

JUL 9 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98 CV 0911 H (M) ✓

JOURNAL ENTRY OF DEFAULT JUDGMENT

NOW, on this 9TH day of July, 1999, the above-entitled cause comes on before me, the undersigned Judge of the above-entitled Court. Plaintiffs, Gerald B. Ellis, William H. Noble, Michael Ellis, Robert Luellen, as Trustees of and for Oklahoma Operating Engineers Welfare Plan; the Oklahoma Operating Engineers Welfare Plan; the District 2 Joint Apprenticeship & Training Committee of the International Union of Operating Engineers Local 627; the Central Pension Fund of the International Union of Operating Engineers and Participating Employers; and Local Union 627 of the International Union of Operating Engineers, represented and having entered its appearance

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

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

The Court further finds that on January 7, 1999, Defendant was served with Summons and the Complaint by personally serving Lisa Richardson, Managing Agent in Charge, as evidenced by the Return of Summons filed in this cause of action with the Court Clerk indicating that proper service had been made on the Defendant.

The Court further finds that the Clerk of this Court entered default in this matter on May 28, 1999.

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

The Court further finds that since the filing of the Complaint by Plaintiffs, Defendant has submitted to an audit for the period June 1996 through March 1999. The amount of the judgment is based upon the results of the audit.

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

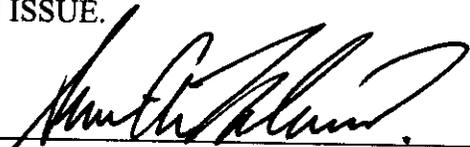
IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Plaintiffs be

granted judgment in its favor and against Defendant, L. F. Downey Construction Inc. as follows:

1. Judgment in favor of Oklahoma Operating Engineers Welfare Plan for delinquent contributions due and owing pursuant to the audit, for the period June 1996 through March 1999 in the amount of \$13,170.35, liquidated damages of \$1,317.06, plus interest at the judgment rate until paid;
2. Judgment in favor of Central Pension Fund of the International Union of Operating Engineers and Participating Employers for delinquent contributions due and owing pursuant to the audit, for the period June 1996 through March 1999 in the amount of \$7,892.70, liquidated damages of \$789.27, plus interest at the judgment rate until paid;
3. Judgment in favor of District 2 Joint Apprenticeship & Training Committee of the International Union of Operating Engineers Local 627 for delinquent contributions due and owing pursuant to the audit, for the period June 1996 through March 1999 in the amount of \$1,175.49, liquidated damages of \$117.57, plus interest at the judgment rate until paid;
4. Judgment in favor of Plaintiffs for costs of this action in the amount of \$218.25, audit fees of \$1,288.06, and attorney fees of \$758.75.

The total amount of the judgment is \$26,727.50, with interest thereon.

ALL FOR WHICH LET EXECUTION ISSUE.


UNITED STATES DISTRICT COURT JUDGE

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

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 09 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

OSCAR STEPHEN JARRELL,)

Petitioner,)

v.)

LENORA JORDAN, Warden,)

Respondent.)

Case No. 99-CV-0051-H (E)

ENTERED ON DOCKET

DATE JUL 12 1999

REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 2254, petitioner Oscar Stephen Jarrell filed a Petition for Writ of Habeas Corpus (Docket # 1). Acting *pro se*, petitioner challenges the judgment and concurrent sentences he received for first degree burglary (ten years), feloniously pointing a weapon (ten years), aggravated assault and battery (one year), and wearing a mask in the commission of a crime (five years).¹ Petitioner pleaded guilty to these charges in Case No. CF-96-715, Tulsa County, Oklahoma. For the reasons set forth below, the undersigned recommends that petitioner be appointed counsel and that an evidentiary hearing be set to address the issues identified in this Report and Recommendation.

¹ Petitioner apparently believes he was convicted solely of the first degree burglary charge. See Petition, Docket # 1, at 1; Petition for Writ of Habeas Corpus and Mandamus, Court of Criminal Appeals, State of Oklahoma, Case No. H 98-675, filed June 11, 1998, attached as Ex. B to Respondent's Motion to Dismiss, Docket # 8; Petition in Error, filed October 23, 1998, Court of Criminal Appeals, State of Oklahoma, Case No. PC 98-1223, attached as Ex. D to Respondent's Motion to Dismiss, Docket # 8.

BACKGROUND

According to petitioner,² the following events led to his conviction and incarceration: In January 1996, petitioner parted company amicably with his girlfriend, Gail Woods, and subsequently met another woman in whom he became interested. Gail Woods was the victim of the crimes with which petitioner is charged. Petitioner enrolled in a restaurant manager's class at a vocational technical school which met four nights a week from 6:00 p.m. until 10:00 p.m. On the last night of the class (the night Gail Woods was attacked),³ petitioner and six other students took a test which petitioner completed at 9:45 p.m. Afterwards, he went to a local club for about an hour, and then he went home.

When he arrived at his house, he found three rifles, three boxes of shells, a bag of "army" clothes, a green mask and a pair of shoes placed between his storm door and the inner door. The clothing and shoes were not his size. His telephone rang, and when he answered, someone whom he did not know, but who had previously threatened him by telephone not to return to Gail Woods, asked if he had found the guns and clothing and told him that the police were on the way. Petitioner claims he became fearful, put the clothing in a bag that he placed in his laundry room, and put the guns in a black garbage bag that he placed behind a shed in his back yard. His plan was to call "911" and say that he heard someone in his back yard.

Before he could do so, the police arrived and arrested him, but they did not tell him why. The officers searched his house and yard, and he was asked to sign forms giving them permission to

² The undersigned recognizes that some of petitioner's claims appear implausible and unconvincing. However, petitioner has never had an evidentiary hearing, the state has never challenged his version of the events, and many of his claims, if true, tend to prove his innocence.

³ Neither petitioner nor respondent provides the date of the crime.

search his house and car. He signed one form, granting permission to search only his automobile. The officers found the guns behind the shed and the clothes in the laundry room. The police officer who took petitioner back into his house and stayed with him throughout the search later testified that he saw the guns through a hole in the garbage bag. Petitioner claims that he asked the police officers to check the guns for prints, but they refused to do so, and they themselves handled the guns with their bare hands.

The police officers took petitioner to the police station and forced him to stand in front of a police car. Later he learned that Gail Woods was in another car, and she identified him by his name, but not as her attacker, whom she claimed was covered from head to toe in "army" clothes. She had also stated that she sprayed a full can of pepper spray into her attacker's face, and that she stabbed her attacker in the chest or stomach with a knife. Petitioner was taken inside the station and inspected for stab wounds, but none were found, and no blood tests were taken from him. He was also tested for pepper spray, but no evidence of pepper spray was found on him.

Ms. Woods stated that the attack started at 9:30 p.m.. She knew the exact time because she wrote it on a notepad when she realized that someone had cut her phone lines and electricity. Although she claimed to recognize petitioner's voice among the voices of three or four others outside her door, the voice of her attacker was the voice of actor John Wayne. The attacker spoke to her in that voice, asking that she pack her things and "come back to me." Petitioner has concluded that the Gail Woods' ex-husband framed him, and he points to several items of evidence and information as proof. He says that the guns belonged to the ex-husband, who claimed that they had been stolen from a gun collection he kept in his mobile home. Nothing else was stolen from the ex-husband's

home (which was guarded by vicious dogs) except some gold Krugerands. Gail Woods said that her ex-husband did not have any such coins.

Petitioner was taken to the jail about six hours after his arrest. He was placed on suicide watch, and he believes that he must have passed out because he “came to” three or four days later. No one would tell him why he was under arrest. Two weeks later he was presented with the charges against him,⁴ and he retained a husband and wife lawyer team to represent him. He claims that these lawyers broke into his house and stole about \$85,000 worth of property. A detective came to visit him in jail and misrepresented that he was working for petitioner’s attorneys. That detective read him his rights for the first time. Petitioner asked for a polygraph test, but the detective laughed at him. Petitioner fired those lawyers and hired David Robertson, a former assistant district attorney. Robertson later told him that a polygraph test would cost over a hundred dollars, and the money needed to be saved in the event other expenses arose.

Petitioner asserts that Robertson “sold him out” because Robertson wanted to get his job back as an assistant district attorney, and that he told petitioner that he wanted to help a friend win his first big case. The friend was the assistant district attorney in petitioner’s case. Robertson took a \$10,000 insurance check from him, but would not help him obtain a bond. Petitioner lost his home, his job, and his car, and he became depressed. He was placed on suicide watch and given psychotropic drugs. Robertson told petitioner that the judge would give him twenty years on each charge if he did not plead guilty to second degree burglary. Petitioner asserts that he was depressed and drugged when Robertson gave him the “paper work” for his guilty plea and he wrote what Robertson told him

⁴ In one pleading, petitioner states that he did not know the charges against him until two *months* after his arrest. (See Petition Application for Post-Conviction Relief/Appeal Out of Time, attached to Petition, Docket # 1.)

to write.⁵ He claims that, at the plea hearing, he was merely nodding his head the way Robertson nodded his head, as Robertson had instructed him. Robertson refused to call witnesses or present evidence which would have proved petitioner's innocence.

After the plea hearing, petitioner claims that he sent letters to Robertson and the judge indicating that he wanted to appeal, and he claims that he telephoned Robertson. Robertson refused to move to withdraw the guilty plea or to file a notice of intent to appeal, although petitioner sent him the paper work to do so. Petitioner claims that Robertson told him that the judge would not allow an appeal. Robertson became an assistant district attorney on November 1, 1996. (Letter from David Robertson to Petitioner, dated January 3, 1997, attached as Ex. 4 to petitioner's reply brief, Docket # 10.) Petitioner claims that Robertson has refused to give him files, transcripts and notes from his case. He also claims that he has been incarcerated in facilities where he had no access to law books or law libraries, that he has dyslexia, that he has been beaten, mistreated, and robbed in prison.

PROCEDURAL HISTORY

Petitioner filed a grievance against his trial attorney with the Oklahoma Bar Association in February 1997, but the OBA declined to act on his complaint. Petitioner also filed a civil rights complaint in the Western District of Oklahoma on April 22, 1997, in which he set forth claims against his trial attorney and the trial attorney's law firm. The Honorable Wayne E. Alley referred

⁵ The plea agreement is dated September 10, 1996; however, respondent indicates that petitioner entered his plea on September 11, 1996, and petitioner indicates that he was convicted on September 20, 1996. Neither respondent nor petitioner provided a complete copy of the plea agreement, a copy of the plea hearing transcript, or other documents which would allow the Court to confirm these dates. If the Court adopts this Report and Recommendation, the undersigned recommends that the Court require respondent to provide a complete record of all proceedings in state court.

the matter to United States Magistrate Judge Doyle W. Argo as a habeas corpus petition or motion to vacate sentence. Judge Argo submitted a report and recommendation to dismiss the matter due to petitioner's failure to pay the filing fee or to show cause for his failure to do so. The District Court for the Western District of Oklahoma adopted the magistrate's recommendation on June 20, 1997, and the case was dismissed.

On June 11, 1998, petitioner filed a petition for writ of habeas corpus and mandamus in the Oklahoma Court of Criminal Appeals ("CCA"), but the CCA issued an order on June 23, 1998, declining jurisdiction because petitioner had not first sought relief at the state district court level. Petitioner then filed an application for post-conviction relief in the district court on or about July 8, 1998. The standard language of the form application indicates a request for appointment of counsel, but no counsel was appointed. Petitioner's application was denied by the district court on September 22, 1998, without an evidentiary hearing, on the basis that petitioner had not filed a timely appeal and his counsel was not ineffective.

On October 23, 1998, petitioner filed a *pro se* appeal from the denial of his application for post-conviction relief. In his petition in error (Case No. PC-98-1223), he again requested appointment of counsel. The CCA dismissed the appeal on November 9, 1998, because petitioner failed to attach a copy of the district court order to his petition and he failed to appeal within the 30 days permitted by statute. Petitioner subsequently filed a motion for an appeal out of time, with the district court order attached, but the CCA court clerk refused to file it because a final order had already been issued in the case.

As grounds for his federal habeas petition, petitioner claims ineffective assistance of counsel, denial of his right to appeal from his guilty plea, and that he did not knowingly plead guilty.

Specifically, he asserts that he was not competent to plead guilty because he was on a suicide watch and psychotropic drugs at the time of the plea, his trial counsel coerced him into pleading guilty, and his trial counsel failed to perfect his appeal.⁶ He states that he prepared a motion for an appeal out of time, but the prison officials in Cushing, Oklahoma, refused to mail it. He also claims that he has been denied a court-appointed attorney. He specifically requests an evidentiary hearing. Respondent has moved to dismiss the petition, alleging that it is procedurally barred.

DISCUSSION AND LEGAL ANALYSIS

1. Exhaustion of Remedies

As a preliminary matter, a court must determine whether a petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Federal courts are prohibited from issuing writs of habeas corpus on behalf of a prisoner in state custody unless the prisoner demonstrates that he has exhausted available state court remedies, "state corrective process" is unavailable, or circumstances exist that render the process "ineffective" to protect the prisoner's rights. 28 U.S.C. § 2254(b)(1); Demarest v. Price, 130 F.3d 922, 932 (10th Cir. 1997). Further, "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c).

⁶ Petitioner also sets forth seven additional grounds on which he claims that he is being unlawfully held, but petitioner's handwritten list of these claims and the facts supporting each appear to be more appropriately characterized as arguments in support of his petition. These claims are described by petitioner as: conviction obtained by use of evidence obtained pursuant to an unlawful arrest; failure of prosecution to disclose evidence favorable to defendant; perjured testimony; obtain witnesses; unlawful lineup; speedy trial; and mentally incompetent. (See Petition, Docket # 1, supplemental pages (1) & (2).)

The doctrine of exhaustion reflects the policies of comity and federalism. Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981); see also Coleman v. Thompson, 501 U.S. 722, 730 (1991); Demarest, 130 F.3d at 932. A state prisoner bringing a federal habeas corpus action bears the burden of showing that he has exhausted all available state remedies. Miranda v. Cooper, 967 F.2d 392, 398 (10th Cir. 1992). To exhaust a claim, petitioner must have "fairly presented" the facts and legal theory supporting a specific claim to the highest state court. See Picard v. Conner, 404 U.S. 270, 275-76 (1971); Demarest, 130 F.3d at 932. In Oklahoma, the highest state court for criminal matters is the CCA.

There is no dispute between the parties as to whether petitioner has exhausted his claims. Although petitioner does not use exactly the same language in his federal habeas petition as in his petition in error to the state court, petitioner explicitly set forth his ineffective assistance of counsel claims and implicitly set forth allegations as to his counsel's coercion and his own incompetency to plead guilty. *Pro se* petitions must be read liberally. Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing Haines v. Kerner, 404 U.S. 519, 520 (1972)). There is ample evidence in the record for the Court to find that petitioner has exhausted his claims.

2. Procedural Default

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds. Coleman, 501 U.S. at 729; see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir.

1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an "adequate" state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

The CCA refused to reach the merits of petitioner's claims, holding that petitioner had waived his claims because he did not attach a copy of the district court order to his petition and he missed the 30-day deadline within which to file his appeal by one day. See Rule 5.2(C) of the Rules of the Oklahoma Court of Criminal Appeals, Okla. Stat. tit. 22, ch. 18, app. (1998). As respondent acknowledges, petitioner mistakenly alleged in his petition in error that the district court dismissed his application on September 8, 1998, but the actual date of the order dismissing his application was September 22, 1998. Petitioner did not file his petition in error until October 23, 1998. He then tried to refile the petition in error with attachments by filing an application to appeal out of time, but he was not permitted to do so because a final order had already been entered.

The CCA's finding of procedural default is independent because it is "separate and distinct from federal law." Maes, 46 F.3d at 985. However, it is an "adequate" state ground only if it has been applied evenhandedly "in the vast majority of cases." Id. (citation omitted) Respondent cites one case, Duvall v. State, 869 P.2d 332, 333-34 (Okla. Crim. App. 1994), for the proposition that the CCA has held that Rule 5.2 acts as a procedural bar in analogous cases. One analogous case hardly qualifies as a "vast majority of cases" but the undersigned recognizes that there is a paucity of published cases in which the failure to attach the district court order presents itself. Nonetheless, the Tenth Circuit has consistently held that claims raised for the first time in state post-conviction proceedings are procedurally defaulted if the petitioner fails to obtain timely appellate review of the

state trial court's decision. West v. Gibson, No. 98-7151, 1999 WL 339702, at *2 (10th Cir. May 28, 1999) (Oklahoma); Watson v. State of New Mexico, 45 F.3d 385, 387 (10th Cir. 1995); Dulin v. Cook, 957 F.2d 758 (10th Cir. 1992) (Utah). While it would appear that the CCA based its decision on independent and adequate state procedural grounds, this Court need not find that petitioner's claims are procedurally defaulted if petitioner can demonstrate cause for the procedural default (petitioner's failure to attach the district court order and file his appeal within 30 days from the order) and actual prejudice, or that the Court's refusal to consider the merits of his claims will result in a fundamental miscarriage of justice. See, e.g., Coleman, 510 U.S. at 750.

a. Cause and Prejudice

The cause standard requires a petitioner to show "something external to [himself], something that cannot fairly be attributed to him . . ." that prevented him from complying with the state procedural rules. See Coleman, 510 U.S. at 753; Demarest, 130 F.3d at 941 (both cases citing Murray v. Carrier, 477 U.S. 478, 488 (1986)). "Adequate cause includes interference by officials which makes compliance with a state's procedural rule impracticable, demonstration of unavailability of a factual or legal basis, or constitutionally ineffective assistance of counsel in not bringing a claim." Worthen v. Kaiser, 952 F.2d 1266, 1268 (10th Cir. 1992). Once cause is established, the petitioner must then show that he suffered "actual prejudice" as a result of the alleged violations of federal law. E.g., Demarest, 130 F.3d at 941. To show "prejudice," petitioner must demonstrate "not merely that errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Murray, 477 U.S. at 488; see also United States v. Frady, 456 U.S. 152, 168 (1982).

Petitioner claims that his trial counsel abandoned him, so he had no counsel on direct appeal. He also claims that his trial counsel refused to give him files, transcripts and notes from his case. In addition, petitioner has made general allegations which, if proved, could constitute cause. He claims that he has been incarcerated in facilities where he had no access to law books or law libraries, that he has dyslexia, and that he has been beaten, mistreated, and robbed in prison. He states that he prepared a motion for an appeal out of time, but that prison officials refused to mail it.

The trial court denied petitioner's application for post-conviction relief because petitioner did not seek to withdraw his guilty plea or give notice of intent to appeal from his conviction. The trial court dismissed petitioner's ineffective assistance of counsel claim without significant analysis. While it is likely that the CCA would hold petitioner's claims procedurally barred for the same reasons, the undersigned notes that petitioner's allegations regarding his trial counsel's conduct before and after the plea hearing, if true, could constitute cause for the underlying procedural default relied upon by the trial court. See, e.g., Coleman, 510 U.S. at 753-55. Petitioner's ineffective assistance of counsel claim is discussed more fully in section 3 below.

Because the undersigned ultimately recommends supplementation of the record and an evidentiary hearing in connection with the merits of petitioner's claims, the undersigned further recommends that petitioner be given an opportunity at the evidentiary hearing to present evidence that would establish cause and prejudice for his procedural default. Alternatively, he may be able to demonstrate that a fundamental miscarriage of justice would result if the Court does not consider the merits of his claims.

b. Fundamental Miscarriage of Justice

A federal court may proceed to the merits of a procedurally defaulted claim if the petitioner can establish that a failure to consider the claim would result in a fundamental miscarriage of justice. To come within this "very narrow exception," petitioner must supplement his habeas petition with a "colorable showing" that he is factually innocent of the crime of which he was convicted. Schlup v. Delo, 513 U.S. 298, 311 (1995) (citing Kuhlman v. Wilson, 477 U.S. 436, 454 (1986)). Factual innocence requires a stronger showing than that necessary to establish prejudice. Schlup, 513 U.S. at 326. Such a showing does not in itself entitle the petitioner to relief but instead serves as a "gateway" which then entitles petitioner to consideration of the merits of his claims. Id. at 327.

Petitioner has set forth numerous claims which, if proven, would bring him within the fundamental miscarriage of justice exception. His purported alibi appears particularly strong. Petitioner claims that he was in class, taking a test at the time the attack on Gail Woods began, and that he went to a local club after class. He asserts that his professor and the other students in the class would have testified in support of this alibi, and that Gail Woods knows the exact time the attack started because she wrote it down on a sheet of paper. Petitioner also claims that Ms. Woods told police that she stabbed her attacker in the chest or stomach, but no stab wounds were found on petitioner's chest or stomach when he was arrested a short time after the attack. Further, she testified that she sprayed a full can of pepper spray on her attacker, but no trace of the spray was found on petitioner at the time of his arrest.

Petitioner also claims that the police conducted an unlawful search and seizure at the time of his arrest. He sets forth compelling evidence suggesting that the officers could not have seen the guns (inside the garbage bags behind the tool shed in his back yard) from their vantage point inside

the house or car, which he gave permission to search. He asserts that the judge even questioned his attorney about whether the search and seizure were lawful, but the attorney simply shrugged his shoulders. Petitioner maintains that the guns and clothes were not his, and the police did not dust the guns for fingerprints on the guns. According to petitioner, the victim's ex-boyfriend claims the guns were stolen from his home. Petitioner's story as to how the victim's ex-boyfriend may have framed him is not incredible.

Petitioner alleges other errors by the police, including the victim's identification of petitioner. He claims that she identified him, but not as her attacker. Other allegations, e.g., that petitioner was not informed of the charges against him or read his rights until some time after his arrest, are not compelling, but petitioner should be given the opportunity to be heard on these claims as well. While any one of petitioner's allegations, standing alone, might not be sufficient to bring his claims within the fundamental miscarriage of justice exception, the cumulative effect of these allegations lead the undersigned to believe that petitioner may be able to prove that constitutional error "probably" resulted in the conviction of one who was actually innocent." Schlup, 513 U.S. at 327 (citation omitted). The evidence, if forthcoming, may tend not only to demonstrate actual innocence, but also to support petitioner's claim that his counsel was ineffective.

3. Ineffective Assistance of Counsel

Ineffective assistance of counsel claims are treated different from other habeas claims for purposes of applying a procedural bar based on state law grounds. The general rules regarding review of claims procedurally barred in state court do not apply to ineffective assistance of counsel claims brought under the Sixth Amendment to the United States Constitution. According to the Tenth Circuit, the general rule of procedural default "must give way because of countervailing

concerns unique to ineffective assistance claims." Bercheon v. Reynolds, 41 F.3d 1343, 1363 (10th Cir. 1994) (relying on Kimmelman v. Morrison, 477 U.S. 365 (1986)); see also English v. Cody, 146 F.3d 1257 (10th Cir. 1998); United States v. Galloway, 56 F.3d 1239, 1242-43 (10th Cir. 1995) (*en banc*) (a § 2255 case). In Bercheon the Tenth Circuit focused on two factors which the Supreme Court has identified as unique to ineffective assistance claims: (1) the need for a petitioner to consult with separate counsel on appeal in order to obtain a meaningful and objective assessment of trial counsel's performance; and (2) the possible need to develop facts in support of an ineffective assistance claim. *Id.* at 1363-64. In English, the Tenth Circuit held that a state's procedural rule will not be "adequate" as to ineffective assistance of counsel claims unless the state's procedural rule accounts for these two unique factors. English, 146 F.3d at 1261-63.

In Bercheon, English, and several other Tenth Circuit cases dealing with the application of Oklahoma's procedural default rules to ineffective assistance of counsel claims,⁷ the particular state rule at issue provides that any claim which could have been raised on direct appeal, but was not, is waived. Okla. Stat. tit. 22, § 1086.⁸ The CCA routinely refuses to hear all claims brought for the

⁷ See, e.g., Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998); Hickman v. Spears, 160 F.3d 1269 (10th Cir. 1998); Jackson v. Shanks, 143 F.3d 1313, (10th Cir.), *cert. denied*, 119 S. Ct. 378, L. Ed. 2d 312 (1998); Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995); Brewer v. Reynolds, 51 F.3d 1519 (10th Cir. 1995).

⁸ Okla. Stat. tit. 22, § 1086 provides as follows:

All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

first time in an application for post-conviction relief, including ineffective assistance claims. In this matter, the trial court applied this waiver rule but the CCA did not review the decision of the trial court or reach the merits of petitioner's claims because of another rule by which petitioner failed to abide, Rule 5.2(C) of the Rules of the Oklahoma Court of Criminal Appeals, Okla. Stat. tit. 22, ch. 18, app. (1998). Petitioner failed to attach the district court order to his petition in error, and he missed the deadline for appealing the decision of the trial court by one day. Thus, he procedurally defaulted his claims. Nonetheless, the same concerns expressed in Bercheon and its progeny are applicable to this matter.

In Bercheon, the Tenth Circuit held that the CCA's waiver rule is an "independent" procedural rule because it is not dependent in any way on federal law. The question in English was, therefore, whether the CCA's waiver rule is "adequate" as it is applied to ineffective assistance of counsel claims. See, e.g., English, 146 F.3d at 1257-58. The question in this matter is whether the CCA's application of Rule 5.2(C) is "adequate" as it is applied to ineffective assistance of counsel claims. In English, the Tenth Circuit held that if trial counsel and appellate counsel are the same, the CCA's waiver rule can never be "adequate" as to ineffective assistance of counsel claims. English, 146 F.3d at 1264. If trial and appellate counsel differ, the CCA's waiver rule will be "adequate" if "the ineffectiveness claim can be resolved upon the trial record alone." Id. The Tenth Circuit refused, however, to decide whether the CCA's waiver rule would be "adequate" if trial and appellate counsel differed but resolution of the ineffectiveness claim required development of facts not in the trial record. The English court found that the procedural posture of the case before it

prevented it from determining whether the claims required supplementation of the trial record or additional fact-finding, and it remanded for such a determination. Id. at 1264.

The claims in this matter call for supplementation of the record and additional fact-finding. Since petitioner pleaded guilty, there is no trial record. Thus, petitioner's ineffectiveness claim necessarily requires the development of facts not in the trial record.

If petitioner was on suicide watch and psychotropic drugs when he pleaded guilty, as he claims, he may not have been mentally competent to sign a guilty plea or to respond to questions at the plea hearing. Petitioner also alleges that he is innocent, that there was insufficient evidence to convict him on the charges to which he pled guilty, and that he only pled guilty as a result of undue coercion from his trial counsel. There is no evidence in the record that, prior to the time in which petitioner was required to file a direct appeal, he had the opportunity to consult with counsel other than trial counsel in order to obtain a meaningful and objective assessment of his trial counsel's performance. The requirements for an adequate procedural rule under Kimmelman, Bercheon, and English are not met.

The undersigned acknowledges that, although petitioner is entitled to counsel on direct appeal, see Evitts v. Lucey, 469 U.S. 387, 394 (1985), he is not entitled to counsel in state post-conviction proceedings. See Coleman, 501 U.S. at 752. The record indicates that petitioner tried to appeal *pro se* by filing an "petition for habeas relief" in the CCA. However, the CCA declined jurisdiction, stating that petitioner had not first presented his claims to the district court. Petitioner followed the suggestion of the CCA and filed an application for post-conviction relief instead of entitling his application one for an appeal out-of-time, thus unwittingly foregoing his right to counsel. Nevertheless, he has never had the opportunity to obtain a meaningful and objective

assessment of his trial counsel's performance, nor is the trial record sufficiently developed to resolve his ineffectiveness claim.⁹

Furthermore, petitioner has set forth a claim of presumed ineffective assistance of counsel, as distinguished from actual ineffective assistance of counsel. Presumed ineffective assistance exists when counsel has an actual conflict of interest and when there is a total absence of counsel during a critical stage of the proceedings. See United States v. Cronin, 466 U.S. 648, 659 n.25, 662 n. 31 (1984); Holloway v. Arkansas, 435 U.S. 475, 484 (1978). Petitioner alleges coercion and abandonment by his trial counsel, as well as his trial counsel's conflict of interest, as discussed below. An evidentiary hearing is necessary to determine whether his allegations are sufficient to raise a presumption of ineffective assistance of counsel. Petitioner's ineffective assistance of counsel claim should be heard on the merits unless resolution of one of his other claims is dispositive.

4. Incompetency

Like ineffective assistance of counsel claims, incompetency claims are subject to more intensive procedural default analysis than many habeas claims. Competency claims can raise issues of both substantive and procedural due process. A procedural competency claim is implicated where the trial court fails to hold a competency hearing after the mental competency of a defendant

⁹ In Benavidez, No. 98-6277, 1998 WL 852681 (10th Cir. Dec. 10, 1998), the Tenth Circuit dismissed the appeal where the petitioner failed to (1) perfect an appeal from the denial of an application to withdraw his guilty plea; (2) timely appeal the trial court's denial of a post-conviction application; and (3) raise claims in his application for post-conviction relief that he raised in his habeas petition. The petitioner alleged that his trial counsel abandoned him after filing a notice of appeal but before perfecting the appeal. The court held that his claims were procedurally barred. *Id.* at **3. Unlike the petitioner in Benavidez, the petitioner here did not have a hearing on an application to withdraw his guilty plea because his trial counsel did not file one, and petitioner did not fail to raise his "abandonment" claim in his application for post-conviction relief. Further, petitioner has sufficiently alleged his actual innocence to show that the application of a procedural bar may result in a fundamental miscarriage of justice, as discussed above.

becomes an issue. See Walker v. Attorney General for the State of Oklahoma, 167 F.3d 1339, 1343 (10th Cir. 1999). A substantive competency claim arises where a petitioner alleges that he was mentally incompetent when he was tried and convicted. Substantive competency claims carry a greater burden of proof than procedural ones. Id. A substantive incompetency claim is not procedurally barred because competence to stand trial is deemed an aspect of substantive due process that cannot be waived. Nguyen v. Reynolds, 131 F.3d 1340, 1346 (10th Cir. 1997), cert. denied, 110 S. Ct. 128, 142 L. Ed. 2d 103 (1998); Sena v. New Mexico State Prison, 109 F.3d 652, 654 (10th Cir. 1997).

Incompetency is measured by whether a criminal defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him." Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) (quotations omitted); Nguyen, 131 F.3d at 1346. Petitioner has alleged that he was on suicide watch and psychotropic drugs when he pleaded guilty. He has made a substantive competency claim. Unfortunately, his claim cannot be addressed on the merits at this point because neither the petitioner nor the respondent provided a complete copy of the petitioner's plea agreement or the transcript of the plea hearing.

The undersigned recommends that, at a minimum, respondent be required to supplement the record with these items. Then the Court could determine if an evidentiary hearing is required. Petitioner is entitled to an evidentiary hearing on the issue of whether he was competent to stand trial only if he presents evidence "sufficient 'to positively, unequivocally and clearly generate a real, substantial and legitimate doubt' concerning his mental capacity." Nguyen, 131 F.3d at 1346 (quotations omitted); accord Sena, 109 F.3d at 655. If, as petitioner asserts, he was on psychotropic

drugs and under a suicide watch when he pleaded guilty, his competency should have been an issue. Petitioner has not submitted any affidavits, medical records or deposition testimony to support his assertion, but the record contains no evidence that contradicts petitioner's assertion either. Given that petitioner's incompetency claim is inextricably intertwined with his coercion and conflict of interest claim, the undersigned deems it the prudent course to recommend an evidentiary hearing as well as supplementation of the record.

5. Coercion and Conflict of Interest

Petitioner has claimed that his trial counsel coerced him into pleading guilty at a time when he was vulnerable due to his depression and the drugs he was taking. He claims that his trial counsel "yelled, screamed, cussed, and made threats if I didn't plea [sic] guilty"¹⁰ and told petitioner to nod his head just as the attorney did at the plea hearing. (See Petition, Docket # 1, at 4, 7, supp. p. 2.) He also claims that his attorney forced him to plead guilty due to a conflict of interest, i.e., his trial attorney, a former assistant district attorney, wanted his job back and wanted to help the assistant district attorney in petitioner's case "win his first case." (Id. at 4, supp. p. 2.) Whether petitioner's claims constitute coercion or conflict of interest sufficient to undermine the voluntariness of petitioner's guilty plea is an issue that should be determined at an evidentiary hearing.

"The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985) (citations omitted). To prevail on a challenge

¹⁰ Unlike the petitioners in United States v. Kramer, 168 F.3d 1196 (10th Cir. 1999), and United States v. Carr, 80 F.3d 413 (10th Cir. 1996), in which the petitioners alleged similar coercive tactics by their trial attorneys, petitioner in this matter did not have an evidentiary hearing on a motion to withdraw his guilty plea. See Kramer, 168 F.3d at 1200, 1201 n. 2; Carr, 80 F.3d at 415 n. 3. Thus, the factual record is not sufficiently developed for effective review.

to a counseled guilty plea based on ineffective assistance of counsel, the petitioner must identify particular acts and omissions of counsel tending to prove that counsel's advice was not within the wide range of professional competence. Hill, 474 U.S. at 59 (applying the two-pronged performance and prejudice test of Strickland v. Washington, 466 U.S. 668 (1984), for evaluating claims of ineffective assistance of counsel); see also Laycock v. State of New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989). Petitioner must also show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59; Laycock, 880 F.2d at 1187.

Coercion invalidates a guilty plea entered upon the advice of counsel. Osborn v. Shillinger, 997 F.2d 1324, 1327 (10th Cir. 1993). A defendant's right to counsel may also be compromised by conflicts of interest, if the defendant did not waive that right. See Moore v. United States, 950 F.2d 656, 660 (10th Cir. 1991) (citations omitted).¹¹ "If a defendant would have elected to go to trial, but an improper motivation precluded counsel from evaluating this alternative and advising defendant, a defendant has been prejudiced." Id. An evidentiary hearing is sometimes necessary where claims cannot be resolved with sole reference to the record. Id. The claims in this case cannot be resolved with sole reference to the record. An evidentiary hearing is necessary.

6. Evidentiary Hearing

Under the AEDPA, a habeas petitioner is not entitled to an evidentiary hearing where he has failed to develop the factual basis of a claim in state court unless certain criteria are met.¹² Since

¹¹ As set forth above, petitioner's conflict of interest allegations, if true, raise a presumption of ineffective assistance by his counsel.

¹² The applicable provision provides:

petitioner in this matter has "diligently sought to develop the factual basis underlying his habeas petition, but a state court has prevented him from doing so," Miller v. Champion, 161 F.3d 1249, 1253 (10th Cir. 1998), the restrictions of section 2254(e)(2) do not apply. He is therefore "entitled to receive an evidentiary hearing so long as his allegations, if true and if not contravened by the existing factual record, would entitle him to habeas relief." Id. In Miller, as here, the petitioner challenged his guilty plea on the ground that he was denied his Sixth Amendment right to effective assistance of counsel. The Tenth Circuit determined that the petition had alleged facts sufficient to demonstrate the ineffectiveness of counsel, and that his counsel's ineffective assistance prejudiced him. Although the Miller court noted that petitioner's version of events leading to his conviction did not conflict with the statements of his guilty plea, it also noted that the respondent did not offer any evidence that would cast doubt on the petitioner's version of events, and no state or federal court conducted a hearing to develop the facts. Id. at 1258. Accordingly, it remanded the matter for an evidentiary hearing. Id. at 1259.

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

- (A) the claim relies on--
 - (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
 - (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
- (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

CONCLUSION

Pursuant to Rule 8(a) of the Rules Governing Section 2254 Cases in the United States District Courts ("Section 2254 Rules"), the undersigned recommends that the Court order supplementation of the record and an evidentiary hearing to permit petitioner an opportunity to develop the facts underlying his ineffective assistance of counsel claim. The undersigned further recommends that the Court appoint the United States Federal Public Defender's Office to represent petitioner at the evidentiary hearing. See Section 2254 Rules, Rule 8(c). The undersigned recommends that the following issues be addressed at the evidentiary hearing: (1) whether cause exists for petitioner's failure to file a timely appeal from the denial of his application for post-conviction relief to the CCA and the resulting prejudice; (2) whether a fundamental miscarriage of justice would result if the Court did not hear the merits of petitioner's claims; (3) the merits of petitioner's ineffective assistance of counsel claim; (4) the merits of petitioner's incompetency claim; and (5) the merits of petitioner's coercion and conflict of interest claim.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must file them with the Clerk of the District Court within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District**

Court. See Thomas v. Arn, 474 U.S. 140 (1985); Haney v. Addison, Case No. 98-6255, 1999 WL 288295 (10th Cir. May 19, 1999).

Dated this 9th day of July, 1999.

Claire V Eagan
CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

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

12 Day of July, 1999.

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

FILED

JUL 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FIRST MARINE INSURANCE COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 JIM D. SCOTT and BRENDA SCOTT, and CITY)
 BANK TRUST COMPANY OF OKLAHOMA)
 CITY, OKLAHOMA, now Bancfirst,)
)
 Defendants, 3rd Party Plaintiffs,)
)
 vs.)
)
 STEVE YOUNG,)
)
 3rd Party Defendant.)

Case No. 97-C-113-E

ENTERED ON DOCKET
DATE JUL 12 1999

JUDGMENT

In accord with the Order denying the Motion for Summary Judgment of the Third Party Plaintiffs, Jim and Brenda Scott and Bancfirst, and granting the Motion for Summary Judgment of the Third Party Defendant, Steve Young, filed this date, the Court hereby enters judgment in favor of the Third Party Defendant, Steve Young, and against Jim D. Scott, Branda Scott, and City Bank Trust Company of Oklahoma City, now BancFirst.

Dated, this 7th day of July, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

F I L E D

JUL 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FIRST MARINE INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
JIM D. SCOTT and BRENDA SCOTT, and CITY)
BANK TRUST COMPANY OF OKLAHOMA)
CITY, OKLAHOMA, now Bancfirst,)
)
Defendants, 3rd Party Plaintiffs,)
)
vs.)
)
STEVE YOUNG,)
)
3rd Party Defendant.)

Case No. 97-C-113-E

ENTERED ON DOCKET

DATE JUL 12 1999

ORDER

Now before the Court is the Motion for Summary Judgment (Docket # 57) of the Third Party Defendant Steve Young and the Motion for Partial Summary Judgment (Docket # 72) of the Third Party Plaintiffs, Jim and Brenda Scott and Bancfirst.

Plaintiff, First Marine Insurance Company, initially brought this action for a declaratory judgment regarding a policy of boat insurance issued by First Marine to the Defendants. The policy, with a limit of \$85,000, was taken out by the Scotts in February, 1994 to insure a 1993 40' Sea Ray Cabin Cruiser. The boat had an approximate market value of \$150,000, but Mr. Scott chose to insure the boat for only \$85,000, which is how much Mr. Scott owed Bancfirst on the boat at the time he took out the insurance. In fact, in a letter dated February 28, 1994, Mr. Scott was asked by his insurance agent, Steve Young, to sign the enclosed application for insurance and to initial an

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acknowledgment that the boat was underinsured by approximately \$65,000.

In November, 1996, the boat was damaged in a windstorm on Grand Lake. It was estimated that it would take approximately \$72,000 to repair the boat, and salvage value is estimated by plaintiffs as approximately \$50,000. The Court has already granted summary judgment in favor of First Marine, holding that, under the clear and unambiguous terms of the insurance policy, it can pay the Scotts the policy limits of \$85,000.00 and then take the boat for salvage. The only remaining claims are the Scotts' negligence and fraud or negligent misrepresentation claims against Steve Young. Both the Scotts and Young seek summary judgment on these claims. The Scotts argue that, as a matter of law, Young owed the Scotts a duty to exercise reasonable diligence and skill in obtaining their insurance, as well as a duty to fully inform the Scotts of the terms of their Marine Insurance Policy. Young argues that the Scotts got exactly the insurance that they requested, that he did not owe a duty to the Scotts to explain the terms of the Policy, or their legal effect, and that Young did not knowingly or negligently deceive the Scotts.

Legal Analysis

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

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

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

A recent Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

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

* * *

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

Id. at 1521.

Duty

On cross motions for summary judgment, the Scotts and Young argue whether Young owed any duty to the Youngs which could give rise to a claim for negligence. Under Oklahoma law, the

elements of a negligence claim are: 1) duty; 2) breach of duty; and 3) injury proximately resulting from that breach. Grover v. Superior Welding, Inc., 893 P.2d 500, 502 (Okla. 1995). Both sides agree that the question of the existence of duty is a matter of law. Delbrel v. Doenges Bros. Ford, 903 P. 2d 500, 502 (Okla. 1995).

The Scotts make two arguments in support of finding a duty owed by Young: first, that he had a duty to diligently obtain their insurance policy, and second, that he had a duty to fully inform the Scotts of the terms of their policy. Young asserts that the first duty was met and that the second duty does not exist under Oklahoma law and the facts of this case.

The Scotts assert that an insurance agent owes a duty to a potential insured to exercise reasonable diligence and skill when obtaining an insurance policy. DeWees v. Cedarbaum, 381 P.2d 830, 836 (Okla. 1936); A-Ok Construction, Inc. v. McEldowney, McWilliams, Deardeuff, & Journey, 844 P.2d 182 (Okla. App. 1992). Young acknowledges a duty, but argues that he fulfilled that duty. He claims that the Scotts wanted insurance coverage in the amount of \$85,000 to protect the bank's interest in a boat worth approximately \$150,000, and that he was able to get that insurance for them. Interestingly, the Scotts do not specify how this duty was breached by Young, and the cases relied on by them are distinguishable. DeWees and A-OK Construction deal with the failure to procure requested insurance, not with a situation where the insurance was procured, but the policy contained terms the insured did not like. Under the undisputed facts, the Court concludes that the duty to exercise reasonable diligence and skill when obtaining an insurance policy, as it exists under Oklahoma law, was satisfied by Young.

The Scotts also argue that Young had a duty to read and explain the terms of the policy to them, apparently based on the theory that if one "volunteers to speak and to convey information

which may influence the conduct of the other party, he is bound to disclose the whole truth.” Uptegraft v. Dome Petroleum Corp., 764 P.2d 1350, 1353-54 (Okla. 1988). Because Young made the representation that the Scotts’ boat was underinsured by approximately \$65,000, and that, should they have a total loss, the policy would only pay the “agreed value” of \$85,000, the Scotts argue that he then had an obligation to read and explain the terms of the entire policy to them. They argue that although he told them that if their boat was damaged by more than \$85,000, they would be liable for excess damages, he failed to explain either salvage or co-insurance as it related to their policy.

There is no authority to support the Scotts’ assertion that the rule of law of Uptegraft, that one who speaks has an obligation to tell the whole truth, translates into a requirement on the part of the agent to read and explain the terms of the policy to the insured. Moreover, Uptegraft is distinguishable from the facts of this case. In Uptegraft, the plaintiffs did not learn of the “entire truth” until after they were injured by their lack of knowledge. In this case, the Scotts were provided the policy under cover letter dated March 16, 1994, which was 16 days after the effective date of the policy and more than two years before the loss to the boat occurred. Under Oklahoma law, they had a responsibility to read the policy and are bound by the policy provisions even if they failed to read it. Dalton v. LeBlanc, 350 F.2d 95 (10th Cir. 1965), Travelers Insurance Company v. Morrow, 645 F.2d 41 (10th Cir. 1981). Moreover, the Scotts were specifically requested to review the policy to “insure accuracy and your satisfaction.” The Court simply cannot conclude that Young had a duty to read and explain the term of the policy to the Scotts.

Fraud or Negligent Misrepresentation

Young argues that summary judgment is appropriate on the Scotts’ fraud or negligent misrepresentation claims because he did not make any material misrepresentation. The Scotts argue

that it was Young's representation to them in his letter and orally that induced them to enter into the policy. They argue, as they do with the negligence claim, that when Young spoke in his February 28, 1994 letter, he then had an obligation to tell "the whole truth." While the Scotts call their claim one for "Fraud and/or Negligent Misrepresentation," it is clear from their response to the motion for summary judgment that they are making a claim for constructive fraud, not for actual fraud.

While summary judgment is not appropriate on a fraud claim if there is conflicting evidence, the party who brings the claim has a threshold duty to present evidence of each element of fraud. Practical Products Corporation v. Brightmire, 864 P.2d 330, 334 (Okla. 1992). The elements of a common-law action for fraud are: "1) a material misrepresentation, 2) knowingly or recklessly made, 3) with intent that it be relied upon, and 4) the party relying on the false statement suffers damages." Silver v. Slusher, 770 P.2d 878, 882 (Okla. 1988). Moreover, there is no action for fraud based on a false statement if the allegedly defrauded party could have determined the truth with reasonable diligence. Sokolosky v. Tulsa Orthopaedic, 566 P.2d 429, 431 (Okla. 1977), Silver v. Slusher, 770 P. 2d, at p. 882 n. 8 (applying the rule of Sokolosky to alleged constructive fraud with respect to a contract of insurance). Lastly, constructive fraud requires a breach of some legal or equitable duty. Silver v. Slusher, 770 P.2d, at p. 882 n. 11. This court has already determined that there was no duty to read and explain the entire policy to the Scotts. In the absence of such a duty, there is no claim for constructive fraud or negligent misrepresentation.

The Motion for Summary Judgment (Docket # 57) of the Third Party Defendant Steve Young is **Granted** and the Motion for Partial Summary Judgment (Docket # 72) of the Third Party Plaintiffs, Jim and Brenda Scott and Bancfirst is **Denied**. Accordingly, the Motion of the Defendants Jim and Brenda Scott and Bancfirst for Leave to File an Amended Answer Asserting an

Additional Counterclaim (Docket # 56) is **Denied** as moot. The Application of the Defendants Jim and Brenda Scott and Bancfirst to Stay Time To Respond to Plaintiff's Second Motion for Recovery of Attorney's Fees and Motion to Tax Costs (Docket #46) is **Granted**. Defendants are Directed to Respond to Plaintiff's Second Motion for Recovery of Attorney's Fees and Motion to Tax Costs within 15 days of the date of this Order. Plaintiff's Counter-Motion for Entry of Final Judgment (Docket # 47) is **Denied** as moot.

IT IS SO ORDERED THIS 9th DAY OF JULY, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT