

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

FILED

AUG 10 1999

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 AUG 10 1999

**STIPULATION OF DISMISSAL WITH PREJUDICE OF
ASSOCIATED RESOURCES, INC., OF CROSS-CLAIM AGAINST
DEFENDANT, BRIAN L. RICE**

COME NOW the Defendants, Associated Resources, Inc., by and through its attorney of record, James K. Deuschle, and Brian L. Rice, by and through his attorney, Danny P. Richey, and hereby stipulate to the dismissal with prejudice of Defendant, Associated Resources, Inc.'s Cross-Claim filed in this matter against Defendant, Brian L. Rice and both parties agree that each shall bear their own costs and attorneys fees incurred in this action.

The Defendant,
Associated Resources, Inc.
By its attorney,


JAMES K. DEUSCHLE, OBA #011593
525 South Main, Suite 209
Tulsa, Oklahoma 74103-4503
(918) 592-2280 Telephone
(918) 592-2281 Facsimile

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

FILED

AUG - 9 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT C. MAYS)
)
 Plaintiff,)
)
 v.)
)
 CMC STEEL FABRICATORS, INC., a foreign)
 corporation, d/b/a SAFETY RAILWAY)
 SERVICES, and SIMON C. RETHERFORD,)
)
 Defendants.)

Case No. 98 C 682 B(M)

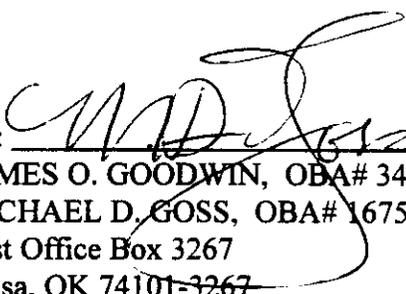
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DISMISSAL WITH PREJUDICE

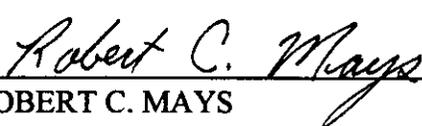
COMES NOW, Plaintiff, ROBERT C. MAYS, and hereby dismisses all claims and causes of action in the above styled and captioned matter with prejudice.

Respectfully submitted,

GOODWIN & GOODWIN

By: 
JAMES O. GOODWIN, OBA# 3458
MICHAEL D. GOSS, OBA# 16759
Post Office Box 3267
Tulsa, OK 74101-3267
(918) 582-9181

ATTORNEYS FOR PLAINTIFF

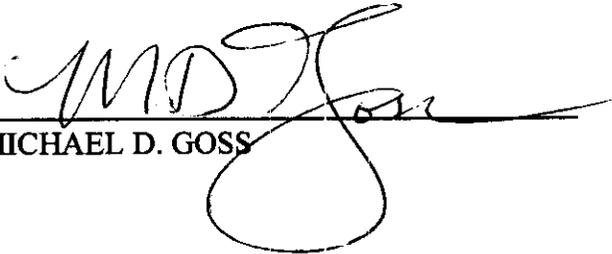

ROBERT C. MAYS
Plaintiff

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 9 day of August, 1999, a true and correct copy of the foregoing document was deposited in the United States mails, proper postage fully prepaid thereon, to: Ms. Leslie Selig Byrd, Attorney at Law, 106 South St. Mary's Street, San Antonio, TX 78205, and Thomas D. Robertson, Attorney at Law, 124 East 4th Street, Ste 400, Tulsa, OK 74103-5010.


MICHAEL D. GOSS

127.

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

DARLA E. MELLOR,)
)
Plaintiff,)
)
vs.)
)
METROPOLITAN LIFE INSURANCE)
COMPANY, a foreign corporation,)
and SHERI WELLS,)
)
Defendants.)

Case No. 98CV960 BU(J)

FILED
AUG 9 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
AUG 9 1999
DATE _____

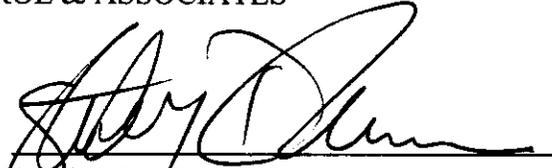
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant, by and through their respective attorneys, have reached a mutually satisfactory settlement regarding Plaintiff's claims herein. Therefore, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties stipulate that this action should be dismissed with prejudice with each of the parties to bear their own costs and attorneys' fees.

Dated this 16th day of August, 1999.

Respectfully submitted,

MONROE & ASSOCIATES

BY: 
Stanley D. Monroe
525 South Main, Suite 600
Tulsa, Oklahoma 74103-4509

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015

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

BY:

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

J. Patrick Cremin, OBA #2013
320 South Boston Avenue, Suite 400
Tulsa OK 74103-3708
(918) 594-0400

ATTORNEY FOR DEFENDANTS
METROPOLITAN LIFE INSURANCE
COMPANY and SHERI WELLS

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FILED

AUG 9 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

Case No. 99CV0325H(E)

ENTERED ON DOCKET
AUG 9 1999
DATE _____

STIPULATION OF DISMISSAL

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 defendant, William F. Craig, pro se, hereby stipulate to the dismissal of this action, with prejudice, pursuant to Rule 41 (a) (1) (ii), Federal Rules of Civil Procedure.

Dated this 3rd day of August, 1999.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

Phil Pinnell

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

William F. Craig
WILLIAM F. CRAIG
Defendant

PEP/jmo

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

ENTERED ON DOCKET
DATE AUG 9 1999

ALEXIS KIM SCHRADER,)

Plaintiff,)

v.)

Case No.: 99 CV 0340-C (J)

DR. FRED A. RAY,)
an individual,)

Defendant.)

FILED

AUG 9 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL

The parties hereby jointly stipulate for the dismissal of this cause without prejudice to re-filing pursuant to Rule 41 (a) (1) of the Federal Rules of Civil Procedure.

Kristin L. Oliver

Patrick W. Cipolla, OBA No. 15203
Kristin L. Oliver, OBA No. 17687
GABLE & GOTWALS
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F. Michael McGranahan, OBA No. 11424
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(918) 744-6300 (fax)

ATTORNEY FOR DEFENDANT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 9 1999

LINDA DE LOAYZA,
SSN: 442-40-8993,

Plaintiff,

v.

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

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-755-EA

ENTERED ON DOCKET

DATE AUG 9 1999

ORDER

Claimant, Linda de Loayza, 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 **AFFIRMS** the Commissioner's decision.

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

² On November 10, 1993, claimant protectively 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 (February 7, 1994), and on reconsideration (June 2, 1994). A hearing before Administrative Law Judge Richard J. Kallsnick (ALJ) was held October 18, 1995, in Tulsa, Oklahoma. By decision dated January 26, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. On June 18, 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.

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 her “physical or mental impairment or impairments are of such severity that [she] is not only unable to do [her] previous work but cannot, considering [her] 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 she is not engaged in substantial gainful activity, as defined by 20 C.F.R. § 404.1510. Step two requires that claimant establish that she has a medically severe impairment or combination of impairments that significantly limit her 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 she does not retain the residual functional capacity (RFC) to perform her 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 her 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 July 1, 1940, and was 55 years old at the time of the administrative hearing in this matter. She has a master’s degree in education and has worked very briefly as a substitute teacher and animal groomer. Claimant alleges an inability to work beginning November 1, 1993, primarily due to mental disorders. Initially, she also claimed to suffer from osteoarthritis and allied disorders.

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform the nonexertional requirements of work except work activity in more than a moderate stress environment. The ALJ concluded that claimant had no past relevant work and had acquired no work skills which are transferable to the skilled or semiskilled work functions of other work. He concluded that claimant can be expected to make a vocational adjustment to work which exists in significant numbers in the national and regional economies that she could perform, based on her RFC, age, education, and work experience. He listed, as examples of such jobs, appointment clerk, library assistant, and home attendant. The ALJ

concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision. (R. 12-20)

IV. REVIEW

Claimant asserts as error that the ALJ: (1) posed an incomplete hypothetical question to the vocational expert; and (2) failed to consider the effects of the claimant's impairments on her ability to perform other work.

Vocational Expert

In forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). Claimant argues that the ALJ's hypothetical questions to the vocational expert was incomplete because it did not contain a finding by Janice C. Boon, Ph.D., that claimant was markedly limited in her ability to interact appropriately with the general public. (R. 59) Dr. Boon made her finding in the "social interaction" category of a "Mental Residual Functional Capacity Assessment" that Dr. Boon completed on June 1, 1994, for the Disability Determination Unit, a state agency employed by the Social Security Administration. Claimant fails to note Dr. Boon's finding that claimant was not significantly limited in any other abilities described in the social interaction category. (Id.) In addition, Dr. Boon rated claimant's difficulties in maintaining social functioning as a "moderate" functional limitation -- not a "marked" one -- when she completed the Psychiatric Review Technique (PRT) form on June 1, 1994. (R. 68) Dr. Boon did not examine claimant.

The ALJ did include in his hypothetical question the fact that claimant had been diagnosed with affective and personality disorders under treatment, and he limited her to work in a moderately

stressful situations. (R. 229-30) The vocational expert testified that claimant's education background would give her some communication skills and skills in working with people that were transferable to other jobs existing in significant numbers in the national and/or regional economy, such as home attendant, library assistant, or appointment clerk. (R. 231) Claimant argues, without substantiation or support, that these jobs would involve working with the general public in some fashion.

Although Dr. Boon found that claimant was markedly limited in her ability to interact appropriate with the general public, the ALJ did not make the same finding. He was not obliged to do so, given Dr. Boon's contemporaneous assessment that claimant was not markedly limited in her ability to maintain social functioning coupled with the fact that Dr. Boon did not examine claimant. The opinion of a medical source who has not examined a claimant is not entitled to the same weight as the opinion of an examining medical source. 20 C.F.R. § 404.1527(d)(1); Winfrey v. Chater, 92 F.3d 1017, 1022 (10th Cir. 1996). As discussed below, the ALJ properly gave greater weight to the opinion of Richard A. Luc, M.D., claimant's treating physician. Accordingly, the ALJ was not obliged to include limitation found by Dr. Boon in a hypothetical question to the vocational expert.

Mental Impairments

The Tenth Circuit requires an ALJ to follow the procedure in 20 C.F.R. § 404.1520a when he or she evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey 92 F.3d at 1024; Cruse v. United States Dep't of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedure first requires the ALJ to determine the presence or absence of certain medical findings pertaining to claimant's ability to work. Next, the ALJ is to evaluate the degree of functional loss resulting from claimant's impairment. The ALJ must then complete a Psychiatric Review Technique ("PRT") form and attach it to a written decision in which he or she discusses the

evidence upon which the conclusions expressed on the form are based. Winfrey, 92 F.3d at 1024; Cruse, 49 F.3d at 617-18; see also Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994).

The ALJ followed this procedure. He determined that claimant had been diagnosed with bipolar mixed, severe, without psychotic features and a narcissistic personality disorder. (R. 14; see R. 126, 146). He acknowledged that she continued treatment consisting of counseling, group therapy, and medication. He concluded that claimant's impairments limit her to work activity in a moderate stress environment. (R. 14) He then methodically explained the degree of functional loss resulting from claimant's impairments as he discussed the "B" criteria of listings 12.04 (affective disorders) and 12.08 (personality disorders) in the regulations governing the Social Security Administration's assessment of claims. See 20 C.F.R. Part 404, Subpt. P., App. (1998). The "B" criteria include: (1) marked restriction of a claimant's activities of daily living; (2) marked difficulties in maintaining social functioning; (3) deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or (4) repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deteriorating of adaptive behaviors). Id. He also completed a PRT form, attached it to his decision, and discussed in it in his decision. (R. 16, 21-23)

The ALJ acknowledged that claimant had some symptoms, but none were sufficiently severe to preclude her from engaging in all types of work. (R. 17) He also expounded on claimant's testimony, her current medications, and her uncle's testimony at the hearing. Claimant's testimony as well as the documents submitted with her disability application reveal her ability to perform a wide variety of activities such as sewing, gardening, painting, cooking, shopping, laundering, vacuuming,

reading, writing, typing, driving, bicycling, and swimming. (See R. 54-55, 90, 95-99, 103, 109, 111, 205, 206, 207) She cared for her father, who was ill and required nursing care prior to his death in 1993. (R. 95) She also takes care of her dog. (R. 90, 95-96, 109) Her uncle testified that she did not perform any of these activities very well. (R. 221-23)

Her treating physician, Dr. Luc, indicated on January 11, 1994, that claimant could secure gainful employment and be able to respond appropriately to work pressure, supervision and co-workers if she took the recommended dosage of Lithium. (R. 126) Progress notes from the Star Community Mental Health Center indicate that claimant was complying, after that date, with her treatment plan. (R. 169, 174, 176, 178, 180, 182, 191, 193) It is true that she was diagnosed at the Star Community Mental Health Center as having a global assessment functioning (GAF) scores of 35 and 40 in December 1993 and February 1995, respectively (R. 146, 172),⁴ but claimant has not shown that these scores require a finding of disability.

Finally, claimant asserts that she has not been able to secure and maintain employment. (Cl. Br., Docket # 13, at 4.) Most of her efforts to secure employment have been to apply for teaching positions. (R. 203; see also R. 54-55) She is certified to teach Spanish or French in middle school and high school. (R. 203) However, as the ALJ pointed out: “employability is not a factor in determining disability.” (R. 17) The determination that work exists in significant numbers in the national or local economy does not depend on whether the work exists in the area in which the claimant lives, whether a specific job vacancy exists, or whether claimant would be hired for the job

⁴ Claimant does not mention the report of Donald R. Inbody, M.D., who indicated in December 1993 that claimant’s GAF score was 70. (R. 116)

if she applied. 42 U.S.C.A. § 423(d)(2)(A) (West 1991 & Supp. 1999); 20 C.F.R. § 416.966(a). The ALJ properly considered the effects of claimant's impairments on her ability to perform other work

V. CONCLUSION

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

DATED this 9th day of August, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

AUG 9 1999

ROBERT MOYER and PAULA MOYER,)
Natural Parents of RONORA STEVENS,)
SSN: 311-60-7523, deceased,)

Plaintiffs,)

v.)

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

Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-1009-EA

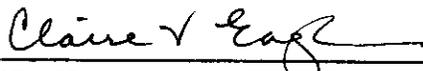
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DATE AUG 9 1999

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 9th day of August 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D
AUG 9 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT MOYER and PAULA MOYER,)
Natural Parents of RONORA STEVENS)
SSN: 311-60-7523, deceased,)

Plaintiffs,)

v.)

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

Defendant.)

Case No. 97-CV-1009 EA

ENTERED ON DOCKET

DATE AUG 9 1999

ORDER

Claimants Robert Moyer and Paula Moyer, natural parents of Ronora Stevens, their deceased daughter, request judicial review pursuant to 42 U.S.C. § 405(g) of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimants' application for children's disability benefits under the Social Security Act. 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. Claimants appeal the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that Ronora Stevens 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.¹ See 42 U.S.C.A. § 1382c(a)(3)(A) (West 1992); 20 C.F.R. § 416.924(b)-(f) (1995). 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

¹ 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) (1995).

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.A. § 1382c(a)(3)(C)(i) (West Supp. 1999).

The notes following the Act provide that the 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 rel. Wallace v. Callahan, 120 F.3d 1133, 1135 (10th Cir. 1997) (applying new standards to a children's disability appeal). Consequently, the Act applies to the claimants' case. The regulations which implement the Act 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.").

II. BACKGROUND

Ronora L. Moyer (now Stevens, deceased) was born on December 28, 1968. On February 4, 1980, Robert Moyer applied for Supplemental Security Income (SSI) benefits under Title XVI (42 U.S.C. § 1381 et seq.) on behalf of his daughter. He filed the application in Indiana, claiming that his daughter was impaired by mental illness and mental retardation. The application was denied initially. The record does not include a copy of the initial application or denial. It is also incomplete in several other respects.

Nonetheless, the record indicates that Ms. Stevens' life was not a happy one. She claimed several times that she had been abused and sexually molested as a child by alcoholic parents, their friends, and others. (R. 163, 165, 167, 173, 175, 187, 216, 220, 227, 233, 242, 261, 264, 267) She

was treated by several doctors and therapists in mental health clinics, hospitals, and private practice for behavioral problems, and, as an adult, for depression and suicidal tendencies. (R. 54-55, 154-56, 162, 215, 216-17, 220-21, 226-34, 236-40, 242, 253-71) Ms. Stevens married and had two children in the late 1980's. The record indicates that she and her husband separated many times, that he served some time in jail, that he was an alcoholic, and that he may have abused her. (R. 40, 100, 188, 221, 224, 226, 228-29, 232-34, 237, 253-56, 258-59)

She protectively reapplied for SSI benefits as an adult on November 8, 1991 (R. 26-30) and her application was granted on February 13, 1992. (R. 31) She claimed to be disabled due to a learning disability and suicidal depression, and that her impairment began on February 3, 1978. On February 26, 1992, Ms. Stevens' uncle completed a supplemental application for SSI benefits on Ms. Stevens' behalf. (R. 40-53) These applications indicate that Ms. Stevens worked for minimum wage at some point for one or two weeks in 1988 and 1989 at a plastics company, and for three weeks in 1987 as a cook at a bowling alley. (R. 57, 157) She moved to Muskogee, Oklahoma with her husband and children in April 1992. (R. 100)

In May, 1992, the Social Security Administration sent a "Zebley v. Sullivan Reply Form" to Ms. Stevens and to Paula Moyer, Ms. Stevens' mother (R. 85-86). The 1980 application was then re-adjudicated under the requirements mandated by Sullivan v. Zebley, 493 U.S. 521 (1990), which required that all children's applications denied prior to January 1, 1990, be re-evaluated to determine if the child suffered from any "impairment of comparable severity" to one that would render an adult "unable to engage in any substantial gainful activity." 42 U.S.C. § 1382c(a) (1982 ed.). She notified the Commissioner in September 1992, that she believed her parents were trying to take her back pay as a result of the Zebley case, and that they were misrepresenting that she lived in their house and

that they were the payees for her benefits. (R. 93)² Under the re-adjudication, the 1980 application for benefits was denied in its entirety initially on October 26, 1993 (R. 131-134), and on February 23, 1994 (R. 138, 146-48), when it was reconsidered.³ In April 1994, Ms. Stevens' representative requested a hearing on Ms. Stevens' behalf. (R. 149) Sometime in 1994, Ms. Stevens moved back to Indiana, and she spent several months in a mental health clinic dealing with suicidal thoughts and depression. (R. 253- 58) She was discharged on March 14, 1995. (R. 253) Four days later, on March 18, 1995, she died in an auto-train accident. (R. 251)

A hearing before Administrative Law Judge Stephen C. Calvarese (ALJ) was held October 4, 1995, in Muskogee, Oklahoma. After the hearing, Robert Moyer signed a Notice Regarding Substitution of Party upon Death of Claimant. (R. 295) His attorney submitted the Notice and additional medical records, as well as additional briefing. These documents were admitted into evidence, together with additional exhibits reflecting updated opinions from the medical expert who testified at the hearing. (R. 333-34)

By decision dated March 25, 1996, the ALJ found that Ronora Stevens was not disabled at any time through the date she attained age 18. (R. 14-19) The ALJ made his decision at the second step of the sequential evaluation process applicable to claims for disability benefits on behalf of a minor child. He found that Ms. Stevens had no impairment or combination of impairments which

² In March 1993, she again applied for SSI benefits. (R. 98-101, 152-58) At that time, she completed a Questionnaire for Children Claiming SSI Benefits (R. 161-71), a Disabled Child Supplemental Questionnaire (R. 172-75), and a Supplemental Interview Outline (R. 176-86) with the assistance of her husband. A disability examiner also completed a Report of Lay Information while Ms. Stevens lived in Muskogee, but it is undated. (R. 187)

³ However, the SSI disability payments made pursuant to her 1991 application were continued. (See R. 115, 130)

could be considered "severe" under the Social Security Act regulations. He thus concluded that she was not disabled, and she was ineligible to receive SSI benefits by virtue of her 1980 application. (R. 18-19) On September 12, 1997, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 416.1481.

Pursuant to 42 U.S.C. § 405(g), claimants may obtain review of a decision of the Commissioner of Social Security "in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia." The record in this matter indicates that claimants reside in Indiana and obtained SSI benefits for Ms. Stevens in Indiana. Ms. Stevens resided there until she moved to Muskogee, Oklahoma in 1992, where she continued to receive disability benefits until her claim was readjudicated in 1993. (See R. 131) In 1994, she returned to Indiana and died there. The hearing, however, was held in Muskogee, Oklahoma.

Muskogee is located within the jurisdictional territory of the Eastern District of Oklahoma. 28 U.S.C. § 116(b). The only jobs Ms. Stevens ever had were for very short periods in 1987, 1988, and 1989 -- before she moved to Oklahoma. The record does not indicate that claimants or Ms. Stevens ever resided or worked within the jurisdictional territory of the Northern District of Oklahoma. Venue is not proper in this judicial district, but respondent has waived the defect. See 28 U.S.C.A. § 1406(b) (West 1993).

III. REVIEW

Claimants asserts as error that the ALJ:

- (1) incorrectly disregarded the medical expert's medical assessments;
- (2) failed to disclose the inconsistencies that caused him to accord no weight to the medical expert's evaluation;
- (3) incorrectly substituted his medical opinion for the medical expert(s);
- (4) found that Ms. Stevens had no severe impairment(s); and
- (5) incorrectly cited certain exhibits as evidence of the medical expert's opinion that the evidence failed to show a significant mental disorder.

In essence, claimants disagree with the ALJ's assessment of the opinions of the medical expert, B. Todd Graybill, Ph.D.

Dr. Graybill examined Ms. Stevens in September 1993 (R. 242-43), and he testified at the administrative hearing in 1995. He acknowledged that she had severe mental impairments as an adult in 1993, but considered it improper to "extrapolate back" and conclude that she had severe mental impairments as a child from the evidence of her impairments as an adult. (R. 318, 326) He testified that the record lacked sufficient evidence for him to offer an opinion as to the severity of Ms. Stevens' mental impairment as a child. (R. 315-16)

After the hearing, Dr. Graybill completed two Individualized Functional Assessments (IFAs)⁴ and responded to interrogatories after the hearing. He identified her medically determinable

⁴ Under the standard for evaluating children's disability claims prior to August 22, 1996, IFAs were completed at the fourth step of the evaluation process to determine whether a claimant had an impairment or impairments of comparable severity to that which would prevent an adult from engaging in substantial gainful activity. 20 C.F.R. § 416.924(f) (1995).

impairments as “Borderline Mentally Retarded” and “Oppositional Defiant Disorder” and evaluated how these impairments affected Ms. Stevens’ development and performance of age-appropriate activities in various domains and behaviors. (R. 284-90; see also R. 292) The developmental domains and behaviors included cognitive, communicative, motor, social, personal/behavioral, as well as her concentration, persistence and pace. He rated the level of severity of functional impairment as moderate, less than moderate, or “no evidence of limitation” in each domain and behavior except the personal/behavioral domain, which he rated as “marked” due to temper tantrums, excessive anger, argumentativeness and resentment toward authority. (R. 284-90) Nonetheless, he stated that “[c]linical records do not suggest a severe disorder.” (R. 287, 290) In response to interrogatories, he again stated that Ms. Stevens’ “[i]mpairment was not severe according to clinical records.” (R. 292)⁵

In his decision, the ALJ stated that Dr. Graybill’s evaluation was “internally inconsistent and is not reliable as an indicia of the child’s actual level of functioning.” (R. 17) The inconsistencies which claimants fault the ALJ for failing to disclose are obvious: Dr. Graybill found that Ms. Stevens’ impairments were not severe despite his finding that he impairments caused a “marked” limitation on her personal/behavioral functioning. A child is disabled only if he or she has a medically determinable physical or mental impairment(s) that causes marked *and* severe functional limitations and that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months. 20 C.F.R. § 416.906 (emphasis added). Under 20 C.F.R. § 416.924(c), a slight abnormality or a combination of abnormalities that causes no more than

⁵ As defendant points out, Dr. Graybill’s opinions are consistent with those of Carolyn Goodrich, Ph.D., and Ron Smallwood, Ph.D., who both evaluated Ms. Stevens in 1993. (See R. 117-28,139-43)

minimal functional limitation supports a finding that a claimant does *not* have a severe impairment and is not disabled.⁶ An impairment must result from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. § 416.927(a)

Under 20 C.F.R. § 416.913(c), a medical expert can offer an opinion about a child's functional limitations in learning, motor functioning, performing self-care activities, communicating, socializing and completing tasks. However, other sources of information are also used to help the Commissioner understand how a claimant's impairments affecting his ability to function independently, appropriately and effectively in an age-appropriate manner. 20 C.F.R. § 416.913(e). The Commissioner can use medical sources to provide evidence, including opinion, on the nature and severity of a claimant's impairment(s); however, the final responsibility for determining the ultimate issue of disability is reserved to the Commissioner. 20 C.F.R. § 416.927(e)(2).

The ALJ found that Dr. Graybill's characterization of Ms. Stevens' temper tantrums as a "marked" limitation in personal/behavioral functioning overestimated the importance of one behavior in overall functioning in a single domain. (R. 17) He also pointed out that Dr. Graybill's evaluation was made some 15 years after Mr. Moyer filed an application on his daughter's behalf, almost 10 years after the date of Ms. Stevens' potential eligibility for children's disability benefits, and almost a year after the her death. (*Id.*) The ALJ chose, instead, to rely on the records made

⁶ In this respect, claimants confuse the requirements for finding a severe impairment in adults with those for a severity finding in children. Claimants argue that a non-severe impairment is defined by 20 C.F.R. § 404.1521 as "an impairment or combination of impairments [that] does not significantly limit your physical or mental ability to do basic work activities." (Pl. Reply Br., Docket # 10, at 2.) Claimants have not applied for Title II disability benefits, which are covered by the regulations at 20 C.F.R., Part 404; they have applied for Title XVI disability benefits, which are covered by the regulations at 20 C.F.R., Part 416.

when Ms. Stevens was still a child. Those records show that she did not have an impairment which caused significant restrictions in her ability to perform age-appropriate functions.

In 1979, when Ms. Stevens was known as ten-year-old "Ronora," she was interviewed and evaluated at a mental health center. Her parents stated that she could not control her temper and she had a personality clash with her special education teacher. They described her as being spoiled, and they explained that she liked to play with smaller children in order to dominate them. (R. 269) They thought that her problem began when she was placed in a special education classes, because that is when she began to think of herself as being mentally retarded. (*Id.*) Ronora's mother stated that her Ronora would tear up her completed assignments and that school officials had called her several times complaining of Ronora's behavior. The therapist reported that Ronora appeared to have a "somewhat dulled appearance." (R. 270) He also stated:

Ronora appeared not to be delusional nor hallucinatory and showed appropriate affect for the circumstances. She appeared to be of borderline intelligence and spoke in short, soft sentences, with much irrelevant [sic] talk. She appeared happy but demonstrated a poor self-concept. She appeared to be quite immature for her age, and showed some self-destructive features.

(*Id.*) He indicated that she sought a large amount of attention. (R. 271)

A staff therapist at another mental health facility in Indiana interviewed Ronora on June 27, 1984. (R. 264) Ronora's mother, who had apparently been drinking prior to the interview, brought her to the clinic. The therapist reported that Ronora had run away from the home a week prior to the interview, but she returned after a day. The evaluation indicates that Ronora's parents had difficulty dealing with Ronora and her sister, who were both mildly mentally handicapped. In particular, the parents reported problems with Ronora's temper. The therapist reported that Ronora had some problems with lack of attendance and verbal aggression at school, but that Special Education classes

helped her to mainstream. The therapist question how much her family had to do with Ronora's "acting out." At that time, Ronora denied depression, anxiety, sleep disturbance or appetite disturbance. The therapist recommended family therapy "with the goal of treatment being for the parents to implement more appropriate parenting skills," but she expressed doubt that the family could change. (Id.)

Ronora was interviewed at the mental health facility again on September 17, 1985. (R. 267) The therapist noted that she was referred by the La Porte County Juvenile Probation Department. She was placed on probation following a "runaway" earlier that summer. (Id.) The therapist reported that Ronora was accompanied to the interview by her father, an alcoholic who was intoxicated at the time of the interview and who was intoxicated at the time of a previous morning interview a year earlier. The father reported that his daughter was difficult to get along with at home. According to him, she would refuse to do something or disagree with them and an argument would result. (Id.)

Ronora reported that she got along well in life, with the exception of her home life. She was angry with her parents for being alcoholic. The therapist noted that she had frequent problems at school, her mood was often labile, she could be obstinate, she skipped school, she argued with her teachers, and students regarded her warily. (Id.) The therapist stated that Ronora may have been sexually abused. The evaluation indicates that Ronora was anxious, depressed, flighty, attention-seeking, and narcissistic. She had difficulty with relationships, but she did have a couple of close friends and many acquaintances who excused her behavior. "Although she will threaten suicide at the drop of a hat," the therapist stated, "there have been no suicidal nor homicidal actions present."

(Id.) The therapist recommended individual therapy because she feared the parents would come to the sessions inebriated if she recommended family therapy. (R. 262)

The South La Porte County Special Education Cooperative evaluated Ronora on March 4, 1986. (R. 189) The evaluation indicates that Ronora was previously evaluated in 1975, 1978 and 1981. These evaluations consistently indicated that Ronora scored between 70 and 80 on IQ tests, except for one verbal IQ score of 65 in 1978, and a performance IQ score of 87 in 1981. (R. 190) Her evaluations generally suggest a very low borderline intellectual potential, academics well-below age level, visual-motor lags for her age, and frequent references to behavioral difficulties relating to authority figures. However, other reports indicate that Ronora could be well-behaved, polite, respectful and conscientious. Apparently, she had either good days or bad days. (R. 189)

In the 1986 evaluation, Ronora scores were VIQ: 77; PIQ: 84; and FIQ: 78. (R. 190) The evaluator, a psychologist, indicated that Ronora had been placed in special education classes in 1977 when the requirements were less restrictive requirements than in 1986. He found no severe emotional difficulties and remarked that she was polite and pleasant. (R. 191-92) Her teacher indicated that her lack of attendance and motivation had been problematic, but she had become more organized, more cooperative, and her behaviors were more appropriate in the 1986-87 school year. (R. 196, 198, 201) A committee recommended that she be placed part-time in regular classes and part-time in special education classes. (R. 203)

A staff therapist at the mental health facility in Indiana interviewed Ronora again on May 27, 1986. (R. 261) Her mother took her to the facility, claiming that "Ronora's incorrigibility" was a problem. (Id.) The therapist noted that there was physical violence in the home, and that Ronora's parents tended to blame her for problems in their home. The therapist reported that Ronora had an

erratic affect, sought attention, was somewhat impulsive and extremely self-centered. She recommended family therapy (id.), but the family never returned. (R. 263)

The diagnosis in each of these evaluations varied. (See R. 257) Her first diagnosis, in April 1979, was 319.00⁷ - Unspecified Mental Retardation. (R. 271) In December 1979, the diagnosis was 308.9 - "other reaction childhood." (R. 268) The diagnosis in June 1984 was 313.81 - Oppositional Disorder. (R. 264) She was diagnosed as 300.02 - Generalized Anxiety Disorder in September 1985. (R. 262) In April 1986, she was diagnosed with 301.5 - Histrionic Personality Disorder. (R. 266) A month later, another therapist diagnosed her as 301.03 - Borderline Personality Disorder. (R. 261) Five years later, in 1991, she was diagnosed as an adult with Depressive Disorder, Not Otherwise Specified (NOS), and Borderline Personality Disorder. (R. 232-34) In 1992, she was diagnosed as 311.00 - Depressive Disorder, NOS, 300.60 - Depersonalization Disorder, V40.00 - Borderline Intellectual Functioning, 301.83 - Borderline Personality Disorder (R. 224). Her diagnosis in 1994 and 1995 was Major Depression, Recurrent with Psychotic Features (R. 253, 255, 258)

Claimants focus solely on the diagnosis in June 1984: 313.81 - Oppositional Disorder (R. 264), to support their argument that the court incorrectly substituted its medical opinion for those of the medical experts. In 1995, Dr. Graybill reviewed the record and identified Ms. Stevens as having borderline mental retardation and oppositional defiant disorder as a child. (R. 284, 288) Given the wide variety of diagnoses throughout Ms. Steven's childhood, however, the ALJ did not err in failing to accord any weight to Dr. Graybill's evaluation.

⁷ Diagnoses correspond with the numerical categories set forth in American Psychiatric Assoc., Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R), (3rd ed. 1987) or American Psychiatric Assoc., Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), (4th ed. 1994).

The ALJ acknowledged that Ms. Stevens' test scores indicated that she functioned at below the normal range of intelligence, and she was characterized as "mildly mentally handicapped." (R. 16) He noted that she complained of a hearing problem, as well as her lack of motivation, that may have affected her responses and test scores. (R. 16-17; see R. 190) He also discussed her placement in Special Education classes, and her problematic behavior in other classes. (R. 16-17; see R. 190) The ALJ pointed out that, nonetheless, Ms. Stevens participated in school activities, ate with other children in the cafeteria, and had no difficulty with personal hygiene. (R. 16) Her parents attributed her placement in Special Education classes to problematic behavior, such as throwing temper tantrums, at home. (R. 16; see R. 269) However, the ALJ noted that Ms. Steven's family solved problems by "acting out" and confrontation. (R. 17; see R. 264) He reasoned that family problems, including parental alcoholism, contributed to Ms. Stevens' difficulties. (R. 17)

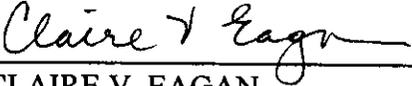
As noted above, the ALJ decided this case before the passage of the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996), which amended the substantive standards for the evaluation of children's disability claims. The Act effectively negated the impact of Sullivan v. Zebley, 493 U.S. 521 (1990), the case which caused the decision on claimants' 1980 application to be re-evaluated. Sullivan v. Zebley required that all children's applications denied prior to January 1, 1990, be re-evaluated to determine if the child suffered from any "impairment of comparable severity" to one that would render an adult "unable to engage in any substantial gainful activity." Id. at 541 (citation omitted). That requirement was reflected in step four of the analysis required under the regulations prior to August 22, 1996. 20 C.F.R. § 416.924(b)-(f) (1994).

However, the ALJ in this matter did not decide the case at step four; he decided the matter at step two, which remained unchanged by the Act. At that step, the ALJ merely decides if the impairment claimed is "severe." 20 C.F.R. § 416.924(c) (1998). The ALJ decided that Ms. Stevens' impairment was not severe under the regulations applicable to children when she was a child. It is undisputed that Ms. Stevens had a "medically determinable mental impairment." See 42 U.S.C. § 1382c(a)(3)(C)(i) (Supp. 1998); 20 C.F.R. § 416.906 (1998). However, the evidence does not conclusively show that her impairment resulted in "marked and severe functional limitations," which could be expected to result in death or which lasted or could be expected to last for a continuous period of not less than 12 months. Id. Accordingly, the Commissioner properly found that Ms. Stevens was not disabled as that term is used in the Social Security Act.

IV. CONCLUSION

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

DATED this 9th day of August, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

FILED

IN THE UNITED STATES DISTRICT COURT

AUG - 6 1999

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

JOHN R. RUDY,

Plaintiff,

vs.

Case No. 99CV008-B(E)

MS LIFE INSURANCE COMPANY, a
foreign insurance company,

Defendant.

FLEET BANK, N.A., and LOAN
SERVICING ENTERPRISE,

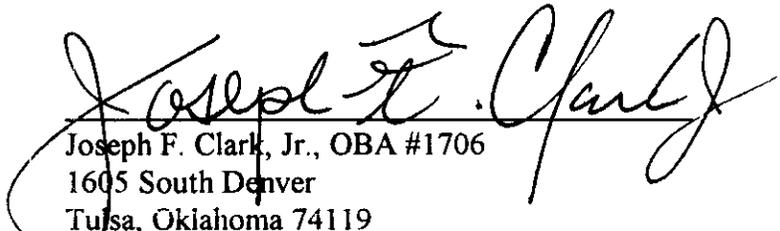
Third Party Defendants.

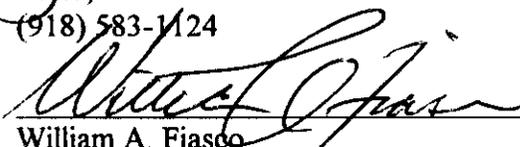
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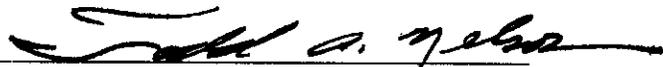
DATE AUG 09 1999

STIPULATION FOR DISMISSAL

COME NOW the parties, John R. Rudy, MS Life Insurance Company and Fleet Bank, N.A., and stipulate to the dismissal without prejudice of Fleet Bank, N.A.


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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA *ex rei.*
WILLIAM I. KOCH and
WILLIAM A. PRESLEY,

Plaintiffs,

v.

KOCH INDUSTRIES, INC., *et al.*,

Defendants.

FILED

AUG 06 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 91-CV-763-K(J)

ENTERED ON DOCKET

DATE AUG 09 1999

REPORT AND RECOMMENDATION

"Defendants' Motion for Summary Judgment Re Plaintiffs' Failure of Proof of Liability and Damages" is now before the Court. [Doc. No. 331]. The motion has been referred to the undersigned for report and recommendation pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72.

With their motion, Defendants' argue that summary judgment should be granted in their favor because Plaintiffs, as the parties with the burden of proof at trial, have no evidence from which a jury could (1) find that Defendants violated the False Claims Act, or (2) determine the amount of damages. The undersigned has reviewed the massive^{1/} record presented by the parties, and for the reasons discussed below the undersigned finds, viewing all inferences in the light most favorable to Plaintiffs, that Plaintiffs have demonstrated that they have at least some evidence on each element of their False Claims Act cause of action. Consequently, the undersigned recommends

^{1/} The pleadings and exhibits relating to this motion for summary judgment are taller than a young child (i.e., more than 3' tall), not counting the volumes of measurement standards which were submitted separately.

that Defendants' motion for summary judgment be **DENIED**. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

Defendants' motion^{2/} requires the Court to answer the following interrelated questions:

1. What "nature" of evidence is required to prove a violation of the False Claims Act?
2. What must Plaintiffs prove to establish liability under 31 U.S.C. § 3729(a)(7)?
 - a. When is a "run ticket" false?^{3/}
 - b. Does a false run ticket produce a false MMS-2014, Osage Royalty Report or monthly check stub?
 - c. Must Plaintiffs prove that Defendants intended to conceal, avoid or reduce an obligation to pay or transmit money to the government?
 - d. Is plaintiffs' evidence of damages sufficient?
3. May Plaintiffs prove certain elements of their cause of action by establishing Defendants' "routine practice" under Fed. R. Evid. 406?

Each of these questions will be addressed separately below.

^{2/} See Doc. Nos. 331-35, 360-67, 407-409, 483, 500, 515, 520 and the Manual of Petroleum Measurement Standards published by the American Petroleum Institute.

^{3/} This issue was raised by Plaintiffs in a prior motion for summary judgment. In the prior summary judgment ruling, the Court did not rule on this issue, preferring instead, after additional briefing, to address the issue in connection with Defendants' motion for summary judgment. See Doc. No. 426. Thus, to rule on this issue, the undersigned has considered the submissions made in connection with Plaintiffs' prior motion for summary judgment and the supplemental submissions made in connection with Defendants' motion for summary judgment. See Doc. Nos. 211, 219, 224, 227, 232, 250, 433 and 451.

I. NATURE OF THE EVIDENCE – GENERALIZED, INFERENTIAL AND ANECDOTAL EVIDENCE VS. SPECIFIC AND PARTICULARIZED EVIDENCE

Defendants argue that to prove liability under the False Claims Act, Plaintiffs' evidence must be specific and particularized, not general and speculative. The undersigned finds none of this nomenclature particularly helpful. Plaintiffs have the burden of establishing, by a preponderance of the evidence, all of the elements of their False Claims Act cause of action. Plaintiffs may use any evidence which is admissible under the Federal Rules of Evidence. The Court should, therefore, address the admissibility of Plaintiffs' evidence by using the Federal Rules of Evidence as the litmus, and not the vague nomenclature suggested by Defendants.

II. WHAT MUST PLAINTIFFS PROVE TO ESTABLISH LIABILITY UNDER 31 U.S.C. § 3729(a)(7)?

A. WHEN IS A RUN TICKET FALSE?

Each time Defendants purchase oil from a lease, the oil must be gauged to determine how much oil was purchased and at what price. In the majority of purchases at issue in this lawsuit, Defendants hand gauged the oil. To hand gauge a tank of oil, Defendants' gauger takes several physical measurements including the level of the oil in the tank before and after the oil is run out of the tank (the top and bottom gauge), the temperature of the oil before and after the oil is run out of the tank (the opening and closing temperature), the gravity of the oil and the basic sediment and water ("BS&W") content of the oil. The gauger records each of these measurements

on a paper run ticket, and all of these numbers, taken together, determine the volume and price of the oil taken from the tank by the gauger. See Doc. No. 425.

Plaintiffs intend to prove that on nearly every lease from which Defendants purchased oil, Defendants' gaugers wrote on the run ticket a measurement number which was not the same as the number the gauger actually observed when he took the measurement. Following are some illustrations presented by way of example only: gauger measures the top gauge at 11'2", but writes 11' on the run ticket; gauger measures opening temperature at 68° and writes 70° on the run ticket. Plaintiffs argue that a run ticket is false for purpose of the False Claims Act whenever a gauger writes a measurement number on the run ticket which is different from the number actually observed by the gauger when the measurement was taken.

Defendants argue that Plaintiffs cannot prove that a run ticket is false simply by showing that it has a measurement number on it that is different from the number actually obtained by the gauger when he took the measurement. This is so, Defendants argue, because measurement of oil is not an exact science and that there are many conditions which exist in the oilfield which require a gauger to adjust his observed measurements. One type of field condition commonly cited by Defendants as justifying an adjustment to observed measurements is "green oil."

According to Defendants, green oil is oil which has gasses trapped within it because the oil has not been allowed to settle. Defendants intend to show that as green oil settles, the gases trapped in the oil escape, and that to accurately determine the volume of green oil, the gauger must make adjustments to his observed

measurements. Defendants believe that green oil justifies an adjustment to the top gauge measurement. For example, the top gauge measurement of green oil might be 11'2", but if the oil were left to settle, the top gauge would only be 11'. Defendants argue that their gauger is justified in writing 11' on the run ticket, rather than 11'2", and that to do so does not make the ticket false for purposes of the False Claims Act.^{4/}

Plaintiffs attack Defendants' theory of adjustments to observed measurements on two fronts. First, Plaintiffs argue that adjustments for certain field conditions are not necessary to accurately determine the oil's volume or price. Second, Plaintiffs argue that even if an adjustment were necessary, the way Defendants went about making adjustments was improper.

Plaintiffs have some evidence from which a jury could conclude that adjustments for green oil, or at least the adjustments being made by Defendants, were not justified because tests show that there was no significant difference in either the gross or the net volume of oil when gauged while green and when gauged after it had time to settle. See, e.g., Doc. No. 363, Exs. 117-119. Plaintiffs also intend to show that the gravity and BS&W measurements taken by Defendants' gaugers were also routinely "adjusted" when there was no justifiable reason to adjust these particular measurements. In short, Plaintiffs have at least some evidence to suggest that the

^{4/} Defendants also intend to show that there are other conditions in the oilfield that permit a gauger to make similar adjustments to his observed measurements (e.g., encrustation on the walls of a tank, sludge in the bottom of a tank, extreme temperature variations, etc.).

"conditions," for which Defendants' gaugers were allegedly adjusting their observed measurements did not in fact justify adjustments.

Plaintiffs also argue that even if a legitimate field condition would justify an "adjustment" to the gauger's observed measurements, the way Defendants made adjustments in this case still causes the run ticket to be false for purposes of the False Claims Act. Plaintiffs have some evidence from which a jury could determine that Defendants' gaugers received no training on how to determine the amount of adjustment to be made to an observed measurement for any particular field condition, leaving Defendants' gaugers to guess at the appropriate adjustment. There is also evidence that Defendants never indicated on the run ticket or anywhere else that its gauger had in fact decided to make an adjustment for a particular tank. The jury could conclude from this evidence that, as Plaintiffs believe, the "adjustments" were designed for something all together different than to achieve an accurate volume.

Plaintiffs also have some evidence which establishes that given the regulatory climate within which federal and Indian oil is purchased, given the custom in the industry, and given common sense,^{5/} it would be unreasonable for a purchaser to believe that it could make unilateral adjustments to measurement information. Plaintiffs have some evidence from which a jury could conclude that Defendants were aware that they were permitted to make adjustments to observed measurements only after reaching an accord with the producer or a government official. Defendants allege

^{5/} There are numerous factual disputes between the parties and their experts regarding just what the government's regulations, the industry custom, and common sense would require of Defendants with regard to the measurement of crude oil.

that they did obtain permission to make adjustments, but there are numerous factual issues regarding when and from whom Defendants obtained this permission.

There is also some evidence from which the jury could conclude that the terms on a run ticket mean what they say. When a run ticket contains a space for a top gauge measurement, what is to be recorded is the actual top gauge measured by the gauger, and not the gauger's estimate of what the gauger thinks the top gauge ought to be. Plaintiffs couple this evidence with the evidence that Defendants never indicated on a run ticket or anywhere else that an adjustment had been made, leaving the producer, the government or anyone else looking at that ticket to believe that the numbers were actual measurements, not adjusted measurements which were simply the rough estimations of a party with a financial incentive to adjust in its own favor. In other words, Plaintiffs have at least some evidence that the run tickets created by Defendants asserted facts (i.e., observed measurements) which were not true.

The False Claims Act imposes liability for creating or using false records to conceal, reduce or avoid an obligation to pay or transmit money to the government. 31 U.S.C. § 3729(a)(7). The FCA does not, however, define when a record is false. It is the jury's job to determine falsity. As with any other element of a False Claims Act case, Plaintiffs bear the burden of showing by a preponderance of the evidence that a run ticket containing adjusted measurements is false. See 31 U.S.C. § 3731(c). The undersigned finds that the burden should not in any way be shifted to Defendants to establish that run tickets with adjusted measurements are not false. The jury should be instructed that to be false, the run tickets must be tantamount to a lie, and

that a run ticket's falsity may be established by showing that Defendants omitted material information from the run tickets. The undersigned finds that Plaintiffs currently have enough evidence for a reasonable jury to conclude that a run ticket containing adjusted measurement numbers, without any indication that the numbers are in fact adjusted, is a lie.^{6/}

B. CAN FALSE RUN TICKETS PRODUCE FALSE MMS-2014'S, OSAGE ROYALTY REPORTS AND MONTHLY CHECK STUBS?

The Court has previously held that penalties under the False Claims Act will be assessed each time an MMS-2014, Osage Royalty Report or monthly check stub falsely reports the volume of oil purchased from a particular lease. See Doc. Nos. 425 and 531. Thus, to recover penalties in this case, Plaintiffs must prove that the relevant MMS-2014's, Osage Royalty Reports and monthly check stubs contain false information. Plaintiffs intend to demonstrate that the relevant MMS-2014's, Osage Royalty Reports and monthly check stubs are false because the run tickets flowing into these monthly reports were false. Defendants argue that there is insufficient evidence to permit the jury to conclude that the creation of a false run ticket necessarily results in a false MMS-2014, Osage Royalty Report or monthly check stub. The undersigned does not agree.

^{6/} The jury would be equally justified in concluding that a run ticket with adjusted measurement numbers is false only if (1) there was no field condition justifying the adjustment, or (2) the adjustment was more than was necessary to compensate for an otherwise legitimate field condition.

There is sufficient evidence in the record for the jury to conclude that the creation of a false run ticket will result in the creation of a false MMS-2014, Osage Royalty Report or check stub. See, e.g., Doc. No. 425 (which contains a detailed discussion of run tickets, MMS-2014's, Osage Royalty Reports and check stubs). The measurement information from a run ticket is entered into Defendants' computerized oil accounting system, and this system calculates the volume and price of the oil purchased. Check stubs are then generated from Defendants' computerized oil accounting system. These check stubs are either mailed directly to the lessee/producer or used by Defendants' accountants to prepare MMS-2014's and Osage Royalty Reports. Given this scenario, the jury may conclude that false input (i.e., a false run ticket) produces false output (i.e., a false MMS-2014, Osage Royalty Report or monthly check stub).

C. MUST PLAINTIFFS PROVE THAT DEFENDANTS INTENDED TO CONCEAL, AVOID OR REDUCE AN OBLIGATION TO PAY OR TRANSMIT MONEY TO THE GOVERNMENT?

The False Claims Act defines liability in this case as follows:

Any person who knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money to the Government is liable to the United States Government

31 U.S.C. § 3729(a)(7). "Knowingly" is defined by the Act as follows:

[A] person, with respect to information —

(1) has actual knowledge of the information;

- (2) acts in deliberate ignorance of the truth or falsity of the information; or
- (3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

Id. at § 3729(b).

Section 3729 clearly requires Plaintiffs to prove (1) that Defendants made records (i.e., run tickets, MMS-2014's, Osage Royalty Reports and monthly check stubs); (2) that these records were false; and (3) that Defendants knew these records were false. Defendants argue that to establish liability, Plaintiffs must also prove that Defendants created these records with the intent to conceal, avoid or decrease an obligation to pay or transmit money to the government. The undersigned does not agree. As § 3729(b) states, Plaintiffs are not required to prove that Defendants had a specific intent to defraud the government. Reading § 3729(a)(7) and § 3729(b) together establishes that Plaintiffs need only prove that Defendants knowingly created records which they knew to be false.

The phrase "conceal, avoid, or decrease an obligation to pay or transmit money to the Government" is relevant to the materiality of the alleged falsehoods and the determination of actual damages. Not every false piece of information on a run ticket will lead to liability under the False Claims Act. For example, if a gauger writes December 13, 1985 in the date box on a run ticket, knowing full well that it is December 10, 1985, the technically false run ticket would not trigger liability under § 3729(a)(7) unless it could be shown that a false date would somehow affect

Defendants' obligation to pay or transmit money to the government. The measurement information on a run ticket does, however, directly impact Defendants' obligation to pay or transmit money to the government. Thus, any falsehood in connection with the measurement information on a run ticket would be material and could lead to liability for penalties under the Act.

If Plaintiffs wish to recover actual damages in this case, they will have to establish by a preponderance of the evidence that the submission of a run ticket with false measurement information on it did in fact "conceal, avoid or decrease" Defendants' royalty obligation. Thus, to recover actual damages, Plaintiffs will have to show not only that the information on a run ticket was false, but that false information actually caused Defendants' royalty obligation to be concealed, avoided or decreased.

D. IS PLAINTIFFS' EVIDENCE OF DAMAGES SUFFICIENT?

Defendants argue that Plaintiffs' evidence regarding the amount of actual damages suffered by the government is insufficient. Even if Defendants were correct, this fact would not provide a basis for sustaining Defendants' motion for summary judgment because actual damage to the government is not an essential element of Plaintiffs' False Claim Act case.

The legislative history of the False Claims Act states that the penalty provision of the Act "is automatic and mandatory for each claim which is found to be false. The United States is entitled to recover such forfeiture solely upon proof that false claims

were made, without proof of any damages." S. Rep. No. 99-345, 1986 U.S.C.C.A.N. 5273 (citing Fleming v. United States, 336 F.2d 475, 480 (10th Cir.1964)). See also United States v. Miller, 645 F.2d 473, 475-76 and n.4 (5th Cir.1981) ("as to the forfeiture, the knowing submission of a false claim to the government is sufficient for the levying of the statutory forfeiture penalty"); and United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) (affirming district court decision allowing forfeitures for public works projects for which no damage had been incurred).

Defendants' attack on Plaintiffs' damages evidence is focused primarily on the admissibility of the expert, statistical testimony Plaintiffs intend to offer in support of actual damages. The Court need not rule on the admissibility of that evidence here. The admissibility of Plaintiffs' damages evidence should be addressed in a relevant pre-trial motion in limine. See, e.g., Doc. No. 349.

E. CONCLUSION

Plaintiffs must prove that Defendants knowingly created MMS-2014's, Osage Royalty Reports and monthly check stubs and that Defendants knew these reports were false. Plaintiffs do not have to prove that Defendants had the specific intent to cheat the government by reducing its royalty obligation to the government. Plaintiffs need only prove the knowing creation of what is known to be false. Plaintiffs also do not have to prove that the government sustained actual damages.

The jury may determine that an MMS-2014, Osage Royalty Report or monthly check stub was false by determining that the run tickets flowing into those reports

were false. The jury may also determine that a run ticket is false if its contains measurement numbers which were different from those actually observed by the gauger when he took the measurement.

III. MAY PLAINTIFFS PROVE CERTAIN ELEMENTS OF THEIR CAUSE OF ACTION BY ESTABLISHING DEFENDANTS' "ROUTINE PRACTICE" UNDER FED. R. EVID. 406?

Given the nature of this case, Plaintiffs admit that for the eleven years involved in this lawsuit it would be very difficult for them to prove for every run ticket that on a particular date, a particular gauger went to a particular lease, gauged oil in a particular tank, and wrote down measurement numbers on the run ticket that were different from what the gauger actually observed when he took the measurements. There are very few instances in which anyone has a direct memory of a specific lease transaction, and Defendants neither made nor kept any record of the "adjustments" to measurement numbers which their gaugers did make.

To fill the evidentiary gap left by the absence of evidence relating to specific lease transactions, Plaintiffs intend to put on evidence pursuant to Fed. R. Evid. 406 to show Defendants' routine gauging practices. Rule 406 provides as follows:

Evidence . . . of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the . . . organization on a particular occasion was in conformity with the . . . routine practice.

Fed. R. Evid. 406. Plaintiffs intend to establish Defendants' routine gauging practice and that this routine gauging practice resulted in the creation of run tickets that were

false. If the jury finds that Plaintiffs have established a routine gauging practice that results in the creation of false run tickets, Plaintiffs believe that the jury, using the inference permitted by Rule 406, can conclude that the routine gauging practice was used, and resulted in the creation of false run tickets, on a certain percentage of Defendants' purchases (i.e., that Defendants' gauging practices were in conformity with the established routine practice on a certain number of particular occasions).

Defendants argue that viewing all of Plaintiffs evidence in the light most favorable to Plaintiffs, no reasonable jury could conclude that Plaintiffs have established Defendants' routine gauging practice in part because Defendants' gauging practices are not routine and vary widely from region to region, oilfield to oilfield, and gauger to gauger. At most, Defendants argue, Plaintiffs can establish the habit of a particular gauger, but not the routine corporate practice of Defendants as a whole.

The routine gauging practice which Plaintiffs will actually have to prove is determined in part by how the jury resolves the run ticket falsity issue. If the jury finds, given the totality of the evidence presented, that a run ticket containing adjusted numbers is false, then Plaintiffs would have to prove that Defendants had a routine gauging practice which consisted of recording adjusted measurement numbers on run tickets. The jury may, however, find that a run ticket with adjusted measurement numbers is false only if (1) there was no field condition justifying the adjustment, or (2) the adjustment was more than was necessary to compensate for an otherwise legitimate field condition. If so, Plaintiffs would then have to prove that Defendants had a routine gauging practice which consisted of recording adjusted measurement

numbers on run tickets regardless of whether the adjustment was justified by a legitimate field condition. Having reviewed the pleadings and record submitted by the parties, the undersigned finds that Plaintiffs have demonstrated that there is enough evidence in the record to permit the jury to conclude that Defendants did in fact engage in either of the routine gauging practices discussed above.⁷¹

IV. CONCLUSION

The Court has been presented with a rather large summary judgment record. The record, unlike trial testimony, is flat and static. At the summary judgment stage, it is often difficult to determine how a mass of complicated and interwoven facts actually fit together and complement each other. Permissible Inferences generated by the synergistic effect of evidence presented and explained at trial are often lost on the trial judge confronted with static summary judgment record. The undersigned has strived, therefore, to draw every inference in Plaintiffs favor. The undersigned is convinced at this stage of the proceeding that Plaintiffs' claims should survive summary judgment.

Plaintiffs must be mindful, however, that the Court will seriously evaluate Plaintiffs' evidence during their case in chief. Defendants will no doubt file a motion for judgment as a matter of law at the close of Plaintiffs' case in chief. See Fed. R. Civ. P. 50(a). At that point, the Court must again undertake a critical evaluation of

⁷¹ The jury should be instructed in an alternative fashion. For example: If you resolve the run ticket falsity issue this way, you must find that Defendants engaged in this routine practice, and if you resolve the run ticket falsity issue that way, you must find that Defendants engaged in that routine practice.

Plaintiffs' evidence to determine if Plaintiffs' have in fact been able to elicit evidence to establish each of the elements of their False Claims Act claim.

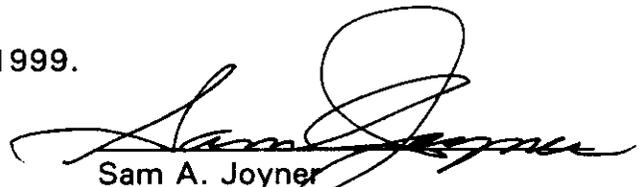
CONCLUSION

For the reasons discussed above, the undersigned recommends that Defendants' "Motion for Summary Judgment Re Plaintiffs' Failure of Proof of Liability and Damages" be **DENIED**. [Doc. No. 331].

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 his/her review of the record, the District Judge will consider the parties' written objections to 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 6 day of August 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 9 Day of August, 1999.

-- 16 --

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

FILED

AUG 6 1999

JASIEL RANDOLPH)

Plaintiff,)

vs.)

FARMERS INSURANCE COMPANY, INC.)

Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

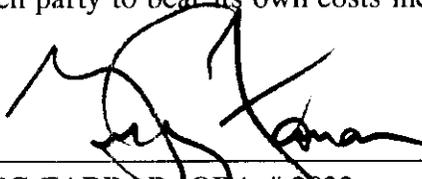
Case No. 99 CV-224 J V

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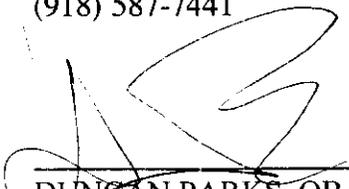
DATE AUG 6 1999

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the Plaintiff, Jasiel Randolph and Defendant, Farmers Insurance Company, Inc., being parties to the above styled action, hereby stipulate that all claims among said parties should be and hereby are dismissed with prejudice, with each party to bear its own costs including attorney fees.



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C/SA

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

FILED

AUG 5 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KAREN GORMLEY and)
MARK J. GORMLEY, individually and as)
husband and wife,)
Plaintiffs,)
vs.)
AMERICAN NATIONAL INSURANCE)
COMPANY, a foreign corporation,)
Defendant.)

No. 99-CV-121E (J)

ENTERED ON DOCKET
DATE **AUG 06 1999**

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the plaintiffs and defendant, by and through their respective counsel, hereby stipulate that this action shall be and is hereby dismissed, with prejudice. Each party shall bear its own costs and attorney fees.



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ATTORNEYS FOR DEFENDANT

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

FILED
AUG - 5 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM F. McCracken,

Plaintiff,

vs.

Case No. 98 CV-0142-B (J)

THE UNITED STATES OF AMERICA,

Defendant.

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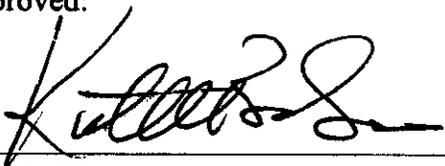
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ORDER

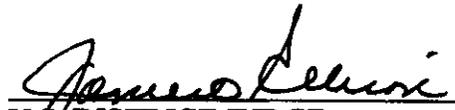
THIS MATTER comes before the Court on the Joint Application of the parties hereto. The Court finds that all of the issues between the parties have been completely settled and compromised, and therefore dismisses the above-entitled cause of action with prejudice as to any future actions.

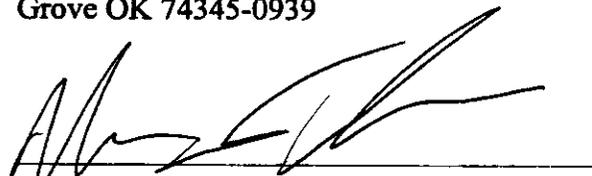
SO ORDERED this 5TH day of August, 1999.

Approved:



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Attorney for Plaintiff
PO Drawer 450939
Grove OK 74345-0939


U.S. DISTRICT JUDGE
For Thomas R. Brett, Judge



William F. Smith OBA# 8420
Attorney for Defendant
2642 East 21st Street, Suite 150
Tulsa, OK 74114-1739

18

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

JACK DALE WALKER,)
)
Petitioner,)
)
v.)
)
RON WARD, Warden,)
Oklahoma State Penitentiary,)
)
Respondent,)

ENTERED ON DOCKET
DATE AUG 05 1999

Case No. 97-CV-208-K ✓
F I L E D

AUG 04 1999 ✓

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the court for consideration of the Petitioner's petition for writ of habeas corpus. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

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

ORDERED THIS 4 DAY OF AUGUST, 1999


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

JACK DALE WALKER,)
)
)
 Petitioner,)
)
)
 v.)
)
)
 RON WARD, Warden,)
)
 Oklahoma State Penitentiary,)
)
)
 Respondent,)

ENTERED ON DOCKET
DATE AUG 05 1999

Case No.97-CV-208-K ✓

F I L E D

AUG 04 1999 *AR*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

This matter is before the Court for consideration of a petition for writ of habeas corpus filed by Oklahoma death row inmate Jack Dale Walker pursuant to 28 U.S.C. § 2254. Petitioner, who appears through counsel, challenges his convictions and sentences in Tulsa County District Court, Case No. CF-89-0018. The Respondent has filed a response to the petition denying the allegations of the petition.

District Court on May 19, 1989; (8) and the records before the Oklahoma Court of Criminal Appeals, including Volume II, Addendum to the State Post Conviction Petition. As a result, the Court finds that the records, pleadings, and transcripts of the state proceedings provide all the factual information necessary to resolve the matters in the petition and, therefore, Petitioner's request for an evidentiary hearing is denied. 28 U.S.C. §2254(e)(1); *see also* Steele v. Young, 11 F.3d 1518 (10th Cir. 1993) and cases cited therein.

I. PROCEDURAL BACKGROUND

Jack Dale Walker, Petitioner, was convicted on two counts of First Degree Murder, one count of Assault and Battery with a Deadly Weapon, and two counts of Assault with a Dangerous Weapon in 1989, following a jury trial in the District Court of Tulsa County, Case No. CF-89-0018. During the sentencing phase of the trial, the jury found the existence of three aggravating circumstances: (1) Petitioner knowingly created a great risk of death to more than one person; (2) the murders were especially heinous, atrocious, or cruel; and (3) there exists the probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. Thereafter, the jury recommended a death sentence as punishment for the two murders. Additionally, the jury recommended a total term of forty (40) years imprisonment for the other three charges. The trial court sentenced Petitioner accordingly.

Petitioner filed a direct appeal of his conviction in the Oklahoma Court of Criminal Appeals, Case No. F-89-508. In a published opinion, that court rejected Petitioner's alleged

errors and affirmed the conviction and sentence. Walker v. State, 887 P.2d 301 (Okla. Crim. App. 1994), *cert. denied*, 116 S.Ct. 166 (1995). Upon the Supreme Court's denial of certiorari, Petitioner filed an Application for Post-Conviction Relief in the Oklahoma Court of Criminal Appeals on August 16, 1996, Case No. PC-96-1003. By published opinion, the Oklahoma Court denied relief. Walker v. State, 933 P.2d 327 (Okla. Crim. App.), *cert. denied*, 117 S.Ct. 2524 (1997).

Petitioner filed a request for appointment of counsel with this Court on March 5, 1997. Petitioner's habeas petition was filed on April 22, 1997. A response to the petition was filed by Respondent on July 1, 1997. Petitioner's Reply was filed on August 29, 1997.

II. FACTUAL BACKGROUND

Pursuant to 28 U.S.C. § 2254 (d), the historical facts as found by the state court are to be presumed correct. Accordingly, the facts set forth by the Oklahoma Court of Criminal Appeals will be reiterated herein, amplified by other pertinent facts apparent from the record.

On December 30, 1998, at around 8:00 a.m., Petitioner arrived at a trailer home where Shelley Ellison, his girlfriend and the mother of his three-month old child, was staying. The trailer belonged to Shelley's grandmother, Juanita Epperson. Shelley, the baby, Juanita, Juanita's son Donnie Epperson, Donnie's wife Linda, and four more of Juanita's grandchildren, were all present in the trailer when Petitioner arrived.

Hansel Norton, who had known and worked with Petitioner for three weeks, had driven him to the trailer. Norton testified that on the way there Petitioner seemed very upset.

Petitioner pulled out a knife and said to Norton "Talk to me." (Tr. at p. 188). Petitioner told Norton he had something to do before he came into work that day. At trial, Norton identified the murder weapon as the knife Petitioner had shown him in the car.

Petitioner arrived at the trailer, told Juanita he was looking for Shelley, and she invited him inside. Petitioner and Shelley talked in a back bedroom. Apparently, Petitioner wanted to leave with the baby. When Shelley asked Juanita to explain to Petitioner that the baby was sick and that he could not take him, Petitioner attacked Shelley.

Shelley yelled for Donnie to come and help her. Donnie, who had been asleep, ran down the hall toward them. Petitioner stabbed Donnie and then continued stabbing both Donnie and Shelley. During the attack, Shelley managed to make a 911 call. When the police arrived, she was dead. Donnie was alert and conscious, but he died shortly thereafter. Shelley suffered more than thirty-two stab wounds; many were defensive ones. Donnie sustained eleven.

Juanita had tried to help Shelley and Donnie by hitting Petitioner with a pipe wrench. Petitioner pushed her down, breaking her arm, and then stabbed her. Linda, Donnie's wife, and their nephew had run down the hall after Donnie. At various times, Petitioner threatened them with the knife and chased them out of and away from the trailer. Petitioner's infant son and the three other children who witnessed the events were unharmed.

When the police arrived, they found Petitioner lying on the front porch, his wrists bleeding. Juanita testified that Petitioner had cut his own wrists. She also stated that during

the attack, Petitioner had said he was going to kill himself and had tried to push a paring knife into his throat.

III. GROUNDS FOR RELIEF

Petitioner asserts eleven (11) grounds for relief in his Petition for Writ of Habeas Corpus. Specifically Petitioner asserts the following propositions of error: (1) Petitioner was incompetent to stand trial; (2) Petitioner was denied effective assistance of counsel both at trial and on direct appeal; (3) trial court's instruction to the jury that Petitioner is presumed "not guilty" rather than presumed "innocent" violated his Sixth, Eighth, and Fourteenth Amendment rights; (4) Petitioner's due process rights were violated when trial court refused to instruct the jury on the lesser included offense of First Degree Manslaughter; (5) admission of Petitioner's statements to doctors overheard by a police deputy violated his constitutional rights; (6) the state's failure to provide sufficient and timely notice of evidence in support of the aggravators violated Petitioner's Fifth, Sixth, and Fourteenth Amendment rights; (7) the "continuing threat" aggravating circumstance is unconstitutional; (8) the "heinous, atrocious, or cruel" aggravating circumstance is unconstitutional; (9) juror misconduct violated his Sixth, Eighth, and Fourteenth Amendment rights; (10) numerous sentencing instructions deprived Petitioner of a fair trial; and (11) prosecutorial misconduct violated Petitioner's right to a fair and impartial trial.

IV. APPLICABILITY OF AEDPA

On April 25, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). This Act made significant changes to federal habeas corpus law, specifically delineating the circumstances under which a federal court may grant habeas relief. Title 28, Section 2254(d) now provides:

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

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

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

28 U.S.C. § 2254(d).

Petitioner urges this court to find that the AEDPA is an *ex post facto* law and, therefore, does not apply to his case. Petitioner devotes approximately twenty pages in his reply brief to the applicability of the AEDPA, interpretation of the AEDPA when applicable, history of habeas corpus and of the AEDPA and the role of federal courts in habeas corpus proceedings. The gist of Petitioner's argument is since the "constitutional violations" alleged herein occurred years before the AEDPA became effective, to the extent that any amendments to the AEDPA increase the deference paid to a state court's factual findings and legal determinations, those amendments should not be given "retroactive" effect.

Although the AEDPA makes several changes to federal habeas corpus procedures, Petitioner's challenge is primarily directed to the applicability of the AEDPA's amended standard of review. The Tenth Circuit has recognized that the AEDPA increases the deference to be paid to a state court's factual findings and legal determinations. Houchin v. Zavaras, 107 F.3d 1465 (10th Cir. 1997). The Tenth Circuit has, however, applied the new standard of review to cases commenced after the effective date of the AEDPA, regardless of whether the crime or state trial occurred prior to the effective date. *See, e.g., White v. Scott*, 141 F.3d 1187 (Table, text available at 1998 WL 165162)(10th Cir. 1998); Dodson v. Scott, 139 F.3d 911 (Table, text available at 1998 WL 50957) (10th Cir. 1998); and United States v. Coleman, 125 F.3d 863, (Table, text available at 1997 WL 608762)(10th Cir. 1997), *cert. denied*, --- U.S. ---, 118 S.Ct. 1328, 140 L.Ed.2d 490 (1998). Therefore, this court finds since Petitioner initially filed a request for appointment of counsel herein on March 5, 1997, and filed his Petition herein on April 22, 1997, the provisions of Chapter 153 of the AEDPA (which apply to all habeas corpus proceedings) are applicable in this case. Because the State of Oklahoma has not satisfied the requirements of Chapter 154, however, those provisions (which apply to § 2254 proceedings in capital cases if the state holding the condemned prisoner has met certain conditions) do not apply to this case. Lindh v. Murphy, 521 U.S. 320 (1997).

Under the AEDPA the issuance of a writ is only authorized if the challenged decision of the state court "was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States,” 28 U.S.C. § 2254(d)(1), or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.” 28 U.S.C. § 2254(d)(2). Additionally, the federal courts must give greater deference to state court determinations than they were required to under the previous law. Ford v. Ahitow, 104 F.3d 926, 936 (7th Cir. 1997). *See also*, Thompson v. Cain, 161 F.3d 802, 805 (5th Cir. 1998). Determinations of factual issues made by state courts are presumed correct and a habeas petitioner must rebut the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Petitioner herein has not made a credible argument that application of the AEDPA to his petition would impair any rights he possessed when he committed the crimes at issue herein, or when he was convicted or sentenced. Nor has the Petitioner shown that the AEDPA has increased the penalty for his past conduct, or imposed new duties with respect to transactions already completed. Landgraf v. USI Film Products, 511 U.S. 244, 280-281 (1994). A statute does not have retroactive effect simply because it is applied to conduct that predates the law’s enactment. *See* Lindh v. Murphy, 521 U.S. 320 (1997). Therefore, this Court finds application of the AEDPA’s new standard of review will not have a prohibited retroactive effect with regard to this proceeding, which was commenced after the effective date of the Act. Accordingly, this Court holds that the AEDPA is applicable and will apply it herein.

V. COMPETENCY

Petitioner claims he is entitled to federal habeas relief because the state court used an unconstitutional burden of proof at his competency hearing, and that he was actually incompetent at the time of trial. In 1996, the Supreme Court struck down the “clear and convincing evidence” standard applied by the state courts in Oklahoma, holding that “[b]ecause Oklahoma’s procedural rule allows the State to put to trial a defendant who is more likely than not incompetent, the rule is incompatible with the dictates of due process.” Cooper v. Oklahoma, 517 U.S. 348, 369 (1996). The Supreme Court pointed out that “the State’s power to regulate procedural burdens was subject to proscription under the Due Process Clause if it ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” Id. at 367 (quoting Patterson v. New York, 432 U.S. 197, 201-202 (1977)).

Petitioner filed his direct appeal in 1994, two years before the Supreme Court handed down the decision in Cooper. Petitioner, subsequently, raised the issue in post-conviction. The Oklahoma Court of Criminal Appeals ruled the proposition was waived for failure to raise it on direct appeal following the state’s statutory post-conviction procedures enacted in 1995. *See* Walker, 933 P.2d at 338-339. Accordingly, the state argues the issue is procedurally barred from consideration by this Court. The Court disagrees with the state’s argument. However, for the reasons stated herein, the Court concludes that the merits of this proposition do not provide sufficient grounds for habeas relief.

A. Applicable Legal Standards

A defendant is competent to stand trial if he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [and if] he has a rational as well as a factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960); *see also* Lafferty v. Cook, 949 F.2d 1546, 1550 (10th Cir.1991). Several courts have held that competency claims can raise issues of both substantive and procedural due process.

A petitioner may make a procedural competency claim by alleging that the trial court failed to hold a competency hearing after the defendant's mental competency was put in issue. To prevail on the procedural claim, "a petitioner must establish that the state trial judge ignored facts raising a 'bona fide doubt' regarding the petitioner's competency to stand trial."

Medina v. Singletary, 59 F.3d 1095, 1106 (11th Cir.1995) (citing Pate v. Robinson, 383 U.S. 375, 385, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966) and quoting James v. Singletary, 957 F.2d 1562, 1572 n. 15 (11th Cir.1992)); *see also* Carter v. Johnson, 110 F.3d 1098, 1105 n. 7 (5th Cir.1997). On the other hand,

[a] petitioner may make a substantive competency claim by alleging that he was, in fact, tried and convicted while mentally incompetent. In contrast to a procedural competency claim, however, "a petitioner raising a substantive claim of incompetency is entitled to no presumption of incompetency and must demonstrate his or her incompetency by a preponderance of the evidence." A petitioner who presents "clear and convincing evidence" creating a "real, substantial and legitimate doubt" as to his competence to stand trial is entitled to a hearing on his substantive incompetency claim.

Medina, 59 F.3d at 1106 (quoting James, 957 F.2d at 1572-73); *see also* Carter, 110 F.3d at 1105-06 & n. 7.

The distinction between substantive and procedural claims is significant because courts have evaluated these claims under differing evidentiary standards. In addition, the Tenth Circuit has held that a procedural competency claim is subject to waiver while a substantive competency claim is not. *See* Nguyen v. Reynolds, 131 F.3d 1340, 1346 & n. 2 (10th Cir.1997); *but cf.* United States v. Williams, 113 F.3d 1155,1160 (10th Cir.1997) (holding in direct appeal that neither substantive nor procedural due process competency rights can be waived). However, some cases have on occasion blurred the distinctions between the two claims, particularly when both claims are raised together. *See, e.g.*, Castro v. Ward, 138 F.3d 810, 817-18 (10th Cir.1998) (applying both procedural and substantive competency standards to claims defaulted in state court); Sena v. New Mexico State Prison, 109 F.3d 652 (10th Cir.1997) (applying procedural standard to substantive claim defaulted in state court). The Court need not attempt to reconcile these inconsistencies because the Court holds that if the claim here is characterized as procedural and is therefore subject to waiver, it was not waived in this case. The Court further rules that Petitioner has failed to establish the right to habeas relief under the standards applied either to procedural or to substantive competency claims.

B. Procedural Default

Petitioner's argument on appeal may be construed as one asserting that the state courts' use of the "clear and convincing evidence" standard rendered the procedure used to evaluate his competency inadequate to ensure he was competent to stand trial. Viewed in this light, the claim asserts a denial of procedural due process, a claim that Tenth Circuit, in Nguyen, held is subject to waiver. The state court held the claim procedurally barred reasoning that the claim should have been raised on direct appeal. *See Walker*, 933 P.2d at 338-339. In holding the claim barred by Petitioner's failure to raise it on direct appeal, the state court applied the 1995 amendments to the state's post-conviction procedures, under which a petitioner who has not raised the issue on direct appeal must show that the legal basis for the claim was unavailable. The state court further held that the challenge to the evidentiary standard could have been made in Petitioner's direct appeal. *Id.*

The Court must first assess the effect given to the state court's application of the 1995 amendments to an alleged default that occurred before those amendments were enacted. When a federal habeas petitioner has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review of the claims is barred absent a showing of cause and prejudice or of a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). "The Supreme Court of the United States has made it clear that a state's procedural rule used to bar consideration of a claim 'must have been "firmly established and regularly followed"

by the time as of which it is to be applied." Fields v. Calderon, 125 F.3d 757, 760 (9th Cir.1997) (quoting Ford v. Georgia, 498 U.S. 411, 424, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991)), *cert. denied*, --- U.S. ----, 118 S.Ct. 1826, 140 L.Ed.2d 962 (1998). The Tenth Circuit recently held that "the proper time for determining whether a procedural rule was firmly established and regularly followed is the time of the purported procedural default." Gary Alan Walker v. Attorney General for the State of Okla., 167 F.3d 1339, 1345 (10th Cir.1999)¹ (citations omitted) (quotations omitted). The Tenth Circuit continued, "[a] defendant cannot be expected to comply with a procedural rule that does not exist at the time, and should not be deprived of a claim for failing to comply with a rule that only comes into being after the time for compliance has passed." Id. (citations omitted) (quotations omitted).

In the present case, the Oklahoma Court of Criminal Appeals held that Petitioner's Cooper challenge to the burden of proof was procedurally barred by his failure to raise it in his direct appeal. Prior to the 1995 amendments to the state post-conviction procedures, however, it was settled law in Oklahoma that an intervening change in the law constituted sufficient reason for a petitioner's failure to raise an issue on direct appeal. See Gary Alan Walker v. Ward, 934 F. Supp 1286, 1293 (N.D. Okla. 1996) (citing cases). Moreover, Oklahoma had held that a decision qualified as an intervening change in the law even if it was based on previously announced principles so long as it constituted the Supreme Court's

¹Gary Alan Walker's case is not related to this case, wherein Petitioner is Jack Dale Walker, and that case will be cited throughout this order as Gary Alan Walker to avoid confusion.

definitive resolution of the matter. See id. at 1293-94 (quoting Stafford v. State, 815 P.2d 685, 687 (Okla.Crim.App.1991)). The Court of Criminal Appeals specifically noted in Valdez v. State, 933 P.2d 931 (Okla.Crim.App.1997), that a Cooper claim would have constituted an intervening change in the law under prior capital post-convictions statutes, id. at 933 n. 7. Since Petitioner's proposition would not have been barred under the pre-1995 standard, the Court holds that Petitioner is not procedurally barred from seeking habeas relief on his Cooper claim by his failure to raise it in his direct appeal. See Gary Alan Walker, 167 F.3d at 1345 (holding the petitioner's Cooper claim was not barred when the state claimed a bar based on the 1995 amendments to Oklahoma's post-conviction rules and original omission occurred before 1995). The Court now turns to the merits of the claim.

C. Procedural Competency Claim

"A habeas petitioner who makes a procedural competency claim by alleging that state procedures were inadequate to ensure he was competent to stand trial is entitled to habeas relief if the state trial court ignored evidence that, viewed objectively, raised a bona fide doubt as to the petitioner's competency to stand trial." Gary Alan Walker, 167 F.3d at 1344-45 (citing Drope v. Missouri, 420 U.S. 162, 180-81 (1975); Carter, 110 F.3d at 1105 n. 7; and Medina, 59 F.3d at 1106).

This standard is usually applied to a claim arising when a petitioner asserts that no competency hearing was held despite the existence of evidence creating a bona fide doubt regarding his competency to stand trial or to continue in a trial already begun. In the present case, although a hearing was ultimately held, [Petitioner's] competency was determined under a

constitutionally impermissible standard of proof. Such a determination is not entitled to a presumption of correctness. See Lafferty, 949 F.2d at 1551 & n. 4. Indeed, in view of the Supreme Court's statement in Cooper that the clear and convincing evidence requirement "allows the State to put to trial a defendant who is more likely than not incompetent," 517 U.S. at 369, 116 S.Ct. 1373, the situation here is arguably analogous to that in which no hearing has taken place. [Petitioner] is therefore entitled to some form of relief if the record evidence is sufficient to raise a bona fide doubt as to his competency at the time of his trial.

Id.

"[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant" to the bona fide doubt inquiry. Drope, 420 U.S. at 180, 95 S.Ct. 896; Castro, 138 F.3d at 818.

At the competency hearing before trial, Dr. Robert Nicholson was the only witness who testified. Dr. Nicholson had been appointed to examine Petitioner to determine if he was insane at the time of the murder, and if he was a continuing threat to society. Dr. Nicholson did not test Petitioner for competency. However, once on the stand, the prosecutor asked Dr. Nicholson if he thought Petitioner was competent to stand trial. Dr. Nicholson initially refused to give his opinion as to Petitioner's competency, because he had not tested Petitioner specifically for competency. After the two went back and forth for a moment, Judge Hopper told Dr. Nicholson to answer the question. Then Dr. Nicholson stated, "I believe on my interactions with [Petitioner] that he would be competent to stand trial but I did not – I'd again state that I did not do a competency evaluation, did not formally assess competency." (Tr. at p. 24).

Now, Petitioner puts forth several affidavits in his effort to raise a “bona-fide doubt” to his competency at the time of trial. Dr. Nicholson’s affidavit states he should not have answered the question because he had not performed a formal competency evaluation. Several friends and family members, as well as three jurors, all state that Petitioner appeared “out of it,” that “he continuously stared into space during trial,” that “he sat there with a blank look on his face,” and that “it just wasn’t like it was Jack”...etc. See Volume II, Addendum to State Post Conviction Petition. In addition, Petitioner provides documentation from the jail medical records showing he was heavily drugged during the period leading up to trial and during the trial. However, nothing in the trial record itself shows Petitioner was incompetent, nor does Petitioner provide any medical testimony actually proving he was incompetent at the time of trial.

The Court has carefully reviewed the evidence pertaining to Petitioner’s competency at the time of his trial. This record sets out a lamentable and grievous life history. It shows that Petitioner was brutalized physically, emotionally, and possibly sexually by his parents. His medical records reveal a history of serious mental disease that was apparently difficult to diagnose and to treat effectively. Nonetheless, the experts who examined the evidence never stated that Petitioner was incompetent to stand trial and we have found nothing in the record to indicate he was truly incompetent. The evidence simply does not raise a bona fide doubt as to Petitioner’s competency at the time of his trial. Accordingly, he cannot prevail on his procedural competency claim.

D. Substantive Competency Claim

Petitioner's failure to establish his procedural competency claim is also dispositive of his substantive claim. As discussed above, to succeed in stating a substantive incompetency claim, a petitioner must present evidence that creates a "'real, substantial and legitimate doubt' as to his competency to stand trial." Medina, 59 F.3d at 1106 (quoting James, 957 F.2d at 1573). The evidence here, which does not satisfy the "bona fide doubt" standard for a procedural claim, also does not satisfy the more demanding standard for a substantive claim. The Court therefore rejects Petitioner's argument that he was tried while incompetent. Habeas relief on this proposition is denied.

VI. INEFFECTIVE ASSISTANCE

In his second proposition of error, Petitioner alleges that he received ineffective assistance from counsel at both the trial and appellate levels. In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court enunciated the legal standards which apply to claims of ineffective assistance of counsel in a criminal proceeding. "First, the defendant must show that counsel's performance was deficient.... Second, the defendant must show that the deficient performance prejudiced the defense." Id. at 687. Failure to establish either prong of the Strickland standard will result in a denial of Petitioner's Sixth Amendment claims. Id. at 696.

Deficient performance is established by showing counsel committed serious errors in light of "prevailing professional norms" to the extent that the legal representation fell below

“an objective standard of reasonableness.” Id. at 688. The petitioner must overcome a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance [that] ‘might be considered sound trial strategy.’” Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). In other words, Petitioner must overcome a presumption that his counsel’s conduct was constitutionally effective. See United States v. Haddock, 12 F.3d 950, 955 (10th Cir. 1993). “A claim of ineffective assistance “must be reviewed from the perspective of counsel at the time.” Duvall v. Reynolds, 139 F.3d 768, 777 (10th Cir. 1998) (quoting Porter v. Singletary, 14 F.3d 554, 558 (11th Cir. 1994)). Every effort must be made by a reviewing court to “eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland at 689. The Court considers “not what is prudent or appropriate, but only what is constitutionally compelled.” United States v. Cronin, 466 U.S. 648, 655 n. 38 (1984).

Even if the petitioner is able to show constitutionally deficient performance, he must also show prejudice before a reviewing court will rule in favor of an ineffective assistance of counsel claim. “Prejudice” in this context means that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Strickland at 687. Stated differently, Petitioner must prove that “there is a ‘reasonable probability’ that the outcome would have been different had those errors not occurred.” United States v. Haddock, 12 F.3d 950, 955 (10th Cir. 1993)(quoting Strickland, 466 U.S. at 694). Upon

review of Petitioner's claims, following the standards enunciated in the previous discussion, the Court finds Petitioner did not receive constitutionally ineffective assistance from either his trial or appellate counsel.

A. Trial Counsel

Petitioner asserts that he received ineffective assistance of trial counsel. In support of this claim, Petitioner cites twelve factual allegations. The Oklahoma Court of Criminal Appeals held that Petitioner waived his ineffective assistance of trial counsel claim when he did not raise the issue in his direct appeal. Walker, 933 P.2d at 332. In accordance, Respondent asserts the claim is procedurally barred from consideration by this Court. Petitioner argues that failure to raise a claim of ineffective assistance of trial counsel in a direct appeal does not waive the issue and that it can be raised for the first time in post-conviction. See Brecheen v. Reynolds, 41 F.3d 1343, 1364 (10th Cir. 1994) (creating exception to the general procedural bar rule when the case involves ineffective assistance of counsel). Respondent submits the exception established by Brecheen does not apply to this situation. The Court agrees with Petitioner and finds the claims are not procedurally barred; however, the Court does not grant relief on the merits.

1. PROCEDURAL DEFAULT

Generally, where "a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner" can show either "cause and prejudice," or, alternatively,

a “fundamental miscarriage of justice.” See Coleman v. Thompson, 501 U.S. 722, 750 (1991). The Tenth Circuit in Brecheen recognized an exception to this “general” rule when the underlying claim is ineffective assistance of counsel, because of countervailing concerns unique to ineffective assistance claims. 41 F.3d at 1363. The unique concerns are “dictated by the interplay of two factors: the need for additional fact-finding, along with the need to permit the petitioner to consult with separate counsel on appeal in order to obtain an objective assessment as to trial counsel’s performance.” Id. at 1364 (citing Osborn v. Shillinger, 861 F.2d 612, 622 (10th Cir. 1988)); see also English v. Cody, 146 F.3d 1257 (10th Cir. 1998). The Tenth Circuit concluded that a state law rule barring the review of ineffective assistance of counsel claims is not an “adequate” basis for barring federal habeas review because it forces criminal defendants to either raise such claims on direct appeal, with new counsel but without the benefit of additional fact-finding, or to have such claims forfeited under state law. Id.

In the case at bar, Petitioner was not afforded the opportunity to confer with separate counsel on his direct appeal. Petitioner’s direct appeal counsel was Johnie O’Neal and his lead attorney at trial was Mr. Mark Graziano. Both attorneys worked for the Tulsa County Public Defender’s Office. Although the Court believes that, in certain situations, it is possible for two attorneys from the same public defender’s office to be considered “separate” counsel under Brecheen, that determination is not practical under the facts of this case. Mr. O’Neal sat at Petitioner’s defense table during the entire trial, raised objections on

Petitioner's behalf on more than one occasion, and Mr. O'Neal is listed as defense counsel on the trial record. Although Mr. O'Neal may not have been "lead" counsel, he was still an active participant in the defense of Petitioner at trial. Therefore, the Court finds he was not "separate" counsel when he represented Petitioner on direct appeal. Since Petitioner was not afforded the opportunity to consult with counsel who could objectively assess trial counsel's performance on direct appeal, the Court will consider the merits of Petitioner's ineffective assistance of trial counsel claim.

2. ON THE MERITS

As stated previously, Petitioner raises twelve separate allegations of ineffective assistance of trial counsel. Petitioner claims trial counsel was ineffective because: 1) the Tulsa County Public Defender's Office was overworked and understaffed; 2) he failed to comply with the trial court's discovery order; 3) he failed to request a competency evaluation, present available evidence, or ask for a continuance to prepare for the competency hearing; 4) he failed to seek the suppression of Petitioner's statements; 5) he failed to seat a fair and impartial jury; 6) he failed to investigate or to present evidence to negate the element of specific intent and request an intoxication defense instruction; 7) he failed to present available evidence to support the requested instruction of First Degree Manslaughter; 8) he failed to present evidence that Petitioner was heavily medicated during trial; 9) he failed to object to the late filing of the Bill of Particulars; 10) he failed to object or to request a continuance when the state filed an amended notice of evidence to be used in

aggravation of punishment; 11) he failed to investigate and present all of the evidence available in second stage; and, 12) he failed to challenge the admission of a confession on the grounds that it violated Petitioner's Fifth and Sixth Amendment rights.

Of these twelve allegations, five can be quickly discarded for lack of prejudice. The claims that trial counsel failed to 1) request a competency evaluation, present available evidence, or ask for a continuance to prepare for the competency; 2) seek the suppression of Petitioner's statements; 3) present available evidence to support the requested instruction of First Degree Manslaughter; 4) object to the late filing of the Bill of Particulars; and, 5) object or to request a continuance when the state filed an amended notice of evidence to be used in aggravation of punishment, have been discussed in other sections of this order.² In each instance, the Court found Petitioner was not prejudiced by these factual occurrences. "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will be often so, that course should be followed." Id. Since counsel's actions with respect to these claims did not prejudice the defense, no ineffective assistance is shown. The remaining seven claims will be addressed individually.

²See, *infra* Sections V-"Competency," VII- "Jury Instructions," IX- "Petitioner's Statements to Treating Physician Overheard by Police Deputy and Admitted at Trial," and XI-"Procedural Due Process."

Petitioner claims an overload of cases in the Tulsa County Public Defender's Office resulted in state-induced ineffective assistance of counsel. Such a claim will not sustain a charge of ineffectiveness under Strickland unless Petitioner can show that it caused counsel's performance to fall below some objective standard of reasonableness and actually prejudiced his chances at trial. Petitioner simply has not met his burden in this respect. Moreover, a review of the trial transcript reveals that Petitioner's counsel subjected the state's witnesses to meaningful cross examination and otherwise satisfies the Court that there was not a "fundamental breakdown of the adversarial process" sufficient to justify a presumption that Petitioner was prejudiced at either stage of trial. *See generally* United States v. Cronin, 446 U.S. 648 (1984).

Next, Petitioner contends his trial counsel was ineffective for failing to properly comply with one of the trial court's discovery orders. The discovery order required counsel to provide a copy of Dr. Nicholson's psychological report.³ When Petitioner's counsel failed to provide this report to the prosecution, the trial court allowed the prosecutor to call Dr. Nicholson as a State's witness and examine him about the contents of the report before the trial began. Petitioner believes this allowed the prosecutor to get an "incalculable strategic advantage," because it revealed Petitioner's first and second stage defenses to the prosecution before trial began. (Pet. at p. 59). Petitioner further states that "requiring Dr. Nicholson to

³Dr. Nicholson is a psychologist appointed by the trial court to determine whether or not Petitioner was insane at the time of the murder and whether he constituted a "continuing threat to society."

testify was the equivalent of making the defense counsel reveal its entire case to the prosecutor prior to the trial.” Id.

The second prong of the Strickland test states that a petitioner must prove that counsel’s deficient performance “prejudiced the defense.” Strickland at 687. “Prejudice” in this context means that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id. Petitioner himself admits the effects of this occurrence are “incalculable.” Petitioner has not shown prejudice, but rather is merely asking the Court to speculate that he was prejudiced based on “incalculable” assertions. The Court cannot grant habeas relief on this allegation.

The fifth factual occurrence Petitioner cites as evidence of his trial counsel’s ineffectiveness occurred during voir dire. Petitioner claims counsel failed to seat a fair and impartial jury because he allowed four “probably automatic death penalty jurors to be seated” and he did not “attempt to rehabilitate jurors likely to vote for a punishment less than death.” (Pet. at pp. 70-71). The Court has reviewed the entire trial transcript, including the voir dire portion, and finds no deficiency in trial counsel’s actions.

Petitioner next alleges ineffective assistance because his trial counsel failed to investigate or present evidence of Petitioner’s intoxication at the time of the murder, a possible defense to the specific intent element of First Degree Murder. Furthermore, Petitioner claims his trial counsel should have requested an intoxication defense instruction. However, nothing in the evidence suggests Petitioner was intoxicated at the time of the

murders. Petitioner points to the Oklahoma State Bureau of Investigation's drug test of his blood taken shortly after the murders. The results showed Petitioner had small amounts of Diazepam and Nordiazepam in his blood.⁴ But, this does not prove Petitioner was intoxicated on December 30, 1988, the morning of murders. Petitioner himself, in a statement given to Tulsa County Police Officers two days after the murder, stated that he had used several drugs the night before the murder, and in the past, but "that morning [December 30, 1988] he didn't have any [drugs]." (Tr. of Statement given by Jack Dale Walker on January 1, 1989, at p. 8). Absent evidence that Petitioner was intoxicated, trial counsel is not required to request an intoxication instruction nor waste time investigating something that his own client says is not true.

Petitioner also argues that his trial counsel was ineffective for failing to inform the jury that Petitioner was medicated with psychotropic drugs during the trial. In support, Petitioner offers the affidavit of John Milus, an investigator for the Oklahoma Indigent Defense System. Mr. Milus states that two of the jurors told him that the fact Petitioner seemed unremorseful affected their decision, and had they known he was sedated they might not have given the death penalty. Whether this is enough evidence to show that Petitioner was prejudiced by counsel's failure to inform the jury that Petitioner was under medication is irrelevant, because Petitioner fails to show that counsel's actions were deficient. *See*

⁴According to Dr. Lipman, these drugs could have been taken about forty-three hours prior to the time Petitioner's blood sample was drawn. *See* Volume II, Appendix 2 at p. 8, Addendum to State Post-Conviction Petition.

Strickland 466 U.S. at p. 696 (Failure to establish either prong of the Strickland standard will result in a denial of Petitioner's Sixth Amendment claims).

The first prong of the Strickland test requires a showing that "counsel's performance was deficient." 466 U.S. at 687. There is "no particular set of detailed rules for counsel's conduct," because "any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Id. at 688-689 (citing United States v. Decoster, 199 U.S.App.D.C. 359, 371, 624 F.2d 196, 208 (en banc)). Nowhere within the petition does Petitioner show how counsel's failure to tell the jury Petitioner was medicated is outside the bounds of reasonable representation. All Petitioner offers is the conclusory statement that it is deficient, without any argument in support. Accordingly, Petitioner's claim of ineffective assistance based on this allegation is denied.

Petitioner's eleventh allegation states that trial counsel's "failure to investigate and present all of the evidence available in [the] second stage" constitutes ineffective representation. (Pet. at p. 84). Thus, Petitioner asserts his death sentence violates state and federal prohibitions against cruel and unusual punishment.

As stated previously, in order to prevail on an ineffective assistance of counsel claim, Petitioner must establish that counsel's performance was professionally unreasonable and that but for the errors, the outcome of the proceeding would have been different. Strickland

v. Washington, *supra* at 687. Failure to establish either prong will result in a denial of a petitioner's claim. *Id.* at 696.

Petitioner argues that trial counsel should have discovered and presented evidence of Petitioner's prior struggles with mental illness and drug dependency. In addition, Petitioner avers the jury should have heard testimony concerning the Paradoxical Benzodiazepine Rage Syndrome, a disease from which Petitioner suffers. Nonetheless, all of this evidence, without more, is insufficient to establish that the outcome of Petitioner's trial would have been different even if this evidence had been admitted at trial.

Furthermore, this is not a case where counsel did nothing during the penalty phase of the trial. *See Stafford v. Saffle*, 34 F.3d 1557, 1562 - 1564 (10th Cir. 1994), *cert. denied*, 514 U.S. 1099 (1995) (court held where counsel did nothing during the penalty phase of trial, petitioner still failed to establish prejudice). Rather, defense counsel called three witnesses during the second stage of the trial and cross-examined all of the State's witnesses.

While an attorney has an affirmative duty to conduct an investigation of potential mitigation evidence, that duty is not boundless. *Brecheen v. Reynolds*, 41 F.3d 1343, 1365 (10th Cir. 1994), *cert. denied*, 515 U.S. 1135 (1995). Further, since counsel does not have an absolute duty to present any mitigating character evidence, the fact that he did not call additional witnesses does not automatically render his conduct unreasonable. *Id.* at 1368.

Particular decisions not to investigate must be considered in light of all the circumstances with deference weighing heavily in favor of counsel's judgments. *Strickland*

at 691. Based upon the facts as they appear from the trial court records, as well as the speculative nature of the evidence now presented to challenge trial and/or appellate counsel's actions, this Court is not prepared to say counsel's conduct fell outside the wide range of "reasonable professional assistance" which would render Petitioner's trial fundamentally unfair. There can be no doubt that trial counsel is free to exercise his professional judgment in effective trial strategy decisions. To hold, where some investigation was clearly conducted and mitigating evidence was actually presented to the trial jury, counsel erred by not discovering some "better" evidence, would serve no purpose other than engaging in the type of "hindsight" absolutely forbidden by Strickland. Based upon the specific facts of this case, this Court finds defense counsel's strategy at the sentencing hearing was not unreasonable. Accordingly, the Court finds Petitioner has failed to establish trial counsel's actions fell below the level of competency which would have rendered his trial fundamentally unfair.

Lastly, Petitioner claims his trial counsel was ineffective for failing to challenge the admission of his confession on the grounds that it violated Petitioner's Fifth and Sixth Amendment rights. To show prejudice, Petitioner must prove that the confession would have been kept out had trial counsel objected to its admission. In support, Petitioner argues that in the middle of the interview, when he mentioned that he asked when he would get an attorney, his "interrogators played on his poor physical and mental condition, and his heavily medicated state and urged him to continue." (Pet. at p. 87). A look at the transcript of the

confession, however, suggests a less objective dialogue between Petitioner and Officer Clugston and Officer Whisenhunt than that described by Petitioner.

The confession transcript shows Petitioner waived his rights and answered several questions about the murders. Then, after the tape recorder had been turned off, the following exchange occurred when the recorder was turned back on:

Officer Clugston: Mr. Walker[Petitioner], I am going to ask you at this time do you want an attorney at this time, or do you wish to continue with this interview.

Petitioner: How long will it be before I get an attorney?

Officer Clugston: You mentioned to me earlier that you were destitute and you did not have any money there will be an attorney appointed for you by the court and but if you wish an attorney here and now and you don't want to proceed any further then we will terminate this conversation, at this time, I just want to make you aware that you can have an attorney at any time you want.

Petitioner: Can I have one now?

Officer Clugston: Do you wish to terminate the conversation and interview at this time?

Petitioner: Do we have to stop everything and wait a few days to get an attorney or what?

Officer Clugston: If you want an attorney, Mr. Walker, by law I must terminate this interview

Petitioner: Oh I've got nothing to lose let's go on

Officer Clugston: Alright sir

Ofc. Whisenhunt: Now you did ask a point blank question and I need to answer it for you, we are not trying to evade you in any way, you asked about if you don't ask for an attorney at this time, when will you get an attorney, Jack you will have an attorney appointed for you by the court without any cost to you if you can't afford one before you ever go to court, OK, in other words, when you go to court, you'll have an attorney there, either by paid by you or paid by the court, you will not be forced to go before a Judge at any time ever without an attorney and you have the right to have one anytime you want him

Officer Clugston: Knowing this do you wish to continue on with this interview

Petitioner: We can go on

(Tr. of Statement given by Jack Dale Walker on January 1, 1989, at pp. 5-6). Petitioner then made several incriminating statements.⁵ He argues trial counsel should have objected to the admission of these statements because they were obtained after Petitioner invoked his right to counsel.

After a knowing and voluntary waiver of Miranda rights, law enforcement officers may continue questioning through equivocal statements until a suspect clearly requests an attorney. In Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350 (1994), the United States Supreme Court described when an examination must end:

But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect **might** be invoking the right to counsel, our precedents do not require the cessation of questioning. See [McNeil v.

⁵It should be noted that before this exchange regarding counsel, Petitioner had already admitted to the murders. The dialogue after this merely delved deeper into the specifics of the crime. Hence, even if the later consistent statements and more detailed descriptions of the murders should not have been admitted, the error was harmless; because the jury still would have heard Petitioner admit to killing the victims.

Wisconsin, 501 U.S. 171, 178 (1991)] (“[T]he **likelihood** that a suspect would wish counsel to be present is not the test for applicability of Edwards”); Edwards v. Arizona, [451 U.S. 477, 485 (1981)] (impermissible for authorities “to reinterrogate an accused in custody if he has **clearly asserted** his right to counsel”) (emphasis added).

Rather, the suspect must unambiguously request counsel. As we have observed, “ a statement either is such an assertion of the right to counsel or it is not.” Smith v. Illinois, [469 U.S. 91, 97-98 (1984)] (brackets and internal quotation marks omitted). Although a suspect need not “speak with the discrimination of an Oxford don,” *post*, at 2364 (SOUTER, J., concurring judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the suspect. See Moran v. Burbine, 475 U.S. 412, 433, n.4, 106 S.Ct. 1135, 1147, n. 4, 89 L.Ed.2d 410 91986) (“[T]he interrogation must cease until an attorney is present **only** [if] the individual states that he wants an attorney”) (citations and internal quotation marks omitted).

Davis, 512 U.S. at 459, 114 S.Ct. At 2355.

When Petitioner invoked his right to counsel, it is unclear whether he merely wanted an attorney at trial or whether he wanted an attorney before answering any other questions. In light of this confusion, the police officers did not ask any substantive questions about the crime until after clarifying that Petitioner wanted to continue without an attorney. Since the admission would have been admissible over the objection of trial counsel had counsel made such an objection, Petitioner cannot show that he has been prejudiced by counsel’s failure to object to the admission of Petitioner’s statements.

Petitioner has failed to show that any of the alleged defects in trial counsel performance were actually “constitutionally ineffective assistance” as described by the

Supreme Court in Strickland. The Court, therefore, finds that trial counsel's performance constituted effective assistance under Federal law as established by the Supreme Court.

B. Appellate Counsel

Petitioner also alleges his appellate counsel's assistance was constitutionally ineffective. The Strickland test requires a showing of both deficient performance by appellate counsel and prejudice to Petitioner's defense. 466 U.S. at 687. Failure to establish either prong of the Strickland standard will result in a denial of the claim. Id. at 696.

1. CONFLICT OF INTEREST

Petitioner alleges there was a conflict of interest between appellate counsel and trial counsel because they both worked in the Tulsa County Public Defender's Office. Petitioner argues that this conflict kept appellate counsel from raising certain issues on direct appeal. This Court has previously determined, in Section VI(A)(1)- "Procedural Default," that appellate counsel and trial counsel were not "separate" counsel for purposes of review of Petitioner's claims, and, consequently, considered all omitted claims on the merits. Thus, any possible conflict could not have prejudiced Petitioner.

2. ACTUAL INEFFECTIVENESS

In two of the three actual ineffectiveness claims raised by Petitioner, he cannot establish prejudice as a result of appellate counsel's possible deficiencies. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will be often so, that course should be followed." Strickland, at 697. The gist of

Petitioner's ineffective appellate counsel claims deals with counsel's failure to raise certain propositions on direct appeal that were subsequently barred from consideration by the Oklahoma Court of Criminal Appeals. All but one of these, however, this Court considered on the merits after finding the state court's bar was inappropriate. Specifically, the ineffective assistance of trial counsel claim and the claim centering upon the competency issue were discussed previously in this order.⁶ Hence, appellate counsel's failure to raise those claims on direct appeal did not prejudice Petitioner and habeas relief is unwarranted.

The lone claim not previously considered by this Court is Petitioner's claim that appellate counsel was ineffective for failing to challenge the voluntariness of Petitioner's statement. In conjunction, Petitioner asserts ineffectiveness shown by appellate counsel's failure to raise a claim that the trial court erred when it did not conduct a Jackson v. Denno, 378 U.S. 368 (1964), hearing. Denno holds that due process concerns require an actual determination of voluntariness before a confession is presented to the jury. The Oklahoma Court of Criminal Appeals considered this claim on the merits and found that Petitioner made

no attempt to establish that O'Neal [appellate counsel] breached any duties owed to [Petitioner], or that O'Neal's judgment was unreasonable under the circumstances or did not fall within the wide range of professional assistance. To prove that O'Neal's performance was deficient, [Petitioner] instead reasons that an attorney who omits arguably meritorious appellate claims is always ineffective. This is simply not the case, and such a conclusory allegation, standing alone, will never support a finding that an attorney's performance was deficient.

⁶See, *supra* Sections IV-"Competency," and VI(A)-"Trial Counsel."

Walker, 933 P.2d at 336; *see also Jones v. Barnes*, 463 U.S. 745, 751 (1983) (stating that the Sixth Amendment does not require an attorney to raise every nonfrivolous issue on appeal).

This Court is bound to deny relief on any claim already decided by state courts unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d). Petitioner declines to argue how the state court determination on this issue was improper. He merely continues to make conclusory allegations about the merits of the omitted claim rather than show how appellate counsel's actions were actually "deficient" under the standards enunciated in Strickland. The Court, therefore, does not conclude that the Oklahoma court's decision rests upon an objectively unreasonable application of Supreme Court precedent. Accordingly, this Court denies habeas relief on Petitioner's claim of ineffective assistance of appellate counsel.

VII. JURY INSTRUCTIONS

Petitioner alleges the trial court's use of certain jury instructions denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Petitioner's argument attacks the inclusion and, in some cases, the omission of six jury instructions each raising various constitutional issues. The instructions at issue are 1) the "presumed to be not guilty" instruction, 2) the lack of a "First Degree Manslaughter" instruction, 3) the lack of a "presumption of life" instruction, 4) the "weighing" instruction, 5) the mitigating evidence

instruction, and 6) the instruction defining the “heinous, atrocious, or cruel” aggravating circumstance.

It is well established that jury instructions “may not be viewed in isolation,” but must be considered in the context of the trial record and the instructions as a whole. Cupp v. Naughten, 414 U.S. 141, 147 (1973). After review of the entire record, the Court concludes that the jury instructions at issue are either constitutional or their use resulted in harmless error; accordingly, habeas relief on these claims is unwarranted.

A. The “Presumed to Be Not Guilty” Instruction

Petitioner contends his Sixth, Eighth, and Fourteenth Amendment rights were violated when the trial court failed to properly instruct the jury regarding his constitutionally protected presumption of innocence. At trial Petitioner’s jury was not given the suggested Oklahoma Uniform Jury Instruction on the presumption of innocence, OUJI CR-903. Instead, the trial court gave the jury the following jury instruction:

You are instructed that the defendant is **presumed to be not guilty** of the crime charged against him in the Information unless his guilt is established by evidence beyond a reasonable doubt and that **presumption of being not guilty** continues with the defendant unless every material allegation of the Information is proven by evidence beyond a reasonable doubt.

(O.R. at p. 206, Instruction No. 2) (emphasis added). Petitioner further argues the Oklahoma Court of Criminal Appeals has held an identical jury instruction unconstitutional under the Fourteenth Amendment to the United States Constitution. *See Flores v. State*, 896 P.2d 558 (Okla.Crim.App. 1995) (reversing a conviction on the basis of this flawed instruction, and

holding that it unconstitutionally diluted the presumption that guilt is to be proven beyond a reasonable doubt). Hence, Petitioner claims he is entitled to habeas relief because of the error attributable to the “presumed to be not guilty” instruction given to the jury.

Petitioner raised this claim for the first time in his post-conviction appeal. Thus, the state argues the claim is procedurally barred because of Petitioner’s failure to raise the proposition in his direct appeal. Although the Court holds the claim is not procedurally barred, the Court concludes it does not provide grounds for habeas corpus relief on the merits.

1. PROCEDURAL DEFAULT

The state contends Petitioner waived this claim when he failed to raise it in his direct appeal. On post-conviction review, the Oklahoma Court of Criminal Appeals barred Petitioner’s allegation based on the authority of 22 O.S.Supp. 1995, § 1089 (C)(1). Under section 1089(C)(1), Petitioner’s claim is barred unless he can demonstrate that it “could not have been raised in [his] direct appeal.” Petitioner’s challenge to the “presumed to be not guilty” jury instruction “could not have been raised” if it:

(a) was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before [the] date [Petitioner’s direct appeal brief was due], or (b) is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of [the state of Oklahoma]...

22 O.S.Supp. 1995, § 1095 (D)(9)(a) & (b). The Oklahoma Court found that as of the date of Petitioner's direct appeal, the legal basis of Petitioner's post-conviction attack on the "presumed to be not guilty" instruction was "either recognized by or could have been reasonably formulated from a final decision of [the Oklahoma Court of Criminal Appeals]." Walker, 933 P.2d at 338. Further, the Oklahoma Court found the rule enunciated in Flores is not a "new" rule of constitutional law. Accordingly, the Oklahoma Court barred consideration of the claim.

Petitioner argues his claim should not be barred because section 1089(C)(1) was enacted after his direct appeal; thus, the Oklahoma Court of Criminal Appeals incorrectly relied upon it when they determined Petitioner's claim was procedurally barred. The new post-conviction rules, including section 1089(C)(1), were enacted on November 1, 1995. Petitioner's direct appeal was filed on February 23, 1990 and his original application for post-conviction relief was filed on August 16, 1996. In other words, the procedural rules in place at the time of his post-conviction appeal, and relied upon by the Oklahoma Court of Criminal Appeals to bar his claim, were not the same as the rules in place at the time of his original direct appeal. Petitioner argues that he should not be barred by the new procedural rule that came into effect in the interim between his original appeal and his subsequent post-conviction appeal. Under the procedural rules in place at the time of his direct appeal, Petitioner claims he would have been able to raise the deficient instruction claim in his post-conviction appeal irrespective of his failure to raise the claim in the initial direct appeal.

Hence, Petitioner asserts his claim should not be barred and the Court should consider it on the merits.

The Tenth Circuit's recent decision in Gary Alan Walker⁷ resolves this dispute. In Gary Alan Walker, the Tenth Circuit stated that the Oklahoma Court of Criminal Appeals should look to the rule in effect "at the time of the purported procedural default" not the rule in effect at the time of the post-conviction application. 167 F.3d at 1345 (citations omitted) (quotations omitted). Thus, the standard to be applied to determine whether or not Petitioner's Flores claim should be barred for failure to raise it in the direct appeal is the standard in place on February 23, 1990, the date Petitioner's deficient direct appeal was filed.

Under the procedural rules in place on February 23, 1990, the Oklahoma Court of Criminal Appeals has said Petitioner's Flores claim would not be barred. When the Oklahoma Court of Criminal Appeals barred Petitioner's Flores claim in his application for post-conviction relief, the Oklahoma Court stated:

Under the previous capital post-conviction statutes, we **could have applied** our decision in Flores to this collateral appeal on the ground that the decision constituted an intervening change in the law. See Rojem v. State, 829 P.2d 683, 684 (Okla. Cr.) *cert. denied*, 506 U.S. 958, 113 S.Ct. 420, 121 L.Ed.2d 343 (1992) (post-conviction claims which are based upon intervening changes in constitutional law and which impact judgment or sentence will not be procedurally barred); James v. State, 818 P.2d 918, 920-21 (Okla. Cr.), *cert. denied*, 502 U.S. 1111, 112 S.Ct. 1214, 117 L.Ed.2d 452 (1991) (post-

⁷In Gary Alan Walker, the Tenth Circuit was considering a similar procedural bar in relation to a Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996), claim, but the effect of that decision spills into the Court's determination in the case at bar.

conviction claims based upon intervening change in law which did not exist at time of previous appeals will not be procedurally barred.)

Walker v. State, 933 P.2d at 337 n. 42. Thus, the Oklahoma Court's decision in Flores v. State, 896 P.2d 558 (Okla.Crim.App. 1995), constitutes an intervening change in Oklahoma law and Petitioner's claim is not barred by the procedural rules in place at the time of his direct appeal. See 22 O.S. § 1086; see also Gary Alan Walker, 934 F. Supp 1286 (stating that, in Oklahoma, it is settled law that an intervening change in the law constitutes a sufficient reason why an issue could not have been raised on direct appeal or in a prior application for post-conviction relief under section 1086). Accordingly, this Court will consider the claim on the merits.

2. THE MERITS OF THE CLAIM

Petitioner asserts the trial court's use of the "presumed to be not guilty" instruction violated the Fourteenth Amendment by distorting the principle that defendants are presumed innocent until the state proves them guilty beyond a reasonable doubt. Furthermore, Petitioner argues the instruction constitutes a "structural error," which would entitle him to habeas relief without the need to conduct any form of harmlessness review. See Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The Court disagrees and for the reasons discussed below finds the "presumed not guilty" instruction was not "structural error." Therefore, regardless of whether the error constituted a constitutional

violation,⁸ the Court reviews the alleged error for harmlessness using the standard discussed in Kotteakos v. United States, 328 U.S. 750 (1946). *See, e.g.* United States v. Hernandez-Muniz, 170 F.3d 1007, 1010 (holding that the applicable harmless error standard in the Tenth Circuit is the one articulated in Kotteakos). Under Kotteakos, the Court concludes the error in this case was harmless.

A federal court, within the jurisdiction of the Tenth Circuit, reviewing a “state court error in a habeas proceeding should not grant relief unless the court finds the trial error ‘had substantial and injurious effect or influence in determining the jury’s verdict.’” Crespin v. New Mexico, 144 F.3d 641, 649 (10th Cir. 1998) (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946))). Nonetheless, the Supreme Court has determined that certain “structural errors” so undermine the constitutionality of a criminal trial that automatic reversal of a conviction is required. *See* Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The Supreme Court has observed that classification of an error as structural, and therefore not subject to review for harmlessness, is “the exception and not the rule.” Rose v. Clark, 478 U.S. 570, 578 (1986). “[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to

⁸ Whether the “presumed not guilty” instruction is actually unconstitutional is unclear. *See* Sherrill v. Hargett, 1999WL492682 (10th Cir. 1999). *Compare* Flores, 896 P.2d 558 (Okla. Crim. App. 1995) (wherein the Oklahoma Court of Criminal Appeals held the “presumed not guilty” instruction unconstitutional because it diluted the presumption that guilt is to be proven beyond a reasonable doubt) *with* State v. Pierce, 927 P.2d 929, 936 (Kan. 1996) (wherein the Kansas Supreme Court held that a “not guilty” instruction preserved defendant’s presumption of innocence).

harmless-error analysis." Id. at 579. Structural errors are errors that affect the "entire conduct of the trial from beginning to end," and therefore cannot be harmless. Arizona v. Fulminante, 499 U.S. 279, 309 (1991).

Correctly applied, harmless error and structural error analyses produce identical results: unfair convictions are reversed while fair convictions are affirmed. Expanding the list of structural errors, however, is not mere legal abstraction. It can also be a dangerous endeavor. There is always the risk that a sometimes-harmless error will be classified as structural, thus resulting in the reversal of criminal convictions obtained pursuant to a fair trial. Given this risk, judges should be wary of prescribing new errors requiring automatic reversal. Indeed, before a court adds a new error to the list of structural errors (and thereby requires the reversal of every criminal conviction in which the error occurs), the court must be certain that the error's presence would render every such trial unfair.

Sherman v. Smith, 89 F.3d 1134, 1138 (4th Cir. 1996) (citing Fulminante).⁹

In Sullivan, the Supreme Court found the trial court's use of an unconstitutional instruction defining "reasonable doubt" to be one such "structural error" and granted relief absent any harmless error analysis. Id. Petitioner argues the erroneous "presumed not guilty" instruction is analogous to the unconstitutional instruction defining "reasonable doubt" in Sullivan because both are intertwined within the maxim that defendants, in the American criminal justice system, are "innocent until proven guilty." Hence, Petitioner

⁹Examples of cases involving structural defects in the constitution of the trial mechanism, which defy analysis by "harmless error" standards, include: total deprivation of the right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963); a judge who was not impartial, Tumey v. Ohio, 273 U.S. 510 (1927); unlawful exclusion of members of defendant's race from a grand jury, Vasquez v. Hillery, 474 U.S. 254 (1986); the right to self-representation at trial, McKaskle v. Wiggins, 465 U.S. 168, 177-78 n. 8 (1984); and the right to a public trial, Waller v. Georgia, 467 U.S. 39, 49 n. 9 (1984). Arizona v. Fulminante, 499 U.S. 279, 309-10. These errors are "structural defects affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Id. at 310.

claims the trial court's use of the unconstitutional "presumed not guilty" instruction is structural error. The Court disagrees.

The Supreme Court has consistently distinguished the importance of the two standards. As an example, this Court looks to Justice White's dissent in the Fulminante case to better understand the difference between the importance of the two instructions:

[The Supreme Court has] held susceptible to harmless-error analysis the failure to instruct the jury on the presumption of innocence, Kentucky v. Whorton, 441 U.S. 786 ... (1989), while finding it impossible to analyze in terms of harmless error the failure to instruct a jury on the reasonable-doubt standard, Jackson v. Virginia, 443 U.S. 307, 320, n. 14 ... (1979). These cases cannot be reconciled by labeling the former "trial error" and latter not, for both concern the exact same stage in the trial proceedings. Rather, these cases can be reconciled only by considering the nature of the right at issue and the effect of an error upon the trial. A jury instruction on the presumption of innocence is not constitutionally required in every case to satisfy due process, because such an instruction merely offers an additional safeguard beyond that provided by the constitutionally required instruction on reasonable doubt. *See Whorton, supra* 441 U.S., at 789 ... ; Taylor v. Kentucky, 436 U.S. 478, 488-490 ... (1978). While it may be possible to analyze as harmless the omission of a presumption of innocence instruction when the required reasonable-doubt instruction has been given, it is impossible to assess the effect on the jury of the omission of the more fundamental instruction on reasonable doubt.

Fulminante, 499 U.S. at 291 (WHITE, J., dissenting). Thus, it stands to reason, that although the Sullivan court found the improper "reasonable doubt" instruction "structural error," the unconstitutional "presumption of guilt" instruction in this case would not be "structural error." Therefore, this Court will review the error under the harmless-error analysis originally described by Kotteakos.

As mentioned previously, the Kotteakos harmless-error standard states that habeas relief shall not be granted unless the error “had a substantial and injurious effect or influence in determining the jury’s verdict.” 328 U.S. at 776. In the present case, there were several eyewitnesses who named Petitioner as the murderer. Petitioner himself admits he committed the crimes. In addition, when the police arrived, Petitioner was covered in blood and holding one of the murder weapons. Thus, the Court holds it was the substantial evidence against Petitioner that was the determining factor in the jury’s decision of guilt, not the semantic difference between “presumed innocent” and “presumed not guilty.” The Court, accordingly, denies habeas relief on this claim.

B. The “First-degree Manslaughter” Instruction

Petitioner claims his Eighth and Fourteenth Amendment rights were violated when the trial court refrained from including an instruction on the lesser offense of First Degree Manslaughter.¹⁰ In support, Petitioner cites Beck v. Alabama, 447 U.S. 625 (1980) wherein the Supreme Court held that due process is violated by the imposition of the death penalty upon conviction by a state court jury which was not permitted to consider a verdict of guilty on a lesser included offense. However, the Beck holding requires an instruction on a lesser included offense only when the evidence would have supported such a verdict. Id. On direct appeal, the Oklahoma Court of Criminal Appeals held:

¹⁰The trial jury was given an instruction on the lesser included offense of Second Degree Murder.

The evidence did not in fact support a first degree manslaughter instruction. First degree manslaughter is defined as homicide perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide. Second degree murder is homicide perpetrated by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual[.] [Petitioner] went to the trailer with a concealed, sharpened knife. He became angry with Shelley and began hitting her. When her uncle, Donnie, came running to her rescue, [Petitioner] stabbed him in the stomach. [Petitioner] then stabbed each of them numerous times, ultimately telling Donnie that he should have minded his own business. At one point, he went to the kitchen cabinets, found an ice pick, and returned to stab Shelley with it. He took Shelley's pulse to make certain she was dead. In his statement to the police, he admitted that he intended to kill anyone who tried to prevent him from taking the baby. This evidence did not show that [Petitioner] killed the two victims in a heat of passion and without a design to effect their deaths. The trial judge properly denied [Petitioner's] requested instruction on this basis.

Walker, 887 P.2d at 313 (footnotes omitted) (quotations omitted). Upon examination of the Oklahoma statute defining First Degree Manslaughter, 21 O.S.1981 § 711, and the facts of this case, the Court agrees with the Oklahoma appellate court and holds there is insufficient evidence to support such a verdict. Hence, the trial court's omission of an instruction on the lesser offense of First Degree Manslaughter did not deprive Petitioner of his due process rights.

C. The "Presumption of Life" Instruction

Petitioner believes the jury should have been given an instruction on the "presumption of life." An instruction informing the jury it has the option to return a life sentence

regardless of its finding that the aggravating factors outweigh the mitigating circumstances. Petitioner further argues, the trial court's failure to instruct the jury concerning a presumption of life violated his rights under the Eighth and Fourteenth Amendment of the United States Constitution. The Court disagrees.

The penalty phase instructions charged the jury to presume Petitioner innocent of the charges made against him in the Bill of Particulars, "and this presumption of innocence continues unless [Petitioner's] guilt is established beyond a reasonable doubt." (Instruction No. 5, O.R. at p. 230). The jury was also instructed to resolve any reasonable doubt in favor of a sentence of imprisonment. *Id.* ("If, upon consideration of all the evidence, facts and circumstances in the case, you entertain a reasonable doubt of the guilt of the defendant ... you must give him the benefit of that doubt and return a sentence of either imprisonment for life without parole or imprisonment for life"). The jury was thus adequately charged on the presumption of innocence and the burden of proof. Petitioner cites no precedent supporting a contrary conclusion.

D. The "Weighing" Instruction

Petitioner argues the "weighing" instruction given to the jury could reasonably have been interpreted in an unconstitutional manner. The instruction at issue reads:

If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances, the death penalty shall not be imposed.

(Instruction No. 11, O.R. at p. 237). In Zant v. Stephens, 462 U.S. 862, 875 n. 13 (1983), the Supreme Court stated that the Constitution does not require specific standards for balancing aggravating and mitigating circumstances. The Constitution does not command “that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence.” Buchanan v. Angelone, ___ U.S. ___, ___, 118 S.Ct. 757, 761, 139 L.Ed.2d 702 (1998). Instead, “the state may shape and structure the jury’s consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence....” Id. The standard for determining whether jury instructions satisfy these principles is “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of relevant evidence.” Boyd v. California, 494 U.S. 370, 380 (1990). Looking at Instruction No. 11, it is clear the jurors were instructed that mitigating factors should be accounted for in reaching their decision, and that such factors should be balanced against any aggravating circumstances found to exist beyond a reasonable doubt in deciding between life and death. This is all that the Constitution requires.

E. The Mitigating Evidence Instruction

Next, Petitioner questions the constitutionality of the mitigating evidence instruction.

Instruction No. 9 defines mitigating circumstances. It reads:

Mitigating circumstances are those which, in fairness and mercy, *may be considered* as extenuating or reducing the degree of moral culpability or

blame. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances.

(O.R. at p. 234) (emphasis added).

Petitioner argues the “may be considered” language in the instruction could have led the jury to ignore the evidence and assess the death penalty without considering any of the mitigating evidence. The sentencer “may determine the weight to be given relevant mitigating evidence. But they may not give it **no weight** by excluding such evidence from their consideration.” Eddings v. Oklahoma, 455 U.S. 104, 114 (1982)(emphasis added).

Once again, the standard developed in Boyd v. California, *supra*, applies to determine the merits of a challenged jury instruction. The Court must determine the likelihood that a reasonable juror, looking at all the instructions given, would decide Instruction No. 9 gave them the right to ignore the mitigating evidence and return a verdict of death.

The Court finds it unlikely that a reasonable juror would believe the “may be considered” language in the mitigating instruction gave the jury the right to disregard other instructions and not consider any mitigating evidence. Instruction No. 5, in part, tells the jury to consider “**all the evidence, facts, and circumstances**” during their sentencing deliberations. (O.R. at 230) (emphasis added). Instruction No. 11 informs the jury that the aggravating circumstance must outweigh mitigating circumstances before the death penalty can be imposed. (O.R. at 237). In addition, the jurors were instructed to consider all of the

instructions together and “not just a part of them.” (Instruction No. 13, O.R. at 239). When the instructions are viewed as a whole, a reasonable juror would find Instruction No. 9 actually widens the range of circumstances they are allowed to consider as mitigating, not ignore them. The language opens their options to those circumstances that “may be considered” as extenuating, not just those that “are considered,” or “have been determined to be,” or “they unanimously find” extenuating. When considered in conjunction with all of the instructions, the mitigating instruction does not prevent the consideration of constitutionally relevant evidence nor does it violate Petitioner’s constitutional rights.

F. The Instruction Defining the “Heinous, Atrocious, or Cruel” Aggravator

Petitioner challenges the constitutionality of the defining instruction supplementing the “especially heinous, atrocious, or cruel” aggravating circumstance. The gist of Petitioner’s argument is that the instruction defining the aggravating circumstance is unconstitutionally vague on its face and as applied. The Court holds the “especially heinous, atrocious, or cruel” aggravator is constitutional and the use of it in Petitioner’s trial did not violate his rights as established by either the Eighth or Fourteenth Amendment.

Petitioner contends the “especially heinous” aggravating circumstance is unconstitutional as applied by Oklahoma Courts. Petitioner cites Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987), wherein the Tenth Circuit held that an “especially heinous, atrocious, or cruel” aggravator was unconstitutional because it failed to channel the jury’s discretion as required by the Eighth Amendment. The Supreme Court affirmed the

Cartwright opinion reasoning that without precise explanatory language to guide the jury's sentencing decision "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" Maynard v. Cartwright, 486 U.S. 356, 364 (1988). However, "the Supreme Court noted that Oklahoma could have cured the unconstitutionally vague aggravator by adopting a narrowing construction." Duvall v. Reynolds, 139 F.3d 768, 793 (10th Cir. 1998). Thereafter, the Oklahoma Court of Criminal Appeals tempered application of the "especially heinous, atrocious, or cruel" aggravating circumstance, mandating that it be used only when the murder involved "torture of the victim or serious physical abuse." Stouffer v. State, 742 P.2d 562, 563 (Okla. Crim. App. 1987).

Petitioner's claim focuses on the narrowing instruction outlined in Stouffer. Petitioner argues that this definition is insufficient to bring the "especially heinous, atrocious, or cruel" aggravating circumstance within constitutional limits; because, the defining instruction, Instruction No. 7, is itself vague and over broad. Instruction No. 7 provides:

You are instructed that the application of "especially heinous, atrocious, or cruel" is limited and restricted to only those murders where the death of the victim was preceded by torture of the victim or serious physical abuse.

(O.R. at p. 232).

The Court looks to the recent Tenth Circuit decision in Duvall for guidance on this question. The petitioner in Duvall challenged the constitutionality of a defining instruction

for the “especially heinous” aggravating circumstance. That instruction contained language similar to the instruction challenged by Petitioner in the case at bar. Compare Duvall, 139 F.3d at 768 with Instruction No. 7, above. After careful examination, the Tenth Circuit held “[t]he aggravator is not unconstitutional on its face or as applied.” Id. at 794; see also Hatch v. State, 58 F.3d 1447 (10th Cir. 1995)(finding that the narrowing interpretation of the “especially heinous, atrocious, or cruel” aggravating circumstance which requires proof of “torture” or “serious physical abuse” is constitutionally permissible). This Court, following the precedent set by the Tenth Circuit in Duvall and Hatch, holds the defining instruction in question is constitutional on its face and as applied.

VIII. THE “CONTINUING THREAT” AGGRAVATING CIRCUMSTANCE

In his seventh ground for relief, Petitioner argues the “continuing threat”¹¹ aggravating circumstance is unconstitutional. Petitioner’s very lengthy and detailed argument spans nearly twenty pages of his petition. Petitioner attacks the constitutionality of the continuing threat aggravator on several fronts: the factor “fails to narrow the class of crimes and defendants eligible for the death penalty;” there is no limitation placed on the application of the factor; the Oklahoma Court of Criminal Appeals’ reliance on Jurek v. Texas, 428 U.S. 262 (1976), is misplaced; and, the factor replaced the heinous, atrocious, or cruel aggravating circumstance as Oklahoma’s “catch-all aggravator.” In response, Respondent acknowledges

¹¹“Aggravating circumstances shall be: ... The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” 21 O.S. § 701.12(7).

that Petitioner exhausted his state remedies on this claim. Respondent argues, however, that Petitioner has failed meet his burden of proving the Oklahoma Court of Criminal Appeals' decision was "contrary to, or involved unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254 (d)(1).

The Court rejects petitioner's argument in light of the recent precedent established by the Tenth Circuit Court of Appeals in Nguyen v. Reynolds, 131 F.3d 1340 (10th Cir. 1997). In Nguyen, the Tenth Circuit found Oklahoma's "continuing threat" aggravating circumstance was "nearly identical" to the aggravating factor used by Texas and approved by the Supreme Court in Jurek. In construing the constitutionality of Oklahoma's "continuing threat" aggravator, the Tenth Circuit held:

the fact that Oklahoma chooses to grant a sentencing jury wide discretion to make a predictive judgment about a defendant's probable future conduct does not render the sentencing scheme in general, or the continuing threat factor in particular, unconstitutional. Although this predictive judgment is not susceptible of "mathematical precision," we do not believe it is so vague as to create an unacceptable risk of randomness. To the contrary, we believe the question of whether a defendant is likely to commit future acts of violence has a "common-sense core of meaning" that criminal juries are fully capable of understanding.

Nguyen, 131 F.3d at 1354. Thus, the Tenth Circuit concluded that "the continuing threat factor used in the Oklahoma sentencing scheme does not violate the Eight Amendment." Id. The Tenth Circuit has not wavered from its analysis or holding since Nguyen. See, Moore

v. Reynolds, 153 F.3d 1086, 1116 (10th Cir. 1998); Castro v. Ward, 138 F.3d 810, 816-17 (10th Cir. 1998); and Sellers v. Ward, 135 F.3d 1333, 1339 (10th Cir. 1998).

Petitioner makes no argument which compels this Court to disregard Jurek or Nguyen and progeny, *supra*, thus, the Court finds that Petitioner has failed to meet his burden under 28 U.S.C. § 2254(d). Habeas relief is denied on this ground.

IX. PETITIONER'S STATEMENTS TO TREATING PHYSICIAN OVERHEARD BY POLICE DEPUTY AND ADMITTED AT TRIAL

When Petitioner was taken to the hospital after the murders, the doctor asked Petitioner if he knew he had killed Shelly, to which Petitioner answered yes, but Petitioner stated he was sorry he had killed Donnie because it wasn't any of Donnie's business. (Tr. at pp. 470-471). Deputy Dan Fritz, acting as a guard, was also in the examining room during this conversation. At trial, the judge allowed Deputy Fritz to testify regarding this admission. Petitioner claims the testimony of Deputy Fritz was improperly admitted against Petitioner because the statements were privileged based on the physician patient relationship. 12 O.S. Supp. 1989, §2503 (4) (B).

However, "federal habeas corpus relief does not lie for errors of state law." Lewis v. Jeffers, 497 U.S. 764, 780 (1990). In conducting habeas review, "a federal court is limited to deciding whether a conviction violated the constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 67 (1991) (citations omitted). Errors of state law rise to constitutional dimension only if they "so infused the trial with unfairness as to deny

due process of law.” Lisenba v. California, 314 U.S. 219, 228 (1941). Petitioner has failed to provide legal support for his contention that the alleged error in the present case rises to such a level. Further, Petitioner has provided no authority to show that the admission of the evidence at issue was contrary to clearly established federal law. As such, Petitioner has not met the burden imposed by 28 U.S.C. § 2254 (d) (1). Hence, habeas relief on this claim is unwarranted.

X. JUROR MISCONDUCT

Petitioner asserts juror misconduct on the part of Juror Joy Jacqueline Grubs who, Petitioner claims, intentionally read newspaper articles and watched television reports regarding this incident. The Oklahoma Court of Criminal Appeals held that Petitioner waived his juror misconduct claim when Petitioner did not raise the issue in his direct appeal. Walker, 933 P.2d at 340.¹² In accordance, Respondent asserts the claim is procedurally barred from consideration by this Court.

In the situation where “a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner” can show either “cause and prejudice,” or, alternatively, a “fundamental miscarriage of justice.” See Coleman v. Thompson, 501 U.S. 722, 750 (1991). Hence, unless Petitioner can show that either the “cause and prejudice” or

¹²The Oklahoma Court based the procedural bar on the “firmly established and regularly followed,” Ford v. Georgia, 498 U.S. 411, 424 (1991), rule set forth in 22 O.S. § 1086, which requires

“fundamental miscarriage of justice” exception to the procedural bar rule is applicable, the Court will not adjudicate the merits of this claim. See Coleman, 501 U.S. at 750. Petitioner does not argue that he has shown a fundamental miscarriage of justice to override his procedural default; instead he relies on the “cause and prejudice” exception.

Petitioner attempts to demonstrate “cause and prejudice” via an ineffective assistance of appellate counsel claim. Ineffective assistance of appellate counsel may constitute cause for state procedural default where counsel’s performance falls below the minimum standard established in Strickland. See Murray v. Carrier, 477 U.S. 478, 488-489 (1986). However, the exhaustion doctrine, which is “principally designed to protect the state courts’ role in the enforcement of federal law and prevent disruption of state judicial proceedings,” Rose v. Lundy, 455 U.S. 509, 518 (1982), generally “requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.” Murray, 477 U.S. at 489. A review of the state court proceedings shows that Petitioner has never raised an ineffective assistance of appellate counsel claim based upon appellate counsel’s failure to raise a claim of juror misconduct.¹³ The Court, therefore, holds the ineffective assistance claim is unexhausted and an unexhausted claim cannot be “cause” for a procedural default. Id. Since Petitioner has failed

¹³Petitioner did raise a claim of ineffective assistance of appellate counsel at post-conviction review, but that claim was based upon other factual allegations. No ineffective assistance claims have been raised in relation to the juror misconduct claim until this petition for federal habeas corpus relief.

to establish the “cause” portion of the “cause and prejudice” exception to the procedural bar, this proposition is procedurally barred from consideration by the Court.

XI. PROCEDURAL DUE PROCESS

Petitioner claims his due process rights were violated when the state failed to provide timely and sufficient notice of the evidence to be used in support of the aggravating circumstances. The majority of Petitioner’s argument attacks the Oklahoma Criminal Court of Appeals’ findings regarding state procedural notice requirements for criminal cases. “[F]ederal habeas corpus relief does not lie for errors of state law.” Lewis v. Jeffers, 497 U.S. 764, 780 (1990). However, Petitioner does briefly argue the notice given was also a violation of Petitioner’s constitutional right to due process under the Sixth and Fourteenth Amendments. Although the argument is brief, the Court will consider the merits of the claim.

Of the limited Supreme Court cases used by Petitioner to show the circumstances of this claim represent a violation of “clearly established Federal law,” 28 U.S.C. § 2254 (d) (1), Langford v. Idaho, 500 U.S. 110 (1991), is the most helpful to Petitioner’s argument regarding the timeliness of the notice given. In Langford, the prosecution filed a presentencing order stating it would not seek the death penalty at the sentencing hearing. Id. Upon the conclusion of the sentencing hearing, however, the judge stated the seriousness of the crimes warranted a more severe penalty than that recommended by the State, and eventually sentenced the petitioner to death. The Supreme Court found the petitioner’s due

process rights were violated by the lack of notice from the trial judge that the death penalty would be considered despite the prosecution's decision not to seek it. The Court stated, "[i]f notice is not given, and the adversary process is not permitted to function properly, there is an increased chance of error, ... and with that, the possibility of an incorrect result." Id. at 127 (citations omitted).

In Petitioner's case, the prosecution filed a Bill of Particulars on March 17, 1989, stating its intention to seek the death penalty at trial. The trial actually commenced on May 8, 1989. Thus, Petitioner was notified of the State's intention to seek the death penalty almost two months before the trial began, not at the conclusion of the sentencing hearing as in Langford. Although the Supreme Court has not drawn a line in the sand delineating the precise length of time a petitioner is entitled to notice in a capital case to ensure due process, this Court finds two months is sufficient notice. Hence, the notice given was timely, because it adequately provided Petitioner time to prepare a capital defense, thereby maintaining the proper function of the adversary process.

In addition to the untimely notice claim, Petitioner alleges the notice was insufficient. Petitioner objects to the use of certain evidence admitted at the sentencing phase which was not listed in the notice. Specifically, Petitioner disputes the constitutionality of the prosecution's use of the following evidence: (1) the autopsy slides, (2) portions of the medical examiner's testimony, and (3) the evidence of past conduct that came in during cross-examination of the defense's mitigation witnesses. In

support, Petitioner cites Gardner v. Florida, 430 U.S. 349 (1977), for the proposition that a procedure for selecting people eligible for the death penalty that permits consideration of secret information about the defendant is unacceptable.

The Supreme Court, in Gardner, held that denial of a defendant's opportunity to meaningfully deny or explain evidence used to procure a death sentence is a denial of due process. 430 U.S. at 362. In Gardner, the evidence considered by the judge in making the decision to impose the death penalty was a part of a presentence investigation report that contained confidential information which was not disclosed to defense counsel at any time during the proceedings. In the case at bar, all of the evidence now objected to by Petitioner came in during the sentencing phase of trial in the presence of Petitioner and his counsel. None of the evidence was "secret," nor was Petitioner's opportunity to meaningfully deny or explain that evidence diminished by the prosecutor's failure to specifically list that information in the notice.¹⁴ Since Petitioner has failed to show a violation of clearly established Federal law, Petitioner's claim for relief based upon the proposition that the State provided untimely and insufficient notice is denied.

¹⁴Although the specific evidence objected to by Petitioner was not in the notice, a review of the record shows it was covered by the information in the notice. The autopsy slides were listed on the notice as "photographs of the autopsy." The medical examiner was listed as a witness on the notice and his disputed testimony related to the "heinous, atrocious, or cruel" aggravating circumstance, which was listed on the Bill of Particulars. And, although the information that came out in cross-examination was not in the notice, Petitioner has cited no Supreme Court case that stands for the proposition that a prosecutor is required to list every possible piece of evidence that might surface while cross-examining the defendant's witnesses.

XII. PROSECUTORIAL MISCONDUCT

Petitioner alleges five different areas of prosecutorial misconduct which he claims rendered his trial fundamentally unfair. First, Petitioner claims the prosecutor misstated the law on several instances. Second, Petitioner claims the prosecutor elicited and emphasized improper testimony regarding Petitioner's character and past conduct. Third, Petitioner claims the prosecutor improperly expressed his opinions on the guilt of Petitioner and the need for a death sentence in this case. Fourth, Petitioner asserts the prosecutor improperly appealed to the jurors' passions and prejudices by invoking sympathy for the victims. Fifth, Petitioner argues the prosecutor improperly commented on Petitioner's right to remain silent. Petitioner admits that some of these issues were objected to at trial, while others were not. Petitioner argues, however, that these errors constituted fundamental error, with or without objection. Further, Petitioner states the combined effect of each of these errors was so prejudicial as to affect adversely the fundamental fairness and impartiality of the proceedings, thereby resulting in the deprivation of his Constitutional rights.

In a federal habeas proceeding, review of state prosecutor's allegedly prejudicial remarks is limited to remarks which cause a defendant's constitutional rights to be violated. Coleman v. Brown, 802 F.2d 1227, 1237 (10th Cir. 1986), *cert. denied*, 482 U.S. 909, 107 S.Ct. 491, 96 L.Ed.2d 383 (1987), *reh. denied*, 483 U.S. 1034, 107 S.Ct. 3279, 97 L.Ed.2d 783 (1987). Only if a prosecutor's comments render the trial so

fundamentally unfair as to amount to a denial of due process, would habeas relief be warranted. Donnelly v. DeChristoforo, 416 U.S. 637 (1974). “In evaluating whether improper prosecutorial comments render a trial fundamentally unfair, we view the comments within the context of the trial as a whole.” Duvall v. Reynolds, 139 F.3d 768, 794 (10th Cir. 1998), *cert. denied*, 119 S.Ct. 345 (citing United States v. Young, 470 U.S. 1, 11-12 (1985)). In evaluating claims of prosecutorial misconduct, the Tenth Circuit has stated:

To view the prosecutor’s statements in context, we look first at the strength of the evidence against the defendant and decide whether the prosecutor’s statements plausibly “could have tipped the scales in favor of the prosecution.” . . . We also ascertain whether curative instructions by the trial judge, if given, might have mitigated the effect on the jury of the improper statements . . . When a prosecutor responds to an attack made by defense counsel, we evaluate that response in light of the defense argument. . . ultimately, we “must consider the probable effect the prosecutor’s [statements] would have had on the jury’s ability to judge the evidence fairly.”

Fero v. Kerby, 39 F.3d 1462, 1474 (10th Cir. 1994), *cert. denied*, 515 U.S. 1122, 115 S.Ct. 2278, 132 L.Ed.2d 282 (1995) (citing Hopkinson v. Shillinger, 866 F.2d at 1210). In considering whether prosecutorial misconduct was “so flagrant as to deny a defendant a fair trial, [this Court] must take notice of all the surrounding circumstances, including the strength of the state’s case.” Coleman, 802 F.2d at 1237.

On direct review, the Oklahoma Court of Criminal Appeals found that none of the disputed comments so infected the jury as to require relief. Walker, 887 P.2d 301. The

Court agrees.¹⁵ The evidence against Petitioner was overwhelming. For example, several witnesses testified that Petitioner killed both victims. (Tr. at pp. 199-203, 221-225, 234-236, 243-246, 251-253). Petitioner admitted he was the murderer. (States Ex. # 26). Medical evidence showed the victims had both been stabbed several times each. (Tr. at pp. 299-311). In addition, the 911 tape proved one of the victims was conscious during the attack. (State's Ex. #24). Looking at the strength of the evidence against Petitioner, the Court finds it implausible that any of the prosecutor's comments "tipped the scales" in favor of the prosecution, because the large amount of uncontroverted evidence was enough to substantially weigh the scales against Petitioner. Hence, the prosecutor's comments had little or no effect on the jury's decision.

After reviewing the challenged statements of the prosecutor herein, in the totality of the circumstances of the trial, the Court finds that none of the comments by the prosecutor undermined any specific constitutional rights of the Petitioner nor denied Petitioner a fundamentally fair trial. Habeas relief for prosecutorial misconduct is available only if the conduct was so egregious in the context of the trial as a whole that it rendered the trial fundamentally unfair. *See DeChristoforo*, 416 U.S. at 94. Accordingly, the Court finds that the decision of the Oklahoma appellate court was not contrary to, nor did it involve an unreasonable application of, clearly established Federal law, as

¹⁵The Court is not considering whether or not each individual comment was proper, because it is unnecessary based upon the amount of evidence against Petitioner using the standard of review outlined in *Coleman* and *Fero*, *infra*.

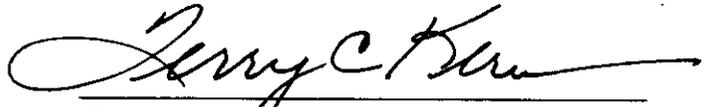
determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1).

Therefore, habeas relief on this issue is not warranted.

XIII. CONCLUSION

After careful review of the petition for writ of habeas corpus and the record, the Court finds Petitioner is not entitled to relief. ACCORDINGLY, the Writ of Habeas Corpus is denied.

IT IS SO ORDERED this 4 day of August 1999.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

thereafter at the current legal rate of 4.966 percent per annum until paid, plus costs of this action.


United States District Judge
for Thomas R. Brett

Submitted By:


PHIL PINNELL, OBA # 7169
Assistant United States Attorney
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Tulsa, Oklahoma 74103-3809
(918) 581-7463

PEP/11f

112

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

KTI RECYCLING OF CANADA,)
 INC., a corporation incorporated)
 pursuant to the laws of the province)
 of Ontario, Canada, with a principal)
 place of business in Cambridge,)
 Ontario, Canada and KTI)
 RECYCLING, INC., a Delaware)
 corporation with a principal place)
 of business in New Jersey,)

Plaintiffs)

v.)

SOUTHWEST RUBBER, INC., an)
 Oklahoma corporation with a)
 principal place of business in)
 Bristow, Oklahoma)

and)

JAMES KING, a citizen of)
 Oklahoma,)

Defendants)

v.)

SPIRITBANK, N.A.,)

Intervenor.)

FILED

AUG 4 1999

Phil Lombardi, Clerk
 U.S. DISTRICT COURT

Case No. 98-CV-0985BU(J)

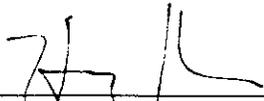
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 DATE AUG 05 1999

STIPULATION OF DISMISSAL

The Plaintiffs KTI Recycling of Canada, Inc. and KTI Recycling, Inc. and Defendants Southwest Rubber, Inc. and James King, an individual and the Intervenor SpiritBank, N.A., by their attorneys of record, hereby agree that the action shall be, and is dismissed, with

prejudice to the filing of any future action pursuant to Federal Rule Civil Procedure 41(a)(1).

Each party shall bear its own cost.


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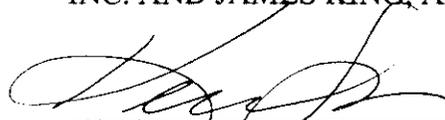
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ATTORNEY FOR SPIRITBANK, N.A.,

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

F I L E D

AUG 3 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEBRA R. TERRY,

Plaintiff,

vs.

No. **99-CV-125-E**

**BOARD OF COUNTY
COMMISSIONERS OF OTTAWA
COUNTY and BEVERLY STEPP,**
in her official capacity as Court Clerk
of Ottawa County,

Defendants.

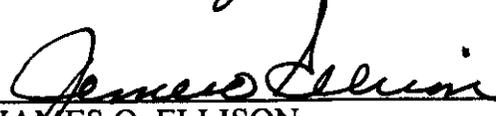
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DATE **AUG 01 1999**

JUDGMENT

This action came before the Court for consideration of the motion for default judgment filed by the plaintiff, Debra R. Terry, on her claims under the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.*, the Rehabilitation Act, 29 U.S.C. §794, and the Oklahoma Anti-Discrimination Act, 25 O.S. §1302. After hearing evidence in support of plaintiff's damages, after due consideration of the issues, and in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Court that judgment be and is hereby entered in favor of the plaintiff, Debra R. Terry, and against the defendants, Board of County Commissioners of Ottawa County and Beverly Stepp, in her official capacity as Court Clerk of Ottawa County.

IT IS SO ORDERED this 3RD day of August, 1999.


JAMES O. ELLISON
Senior, United States District Judge

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

FILED

AUG 3 - 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CATHERINE D. FREEMAN,)
)
Plaintiff,)
)
vs.)
)
PROVIDENT LIFE & ACCIDENT)
INSURANCE COMPANY, a)
Tennessee-based insurance)
company authorized to)
transact business in the)
State of Oklahoma,)
)
Defendant.)

Case No. 99-CV-470-BU

ENTERED ON DOCKET
DATE AUG 04 1999

ORDER

On June 18, 1999, Defendant removed this action from the District Court of Tulsa County, Oklahoma, pursuant to 28 U.S.C. § 1441, et seq. In its Notice of Removal, Defendant asserted that the Court has jurisdiction over this action by reason of diversity of citizenship and amount in controversy pursuant to 28 U.S.C. § 1332. Although Defendant admitted in the Notice of Removal that the face of Plaintiff's Petition did not affirmatively establish the amount in controversy exceeded \$75,000.00, Defendant stated that Plaintiff's response to its request for admission established that the jurisdictional amount was satisfied.

This matter now comes before the Court upon the motion of Plaintiff to remand this action to the Tulsa County District Court. Plaintiff initially contends that this action must be remanded to state court because Defendant's removal was untimely. According to Plaintiff, Defendant failed to remove the action within 30 days of receipt of the Petition. In addition, Plaintiff contends that this

action must be remanded to state court since her Petition did not pray for damages in excess of \$75,000.00,¹ and Defendant's Notice of Removal did not set forth the necessary underlying facts that established the amount in controversy exceeded \$75,000.00.

Defendant, in response, asserts that its removal was timely. Defendant states that after service of the Petition, it served a request for admission upon Plaintiff asking her to "[a]dmit that [her] claim does not exceed \$75,000.00 exclusive of interest and costs." Defendant states that Plaintiff, for her response, objected to the request as premature and stated that she could not truthfully admit or deny the request. According to Defendant, Plaintiff also stated that Defendant's request required her to speculate as to damages and invaded the purview of the trier of fact. Defendant contends that Plaintiff's refusal to admit or deny the request did not comply with the Oklahoma law, specifically Okla. Stat. tit. 12, § 3236, and was tantamount to an admission. However, Defendant also contends that Plaintiff's response appeared to be a denial. Because the response to the request for admission constituted "other paper" under 28 U.S.C. § 1446(b) and Defendant removed the action to this Court within 30 days of receipt of the answer, Defendant contends that removal of the action was timely. Furthermore, Defendant contends that Plaintiff's response

¹ In her Petition, Plaintiff alleged claims for breach of contract, breach of duty of good faith and fair dealing and negligent and/or intentional infliction of emotional distress. For each of her claims, Plaintiff prayed for judgment against Defendant in an amount in excess of "Ten Thousand Dollars (\$10,000.00) as and for compensatory damages" and in an amount in excess of "Ten Thousand Dollars as and for punitive damages."

established that the amount of controversy exceeded \$75,000.00.

Plaintiff, in reply, contends that despite Defendant's contentions, her response to the request for admission was in compliance with Oklahoma law and cannot be construed as a denial. Plaintiff contends that pursuant to § 3236, she gave her reasons for her objection; explained why she was unable to admit or deny the request; and stated that she had made reasonable inquiry as to her damages but the information available to her was insufficient to truthfully admit or deny the request. Plaintiff contends that she did not object to the request for the admission on the sole basis that it was speculative and invaded the province of the trier of fact. Nonetheless, even if her response could be construed as a denial, Plaintiff contends that Defendant has still failed to establish the amount in controversy requirement to warrant removal. Plaintiff contends that the response to the request for admission, standing alone, could not satisfy Defendant's burden of proving the requisite jurisdictional amount.

To be removable, a civil action must satisfy the requirements for federal jurisdiction. 28 U.S.C. § 1441(a); Huffman v. Saul Holdings Limited Partnership, ___ F.3d ___, 1999 WL 394193 *2 (10th Cir. 1999). For diversity federal jurisdiction, there must be a diversity of citizenship between the parties and the amount in controversy must exceed \$75,000.00. 28 U.S.C. § 1332(a). The courts are to "rigorously enforce Congress' intent to restrict federal jurisdiction in controversies between citizens of different states." Huffman, 1999 WL 394193 *2 (quoting Miera v. Dairyland

Ins. Co., 143 F.3d 1337, 1339 (10th Cir. 1998)). "[T]here is a presumption against removal jurisdiction," Laughlin v. Kmart Corp., so that all doubts are resolved in favor of remand, see, Fajen v. Foundation Reserve Ins. Co., 683 F.2d 331, 333 (10th Cir. 1982).

The removal statute provides in pertinent part:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based....

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446(b).

Plaintiff's Petition, the initial pleading in this case, requested compensatory damages in excess of \$10,000.00 and punitive damages in excess of \$10,000.00 for her claims. Defendant could only speculate from the Petition as to whether the amount in controversy exceeded \$75,000.00. Because the Petition did not permit Defendant to discern the amount in controversy, Defendant sent a request for admission to Plaintiff to determine the matter².

² The Oklahoma Pleading Code provides that in all cases, except actions sounding in contract, the pleading demanding relief for damages in money in excess of \$10,000.00 shall, without demanding any specific amount of money, set forth only that the amount sought as damages is in excess of \$10,000.00. Okla. Stat. tit. 12, § 2008(A)(2). Because of this limitation in the Oklahoma Pleading Code, the only way, in many situations, for a defendant to determine the amount of a plaintiff's claim is through discovery.

Defendant, as previously stated, contends that Plaintiff's response to the request for admission constituted "other paper from which it [could] first be ascertained that the case [was] one which [had] become removable." 28 U.S.C. § 1446(b).

In a removal case, it is the obligation of the removing defendant to establish that the amount in controversy has been satisfied. See, Laughlin, 50 F.3d at 873. Having reviewed the response to the request for admission, the Court finds that Defendant has failed to satisfy its burden that the amount in controversy exceeds \$75,000.00.³

Plaintiff's response to Defendant's request to "[a]dmit that Plaintiff's claim does not exceed \$75,000.00 exclusive of interest and costs" was as follows:

Plaintiff objects to [the request] to the extent that it is premature and, at this state of the litigation, Plaintiff cannot truthfully admit or deny such request. In this regard, Plaintiff has made reasonable inquiry as to her potential for recovery of punitive damages as pleaded, but, the information known or readily obtainable by her is insufficient to enable her to truthfully admit or deny [the request]. Plaintiff has pleaded damages in excess of \$10,000.00. At this point in the litigation, Defendant's [request] requires the Plaintiff to speculate as to damage and invade the purview of the trier of fact.

In its briefing, Defendant argues that this response failed to comply with Okla. Stat. 12, § 3236⁴ and was tantamount to a denial.

³ In light of the Court's finding, the Court need not address Plaintiff's timeliness argument.

⁴ Section 3236 provides in pertinent part:

If an objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in

However, from reviewing Plaintiff's response, the Court cannot say that it is, in fact, a denial of the request for admission. Furthermore, Defendant has not presented any authority which establishes that such a response is a denial.⁵

Defendant, however, also asserts that Plaintiff's response is tantamount to an admission for failure to comply with § 3236. Upon review of Plaintiff's response, the Court agrees with Defendant that Plaintiff's response does not comply with § 3236. Under that statute, a party may not give lack of information or knowledge as a reason for failure to admit or deny unless she states that she has made reasonable inquiry and that the information known or readily obtainable by her is insufficient to enable her to admit or deny. Plaintiff only states she made reasonable inquiry as to her potential for recovery of punitive damages as pleaded. The request for admission, however, was not limited to punitive damages. The

detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny.

⁵ The Court notes that § 3236 provides that if the court determines that an answer does not comply with the requirements of this section, it may order "either that the matter is admitted or that an amended answer be served." It does not provide for the Court deeming the request denied.

request was to admit that Plaintiff's "claim" does not exceed \$75,000.00. In her Petition, Plaintiff requested both compensatory and punitive damages for her claims. Moreover, the Court finds that Plaintiff's objections to the request, namely, it is premature; it requires her to speculate as to damage and it invades the purview of the trier of fact, are not justified. Section 3236 states that may not object to a request on the basis that the matter presents a genuine issue for trial. With her objections, Plaintiff is essentially claiming that the matter of whether her claim exceeds \$75,000.00 is a genuine issue for trial.

Because Plaintiff's response is not in compliance with § 3236, the Court concludes that the response is an admission of the request. And as Plaintiff's response admits that her claims against Defendant do not exceed \$75,000.00, Plaintiff's response does not satisfy Defendant's burden of proving the jurisdictional amount.

Because Defendant bears the burden of proving the requisite jurisdictional amount and Defendant has not satisfied its burden, the Court finds that remand of this action to the Tulsa County District Court is appropriate. However, if at any time within one year of the commencement of this action, Defendant has received an amended pleading, motion, order or other paper from which it appears that Plaintiff's position in regard to her damages has changed and her claims exceed the jurisdictional amount, Defendant will have the option of seeking removal to this Court under § 1446(b).

Accordingly, Plaintiff's Motion to Remand (Docket Entry #6) is GRANTED.
The Clerk of the Court is directed to mail a certified copy of this order to the Clerk of the District Court of Tulsa County, Oklahoma.

ENTERED this 3rd day of August, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

MT

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

FILED

AUG 4 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TWIN CITY FIRE INSURANCE COMPANY,)
a Connecticut corporation,)

Plaintiff,)

vs.)

No. 99-CV-0440H (M) ✓

CHEROKEE NATION, a public entity;)
REX EARL STARR, an individual;)
JENNIE L. BATTLES, an individual;)
LISA FINLEY, an individual; JOE)
BYRD, an individual; MARVIN)
SUMMERFIELD, an individual; ROBIN)
MAYES, an individual; DAVID)
CORNSILK, an individual; and CHARLIE)
ADDINGTON, an individual,)

Defendants.)

ENTERED ON DOCKET

DATE AUG 04 1999

NOTICE OF DISMISSAL WITHOUT PREJUDICE
OF DEFENDANT, LISA FINLEY

COMES NOW the Plaintiff, Twin City Fire Insurance Company, and gives notice of its dismissal of Defendant, Lisa Finley, as Defendant Finley has not filed an answer to the Plaintiff's cause of action. This Notice of Dismissal is filed because Lisa Finley is no longer a plaintiff in the underlying cause of action, Summerfield v. Mark McCollough; et al., U.S. District Court for the Northern District of Oklahoma, Case No. 98-CV-0328B(EA).

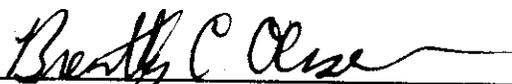
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Accordingly, Plaintiff, Twin City Fire Insurance Company, thereby dismisses its cause of action without prejudice against Defendant Lisa Finley.

Respectfully submitted,

HUCKABY, FLEMING, FRAILEY, CHAFFIN,
CORDELL, GREENWOOD & PERRYMAN, L.L.P.

BY:

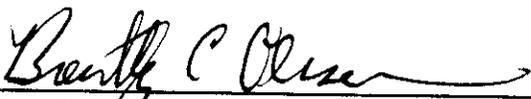

Kent Fleming (OBA 2976)
Brently C. Olsson (OBA 12807)
1215 Classen Drive
P. O. Box 60130
Oklahoma City, OK 73146
(405)235-6648
(405)235-1533 (fax)
ATTORNEYS FOR PLAINTIFF,
TWIN CITY FIRE INSURANCE COMPANY

CERTIFICATE OF MAILING

I hereby certify that on this 13th day of August, 1999, I mailed a true and correct copy of the above and foregoing instrument by depositing the same in the United States Mail, to:

Charles W. Shipley
Mark B. Jennings
Jamie Taylor Boyd
Shipley, Jennings & Champlin, P.C.
201 West Fifth Street, Suite 400
Tulsa, OK 74103-4230
ATTORNEY FOR DAVID CORNSILK and ROBIN MAYES

Diana Bond Dry (Fishinghawk)
Law & Justice Division
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465
ATTORNEY FOR CHEROKEE NATION, REX EARL STARR,
JENNIE L. BATTLES, LISA FINLEY and JOE BYRD


Brently C. Olsson

IN THE NORTHERN DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RUBEN BAIZA,)
)
 Plaintiff,)
)
 vs.)
)
 ANHEUSER BUSCH SALES OF)
 TULSA, INC.)
)
 Defendant.)

FILED

AUG - 3 1999

Case No. 98-CV-626-E(E) Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE AUG 04 1999

ORDER

Now before the Court is the Motion for Summary Judgment (Docket #7) of the Defendant Anheuser Busch Sales of Tulsa, Inc. ("ABS").

Background

Plaintiff, Ruben Baiza, was employed as a warehouse worker in April 1992 by Defendant ABS, a Tulsa area beer distribution business. The parties never signed an employment agreement or drafted a formal contract. During the course of Plaintiff's employment, he attended at least one mandatory Diversity Workshop sponsored by ABS, which discussed, *inter alia*, equal employment opportunity matters. Around October 15, 1997, Plaintiff Baiza was charged by a co-worker, Jensen Cass, with conduct that violates provisions of ABS's Sexual Harassment and Workplace Violence Policies. Specifically, Cass charged Plaintiff with making lewd and unwanted sexual comments toward him and threatening to inflict imminent physical harm while waving a pocketknife in his direction. Lawrence Jordan, then regional human resources representative for ABS, was directed by management to investigate Cass's complaint. At the conclusion of Jordan's investigation, Paula

Brown, ABS's Vice-President and Tulsa Facility Manager, found that several employees had engaged in inappropriate conduct to varying degrees. Brown determined that John Butler may have used some inappropriate language, and while he neither violated the Sexual Harassment nor the Workplace Violence Policy, he did receive a verbal reprimand. Al Vietz was found to have played a more peripheral role in the sexually inappropriate conduct toward Cass, and was suspended two weeks without pay for violating ABS's Sexual Harassment Policy. Baiza, whose conduct was deemed more severe, was terminated by ABS effective October 21, 1997 for violating both the Sexual Harassment and Workplace Violence Policies.

Subsequently, Baiza brings this action for (1) national origin discrimination by virtue of his national origin, Hispanic, pursuant to Title VII of the Civil Rights Act; (2) breach of contract for wrongful discharge; and (3) breach of contract under a variety of alternative theories. Defendant seeks Summary Judgment, pursuant to Fed.R.Civ.P. 56, arguing that termination of Plaintiff was legitimate and nondiscriminatory, and not a pretext for national origin discrimination. Secondly, ABS contends that Plaintiff's employment was "at will" and Baiza's termination was not in violation of its policies, procedures, manuals and oral representations, and therefore, Defendant cannot be liable for breach of contract under any theory.

Legal Analysis

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); Widon 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.

National Origin Discrimination Claim

Plaintiff Baiza's claim can be reviewed using the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973). Plaintiff must first establish a prima facie case of national origin discrimination by showing: "(i) that [the plaintiff] belongs to a [protected class]; (ii) that he was discharged for violating a work rule. . . .; and (iii) that similarly situated non-minority employees. . . were treated differently." Equal Employment Opportunity Commission ("EEOC") v. Flasher Co., 986 F.2d 1312, 1316 (1992)(quoting McAlester v. United Air Lines, 851 F.2d 1249, 1260 (10th Cir. 1988)). The burden then shifts to the employer to show a legitimate, nondiscriminatory reason motivated the decision to terminate Plaintiff. Plaintiff then has the burden to rebut Defendant's showing by demonstrating that proffered justification is pretext. McDonnell Douglas Corp., 411 U.S. at 802.

Defendant does not dispute that Plaintiff meets the first two requirements of the prima facie case. Baiza is Hispanic, and therefore, a member of the protected class as defined in Title VII, 42 U.S.C. §2000e, *et seq* ("Title VII"). Plaintiff was terminated for violating both ABS's Sexual Harassment and Workplace Violence Policies. Defendant contends, however, that since no other similarly situated non-minority worker violated both the Sexual Harassment and Workplace Violence Policies, Plaintiff cannot establish part (iii) of his prima facie case.

The Court assumes without deciding that Plaintiff has met the burden of proving a prima facie case for the purpose of Defendant's Motion for Summary Judgment. The Court also finds that Defendant ABS has come forward with a legitimate reason for the termination of Baiza's employment, namely that Plaintiff made sexually inappropriate comments and demonstrated violent behavior toward a co-worker.

Therefore, the burden returns to Plaintiff, who must either provide direct evidence of discrimination or demonstrate that Defendant's reason for terminating his employment was a pretext for national origin discrimination. EEOC, 986 F.2d at 1316. "Pretext can be shown by such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employers proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." Hardy v. S.F. Phosphates Ltd. Co., 1999 WL 401722, -- F.3d -- (10th Cir. 1999), (internal quotation marks and citation omitted)(quoting Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997)). Even after demonstrating pretext, Plaintiff has the ultimate burden of establishing that national origin was the "determining factor" in Defendants decision to terminate the employment. Lucas v. Dover Corp., Norris Div., 857 F.2d 1397 (10th Cir. 1988).

Baiza presented no direct evidence that ABS discriminated against him on the basis of his national origin. Rather, he argues that other similarly situated, non-minority workers were not terminated for committing comparable offenses at the workplace. ABS terminated Biaza for violating both the Sexual Harassment and Workplace Violence Policies, and chose lesser sanctions for those employees who violated the Sexual Harassment Policy alone. Plaintiff contends, however, that he has heard both John Butler and another employee, Bruce Ragland, make threatening comments while

at the workplace and neither Butler nor Ragland were discharged. Plaintiff would have the Court view this as support for his contention that similarly situated employees were not treated similarly, thus a possible showing of pretext for national origin discrimination.

The Court is not so persuaded. First, Plaintiff does not demonstrate that the comments of Butler and Ragland were heard by or reported to management. Moreover, neither the comment by John Butler, threatening to blow up the worksite, or Bruce Ragland, threatening to get his gun out of the car, placed anyone in imminent danger. Plaintiff, however, made threatening comments to a co-worker while waving a pocket knife in his direction. The Court finds no showing of pretext, and therefore Defendant's Motion for Summary Judgment as to the national origin discrimination claim is granted.

Breach of Contract Claims

Plaintiff Baiza brings alternative claims for breach of contract against Defendant. First, Plaintiff contends Defendant made a contractual agreement not to terminate him without warning in its policies, procedures, manuals and oral representations to the Plaintiff. In the alternative, Plaintiff alleges Defendant made promises to him which altered the at-will status of Plaintiff's employment and limited ABS's ability to discharge him.

Under Oklahoma law, employment must be considered terminable at-will unless the employee can prove substantive restrictions on the employer's power to discharge. Vice v. Conoco, Inc., 150 F.3d 1286, 1289 (10th Cir. 1999). Furthermore, employer's manuals which provide suggestions to aid supervisors in employee discipline matters do not restrict the employer's power to terminate employee unless the manual expressly alters the at-will employment status of a particular employee.

Vice, 150F.3d at 1290.

The Court finds that Baiza has failed to provide any material representation by Defendant, either a written document or other admissible evidence, which could be construed as changing the at-will nature of Plaintiff's employment. Furthermore, employer manuals which do not mandate specific termination procedures will not be construed to restrict employer's power to terminate an at-will employee. Vice, 150 F.3d at 1288; see also Williams v. Maremont Corp., 875 F.2d 1476 (10th Cir. 1989). The Court finds that the employment between Plaintiff and Defendant was at-will and the Defendant had no legal duty to implement progressive discipline with regards to violations of ABS's Sexual Harassment and Workplace Violence Policies. There is no factual basis for Plaintiff's breach of contract claims.

The Defendant's Motion for Summary Judgment (Docket #7) is GRANTED.

IT IS SO ORDERED THIS 3RD DAY OF AUGUST, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

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

RUBEN BAIZA,)
)
Plaintiff,)
)
vs.)
)
ANHEUSER BUSCH SALES OF)
TULSA, INC.)
)
Defendant.)

Case No. 98-CV-626-E(E)

FILED ON DOCKET
AUG 04 1999

JUDGMENT

In accord with the Order filed this date sustaining the Defendants' Motions for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Anheuser Busch Sales of Tulsa, Inc., and against the Plaintiff, Ruben Baiza. Plaintiff shall take nothing of his claim.

DATED, THIS 3^d DAY OF AUGUST, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

15

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

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

PRUDENTIAL SECURITIES)
INCORPORATED and PAUL)
ROMM SOULE,)

Plaintiffs,)

vs.)

Case No. 98-CV-210-E(J) ✓

PATSY PLAGGEMEYER, et al.,)

Defendants.)

FILED ON DOCKET
AUG 04 1999

ORDER

Now before the Court for determination is the ultimate issue of whether any or all of Defendants' claims are untimely for arbitration pursuant to the "six year period" of Rule 10304 of the NASD Code of Arbitration. The Court has previously decided that, pursuant to Cogswell v. Merrill Lunch, Pierce, Fenner & Smith, 78 F.3d 474, 481 (10th Cir. 1996) the date of purchase is not the sole event giving rise to this dispute. Therefore, having now considered the Joint Stipulation of Facts Filed September 14, 1998 and the Joint Stipulation of Facts filed December 17, 1998, as well as the arguments made at the hearing on February 18, 1999, the Court makes the following findings regarding the viability of Defendant's claims for Arbitration.

Findings of Fact and Conclusions of Law

1. Defendants' claims against Plaintiff are based upon the legal theories of negligence, breach of fiduciary duty, negligent misrepresentation and entitlement to punitive damages based on Montana law.

2. All claims, regardless of whether for negligence, breach of fiduciary duty, negligent

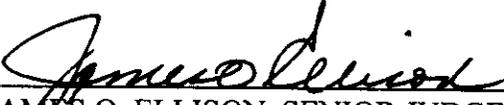
misrepresentation or fraud, based upon statements and conduct allegedly committed by Prudential or Soule prior to October 21, 1991 are barred by Rule 10304.

3. All claims, whether for negligence, breach of fiduciary duty, negligent misrepresentation or fraud, based upon the alleged lack of suitability or over-concentration of ITX in Defendants' accounts, are barred by Rule 10304. Any claims based upon the four purchases of ITX by Defendant Bill Crosland occurring after October 21, 1991 are excepted from this finding.

4. Relying on Cogswell, the Court has already rejected Plaintiff's attempts to apply the rule of Stewart v. Germany, 631 F.Supp. 236 (S.D. Miss. 1986) and Roberts v. Peat, Marwick, Mitchell & Co., 857 F.2d 646 (9th Cir. 1988) to this case. The Court specifically finds that the claim does not solely arise out of the decision to purchase the stock. Therefore all claims, whether for negligence, breach of fiduciary duty, negligent misrepresentation or fraud, based on statements and conduct allegedly committed, or advice given, by Prudential or Soule subsequent to October 21, 1991 are not barred by Rule 10304. Claims based upon Defendants' accounts being margined or based upon subsequent margin calls are subject to this finding.

Subject to the above findings, Plaintiff's request for Dismissal of Defendants' claims is denied. The remaining claims are eligible for arbitration in accord with and to the extent allowed by the NASD Code of Arbitration pursuant to the Uniform Submission Agreement executed by Defendants.

DATED this 3^d Day of August, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

AUG 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PEGGY HENDRICKS,)
)
Plaintiff,)
)
vs.)
)
BALLY TOTAL FITNESS CORPORATION, a)
corporation and BOB COE,)
)
Defendants.)

Case No. 99-C-166-E

ENTERED ON DOCKET
AUG 04 1999

ORDER

Now before the Court is the Motion to Dismiss (Docket # 8) of the Defendant Bob Coe.

Plaintiff, a former employee of Defendant Bally Total Fitness Corporation (Bally) claims that she was sexually harassed by Coe, the manager of the Bally club at which she was employed. Plaintiff brings claims against Bally for sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, and for negligent retention of Coe. She brings claims against Coe for assault and battery, retaliation in violation of Title VII and intentional infliction of emotional distress.

Coe brings this motion to dismiss, arguing that the retaliation claim is not properly brought against him individually and that the assault and battery claim is time-barred. Hendricks, in her response, concedes both arguments. Therefore the Motion to Dismiss (Docket #8) of the Defendant Bob Coe is granted. Plaintiff's claims for retaliation and assault and battery against Coe are dismissed.

IT IS SO ORDERED THIS 30th DAY OF JULY, 1999.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

MT

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

FILED

AUG 3 1999

SARAH WARREN,)
)
Plaintiff,)
)
vs.)
)
ARROW TRUCKING COMPANY,)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

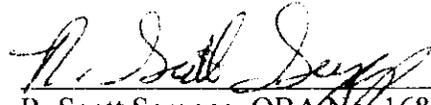
Case No. 98-CV-254-H

ENTERED ON DOCKET

DATE AUG 3 1999

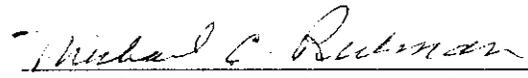
STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(ii), Plaintiff Sarah Warren and Defendant Arrow Trucking Company dismiss the above action with prejudice.



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Attorneys for Plaintiff Sarah Warren



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(918) 582-1211

Attorneys for Defendant Arrow Trucking Co.

CT

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

IN RE)
)
JAMES L. SMART and JOHANNA SMART,)
)
)
LOCAL AMERICA BANK,)
)
)
Appellant,)
)
vs.)
)
JAMES L. SMART and JOHANNA SMART,)
)
)
Appellees.)

ENTERED ON DOCKET
DATE AUG 03 1999

Case No. 99-CV-175-H(J) ✓

FILED

AUG 03 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

The Smarts obtained a home equity loan from Local America Bank. The Smarts sought discharge of the loan in a Chapter 7 bankruptcy proceeding. Local America Bank initiated an adversary proceeding requesting that the Bankruptcy Court except the loan from discharge. The Bankruptcy Court denied Local America Bank's motion for an exception. The Smarts requested attorneys fees, and the Bankruptcy Court awarded the Smarts their attorneys fees. Local America Bank ("LAB") asserts that because the adversary proceeding was substantially justified, the award of attorneys fees by the Bankruptcy Court was error. For the reasons discussed below, the United States Magistrate Judge recommends that the decision of the Bankruptcy Court be **AFFIRMED**.

I. BACKGROUND

LAB is the mortgage holder on property owned by the Smarts. When the Smarts initially mortgaged their property, the house was occupied by the Smarts and served as their principal place of residence. This property will hereafter be referred to as the "Prue" property, which is the designation given it by the parties.

On September 9, 1977, the Smarts filed a Chapter 7 bankruptcy proceeding. LAB filed a complaint requesting an exception from discharge under § 523(a)(2)(B) of the Bankruptcy Code for the Smarts' debt related to the mortgage of the Prue property. The Bankruptcy Court held a trial on July 9, 1998. By decision dated September 10, 1998, the Bankruptcy Court denied LAB's request for relief concluding that the debt was dischargeable. This decision was not appealed by LAB.

The Smarts filed a motion for their attorneys fees pursuant to § 523(d) in October. LAB objected to the motion and the issue of attorneys fees was tried December 4, 1998. The Bankruptcy Court granted the Smarts' motion for attorneys fees and awarded fees to the Smarts. LAB appealed the award of fees.

II. STANDARD OF REVIEW

Generally, the Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard, and conclusions of law are reviewed *de novo*. Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988). "When reviewing factual findings, an appellate court is not to weigh the evidence or reverse the finding because it would have decided the case differently. A trial court's findings may not

be reversed if its perception of the evidence is logical or reasonable in light of the record." In re Branding Iron Motel, Inc., 798 F.2d 396 (10th Cir. 1986) (citations omitted).

In the Equal Access to Justice Act ("EAJA") context, in determining whether an original complaint and its continued pursuit is "substantially justified" for the purpose of deciding whether attorney fees are to be awarded, the Supreme Court has applied an abuse of discretion standard. Pierce v. Underwood, 487 U.S. 552, 557-63 (1988).

The Court noted:

although as we acknowledged at the outset our resolution of this issue is not rigorously scientific, we are satisfied that the text of the statute permits, and sound judicial administration counsels, deferential review of a district court's decision regarding attorney's fees under the EAJA. In addition to furthering the goals we have described, it will implement our view that a "request for attorney's fees should not result in a second major litigation."

Id. at 563, citations omitted. In AT&T Universal Card Services Corp. v. Williams, 224 B.R. 523 (2nd Cir. BAP 1998), the court applied the "abuse of discretion" standard articulated by the Pierce court, in reviewing a Bankruptcy Court award of attorneys fees. The court noted that Bankruptcy Code § 523(d) was modeled after EAJA and that the text of the two statutes was similar. Id. at 527. The court additionally noted that the legislative intent was that § 523(d) be based upon EAJA. Id. at 528. The court concluded that "a bankruptcy court abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings. A court abuses its discretion if the reviewing court has a definite and firm conviction that the lower

court committed a clear error of judgment in the conclusion it reached based on all the appropriate factors." Id. at 529.

Similarly, the Tenth Circuit has noted that § 523(d) parallels EAJA. In Citizens National Bank v. Burns, the Tenth Circuit Court of Appeals observed,

The statute mirrors the language of the Equal Access to Justice Act (EAJA). . . .

Contrary to the view expressed by the district court, Congress used this language deliberately to indicate its intent that the EAJA standard be incorporated into the fee determination under section 523(d).

"The Committee, after due consideration, has concluded that amendment of this provision to incorporate the standard for award of attorney's fees contained in the Equal Access to Justice Act strikes the appropriate balance between protecting the debtor from unreasonable challenges to dischargeability of debts and not deterring creditors from making challenges when it is reasonable to do so. This standard provides that the court shall award attorney's fees to a prevailing debtor where the court finds that the creditor was not substantially justified in challenging the dischargeability of the debt, unless special circumstances would make such an award unjust."

Citizens Nat'l Bank, 894 F.2d at 363 (citations omitted). See also In re Hingson, 954 F.2d 428 (7th Cir. 1992) (applying abuse of discretion standard to review of attorneys fee award).

III. ANALYSIS

Section 523 of the Bankruptcy Code governs exceptions to discharge. LAB argued, before the Bankruptcy Court, that the amount due by the Smarts on the mortgage was not dischargeable pursuant to Section 523(a)(2)(B). That section provides that a debt for money is not dischargeable to the extent the debt was obtained

by the use of a statement in writing that: (1) was materially false, (2) regarding the debtor's or an insider's financial condition, (3) was relied upon by the creditor, and (4) that was made with the intent to deceive.

The Bankruptcy Court evaluated each of the alleged materially false statements and concluded that LAB had not sufficiently proved the required elements. The Court concluded that the debt was dischargeable. Section 523(d) provides for the award of attorneys fees in certain situations.

If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

The Smarts filed a motion for attorneys fees. LAB asserted that their complaint was "substantially justified" and that an award of fees would therefore be inappropriate. Both parties briefed the issues, and after an evidentiary hearing, the Bankruptcy Court concluded that LAB's position with regard to the dischargeability of the debt was not substantially justified and awarded fees to the Smarts. LAB appeals the decision of the Bankruptcy Court.

ELEMENTS OF § 523(B)

The underlying cause of action is § 523(b). A debt is not dischargeable if the debt was obtained by the use of: (1) a statement in writing, (2) respecting the Debtors financial condition; (3) that is materially false, (4) on which the creditor reasonably

relied, and was (5) made with intent to deceive. If the debtor establishes that the creditor unsuccessfully sued for discharge of the debt, the burden of proof shifts to the creditor to establish that its position was "substantially justified."

The Pierce Court recognized that the "substantial" in the phrase "substantially justified" has two almost contradictory meanings. Substantial can be "considerable" or it can mean justified in the main. The Court concluded that the meaning "most naturally conveyed by the phrase before us here is not 'justified to a high degree,' but rather 'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person. That is no different from the 'reasonable basis both in law and fact' formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed the same issue." Pierce 487 U.S. at 564.

The Bankruptcy Court analyzed whether or not LAB's position was "substantially justified," or whether it had a reasonable basis in both law and fact. The Bankruptcy Court concluded that LAB's position was not substantially justified. On appeal, this Court analyzes whether the Bankruptcy Court abused its discretion in concluding that LAB's position was not substantially justified.^{1/}

^{1/} For practical purposes, the abuse of discretion standard is the standard articulated by both parties as the appropriate standard of review. See Robinson, et al. v. City of Edmund, et. al., 160 F.3d 1275, 1280 (10th Cir. 1998) ("In light of the discretionary nature of the district court's decision, we review an attorney's fee award under 42 U.S.C. § 1988(b) for an abuse of discretion. This standard of review applies to both the court's decision to award fees in the first place and the court's determination of the amount of fees to be awarded. Under this standard, we may reverse a district court's underlying factual findings only if they are clearly erroneous, but we review the court's statutory interpretation or other legal conclusions de novo.") (citations omitted); Cartier v. Jackson et.al., 59 F.3d 1046, (10th Cir. 1995) ("In reviewing a court's determination for abuse of discretion, we will not disturb the determination absent a distinct showing it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error of judgment.") (citations omitted); Braudau v. State of Kansas, 168 F.3d 1179, 1181 (10th Cir. 1999) ("We will reverse the district court's factual findings only if we have 'a definite and firm conviction that the lower
(continued...)

Statement in Writing

LAB notes that the loan applications qualify as statements in writing. The Bankruptcy Court concluded that the loan applications were statements in writing. The Smarts do not challenge this conclusion. LAB easily meets the first requirement of § 523(a)(2)(B).

Materially False Statement, Reasonable Reliance, and Intent

The Smarts submitted two separate loan applications. The first loan application was dated February 27, 1996. The second loan application is dated March 21, 1996. The February 27 application requested a home equity loan for debt consolidation, home improvements, and personal use in the amount of \$38,000. The equity for the home was the Prue property. This application was initially denied because the Smarts' equity in the Prue property was insufficient to support a loan for \$38,000. The Bankruptcy Court concluded that the February 27 application was eventually approved for a loan in the amount of \$29,400.

The March 21 application is the second loan application. The Smarts completed this loan application after they had entered a contract to purchase the Sand Springs Property.^{2/} They requested a home equity loan in the amount of \$24,800.

^{1/} (...continued)

court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.")(citations omitted).

^{2/} The Sand Springs Property consists of a 16 acre tract of real estate in Sand Springs. The Smarts entered into a contract to purchase the property on March 7, 1996, for the sum of \$35,000. The Smarts closed on the Sand Springs Property on April 22, 1996, and became obligated to make monthly payments of \$430.41 for a period of ten years.

The Bankruptcy Court concluded, based on the testimony and evidence presented by the parties, that the February 27 loan application was the application that was processed and approved by LAB. LAB asserts that for the purpose of evaluating whether or not their claim is substantially justified the Court should analyze the misrepresentations made by the Smarts on both loan applications. In many instances, the misrepresentations overlap. The Court will consider all of the misrepresentations outlined by LAB.

The Sand Springs Property

LAB initially asserts that the applications were materially false because the Smarts' contract to purchase the Sands Springs Property should have been included in the "debts" section of the March 21 application. LAB also contends that pursuant to the February 27 application the Smarts had a duty to update the financial information provided to LAB and inform LAB of an additional \$35,000 obligation. The Smarts entered the contract to purchase the Sand Springs Property on March 7, 1996, but did not close on and incur the debt until April 22, 1996.

The Bankruptcy Court concluded that LAB failed to prove that "it relied upon any failure by the Smarts to disclose their purchase of the Sand Springs Property and their obligation to the Ringles in approving the Home Equity Loan." Memorandum Opinion of the Bankruptcy Court, filed September 10, 1998, at 11-12. The Bankruptcy Court additionally noted that LAB's witness, Ms. Necek, testified that if the Smarts' \$430.41 monthly obligation had been included in the calculation of the Smarts' monthly debt-to-income ratio, LAB would have approved the home equity loan. Id. at 12; see also

Testimony of Ms. Necek, Transcript of July 9, 1998 hearing, at 83-84. Therefore, assuming that the failure to disclose the loan with regard to the Sand Springs Property is materially false, the evidence from LAB's witnesses is that if the loan had been disclosed, LAB still would have made the loan. The Bankruptcy Court was correct in concluding that LAB did not rely on the failure of the Smarts' to disclose the loan. LAB does not specifically counter this argument.

LAB devotes a portion of its brief to the discussion of reliance. LAB notes that proof of actual reliance is difficult to obtain and that the court should therefore consider circumstantial evidence of reliance. This Court perceives a different problem presented by LAB's case. The trial before the Bankruptcy Court produced direct evidence that LAB did not rely on the misrepresentations made by the Smarts. To accept LAB's position, the court would have to additionally ignore all of the direct evidence presented that LAB did not rely on the misrepresentation.

Loan of \$4,500 from Roger Wheeler

The Smarts acknowledge that on April 22, 1996 the Smarts borrowed \$4,500 from Roger Wheeler, Mrs. Smart's employer, to pay the closing costs on the Sand Springs Property. The Smarts concede that they failed to disclose this obligation to LAB. The Smarts obtained the loan from LAB on April 25, 1996.

The Smarts testified that the \$4,500 was repaid to Roger Wheeler around May 1, 1996, out of the proceeds of the loan from LAB. LAB's witness, Ms. Necek, testified that debts which are repaid with proceeds from the loan are not included in the

loan calculation. Based on Ms. Necek's testimony, the Bankruptcy Court concluded that LAB did not rely upon the omission of the loan to Roger Wheeler.

LAB asserts on appeal that the Bankruptcy Court's analysis is flawed because the Bankruptcy Court failed to consider that by using \$4,500 to pay the debt to Roger Wheeler that amount of the loan would not be used to pay other debt. LAB asserts that this therefore did affect the income ratio and is a significant omission. LAB references no evidence in the record to support its assertion that by paying the Roger Wheeler debt the Smarts' did not pay other significant debt which LAB was relying upon the Smarts to pay, or that the loan ratio was materially affected. Testimony from LAB witnesses indicates that LAB had no specific requirements for the expenditure of the amounts of money loaned to the Smarts. The amounts could have been used for home improvement or debt consolidation. See Transcript at 106. The record contains no evidence that the \$4,500 amount would have placed the monthly debt to income ratio at an amount over that at which LAB would have made the loan. Ms. Necek testified that by including the \$430 per month obligation (for the Sand Springs Property) in the equation, the ratio was at 34%. Ms. Necek testified that if the monthly debt to income ratio was at or below 38% the loan would be made. See Transcript at 84. No witness testified as to what the ratio would have been if either the \$4,500 debt had been included, or if LAB had been informed that a portion of the loan was going to pay off the \$4,500 debt.^{3/} The Court concludes that the Bankruptcy

^{3/} Perhaps the closest is Ms. Necek's testimony in which she states that if the Sand Springs Property, the Roger Wheeler loan, and the assumed child support obligations were included in the ratio, the
(continued...)

Court's conclusion that LAB did not establish that it reasonably relied on the omission of the \$4,500 loan was not an abuse of discretion. The Bankruptcy Court additionally concluded that LAB had not established that the Smarts' intended to deceive LAB by failing to disclose the debt to Wheeler.

Number of Dependents

LAB asserts that the Smarts failed to disclose that Mr. Smart had three children from a prior marriage. At the Bankruptcy Court evidentiary hearing, LAB's attorney informed the Bankruptcy Court that LAB had been "unaware of them until court today. We did, during one of the breaks, calculate, based on the guidelines in the state statutes, what three children would be at his stated income on the loan, attributing a minimum wage to his ex-wife." See Transcript at 115. LAB's attorney asked the Bankruptcy Court to "assume that there's a duty to support these children." Transcript at 110.

The initial problem with LAB's position is that LAB offered no information about any child support obligations at the evidentiary hearing. Mr. Smart testified at the hearing. LAB could easily have asked Mr. Smart if he had child support obligations. LAB did not.^{4/} LAB asked only whether he had children by a previous marriage and

^{3/} (...continued)

loan would not have been made. The Court located no testimony which separately addressed the Roger Wheeler loan, other than Ms. Necek testifying that if it was paid off by the LAB loan it would not have been considered in the debt to income ratio.

^{4/} In addition, as pointed out by the Smarts, LAB did not attend the "meeting of creditors." If LAB had attended, LAB could have inquired as to whether the Smarts had any additional dependents and whether the Smarts paid child support.

whether or not he spent any time with the children. He answered "yes" that he had three daughters, and that he was "allowed visitation." See Transcript at 22.

Ms. Necek testified for LAB that if child support obligations were considered for three children, the monthly debt to income ratio would have been exceeded and the loan would not have been made. See Transcript at 84. Ms. Necek attributed an \$800 per month child support obligation to the Smarts. See Transcript at 85.

However, nothing in the record indicates any obligation to pay any amount of child support. The Bankruptcy Court noted that the loan application asks for "number of dependents" and "ages of dependents." The Bankruptcy Court observed that no evidence indicated that the three daughters from Mr. Smart's prior marriage were "dependents" or whether Mr. Smart had any obligation to pay child support. The Bankruptcy Court noted that the 1995, 1996, and 1997 income tax returns indicated only that the Smarts had one boy, which the Court noted was probably Mrs. Smart's son from a prior marriage. The Bankruptcy Court concluded that LAB failed to establish that the failure by the Smarts to disclose the existence of the three daughters was a false statement, and that LAB failed to prove that the Smarts made the omission with the intent to deceive. The record supports the Bankruptcy Court's conclusion.

Ownership of 16 Acres

LAB notes that the Smarts represented that Ms. Smart and her mother owned 16 acres of real property. LAB asserts that Ms. Smart and her mother actually are beneficiaries of a trust which owns an 80 acre tract in Pawnee County, Oklahoma and that their share of the trust would be 16 acres.

Ms. Necek, LAB's witness testified that an asset section of a loan application is given some weight but that it is not verified, and that the assets are usually used as a "compensating factor" in processing the loan application. The Bankruptcy Court concluded that LAB failed to prove that the alleged misrepresentation was the type of misrepresentation which would affect the decision to grant the loan, that LAB did not present evidence that it relied on the Smarts' representation (either specifically or generally), or that the misrepresentation was made with the intent to deceive. The Bankruptcy Court's conclusion is not an abuse of discretion.

Intent to Occupy

LAB asserts, generally, that the Smarts misrepresented the fact that the Smarts intended to move off of the property and live elsewhere. The Bankruptcy Court correctly observed that the loan application form requests no information about the intent of the applicant to continue to reside on property that is proposed as collateral for a home equity loan. The Bankruptcy Court therefore concluded that no false statement had been made. In addition, the Bankruptcy Court concluded that LAB did not establish that it relied on the Smarts' intent to continue to reside and did not prove that the Smarts had an intent to deceive LAB.

Overvaluation of the Prue Property

LAB asserts that the Smarts initial valuation of the Prue property was \$55,000, and that a subsequent appraisal performed at the request of LAB valued the property at \$43,000. As observed by the Bankruptcy Court, LAB did not rely on the \$55,000 estimated value of the Prue property, but instead relied on their appraisal. LAB

presented no evidence that it relied on the \$55,000 valuation and no evidence that the Smarts intended to deceive LAB.

Omitted Debt

The Smarts omitted approximately five debts from their loan application which LAB discovered from credit reports. LAB admits that the five omitted debts were discovered prior to closing, and were included in LAB's calculations of the Smarts' monthly debt-to-income ratio. In addition, the Bankruptcy Court noted that Ms. Smart disclosed the debts in a March 8, 1996 letter to LAB. The Bankruptcy Court concluded that LAB had not proved reliance and had not established that the Smarts intended to deceive LAB.

BIG PICTURE ANALYSIS

LAB asserts that it had a reasonable basis in law and fact to assert that the Smart's provided a materially false financial picture. LAB urges that a "big picture" approach should be used by the Court, and asserts that the Bankruptcy Court erred by not using the "big picture" approach. LAB's argument is that the numerous omissions by the Smarts supports LAB's contention that the loan application was materially false.

However, as this Court interprets the Bankruptcy Court's decision, and as noted in LAB's own brief, LAB must meet several other elements to have "substantial justification" under § 523. In numerous cases, the Bankruptcy Court notes the false representation but concludes that LAB did not reasonably rely on the omission or did not prove that the Smarts intended to deceive LAB. The Bankruptcy Court rarely

discusses the "materiality" of the omissions.^{5/} As outlined by LAB, however, this is a separate element of a § 523(a)(2)(B) cause of action.

LAB urges the Court to consider the broad picture and conclude that LAB had substantial justification to challenge the discharge of the Smarts' debt. LAB is correct that the initial list of seven omissions or misrepresentations appears, at a glance, to be impressive. However, LAB's asserted misrepresentations of "number of dependents,"^{6/} "intent to occupy,"^{7/} and "overvaluation of Prue property,"^{8/} are, as discussed in this opinion, questionable as "misrepresentations." Of the remaining misrepresentations (ownership of 16 acres, land sale contract, Wheeler debt, omitted debt), testimony indicated that LAB did not rely on the failure to disclose the debt, or in the case of the "omitted debt," discovered the debt prior to loan approval and included the undisclosed debts in their calculations. Therefore, as this Court interprets the "big picture," although the Smarts' made some misrepresentations (or omitted some information), none of the misrepresentations (or omissions) were relied upon by LAB. Using LAB's

^{5/} The Bankruptcy Court does conclude that the number of dependents, and the intent to occupy the premises were not materially false statements. The Bankruptcy Court additionally concludes, however, that with regard to the intent to occupy the premises, LAB did not establish the intent of the Smarts and did not show reliance. With regard to the number of dependents, the Bankruptcy Court held that LAB failed to establish the intent of the Smarts.

^{6/} LAB never establishes that the three children are dependents or that any amounts are owed for child support, or that Mr. Smart pays any amount for child support.

^{7/} LAB does not establish that the Smarts knew or should have known that they had to inform LAB of their intent with regard to occupation of the property.

^{8/} The Smarts' explanation of their valuation of the property (purchase price, prior valuation of worth, and improvements) is reasonable. In addition, LAB performed their own valuation of the Prue property and did not rely on the Smarts' estimated value.

— "language" from their argument, the Court cannot conclude that a "substantially untruthful picture was painted." See LAB's Brief, [Doc. No. 4-1] at 12.

Furthermore, the "big picture" concept urged by LAB is articulated by the courts which LAB cites as "a statement is materially false if it 'paints a substantially untruthful picture of a financial condition by misrepresenting information of the type which would normally affect the decision to grant credit.'" See In re Furio, 77 F.3d 622 at 625 (2d Cir. 1996); In re Norris, 70 F.3d 27 at 30, n.10 (5th Cir. 1995). This "big picture" which LAB articulates considers the falsity of the statement in conjunction with whether or not that statement would affect the right to lend credit. As already discussed by this Court, evidence indicates that in many instances the alleged false statements would not have affected the decision to lend credit.

RELIANCE

LAB notes that the Bankruptcy Court found that there was no actual reliance with regard to numerous alleged misrepresentations. LAB asserts that proof of reliance in fact is sufficient to prove actual reliance. The case cited by LAB discusses circumstantial proof of reliance and sufficient proof of reliance consisting of evidence that the false statement was a substantial factor in causing the extension of credit. See LAB's Brief [Doc. No. 4-1] at 14. LAB asserts that, generally, the Smarts completed a loan application, that LAB relied on the loan application in extending credit, and that this is a reasonable basis for the assertion of actual reliance.

LAB discusses reliance in quite general terms. As specifically pointed out by the Bankruptcy Court, in numerous circumstances, LAB's own witness testified that LAB did not rely on the alleged misrepresentations in making the loan.^{9/} The Court has a difficult time accepting LAB's premise that their reliance on the loan application should be accepted as proof of actual reliance over the direct testimony of LAB witnesses, in numerous instances, that LAB did not actually rely on the alleged misrepresentation.

In addition, in numerous instances the Bankruptcy Court held that LAB had additionally failed to establish an intent to deceive or that the statement was a misrepresentation. The Court has separately considered each of the arguments by LAB and is persuaded that the Bankruptcy Court did not err in concluding that LAB failed to prove either reliance, intent, or a misstatement of fact with regard to each of the alleged misrepresentations.

INTENT

LAB asserts that the Bankruptcy Court's conclusion that LAB did not establish that the Smarts had an intent to deceive LAB was reached after a microscopic examination of the alleged misrepresentations. LAB again urges a "big picture" approach.

^{9/} Ms. Necek testified that the five omitted debts were discovered prior to the close of the loan and therefore not relied upon by LAB. Ms. Necek testified that if the Sand Springs Property had been disclosed the debt to income ratio would not have been exceeded and the loan would have still been made. Ms. Necek confirmed that LAB did not rely on the Smarts' valuation of the Prue property, but requested an appraisal. Ms. Necek testified that the \$4,500 loan to Roger Wheeler would not have been considered because the loan was repaid with proceeds from the LAB loan. Ms. Necek testified that the alleged misrepresentation with regard to the 16 acres of property would have been used as a "compensating factor."

Initially, even if the Court were to assume that LAB had established that the Smarts had intended to deceive LAB, LAB has still not met the required elements of § 523(a)(2)(B). With regard to each of the alleged misrepresentations, the Bankruptcy Court concluded that either no misrepresentation was made or that LAB did not rely on the misrepresentation. Therefore, even if the Court were to assume that the Smarts intended to deceive LAB, LAB still did not establish the remaining elements of § 523(a)(2)(B).

LAB proceeds to interpret the facts to support their conclusion that the Smarts intended to move from the property prior to purchasing the home equity loan and purchase the Sand Springs Property. However, as noted, nothing required the Smarts to disclose whether or not they intended to remain on the property or use the property as a homestead, and the loan would have been approved had the purchase of the Sand Springs Property been disclosed.

LAB contends that the land purchase did "four important things." First, LAB states that it concealed the new \$430.00 monthly payment. However, this payment, according to testimony by LAB witnesses, would not have prevented the loan. Second, LAB asserts that the Smarts concealed their intent to incur additional debt prior to moving. LAB does not explain the "importance" of this assertion. The Smarts testified that they intended to prepare the Prue property for sale and actually had a buyer who had agreed to purchase the property. However, prior to the close of the sale, according to the Smarts, Mr. Smart's father vandalized the septic system on the Prue property rendering it uninhabitable. Consequently the proposed sale did not occur. If the Prue

property had sold, as the Smarts intended, the LAB loan would have been paid off with the proceeds of the sale. LAB states the third and fourth "important things" are that concealing the land purchase agreement kept the debt to income ratio down and kept LAB believing that they were making a home equity loan. The testimony indicated that LAB never asked if the Smarts would be residing on the property, never requested notification if the Smarts intended to move, and never required that the Smarts use the proceeds of the loan to improve the Prue property.

LAB additionally lists several facts which LAB suggests supports its position that the Smarts completed the loan applications with the intent to deceive LAB. The Bankruptcy Court reviewed all of the factors which LAB has presented to this Court. Most of those factors have been previously discussed in this opinion. LAB is correct that the loan application contained several misrepresentations. However, based on either a "big picture" review or a microscopic analysis, this Court concludes that the Bankruptcy Court did not abuse its discretion.

SETTLEMENT OFFER

LAB observes that on the eve of trial the Smarts offered \$5,000 to settle the dispute with LAB concerning dischargeability. LAB asserts that the Bankruptcy Court erred in holding that the settlement offer was not relevant to a determination of whether LAB's complaint was substantially justified.

The transcript of the attorney fees hearing indicates that the Court discussed this issue with counsel. The Bankruptcy Court initially questioned LAB's counsel, noting

that even if the \$5,000 settlement offer indicated whether or not the debtors believed that substantial justification existed to support the creditors claim, that the test was not what the debtors believed with regard to the creditors claim, but whether the creditors claim actually was substantially justified. The Bankruptcy Court makes a good point.

The settlement offer could be admitted as evidence indicating that the debtors believed that LAB's complaint was "substantially justified." It does not establish that the complaint was, in fact, substantially justified. LAB did not appeal the decision of the Bankruptcy Court that the debt was dischargeable. Should that be interpreted as indicating that LAB believed that its complaint was no longer substantially justified?^{10/} LAB never addresses the concerns identified by the Bankruptcy Court regarding the relevancy of the settlement offer. This Court concludes that the Bankruptcy Court did not err in concluding that the settlement offer was of limited value. Certainly the determination of whether or not a complaint is substantially justified should not be dependent on the subjective belief of the debtor.

BURDEN OF PROOF

LAB asserts that the burden of proof under § 523(d) is different from the burden of proof under § 523(a)(2)(B). LAB notes that the burden of proof under § 523(d) is "reasonable basis in law and fact." LAB is correct. However, the Bankruptcy Court clearly recognized this difference. The Bankruptcy Court pointed out that at trial LAB

^{10/} The Court does not seriously consider this prospect, but merely offers it to support the Court's concern as to the relevance of the settlement offer and any conclusions which should be drawn from it.

had failed to establish the elements of its § 523 (a)(2)(B) claim by a preponderance of the evidence, and that the evidence presented at trial was also "insufficient to establish that the amended complaint has a reasonable basis in fact."

LAB suggests that the Bankruptcy Court "misses the mark" because the Court noted that although LAB had a second chance to present evidence that its amended complaint was substantially justified it called no witnesses and offered no evidence. LAB states that it is not required to prove its case with new evidence, but that the Bankruptcy Court should have applied the lower burden in analyzing whether or not LAB was "substantially justified."

The Bankruptcy Court clearly articulated the correct standard. Nothing suggests that the Bankruptcy Court did not apply the correct standard in reviewing whether or not LAB's complaint was substantially justified.

SPECIAL CIRCUMSTANCES

Pursuant to the statute, a court can decide that fees will not be awarded if "special circumstances [exist that] would make the award unjust." 11 U.S.C. § 523(d). LAB argues that in this case such special circumstances exist.

LAB asserts that the disclosure form submitted by the debtors attorneys indicates that the debtors are not liable for any additional attorneys fees. At the evidentiary hearing, the Smarts' attorney represented to the Court that the Smarts were paying for the attorney fees incurred in the adversary proceeding and that he would file an amended disclosure statement.

LAB's argument appears to be a bit different from that which LAB argued at the Bankruptcy Court. LAB seems to suggest that even if the Smarts are paying for the attorney fees, because the Smarts are not liable, due to the disclosure form, forcing LAB to compensate the Smarts for something they are paying but are not liable for would be unjust.

LAB's representation initially depends on their assertion that "from the form" it is clear that the debtors are not liable for any additional attorneys fees. The Court is not convinced of this initial premise. LAB cites nothing to support its position. Further, the Bankruptcy Court knew of the initial disclosure form, and yet was satisfied with the debtor's attorney representation that the form would be amended and that the Smarts were liable and were paying the attorney fees. In addition, LAB suggests that "it is doubtful that Riggs Abney [debtor's attorneys] would have prevailed on an action for attorneys fees and costs against the debtors." LAB presents nothing to support this position.^{11/}

^{11/} LAB's position would require that the debtors first challenge Riggs Abney regarding the payment of the attorneys fees. Debtors may have been forced to hire additional attorneys to represent the position that due to the initially filed disclosure form no more attorneys fees were owed to the attorneys hired to handle the bankruptcy proceeding. The provision of the statute which permits the Court to decline to award attorneys fees in situations that are "unjust" certainly does not contemplate requiring a debtor to incur additional fees to establish that the debtor does not actually owe the fees.

RECOMMENDATION

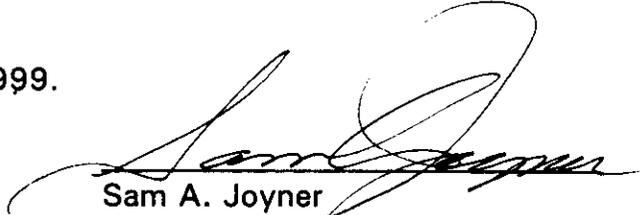
The Bankruptcy Court initially concluded that although the loan applications did contain some false statements or omissions, the statements or omissions were not relied upon by LAB and/or LAB did not prove that the statements or omissions were made with the intent to deceive. The Bankruptcy Court additionally concluded that LAB was not substantially justified in filing and pursuing its §352(a)(2)(B) claim. The record indicates that the Bankruptcy Court did not abuse its discretion in concluding that attorney fees should be awarded to the debtor under § 523(d). The Bankruptcy Court's findings of fact are not clearly erroneous and the conclusions of law are correct. The Magistrate Judge recommends that the District Court **AFFIRM** the decision of the Bankruptcy Court.

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 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 3rd day of August 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 3 Day of August, 1999.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 3 - 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

CHRISTOPHER C. WREN, et al.,)

Defendants.)

CIVIL ACTION NO. 95-C-0095-BU

ORDER

ENTERED ON DOCKET
AUG 3 1999
DATE _____

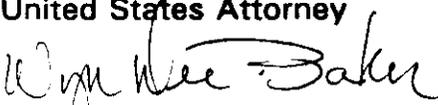
Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that Defendant, Dana Lynne Wren aka Dana L. Sterling is dismissed from this action.

Dated this 3rd day of August, 1999.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney


WYN DEE BAKER, OBA #465
Assistant United States Attorney
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 3 - 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARCUS R. MILLER,)
)
Petitioner,)
)
vs.)
)
KEN KLINGLER, Warden,)
)
Respondent.)

Case No. 97-CV-287-BU ✓

ENTERED ON DOCKET
DATE AUG 3 1999

JUDGMENT

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

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

SO ORDERED THIS 3rd day of August, 1999.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

MT

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

FILED

AUG 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DOLLAR RENT A CAR SYSTEMS, INC.)
an Oklahoma corporation,)

Plaintiff,)

vs.)

R.A.H. CORPORATION, a California)
corporation, ROBERT HEYMANN, an)
individual, and RALPH HEYMANN,)
an individual,)

Defendants.)

Case No. 98CV0748Bu(J)

ENTERED ON DOCKET

DATE AUG 03 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Dollar Rent A Car Systems, Inc., and Defendants, R.A.H. Corporation, Robert Heymann, and Ralph Heymann, by counsel, pursuant to Federal Rule of Civil Procedure 41, stipulate to dismiss the above-captioned action with prejudice, with each party to bear its own costs and attorneys' fees.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS
R. A. H. CORPORATION,
ROBERT HEYMANN, AND RALPH
HEYMANN

22

CLJ

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 02 1999

BILLIE J. STAPP,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-936-M

ENTERED ON DOCKET

DATE AUG 2 1999

ORDER

This matter comes on before the court upon the stipulation of all parties and the court, being fully advised in the premises, orders, adjudges and decrees that all claims asserted herein by plaintiff, Billie J. Stapp, against the United States of America and the Claremore Indian Hospital are hereby dismissed with prejudice.

Dated this 2nd day of AUG. 1999.

Frank H. McCarthy
FRANK H. McCARTHY
United States Magistrate Judge

APPROVED AS TO CONTENT AND FORM:

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Attorney for Plaintiff

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

FILED

JUL 30 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-504-K(J)

ENTERED ON DOCKET

DATE AUG 02 1999

REPORT AND RECOMMENDATION: ATTORNEYS FEES

Plaintiff filed an Application for Attorney Fees pursuant to the Equal Access to Justice Act ("EAJA") on June 28, 1999. [Doc. No. 11-1]. Plaintiff requests \$2,405.13 in fees. On July 13, 1999, Defendant filed a response to Plaintiff's Application. Defendant objected to attorneys fees totaling \$1,038.63, and requested that Plaintiff be awarded only \$1,367.13. This Court directed Plaintiff to file a response to the objections noted by Defendant. Plaintiff filed a "response" on 29, 1999. Plaintiff's complete response was that "Plaintiff, by and through counsel, denies in summary all allegations contained in Defendant's response and demand [sic] that the court grant amount stated."^{1/} [Doc. No. 14-1].

^{1/} Plaintiff's response is of very limited assistance to the Court. Defendant has numerous specific objections to Plaintiff's fee request, and Plaintiff has not addressed any of Defendant's objections. The Court addresses and analyzes each of Defendant's objections. In the future, the Court would urge Plaintiff's counsel to file a brief which addresses the arguments of opposing counsel.

EAJA requires the United States to pay attorney fees and costs to a "prevailing party" unless the position of the United States was substantially justified, or special circumstances make an award unjust. 28 U.S.C. § 2412(d). The United States has the burden of proof to establish that its position was substantially justified. Kemp v. Bowen, 822 F.2d 966, 967 (10th Cir. 1987). Defendant does not challenge Plaintiff's fee award on the basis that Defendant's position was substantially justified. Rather Defendant challenges specifics of Plaintiff's application and asserts that numerous items for which Plaintiff requests compensation are not properly compensable in an attorneys fee award.

Personally Filing Pleadings

Defendant notes that Plaintiff requests \$218.45 for compensation for personally filing documents at the courthouse. Defendant asserts that travel time and expenses are not compensable under EAJA. Plaintiff requests compensation for filing pleadings (1.45 hours or \$181.25) and a trip to Tulsa to file pleadings (\$37.20). As noted, Plaintiff does not address Defendant's argument.

In the case cited by Defendant, Weakley v. Bowen, 803 F.2d 575, 579 (10th Cir. 1986), the Tenth Circuit Court of Appeals noted that "costs for travel expenses and postage fees are not authorized." The Court concludes that the requested fees should be reduced by \$218.45.

"Secretarial Tasks"

Defendant asserts that tasks which do not require the expertise of an attorney, or which are considered general office duties should be performed by "support staff." Such tasks are, argues Defendant, considered "secretarial" in nature and are not compensable pursuant to EAJA. Defendant notes that work which is not compensable as attorneys fees includes: photocopying, mailing, and filing documents, and reviewing mail receipts and communicating with court offices. Defendant objects to a total of six hours, or \$750 of Plaintiff's attorney fee requests.

Plaintiff provides no additional explanation for the tasks performed. Some of the tasks are clearly "secretarial" in nature. Costs for work performed by a secretary are generally considered to be included in the billable hourly rate of the attorney. The Court concludes that Plaintiff should therefore not be compensated for work which was clearly secretarial.

Plaintiff requests reimbursement for photocopying pleadings to be filed, for mailing copies of pleadings, for reviewing green cards, for mailing proof of service and scheduling orders. The Court concludes that these expenses are clearly secretarial in nature and not compensable under EAJA.

Plaintiff additionally requests compensations for checking on the status of Plaintiff's pending case. Plaintiff apparently made six separate phone calls to the Court with regard to the status of Plaintiff's case. Plaintiff's case was not at issue until the end of December. Plaintiff's first telephone call was made in early February. Plaintiff requests reimbursement for .25 hours for each of the six telephone calls, for

a total of \$187.50 for 1.5 hours of work. Defendant's objects that the telephone calls were secretarial in nature, and certainly a secretary could have initiated the telephone calls. In addition, the Court believes that six telephone calls to check on the status of a case which was at issue and pending for between one and three months is excessive. The Court concludes that at least four of the phone calls, if necessary, could have been made by a secretary or delayed. Consequently, the Court allows .50 hours for telephone calls by the attorney.

Defendant additionally objects to two telephone calls to the District Court Clerk inquiring as to the status of the entry of the Judgment. The Court concludes that the two calls are not excessive and that such calls are a permissible expenditure of attorney time for which the Court allows .5 hours.

The Court therefore concludes that Plaintiff's attorney fee request should be decreased by a total of 5 hours, or \$625.

Duplicative or Excessive Tasks

Defendant objects to .75 hours which Plaintiff's attorney spent signing three documents and reviewing a consent to proceed and the scheduling order. Defendant additionally notes that Plaintiff's record keeping, which apparently records attorney time in increments of .25 hours serves, to inflate the actual attorney time.

Although Defendant's point that the time may be excessive is well taken, Defendant requests that the Court cut all of the attorney time. Certainly Plaintiff's

attorney deserves compensation for the review of the scheduling order and signing^{2/} documents. The Court concludes that the time may be reduced, but that Plaintiff should be compensated for .5 hours. Plaintiff's time is therefore reduced by .25 hours, or \$31.25.

Postage Costs

Plaintiff requests compensation for costs for postage totaling \$23.31. Defendant objects noting that postal fees are not compensable. See Weakley, 803 F.2d at 580. The Court concludes that \$23.31 should be reduced from Plaintiff's fee request.

RECOMMENDATION

Plaintiff's total attorneys fee request is for \$2,405.76, which includes a request for \$2,306.25 in attorneys fees and \$99.51 in costs. Defendant requests that Plaintiff's fees and costs be reduced by \$1,367.13. Plaintiff does not specifically respond to the objections raised by Defendant.

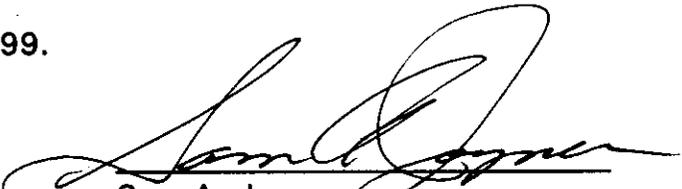
The United States Magistrate Judge recommends that the District Court grant Plaintiff's motion for attorneys fees and costs, reducing Plaintiff's total fees and expenses request by \$898.01. Plaintiff should therefore be awarded \$1,507.75. This would compensate Plaintiff for \$1,431.55 in attorneys fees, and \$76.20 in costs.

^{2/} Plaintiff's time record does not indicate that he "reviewed" and signed the documents, but only that he signed the documents.

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 his 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 30th 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 2 Day of August, 1999.

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

FILED

JUL 30 1999

DENISE M. PENN,)
SSN: 448-72-7261,)

Plaintiff,)

v.)

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

Defendant.)

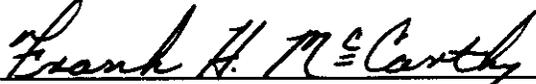
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 98-CV-645-M

ENTERED ON DOCKET
DATE AUG 2 1999

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 30th 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 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DENISE M. PENN,
448-72-7261

Plaintiff,

vs.

Case No. 98-CV-645-M ✓

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE AUG 2 1999

ORDER

Plaintiff, Denise M. Penn, 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 January 30, 1996, applications for disability benefits were denied. The denials were affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held September 27, 1996. By decision dated October 30, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on June 19, 1998. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born June 5, 1961, and was 35 years old at the time of the hearing. She has a high school education and formerly worked in a cafeteria as a cook and bussing tables. She claims to have been unable to work since August 15, 1987, as a result of severe headaches, back and neck pain. The ALJ determined that Plaintiff was not under a disability as defined in the Social Security Act as she does not have any impairments which in combination have more than a minimal effect on her ability to perform basic work activities. The case was thus decided at step two 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 failed to properly develop the record by failing to obtain a consultative evaluation and that the ALJ failed to follow Social Security Ruling 96-3p concerning the step-two analysis.

The medical record begins with an emergency room record dated June 22, 1989, from Saint Francis Hospital. Plaintiff was treated for a cyst in her perineal area.

[R. 93]. Progress notes from OU Adult Medicine Clinic reflect that Plaintiff was seen on March 21, 1995, for complaints of headache. The examining physician noted she gave a history of having had headaches for 10 years, which she felt were migraines which were relieved in a dark quiet room and by pain medication. She requested Tylenol #3. The doctor diagnosed tension headache and prescribed 800 mg of ibuprofen twice daily. If there was no improvement, then Midrin was to be tried. Thereafter, if Plaintiff's headache was not resolved, she was to be referred to the headache clinic. [R. 98]. The record contains no indication that Plaintiff returned for Midrin or for referral to the headache clinic. Boxes were checked on the March 21, examination form signifying that physical examination of the following were within normal limits: eye; ENT; neck; heart; chest-lungs; abdomen; neurologic; back; periph. circ.; upper extremity; and lower extremity. *Id.*

There is no record of treatment for any ailment until February 8, 1996, when Plaintiff presented to the clinic complaining of neck and low back pain following a car accident which had taken place three weeks earlier. The doctor noted Plaintiff related no radiation of pain and no limitation of motion. On physical exam, pain was elicited on full neck flexion and her paraspinal muscles were tender. The doctor concluded Plaintiff had muscular strain and prescribed a muscle relaxant, Norflex, and heating pad. [R. 97]. There are no other treatment records.

The Tenth Circuit has ruled that "the ALJ should order a consultative exam when evidence in the record establishes the reasonable possibility of the existence of a disability and the result of the consultative exam could reasonably be expected to be

of material assistance in resolving the issue of disability." *Hawkins v. Chater*, 113 F.3d 1162, 1169 (10th Cir. 1997). The court finds that the medical record fails to establish the reasonable possibility of the existence of a disability such that the ALJ was required to order a consultative examination. Further, the record contains no evidence to suggest that a consultative examination would have produced material information. There is no direct conflict in the medical evidence requiring resolution; the medical evidence in the record is not inconclusive; and additional tests are not required to explain a diagnosis already contained in the record. *See Id. at* 1166.

Plaintiff argues that because she is impecunious and has applied for Supplemental Security Income benefits under Title XVI, the Commissioner has a higher duty to order a consultative examination than the standard expressed in *Hawkins*. In support of this argument, Plaintiff cites a footnote from a Third Circuit case, *Ferguson v. Schweiker*, 765 F.2d 31 n.4 (3rd Cir. 1985). In *Ferguson*, the court noted that the statutory language in Title II which places the burden of proof as to the medical basis of finding disability on the claimant is not present in Title XVI. The absence of that provision is explained by the legislative history which makes clear that the Title XVI-Supplemental Security Income benefits is a needs-based program. Taking the legislative history into account, the *Ferguson* Court stated that "in an SSI case, if there is insufficient medical documentation or if the medical documentation is unclear, it is incumbent upon the Secretary to secure any additional evidence needed to make a sound determination." *Id.* The ALJ's duty to develop the record in an SSI case as expressed by the Third Circuit in *Ferguson* does not differ from the duty imposed by

the Tenth Circuit for all Social Security disability cases. See *Hawkins*, 113 F.3d at 1166. Consequently, there is no reason to apply a different standard to this case.

Social Security Ruling 96-3p addresses consideration of allegations of pain and other symptoms in making a step two severity determination. The ruling instructs that symptoms such as pain and fatigue will not be found to affect an individual's ability to do basic work activities unless the individual first establishes that he or she has a medically determinable physical or mental impairment and that the impairment could reasonably be expected to produce the alleged symptoms. In other words, Plaintiff must make a "threshold showing that [her] medically determinable impairment or combination of impairments significantly limits [her] ability to do basic work related activities. . . ." *William v. Bowen*, 844 F.2d 748, 751 (10th Cir. 1988); see also 20 C.F.R. §§ 404.1520(c), 416.920(c).

It is the plaintiff's burden to prove disability.² *Hawkins v. Chater*, 113 F.3d at 1164. In order to demonstrate at step two that an impairment is severe, plaintiff must show that it "significantly limits [her] physical or mental ability to do basic work activities." 20 C.F.R. § 416.920(c). The step two severity determination is based solely on medical factors affecting a claimants ability to perform basic work activities. Although the showing required at step two has been characterized as "de minimis," the mere presence of a condition or ailment documented in the record is not sufficient

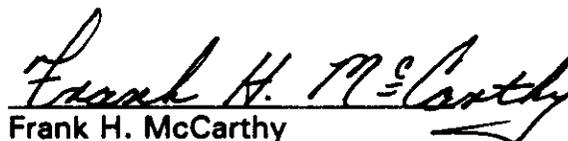
² The Tenth Circuit has not imposed a different burden of proof for Title XVI (SSI) claimants. In *Hawkins*, the court referred to *Hill v. Sullivan*, 924 F.2d 972, 974 (10th Cir. 1991) for support of its statement that "[i]t is beyond dispute that the burden to prove disability in a social security case is on the claimant." *Hawkins*, 113 F.3d at 1164. *Hill* was an appeal from denial of Title XVI benefits.

to prove that the plaintiff is significantly limited in the ability to do basic work activities. See *Hinkle v. Apfel*; 132 F.3d 1349, 1352 (10th Cir. 1997); *Hawkins*, 113 F.3d at 1169.

The ALJ determined that the record "does not suggest serious ongoing debilitating medical conditions precluding the performance of basic work activities Nor do these medical documents reflect any significant adverse [sic] side effects from use of medication." [R. 15]. He noted that "the general tenor of these treatment notes reviewed above does not suggest any medical condition producing symptoms of a nature so urgent, persistent, or intense as to constitute limitations on the claimant's ability to perform work-like activity, certainly for any period lasting, or expected to last, 12 continuous months." *Id.* The record contains substantial evidence supporting the ALJ's conclusions.

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

SO ORDERED this 30th Day of July, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

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

AUG 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

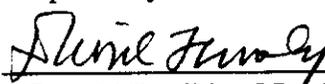
Case No. 98-CV-0439H(M) ✓

ENTERED ON DOCKET
DATE AUG 2 1999

STIPULATION OF DISMISSAL OF OPT-IN PLAINTIFF SUSAN K. IVES

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

Respectfully submitted,



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

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-AND-



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Attorneys for the Defendant,
HEALTHSOUTH CORPORATION

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BILLIE J. STAPP,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

ENTERED ON DOCKET
DATE AUG 2 1999

No. 98-CV-936-M ✓

FILED

AUG 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

The plaintiff, Billie J. Stapp, by her attorneys of record, Clark O. Brewster and Jennifer L. De Angelis, and the defendant United States of America, *ex rel*, Claremore Indian Hospital, through Wyn Dee Baker, Assistant United States Attorney for the Northern District of Oklahoma, having fully settled all claims asserted by the plaintiff in this litigation, hereby stipulate to, and request entry by the Court of, the order submitted herewith dismissing all such claims with prejudice.

Dated this 2nd day of August 1999.

Wyn Dee Baker
WYN DEE BAKER, OBA #465
Assistant United States Attorney
Attorney for Defendant

Jennifer L. DeAngelis
CLARK O. BREWSTER, OBA #1114
JENNIFER L. De ANGELIS, OBA #12416
Attorney for Plaintiff

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

F I L E D

AUG 2 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 AUG 2 1999

STIPULATION OF DISMISSAL OF OPT-IN PLAINTIFF SHANE CARON

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

Respectfully submitted,

Shirley J. Herrold

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-and-

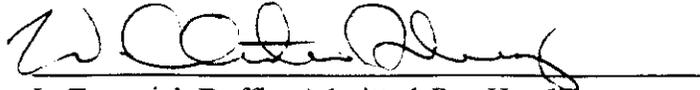
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KATHLEEN DONICA and those other present and former employees of HealthSouth Corporation who are similarly situated

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Attorneys for the Defendant,
HEALTHSOUTH CORPORATION

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

CHARLES WILLIAM RUSHING)
SSN: 440-56-6891,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner,)
Social Security Administration,¹)
)
Defendant.)

JUL 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-871-EA

ENTERED ON DOCKET
AUG 02 1999
DATE _____

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 30th day of July 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

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

CHARLES WILLIAM RUSHING)
SSN: 440-56-6891,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner,)
Social Security Administration,¹)
)
Defendant.)

JUL 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-871-EA

ENTERED ON DOCKET

DATE AUG 02 1999

ORDER

Claimant, Charles William Rushing, 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 March 6, 1995, 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 (June 14, 1995), and on reconsideration (October 30, 1995). A hearing before Administrative Law Judge Richard Kallsnick (ALJ) was held August 1, 1996, in Tulsa, Oklahoma. By decision dated August 13, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. On July 25, 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.

I. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

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

Judicial review of the Commissioner’s determination is limited in scope by 42 U.S.C. § 405(g). This Court’s review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted). The term substantial evidence has been interpreted by the U.S. Supreme Court to require “more than a mere scintilla. It means such

³ Step one requires claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. § 404.1510. Step two requires that claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 404.1521. If claimant is engaged in substantial gainful activity (step one) or if claimant’s impairment is not medically severe (step two), disability benefits are denied. At step three, claimant’s impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment or impairments “medically equivalent” to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If claimant’s step four burden is met, the burden shifts to the Commissioner to establish at step five that work exists in significant numbers in the national economy which claimant--taking into account his age, education, work experience, and RFC--can perform. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Court may not reweigh the evidence nor substitute its discretion for that of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). Nevertheless, the court must review the record as a whole, and “the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); see also Casias, 933 F.2d at 800-01.

II. CLAIMANT’S BACKGROUND

Claimant was born on February 7, 1956, and was 40 years old at the time of the administrative hearing in this matter. He has a tenth grade education. Claimant has worked as a floor tile laborer, landscape laborer, rental property maintenance worker, painter’s helper, shop helper at a tank company, and construction laborer. Claimant alleges an inability to work beginning August 15, 1994, due to foot problems, back problems, neck problems, arm problems, pain, and limited mobility. He also claims to suffer from dizziness and shortness of breath. (Complaint, Docket # 1, at 2.) At various other times throughout these proceedings, he has also claimed to have a heart murmur or an oversized heart, high blood pressure, poor vision, and residual hand problems from a broken wrist. (R. 61-62)

III. MEDICAL HISTORY OF CLAIMANT

From April 1993 through February 1994, claimant made three visits to a chiropractor, John A. Karr, D.C. Claimant’s medical history revealed previous work-related injuries to claimant’s lower back (1982), left wrist (1984), head and neck (1985), upper back (1990), left leg (1991), and right heel (1992). (R. 88) His first visit to Dr. Karr was April 30, 1993, for symptoms resulting from

moving and lifting rolls of carpet at work. Dr. Karr noted pain and problems associated with claimant's thoracic spine, right wrist, and right shoulder muscles. (R. 89) His diagnosis was "[s]prain of the thoracic paraspinal musculature" as well as "post-traumatic right shoulder and wrist neuronal insult. . . ." (R. 90) He opted to treat claimant with "corrective manipulative therapeutics in conjunction with associated physical therapy modalities in the form of interferential therapy and cryotherapy." (Id.) He found claimant "temporarily totally disabled" for workers' compensation purposes. (R. 87, 91)

In January 1994, Dr. Karr reported that claimant still experienced stiffness and limited ability to move his mid back, muscle weakness in his mid back and in his right hand and shoulder, and pain and spasm in his mid back and in his right hand and shoulder. (R. 82) Dr. Karr found that claimant's hand reached maximum medical improvement and his temporary total disability (extending from April 29, 1993 to November 29, 1993) had been reduced. (R. 83) It was Dr. Karr's opinion that claimant suffered from 14% permanent impairment to the right shoulder, 30% permanent impairment to his right hand, and a 24% whole person permanent impairment to the thoracic spine (mid back) due to his injuries. (R. 83) Dr. Karr saw claimant again in February 1994 "for evaluation of injuries for special indemnity." (R. 79) He opined that the combination of injuries claimant sustained in 1982, 1983, 1985, 1990, and 1991 "resulted in an 88.4% physical impairment to the whole person." (R. 80)

On March 4, 1994, Lawrence A. Reed, M.D., examined claimant for purposes of evaluating his claim against the Special Indemnity Fund. (R. 103) He noted claimant's court claims for his 1982, 1984, 1985, 1990, 1991, and 1992 injuries. (R. 104) In contrast to the medical history recited by Dr. Karr, Dr. Reed noted that claimant's 1992 injury involved claimant's neck, left shoulder,

upper, mid and lower back (as opposed to his right heel). (Id.) Dr. Reed stated that claimant demonstrated tenderness, paravertebral muscle spasm, and restricted motion of both shoulders, his left elbow and lower back. The range of motion of the cervical spine was markedly restricted, crepitation was present in the right shoulder, and there was continuing restricted motion of the lower back. (R. 105) It was Dr. Reed's opinion that claimant has experienced injuries affecting his neck, both shoulders, left arm, lower back, left leg and left foot. He considered claimant unable to function normally with either upper extremity, and he opined that claimant's lower back pain extended to both lower extremities. He stated that claimant had total impairment of 70% the whole man. (R. 104)

In a letter dated January 13, 1995, Dr. Reed reported that claimant visited a WorkMed clinic on July 20, 1994, after experiencing pain in his right shoulder and lower back as a result of supporting a 150-200 pound device with his arms at work. At the clinic, he was examined, x-rayed, and prescribed oral medications. A few days later, he returned to work for two to three weeks, but returned to the clinic for physical therapy because his back pain had worsened. (R. 95) He was referred to Dr. Sami Framjee, an orthopedic surgeon, who continued conservative treatment of claimant and released him to return to work during the first week of October 1994. (R. 95-98)⁴ About two weeks after Dr. Framjee released claimant, claimant had started a new job assignment which involved only minimal lifting. (R. 96)

On November 7, 1994, claimant returned to the office of Dr. Reed. Claimant complained of continuing pain and stiffness in his right shoulder and lower back, but no pain extending from his lumbar spine into his lower extremities. (R. 95-96) Claimant reported that sitting, standing, or walking continuously tended to increase his lower back discomfort, and that driving increased his

⁴ There are no records in the file from Dr. Framjee.

right shoulder and back discomfort. (R. 96) Dr. Reed found tenderness and decreased range of motion in claimant's right shoulder, as well as tenderness, paravertebral muscle spasm and restricted motion of his lumbar spine. (Id.) Dr. Reed recommended a treatment of physical therapy, exercises, and over-the-counter anti-inflammatory agents. (R. 97) His impairment summary showed claimant to have 14.5% impairment of his right shoulder and 8% impairment of the whole man due to restricted motion of his lumbar spine. (R. 99-100)

On March 26, 1995, claimant went to the emergency room at Tulsa Regional Medical Center with a fractured right arm. His arm was placed in a splint, and he was scheduled for an March 31, 1995 appointment at an orthopedic clinic. (R. 108) Dr. Mark Zulkey gave him a prescription for pain medication on March 28, 1995. (R. 109) Apparently, instead of going to the orthopedic clinic on March 31, 1995, claimant went to the Hillcrest Medical Center Emergency Room on April 1, 1995, complaining of swelling in both hands. (R. 110-11) He told Gary Lee, M.D., that he had taken a fall a week earlier and landed on his right hand. (R. 112) Dr. Lee reported that claimant had a fractured his wrist. The area was splinted, iced and elevated. Dr. Lee gave him a prescription for Tylox for pain and Naprosyn for swelling. (R. 112) J. J. Newman, M.D., confirmed that claimant had fractured his right hand and wrist (fracture of radial styloid process and at base of second metacarpal), but he saw no significant displacement. (R. 113) Subsequent x-ray examinations in April and May 1995 indicated that claimant's right radius and ulna were normal. (R. 115)

Claimant failed to appear for appointments at Morton Health Services in July and August 1995. (R. 117) Claimant returned to Hillcrest in September 1995 with complaints of back pain. (R. 118) Routine x-ray views of claimant's lumbar spine showed intact vertebral bodies and posterior

elements. Alignment, disk interspaces, and neural foramina were well-maintained. He had a normal lumbar spine. (R. 120) He was prescribed medication. (R. 119, 121)

Angelo Dalessandro, D.O., performed a consultative examination on claimant in October 1995. Dr. Dalessandro noted the claimant had lower back pain, prasthesias in his legs, occasional pain and stiffness in his legs, and bunions in his feet. (R. 123) Dr. Dalessandro reported that claimant had a slow gait, but no problem getting on and off the examination table. Claimant's affect was flat, but he appeared alert. (R. 123) He had limited range of motion in the cervical area and tenderness in the lumbodorsal and upper dorsal areas. (R. 124) There appeared to be slight weakness in claimant's left hand due to his recent fracture and an exostosis in his left forearm above his wrist. (Id.) Dr. Dalessandro stated:

This 39-year-old muscular male with a slightly slow gait but it is stable and safe. He states he is using the cane to help him arise when he is sitting. Dexterity of gross and fine manipulation is normal. There may be slight weakness of his left hand grip. Grip strength of the right hand is 14 kg, left 4 kg. There are no joint deformities or swelling noted. Movement in his lower extremities and hips appear[s] limited, however I feel that this patient is not cooperating to his fullest ability.

(R. 124)

The Residual Physical Functional Capacity Assessment, completed by Carmen Bird Pico, M.D., on October 26, 1995, indicates that claimant could occasionally lift 50 pounds, frequently lift 25 pounds, stand, walk or sit for 6 hours of an 8-hour workday, and was unlimited in his ability to push or pull. (R. 38) She also indicated that he had no postural, manipulative, visual, communicative or environmental limitations. (R. 39-41)

Beginning February 12, 1996, claimant began seeing chiropractor J. C. Newby, D.C., for pain with muscle spasms in his lower back and numbness in his left leg. (R. 147) He claimed that

he injured himself when he lifted a treadmill on February 1, 1996, to make repairs. (R. 141-42) Dr. Newby's report to the Workers' Compensation Court indicated his diagnosis: "traumatic lumbar sprain strain." (R. 142) Dr. Newby treated claimant with spinal adjustment, ultrasound and electrical stimulation. (R. 144-45) He initially recommended that claimant could return to work on February 15, 1996, but changed his recommendation for claimant to return to work on February 19, 1996, with light duty (no lifting and/or standing for long periods of time). (R. 147-49) On March 11, 1996, he stated that claimant was "progressing satisfactorily and in all probability will be released to full duty with no restrictions on Monday, March 18, 1996." (R. 151)

On March 12, 1996, claimant was riding a city bus when it was struck by a school bus. (R. 140) On March 14, Dr. Reed prescribed Lortab (for pain), Lodine (for pain) and Flexeril (for muscle spasms). (R. 139) The Lortab was subsequently changed when claimant complained of stomach cramps and vomiting. (Id.) Dr. Newby saw claimant on March 15, 1996, and released claimant to return to work with no restrictions. (R. 152) On March 24, 1996, Dr. Reed noted that the range of motion in claimant's cervical spine was 60%, and his lumbar spine was moderately tender. Dr. Reed prescribed Tylenol #4, Lodine, and Skeletin (muscle relaxant). (R. 138) In April 1996, claimant complained of chest pain and a swollen right thumb. (R. 137)

IV. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fifth step of the sequential evaluation process. The ALJ found that claimant had chronic lumbar strain, but that it was not an impairment which meets the criteria of any listed impairment described in Appendix 1 of the Regulations (20 C. F. R., Part 404, Subpart P, Appendix 1) (R. 12) He found that claimant had the residual functional capacity (RFC) to perform medium work, limited by the need to change positions sitting or standing by shifting his

weight. The ALJ deemed claimant unable to perform his past relevant work as a construction laborer and general laborer, but he determined that claimant was capable of making an adjustment to unskilled work which existed in significant numbers in the national and regional economies that he could perform, based on his RFC, age, education, and work experience. The ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision.

V. REVIEW

Claimant asserts as error that the ALJ: (1) failed to accord any limitation to claimant's hand impairment; and (2) failed to incorporate all of claimant's established limitations into the hypothetical posed to the vocational expert.

Hand Impairment

The ALJ's based his assessment of claimant's hand impairment primarily on claimant's testimony and the October 1995 report by Dr. Dalessandro. He noted that Dr. Dalessandro observed that claimant had a slight weakness in his left hand due to a recent fracture, and there appeared to be a 2 x 2 cm exostosis on the medial aspect of his left forearm above the wrist. (R. 13; see R. 124). He also noted claimant's testimony that he had pain in his left arm and is unable to turn a doorknob or play a guitar. Claimant also testified that he has a knot on his forearm and drops things due to difficulty with his grip. (R. 15; see R. 184-85) The ALJ discounted claimant's testimony based on Dr. Dalessandro's finding that claimant's grip strength was only slightly decreased and claimant's dexterity of gross and fine manipulation were normal. (R. 15; see R. 124) More generally, the ALJ suspected "a strong element of secondary gain," given claimant's sporadic work history, numerous workers' compensation claims, failure to show for appointments, and failure to seek consistent

medical treatment or take prescription medication. (R. 16) He also noted that none of claimant's treating sources had placed functional limitations on claimant. (R. 17)

Claimant points out that he also testified that he could lift only 5 pounds (R. 188), and he could only work with his left hand for about three to four minutes before having to stop for an hour. (R. 198). He faults the ALJ for not finding that claimant's hand impairment limited his ability to work, and not including it in his hypothetical question to the vocational expert. (Pl. Br., Docket # 9, at 4-5.) As defendant points out, however, the fact that claimant's left hand grip strength was less than half of his right hand grip strength does not mean that claimant has a functional limitation that must be included in the hypothetical posed by the ALJ to the vocational expert. (Def. Br., Docket # 10, at 2) The only medical evidence in the record upon which either party relies is Dr. Dalessandro's examination of October 12, 1995. He found that claimant's left hand weakness was "slight." (R. 124) The ALJ did not err by failing to accord any limitation to claimant's hand impairment.⁵

Hypothetical Posed to Vocational Expert

Nonetheless, the ALJ erred by failing to include, in his hypothetical question to the vocational expert, his finding that claimant's capacity for medium work is limited by his need to change positions to tolerate his symptoms. The ALJ asked the vocational expert to assume that the person about whom he would testify had the physical capability of performing medium, light and

⁵ Indeed, even where a claimant has one hand that is paralyzed, the Commissioner is not required to find that a claimant is disabled due to an alleged manipulative impairment in the other hand, especially where the treating physician does not identify any limitation in the use of the other hand. See Marshall v. Apfel, Case No. 98-5159, 1999 WL 370403 (10th Cir. June 8, 1999).

sedentary work activity; that he was afflicted with symptoms from a variety of sources; that he had occasional chronic pain; and that he took over-the-counter medications. (R. 198)

The vocational expert testified that claimant could perform light hand-working and hand-packaging, medium hand-packaging, and janitorial cleaning. (R. 199-200) He also testified that claimant could work as an arcade attendant, a parking lot attendant, an auto wash attendant, an escort driver, an assembler, and a taxi starter. (Id.) The ALJ's request that the vocational expert assume that claimant could perform medium, light and sedentary type work (instead of stating the impairment) begs the question, or, alternatively, assumes the answer. A hypothetical question that assumes its own answer is improper. See Simonson v. Schweiker, 699 F.2d 426, 430 (8th Cir. 1983).

In forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). However, "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the [Commissioner's] decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). In the first hypothetical to the vocational expert, upon which he apparently relied, the ALJ included no mention of his finding that claimant is limited by "his need to change positions, by shifting his weight, either sitting or standing." (R. 19; see also R. 16-17) Since the testimony elicited by the question does not relate with precision all of claimant's impairments, the ALJ's decision is not supported by substantial evidence. The ALJ's omission is particularly troubling given the vocational expert's concerns regarding claimant's foot and back problems. (See R. 202)

Defendant attempts to rectify the ALJ's error by urging the Court to review the Dictionary of Occupational Titles (DOT) descriptions of the various jobs the vocational expert testified claimant could perform. (Def. Br., Docket # 10, at 3-4.) While it may be true that certain of the jobs identified by the vocational expert allow for considerable movement, there is no indication in the record that the ALJ or the vocational expert relied on the DOT with regard to the movement permitted by the jobs that they deemed claimant able to perform, given his RFC.

VI. CONCLUSION

The ALJ's opinion was a thorough analysis, but the correct legal standards were not applied. Specifically, the ALJ found that claimant had a physical impairment which required that he change positions by shifting his weight, either standing or sitting, and he failed to incorporate that impairment into the hypothetical question he posed to the vocational expert. Since the ALJ relied on the vocational expert's response to his incomplete question, he failed to meet his step five burden to prove the existence of other jobs in the national and regional economies that claimant could perform.

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 30th day of July, 1999.

Claire V Eagan
CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

F I L E D

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

JUL 30 1999

DERRICK DEON MCBEE,)
)
 Petitioner,)
)
 v.)
)
 THE ATTORNEY GENERAL of the)
 STATE OF OKLAHOMA, and)
 J. W. BOOKER, Warden,)
 United States Penitentiary,)
 Leavenworth, Kansas)
)
 Respondents.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-0147-H (E)

ENTERED ON DOCKET

DATE AUG 02 1999

REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 2254, petitioner, Derrick Deon McBee filed a Petition for Writ of Habeas Corpus (Docket # 1). Acting *pro se*, petitioner challenges the 20-year consecutive sentences he received after pleading guilty to robbery with a firearm after former conviction of a felony. Petitioner was convicted on September 10, 1996, in the Fourteenth Judicial District Court, Tulsa County, State of Oklahoma, Case No. CF-94-4884. Respondent has filed a Motion to Dismiss Petition for Habeas Corpus as Time-Barred by the Statute of Limitations (Docket # 5) and a Motion to Substitute Proper Party (Docket # 6).

This case was referred to the undersigned for a report and recommendation. See 28 U.S.C. § 636, and 28 U.S.C. § 2254, Rules 8, 10. Based on a review of the record and the parties' briefs, the undersigned proposes findings that petitioner is attacking a state action which will cause him to be kept in custody in the future rather than the government action under which he is presently confined, and the limitations period in which petitioner was required to file his federal habeas petition has run. For the reasons set forth below, the undersigned recommends that the Motion to

Dismiss (Docket # 5) be **GRANTED**, the Motion to Substitute Proper Party (Docket # 6) be **DENIED**, and the Petition for Writ of Habeas Corpus (Docket # 1) be **DISMISSED**.

BACKGROUND AND PROCEDURAL HISTORY

As grounds for his petition, petitioner claims “denial of constitutional right to due process of law” and “abuse of discretionary authority by district court.” (Petition, Docket # 1, at 5.) Specifically, he claims that

his conviction and sentence were predicated upon the woefully ineffective assistance of his attorney of record which obstructed his ability to receive a fair trial, sentencing determination and/or reasonable opportunity for appeal, as well as the willful and intention[al] efforts of the State of Oklahoma to deprive the defendant of a full and fair opportunity to obtain relief through the state’s established collateral post-conviction procedure, all [of] which ultimately worked to the defendant’s prejudice.

Petitioner’s “Memorandum and Brief of Law in Support” of his Petition, Docket # 2, at 1.

According to petitioner, he was arrested in October 1994 in Tulsa County and charged with two counts of Robbery with a Firearm After Former Conviction of a Felony. He replaced his appointed counsel with retained counsel, but retained counsel was removed by the Court and replaced with an attorney from the state Public Defender’s office. In March 1995, petitioner was indicted on federal charges arising out of the same incident as the state robbery charges. In April 1995, claimant was placed in federal custody, and in August 1995, he was convicted in the United States District Court for the Northern District of Oklahoma, Case No. 95-CR-035-001-K, for armed carjacking and possession of a firearm during a crime of violence. He admits that the conviction and sentence were the result of a written plea agreement with the United States Attorney for the Northern District of Oklahoma. In November 1995, he was sentenced on the federal conviction and returned to state custody for disposition in the state criminal case.

Petitioner plead guilty to the state charges and was sentenced on September 10, 1996, to consecutive twenty-year terms. The terms were also to run consecutively to petitioner's federal sentence. Petitioner did not file a motion to withdraw his guilty plea or a notice of intent to appeal. Twenty months later, on May 20, 1998, he filed a Request for Post-Conviction Relief in the Tulsa County District Court, alleging ineffective assistance of counsel. He claimed that counsel (1) failed to challenge the constitutional infirmity of petitioner's guilty plea colloquy; (2) never seriously conducted any pretrial investigation or considered any reasonable defensive strategy; (3) failed to challenge the violations of petitioner's right to a speedy trial; (4) failed to challenge the illegal sentence imposed upon petitioner by the trial court; and (5) failed to safeguard petitioner's rights and/or to perfect an effective appellate brief.

The district court denied his application for post-conviction relief on July 23, 1998, finding that petitioner failed to file a timely appeal and that claimant received reasonably effective assistance of counsel. Petitioner alleges that he sent his appellate brief to the Oklahoma Court of Criminal Appeals (CCA) within 30 days from the date the final order was filed in the district court, and the CCA court clerk acknowledged receipt of it on August 20, 1998. However, petitioner failed to submit with his brief the filing fee or an affidavit to proceed *in forma pauperis*. The CCA court clerk received the filing fee from petitioner's mother on August 26, 1998, and petitioner's appellate brief was filed on that day. On September 9, 1998, the CCA dismissed his appeal as untimely. Petitioner filed his federal habeas petition on February 23, 1999.

DISCUSSION AND LEGAL ANALYSIS

Motion to Dismiss

Habeas corpus actions requiring the review of state court judgments and sentences are governed by 28 U.S.C. § 2254. Section 2254 was amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, tit. I, § 104 (1996). The AEDPA's amendments to 28 U.S.C. § 2254 became effective on April 24, 1996. Under the AEDPA,

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

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

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

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

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

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

28 U.S.C. § 2244.

Petitioner was convicted and sentenced, pursuant to his guilty plea, on September 10, 1996. Under Oklahoma law, he had ten days within which to file an application to withdraw his guilty plea or to file a notice of intent to appeal. See Rule 2.5(A)) and Rule 4.2(a) of the Rules of the Court of Criminal Appeals, Okla. Stat. tit. 22, ch. 18, app. (1997). He failed to file either; therefore, his

conviction became final on September 20, 1996. Under the AEDPA, petitioner thus had until September 20, 1997, in which to file a petition for writ of habeas corpus in federal court. He did not file his Petition until February 23, 1999.

The time during which his application for post-conviction relief was pending could have tolled the period of limitations, if he had filed it within the one-year limitations period. 28 U.S.C. § 2244(d)(2); Hoggro v. Boone, 150 F.3d 1223, 1226 (10th Cir. 1998). However, he did not file his application for post-conviction relief until May 20, 1998 -- some eight months after the statutory limitations period expired. His petition is not subject to statutory tolling.

The limitations period of 28 U.S.C. § 2244(d) is not jurisdictional and may be subject to equitable tolling, Miller v. Marr, 141 F.3d 976, 978 (10th Cir.), cert. denied, 119 S. Ct. 210, 142 L. Ed.2d 173 (1998), but petitioner has not shown that he is entitled to equitable relief. Equitable tolling has historically been limited to situations where the petitioner "has actively pursued his judicial remedies by filing a defective proceeding during the statutory period, or where the [petitioner] has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Irwin v. Department of Veteran's Affairs, 498 U.S. 89, 96 (1990) (footnotes omitted). It can also be appropriate where a court or agency makes an incorrect representation that deceives the petitioner. See Johnson v. United States Postal Serv., 861 F.2d 1475, 1481 (10th Cir. 1988).

Petitioner claims that immediately after he was sentenced he was transferred to the federal penitentiary to begin serving his federal sentence. He also claims that "almost immediately he began forwarding requests to just about every state agency in Oklahoma asking for a true and complete copy of the transcripts of his change of plea and sentencing hearing so that he could initiate collateral

procedures [sic]” Petitioner’s Consolidated Reply to Respondents’ Motion to Dismiss Habeas Petitioner and Motion to Substitute Proper Party, Docket # 9, at 5. He maintains that he was “shuffled from one agency to another as he was informed that no copy of the transcripts was in existence or that the transcripts had been forwarded to the wrong address or some other excuse.” *Id.* However, he does not provide any evidence to substantiate his claims. In any event, his failure to receive the requested transcripts would not excuse his failure to file a motion to withdraw his guilty plea, a direct appeal, or an application for post-conviction relief within the statutory time limit.

Petitioner attempts to focus the Court’s attention on his reasons for failing to file a timely direct appeal or a timely appeal from the denial of his post-conviction application. Although his reasons do not appear to be without merit, they do not excuse his failure to file an application for appeal out-of-time or an application for post-conviction relief within one year after his conviction (which would have tolled the one-year limitation period). Petitioner cannot escape the fact that he waited more than a year to file his application for post-conviction relief, and more than two years before he filed his federal habeas petition. Petitioner is not entitled to equitable relief.

Motion to Substitute Proper Party

Respondent filed a Motion to Substitute Proper Party (Docket # 6) on April 2, 1999, requesting that the Court substitute the Oklahoma Department of Corrections as the proper party to this action. Respondent makes an unsubstantiated claim that petitioner is currently on probation and parole for the challenged conviction and is currently under the custody of the Oklahoma Department of Corrections while he is incarcerated in the federal penitentiary. However, the record shows that claimant’s consecutive 20-year sentences on the state charges were to run consecutively to petitioner’s eight-year sentence on the federal charges. Order Denying Petitioner’s Application for

Post-Conviction Relief, filed July 23, 1998, attached as Ex. C to Respondents' Brief in Support of Motion to Dismiss Time-Barred Petition, Docket # 7, at 2.

Petitioner is presently serving his federal sentence in the United States Penitentiary in Leavenworth, Kansas. Since petitioner "is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future . . . ," the officer having present custody (the warden of the Leavenworth facility) and the Oklahoma Attorney General were properly named as respondents. Rule 2(b) of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C.A. foll. § 2254 (West 1994); cf. Leacock v. Henman, 996 F.2d 1069 n. 4 (10th Cir. 1993). The Advisory Committee specifically addressed this situation:

(4) The applicant is in jail, prison, or other actual physical restraint but is attacking a state action which will cause him to be kept in custody in the future rather than the government action under which he is presently confined. The named respondents shall be the state or federal officer who has official custody of him at the time the petition is filed and the attorney general of the state whose action subjects the petitioner to future custody.

Advisory Committee Notes to the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C.A. foll. § 2254 (West 1994). Although this issue may be moot if the Court adopts the recommendation to grant respondents' Motion to Dismiss, petitioner named the correct parties as respondents, and respondents' Motion to Substitute Proper Party should not be granted.

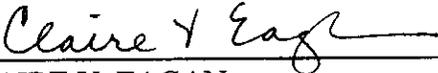
CONCLUSION

For the reasons cited herein, the undersigned recommends that the respondents' Motion to Dismiss (Docket # 5) be **GRANTED**, the Motion to Substitute Proper Party (Docket # 6) be **DENIED**, and the Petition for Writ of Habeas Corpus (Docket # 1) be **DISMISSED**.

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 § 2254, Rules 8, 10; see also 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*, 175 F.3d 1217 (10th Cir. 1999).

Dated this 30th 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 30 1999

MATTIE M. CARR, o/b/o)
JIMMIE L. CARR, deceased)
SSN: 506-56-9813,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiff,)

v.)

Case No. 97-CV-0723-EA

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

Defendant.)

ENTERED ON DOCKET

DATE AUG 02 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 30th day of July 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 30 1999

MATTIE M. CARR, o/b/o)
JIMMIE L. CARR, deceased)
SSN: 506-56-9813,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiff,)

v.)

Case No. 97-CV-0723-EA

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

Defendant.)

ENTERED ON DOCKET
AUG 02 1999
DATE _____

ORDER

Pursuant to 42 U.S.C. § 405(g), Mattie M. Carr, on behalf of Jimmie L. Carr, deceased, 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. 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 **AFFIRMS** 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).

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. § 404.1520.²

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.”

² 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, 1947, and was 47 years old at the time of the third administrative hearing in this matter. He was 42 years old when he applied for benefits, and 44 years old when his insured status expired. He had a 12th grade education. Claimant worked as a mechanic, tire repair worker, truck driver, fork lift operator and steel worker. He alleged an inability to work beginning November 20, 1989, when he injured his neck and back in an industrial accident. He claimed to suffer from pain in his neck and legs, hand and grip muscle spasms, and limited mobility. (Complaint, Docket # 1, at 2.) He initially claimed disability as a result of two ruptured discs, low back pain, headaches, and residuals from four bone spurs, as well as pain in his neck and legs. (R. 67)

III. MEDICAL HISTORY OF CLAIMANT

Claimant went to the emergency room at Hillcrest Medical Center in Tulsa on November 21, 1989. (R. 109) He was misdiagnosed upon admission with “chest pain - acute myocardial infarction. . . .” The discharge diagnosis was “chest pain - musculoskeletal origin; smoker.” The discharge summary indicates that claimant drank up to one pint of alcohol every two days. (Id.) There is no mention of any accident at work that led to his chest pain. He was given a prescription

for Feldene and advised not to do any heavy labor for the next week. (R. 110) The hospital reports indicate that claimant had a back operation for a ruptured disc in 1984. (R. 111) After his discharge, he saw Allen Fielding, M.D. He complained of headaches, neck pain, left arm pain, and some right upper extremity pain. (R. 129)

In February 1990, claimant went to see an orthopedic surgeon, Mark A. Hayes, M.D. He complained of loss of strength in his left upper extremity and numbness and tingling down into the fingers of his left hand. (R. 129) Dr. Hayes diagnosed claimant as having "cervical spondylosis with spondylitic disease affecting the nerve roots at C5-6 and C6-7, more so on the left than the right." (R. 129) Claimant opted for surgery (anterior cervical discectomy and fusion), which was performed on February 14, 1990. (R. 131-40) Claimant told the consulting physician, Anthony C. Billings, M.D., that he was injured at work on November 20, 1989, when he hit his head on a pipe. He also told Dr. Billings that Dr. Roy [sic] Fielding performed a myelogram on him and told him that he did not know what was wrong. Claimant said he felt extremely frustrated and sought the assistance of Dr. Hayes. (R. 135)

Following the surgery, claimant was placed on a physical therapy program. (R. 149-55) He reported to his physical therapist that he was injured when a tire fell on his head on November 22, 1989. (R. 155) Claimant also appeared for follow-up appointments with Dr. Hayes. On March 1, 1990, he reported that he was doing fairly well, but he had noticed some tingling in his fingers and left leg. He stated that he had no headaches and was "very satisfied with the results. . . ." (R. 128) On April 2, 1990, he reported improvement, but had some soreness down his left leg. Radiographs showed good alignment of the bone plugs, but there was some anterior protrusion at C5-6 level. In May 1990, Dr. Hayes told him that he could take his neck brace off. In July, claimant reported

improvement in his headaches and hand pain. Radiographs showed progression to a good solid fusion. (Id.) In August, Dr. Hayes reported that claimant had a solid fusion, and he released claimant to work beginning August 13, 1990. He rated claimant's impairment at 24% and advised claimant to avoid lifting more than 25 pounds above the shoulders. (R. 127)

Claimant reported in September 1990 that he still had leg pain. Although Dr. Hayes could detect no motor or reflex abnormalities, and he deemed claimant's range of motion in the hip and knee satisfactory, he scheduled claimant for a magnetic resonance imaging (MRI) scan. (Id.) The MRI revealed disc pathology at the L4-L5 and L5-S1 levels. (R. 158) Claimant was admitted to the hospital for a lumbar myelogram, which indicated no significant abnormalities. (R. 160-61) The radiologist reported a degenerative disc at L4-5 with some mild diffuse bulge present, but there was no impingement on the nerve roots. (R. 165) The myelogram was followed by an epidural steroid injection. (R. 160) Dr. Hayes saw claimant for the last time on October 16, 1990. He noted that claimant was still having headaches and some leg pain. Dr. Hayes did not think anything further could be done for claimant's low back pain. He prescribed Midrin for claimant's headaches. He thought that claimant could begin a vocational rehabilitation retraining program, but he noted that claimant could not perform repetitive over head activity above the shoulders and he could lift no more than 35 pounds. (R. 126)

Later that month, claimant was examined, at his attorney's request, by Michael D. Farrar, D.O. (R. 172-77). Claimant reported to Dr. Farrar that he was injured, on November 20, 1989, when a tire fell on his neck and, later that day, when a metal hose struck him on the side of his head. (R. 172) He also told Dr. Farrar that Dr. Fielding had performed a myelogram on him which showed defects at the C5-6 and C6-7 levels, but claimant left Dr. Fielding because he learned of a relationship

between Dr. Fielding and Frank Letcher, M.D., claimant's former physician. Dr. Letcher performed back surgery on claimant in 1984, and claimant was not satisfied with the outcome. (R. 173) Claimant complained to Dr. Farrar of weakness in his grip, difficulty with numbness and tingling in his hands, a stiff neck, and daily headaches. (Id.)

Dr. Farrar's physical examination of claimant showed hypesthesia [decreased sensation] in claimant's C6-C7 nerve roots, weakness in grip strength, decreased manipulative abilities, diminished reflexes in his arm muscles (without significant atrophy), nerve impingement in his lower spine, hypoactive deep tendon reflexes at the patellas, difficulty with heel and toe walking, equivocal straight leg raising, and decreased range of motion in the cervical and lumbar areas of his spine. (R. 173-74) Dr. Farrar opined that claimant was left with neurological sequelae in both his arms and range of motion loss to his neck.. He felt that additional therapy would not yield any substantial benefit. (R. 174) He assessed claimant as having 40 percent permanent partial impairment attributable to the November 20, 1989 injury. He stated that claimant's condition would not improve and "medical maximum recovery has been achieved." (R. 176) He believed that vocational rehabilitation and aptitude testing were mandatory, but he expressed great concern as to whether claimant would be able to return to the work force at all. (Id.)

In September 1992, claimant appeared at Morton Comprehensive Health Services, complaining of stomach pains and a diminished appetite. An examination revealed that he had an enlarged liver, and he was strongly encouraged to stop drinking. (R. 208, 212, 216) In August 1993, claimant went to the emergency room at Doctors' Medical Center, where he was diagnosed with an electrolyte imbalance and an elevated CPK due to alcohol abuse. (R. 217-218) He reported to Robert Harris, M.D., that he had been using alcohol as a means of pain control because he could not

find a physician to prescribe pain medications for his chronic lower back pain. (R. 219). He was admitted for various tests, discharged, and directed to obtain a psychiatric diagnosis and treatment for his alcohol abuse. (R. 220) In August 1994, claimant was admitted to Hillcrest Medical Center with acute alcoholic gastritis and hepatitis with alcohol withdrawal symptoms. (R. 263) He was diagnosed with "right pyelohydronephrosis in nonfunctioning kidney," and he opted for surgery (nephrectomy) to remove his right kidney. (R. 264) He tolerated the procedure well without complication. (R. 265)

IV. PROCEDURAL HISTORY

On August 27, 1990, claimant applied for disability benefits under Title II (42 U.S.C. § 401 et seq.), and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's application for benefits was denied in its entirety initially (February 13, 1991), and on reconsideration (April 22, 1991). (R. 85, 96) A hearing before Administrative Law Judge James D. Jordan (ALJ) was held September 9, 1991, in Tulsa, Oklahoma. By decision dated October 3, 1991, the ALJ found that claimant was not disabled at any time through the date of the decision. (R. 194) Claimant's insured status expired on March 31, 1992. On June 9, 1993, the Appeals Council vacated the ALJ's decision and remanded the case for rehearing because the hearing tape was lost.³ (R. 199)

A supplemental hearing was held on January 4, 1994, and, after the hearing, the ALJ ordered a consultative examination. William S. Dandridge, M.D. performed the examination in March 1994 and found that claimant had residuals of "old lumbar laminectomy" as well as residuals from "cervical fusion, old, well healed." (R. 252) He assessed claimant's ability to do work-related activities,

³ The hearing tape was apparently found at some unknown later date and transcribed for inclusion in the administrative record. (R. 309-46)

indicating that claimant could sit, stand or walk for one hour at a time, during an eight-hour work day and 6 hours total during an entire eight-hour day. (R. 256) He opined that claimant could lift or carry up to 26 pounds, and claimant had no limitations in the use of his feet or hands for repetitive movements. (R. 256-57) Claimant could reach frequently, but he could bend, squat, crawl, or climb only infrequently. (R. 257)

Claimant objected to the inclusion of the examination report in the record without an opportunity to cross-examine the author. Since Dr. Dandridge was no longer living in the state, claimant offered that the report could be stricken from the record and a new consultative examination ordered. William N. Harsha, M.D., performed the examination in December 1994. Dr. Harsha diagnosed degenerative joint disease of claimant's cervical and lumbar spine, status post surgery. He stated that claimant had "subjective weakness of grip and pinch, lack of endurance, ease of fatigue of repetitive use of his hands. Diminished vision of left eye." (R. 271) He noted that claimant had restricted range of motion in his lower back and in his neck, but claimant "voluntarily limit[ed] motion" in his neck. (Id.)

Dr. Harsha's physical assessment indicated that claimant could sit, stand or walk for a total of one hour at a time during an eight-hour work day, and claimant could sit or walk for no more than four hours total, and he could stand for no more than 2 hours total. (R. 272) He assessed claimant's ability to lift or carry as limited to no more than 20 pounds. (Id.) He found claimant's use of feet and hands for repetitive movement to be limited. He deemed claimant unable to crawl or climb; he could bend or squat infrequently; and he could occasionally reach. He indicated a total restriction for claimant of activities involving unprotected heights and being around moving machinery. (R. 273)

He noted that claimant was not involved in any rehabilitative therapies or exercises, "nor does he seem motivated for self help." (R. 274)

The ALJ sent interrogatories to Michael Karathanos, M.D. in June 1995. (R. 279-81) Dr. Karathanos reviewed the medical records and concluded that claimant's ability to work was limited. (R. 282-83) He found that claimant was able to lift up to 20 to 30 pounds, but should avoid frequent bending, turning, or twisting his lumbosacral and cervical spine. He also indicated that claimant would need to change his position every one or two hours. He did not detect any restriction in claimant's ability to sit, stand or walk. He stated that pain had been a mild to moderate factor limiting claimant's ability to work, but he rated claimant's pain as no higher than moderate. (R. 283)

Claimant objected to the ALJ's consideration of Dr. Karathanos' report, and requested a supplemental hearing to cross-examine Dr. Karathanos. (R. 286) A second supplemental hearing was held on September 27, 1995. At the hearing, counsel for claimant basically established that Dr. Karathanos did not examine claimant, that he disagreed with Dr. Harsher's opinion regarding claimant's limitations, that he was not board-certified, and that he did not specialize in orthopedic medicine. (R. 393-405) Dr. Karathanos implied that Dr. Harsher's report reflects an opinion that claimant was not "accepting his full strength." (R. 404-05) He also indicated that Dr. Harsha's restrictions were based on claimant's subjective complaints, and he could see no objective basis for the restrictions Dr. Harsha placed on claimant's ability to walk or stand. (R. 403) In response to a hypothetical question based upon the limitations found by Dr. Karathanos, the vocational expert at the hearing testified that there were a significant number of jobs in the national economy that claimant could perform. (R. 429) By decision dated October 27, 1995, the ALJ found that claimant was not disabled at any time through the date of his decision.

Claimant died on August 26, 1996, while his claim was pending. The death certificate indicates that the immediate cause of claimant's death was cardiopulmonary arrest due to or as a condition of acute upper GI bleeding and cirrhosis of the liver. Alcohol abuse was listed as another significant condition contributing to the claimant's death. (R. 308) Subsequent to his death, his surviving spouse became the substitute party. On June 6, 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.

V. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant lacked the residual functional capacity (RFC) to lift and carry more than 30 pounds, perform frequent bending, turning or twisting, and had to be able to change positions every one to two hours. He also found that claimant was unable to perform his past relevant work, and claimant's capacity for the full ranges of sedentary and light work was diminished by pain. (R. 22) However, the ALJ found that claimant was capable of making an adjustment to unskilled work which exists in significant numbers in the national economy, based on his RFC, age, education, and work experience. The ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision. (R. 23)

VI. REVIEW

Claimant alleges that

the ALJ committed legal error in evaluating the evidence regarding [claimant's] residual functional capacity as it existed prior to the expiration of his insured status by failing to accord the appropriate weight to the findings and opinions of physicians who actually examined [claimant] in 1990 in favor of the opinion of a nonexamining medical expert taken

6 years later which is contrary to the examining physicians' findings and opinions and fails to reflect all [claimant's] nonexertional impairments as they existed at that time.

(Pl. Br., Docket # 9, at 4.) The nonexamining medical expert to which claimant refers is Dr. Karathanos, who testified at the 1995 hearing. The examining physicians to which he refers are Dr. Hayes and Dr. Farrar. Claimant basically accuses the ALJ of "doctor shopping." (See R. 307.) He contends that the findings of Dr. Farrar are consistent with those of Dr. Harsha, who performed the second consultative examination on claimant after claimant's first administrative hearing. Claimant specifically objects to the first hypothetical question posed by the ALJ to the vocational expert at the 1995 hearing because the question does not contain the manipulative impairments found by Dr. Farrar in November 1990. (R. 429)

In essence, claimant has set up what is generally referred to in civil litigation as a classic "battle of the experts." Claimant prefers the opinions of Dr. Farrar and Dr. Harsha; the ALJ prefers the opinions of Dr. Hayes and Dr. Karathanos (which are consistent with those of Dr. Dandridge). Claimant concedes that the ALJ was on solid footing by relying on Dr. Karathanos' testimony to resolve the conflict between Dr. Harsha's opinion and the objective evidence. (Pl. Br., Docket # 9, at 4.) However, claimant argues that the issue is not what claimant's condition was in 1994, but his condition as it existed prior to the expiration of his insured status on March 31, 1992. He contends that Dr. Farrar examined claimant because Dr. Hayes "did not perform a final examination to determine what residuals persisted from [claimant's] injury." (Pl. Br., Docket # 9, at 5.) This ignores Dr. Hayes' 24% impairment rating. (R. 127) Nonetheless, claimant faults the ALJ for failing to accord controlling weight solely to the findings of Dr. Farrar.

The period for which claimant alleges disability began November 20, 1989, and expired March 31, 1992. Thus, to be entitled to disability benefits, claimant must prove he was totally disabled by March 31, 1992. Henrie v. United States Dept. of Health & Human Servs., 13 F.3d 359 (10th Cir. 1993). He may do so with medical evidence dating from the period preceding or following the date he was last insured, subject to certain conditions. “[E]vidence bearing upon an applicant’s condition subsequent to the date upon which the earning requirement was last met is pertinent evidence in that it may disclose the severity and continuity of impairments existing before the earning requirement date or may identify additional impairments which could reasonably be presumed to have been present and to have imposed limitations as of the earning requirement date.” Baca v. Department of Health & Human Services, 5 F.3d 476, 479 (10th Cir. 1993) (quoting Gold v. Secretary of Health, Educ. & Welfare, 463 F.2d 38, 42 (2d Cir. 1972)).

The ALJ discussed the medical records after the date claimant was last insured, but he emphasized that they did not reflect significant impairments, other than musculoskeletal pain, related to the relevant time period. He then adopted his pain analysis from the 1991 decision to the extent it was not inconsistent with the findings in the decision he was writing, his 1995 decision. (R. 20) In the 1991 decision, the ALJ reviewed the medical record, noting claimant’s successful surgery, the solid fusions, the myelogram showing no significant abnormalities, and the release for claimant to return to work. (R. 187) He acknowledged Dr. Hayes’ report that claimant had significant functional incapacity, but he had no muscle atrophy. The ALJ also pointed out that claimant had never been maintained on substantial amounts of pain medication. (Id.)

In the 1991 decision, the ALJ also discussed his reasons for rejecting the opinion of Dr. Farrar, who performed one examination on claimant at the request of claimant’s attorney, in favor

of the opinions of claimant's treating physician, Dr. Hayes. He noted the inconsistency between Dr. Farrar's statement that claimant had nerve root impingement, and the October 1990 hospital CT lumbar spine report which indicated no impingement of the nerve root, although there were some degenerative disks at L4-5 with mild diffuse bulge. (R. 187; see R. 165) Further, the myelogram showed no evidence of disc herniation, although claimant had some mild spondylosis. (Id.; see R. 164) The ALJ pointed out that both Dr. Hayes and Dr. Farrar had indicated that claimant was a candidate for vocational rehabilitation training. (R. 188; see R. 126, 176)

Claimant's testimony in 1991 regarding his pain does not differ significantly from his testimony in 1994 or 1995. In both decisions, the ALJ carefully assessed claimant's credibility and found that claimant's statements were not credible, given the medical evidence and claimant's own description of his activities, his lifestyle, and his ability to work. (R. 16-18, 186-89) In the 1995 decision, the ALJ discussed his reasons for favoring the opinion of Dr. Karathanos over that of Dr. Harsha. He credited Dr. Karathanos' observation that Dr. Harsha's opinion was based on the claimant's subjective complaints, and Dr. Harsha's assessment of claimant's functional limitations had no objective basis. Dr. Karathanos also indicated that Dr. Harsha may have accepted claimant's subjective complaints because he did not want to damage the claimant's allegations. (R. 20)

The ALJ is required to "evaluate every medical opinion" he receives, 20 C.F.R. § 404.1527(d), and to "consider all relevant medical evidence of record in reaching a conclusion as to disability," Baker v. Bowen, 886 F.2d 289, 291 (10th Cir. 1989), even though he is not required to discuss every piece of evidence. "Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects." Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996)

(citations omitted). The ALJ considered all of the relevant medical evidence. He also discussed the evidence he rejected even though, arguably, that evidence may not have been significantly probative or uncontroverted.

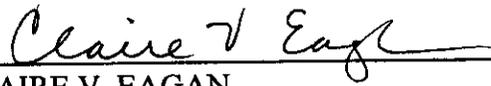
The ALJ was well within his authority to accept the opinions of Dr. Hayes and Dr. Karathanos, given the objective medical evidence, over the opinions of Dr. Farrar and Dr. Harsha. Accordingly, claimant's assignment of error as to the ALJ's reliance on the vocational testimony in the 1995 hearing is misplaced. Claimant argued that the vocational testimony was elicited by a hypothetical which did not reflect claimant's true manipulative and postural limitations as Dr. Farrar found them to be in November 1990 (Pl. Br., Docket # 9, at 5). However, as discussed above, the ALJ found that claimant's *true* manipulative and postural limitations were not found by Dr. Farrar or Dr. Harsha, but by Dr. Hayes and Dr. Karathanos.

In forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). In the first hypothetical to the vocational expert, the ALJ included the functional limitations found by Dr. Karathanos. (R. 428) When the ALJ included the functional limitations found by Dr. Harsha or when he asked the expert to accept claimant's testimony, the vocational expert found that there were no jobs existing in significant numbers in the national economy which claimant could perform. (R. 429-31) This testimony, based on unsubstantiated assumptions contained in the second and third hypothetical questions, was not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993).

CONCLUSION

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

DATED this 30th day of July, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE