

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

F I L E D

SEP 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONALD B. BURGESS, as Personal)
Representative of the Estate of)
ROY O. BURGESS, Deceased, and)
ADALAIDE A. BURGESS,)

Plaintiffs,)

vs.)

FIBREBOARD CORPORATION,)
OWENS CORNING FIBERGLAS)
CORPORATION, et al.,)

Defendants.)

Case No. 87-C-404-C (E)

ENTERED ON DOCKET

DATE SEP 20 1999

ORDER OF DISMISSAL WITHOUT PREJUDICE

NOW, this Court having reviewed the Stipulation of Dismissal Without Prejudice filed by the parties, dismissing this action against the Defendant, Owens Corning Fiberglas Corporation, without prejudice, with the understanding that final payment of the settlement is not due until May, 2000, the Court finds that the claims asserted against the Defendant Owens Corning Fiberglas Corporation, should be, and are hereby dismissed without prejudice. This Order of Dismissal without Prejudice terminates this litigation.

IT IS SO ORDERED this 16th day of Sept., 1999.



HONORABLE H. DALE COOK
Senior Judge, United States District Court
Northern District of Oklahoma

Order of Dismissal Without Prejudice

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

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

Plaintiff,

v.

EDWARD PATRICK OWENS, et. al.,

Defendants.

ENTERED ON DOCKET
DATE SEP 20 1999

Case No. 99-CV-208-H

FILED

SEP 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

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

IT IS SO ORDERED.

This 17TH day of September, 1999.


Sven Erik Holmes
United States District Judge

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

CHARLES KEITH BICKFORD,

Plaintiff,

v.

WARDEN CROSSON and
OFFICER PERRY, Mailroom
Supervisor,

Defendants.

ENTERED ON DOCKET

DATE SEP 20 1999

Case No. 99-CV-694-K (E) ✓

F I L E D

SEP 20 1999

ORDER

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Before this Court is Plaintiff Charles Keith Bickford's Application to Proceed *in Forma Pauperis* (# 2). Upon review of Plaintiff's financial data, the Court GRANTS Plaintiff's Application to Proceed *in Forma Pauperis*.

However, the Court notes that both Defendants reside in Texas and that the events giving rise to this claim also occurred in Texas, not in the Northern District of Oklahoma. Venue in this Court is therefore improper under 28 U.S.C. § 1391(b), and the interest of justice does not require the transfer of this case. IT IS THEREFORE ORDERED this case is DISMISSED WITHOUT PREJUDICE for lack of venue pursuant to 28 U.S.C. §§ 1406(a), 1915(e)(2).

ORDERED this 17 day of September, 1999.



TERRY C. KERN, Chief
United States District Judge

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

ANTHONY LYN KIMBROUGH,)
)
 Petitioner,)
)
 vs.)
)
 GARY GIBSON,)
)
 Respondent.)

ENTERED ON DOCKET
DATE SEP 20 1999

Case No. 98-CV-672-H (E) ✓

FILED
SEP 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

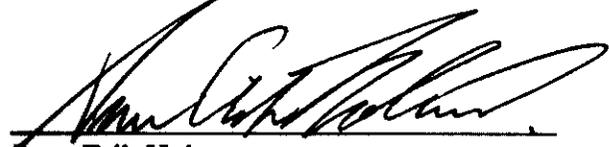
JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed with prejudice as barred by the statute of limitations.

IT IS SO ORDERED.

This 16TH day of SEPTEMBER, 1999.



Sven Erik Holmes
United States District Judge

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

ANTHONY LYN KIMBROUGH,)
)
Petitioner,)
)
vs.)
)
GARY GIBSON,)
)
Respondent.)

ENTERED ON DOCKET
DATE SEP 20 1999

Case No. 98-CV-672-H (E) ✓

FILED
SEP 17 1999
Phil Lombardi, Clerk
DISTRICT COURT

ORDER

Before the Court is Respondent's motion to dismiss petition for writ of habeas corpus as time barred by the statute of limitations (Docket #12). Petitioner has filed a response to the motion (#14). Petitioner has also filed a motion for an evidentiary hearing (#3) and a "motion for supplemental pleading brief in support of petition for a writ of habeas corpus" (#11). Respondent's motion to dismiss is premised on the allegation that Petitioner, a state inmate appearing *pro se*, failed to file this petition for writ of habeas corpus within the one-year limitations period prescribed by 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). For the reasons discussed below, the Court finds that the petition is untimely filed and Respondent's motion to dismiss should be granted. Petitioner's motions for an evidentiary hearing and to file a supplemental brief in support of the petition have been rendered moot.

BACKGROUND

Petitioner was convicted by a jury of First Degree Murder, Trafficking in Cocaine, and Failure to Obtain a Tax Stamp, in Tulsa County District Court, Case No. CF-93-1833. He was sentenced to life imprisonment without the possibility of parole, life with the possibility of parole, and five (5) years imprisonment, on the three convictions, respectively, with the sentences to run

consecutively. Petitioner appealed his judgment and sentence to the Oklahoma Court of Criminal Appeals where, on October 18, 1995, his conviction was affirmed (see #13, Ex. A). Nothing in the record indicates Petitioner sought *certiorari* review in the United States Supreme Court.

Petitioner filed an application for post-conviction relief in the state district court on April 22, 1997 (#13, Ex. B). On June 13, 1997, the trial court denied post-conviction relief (#13, attachment to Ex. B). Petitioner appealed and on August 15, 1997, the Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief (#13, attachment to Ex. C).

Petitioner also sought state habeas corpus relief, filing his petition in Pittsburgh County District Court in January of 1998 (#13, Ex. D). On January 23, 1998, the state district court denied the requested habeas corpus relief. Petitioner appealed and on March 2, 1998, the Oklahoma Court of Criminal Appeals declined jurisdiction because Petitioner failed to serve notice on the adverse party (#13, attachment to Ex. E). Petitioner attempted to file a petition for writ of habeas corpus in the Oklahoma Supreme Court. That court transferred the matter to the exclusive jurisdiction of the Oklahoma Court of Criminal Appeals. On July 21, 1998, the state appellate court dismissed the petition for writ of habeas corpus (#13, attachment to Ex. F).

Petitioner filed the instant federal petition for writ of habeas corpus on September 3, 1998 (#1).

ANALYSIS

The AEDPA, enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

- (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 from filing by such State actions;

(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(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, were afforded a one-year grace period within which to file for federal habeas corpus relief.

In addition, the tolling provision of 28 U.S.C. § 2244(d)(2) applies in § 2254 cases to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998).

Therefore, the one-year grace period is tolled while pursuing state post-conviction proceedings properly filed during the grace period.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Petitioner's conviction became final on or about January 16, 1996, after the 90 day time period for filing a petition for writ of *certiorari* in the United States Supreme Court had lapsed. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994). Therefore, his conviction became final before enactment of the AEDPA and, as a result, his limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Petitioner had one year, or until April 23, 1997, to file his petition for writ of habeas corpus.

However, the limitations period was tolled in this case because Petitioner had "a properly filed application for State post-conviction or other collateral review" pending in the state courts during the grace period. 28 U.S.C. § 2244(d)(2). Petitioner filed his application for post-conviction relief in the trial court on April 22, 1997, the day before the April 23, 1997 federal habeas corpus deadline. Thus, once the state courts concluded review of Petitioner's post-conviction proceedings, Petitioner had the time remaining in his limitations period, i.e., two (2) days, within which to file a timely federal petition for writ of habeas corpus. The Oklahoma Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief on August 15, 1997. Petitioner had to file his federal habeas petition on or before August 17, 1997 to be timely. Because August 17, 1997 was a Sunday, Petitioner's deadline was Monday, August 18, 1997.

Petitioner's state habeas corpus actions did not further toll the limitations period. Petitioner did not file his petition in Pittsburgh County District Court until January, 1998, after expiration of the limitations period. A collateral petition filed in state court after the limitations period has expired

no longer serves to toll the statute of limitations. Rashad v. Khulmann, 991 F. Supp. 254, 259 (S.D. N.Y. 1998). As a result, the limitations period was not tolled during the pendency of Petitioner's state habeas corpus proceedings. Therefore, unless Petitioner can demonstrate that he is entitled to other statutory or equitable tolling of the limitations period, his petition filed September 3, 1998 is clearly untimely.

In his response to the motion to dismiss (#14), Petitioner explains that he filed his state habeas corpus actions in order to exhaust available state remedies, a requirement for filing his federal petition for writ of habeas corpus. 28 U.S.C. § 2254(b). Therefore, Petitioner argues that the limitations period should be considered tolled during the pendency of his state habeas corpus proceedings. However, as discussed above, Petitioner's limitations period had already expired when he filed his state habeas corpus petition. Furthermore, the issues raised in the instant petition were raised in Petitioner's post-conviction application. As a result, the exhaustion requirement of § 2254(b) was satisfied upon conclusion of post-conviction proceedings. See White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988) (stating that exhaustion of a federal claim may be accomplished by either showing (a) the state's appellate court has had an opportunity to rule on the same claim presented in federal court, or (b) there is an absence of available State corrective process or circumstances exist that render such process ineffective to protect the rights of the applicant). Based on these considerations, the Court concludes that the limitations period was not suspended during the pendency of Petitioner's state habeas corpus proceedings. Petitioner's federal petition for writ of habeas corpus was not filed within the limitations period and should be dismissed as time-barred.

CONCLUSION

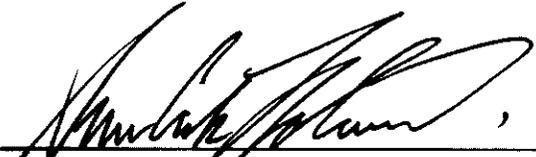
Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period. Therefore, Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted. The petition for writ of habeas corpus should be dismissed with prejudice. Petitioner's motions for an evidentiary hearing and to file a supplemental brief in support of his petition are moot.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus (#12) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.
3. Petitioner's motions for an evidentiary hearing (#3) and to file a supplemental brief in support of his petition (#11) are **moot**.

IT IS SO ORDERED.

This 16th day of September, 1999.


Sven Erik Holmes
United States District Judge

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

SILICONE SPECIALTIES, INC.,)
)
Plaintiff,)
)
v.)
)
WATSON-BOWMAN ACME)
CORP., a corporation, and)
HARRIS SPECIALTY CHEMICAL, INC.,)
a corporation,)
Defendants.)

ENTERED ON DOCKET
DATE SEP 20 1999

98-CV-65-H(M) ✓

FILED

SEP 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court are two Report and Recommendations from the Magistrate Judge and Defendants' objections to the Magistrate Judge's ruling denying Defendants leave to amend their answer and add a counterclaim. Specifically, this Court must rule on: (a) the Report and Recommendation of the Magistrate Judge (Docket # 145) with respect to Defendants' Motion for Summary Judgment (Docket # 51), Plaintiff's Motion for Partial Summary Judgment on Validity (Docket # 54), and Plaintiff's Motion for Partial Summary Judgment on Infringement (Docket # 56); (b) the Report and Recommendation of the Magistrate Judge (Docket # 154) addressing Plaintiff's Motions for Contempt (Docket # 105, 120, 127) and Application for Expedited Hearing on its Pending Motion to Strike (Docket # 140); and (c) the Magistrate's ruling (Docket # 143) denying Defendants' motion to amend its answer.

I

In the Report and Recommendation addressing the parties' summary judgment motions (Docket # 145), the Magistrate Judge concluded that Defendants' Motion for Summary Judgment should be granted with respect to infringement, either literally or under the doctrine of

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equivalents, and with respect to Plaintiff's Lanham Act and New Mexico Deceptive Trade Practice Act claims. The Magistrate Judge further recommended that Plaintiff's Motion for Partial Summary Judgment on the Issue of Infringement be denied and that Plaintiff's Motion for Partial Summary Judgment on Validity be denied as moot.

Plaintiff has filed an objection to the Report and Recommendation, and the Defendants have responded to Plaintiff's objection. When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

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

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

On May 13, 1999, the Court held a hearing on the Plaintiff's objections to the Report and Recommendation. The Court ordered additional briefing with respect to specific factual issues. Based upon a careful review of the Report and Recommendation of the Magistrate Judge, Plaintiff's objection, Defendants' response, and the additional briefing by the parties, the Court adopts the Report and Recommendation granting in part Defendants' motion for summary judgment and denying Plaintiff's motions for partial summary judgment.

II

In his Report and Recommendation filed May 7, 1999 (Docket # 154), the Magistrate Judge addressed four motions by Plaintiff: Motion for Contempt, for an Order to Show Cause and Motion to Strike Defendants' Witnesses and Request for Expedited Hearing (Docket # 105);

Motion for Contempt and for an Order to Show Cause Against Non-Party Crafc0 and Motion to Strike Defendants' Witness Testimony (Docket # 120); Motion for Contempt and an Order to Show Cause (Docket # 127); and Application for Expedited Hearing on Pending Motion to Strike (Docket # 140). The Magistrate Judge recommended denying all four motions. Plaintiff objected only to the Magistrate's recommended disposition of the Motion for Contempt (Docket # 127). That motion dealt with Defendants' alleged dissemination of confidential material, in violation of a protective order. The Magistrate Judge found no disclosure of "material that could reasonably be classified as confidential or proprietary information," Report and Recommendation, at 6, and recommended denial of the motion. After carefully reviewing the entire Report and Recommendation, as well as Plaintiffs' objections thereto, the Court adopts the recommendations of the Magistrate Judge and denies all four of Plaintiff's motions addressed in this Report and Recommendation.

III

Finally, Defendants objected to the Magistrate Judge's denial of their motion to amend their answer. Under Federal Rule of Civil Procedure 72(a), this Court "shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." The Magistrate Judge denied Defendants' motion because it came almost three months after the scheduling order deadline for amendment of pleadings and because the motion did not involve facts unknown to Defendants at the time they filed their answer. The Magistrate Judge also noted that Defendants had been dilatory in pursuing discovery. "It is well settled in this circuit that untimeliness alone is a sufficient reason to deny leave to amend." Frank v. U.S. West, Inc., 3 F.3d 1357, 1365 (10th Cir. 1993); see also, e.g.,

Pallottino v. City of Rio Rancho, 31 F.3d 1023, 1027 (10th Cir. 1994). After reviewing the Magistrate Judge's order and Defendants' objections, the Court concludes that the order was not contrary to law or clearly erroneous.

In conclusion, the Court adopts the **Report and Recommendation** on summary judgment (Docket # 145) and the **Report and Recommendation** on evidentiary issues (Docket # 154). The Court also affirms the Magistrate Judge's **order denying** Defendants leave to amend (Docket # 143).

IT IS SO ORDERED.

This 16TH day of September, 1999.


Sven Erik Holmes
United States District Judge

thereafter at the rates of 7.51% and 8% per annum until judgment,
plus filing fees in the amount of \$150.00 as provided by 28 U.S.C.
§ 2412(a)(2), plus interest thereafter at the current legal rate of
5.285 percent per annum until paid, plus costs of this action.

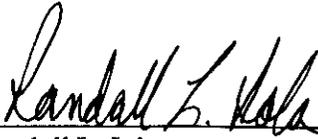

United States District Judge

Submitted By:


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PEP/11f

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Attorneys for Defendants

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY J. ROBINSON,

Plaintiff,

v.

Kenneth S. Apfel, Commissioner of
Social Security,

Defendant.

No. 98-CV-908-J

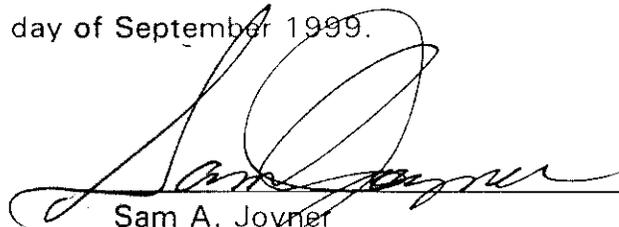
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DATE ~~SEP 20 1999~~

JUDGMENT

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

It is so ordered this 20th day of September 1999.



Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY J. ROBINSON,

Plaintiff,

v.

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

Defendant.

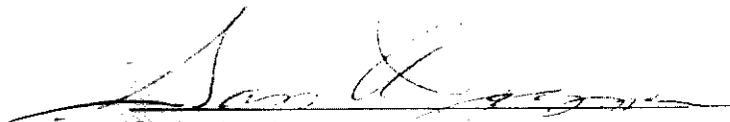
Case No. 98-CV-908-J

ENTERED ON DOCKET
SEP 20 1999
DATE _____

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

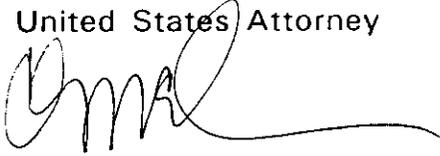
DATED this 20 day of SEPTEMBER 1999.



Sam A. Joyner,
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in black ink, appearing to read 'CMA', with a long horizontal flourish extending to the right.

Cathryn McClanahan, OBA #14853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANITA DICKSON,
o/b/o JAMES DICKSON, a minor,
SSN: 441-96-2888,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0032-EA

ENTERED ON DOCKET

DATE SEP 20 1999

JUDGMENT

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

It is so ordered this 20th day of September 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANITA DICKSON,)
o/b/o JAMES DICKSON, a minor,)
SSN: 441-96-2888,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 98-CV-0032-EA

ENTERED ON DOCKET

DATE SEP 20 1999

ORDER

On September 15, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny her application for children's disability benefits filed on behalf of her son (claimant), the disposition of which both parties have consented to before this Court. Paul McTighe, Esq., appeared on behalf of the plaintiff, and Wyn Dee Baker, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) that claimant was not disabled is supported by substantial evidence, and the correct legal standards were applied. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

Procedural History

On October 11, 1994, claimant protectively filed for children's disability benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's application for benefits was denied in its entirety initially and on reconsideration. A hearing before Administrative Law Judge (ALJ) R. J. Payne was held December 13, 1995, in Tulsa, Oklahoma. (R. 150-81) By decision dated January 23, 1996, the

ALJ found that claimant was not disabled at any time through the date of the decision. (R. 10-19)
On November 7, 1997, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 416.1481.

Claimant's Background

Claimant was born on April 8, 1987, and was seven years old at the time of the supplemental administrative hearing in this matter. He was in second grade at the time. Claimant alleges disability beginning at birth due to mental impairments, including Attention Deficit Hyperactivity Disorder (ADHD), low IQ, and learning disorders. (Complaint, Docket # 1, at 2.)

The ALJ's Decision

The ALJ made his decision at the fourth step of the sequential evaluation process applicable to children's disability benefits cases prior to August 22, 1996. He found that claimant has ADHD and borderline intellectual functioning, but that these do not meet or equal the severity of any impairment listed in Appendix 1, Part A or B, Subpart P, Regulations No. 4 (20 C.F.R. § 416.924(e)). He determined that, although the claimant has moderate limitations in cognitive skills and in concentration, persistence, and pace, these limitations would not affect his ability to function independently, appropriately, and effectively in an age-appropriate manner. He also found that claimant does not have an impairment or combination of impairments of comparable severity to that which would disable an adult. Thus, he concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision. (R. 18)

Issues

Claimant asserts as error that (1) the ALJ did not perform an analysis at step three, and (2) the ALJ's finding that claimant did not meet or equal a listing is not supported by substantial evidence. Claimant argues that his impairments meet Listing 112.05, Mental Retardation, and his impairments are functionally equivalent to Listing 112.11, Attention Deficit Hyperactivity Disorder.

Applicable Law

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 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).

¹ First, the Commissioner determined whether the minor was engaged in substantial gainful activity. If he 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).

The notes accompanying 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 al. v. 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 claimant's case.

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

Listing 112.05

Under the regulations, mental retardation is "[c]haracterized by significantly subaverage general intellectual functioning with deficits in adaptive functioning." 20 C.F.R., Part 404, Subpt.

P, App. 1, 112.05. The required level of severity for this disorder is met when any one of six criteria is met; however, the parties here argue that two are applicable, 112.05A and 112.05D. Listing 112.05A requires that claimant's impairment result in at least two of the age-appropriate criteria in paragraph B2 of 112.02: marked impairment in age-appropriate cognitive/communicative, social, or personal functioning; or deficiencies of concentration, persistence, or pace resulting in frequent failure to complete tasks in a timely manner. 20 C.F.R., Part 404, Subpt. P, App. 1, 112.05A. Listing 112.05D requires a "valid verbal, performance or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant limitation of function." 20 C.F.R., Part 404, Subpt. P, App. 1, 112.05D.

Listing 112.11

ADHD requires marked inattention, impulsiveness, hyperactivity, and two of the age-appropriate criteria in paragraph B2 of 112.02: marked impairment in age-appropriate cognitive/communicative, social, or personal functioning; or deficiencies of concentration, persistence, or pace resulting in frequent failure to complete tasks in a timely manner. 20 C.F.R., Part 404, Subpt. P, App. 1, 112.11.

Functional Analysis

Under the regulations, a proper functional analysis requires an ALJ to evaluate a claimant's impairment or combination of impairments by analyzing whether claimant has (1) limitation of specific functions, (2) limitations in broad areas of development or functioning, (3) episodic impairments, and (4) limitations related to treatment or medication effects. 20 C.F.R. § 416.926a(b). Claimant was seven years old when his application was filed, and eight years old at the time of the administrative hearing and ALJ decision. The ALJ evaluated claimant under the five areas of

functioning for age 6 to 12: cognitive/communicative, motor, social, personal, or deficiencies of concentration, persistence, or pace. Id. § 416.926a(c)(5)(iv). If claimant has "marked" limitations in two areas, or "extreme" limitations in one area, claimant is presumptively disabled. Id. § 416.926a(c). When standardized tests are used as the measure of functional abilities, a valid score that is two standard deviations or more below the norm for the test (but less than three standard deviations), claimant has a marked limitation; a valid score that is three standard deviations or more below the norm for the test means that claimant has an extreme limitation. Id. § 416.926a(c)(3).

Findings

Claimant took the Wechsler Intelligence Scale for Children - Third Edition (WISC-III) in 1994. He scored 74 on the verbal IQ, 77 on the performance IQ, and 73 on the full-scale IQ. (R. 82) These scores place him in the borderline level of functioning. (Id.) Claimant was diagnosed by Children's Medical Center and George J. Bovasso, D.O., as having ADHD, and Dr. Bovasso prescribed Ritalin for him. (R. 93-109, 113-17, 123-24, 130-45) His general assessment of functioning (GAF) score was 50/50 in April 1995. (R. 113)

In this matter, the ALJ identified the relevant listings. Although he did not specifically outline the relevant listing criteria at step three of his decision, it is clear that he meant for his discussion of the evidence and his explanation of why he found that claimant was not disabled at step four to be equally applicable to his finding at step three. The ALJ analyzed and discussed all of the evidence of record. He summarized the testimony of claimant's mother, noting that she had taken claimant off his medication during the summer and that claimant was in regular classes at school, with the exception of one special education class. (R. 15) He noted claimant's IQ scores, and he also pointed to the psychological evaluation of claimant by Yolanda Harper, Ph.D., in September

1993, in which she stated that his borderline attention problem was inconsistent. (R. 16) He also noted that claimant's teacher in 1994 stated that claimant's concentration was better after he started taking medication (Id.) However, his teacher in 1994 noted that he misbehaved on one occasion when he had not taken his medication. (Id.) The ALJ also noted Dr. Bovasso's treatment notes, in which he indicates that claimant did well when he took his Ritalin. (Id.)

Claimant argues that he meets the Listing 112.05D because his lowest score on the WISC-III, a 73, reflects a score two standard deviations below the norm pursuant to the manual for the WISC-III (Cl. Br., Docket #5, at 3, citing The Psychological Corp., *Wechsler Intelligence Scale for Children - Third Edition Manual* 170 (1991).) This argument ignores the fact that the regulations specifically incorporate the standard deviation for the Wechsler series for children, and sets 70 as the threshold IQ score for a finding pursuant to Listing 112.05D. 20 C.F.R. Pt. 404, Subpt. P., App. 1, 112.00D. Other standardized tests which deviate significantly from that standard deviation "require conversion to the corresponding percentile rank in the general population so that the actual degree of impairment reflected by the IQ scores can be determined." Id. Further, the Tenth Circuit has already addressed this issue, noting that the standard deviation argument is contrary to the clear language of the regulations and the court can "assume that SSA was aware of the standard deviation when setting the IQ threshold at 70 points." Brainard v. Secretary of Health and Human Services, No. 93-5173, 1994 WL 170783 (10th Cir. May 5, 1994.) Claimant does not meet the first element of Listing 112.05D.

Claimant also argues that he meets the second element of Listing 112.05D because he has ADHD, he has a GAF of 50, and his teachers indicate that he has significant trouble staying on task. (Cl. Br., Docket # 9, at 3-4.) Claimant points to reports in which the teacher indicated that claimant

had significant trouble staying on task. (R. 71, 86) However, as the Commissioner points out, claimant's teachers later reported that he read at one year below his age level, and he was "on grade level" in math. (R. 125) The teacher also indicated that claimant had misbehaved on only one occasion, and she attributed that to the fact that he had not taken his medicine. (Id.) In addition, records from Tulsa Children's Health Care Center from January and October 1995 indicate that claimant was "doing well" both at school and at home when he was taking his medication (Ritalin). (R. 130-42) The ALJ decision as to Listing 112.05D is supported by substantial evidence.

Claimant also argues that he meets Listing 112.05A, which requires that he meet two criteria listed: marked impairment in cognitive/communicative, social, or personal functioning, or deficiencies of concentration, persistence, or pace resulting in frequent failure to complete tasks in a timely manner. Claimant submits that he has a marked limitation in the cognitive/communicative area because his test score was two standard deviations below the norm for a full scale IQ (an argument the Court has rejected, *supra*), and because claimant is two standard deviations below the norm in three of the nine subcategories tested, and almost two standard deviations below the norm in a fourth category. (Cl. Br., Docket # 9, at 4.) The regulations indicate that "[m]arked limitation means -- (A) when standardized tests are used as the measure of functional abilities, a valid score that is two standard deviations or more below the norm for the test (but less than three standard deviations)" and "[e]xtreme limitation means -- (A) When standardized tests are used as the measure of functional abilities, a valid score that is three standard deviations or more below the norm for the test; . . ." 20 C.F.R. § 414.026a(c). As set forth above, the regulations adopt the standard deviation for the Wechsler series for children with regard to verbal, performance or full scale scores; however, that does not preclude the ALJ from considering claimant's scores in the various subcategories tested

to determine whether claimant is functioning with marked or extreme limitations in other areas. The ALJ did not discuss these scores, but he did recognize that claimant had borderline intellectual functioning. The record shows that claimant reads at one year below his age level, and he was “on grade level” in math. (R. 125) Based on the record, the ALJ found that claimant had a moderate limitation in cognitive functioning (R. 17), and that claimant had no limitation in communication skills and was able to communicate pragmatically and conversationally (id.).

Claimant also argues that his school records support a finding that he suffers from deficiencies of concentration, persistence, and pace resulting in frequent failure to complete tasks in a timely manner. Claimant refers to a record which indicates that he was “in trouble a lot for not staying on task,” talking, and rolling on the floor. (R. 86) This is essentially the same argument that claimant set forth for the second element of Listing 112.05D, and it is contradicted by later evidence from teachers and medical sources. (See R. 125, 130-45). The ALJ found that claimant had a moderate limitation in concentration, persistence, and pace in his ability to engage in an activity, such as playing or reading, and sustaining the activity for a period of time and at a pace appropriate to his age. (R. 17) The ALJ decision as to Listing 112.05A is supported by substantial evidence.

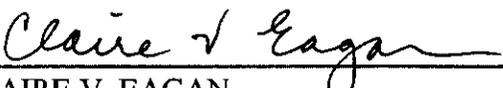
Claimant also contends that the teacher’s reports, the ADHD diagnosis, and the GAF score of 50 support a finding of marked impairment in inattention, impulsiveness and hyperactivity, as required to meet Listing 112.11. (Cl. Br., Docket # 9, at 5.) The Commissioner points out that, in addition to the 1995 teacher’s report (R. 125) and the reports from the Tulsa Children’s Health Care Center (R. 130-41), the April 1995 Children’s Medical Center report with a GAF score of 50, indicates that claimant’s mother did not consider him a behavior or management problem. (R. 113) The ALJ found that, although claimant was diagnosed with ADHD, claimant’s concentration was

better after he started on medication (R. 16), and Dr. Bovasso's records indicate the claimant does well when he is taking Ritalin (id.). An impairment that can be treated with medication is not considered disabling. Teter v. Heckler, 775 F.2d 1104, 1107 (10th Cir. 1985); 20 C.F.R. §§ 416.924c(c) and 416.930(a). The ALJ decision as to Listing 112.11 is supported by substantial evidence.

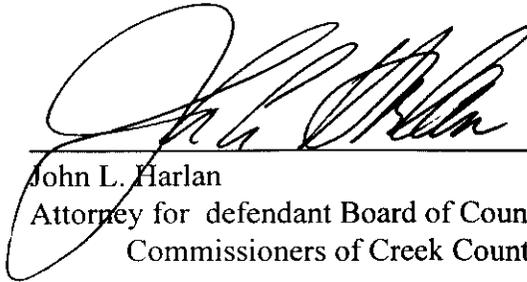
Conclusion

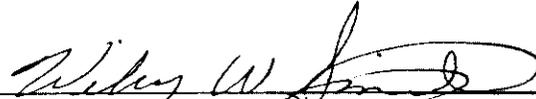
IT IS THEREFORE ORDERED that the plaintiff's request to reverse or remand the Commissioner's decision is denied. The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is **AFFIRMED**.

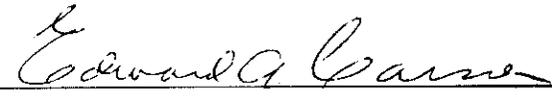
Dated this 20th day of September, 1999.

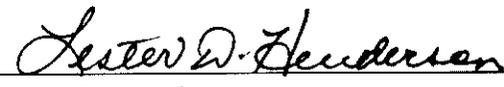


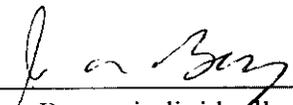
CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

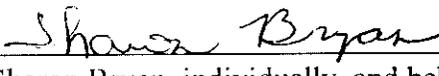

John L. Harlan
Attorney for defendant Board of County
Commissioners of Creek County, Oklahoma

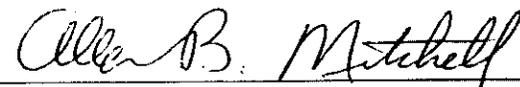

Wiley W. Smith, individually, as member of The
Design Committee, and on behalf of
Soloray Corporation, defendants


Edward A. Carson, individually, as member of The
Design Committee, and on behalf of
Soloray Corporation, defendants


Lester D. Henderson
Attorney for defendants Carson, Smith, The
Design Committee, and Soloray Corporation


Joe Allen Bryan, individually, and behalf of
Bryan Finish Systems and Bryan Finish
Systems, Inc., defendants


Sharon Bryan, individually, and behalf of
Bryan Finish Systems and Bryan Finish
Systems, Inc., defendants


Allen B. Mitchell
Attorney for defendants Joe & Sharon Bryan, Bryan
Finish Systems, Inc., and Bryan Finish Systems

David Simmons

David Simmons, individually, and as Director
of Urban Development, Creek County,
State of Oklahoma, defendant

John H. Lieber

John H. Lieber
Attorney for defendant David Simmons

JDI/dlp

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

FILED

M.S., a minor, and RICHARD SNYDER,)
individually, and as next friend,)

SEP 16 1999

Plaintiffs,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

vs.)

Case No. 97-CV-1056H(M) ✓

CONTEMPORARY INDUSTRIES,)
CORP., a foreign corporation, and STAR)
MANUFACTURING INTERNATIONAL,)
INC., a foreign corporation,)

ENTERED ON DOCKET

DATE SEP 17 1999

Defendants.)

JOURNAL ENTRY OF JUDGMENT

This action came on for hearing on Defendant Star Manufacturing International, Inc.'s Motion for Summary Judgment and Brief in Support on the 31st day of August, 1999, the Honorable Sven Holmes, Judge of the District Court, presiding. Defendant Star appeared by and through its attorney of record, J. Derek Ingle of the law firm Secrest, Hill & Folluo of Tulsa, Oklahoma. The Plaintiffs did not appear nor did their attorney. Likewise, no one from Defendant Contemporary Industries appeared.

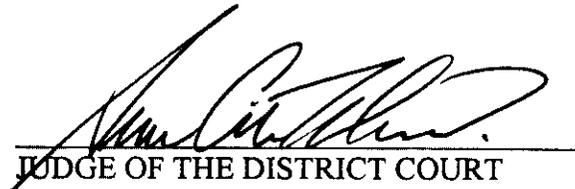
The hearing was to begin on the above stated date at 10:30 a.m. At 10:50 a.m., the Court contacted the office of the attorney of the Plaintiffs to inquire as to his whereabouts. At that time, the office of the attorney for the Plaintiffs stated that the attorney for the Plaintiff was out of town and would not be present at the hearing.

Therefore, this Court ordered that Summary Judgment be entered in favor of Defendant Star Manufacturing International, Inc. and against the Plaintiffs.

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IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Summary Judgment be entered in favor of Defendant Star Manufacturing International, Inc. and against the Plaintiffs.

Dated this 15TH day of September, 1999.



JUDGE OF THE DISTRICT COURT

Copies to be mailed to:

J. Derek Ingle
7134 South Yale, Suite 900
Tulsa, Oklahoma 74136

Mr. Eric Dean Troutt, Esq.
208 E. Dewey, Suite 314
Sapulpa, OK 74066

Mr. Gregory D. Nellis, Esq.
525 S. Main, Suite 1500
Tulsa, OK 74103-4524

Cna/97063/p/journal entry

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
SEP 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SUN COMPANY, INC., (R & M), a)
a Delaware corporation,)
)
Plaintiffs,)
)
vs.)
)
BROWNING-FERRIS, INC., a Delaware)
corporation, successor in interest to Tulsa)
Container Services, Inc.; et al.)
)
Defendants.)

Case No. 94-C-820-K ✓

ENTERED ON DOCKET
DATE SEP 17 1999

ORDER

NOW on this 15th day of September, 1999, comes on for hearing the Application for Attorney Fees for Group II Counsel which was filed by Terence P. Brennan, Liaison Counsel for the Group II Defendants¹, on August 27, 1999.

No objections have been filed with respect to said Application.

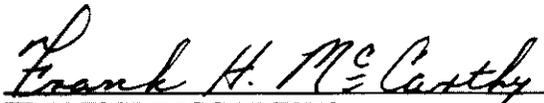
The Court finds that said Application is in compliance with the rules of this Court, that the fees and costs totaling \$6,411.75 set forth are reasonable and proper in all respects; and that said Application should be approved.

IT IS THEREFORE ORDERED that the above-referenced Application be and the same is

¹ Defendant Group II members include: Ark Wrecking Company of Oklahoma, Atlantic Richfield Company, Bankoff Oil Co., Inc., Beverage Products Corp., Borg Industrials Group, Inc. d/b/a American Container Services, Browning-Ferris, Inc., Consolidated Cleaning Service Co., Cowen Construction, Charles Forhan, d/b/a/ D & W Exterminating, Housing Authority of the City of Tulsa, National Tank Co., Oil Capital Trash Services, Inc., Ozark Mahoning Co., Pedrick Labs, John Doe d/b/a Pedrick Labs, Peevy Construction Co., Inc., Public Service Co. of Oklahoma, Steve Richey d/b/a Richey Refuse Service, City of Sand Springs, John D. Shipley, Monte Shipley, Shipley Refuse, Robert E. Sparks d/b/a Tulsa Industrial Service, Sun Chemical Corporation, Union Carbide Corp., and Waste Management of Oklahoma, Inc., successor to Tulsa Industrial Disposal Services, Weedon, Arthur (collectively referred to herein as "Defendants").

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hereby approved, and Liaison Counsel is hereby authorized and ordered to pay the same forthwith
from the Group II Defendants' Liaison Counsel Trust Account.


FRANK H. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

RENEE A. LEWIS,

Defendant.

No. 99CV0493H(J)

ENTERED ON DOCKET

DATE SEP 17 1999

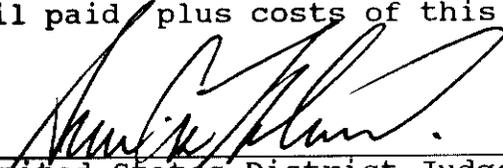
DEFAULT JUDGMENT

This matter comes on for consideration this 16TH day of SEPTEMBER, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Renee A. Lewis, appearing not.

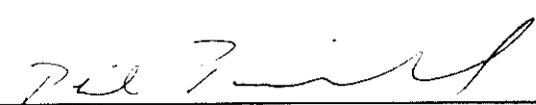
The Court being fully advised and having examined the court file finds that Defendant, Renee A. Lewis, was served with Summons and Complaint on June 24, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Renee A. Lewis, for the principal amounts of \$1,506.58 and \$2,804.66, plus accrued interest of \$570.75 and \$1,379.07, plus administrative charges in the amounts of \$13.19 and \$40.00, plus interest

thereafter at the rates of 9.13% and 8% per annum until judgment,
plus filing fees in the amount of \$150.00 as provided by 28 U.S.C.
§ 2412(a)(2), plus interest thereafter at the current legal rate of
5.285 percent per annum until paid plus costs of this action.


United States District Judge

Submitted By:


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

PEP/11f

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

FILED

SEP 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 GEARY P. SOUTER,)
)
 Defendant.)

CASE NO. 99-CV-517-BU

ENTERED ON DOCKET
DATE SEP 17 1999

AGREED JUDGMENT AND ORDER OF PAYMENT

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

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.
2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.
3. The defendant hereby agrees to the entry of Judgment in the principal sum of \$3,494.46, plus accrued interest of \$3,243.45, plus interest thereafter at the rate of 10.2% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the legal rate 5.285 until paid, plus costs of this action, until paid in full.

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

(a) Beginning on or before the first day of OCT 15 99, 1999, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$ 1500⁰⁰, and a like sum on or before the first day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

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

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided

by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

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

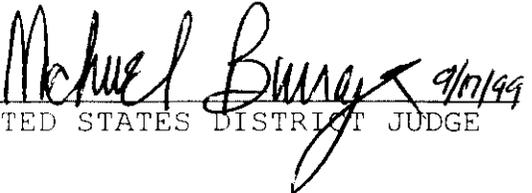
(e) The defendant shall provide the United States with current, accurate evidence of her assets, income and expenditures (including, but not limited to her Federal income tax returns) within fifteen (15) days for the date of a request for such evidence by the United States Attorney.

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

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Geary P. Souter, in the principal amount of \$3,494.46, plus accrued interest in the amount of \$3,243.45, plus interest at the rate of 10.2 until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate of 5.285 percent per annum until paid, plus the costs of this action.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney


PHIL PINNELL, OBA #7169
Assistant United States Attorney


GEARY P. SOUTER

PEP/dlo

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

F I L E D

SEP 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARTIN MORRIS MOSES, SR.,)
)
 Plaintiff,)
)
 vs.)
)
 CITY OF TULSA; COUNTY OF TULSA;)
 J. R. POWELL; and B. BENGE,)
)
 Defendants.)

No. 98-CV-119-C (J)

ENTERED ON DOCKET
DATE SEP 16 1999

ORDER

Before the Court is Plaintiff's "motion to dismiss" (Docket #32) filed in this matter on July 29, 1999. Plaintiff, a state inmate appearing *pro se*, voluntarily requests that the Court dismiss this 42 U.S.C. § 1983 civil rights action without prejudice. In the alternative, Plaintiff requests an additional 90 days within which to file responses to the motion to dismiss, filed by Defendants City of Tulsa and Powell, and the motion for summary judgment, filed by Defendants County of Tulsa and Benge. Plaintiff has been granted three prior extensions of time totaling 150 days. Defendants have not objected or otherwise responded to Plaintiff's motion to dismiss.

Pursuant to Fed. R. Civ. P. 41(a), the Court, in its discretion, finds Plaintiff's motion to dismiss this action without prejudice should be granted. As a result of the dismissal of this action, any pending motion has been rendered moot.

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ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's motion to dismiss (#32) is **granted**.
2. Plaintiff's civil rights complaint is **dismissed without prejudice**.
3. Any pending motion has been rendered **moot**.

SO ORDERED THIS 15th day of September, 1999.


H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

SEP 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONALD B. BURGESS, as Personal)
Representative of the Estate of)
ROY O. BURGESS, Deceased, and)
ADALAIDE A. BURGESS,)
Plaintiffs,)

vs.)

Case No. 87-C-404-C (E)

FIBREBOARD CORPORATION,)
OWENS CORNING FIBERGLAS)
CORPORATION, et al.,)
Defendants.)

ENTERED ON DOCKET

DATE SEP 16 1999

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COME NOW the Plaintiffs, Donald B. Burgess and Adalaide A. Burgess, by and through their counsel of record, Randall L. Iola and Mark H. Iola, and the remaining Defendant, Owens Corning Fiberglas Corporation, by and through their counsel of record, Scott A. Law, and hereby stipulate and agree that the Plaintiffs' claims against this Defendant are hereby dismissed without prejudice, for the sole reason that final payment of the settlement is not due until May, 2000, pursuant to Federal Rule of Civil Procedure 41. Each party is responsible to pay its own attorney's fees, court costs, and expenses. This stipulation of dismissal without prejudice terminates this litigation.

Dated this 16th day of September, 1999.

Respectfully submitted,

Randall L. Iola
Randall L. Iola, OBA #13085
Law Offices of Randall L. Iola, P.L.L.C.

Stipulation of Dismissal Without Prejudice

D:\WordPerf\Burgess, Roy\Pleadings\Stipulation of Dismissal without Prejudice-Burgess.wpd

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022

First Place Tower
15 East Fifth Street, Suite 2750
Tulsa, Oklahoma 74103-4334
(918) 582-7030
FAX: (918) 587-6822

- and -

Mark H. Iola, OBA #4553
Roger L. Mandel
Stanley, Mandel & Iola, L.L.P.
3100 Monticello Avenue, Suite 750
Dallas, TX 75205
(214) 443-4300
FAX: (214) 443-0358

Attorneys for Plaintiffs,
Roy O. Burgess and Adalaide A. Burgess



Scott A. Law, OBA#
1109 N. Francis
Oklahoma City, OK 73106-6871
(405) 235-1611

Attorney for Defendant,
Owens Corning Fiberglas Corporation

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

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

LETHA D. MAYBERRY,)
)
 Plaintiff,)
)
 vs.)
)
 RICHARD F. CARVER, M.D., individually,)
 SPRINGER CLINIC, a limited partnership,)
)
 Defendants.)

Case No. 99-C-108-E

ENTERED ON DOCKET
DATE SEP 16 1999

ORDER

Now before the Court is the Motion to Dismiss Defendant, Springer Clinic (docket #1) of the Plaintiff, Letha D. Mayberry.

Plaintiff alleges that Dr. Carver, in conjunction with Springer Clinic Employees, negligently performed a de-encapsulation procedure on a silicone gel breast implant and negligently underinflated her saline breast implant when surgically replacing the silicone gel implants. Plaintiff also originally brought claims against Dow Corning Corporation and Dow Corning Wright Corporation for negligence in the manufacturing and marketing of the silicone gel implants. Although styled as a motion to dismiss, the root of the issue now before this Court is a battle over diversity jurisdiction.

A brief summary of the procedural history is necessary to the determination of this issue. This matter was originally filed in District Court in Tulsa County, State of Oklahoma, in 1992 against Dr. Carver, Springer Clinic, Dow Corning Corporation, and Dow Corning Wright Corporation. On April 5, 1993, pursuant to an Order of the Oklahoma Supreme Court for the

handling of breast implant cases in the state of Oklahoma, this matter was transferred to Oklahoma County for pretrial work-up under the supervision of the Honorable John Amick, District Judge of Oklahoma County. In October, 1995, Dow Corning filed Bankruptcy and removed this action to Federal Court. Dr. Carver and Springer Clinic objected to the removal of the claims involving them. Before these objections were ruled on, however, the case was transferred to Alabama for handling with the breast implant multidistrict litigation. On January 8, 1998, this litigation was remanded from Alabama back to the United States District Court for the Western District of Oklahoma, with only Dr. Carver and Springer Clinic remaining as Defendants. Claims against Dow Corning Corporation had been sent to bankruptcy court in Michigan.

On remand, Dr. Carver and Springer Clinic sought to be remanded to state court due to the absence of the claims against Dow Corning Corporation. Apparently Plaintiff did not object to this remand and had not objected to a remand to state court (where she filed her claim) during the time that the case was pending in Alabama. On January 4, 1999, the day before a status and scheduling conference, represented by new counsel, Plaintiff filed a motion to dismiss defendant Springer Clinic, without prejudice, asserting, contrary to her original Petition, that "there is no agency or employment relationship between Dr. Carver and the Springer Clinic," and that "Springer Clinic did not commit any negligence independent of Dr. Carver's actions." At the status and scheduling conference, Plaintiff's counsel took the position that federal court jurisdiction was appropriate based on diversity due to the dismissal of Springer Clinic and the fact that Dr. Carver had relocated to South Dakota. The Court found that venue was not appropriate in the Western District of Oklahoma, and transferred the case to this Court, leaving the issues of jurisdiction and dismissal for this Court to decide. Defendants object to the dismissal of Springer Clinic, calling it a "belated

attempt to create federal diversity jurisdiction.

Under Rule 41, Fed.R.Civ.P., dismissal after an answer has been filed, requires an “order of the court [] upon such terms and conditions as the court deems proper.” A motion to dismiss, under these circumstances, is within the Court’s discretion, and the analysis must take into account “whether the opposing party will suffer prejudice in the light of the valid interests of the parties.” Clark v. Tansy, 13 F.3d 1407, 1411 (10th Cir. 1993). A determination of legal prejudice requires a consideration of “the [opposing party’s] effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the [movant] in prosecuting the action, [and] insufficient explanation for the need to take a dismissal.” Id. An analysis of these factors leads the Court to conclude that dismissal of Springer Clinic 7 years after filing the claim, in an apparent calculated move to manufacture diversity jurisdiction, even though state court was the original forum of choice for Plaintiff, and substantial pretrial preparation had been under taken in state court, is clearly improper and prejudicial to Dr. Carver and Springer Clinic. The Court additionally notes in its analysis that the conclusory statements that “there is no agency or employment relationship between Dr. Carver and the Springer Clinic,” and that “Springer Clinic did not commit any negligence independent of Dr. Carver’s actions,” provide insufficient reason for the need to take a dismissal in light of the timing of the statements and the allegations in the complaint. Accordingly, Plaintiff’s motion to dismiss Springer Clinic is denied.

In light of this decision, the Court now considers the motion of Defendants for remand and abstention. The position of the Defendants in this motion is that the Court does not have jurisdiction over the claims against these defendants merely because of the bankruptcy of Dow Corning. In the alternative, Defendants argue that remand is appropriate “based on equitable grounds.” Pursuant to

28 U.S.C. §1452(b), a case removed because it is related to a bankruptcy case may be remanded on equitable grounds. In this instance, the court finds that the state law claims against Dr. Carver and Springer Clinic are not related to any bankruptcy case, see Nickum v. Brakegate Ltd, 743 F.2d 984 (3rd Cir. 1984), and that they should be remanded on equitable grounds because of the expertise of the state court that has dealt with numerous similar breast implant cases, the questions of state law, and the prejudice to the involuntarily removed parties.

Accordingly, the Motion to Dismiss Springer Clinic (Docket #1) is denied and this matter is remanded, pursuant to 28 U.S.C. §1452 , to the Oklahoma District Court, Oklahoma County, for further proceedings.

IT IS SO ORDERED THIS 15TH DAY OF SEPTEMBER, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

KR

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JEFFREY M. WEISER, PAUL E.)
JORNAYVAZ and HOWARD W.)
MARTIN,)

Plaintiffs,)

v.)

STEPHEN J. HEYMAN, STEPHEN E.)
JACKSON, individually and as Trustee)
of the Stephen E. Jackson Trust,)

Defendants.)

Case No. CV-95-854-BU

ENTERED ON DOCKET

DATE SEP 16 1999

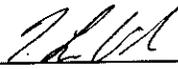
**STIPULATION OF VOLUNTARY DISMISSAL WITH PREJUDICE
OF ALL REMAINING CLAIMS
OF JEFFREY M. WEISER AND PAUL E. JORNAYVAZ**

Plaintiffs Jeffrey M. Weiser ("Weiser") and Paul E. Jornayvaz ("Jornayvaz") and Defendants, Stephen J. Heyman, Stephen E. Jackson, individually and as Trustee of the Stephen E. Jackson Trust, stipulate that pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, all remaining claims asserted by Weiser and Jornayvaz against the Defendants in the above-captioned action are hereby dismissed with prejudice. Each party shall bear its own costs and expenses including attorney fees.

Dated: September 3, 1999.

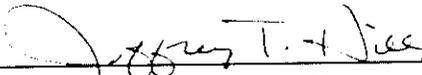
elt

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By:  _____

Donald L. Kahl, OBA # 4855
T. Lane Wilson, OBA # 16343
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320 S. Boston, Suite 400
Tulsa, Oklahoma 74103-3708
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ATTORNEYS FOR PLAINTIFFS
JEFFREY M. WEISER and PAUL E.
JORNAYVAZ

By:  _____

James L. Kincaid, OBA #5021
Jeffrey T. Hills, OBA #14743
CROWE & DUNLEVY
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321 South Boston
500 Kennedy Building
Tulsa, Oklahoma 74103
(918) 592-9800

ATTORNEYS FOR DEFENDANTS
STEPHEN J. HEYMAN and STEPHEN
E. JACKSON, individually and as Trustee of
the Stephen E. Jackson Trust

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

IN RE:

COMMERCIAL FINANCIAL SERVICES,
INC. and CF/SPC NGU, INC.,

Debtor,

CAROL SPANGLER, JOHN BACHMAN
and BRUCE PHELPS,

Appellants,

vs.

COMMERCIAL FINANCIAL SERVICES,

Appellee.

F I L E D

SEP 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-380-H (M)

and

Case No. 99-CV-390-H (M) ✓

ENTERED ON DOCKET

DATE SEP 15 1999

REPORT AND RECOMMENDATION

The instant appeal from the United States Bankruptcy Court for the Northern District of Oklahoma is before the undersigned United States Magistrate Judge for report and recommendation. Appellants, Carol Spangler, John Bachman and Bruce Phelps, appeal from a decision of the Bankruptcy Court *In re Commercial Financial Services, Inc.*, 233 B.R. 885 (N.D. bkcy 1999) denying their motions for administrative claim priority under 11 U.S.C. § 503(b)(1)(A). CFS's Motion to Strike and for Sanctions [Dkt. 9] is also before the court.

Appellants are former employees of Commercial Financial Services, Inc. (CFS). Pre-petition, each of the appellants negotiated written employment agreements with CFS. CFS agreed to pay Bachman and Phelps a lump sum cash payment equal to their respective annual base salaries, \$120,000 and \$150,000, upon termination of employment by CFS prior to expiration of the contract term for any reason other than

107

cause, as that term was defined in the agreement. Spangler's agreement provided that she was an "at will" employee, but specified that in the event CFS terminated her employment for a reason other than cause, CFS would give her six month's notice, or alternatively would pay her a lump sum equal to six months of her annual base salary, \$155,000 at the time of termination. The Bankruptcy Court referred to these provisions as "Lump Sum Termination Payment Clauses." The agreements had not expired on December 11, 1998, when CFS filed its voluntary petition for bankruptcy relief.

Operating as debtor in possession, CFS continued to operate its business with appellants continuing to perform their jobs and receiving their regular salaries. Pursuant to a company-wide reduction in force in which half of the CFS workforce was terminated, Bachman, Phelps, and Spangler were all terminated not for cause effective January 8, 1999, less than one month after the commencement of the bankruptcy case. Bachman and Phelps were terminated prior to the expiration of their contract terms. Spangler was terminated without six months notice.

With Bankruptcy Court approval pursuant to 11 U.S.C. § 365(a), CFS rejected the appellants' employment agreements. The appellants were not paid any funds pursuant to the Lump Sum Termination Payment Clauses.

JURISDICTION AND STANDARD OF REVIEW

The District Court has jurisdiction over this appeal under 28 U.S.C. § 158. The Bankruptcy Court's legal conclusions are subject to *de novo* review. *Phillips v. White*

(In re White), 25 F.3rd 931, 933 (10th Cir. 1994). The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard.

DISCUSSION

In general, Appellants assert two propositions on appeal.¹ First, that their claims for lump sum termination payments **are** administrative expenses under 11 U.S.C. § 503(b)(1)(A) and the Bankruptcy Court erred in holding otherwise. Second, that the debtor in possession committed fraud on appellants by allowing them to work for the debtor in possession while concealing and failing to disclose to them the change in their employment relationship.

Concerning 11 U.S.C. § 503(b)(1)(A), appellants' central premise is that their lump sum termination payments **were part of** their compensation agreements with the debtor in possession for their work **post-petition**. Appellants' assertion is completely unsupported by the record. **Simply stated**, the debtor in possession never agreed to pay the appellants' lump sum termination payments as compensation for their post petition work.

In a thorough and well reasoned written order, the Bankruptcy Court ruled upon all of appellants' arguments under 11 U.S.C. § 503(b)(1)(A). Upon de novo review, the undersigned finds the Bankruptcy Court's legal conclusions to be correct and its factual determinations to be **fully supported** by the record. Having nothing to add to

¹ Appellant Spangler only asserts the first proposition concerning 11 U.S.C. § 503(b)(1)(A).

the Bankruptcy Court's discussion, the undersigned recommends the Bankruptcy Court's decision be affirmed on this issue for the reasons set forth in its order.

Appellants' second general proposition, that the debtor in possession committed fraud, etc., was not presented to the to the Bankruptcy Court. Appellate courts have some discretion to hear matters not raised or argued below. See *Colorado Interstate Corp. v. CIT Group/Equip. Fin., Inc.*, 993 F.2d 743, 751, 753 (10th Cir.1993). However, discretion is exercised to consider new matters only in "the most unusual circumstances." *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721 (10th Cir.1993); *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir.1991). Those circumstances may include issues regarding jurisdiction and sovereign immunity, *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1539 (10th Cir.1992), and instances where public interest is implicated, *FDIC v. Ferguson*, 982 F.2d 404, 407 (10th Cir.1991), or where manifest injustice would result, *Hicks*, 928 F.2d at 970. The general rule, however, is that "[t]he failure to raise the issue with the trial court precludes review except for the most manifest error." *Id.* see also *In re Cozad*, 208 B.R. 495,498 (B.A.P. 10th Cir. 1997) (citing *Gillihan v. Shillinger*, 872 F.2d 935, 938 (10th Cir. 1989).

This case presents no exceptional circumstances that would warrant review of matters not argued to the Bankruptcy Court. The undersigned, therefore, recommends that the Court not consider appellants' arguments concerning fraud, etc. In keeping with the above, the undersigned recommends that the Court grant appellee's Motion to Strike those matters not presented to the Bankruptcy Court. However, appellants' conduct in pressing these arguments on appeal is not of a nature to require sanctions

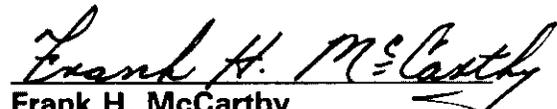
and it is therefore recommended that the Court exercise its discretion and deny appellee's request for sanctions.

CONCLUSION

The undersigned United States Magistrate Judge RECOMMENDS that the Bankruptcy Court's decision denying administrative expense priority to appellants' claims under the Lump Sum Termination Payment Clauses contained in their rejected employments agreements be AFFIRMED and that CFS's Motion to Strike and for Sanctions [Dkt. 9] be GRANTED IN PART and DENIED IN PART as set forth above.

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

DATED this 14th Day of September, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

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

5 15th Day of September, 1999.
C. Portello, Deputy Clerk

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

IN RE:

COMMERCIAL FINANCIAL SERVICES,
INC. and CF/SPC NGU, INC.,

Debtor,

CAROL SPANGLER, JOHN BACHMAN
and BRUCE PHELPS,

Appellants,

vs.

COMMERCIAL FINANCIAL SERVICES,

Appellee.

F I L E D

SEP 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-380-H (M) ✓

and

Case No. 99-CV-390-H (M)

ENTERED ON DOCKET
DATE **SEP 15 1999**

REPORT AND RECOMMENDATION

The instant appeal from the United States Bankruptcy Court for the Northern District of Oklahoma is before the undersigned United States Magistrate Judge for report and recommendation. Appellants, Carol Spangler, John Bachman and Bruce Phelps, appeal from a decision of the Bankruptcy Court *In re Commercial Financial Services, Inc.*, 233 B.R. 885 (N.D. bkcy 1999) denying their motions for administrative claim priority under 11 U.S.C. § 503(b)(1)(A). CFS's Motion to Strike and for Sanctions [Dkt. 9] is also before the court.

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cause, as that term was defined in the agreement. Spangler's agreement provided that she was an "at will" employee, but specified that in the event CFS terminated her employment for a reason other than cause, CFS would give her six month's notice, or alternatively would pay her a lump sum equal to six months of her annual base salary, \$155,000 at the time of termination. The Bankruptcy Court referred to these provisions as "Lump Sum Termination Payment Clauses." The agreements had not expired on December 11, 1998, when CFS filed its voluntary petition for bankruptcy relief.

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With Bankruptcy Court approval pursuant to 11 U.S.C. § 365(a), CFS rejected the appellants' employment agreements. The appellants were not paid any funds pursuant to the Lump Sum Termination Payment Clauses.

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In general, Appellants assert two propositions on appeal.¹ First, that their claims for lump sum termination payments are administrative expenses under 11 U.S.C. § 503(b)(1)(A) and the Bankruptcy Court erred in holding otherwise. Second, that the debtor in possession committed fraud on appellants by allowing them to work for the debtor in possession while concealing and failing to disclose to them the change in their employment relationship.

Concerning 11 U.S.C. § 503(b)(1)(A), appellants' central premise is that their lump sum termination payments were part of their compensation agreements with the debtor in possession for their work post-petition. Appellants' assertion is completely unsupported by the record. Simply stated, the debtor in possession never agreed to pay the appellants' lump sum termination payments as compensation for their post petition work.

In a thorough and well reasoned written order, the Bankruptcy Court ruled upon all of appellants' arguments under 11 U.S.C. § 503(b)(1)(A). Upon de novo review, the undersigned finds the Bankruptcy Court's legal conclusions to be correct and its factual determinations to be fully supported by the record. Having nothing to add to

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the Bankruptcy Court's discussion, the undersigned recommends the Bankruptcy Court's decision be affirmed on this issue for the reasons set forth in its order.

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This case presents no exceptional circumstances that would warrant review of matters not argued to the Bankruptcy Court. The undersigned, therefore, recommends that the Court not consider appellants' arguments concerning fraud, etc. In keeping with the above, the undersigned recommends that the Court grant appellee's Motion to Strike those matters not presented to the Bankruptcy Court. However, appellants' conduct in pressing these arguments on appeal is not of a nature to require sanctions

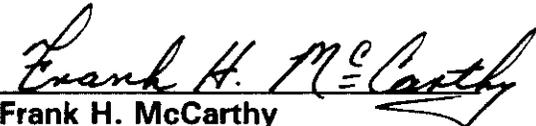
and it is therefore recommended that the Court exercise its discretion and deny appellee's request for sanctions.

CONCLUSION

The undersigned United States Magistrate Judge RECOMMENDS that the Bankruptcy Court's decision denying administrative expense priority to appellants' claims under the Lump Sum Termination Payment Clauses contained in their rejected employments agreements be AFFIRMED and that CFS's Motion to Strike and for Sanctions [Dkt. 9] be GRANTED IN PART and DENIED IN PART as set forth above.

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

DATED this 14th Day of September, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

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

5 15th Day of September, 1999.
C. Portulley, Deputy Clerk.

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

SEP 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEADRA J. GARRETT, et al,)
)
Plaintiff(s),)
)
vs.)
)
ELMER LEE BURKS, et al,)
)
Defendant(s).)

Case No. 99-C-96-B ✓

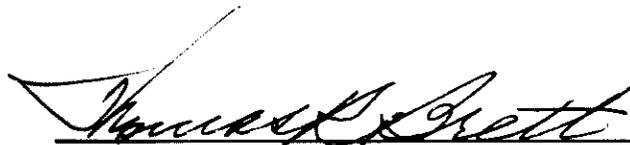
ENTERED ON DOCKET
DATE SEP 15 1999

ADMINISTRATIVE CLOSING ORDER

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

If, by 11-12-99, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this ^{14th} day of September, 1999.



THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

//

FILED

SEP 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JANE MOYNIHAN,)
)
Plaintiff(s),)
)
vs.)
)
STATE FARM MUTUAL AUTOMOBILE)
INSURANCE CO.,)
)
Defendant(s).)

Case No. 98-C-979-B ✓

ENTERED ON DOCKET
DATE SEP 15 1999

ADMINISTRATIVE CLOSING ORDER

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

If, by 11-12-99, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 14th day of September, 1999.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

F I L E D

SEP 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AMERI-CK, INC.,
an Oklahoma Corporation,

Plaintiff,

vs.

Case No. 98-CV0547E(M)

MARTIN & BAYLEY, INC.,
an Illinois Corporation,

Defendant.

ENTERED ON DOCKET

DATE SEP 15 1999

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to the Stipulation of Dismissal With Prejudice filed by all parties in this action,

IT IS THEREFORE ORDERED that the above-captioned action be dismissed with prejudice.

Each party to bear their own costs, attorney fees, and expenses.

SO ORDERED this 14th day of September, 1999.


United States District Judge

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

FILED

SEP 13 1999 *SP*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRODGERICK KYLE SIMMONS,)
)
 Petitioner,)
)
 vs.)
)
 TWYLA SNIDER, Warden,)
)
 Respondent.)

Case No. 97-CV-837-B (J) ✓

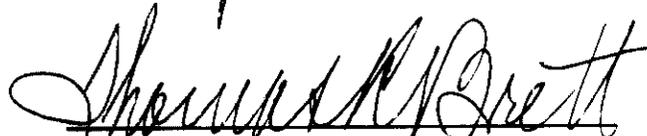
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DATE SEP 14 1999

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 10th day of Sept., 1998.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

MT

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

FILED

AMERI-CK, INC.,)
an Oklahoma Corporation,)
)
Plaintiff,)
)
vs.)
)
MARTIN & BAYLEY, INC.,)
an Illinois Corporation,)
)
Defendant.)

SEP 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV0547E(M)

ENTERED ON DOCKET

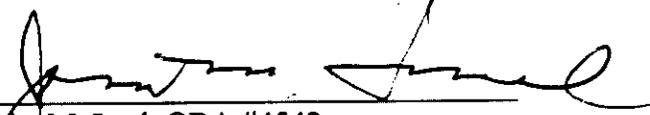
DATE SEP 14 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Ameri-Ck, Inc. and the Defendant, Martin & Bayley, Inc., by and through their undersigned counsel of record, and pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, stipulate to a dismissal with prejudice of all claims in the above-captioned action. Each party shall bear their own costs, attorney fees, and expenses.

Dated this 13th day of September, 1999.

AMERI-CK, INC.

By 
John M. Imel, OBA #4542
John W. Cannon, OBS #15738
MOYERS, MARTIN, SANTEE,
IMEL & TETRICK
320 SouthBoston, Suite 920
Tulsa, Oklahoma 74103-3722
Telephone (918) 582-5281
Facsimile (918) 585-8318

ATTORNEYS FOR PLAINTIFF,
AMERI-CK, INC.

41

OK

MARTIN & BAYLEY, INC.

By 

James D. Bryant, OBA #12228

Keith F. Sellers, OBA #8069

HOLLIMAN LANGHOLZ RUNNELS

HOLDEN FORSMAN & SELLERS

Ten East Third Street, Suite 500

Tulsa, OK 74103-3695

ATTORNEYS FOR DEFENDANT,
MARTIN & BAYLEY, INC.

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

SEP 14 1999

WALTER E. BURNS,
SSN: 576-70-9402,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-0400-EA

ENTERED ON DOCKET
DATE SEP 14 1999

JUDGMENT

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

It is so ordered this 14th day of September 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

WALTER E. BURNS,
SSN: 576-70-9402,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

SEP 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-0400-EA

ENTERED ON DOCKET

DATE SEP 14 1999

ORDER

On September 13, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny his application for disability insurance benefits, the disposition of which both parties have consented to before this Court. Paul McTighe, Esq., appeared on behalf of the plaintiff, and Peter Bernhardt, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) is not supported by substantial evidence and the ALJ failed to apply the correct legal standards. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

Procedural History

On June 26, 1989, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.). His application was denied in its entirety initially and on reconsideration. Claimant did not file a Request for Hearing. On March 23, 1990, claimant filed a second application for benefits, which was denied under the doctrine of administrative res judicata. 20 C.F.R. § 404.957(c)(1). On November 1, 1990 he filed a Request for Hearing.

A hearing before Administrative Law Judge (ALJ) Stephen C. Calvarese was held February 8, 1991, in Tulsa, Oklahoma. (R. 27-76) By decision dated May 31, 1991, the ALJ found good cause to reopen the claimant's prior application for adjudication. However, he found no basis for revising the prior adverse determination that claimant was not under a disability prior to December 31, 1988, the date his insured status expired. (R. 9-21) On March 11, 1992, the Appeals Council denied review of the ALJ's findings. (R. 4-5) On August 23, 1993, the Northern District of Oklahoma ("District Court") remanded, directing that the ALJ hold a supplemental hearing, consider all relevant medical evidence, and clarify an issue. (R. 481-93) On September 3, 1993, the Appeals Council vacated the final decision of the Commissioner and remanded the case to an ALJ "for further proceedings consistent with the order of the court." (R. 495)

Supplemental hearings were held October 25, 1994, December 7, 1994, November 15, 1996, and June 24, 1997 in Tulsa, Oklahoma. (R. 362-71, 372-414, 415-22, 423-56) The ALJ also ordered two consultative examinations for claimant, one by an orthopedic surgeon and the other by a psychologist. Further, the ALJ sent interrogatories to claimant's treating physician, who declined to appear at hearing. By decision dated January 30, 1998, the ALJ found that claimant was not disabled at any time through December 31, 1988. (R. 345-61) On April 20, 1998, the Appeals Council denied claimant's written exceptions to the ALJ's findings. (R. 332-33) Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 404.984.

Claimant's Background

Claimant was born on July 3, 1946, and was 42 years old at the time his insured status expired. He was 51 years old at the time of his last administrative hearing. He has a twelfth grade education and vocational training in cosmetology. Claimant worked as a construction laborer,

carpenter, hospital maintenance and installation worker, and highway maintenance laborer. Claimant alleges an inability to work beginning February 9, 1983, when he injured he back at work while trying to install a 300 pound culture incubator. He claims disability due to back and shoulder problems, neck problems, hip problems, leg problems, arm and elbow problems, chronic pain syndrome, pain and limited mobility. (Complaint, Docket # 1, at 2.) He had surgery on his back in May 1984 and again in March 1988. Claimant's medical history is summarized in the previous opinion of the District Court on August 23, 1993 (R. 481-93). Since the date claimant was last insured for purposes of obtaining benefits under Title II was December 31, 1988, the relevant period for determining whether he is disabled is from his alleged onset date of February 9, 1983 to December 31, 1988.

The ALJ's Decision

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that, on the date claimant's insured status expired, claimant had the residual functional capacity (RFC) to perform light work, reduced by an inability to sit for more than 1-2 hours at one time, stand for more than 1-2 hours at one time, and walk for more than 2-3 hours at one time with no limitations on sitting, standing and walking for more than 8 hours each in an 8-hour workday. The claimant could occasionally lift and carry up to 20 pounds, and frequently lift and carry up to 10 pounds. The ALJ found no basis for placing any limitations on the repetitive use of the claimant's hands and feet. The claimant retained the ability to occasionally bend, squat, crawl, climb, and reach. The ALJ determined that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his RFC, age, education, and work experience. The ALJ concluded that claimant was not disabled under

the Social Security Act at any time through December 31, 1988, the date his insured status expired.

(R.360)

Issues

Claimant asserts as error that:

- (1) the ALJ failed to follow the mandates of the Court's remand decision and therefore the Commissioner did not sustain his burden at step five; and
- (2) the ALJ failed to fully develop the medical evidence regarding the claimant's mental impairments.

Applicable Law

Treating Physician

The regulations provide that, although the final responsibility for determining the ultimate issue of disability is reserved to the Commissioner, 20 C.F.R. §§ 404.1527(e)(2), 416.927(e)(2), the Commissioner will give controlling weight to a treating physician's opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, id. §§ 404.1527(d)(2), 416.927(d)(2).

A treating physician's opinion is entitled to substantial weight unless good cause is shown for rejecting it. Goatcher v. United States Dep't of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995) (citations omitted). A treating physician's report may be rejected if it is brief, conclusory, and unsupported by medical evidence. Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988); see also Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). If the treating physician's opinion is to be disregarded, specific, legitimate reasons for doing so must be set forth. Eggleston v. Bowen, 851 F.2d 1244, 1246-47 (10th Cir. 1988).

Medical Improvement

In connection with possible termination in benefits, medical improvement “must be based on changes (improvement) in the symptoms, signs, and/or laboratory findings associated with your impairment(s)” 20 C.F.R. § 1594(b)(1). A medical improvement is only related to a claimant’s ability to work “if there has been a decrease in the severity . . . of the impairments(s) present at the time of the most recent favorable medical decision and an increase in your functional capacity to do basic work activities” 20 C.F.R. § 404.1594(b)(3)

Duty to Develop the Record

The ALJ has a basic duty of inquiry to fully and fairly develop the record as to material issues. Baca v. Department of Health & Human Servs., 5 F.3d 476, 479-80 (10th Cir. 1993). However, in determining the amount of evidence a claimant must adduce to trigger the ALJ’s duty, “the starting place must be the presence of some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision requiring further investigation.” Hawkins v. Chater, 113 F.3d 1162, 1167 (10th Cir. 1997) (citations omitted). An ALJ is to explore the facts of a case, but is not under a duty to act as counsel for the claimant. Musgrave v. Sullivan, 966 F.2d 1371, 1377 (10th Cir. 1992).

Findings

In its August 23, 1993 decision, the District Court ordered the following:

A supplemental hearing must take place where Dr. Hawkins testifies on his opinion of Mr. Burns’ ability to do sustained work activities and on his assessment of Mr. Burns’ pain. In addition, since Mr. Burns only has to prove that his disability arose prior to December 31, 1988, the [Commissioner] must consider all relevant medical evidence. Specifically the [Commissioner] must give appropriate weight to the treating physician’s opinion prior to 1988, not just opinions given during June and

September of 1988. Lastly, the issue of whether Mr. Burns had fibromyositis prior to December 1988 must be clarified.

(R. 493)

The District Court could not have anticipated that Dr. Hawkins would refuse to testify despite repeated efforts by the ALJ to obtain his testimony. In response to the second subpoena sent to Dr. Hawkins, his office wrote: "Don L. Hawkins, M.D. does not know a Walter Burns. We have no Medical records on a Walter Burns. Dr. Hawkins is very confused as to why you would need him. He cannot help this person Walter Burns." (R. 638) Given Dr. Hawkins' recalcitrance, the ALJ did the best he could do by ordering additional consultative examinations, asking a medical expert to testify at a hearing, and by sending interrogatories to Dr. Hawkins on two occasions. The claimant moved without notifying his attorney or the Administration of his change of address, and he did not get notices about the first hearing or consultative examinations that were scheduled on his behalf. He did appear at the second hearing and for the consultative examinations that were scheduled thereafter. Dr. Hawkins did not respond to the extensive interrogatories prepared by claimant. The ALJ then sent to him two abbreviated interrogatories asking him to review his office notes from January 24, 1984 to September 13, 1988 and render an opinion, if possible, as to claimant's work capabilities during that time period. In response, Dr. Hawkins simply wrote: "Mr [sic] Burns would be unable to work. (Temporarily totally disabled)." (R. 642) He declined to complete a Medical Source Statement, and stated "No Change for Any 12 Months." (Id.) The ALJ's efforts comply with the District Court's order in this regard were extensive.

However, the ALJ's 1998 decision of no disability prior to December 31, 1988 is not supported by substantial evidence. Dr. Hawkins was the treating physician during the relevant period.

The ALJ discussed the medical evidence from the 1983 to 1988 time period, including the opinions of Dr. Hawkins prior to June and September 1988. (R. 352-53) However, there is no dispute that claimant suffered a back injury when he was hurt on the job in February 1983 or that claimant had surgery on his back in May 1984 to fuse his back at the L4-L5 level. Nor is there any dispute that his back failed to fuse solidly, thus necessitating a second surgery in March 1988. (See R. 192-205) The ALJ should have considered claimant's ability to work in light of a fusion that did not fuse solidly. Dr. Hawkins discharged claimant on September 13, 1988, indicating that claimant had reached maximum medical improvement. (R. 207) Dr. Hawkins' statement on September 13, 1988 is evidence of medical improvement, but does not address functional capacity to do basic work activities, and thus does not necessarily mean that claimant could work. In fact, his statement in response to the ALJ's written interrogatories on August 1, 1997, indicates that he believed claimant was not able to work between January 24, 1984, and September 13, 1988. (See R. 642)

Thus, proper evaluation of this record requires the ALJ to consider whether the time period between the date of onset, February 9, 1983, and September 13, 1988, represents a closed period of disability for claimant under the regulations, and whether Dr. Hawkins' report of September 13, 1988, supports a finding of medical improvement (see R. 353) sufficient to meet the regulatory requirements to terminate benefits on that date. If claimant is entitled to benefits during a closed period of disability that ended on September 13, 1988, he would be entitled to payment of benefits for one year prior to the date of his application on June 26, 1989. See 20 C.F.R. § 404.621.

As to the claimant's argument that the ALJ failed to fully develop the medical evidence regarding the claimant's mental impairments, there is some evidence in the record suggesting the existence of a condition which could have a material impact on the disability and medical

improvement analysis requiring further investigation. Shirley J. Welden, M.D., prescribed Pamelor for claimant in March and July 1989 (R. 264, 268), and she prescribed Prozac in June 1989. (R. 263) On remand, the ALJ should discuss whether the mental impairment issue has been properly raised, and if so, consider it as part of the medical improvement analysis. If necessary, the ALJ may wish to call a medical expert to testify as to whether claimant suffers from a mental impairment, its severity, and the onset date, if any.

Conclusion

IT IS THEREFORE ORDERED that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion. On remand, the Commissioner should specifically address the propriety of a closed period of disability, and the medical improvement and mental impairment issues in accordance with the discussion set forth above. 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).

Dated this 14th day of September, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MOLLIE MILLER,)
o/b/o Lakendra Pearson,)
SSN: 444-82-5349,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 98-CV-0900-EA

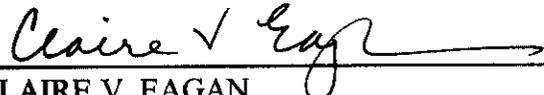
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DATE ~~SEP 14 1999~~

JUDGMENT

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

It is so ordered this 14th day of September 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MOLLIE MILLER,)
o/b/o Lakendra Pearson,)
SSN: 444-82-5349,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 98-CV-0900-EA

ENTERED ON DOCKET

DATE SEP 14 1999

ORDER

On September 14, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny her application for children's disability benefits, the disposition of which both parties have consented to before this Court. Gayle Troutman, Esq., appeared on behalf of the plaintiff, and Peter Bernhardt, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) is not supported by substantial evidence and the ALJ failed to apply the correct legal standards. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

Procedural History

On August 7, 1995, claimant protectively filed for children's disability benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's application for benefits was denied in its entirety initially and on reconsideration. A hearing before Administrative Law Judge (ALJ) Richard J. Kallsnick was held May 19, 1997, in Tulsa, Oklahoma. (R. 32-68) By decision dated August 5, 1997, the ALJ found that claimant was not disabled at any time through the date of the decision. (R. 9-22) On

September 26, 1998, the Appeals Council **denied** review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's **final** decision for purposes of further appeal. 20 C.F.R. § 416.1481.

Claimant's Background

Claimant was born on August 17, 1983, and was 13 years old at the time of the administrative hearing in this matter. She was in **seventh grade** at the time. Claimant alleges disability beginning on the date of her birth due to mental impairments, including: reading problems, problems following one task at a time, hygiene problems, **mood swings** communication problems, anger, discipline problems, behavior problems, forgetfulness, **aggressive behavior**, suicidal [sic], speaking problems and depression. (Complaint, Docket # 1, at 2.)

The ALJ's Decision

The ALJ made his decision at the **third step** of the sequential evaluation process applicable to children. He found that claimant had **mental retardation**. However, the ALJ found that claimant did not have an impairment or combination of impairments either listed in or medically or functionally equivalent in severity to an impairment listed in Appendix 1, Subpart P, Regulations No. 4, Parts B or A, respectively (20 C.F.R. § 416.926a.) **The ALJ** concluded that claimant was not disabled under the Social Security Act at any time through **the date** of the decision. (R. 21)

Issues

Claimant asserts as error that the ALJ:

- (1) found that claimant does not **meet** or equal Listing 112.05D; and
- (2) found that claimant was not **functionally** equivalent in severity to a listed impairment.

Applicable Law

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

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

The regulations provide that a claimant's impairment must meet, medically equal, or functionally equal in severity the set of criteria for an impairment listed in the Listing of Impairments in 20 C.F.R. Pt. 404, Subpt. P, App. 1. 20 C.F.R. § 416.924(d). At step three, an ALJ is "required to discuss the evidence and explain why he found that [claimant] was not disabled" in his written decision. Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996). However, a claimant bears the burden of proving that a Listing has been equaled or met. Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988). Accordingly, claimant is disabled only if claimant can establish that her condition meets or equals a Listing at step three of the sequential evaluation process for children's disability benefits.

Under the regulations, mental retardation is "[c]haracterized by significantly subaverage general intellectual functioning with deficits in adaptive functioning." 20 C.F.R., Part 404, Subpt. P, App. 1, 112.05. The required level of severity for this disorder is met when any one of six criteria is met; however, the parties here argue that only one is applicable, Listing 112.05D. Listing 112.05D requires a "valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant limitation of function." 20 C.F.R., Part 404, Subpt. P, App. 1, 112.05D.

Under the regulations, a proper **functional analysis** requires an ALJ to evaluate a claimant's impairment or combination of impairments by analyzing whether claimant has (1) limitation of specific functions, (2) limitations in broad areas of **development** or functioning, (3) episodic impairments, and (4) limitations related to treatment or medication effects. 20 C.F.R. § 416.926a(b). Adolescents (age 12 to 18) are evaluated in five areas of **functioning**: cognitive/communicative, motor, social, personal, or deficiencies of concentration, **persistence** or pace. Id., § 416.926a(c)(5)(v). If claimant has "marked" limitations in two areas, or "**extreme**" limitations in one area, claimant is presumptively disabled. Id., § 416.926a(c). When **standardized tests** are used as the measure of functional abilities, a valid score that is two standard deviations or more below the norm for the test (but less than three standard deviations), claimant has a **marked limitation**; a valid score that is three standard deviations or more below the norm for the test **means that** claimant has an extreme limitation. Id., § 416.926a(c)(3).

Under James v. Chater, 96 F.3d 1341, 1344 (10th Cir. 1996), "issues not brought to the attention of the Appeals Council on **administrative review** may, given sufficient notice to the claimant, be deemed waived on subsequent **judicial review**." The Commissioner argues that claimant did not raise her "standard deviation" argument **before the Appeals Council**. Claimant argues that the "standard deviation" argument was **only part of the argument** for the broader issue of whether the ALJ's finding that claimant does not **meet or equal Listing 112.05D** is supported by substantial evidence.

Findings

When claimant took the Wechsler **Intelligence Scale for Children - Third Edition (WISC-III)** in 1992, she scored 69 on the verbal IQ, **78 on the performance IQ**, and 71 on the full-scale IQ. (R.

124) Claimant scored in the bottom 1% on **achievement** tests in 1992 at Tulsa Public Schools. (R. 120) When she took the WISC-III again in May 1995, she scored 73 on the verbal IQ, 86 on the performance IQ, and 77 on the full-scale IQ. These scores placed her in the borderline to low average range of intellectual ability. (R. 124) She was diagnosed by Children's Medical Center in June 1995 as having adjustment disorder with depressed mood and borderline intellectual functioning. Her general assessment of functioning (GAF) score was 65. (R. 130) Ronald H. English, M.D., indicated in February 1996 that claimant had been placed on medications due to behavior problems. (R. 133) Her teacher at Gilcrease Middle School stated in May 1997 that, although claimant's chronological age was 13, her mental age approximated a third or fourth grade level, and she actually performed at a first or second grade level. (R. 158)

Claimant argues that claimant is disabled because she scored 69 on the verbal IQ portion of one of the two WISC-III tests that she took, and the diagnosis that she had adjustment disorder with depressed mood indicates that she has a mental impairment imposing additional and significant limitations. Claimant also argues that her verbal IQ score of 73 in 1995 is equivalent to a score of 70 because the IQ scores in Listing 112.05 reflect values from tests of general intelligence that have a mean of 100 and a standard deviation of 15." 20 C.F.R. Pt. 404, Subpt. P., App. 1, 112.00D. Claimant also argues from the manual for the WISC-III that claimant's scores from the 1995 test have to be adjusted because test results typically improve on a second test, a factor described as "test-retest stability." (Cl. Br., Docket #5, at 3, citing *The Psychological Corp., Wechsler Intelligence Scale for Children - Third Edition Manual* 170-71 (1991).)

The Commissioner makes a persuasive argument that claimant's "standard deviation" argument should be rejected. As the Commissioner points out, the Tenth Circuit has already

addressed this issue, noting that the **standard deviation** argument by counsel would be contrary to the clear language of the regulations and the court can "assume that SSA was aware of the standard deviation when setting the IQ threshold at 70 points." See Brainard v. Secretary of Health and Human Services, No. 93-5173, 1994 WL 170783 (10th Cir. May 5, 1994.) The regulations specifically incorporate the **standard deviation** for the Wechsler series; IQs from other standardized tests which deviate significantly from that standard deviation "require conversion to the corresponding percentile rank in the **general population** so that the actual degree of impairment reflected by the IQ scores can be determined." 20 C.F.R. Pt. 404, Subpt. P., App. 1, 112.00D.

However, claimant's **standard deviation** argument is moot as to the first element of Listing 112.05D because "[i]n cases where **more than one** IQ is customarily derived from the test administered, e.g., where verbal, performance, and full scale IQ's are provided, as on the Wechsler series, the lowest of these is used in conjunction with listing 112.05." 20 C.F.R. § C.F.R. Pt. 404, Subpt. P., App. 1, 112.00D. Claimant **meets the first element** of Listing 112.05D due to her verbal IQ score of 69 on the first test. The ALJ **erroneously** stated that "claimant's IQ is above the requisite 60 to 70" when he made his finding that **her mental** retardation does not meet or equal the severity of Listing 112.05 or 12.05. (R. 17) The **Commissioner** does not address the issue created by the fact that claimant scored 69 on the verbal IQ **portion** of the first WISC-III test she took. The ALJ's finding was error.

Claimant also argues that **she meets the second element** of Listing 112.05D because the ALJ did not properly analyze the facts in **light of the four methods** of determining functional equivalence. Claimant argues that the ALJ should **have found** that she had a "marked" limitation in the cognitive/communicative functioning **area** because her score on the WISC-III fell two standard

deviations or more below the norm for the test. (Cl. Br., Docket # 5, at 5, citing 20 C.F.R. § 416.926a(c)(3)(1998).) At oral argument, counsel for claimant conceded that she was not making a true Brainard argument, but she was **instead** arguing that the ALJ failed to follow the regulations at 20 C.F.R. § 414.026a(c). That section indicates that "[m]arked limitation means -- (A) when standardized tests are used as the measure of functional abilities, a valid score that is two standard deviations or more below the norm for the test (but less than three standard deviations)" and "[e]xtreme limitation means -- (A) When standardized tests are used as the measure of functional abilities, a valid score that is three standard deviations or more below the norm for the test; . . ." Id.

As set forth above, the regulations incorporate the standard deviation for the Wechsler series with regard to verbal, performance or full scale scores for purposes of meeting the first element of Listing 112.05D; however, that does not preclude the ALJ from considering claimant's scores in the various subcategories tested to determine whether claimant is functioning with marked or extreme limitations in other areas relevant to the second element of Listing 112.05D. Claimant points out that she scored in the bottom 1 or 2 % on various subtests scored in the Wechsler series, including categories for oral expression, written expression, basic reading skills, mathematics calculations and visual processes. (R. 125) The ALJ did not discuss these scores and found that claimant had only a moderate limitation in cognitive/communicative functioning. (R. 20)

Further, the ALJ found that claimant had only a moderate limitation in social functioning because she testified at the hearing that she had school friends. (R. 20) As claimant's counsel pointed out at hearing, the fact that claimant testified that she has some friends does not mean that those friends have no problems of their own and that she is not markedly limited in social functioning. Claimant also contends that she had a marked limitation in the deficiencies of concentration,

persistence, or pace because teachers indicated that claimant constantly talked and was inattentive in class. (Cl. Br., Docket # 5, at 5.) The ALJ found that claimant's inattention in class led him to conclude that claimant had a moderate limitation in this area of functioning. (R. 20) Given other evidence in the record pertaining to claimant's withdrawal and her medication, the ALJ should revisit his evaluation of claimant in these functional areas.

It is true that claimant's counsel did not specifically raise the "standard deviation" argument to the Appeals Council. However, claimant did argue that she met Listing 112.05 in part because she had a verbal IQ of 69. (R. 167) Claimant also argued that she had problems that met the second element of Listing 112.05D due to her low level of functioning in other areas. Claimant sufficiently raised the issue to pass muster under James v. Chater, 96 F.3d 1341, 1344 (10th Cir. 1996). James does not require that claimant set forth in detail every subcategory of argument to sufficiently raise an issue. Due to the ALJ's failure to take into account claimant's verbal IQ score of 69 when she took the test in 1992 and his failure to analyze claimant's level of functioning in connection with her functional test scores, the decision is not supported by substantial evidence.

Conclusion

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. 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).

IT IS THEREFORE ORDERED that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

Dated this 14th day of September, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ELAINE S. BIRKEY,
SSN: 322-36-2944,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0574-EA

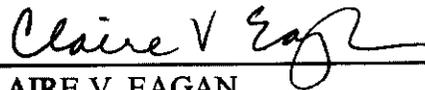
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DATE SEP 14 1999

JUDGMENT

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

It is so ordered this 13th day of September 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ELAINE S. BIRKEY,)
SSN: 322-36-2944,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 98-CV-0574-EA

ENTERED ON DOCKET

DATE SEP 14 1999

ORDER

On September 13, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny her application for supplemental security income and disability insurance benefits, the disposition of which both parties have consented to before this Court. Paul McTighe, Esq., appeared on behalf of the plaintiff, and Peter Bernhardt, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) is not supported by substantial evidence and the ALJ failed to apply the correct legal standards. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

Procedural History

On October 22, 1992, claimant filed for disability benefits under Title II (42 U.S.C. § 401 et seq.). Her application was denied in its entirety initially and claimant did not seek reconsideration. On March 22, 1995, she protectively filed for disability benefits under Title II and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's 1995 applications were denied in their entirety initially and on reconsideration. A hearing before Administrative Law

Judge (ALJ) Richard J. Kallsnick was held October 8, 1996, in Tulsa, Oklahoma. (R. 399-433) By decision dated November 13, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. (R. 10-29) On June 12, 1998, the Appeals Council denied review of the ALJ's findings. (R. 6-7) Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.¹

Claimant's Background

Claimant was born on September 4, 1941, and was 51 years old at the time her insured status expired. She was 55 years old at the time of the administrative hearing in this matter. She has a twelfth grade education, and she has some vocational training in computers and management. Claimant worked as a telemarketer, housekeeper, clerk, cashier, seamstress and upholsterer. Claimant alleges an inability to work beginning January 5, 1987, due to seizures, difficulty concentrating, incontinence, lack of energy, pain and limited mobility. (Complaint, Docket # 1, at 2.) In her memorandum brief, she also claims to have muscle weakness and hand tremors. (Cl. Br., Docket # 7, at 1.) Claimant alleges that her disability arose, in part, as a result of pesticide poisoning. She also has a history of alcohol and substance abuse, and she had polio as a child. The relevant period for purposes of Title II benefits began on March 25, 1993, when her first application was initially denied, and continued through June 30, 1993, the date her insured status expired. The relevant period for purposes of Title XIV benefits continued through the date of the ALJ's decision, November 13, 1996. Therefore, her relevant age is 51 (closely approaching advanced age), for Title II benefits, and 51-55 (closely approaching advanced age and advanced age) for Title XVI benefits.

¹ There is also some evidence in the record that claimant applied for disability benefits in 1984. (See R. 412)

The ALJ's Decision

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 physical exertional and nonexertional requirements of medium work reduced by her need for seizure precautions. He reasoned that 20 C.F.R. §§ 404.1569, 416.969 and 20 C.F.R. Pt. 404, Subpart P, App. 2, Table No. 3, Rules 203.14, 203.15 would direct a conclusion of "not disabled." However, he also determined that claimant could not perform her past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that she could perform, based on her 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 22-23)

Issues

Claimant asserts as error that:

- (1) the ALJ applied an incorrect legal standard in evaluating whether the claimant could make the vocational adjustment to alternative work;
- (2) the ALJ's credibility determination is not supported by substantial evidence, especially in light of the evidence of claimant's mental disorder; and
- (3) the ALJ's finding that the claimant retained the capacity to perform a significant number of medium jobs on a regular and continuing basis with only simple seizure precautions is not supported by substantial evidence.

Applicable Law

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 v. Chater, 92 F.3d 1017, 1024 (10th Cir. 1996); Cruse v. United States Dep't of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedure first requires the ALJ to determine the

presence or absence of certain medical findings pertaining to claimant's ability to work. Next, the ALJ is to evaluate the degree of functional loss resulting from claimant's impairment. The ALJ must then complete a Psychiatric Review Technique ("PRT") form and attach it to a written decision in which he or she discusses the evidence upon which the conclusions expressed on the form are based. Winfrey, 92 F.3d at 1024; Cruse, 49 F.3d at 617-18; see also Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994).

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

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

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

Because the ALJ has the opportunity not only to observe the claimant, but also to consider how the claimant's testimony compares with other evidence, the ALJ's credibility determinations are given great deference and will not be set aside when supported by substantial evidence. Bean v. Chater, 77 F.3d 1210 (10th Cir. 1995). However "the credibility determination is just a step on the way to the ultimate decision. The ALJ must also determine whether the claimant has an RFC level and can perform the full range of work at his or her RFC level on a daily basis." Thompson v. Sullivan, 987 F.2d 1482, 1491 (10th Cir. 1993).

Findings

The record indicates that the ALJ's credibility and RFC findings are not supported by substantial evidence. The only severe impairment found by the ALJ was seizure disorder. However, the record indicates that claimant suffers from a severe mental impairment not found by the ALJ. Claimant tested positive for organophosphate insecticide poisoning (R. 290-91, 345, 353-54). The reports of the consultative examiners and the clinical psychologists who treated her indicate that claimant's physical condition is interrelated with her mental condition. While her physical and mental problems may not be disabling alone, the combination of the two may indicate that claimant is disabled. When a claimant's mental problems cause her credibility to be suspect, the lack of credibility should not necessarily be a determining factor in finding that her physical problems are not disabling. Here, the ALJ did not indicate the effect of claimant's mental impairment on his finding of credibility (see R. 20). Cf. Winfrey, 92 F.3d at 1021.

When claimant was seen at Springer Clinic in February 1987 by Paul W. Hathaway, M.D., he indicated that her symptoms reflected a conversion disorder, although he thought her tremor was "most likely a mild benign essential tremor." (R. 297) William T. Holland, M.D. diagnosed claimant

in 1987 as having generalized anxiety disorder, chronic, with episodes of depression (R. 328) He also indicated that claimant may have conversion disorder and hysteric personality disorder. He opined that this had been a life-long problem for her and had taken many forms over the years. (R. 329) She was diagnosed at the Grand Lake Mental Health Center in 1988 with undifferentiated somatoform disorder and schizotypal personality disorder, with a current GAF (General Assessment of Functioning) of 40 and the highest GAF in the past year of 50 (R. 332, 339) Her personality testing suggested a high probability of somatic delusions, and test results also suggested that emotional decompensation was likely with appropriate amounts of stress. The psychologist recommended individual therapy, medications, and vocational rehabilitation. (R. 339)

When claimant was evaluated by Thomas A. Goodman, M.D., in 1993, he indicated that claimant exhibited a "very marked belle indifference," or a lack of concern about the impairment caused by the symptoms. (R. 370) "La belle indifference" is a symptom of conversion disorder, a mental disorder characterized by symptoms, such as seizures, which have no physiological basis and whose psychological basis is suggested by exacerbation of symptoms at times of psychological stress, relief from tension or inner conflicts provided by the symptoms, or secondary gains provided by the symptoms. Histrionic (hysterical) personality traits are also common in people who have conversion disorder. It is a nonvoluntary mental disorder in which factitious disorders with physical symptoms or malingering are expressly excluded. Dorland's Illustrated Medical Dictionary, 494 (28th ed. 1994). Dr. Goodman stated that claimant "gives a naive, to say the le[a]st, at time incredulous history of [sic] about her medical problems and almost a total lack of concern or care for them." (R. 369) He diagnosed claimant as having "somatoform disorder, probably a conversion reaction with several conversion manifestations, together with some hypochondriasis, provisional, and with histrionic

personality disorder, severe, with some schizotypal features." (R. 371) However, he stated that "she should be able to return to at least moderately complicated type work activities" if a neurological examination revealed no evidence of disease. (Id.)

Minor Gordon, Ph.D. evaluated claimant on the same day as Dr. Goodman in 1993 and noted that claimant has a "very unusual presentation." (R. 365) However, he concluded that she had no mental or emotional impairment to employment. (R. 366) The psychological tests that he performed on her indicated that her intelligence level was in the high part of average range, and he believed she was "quite capable of performing some type of routine, repetitive task on a regular basis." (Id.)

David B. Dean, M.D. performed a physical and psychological examination on claimant in 1995. As part of his physical examination, he diagnosed pseudo-seizures, neurological examination within normal limits and polio myelitis, childhood, no residual noted on physical examination. (R. 377) As part of his psychological examination, he diagnosed major depression by history; polysubstance dependence, currently in remission; alcohol dependence, currently in remission; panic disorder, by history; and mixed personality disorder. (R. 381) However, his description of her mental status reveals a rather normal person. (R. 380-81)

Other evidence suggests the contrary. For example, claimant believed that her son tried to poison her with the same chemical that she believes causes her seizures. (R. 336) She testified that she has a spa in her living room and she swims in it (R. 422), while other evidence indicates that she lives in a one room concrete cabin out near a lake. (R. 418) She told Dr. Goodman that she had a near death experience in the emergency room a few hours after she was sprayed with toxic poisons at the hospital where she worked in 1987. (R. 368) She testified that she does not have any hamstrings in one leg (R. 414), while none of the various physical examinations indicate that she was

missing any hamstrings. (See R. 321, 361, 377) She told Dr. Holland in 1987 that she once had a chiropractor twist her spine and straighten her body because her rib cage faced in one direction while the rest of her body was in another. (R. 328) These examples, combined with the diagnoses provided by treating and consultative examiners, indicates that the ALJ's credibility and RFC findings were not supported by substantial evidence.

The vocational expert testified that seizures are the "biggest factor vocationally." (R. 431-32) Further, the evidence in the record suggests that claimant's seizures and hand tremors were psychologically based. Nonetheless, the ALJ found that claimant could do medium work, reduced by her need for seizure precautions. As noted above, the Court does not believe there is substantial evidence to support a finding that claimant could perform medium work. In particular, with regard to lifting requirements, medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. 20 C.F.R. §§ 404.1567(c), 416.967(c). Claimant testified that she could lift no more than a 20 pound sack of dog food. (R. 418) In her vocational report, she indicated that the heaviest weight she lifted in any of her past jobs was 20 pounds, and she frequently lifted or carried 10 pounds frequently. (R. 106-11) There is no evidence in the record that claimant could lift 50 pounds.

The lifting requirements of medium work are significant because of the regulations indicate that a person over the age of 55 who cannot do medium work may not be able to work unless he or she has skills that can be used in (transferred to) less demanding jobs which exist in significant numbers in the national economy. 20 C.F.R. § 416.963. The vocational expert did not specifically indicate whether claimant had transferable skills; he simply testified as to exertional and skill levels of her past work and the number of unskilled jobs in the regional and national economies that

someone could perform given the hypothetical question posed by the ALJ. (R. 427-33) The ALJ found that claimant had no transferable skills. It is unclear whether the regulation requires that claimant have the ability to do the full range of medium work. However, the ALJ must take into account all relevant factors and make appropriate findings regarding whether a person over age 55 could make the vocational adjustment to alternative work. See Nielson v. Sullivan, 922 F.2d 1118,1120 (10th Cir. 1993). Thus, it is unclear whether a finding that she is not disabled is warranted. The ALJ may have applied an incorrect legal standard in evaluating whether claimant could make the vocational adjustment to alternative work, given her age at the time of the hearing, her lack of transferable skills, and her mental disorders. See id.

Conclusion

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards may not have been applied. 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).

IT IS THEREFORE ORDERED that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

Dated this 13th day of September, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN OF OKLAHOMA

FILED
SEP 10 1999

KURT HOFFMAN,)
)
 Plaintiff,)
)
 v.)
)
 ALLSTATE INSURANCE COMPANY,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

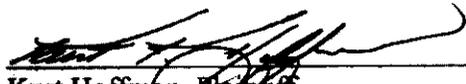
No. 99-CV-0600K (M)

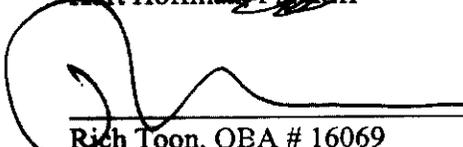
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DATE SEP 13 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Kurt Hoffman, and hereby requests that this Court enter an Order dismissing the above-styled action *with prejudice*. Plaintiff seeks dismissal on the grounds that this action has been fully and finally settled. The Defendant does not object to the dismissal of this action *with prejudice*.


Kurt Hoffman, Plaintiff


Rich Toon, OBA # 16069
Attorney for the Plaintiff


Galen L. Brittingham, OBA # 12226
Attorney for the Defendant

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

FILED

SEP 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MIKE BOYER,

Plaintiff,

vs.

Case No. 98 CV 919 K (M) ✓

LOCKHEED-MARTIN POSTAL
TECHNOLOGIES, INC., a Maryland
corporation, and BILL DOBBS,
individually,

Defendants.

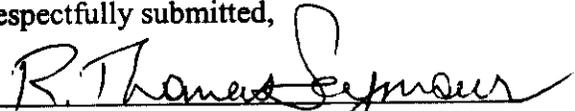
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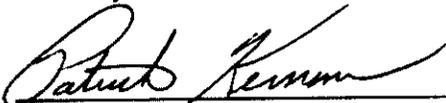
DATE SEP 13 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

The Plaintiff, Mike Boyer, by and through his undersigned attorney, pursuant to Rule 41(a)(1), Federal Rules of Civil Procedure, hereby dismisses with prejudice the above-styled and numbered cause against both Defendants.

Respectfully submitted,


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

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

DONALD MAKER,)
)
Plaintiff,)
)
vs.)
)
CITY OF TULSA)
)
Defendant.)

No. 99-C-494-B

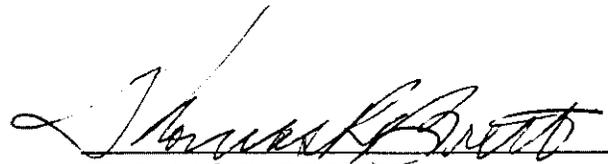
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DATE SEP 13 1999

ORDER

Comes on for Case Management Conference the above-styled case and the parties having announced in open court that they have reached a stipulation that no 42 U.S.C. §1983 claims are raised by the pleadings and that this case should therefore be remanded to the state court for disposition:

IT IS THEREFORE ORDERED that the above styled action is hereby remanded to the District Court of Tulsa County, Oklahoma. The Clerk of Court is directed to take the necessary action to remand this case without delay.

DATED THIS 10th DAY OF SEPTEMBER, 1999, AT TULSA, OKLAHOMA.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JACOB B. JOHNSTON,)
SSN: 444-88-0094,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 98-CV-0411-EA

ENTERED ON DOCKET

DATE SEP 13 1999

ORDER

On September 9, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny his application for supplemental security income benefits, the disposition of which both parties have consented to before this Court. Paul McTighe, Esq., appeared on behalf of the plaintiff, and Peter Bernhardt, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) is not supported by substantial evidence, and the ALJ failed to apply the correct legal standards. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

Procedural History

On September 30, 1994, claimant protectively filed for children's disability benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's application for benefits was denied in its entirety initially and on reconsideration. A hearing before Administrative Law Judge (ALJ) Larry C. Marcy was held January 26, 1996, in Tulsa, Oklahoma. (R. 372-91) By decision dated February 13, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. (R. 12-21) On

May 13, 1998, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 416.1481.

Claimant's Background

Claimant was born on March 6, 1980, and was 16 years old at the time of the administrative hearing in this matter. He was attending the tenth grade at that time. The application was filed by claimant's mother, but claimant became an adult prior to filing his appeal in this Court and is pursuing the case in his own name. Claimant alleges disability since September 30, 1994, due to club feet, ankle problems, depression, pain and limited mobility. (Complaint, Docket # 1, at 2.) Claimant has had numerous surgical procedures on his feet. (R. 185-240, 272-77, 323-49) He has attempted suicide on several occasions and has been hospitalized for treatment from time to time since he was 11 years old. (R. 87-154)

The ALJ's Decision

The ALJ made his decision at the fourth step of the sequential evaluation process applicable to children prior to August 22, 1996. He found that the claimant has bilateral club feet, status post multiple surgeries to both feet, and depression, but that he did not have an impairment or combination of impairments that meets or equals any impairment in the Listing of Impairments at 20 C.F.R., Part 404, Subpt. P, App. 1. He determined that, although claimant has a moderate limitation in motor skills and a less than moderate limitation in social skills, these limitations would not affect his ability to function independently, appropriately, and effectively in an age-appropriate manner. The ALJ concluded that claimant did not have an impairment or combination of impairments comparable in

severity to that which would disable an adult, and thus, claimant was not disabled under the Social Security Act at any time through the date of the decision. (R. 20-21)

Issues

Claimant asserts as error that the ALJ applied an incorrect legal standard by failing to evaluate claimant's impairments under the criteria of listed impairment 101.03 in light of substantial evidence that indicates claimant meets the criteria of that listing.¹ Claimant also argues as error the ALJ's failure to order a consultative examination or obtain the testimony of a medical expert.

Applicable Law

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.² 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:

¹ Claimant did not make this claim to the Appeals Council; thus, the Commissioner argued in his response brief that claimant is not entitled to make this claim to the District Court. At oral argument, however, the Commissioner conceded the issue because the ALJ's decision was rendered before James v. Chater, 96 F.3d 1341 (10th Cir. 1996).

² First, the Commissioner determined whether the minor was engaged in substantial gainful activity. If he 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).

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

42 U.S.C.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 al. 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 claimant's case.

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

Findings

The ALJ made his finding at the fourth step of the sequential evaluation process applicable to children prior to August 22, 1996. The Personal Responsibility and Work Opportunity Reconciliation Act effectively eliminated the fourth step. At the third step of the process, the ALJ found that claimant's impairment did not meet or equal the severity of any impairment in the Listing of Impairments in 20 C.F.R. Pt. 404, Subpt. P, App. 1. (R. 20; 20 C.F.R. § 416.924(d)). He stated that "[s]pecific emphasis has been given to Listing 1.09B - Anatomical deformity of both feet; and Listing 112.04 - Mood disorders." (R. 17) As claimant points out, Listing 1.09B is the listing applicable to adults. Listing 1.09B, requires loss of major function in both feet and makes no reference to ability to walk. Listing 101.03 (deficit of musculoskeletal function) is the listing applicable to children. This listing is applicable if the child has a deformity or musculoskeletal disease which markedly reduces the speed or distance the child is able to walk despite the use of orthotic or prosthetic devices. There is at least one reference in the file that claimant was fitted for an orthotic device when he was 8 years old which he was unable to tolerate. (R. 285)

Although the ALJ's discussion of the medical evidence and his explanation of why he found that claimant was not disabled is otherwise extensive, his failure to discuss the listing applicable to children, as opposed to the listing applicable to adults, is reversible error. This failure is particularly fatal in this case, where the new law in effect for this review requires an analysis of whether claimant met, medically equaled, or functionally equaled a listed impairment applicable to children. As there is no analysis whatsoever by the ALJ of the children's listing for musculoskeletal function deficit, this Court cannot determine whether claimant meets the medical or functional equivalence part of the test. This Court's review is limited to a determination of whether the correct legal standards were applied

and whether there is substantial evidence to support the ALJ's decision. This Court cannot perform the equivalence evaluation for the ALJ. Since the Court reverses and remands on this issue, the Court declines to address the issue of whether the ALJ should have ordered a consultative examination or obtained the testimony of a medical expert.

Conclusion

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. 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).

IT IS THEREFORE ORDERED that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

Dated this 10th day of September, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARK L. WATSON,
SSN: 447-54-3330,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0282-EA

ENTERED ON DOCKET

SEP 13 1999

JUDGMENT

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

It is so ordered this 10th day of **September** 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

MARK L. WATSON,
SSN: 447-54-3330,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0282-EA

ENTERED ON DOCKET

DATE SEP 13 1999

ORDER

On September 9, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny his application for supplemental security income and disability insurance benefits, the disposition of which both parties have consented to before this Court. Paul McTighe, Esq., appeared on behalf of the plaintiff, and Peter Bernhardt, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) is not supported by substantial evidence and the ALJ failed to apply the correct legal standards. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

Procedural History

On June 2, 1995, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.) and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's application for benefits was denied in its entirety initially and on reconsideration. A hearing before Administrative Law Judge (ALJ) Larry C. Marcy was held June 13, 1996, in Tulsa, Oklahoma. (R. 159-85) By decision dated August 23, 1996, the ALJ found that claimant was not

disabled at any time through the date of the decision. (R. 8-15) On February 6, 1998, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Claimant's Background

Claimant was born on August 12, 1955, and was 40 years old at the time of the supplemental administrative hearing in this matter. He has a twelfth grade education with a GED. He worked as a lifeguard, auto detailer, lawn care worker, lot man, mover, and diesel mechanic after serving in the army for seven years as a recovery specialist and tank mechanic. Claimant alleges an inability to work beginning May 8, 1995, due to constant, severe headaches, side effects from medications including, sleepiness, irritability, concentration problems, stomach problems, shaking, pain and limited mobility. (Complaint, Docket # 1, at 2.) His migraine headaches are allegedly due to overexposure to paint fumes and a blow to his head while he was in the military. (R. 163)

The ALJ's Decision

The ALJ made his decision at the fourth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform a full range of medium work, subject to headaches which are noticeable at all times, but claimant could remain attentive in a work setting due to taking medications. Claimant's ability to concentrate would be reduced, but would allow him to understand simple instruction, and he could not drive or be around machinery. The ALJ determined that claimant's impairment and RFC does not preclude claimant from performing his past relevant work as an auto detailer. The ALJ concluded that claimant was not disabled under the Social Security Act. (R. 15)

Issues

Claimant asserts as error that: (i) the ALJ's RFC finding is not supported by substantial evidence; (ii) no findings were made regarding physical or mental demands of claimant's past relevant work; (iii) the ALJ delegated his fact-finding responsibilities to the vocational expert; and (iv) the ALJ's credibility finding is not supported by substantial evidence.

Applicable Law

Step Four

In making his determination at the fourth step of the sequential evaluation process, an ALJ is required to: (1) assess the nature and extent of claimant's physical and mental limitations to determine claimant's RFC for work activity on a regular and continuing basis, supported by substantial evidence from the record; (2) make findings regarding the physical and mental demands of claimant's past relevant work (either as claimant actually performed that work or as is customarily performed in national economy), based on factual information regarding those work demands which bear on medically established limitations; and (3) make findings about claimant's ability to meet the physical and mental demands of that past relevant work. Winfrey v. Chater, 92 F.3d 1017, 1023-26 (10th Cir. 1996). The ALJ decision is **post-Winfrey**. At step four, a vocational expert's (VE) role is limited: the VE may supply information about the demands of claimant's past relevant work; however, the VE cannot perform the ALJ's fact-finding responsibilities regarding the claimant's past relevant work demands and the claimant's ability to perform past relevant work. Id. at 1025.

Credibility

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

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

Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992); accord Kepler v. Chater, 68 F.3d 387, 390 (10th Cir. 1995). The factors that an ALJ should consider when determining the credibility of subjective complaints of pain include, but are not limited to, “the levels of medication and their effectiveness, the extensiveness of attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.” Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991) (quoting Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988)); accord Luna, 834 F.2d at 165-66 (citations omitted); 20 C.F.R. § 404.1529.

Claimant challenges the ALJ’s credibility determination. “[C]redibility determinations are the province of the ALJ, ‘the individual optimally positioned to observe and assess witness credibility.’” Adams v. Chater, 93 F.3d 712, 715 (10th Cir. 1996) (quoting Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 801 (10th Cir. 1991)). Deference is generally accorded to the ALJ on this issue, but only if the credibility determination is supported by substantial evidence. Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995).

Findings

The ALJ did not perform a proper step four analysis pursuant to Winfrey v. Chater at any of the three phases. His assessment of the nature and extent of claimant's physical and mental limitations appears to be combined with his credibility analysis:

[T]he claimant's medical records show that he does not have any physical impairment which would interfere with his ability to sit, stand, walk or lift. The majority of the medical records are for treatment of urinary and gastrointestinal problems which resolved with the passage of time. The claimant's impairment of migraine headaches shows few treatment notes and no recorded complaints of side effects, which is inconsistent with the continual occurrence of the migraine headaches alleged by the claimant; the foregoing diminishes the claimant's credibility. The claimant does obtain relief from his headaches through medication and is able to function at a reduced level of concentration.

(R. 13) This statement follows boilerplate language that has been sharply criticized by the Tenth Circuit. See Barnes v. Apfel, Case No. 98-5156, 1999 WL 559846, *1 n.1 (10th Cir. Aug. 2, 1999) (unpublished).

The ALJ's assessment is not supported by substantial evidence. The medical records indicate a five-year history of debilitating migraine headaches. He began complaining to doctors and receiving strong pain medication for his headaches in February 1991 (R. 110-11), and was continuing to seek relief for these treatments at the time of his hearing and the ALJ's decision in 1996. (See R. 126, 151) His headache problems are mentioned or discussed in notes from more than 20 visits to the Veteran's Administration Medical Center. (See R. 83-148) His medications included oxycodone, acetaminophen with codeine, as well as amitriptyline, metoprolol tartrate, and hydrochlorothiazide. (R. 151) These were adjusted from time to time, and they caused him problems with his sleep patterns. (See R. 94-95) Two of them contain narcotics, and, as noted by claimant, the doctors were

the doctors were concerned about the potential for addiction. (R. 104)¹ Although many of the medical records predate the relevant time period for this decision (from the alleged onset date of May 8, 1995 to the date of the ALJ's decision, August 28, 1996), claimant's complaints of migraine headaches and his effort to control them with medication continued throughout the relevant period.

Claimant testified that he takes his medications every day. If his headaches are more severe, he takes more medications, and they put him to sleep. (R. 166) He has headaches every day. (R. 168) His medication slows down his alertness. (R. 169) On a scale of one to ten, with ten being the most severe pain, his headache at the time of the hearing was five or six (R. 168), and three to five times a week, his headaches are between nine and ten. (R. 170) When his headaches are that severe, he lays down or goes somewhere quiet, and increases his medications. The increase in medication puts him to sleep for eight to twenty-four hours. (R. 170) He was fired from his last job because he was falling asleep on the job due to the medication. (R. 170-71) When he has severe headaches, he cannot focus well enough to read the newspaper, and he sometimes cannot follow a television show. (R. 171) Doctors have told him that there is nothing he can do about his headaches except to try to control them with medication. (R. 173) They have no explanation for what causes them. (R. 174) He went to a headache clinic in Houston for a CT scan, and he was told the same thing: there is nothing they can do. (R. 174) Claimant's sister testified at the hearing and corroborated his

¹ Claimant relies on Saleem v. Chater, 86 F.3d 176 (10th Cir. 1996), for the proposition that an ALJ cannot discredit a claimant's assertions of disabling pain by relying on the claimant's use of addictive medications to control that pain. (Cl. Br., Docket # 9, at 5.) What the Saleem court held is that an ALJ cannot discredit claimant's assertions of disabling pain by relying on her use of medicines to which she was addicted to control pain. 86 F.3d at 179. Although there is an indication in the file that claimant's doctors were concerned about the potential for addiction (R. 104), there is no evidence to suggest that claimant was addicted to his pain medications. Saleem is inapplicable here.

statements. (R. 177-80) The ALJ's RFC finding, intertwined as it was with his credibility finding, is not supported by substantial evidence.

The ALJ also erred by not making the necessary findings regarding physical or mental demands of claimant's past relevant work at phase two of his Winfrey analysis. The ALJ asked the VE to testify as to the demands of claimant's past relevant work, and she gave him the skill and exertional levels required of each. (R. 181) The ALJ recites the VE's testimony in this regard (R. 14), and merely concludes that claimant can perform his past relevant work as an auto detailer. (R. 27) A recitation of the skill and exertional levels does not constitute the function-by-function analysis contemplated by SSA 96-8p or otherwise meet the requirements of Winfrey.

The ALJ also recited the VE's testimony regarding whether claimant could perform his past relevant work, given his RFC. (R. 146, 181-82) This was error. Under Winfrey v. Chater, a vocational expert cannot perform the ALJ's fact-finding responsibilities regarding the claimant's past relevant work demands and the claimant's ability to perform past relevant work. 92 F.3d at 1025. The ALJ erred by delegating his fact-finding responsibilities to the vocational expert at phase three.

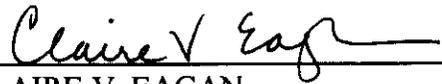
Conclusion

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. 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).

IT IS THEREFORE ORDERED that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

Dated this 10th day of September, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BILLY J. WILLIAMS,
SSN: 440-28-6870,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0606-EA

SEP 13 1999

SEP 13 1999

JUDGMENT

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

It is so ordered this 10th day of September 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

SEP 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BILLY J. WILLIAMS,
SSN: 440-28-6870,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0606-EA

ENTERED ON DOCKET

DATE SEP 13 1999

ORDER

Claimant, Billy J. Williams, 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. 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. On September 1, 1999, the Court heard oral argument in this matter. For the reasons discussed below, the Court **REVERSES** and **REMANDS** the Commissioner’s decision for an immediate award of benefits for the period October 2, 1990 to February 12, 1996.

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. § 404.1520.¹

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

¹ 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.

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.

Procedural History

On March 1, 1989, claimant protectively filed for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). A hearing before Administrative Law Judge (ALJ) James D. Jordan was held April 17, 1990, in Tulsa, Oklahoma. (R. 22-57) By decision dated May 31, 1990, the ALJ found that claimant was not disabled at any time through the date of the decision. (R. 9-16) On March 21, 1991, the Appeals Council denied review of the ALJ's findings. (R. 3-4) On February 26, 1992, the Northern District of Oklahoma (hereafter the "District Court") remanded, upon motion of the defendant, for further development of the record and specific findings of fact. (R. 283) On June 18, 1992, the Appeals Council vacated its denial of the claimant's request for review and remanded the issue to an ALJ for further proceedings. (R. 281-82)

A supplemental hearing before ALJ Richard J. Kallsnick was held on March 17, 1993, in Tulsa, Oklahoma. (R. 284-322) By decision dated September 8, 1993, the ALJ found that claimant was not disabled at any time through the date of the decision. (R. 260-75) On July 15, 1994, the Appeals Council declined to assume jurisdiction. (R. 255-56) The District Court again reversed and remanded the case on June 28, 1996. (R. 438-50) The Appeals Council ordered that the case be remanded on September 27, 1996. (R. 451-52)

A third hearing was held before ALJ Kallsnick on April 27, 1997, in Tulsa, Oklahoma. (R. 516-61) By decision dated August 18, 1997, the ALJ found that claimant was disabled from October 19, 1988, until October 1, 1990, when claimant's condition had sufficiently improved to enable him to work. The ALJ found that claimant became disabled again on February 13, 1996, when he

suffered a brain aneurysm. (R. 410-25) On June 15, 1998, the Appeals Council declined to assume jurisdiction. (R. 401-02) Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 416.1481.

Claimant's Background

Claimant was born on November 8, 1931, and was 65 years old at the time of the third administrative hearing in this matter. He has a 12th grade education. Claimant worked as a building cleaner for American Airlines until 1974. After 1974, he did odd jobs such as washing a few cars or shining shoes from time to time, and he has collected and sold some beer cans for money. He also played golf and performed some volunteer work for a golf association, such as selling advertisements for a tournament and raising money for charitable purposes or distributing food during the holiday season. Claimant alleges an inability to work prior to March 1, 1989,² due to left shoulder pain, left hand pain, bad memory, low energy, pain and limited mobility.

Claimant testified that he first injured his shoulder while he was working at American Airlines in 1969. In 1988, he re-injured his shoulder when he was helping someone push a golf cart at the golf course. He first visited the Springer Clinic in Tulsa on October 19, 1988, complaining of shoulder pain. An arthrogram on January 17, 1989, indicated a rupture of the rotator cuff on the left, and claimant had a surgical repair with partial acromioplasty on February 7, 1989. He was released for therapy through June 8, 1989. Although his doctor and therapist did not believe that claimant put forth adequate effort in his physical therapy program, the doctor released him in March 1989 to begin swinging golf clubs. (R. 146, 174) By April 28, 1989, claimant had begun to swing golf clubs, and

² Claimant claimed that his condition first bothered him in June 1988 (R. 74). However, past due benefits cannot be paid to the claimant prior to the date he filed his application, 20 C.F.R. §416.501; thus, the onset date is March 1, 1989.

his therapist believed he had achieved his maximum benefit from physical therapy at that time. (R. 171)

On May 18, 1989, Richard Cooper, D.O., evaluated claimant, indicating that the range of motion of claimant's left shoulder was reduced to 40 degrees abduction and his shoulder would move a total of 60 degrees. (R. 159-61) At his first hearing on April 17, 1990, claimant first testified that he had fished a couple of times in 1989, and he had played golf a couple of times in 1990. (R. 31) In that same hearing, he testified that he played golf two or three times per month (R. 38) He claimed that he used to have a golf handicap of six or seven; he shot in the mid-to-high 70s. (R. 39)

Claimant reported that he was in a motor vehicle accident on August 3, 1990, re-injuring his left shoulder. (R. 351) On October 1, 1990, claimant reported that his left shoulder was much better, that he was seeing a chiropractor, and that he thought the injection he received had improved his shoulder. (R. 350) He was evaluated by E. Joseph Sutton, II, D.O., on December 29, 1992, at the request of the Social Security Administration. Dr. Sutton's diagnostic impression was that claimant had a frozen left shoulder, post surgery for rotator cuff tear. He opined that claimant would not be able to use his left arm if he had to lift any weight about his head, but that he "would not have any difficulty lifting any weight to at least waist high." (R. 383) He further stated that claimant would not be able to reach above shoulder height with his left arm. (Id.)

At the second hearing on March 17, 1993, claimant testified that he had taken several trips within the preceding year to visit family. He had been to Florida and California. (R. 300-301) Claimant suffered a cerebral aneurysm while he was playing golf in Florida on February 13, 1996; he had complications associated with the aneurysm thereafter. (See R. 464-511) At his third hearing, on April 27, 1997, he first testified that the last golf tournament in which he played was in 1994 or

1995. (R. 538, 542) It was two days, 36 holes, and his last score was in the 80's or 90's. (R. 539) However, he commented that the aneurysm had affected his ability to think and remember well. (See R. 539). He also claimed that, since the aneurysm, he has low energy (R. 526), and his daughter testified that the aneurysm had affected his short term memory. (R. 547)

The ALJ's Decision

The ALJ made his decision at the **fifth step** of the sequential evaluation process. The ALJ found that claimant was disabled from **October 19, 1988**,³ when he first visited Springer Clinic for shoulder problems, to **October 1, 1990**, when the claimant reported that his left shoulder was much better, that he was seeing a chiropractor, and that he thought the injection he received had improved his shoulder. During that two-year time period, claimant's impairment limited him to medium work activity that did not require him to lift his left arm above shoulder level. However, the ALJ found claimant had medical improvement in his condition related to his ability to work, such that his disability ceased on **October 1, 1990**. The ALJ found that claimant became disabled again on **February 13, 1996**, when he suffered a brain aneurysm. The ALJ determined that, during the closed period of **October 2, 1990 to February 12, 1996**, claimant had the residual functional capacity (RFC) to perform a full range of medium work. The ALJ stated that 20 C.F.R. § 416.969 and Rule 203.14 of Table No. 3, Appendix 2, Subpart P, Regulations No. 4 (20 C.F.R. Pt. 404, Subpt. P, App. 2) direct a conclusion that claimant was not disabled during that time period. However, he also recited,

³ On October 19, 1988, claimant was 57 years old; the ALJ erroneously states that 57 is defined as a younger individual in the regulations. He also miscites the regulation by reference to 20 C.F.R. § 416.953. (R. 423) The regulation is at 20 C.F.R. § 416.963, and 57 years is defined as a person of advanced age. It is clear, however, that the ALJ evaluated claimant as a person of advanced age, both explicitly and given his reference to 20 C.F.R. § 416.969 and Rule 203.14 of Table No. 3 of Appendix 2, Subpart P, Regulations No. 4 for his conclusion that claimant was not disabled between October 1, 1990 and February 13, 1996. (*Id.*)

in the body of his decision, the testimony of the vocational expert (VE). She testified that there were a significant number of unskilled, medium jobs in the regional and national economies that claimant could have performed, despite his impairments and based on his RFC, age, education, and work experience between October 1, 1990 and February 13, 1996.

Issues

Claimant asserts as error the ALJ's finding that the claimant had full motion of his left shoulder after October 1, 1990, and therefore could perform a full range of medium work. He contends that his finding is not supported by substantial evidence.

However, the briefs of the claimant and the Commissioner indicate that a key issue in this appeal is whether an ALJ must use a previous RFC assessment on remand, or whether he may change the RFC on remand after a *de novo* review of the record. Thus, the District Court's 1996 remand decision is critical to this appeal. The District Court reversed and remanded because claimant could not perform the jobs that the VE testified, and the ALJ found, claimant could perform, given the claimant's RFC as found by the ALJ. In the 1993 decision, the ALJ found that claimant could perform the full range of medium work provided that claimant was not required to reach or lift above shoulder level with the left extremity. The District Court concluded that "there is such relevant evidence as a reasonable mind might accept as adequate to support [the ALJ's finding]." (R. 442)

The District Court remanded, however, because the Commissioner relied upon erroneous VE testimony that the jobs of janitor and grounds keeper were unskilled medium work. (R. 445-48) Under the Dictionary of Occupational Titles ("DOT"), these jobs are semi-skilled, and the DOT controls if it conflicts with expert testimony. Because of claimant's age and lack of transferable or highly marketable skills, he must be found disabled if he is restricted to light and sedentary jobs. 20

C.F.R. § 1563(d).⁴ The District Court stated that, “upon remand, it is very likely the Secretary would be obliged to return a finding that Claimant is now disabled. See 20 C.F.R. Pt. 404, Subpt. P, App. 2. However, the Court cannot assume this.” (R. 448)

The District Court also suggested, in *dicta*, that the “ALJ may wish to consider refinement of his hypothetical question” because he did not accurately describe the limitations in the hypothetical he posed to the vocational expert. (R. 445) The District Court noted claimant’s argument that the limitation should have included a restriction that claimant would have difficulty lifting weight between waist height and shoulder height, given the report of the consultative examiner, Dr. Sutton. (*Id.*; see R. 381-83) The parties now disagree as to the law of the case which controls the ALJ’s decision on remand.

Claimant argues that, on remand, the ALJ found that claimant’s ability to perform medium work was not restricted by the inability to reach or lift above shoulder level with his left arm, thus violating the law of the case. (Cl. Br., Docket # 7, at 3-4.) Claimant argues that the District Court concluded that the ALJ’s prior RFC assessment was supported by substantial evidence, and claimant contends that the District Court remanded the case for a determination of whether a significant number of unskilled medium jobs were available for a person with those limitations. (*Id.* at 2, 4.) Claimant points out that the VE testified, on remand, that jobs at a unskilled level of medium exertion

⁴ 20 C.F.R. § 404.1563(d) provides:

Person of advanced age. We consider that advanced age (55 or over) is the point where age significantly affects a person’s ability to do substantial gainful activity. If you are severely impaired and of advanced age and you cannot do medium work . . . you may not be able to work unless you have skills that can be used in (transferred to) less demanding jobs which exist in significant numbers in the national economy. If you are close to retirement age (60-64) and have a severe impairment, we will not consider you able to adjust to sedentary or light work unless you have skills which are highly marketable.

require a full range of shoulder motion. (Id. at 3; see R. 553.) Claimant appears to fault the ALJ for reopening the case without good cause. (Id. at 4.) Claimant also asserts that the ALJ erred in rejecting Dr. Sutton's report (id.), and that there is no evidence in the record which proves that claimant had full motion of his shoulder after October 1, 1990. (Id. at 5.)

The Commissioner's brief details the claimant's lack of credibility, given claimant's ability to play golf, fish, and travel after the surgery, as well as claimant's failure to participate fully in physical therapy, his failure to make appointments, his lack of medication for severe pain, his failure to submit for manipulation under anesthesia or for surgery, his active lifestyle, the evasiveness of his answers at hearing, and the inconsistencies in his testimony. (Def. Br., Docket # 12, at 1-15.) The Commissioner asserts that the prior RFC determination that claimant could not lift his left arm above shoulder level was based largely on plaintiffs subjective complaints. (Id. at 15.) The Commissioner contends that the law of the case doctrine is not applicable because the District Court did not make a specific factual finding regarding claimant's RFC. (Id. at 16.) The Commissioner argues that a remand order does not bind the ALJ to the earlier RFC finding. (Id. at 17.) He also maintains that 20 C.F.R. § 404.989(a), a regulation cited by claimant, is not applicable because the claimant has not requested a re-opening of the case. (Id. at 18). Finally, the Commissioner contends that evidence in the record supports the ALJ's selection of October 1, 1990 as the onset date for claimant's disability because it is the date claimant stated that his shoulder was much better. (Id.; see R. 350)

Discussion

Law of the Case

The Court is unaware of any published social security disability benefits case in which the Tenth Circuit has specifically applied the law of the case doctrine. However, the Seventh Circuit has applied it in this administrative context, holding that “[t]he law of the case doctrine requires the administrative agency, on remand from a court, to conform its further proceedings in the case to the principles set forth in the judicial decision, unless there is a compelling reason to depart.” Wilder v. Apfel, 153 F.3d 799, 802 (7th Cir. 1998). “[I]f there is no new evidence, or if . . . the evidence does not undermine the previous ruling on sufficiency, then that previous ruling must stand.” Id.; see also Key v. Sullivan, 925 F.2d 1056, 1060 (7th Cir. 1991) (“The gist of the [law of the case] doctrine is that once an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case.”) Further, “[i]f an issue is left open after remand, the lower tribunal is free to decide it.” Key, 925 F.2d at 1060. In Key, the Seventh Circuit found that the Secretary of Health and Human Services exceeded the scope of the district court’s remand order and violated the law of the case doctrine by expanding his previous inquiry to evaluate whether the claimant could perform any other past relevant work or other work in the national economy. Id.

The Eighth Circuit has indicated that the law of the case doctrine does not bar an ALJ, on remand, from making a finding that differs from a prior ALJ’s finding in the same case. Steahr v. Apfel, 151 F.3d 1124 (8th Cir. 1998). The Steahr court relied on the district court’s statement in its second order that, since the previous decision was reversed and remanded, there was no law of the case to be considered from the first ALJ’s decision. Id. at 1126. The Steahr court relied upon its

decision in Brachtel v. Apfel, 132 F.3d 417 (8th Cir. 1997). The Brachtel court held that the law of the case doctrine did not apply where the district court did not specifically instruct the ALJ to proceed on remand based upon a **factual finding** as to the claimant's RFC. The court simply instructed the ALJ to create a **full and proper record**. Steahr, 151 F.3d at 1125 (citing to Brachtel, 132 F.3d at 420).

These decisions are in accord with Tenth Circuit law in other contexts. See, e.g., Ute Indian Tribe of the Uintah and Ouray Reservation v. State of Utah, 114 F.3d 1513, 1520 (10th Cir. 1997) (under the law of the case doctrine, "once a court decides an issue, the same issue may not be relitigated in subsequent proceedings in the same case"); Mitchell v. Maynard, 80 F.3d 1433, 1448 (10th Cir. 1996) ("[t]he law of the case doctrine provides that once an appellate court decides an issue the decision will be binding on all subsequent proceedings in the same case"); Rohrbaugh v. Celotex Corp., 53 F.3d 1181, 1181 (10th Cir. 1995) ("when a case is appealed and remanded, the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal").

The law of the case applies to issues that are resolved implicitly as well as to those decided explicitly. Rishell v. Jane Phillips Episcopal Memorial Medical Center, 94 F.3d 1407, 1410 (10th Cir. 1996); Wilmer v. Board of County Commissioners of Leavenworth County, 69 F.3d 406, 409 (10th Cir. 1995); Guidry v. Sheet Metal Workers Local No. 9, 10 F.3d 700, 707 (10th Cir. 1993), modified on other grounds, 39 F.3d 1078 (10th Cir. 1994). "When further proceedings follow a general remand, the lower court is free to decide anything not foreclosed by the mandate issued by the higher court." Guidry, 10 F.3d at 705 (citation omitted). However, there are three circumstances in which an issue will be considered implicitly decided for purposes of the law of the case. The doctrine

applies when: (1) resolution of the issue was a necessary step in resolving the earlier appeal; (2) resolution of the issue would abrogate the prior decision and so must have been considered in the prior appeal; and (3) the issue is so closely related to the earlier appeal its resolution involves no additional consideration and so might have been resolved but unstated. Rishell, 94 F.3d at 1410; Guidry, 10 F.3d at 707.

The 1996 decision by the District Court could be deemed a general remand, leaving the ALJ free to decide the RFC issue anew. Yet, even if it is not deemed a general remand, the RFC issue was not implicitly decided because the District Court expressly noted that resolution of the issue was not a necessary step in resolving the appeal. The District Court stated that “the turning point in this case is whether the Secretary can meet her burden by identifying jobs which claimant, now close to retirement age, can perform.” (R. 445)⁵ Further, resolution of the issue would not have necessarily abrogated the prior decision because the District Court focused on the VE’s error in classifying the jobs the ALJ found that claimant could perform. As indicated above, the VE’s testimony that the jobs of janitor and groundskeeper were unskilled medium work conflicted with the DOT.

Finally, the issue is not so closely related to the earlier appeal that its resolution involves no additional consideration and so might have been resolved but unstated. The District Court previously determined that, as to the RFC, “there is such relevant evidence as a reasonable mind might accept

⁵ The District Court, in its decision of June 28, 1996, could not have known that, on remand, claimant could be found disabled as of February 13, 1996, due to the brain aneurysm. The District Court correctly assumed that, on remand, the ALJ would be looking at claimant’s then-current age as “close to retirement age (60-64)” regarding marketability of skills. During the closed period, claimant was 58-59 years of age (“advanced age”) for part of the period, and 60-64 years of age (close to retirement age) for the remainder of the period. He turned 65 years old on November 8, 1996, after the closed period ended on February 13, 1996. However, the ALJ considered claimant to be 57 years old, a “person of advanced age,” during the closed period. Claimant was also close to retirement age.

as adequate to support [the ALJ's finding]." (R. 442) It did not find that the RFC, if altered, would be unsupported by substantial evidence. The problem with the prior decision by the ALJ was that he failed to issue a finding consistent with his RFC determination; the District Court did not mandate a particular RFC determination. Further, the District Court suggested that the ALJ also refine his hypothetical question to reflect the limitations he found; it did not dictate the limitations.⁶

The Tenth Circuit has recognized that an ALJ is not bound to an earlier decision on remand from the Appeals Council. Campbell v. Bowen, 822 F.2d 1518, 1522 (10th Cir. 1987). "The ALJ's redetermination of the residual functional capacity was not inconsistent with [the Appeals Council's remand order]. Nor did the order bind the ALJ to his earlier decision. To hold otherwise would discourage administrative law judges from reviewing the record on remand, checking initial findings of fact, and making corrections, if appropriate." Id.; see 20 C.F.R. § 404.977. The Appeals Council's remand order in this instance directs the ALJ to conduct further proceedings consistent with the District Court's remand order. (R. 451) The ALJ should not be bound by his earlier decision on remand because the remand order does not require a finding that claimant could not reach or lift above shoulder level with the left extremity. The order does require that the ALJ's RFC assessment be supported by substantial evidence, that the ALJ's question to the vocational expert precisely reflect claimant's RFC, and that there be a significant number of unskilled, medium jobs in

⁶ In essence, the District Court's remarks regarding the previous RFC finding were *dicta*, and the Tenth Circuit has explicitly held that *dicta* is not subject to the law of the case doctrine. United States v. Rice, 76 F.3d 394, 1996 WL 44452 at *4 (10th Cir. February 5, 1996) (unpublished decision).

the regional and national economies that claimant could have performed, based on his RFC, age, education, and work experience.⁷

RFC Assessment

The issue remains whether there is substantial evidence to support the ALJ's finding that claimant had full motion of his left shoulder between October 2, 1990 and February 2, 1996, such that he could perform a full range of medium work. As the Commissioner points out, claimant has serious credibility problems. The ALJ discussed these and relied, in part, on claimant's own statements to his treating physicians after his 1989 surgery and his 1990 motor vehicle accident to discredit claimant. Because the ALJ has the opportunity not only to observe the claimant, but also to consider how the claimant's testimony compares with other evidence, the ALJ's credibility determinations are given great deference and will not be set aside when supported by substantial evidence. Bean v. Chater, 77 F.3d 1210 (10th Cir. 1995). However "the credibility determination is just a step on the way to the ultimate decision. The ALJ must also determine whether the claimant has an RFC level and can perform the full range of work at his or her RFC level on a daily basis." Thompson v. Sullivan, 987 F.2d 1482, 1491 (10th Cir. 1993).

The Commissioner argues that claimant's statement to Dr. Hendricks on August 24, 1990, that "he has been doing real well, playing golf all summer and being active" (R. 351), permits the inference that claimant had a full range of motion in his shoulder. However, the notation continues with a statement that claimant was in a motor vehicle accident on August 3, 1990, in which he sustained injury to his left shoulder when he was thrown into the steering wheel and driver's side

⁷ Claimant's reliance on 20 C.F.R. § 404.989(a) is misplaced, as the Commissioner contends. This matter does not involve a reopening of the case.

door. Claimant complained of limited range of motion after the accident and of occasional pain in his left shoulder while at rest. (Id.)

The Commissioner also relies on claimant's statements on October 1, 1990, that his shoulder was "much better," he was "seeing a chiropractor," and he thought "the injection he received has really improved his shoulder." (R. 350) None of these statements, however, prove that claimant could lift his shoulder above shoulder height, a prerequisite for a finding that claimant could do medium work. In connection with a possible termination in benefits, medical improvement "must be based on changes (improvement) in the symptoms, signs, and/or laboratory findings associated with your impairment(s)" 20 C.F.R. § 1594(b)(1). A medical improvement is related to a claimant's ability to work "if there has been a decrease in the severity . . . of the impairment(s) present at the time of the most recent favorable medical decision and an increase in your functional capacity to do basic work activities" Id. § 1594(b)(3). The comments made by claimant to his doctor on October 1, 1990 provide neither a sufficient basis for the ALJ's selection of that date as the date that claimant's original disability ended, nor substantial evidence of medical improvement to do medium work during the subsequent period.

The only evidence in the record of any medical treatment for claimant's shoulder during that subsequent period (1990-96) is one notation in the legible notes from Springer Clinic regarding claimant's request for Tylenol #3 to relieve the pain in his left shoulder. (R. 339) However, Dr. Sutton examined claimant on behalf of the Social Security Administration on December 29, 1992. Dr. Sutton completed a range of motion evaluation chart, indicating that claimant was unable to abduct or flex his left shoulder more than 90-100 degrees. (R. 384) A normal range of motion is 160 degrees. He noted this restriction in his written report. (R. 382). He also wrote that claimant had

good bilateral grip strength and upper extremity strength, and there was no point tenderness or crepitus in claimant's left shoulder. (*Id.*) His diagnostic impression included these remarks:

He should be able to lift or carry any weight commensurate with his size. If the patient had to lift any weight about [sic] his head, he would not be able to use his left arm because of the restriction in his shoulder. The patient, however, has quite normal upper extremity strength and would not have any difficulty lifting any weight to at least waist high. The patient has no restriction of his feet with regard to repetitive movements. He has no restriction in his hands with regard to repetitive movements and has good bilateral grip strength. He has good finger-thumb approximation on both hands. He was able to dress and undress himself without any difficulty. The patient would be able to continuously bend, squat, crawl, climb or reach. The only restriction would be that his reaching with his left arm would have to be below about shoulder height because that is about as high as he is able to raise his left arm. He would be able to reach in front of him or off to the side without any difficulty. There are no restrictions regarding any of the environmental factors.

(R. 383) (emphasis added).

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 rejected Dr. Sutton's opinion that claimant could not lift his left arm above shoulder height because he deemed "Dr. Sutton's assessment inconsistent with his written report." (R. 421) The ALJ was not required to afford Dr. Sutton's opinion controlling weight, given that Dr. Sutton was not claimant's treating physician, and he examined claimant only one time. See 20 C.F.R. §

416.927. However, it is the only medical evidence during the 1990-96 time period regarding claimant's shoulder problems other than claimant's request for pain medication.

The ALJ focused his credibility findings on claimant's lifestyle and lack of treatment for disabling pain. (R. 420) In particular, the ALJ noted that claimant went on trips to visit his children, went fishing, and "played golf occasionally." (*Id.*; *see* R. 382, 465, 530, 531) However, claimant played golf during the earlier (1988-90) period of disability determined by the same ALJ.⁸

The issue is whether claimant could perform medium work during the period in question. The VE testified that medium jobs at the unskilled level required a "full range of motion" (R. 553), but that there were numerous light and sedentary jobs at the unskilled level in the regional and national economies that claimant could perform. (R. 553) The regulations mandate a finding of disability for a person who is 55 years of age or over if that person is severely impaired, cannot do medium work, and has no skills that can be used in (transferred to) less demanding jobs which exist in significant numbers in the national economy. 20 C.F.R. § 404.1563(d). Persons who are close to retirement age (60-64) and have a severe impairment are not considered able to adjust to sedentary or light work unless they have skills which are highly marketable. *Id.* The VE testified that claimant had no transferable or marketable skills. (R. 558; *see also* R. 54, 319)

Based on this record, the Court cannot find substantial evidence to support a finding that claimant could lift his arm above shoulder height between October 2, 1990 and February 12, 1996. Thus, claimant did not have a full range of motion and could not perform medium work. The

⁸ It seems contradictory to the Court (as perhaps it did to the ALJ) that a person suffering from a severe impairment of the left shoulder could play golf, even occasionally. However, there is no evidence that a right-handed golfer has to lift his left elbow above his shoulder during his golf swing, and thus that a golf swing for a right-handed golfer requires a full range of motion of the left shoulder.

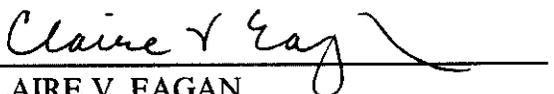
regulations mandate a finding of disability because of his age. The decision of the ALJ that claimant was not disabled from October 2, 1990 to February 12, 1996 is not supported by substantial evidence and must be reversed.

With regard to the advisability of another remand, claimant's testimony following his aneurysm is not reliable, a physical examination at this point would not reveal his physical condition as it existed in the 1990-96 time period, and there is no other evidence from the 1990-96 time period. Thus, the Court has no viable alternative but to reverse for an immediate award of benefits. It is within the Court's discretion to remand for further administrative proceedings or for an immediate award of benefits. Ragland v. Shalala, 992 F.2d 1056, 1060 (10th Cir. 1993). If additional fact-finding would serve no useful purpose, remand for an immediate award is appropriate. See Sorenson v. Bowen, 888 F.2d 706, 713 (10th Cir. 1989). This opinion does not indicate that the Court believes claimant is deserving of benefits for that time period; it merely indicates that the evidence is insufficient to prove that he was not.

Conclusion

The decision of the Commissioner is not supported by substantial evidence. **IT IS THEREFORE ORDERED** that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for an immediate award of benefits for the period October 2, 1990 to February 12, 1996.

DATED this 10th day of September, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE