

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 07 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRENDA A. KETRING,
SSN: 441-76-9671

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

No. 98-CV-389-J ✓

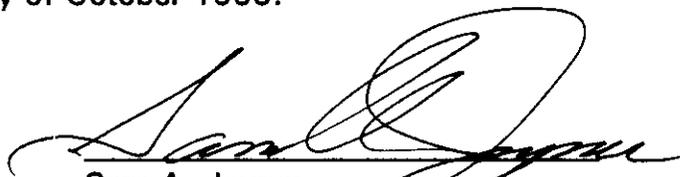
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DATE OCT 8 1999

JUDGMENT

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

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


Sam A. Joyner
United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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BRENDA A. KETRING,
SSN: 441-76-9671

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

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Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-389-J ✓

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ORDER^{1/}

Plaintiff, Brenda A. Ketring, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because (1) the ALJ did not rely on a medical expert, and wrongly concluded that Plaintiff did not meet a Listing, (2) the ALJ improperly exercised his own medical expertise, (3) the ALJ failed to find that Plaintiff had a medically determined mental impairment, (4) the ALJ did not properly evaluate Plaintiff's complaints of pain, (5) the ALJ presented improper hypothetical questions to the vocational expert. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

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

^{2/} Administrative Law Judge Stephen C. Calvarese (hereafter "ALJ") concluded that Plaintiff was not entitled to disability benefits on October 17, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on April 17, 1998. [R. at 5].

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I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff completed the tenth grade at high school and obtained her GED. Plaintiff additionally indicated that she had completed one year of education at business school. [R. at 146-48]. Plaintiff was 28 years old at the time of her hearing before the ALJ. Plaintiff indicated that she had been using alcohol and marijuana since she was twelve years old. [R. at 332].

A Mental Residual Functional capacity Assessment Form was completed by Janice C. Boon, Ph.D., on January 31, 1996. [R. at 43]. She indicated that Plaintiff was markedly limited in her ability to understand and remember detailed instructions, in her ability to carry out detailed instructions, and in her ability to interact appropriately with the general public. [R. at 43-44]. In all other categories Plaintiff was rated as "not significantly limited." [R. at 43-44]. Dr. Boon additionally completed a Psychiatric Review Technique form on January 30, 1996. [R. at 47]. Dr. Boon noted that Plaintiff had "bi-polar disorder, by history." [R. at 50]. Dr. Boon rated Plaintiff's as being moderately restricted in activities of daily living, having moderate difficulties in maintaining social functioning, often exhibiting deficiencies of concentration, persistence, or pace, and once or twice having episodes of deterioration or decompensation. [R. at 54]. Additional Mental Residual Functional Capacity Assessments and Psychiatric Review Technique forms were completed on May 8, 1996. [R. at 66, 75]. The forms were completed in a manner identical to the January 31, 1996 forms.

Plaintiff noted that she cooked once or twice each week, that she cleaned once or twice a month, and that she needed assistance with grocery shopping. [R. at 98]. Plaintiff additionally reported that she drove short distances for errands. [R. at 98].

Plaintiff was admitted on several occasions to Laureate Psychiatric Clinic and Saint Francis Hospital for treatment related to drug overdoses. [R. at 113].

Plaintiff was admitted to Saint Francis on May 22, 1991 after an overdose of drugs. Plaintiff's counselor reported that the counselor believed that Plaintiff had completed a drug detoxification program and had been drug free for a period of time prior to the overdose attempt. [R. at 395].

Plaintiff was admitted to Laureate on July 1, 1992, after she took an overdose of pills while she was intoxicated. [R. at 124]. The intake note indicated that Plaintiff had been able to maintain sobriety for 90 days at a time. [R. at 125]. At that time, Plaintiff was working at Blue Cross and Blue Shield. [R. at 124].

Plaintiff was assaulted on June 24, 1993. The examiner noted that Plaintiff had 16 out of 22 tender points for fibromyalgia. [R. at 183]. Plaintiff was in a motor vehicle accident in September 1993. [R. at 180]. Plaintiff reported pain in her neck and shoulder pain. X-rays were interpreted as normal.

Plaintiff was admitted to Laureate on October 10, 1993, and discharged November 5, 1993, after she had been treated for an overdose at the emergency room. [R. at 132]. Plaintiff indicated that she had never been able to abstain from drugs or alcohol for any length of time. [R. at 133]. Plaintiff's examining doctor at Laureate indicated that Plaintiff might have bipolar disorder, but that due to her

ongoing drug abuse problems a clear diagnosis was very difficult. [R. at 133]. The doctor noted that Plaintiff's prognosis was poor, and that Plaintiff had never followed through with any treatment programs. [R. at 134-35].

Plaintiff was admitted to Laureate on November 15, 1993, and discharged November 22, 1993. [R. at 154]. Plaintiff was reported as depressed because the police had taken her children away from her. [R. at 511]. Plaintiff's prognosis was described as poor due to Plaintiff's severe problem with drugs and alcohol. [R. at 154]. Plaintiff reported using marijuana on a daily basis, abusing her pain medications, and drinking. The examining physician noted that Plaintiff did not exhibit "any overt psychotic symptoms at this time. Her mood continues to be labile, but this may be a reflection of an underlying personality disorder, rather than a true bipolar disorder. However, this is a question that needs to be evaluated on an ongoing basis. One thing that complicates the diagnosis is her severe problems with alcohol and polysubstance abuse." [R. at 155].

Plaintiff was admitted to Parkside on November 30, 1993. [R. at 282]. Plaintiff indicated she began using alcohol and drugs when she was in school. Plaintiff reported using alcohol on the weekends and using marijuana daily. [R. at 285].

In January 1994 Plaintiff complained of pain in her shoulders and "fibromyalgia." [R. at 231].

Plaintiff was admitted to Laureate on July 4, 1995, and discharged the same day. [R. at 212]. The discharge was related to an overdose of medication. Plaintiff stated that she was just "wanting to catch a buzz." [R. at 213].

In November 1995, Plaintiff complained of headaches. [R. at 231-243].

On December 7, 1995, Plaintiff wrote that when she became overwhelmed she would take a walk, exercise, read, or call supportive people. [R. at 379].

Plaintiff was examined by a social security examiner on January 26, 1996. [R. at 250]. He noted that Plaintiff reported performing household chores three to four times per week, cooking one to three times per week, and watching television two to four hours per day. [R. at 250]. Plaintiff stated that she no longer read much because of the pain she experienced in her neck. [R. at 250]. The examiner concluded that Plaintiff would be unable to manage her funds and that she remained emotionally impaired. [R. at 253]. In addition, the examiner noted "She would not be able to work around people or any type of stressful situation. Her prognosis will depend on how well she stabilizes on medications but it is poor at this time. Additionally, the panic disorder also disables her at this time." [R. at 253].

Plaintiff was admitted for treatment on February 22, 1996. [R. at 308]. Plaintiff reported experiencing suicidal thoughts. Plaintiff has numerous treatment notes during 1996. Plaintiff reported that she would not abstain from marijuana or alcohol. Plaintiff was informed that no medications would be prescribed while she continued to abuse street drugs. [R. at 318].

On May 11, 1996, Plaintiff indicated that her children would be out of school soon and that she did not believe she would be able to work until after summer. [R. at 368]. On May 10, 1996, Plaintiff's treating doctor noted that Plaintiff was not incapacitated, "however transition to full-time work should be gradual." [R. at 369].

In June of 1996, Plaintiff wrote to her therapist, while on vacation, that she had been fishing and had caught 20 fish in two days, and that she would probably go boating within the next few days. [R. at 364].

Plaintiff reports that she attempted drug treatment programs on at least three occasions but has been unable to abstain from drugs. [R. at 332]. The record additionally indicates at least four suicide attempts.

At the hearing before the ALJ, Plaintiff indicated that she smoked approximately three marijuana cigarettes each day and that she consumed approximately one-third of a liter of whiskey. [R. at 610]. Plaintiff worked at Blue Cross and Blue Shield from August 1991 until April 1994, when she quit. [R. at 612]. Plaintiff indicated that she never received a raise during her time of employment due to excessive absences. [R. at 613]. Plaintiff previously worked as a secretary from January 1990 until August 1990. [R. at 615]. According to Plaintiff she can no longer handle her children and her father helps on all of her errands. [R. at 620]. Plaintiff indicated that her father has assisted her with errands since 1988. [R. at 620].

Plaintiff testified that she experienced one to two panic attacks each day. [R. at 621]. According to Plaintiff she is still able to type and use a ten key machine. [R. at 633].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

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

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

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

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

42 U.S.C. § 423(d)(2)(A).^{3/}

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

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir.

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

1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

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

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

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

III. THE ALJ'S DECISION

The ALJ found that although Plaintiff was unable to perform work in the national economy, she was not disabled under the Social Security Act because alcohol and drugs addictions were material factors to her disability. [R. at 23].

IV. REVIEW

LISTINGS

Plaintiff initially asserts that she meets or equals Listings 12.04, 12.08, or 12.06.

Listing 12.04 addresses affective disorders. The Listing is "characterized by a disturbance of mood, accompanied by a full or partial manic or depressive syndrome. Mood refers to a prolonged emotion that colors the whole psychic life; it generally involves either depression or elation." This listing is met if the requirements in both A and B are satisfied.

A. Medically documented persistence, either continuous or intermittent, of one of the following:

1. Depressive syndrome characterized by at least four of the following:

- a. Anhedonia or pervasive loss of interest in almost all activities; or
- b. Appetite disturbance with change in weight; or
- c. Sleep disturbance; or
- d. Psychomotor agitation or retardation; or
- e. Decreased energy; or
- f. Feelings of guilty or worthlessness; or
- g. Difficulty concentrating or thinking; or
- h. Thoughts of suicide; or

- i. Hallucinations, delusions, or paranoid thinking; or
* * * *
- 3. Bipolar syndrome with a history of episodic periods manifested by the full symptomatic picture of both manic and depressive syndromes (and currently characterized by either or both syndromes);
AND

B. Resulting in at least two of the following:

- 1. Marked restriction of activities of daily living; or
- 2. Marked difficulties in maintaining social functioning;
or
- 3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or
- 4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors).

20 C.F.R. Pt. 404, Subpt. P, App. 1, 12.04.

At step three of the sequential evaluation process, a claimant's impairment is compared to the Listings (20 C.F.R. Pt. 404, Subpt. P, App. 1). If the impairment is equal or medically equivalent to an impairment in the Listings, the claimant is presumed disabled. A plaintiff has the burden of proving that a Listing has been equaled or met. Yuckert, 482 U.S. at 140-42; Williams, 844 F.2d at 750-51. In his decision, the ALJ is "required to discuss the evidence and explain why he found that [the claimant] was not disabled at step three." Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996).

In this case, the ALJ stated that Plaintiff did not meet a Listing. In support of this statement the ALJ noted, "no treating or examining physician has mentioned findings equivalent in severity to the criteria of any listed impairment."

Prior to the start of the hearing before the ALJ, Plaintiff's attorney stated that Plaintiff was seeking to prove that Plaintiff met Listings 12.04 or 12.06. The record contains sufficient medical evidence to justify an evaluation of the Listings which Plaintiff asserted that she met in accordance with Clifton. On remand, the ALJ should, in accordance with Clifton, evaluate Plaintiff's claim that she meets a Listing and discuss the evidence supporting the evaluation.

ALCOHOL AND DRUGS AS A MATERIAL FACTOR

Plaintiff asserts that the ALJ improperly evaluated the effect of her drug addiction and alcoholism, that the ALJ should have relied upon medical testimony, and that the ALJ provided no reasons to support his conclusion that Plaintiff's alcohol and drug use were material factors in her disability.

In a case in which alcoholism or drug addiction is considered, a condition precedent to determining whether the addiction is a material factor is finding that the claimant is disabled. Therefore, a determination of disability must first be made. "If [the Commissioner] find[s] you are disabled and ha[s] medical evidence of your drug addiction or alcoholism, [the Commissioner] must determine whether your drug addiction or alcoholism is a contributing factor material to the determination of disability." 20 C.F.R. §§ 404.1535(a), 416.935(a).

In this case the ALJ did conclude that Plaintiff was disabled. The ALJ then evaluated Plaintiff's drug addiction and alcohol use. The ALJ concluded that Plaintiff's drug and alcohol use were material factors to her disability and found that Plaintiff was therefore not entitled to disability pursuant to the regulations. The following excerpts consist of the ALJ's evaluation of the materiality of Plaintiff's drug and alcohol use.

The undersigned concludes that the claimant's drug and alcohol addictions are material to the claimant's current inability to work. There is evidence that the mental disorders which limit her ability to work are secondary to the abuse of drugs and alcohol. Although there is some indication of depression and anxiety some years ago due to childhood abuse and stress, she was able to maintain her personal needs, complete her GED, get along with others, in short, function in essentially normal ways, prior to the increased use of alcohol and illegal drugs. Despite her reported history, there is otherwise no medically determinable mental impairment. Therefore, her drug and alcohol consumption are material. The evidence indicates improvement with proper medication and abstinence from drugs and alcohol.

* * * *

Alcoholism and drug abuse are contributing factors material to the determination of the claimant's disability. The medical evidence established that the claimant would not be disabled if she stopped using alcohol and drugs.

[R. at 18, 19].

Although the ALJ states that the record contains evidence to support his findings that (1) with proper medication and abstinence Plaintiff would improve, and (2) that the mental disorders are secondary to the alcohol and drugs, the ALJ never refers to any of the medical evidence in the record. The ALJ discusses the material affect of drugs and alcohol in a very general manner. The ALJ provides no specific

discussion of Plaintiff's medical evidence, the medical doctors, her medical history, or prognosis. The record does contain some evidence to support the ALJ's conclusions.^{5/} However, the ALJ must discuss this evidence in his opinion. This Court cannot on appeal reevaluate the ALJ's findings and attempt to support those findings with the record. The Court is limited to reviewing the ALJ's findings to determine whether or not they are supported by substantial evidence. Furthermore, the Tenth Circuit Court of Appeals has consistently held, in numerous contexts in social security cases, that the ALJ must discuss his findings in his opinion.

In addition, the record does contain evidence which is troubling and which has not been addressed by the ALJ. The Mental Residual Functional Capacity Assessment Forms which were completed by the social security doctors indicated that Plaintiff had bi-polar disease by history, and that Plaintiff has marked limitations in three categories. [R. at 47, 66, 75]. On October 10, 1993, Plaintiff's examining doctor indicated that Plaintiff might have bipolar disorder, but that due to her ongoing drug abuse problems a clear diagnosis was very difficult. [R. at 133]. The doctor noted that Plaintiff's prognosis was poor. [R. at 134-35]. On November 15, 1993, Plaintiff was examined by a physician who noted that Plaintiff did not exhibit "any overt psychotic symptoms at this time. Her mood continues to be labile, but this may be a reflection of an

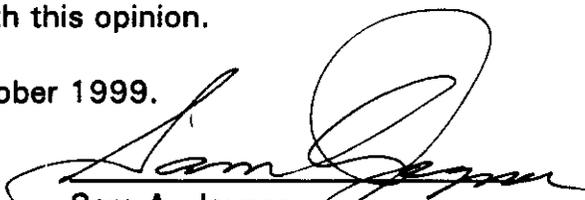
^{5/} For example, Plaintiff's treating doctor, on May 10, 1996, noted that Plaintiff was not incapacitated, "however transition to full-time work should be gradual." [R. at 369]. A few doctors noted that Plaintiff exhibited no overt psychotic signs other than her apparent drug and alcohol additions. Plaintiff worked at Blue Cross and Blue Shield from August 1991 until April 1994, when she quit. [R. at 612]. In addition, several notes in the record indicate Plaintiff planned to work but believed she could earn more on welfare, or that she planned to work as soon as her children returned to school.

underlying personality disorder, rather than a true bipolar disorder. However, this is a question that needs to be evaluated on an ongoing basis. One thing that complicates the diagnosis is her severe problems with alcohol and polysubstance abuse." [R. at 155]. A social security examiner on January 26, 1996 concluded that Plaintiff was emotionally impaired. [R. at 253]. The examiner noted "She would not be able to work around people or any type of stressful situation. Her prognosis will depend on how well she stabilizes on medications but it is poor at this time. Additionally, the panic disorder also disables her at this time." [R. at 253].

Although the ALJ appears to have had no problem reaching the conclusion that Plaintiff does not have a mental impairment, several doctors have indicated that determining whether or not Plaintiff has bi-polar disorder separate from her drug and alcohol addiction is difficult. In addition, the social security examiner concluded that Plaintiff was disabled due to her panic disorder. The ALJ does not address any of these doctors reports. The ALJ refers to no specific medical evidence to support his conclusions. On remand, the ALJ should evaluate whether or not Plaintiff's alcohol and drug use is a material factor and refer to specifics in the record to support his analysis. The ALJ may find it useful to consult a physician in making this analysis.

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

Dated this 7 day of October 1999.


Sam A. Joyner
United States Magistrate Judge

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

PINKERTON & FINN, P.C.)
)
Plaintiff,)
)
vs.)
)
MARILYN J. EICKENHORST and)
CHARLES W. EICKENHORST,)
)
Defendants.)

No. 99-CV-583-K ✓

ENTERED ON DOCKET

DATE OCT 08 1999

FILED
IN DISTRICT COURT

OCT 07 1999 *JA*

PHILIP J. COOPER, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records without prejudice pending the bankruptcy proceedings involving defendants, Marilyn and Charles Eickenhorst.

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

ORDERED this 7th day of October, 1999.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

WTF

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

OCT 8 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RHONDA MICHELLE CARTER,
an individual,

Plaintiff,

v.

UNITED STATES OF AMERICA, *ex rel*,
CLAREMORE INDIAN HOSPITAL,

Defendant.

Case No 99-CV-250H(J) ✓

ENTERED ON DOCKET
DATE OCT 8 1999

STIPULATION OF DISMISSAL

Plaintiff, Rhonda Michelle Carter, by her attorney of record, Clark O. Brewster and the defendant, United States of America, acting on behalf of the United States, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, having fully settled all claims asserted by the plaintiff in this litigation hereby stipulates to, and requests entry by the court of, the order submitted herewith dismissing all such claims with prejudice.

Dated this 7 day of October, 1999.

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

OCT 05 1999

FILED

OCT 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEADRA J. GARRETT and)
JERRY GARRETT, Husband)
And Wife,)

Plaintiffs,)

vs.)

Case No. 99-CV-096 B (M)

ELMER LEE BURKS, individually,)
LOVE TRANSPORT COMPANY, INC.,)
a foreign corporation and, AMERICAN)
MANUFACTURERS INSURANCE)
COMPANY, a foreign insurance)
corporation,)

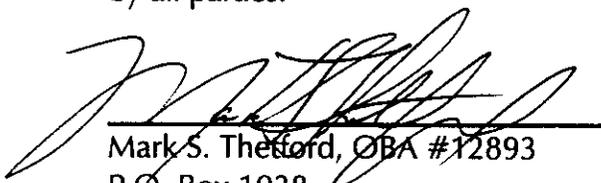
Defendants.)

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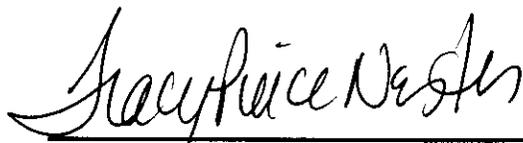
DATE OCT 08 1999

STIPULATION OF DISMISSAL

COME NOW the plaintiffs, Deadra J. Garrett and Jerry Garrett, by and through their attorney of record, Mark Thetford, and defendants, Elmer Lee Burks, Individually, Love Transport Company, Inc., and American Manufacturers Mutual Insurance Company, by and through their attorney of record, Tracy Pierce Nester, and hereby jointly stipulate to a dismissal of all claims herein on the grounds that a full and final settlement has been reached by all parties.



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FILED

OCT 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JOHN DEERE INSURANCE COMPANY,)
)
Plaintiff,)
)
v.)
)
COURTESY MOTOR COMPANY, INC.,)
)
Defendant.)

No. 98 CV 0578B(E)

ENTERED ON DOCKET
DATE OCT 08 1999

ORDER OF DISMISSAL WITHOUT PREJUDICE

On this 7th day of Oct., 1999, the Joint Motion To Dismiss of the parties comes on for hearing before this Court. The Court, upon review of the Joint Motion To Dismiss, finds that said Motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Joint Motion To Dismiss is granted; that the Complaint, Counterclaim and this cause be and the same is hereby Dismissed Without Prejudice; and that each of the parties will bear their own costs and fees.


JUDGE OF THE DISTRICT COURT

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

F I L E D

OCT 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PATTY JENKINS, individually as)
Widow of Billy Jack Jenkins,)

Plaintiff,)

vs.)

BOARD OF COUNTY COMMISSIONERS)
OF THE COUNTY OF WASHINGTON,)

Defendant.)

Case No. 99-CV-236-C

ENTERED ON DOCKET
OCT 08 1999
DATE _____

ORDER

Before the Court is a motion filed by the defendant Board of County Commissioners to dismiss the complaint for failure to state a claim. On July 2, 1999, the Court converted the motion to dismiss to a motion for summary judgment and granted both parties leave to file any additional evidence to be considered by the Court. For the reasons stated below, the Court finds that the defendant is entitled to summary judgment on plaintiff's claim under 42 U.S.C. § 1983.

In this case, plaintiff alleges that on April 17, 1997, her deceased husband Billy Jack Jenkins suffered a fatal heart attack while in custody serving a 90 day sentence in the Washington County Jail. At approximately 6:00 A.M. on that date, Mr. Jenkins notified the jailor that he was suffering from chest pains, shallow breathing, and shooting pain in his arm. The jailor gave Mr. Jenkins an over-the-counter stomach remedy and left him in his cell. After breakfast, at approximately 9:40 A.M., Mr. Jenkins asked Bill Hawk, one of the jailors, if he could see "Jan" concerning the pain. The jailor took Mr. Jenkins out of his cell and to the end of the hall. When "Jan" arrived Mr. Jenkins vomited. Mike Silva, another jailor told Mr. Jenkins that he might be experiencing an anxiety attack. "Jan" gave Mr. Jenkins some Maalox and took him back to his cell and arranged for him to have a lower bunk. "Jan"

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told Mr. Jenkins that she would be back to bring him some pills. Mr. Jenkins continued to be in pain, rolling onto his left side and rubbing his arm. Eventually Mr. Jenkins began gasping for air. An inmate rolled him on his back and saw that he was turning purple. All the inmates screamed for the jailors to come and help Mr. Jenkins, but nobody came until over an hour later. At approximately 12:00 P.M., Mr. Jenkins had turned blue and was still. Even though CPR was administered, Mr. Jenkins died of heart failure.

Prior to entering the jail, Mr. Jenkins had no known heart problems or heart disease. Plaintiff attests that during her visits with her husband at the jail, he did not complain that he was experiencing any sicknesses or physical ailments.

Plaintiff contends by not providing medical assistance and medical treatment to Billy Jack Jenkins the Board of County Commissioners inflicted cruel and unusual punishment upon him in violation of the Eighteenth Amendment to the United States Constitution. Plaintiff contends that the County Commissioners are liable under 42 U.S.C. § 1983 because the Commissioners violated the Jail Standards adopted by the Oklahoma Department of Health in failing to implement regulations or a medical plan for the care and treatment of inmates in the county jail. Plaintiff's action fails for several reasons. First, plaintiff's complaint against the Board of County Commissioners fails because plaintiff has not shown that the Commissioners have a statutory duty to hire, train, supervise, or discipline county jail personnel. Therefore the Commissioners cannot be held responsible for constitutional rights violations by such personnel unless they voluntarily undertook the responsibility of hiring and supervising. *Wells v. Oklahoma Department of Public Safety*, 97 F.3d 1465, 1996 WL 557722 (10th Cir. 1996)(unpublished). Under Oklahoma law, County Commissioners have no statutory duty to hire, train, supervise or discipline county sheriffs or their deputies. *Harwick v.*

Anderson and McClain County, Oklahoma, 145 F.3d 1345, 1998 WL 229751 (10th Cir.1998)(unpublished) *citing*, *Meade v. Grubbs*, 841 F.2d 1512, 1528 (10th Cir.1988). Only by showing that the Commissioners voluntarily undertook responsibility for hiring or supervising county law enforcement officers would plaintiff state a claim against the Commissioners. *Id.* To the extent plaintiff attempts to establish liability on the part of the county through respondeat superior, her effort fails because § 1983 does not encompass respondeat superior liability on the part of a municipality. *Id.* Additionally, within the Jail Standards at § 310:670-1-3, the obligation for development and implementation of the Jail Standards is placed on the local jail administrator, who is also responsible for the daily management, operations, and inspection of the facility.

Further, plaintiff fails to allege facts to establish a county policy of denial of medical treatment, and therefore, plaintiff cannot maintain a claim against the County Commissioners. *Id.* Although the jail's staff apparently violated the Jail Standards adopted by the Oklahoma Department of Health, this alone cannot amount to a constitutional deprivation actionable under § 1983. *Mawby v. Ambroyer*, 568 F.Supp. 245, 249 (E.D.Mich.1983) The challenged conduct must be a constitutional violation on its own; violation of a regulation is not a separate actionable constitutional deprivation. *Id. citing*, *Bills v. Henderson*, 631 F.2d 1287 (6th Cir. 1980). At best, plaintiff's claim raises issues of state law negligence, not constitutional deprivations. Plaintiff's decedent was not denied medical care, rather the care which was provided was inadequate. Section 1983 was not intended to replace state law actions. *See, Webber v. Mefford*, 43 F.3d 1340, 1343 (10th Cir. 1994). For this reason, more than mere negligence is required for liability. "Deliberate indifference requires a higher degree of fault than negligence or even gross negligence". *James v. Grand Lake Mental Health Center, Inc.*, 161 F.3d 17, 1998 WL 664315 (10th Cir.1998)(unpublished), *citing Hovater v. Robinson*, 1 F.3d 1063, 1066

(10th Cir.1993). A county can be held liable under § 1983 only for its own unconstitutional or illegal policies, not for the tortious acts of its employees. *Jennings v. Natrona County Detention Center Medical Facility*, 1999 WL 248634 (10th Cir. 1999), *citing Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir.1998). Plaintiff does not allege the existence of any such policies, but rather that proper medical attention was denied or delayed. This is insufficient to state a constitutional claim against a county. *Id.*

In addition to filing a claim for relief under § 1983, the plaintiff also sued the County Commissioners for wrongful death, a state tort claim. This is a pendant claim which this Court can, in its discretion, dismiss upon finding that plaintiff failed to set forth a federal cause of action to support federal jurisdiction. Accordingly, the Court dismisses plaintiff's state law claim without prejudice to re-filing in state court.

IT IS THEREFORE ORDERED, that the defendant is entitled to summary judgment on plaintiff's claim for constitutional violation under 42 U.S.C. § 1983.

IT IS THE FURTHER ORDER OF THE COURT, that plaintiff's state law claim for wrongful death is hereby dismissed without prejudice.

IT IS SO ORDERED this 7th day of October, 1999.



H. DALE COOK
Senior United States District Court

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

FILED
OCT 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PATTY JENKINS, individually as)
Widow of Billy Jack Jenkins,)

Plaintiff,)

vs.)

Case No. 99-CV-236-C /

BOARD OF COUNTY COMMISSIONERS)
OF THE COUNTY OF WASHINGTON,)

Defendant.)

ENTERED ON DOCKET
DATE OCT 08 1999

JUDGMENT

This matter came before the Court on consideration of summary judgment as to plaintiff's claim for relief under Title 42, United States Code, Section 1983. The issues having been duly considered and a decision having been rendered in accordance with the order filed contemporaneously herewith,

IT IS ORDERED, ADJUDGED, AND DECREED that judgment is entered for the defendant Board of County Commissioners of the County of Washington, and against the plaintiff Patty Jenkins on plaintiff's claim under Title 42, United States Code, Section 1983.

IT IS SO ORDERED this 7th day of October, 1999.



H. DALE COOK
Senior, United States District Judge

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

FILED

OCT 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 THE SUM OF FORTY-THREE)
 THOUSAND FOUR HUNDRED)
 TEN DOLLARS (\$43,410.00) IN)
 UNITED STATES CURRENCY, et al.)

Civil Action No.98-CV-388-B(J)

ENTERED ON DOCKET

DATE OCT 08 1999

JUDGMENT OF FORFEITURE

This matter having come before this Court on the 30th and 31st days of August, 1999, for trial to the court on the Government's Complaint for Forfeiture *In Rem* of the defendant currency and motorcycle and determination of the claim of Duane W. Murphy. The plaintiff appearing by Catherine J. Depew, Assistant United States Attorney, and Claimant Duane W. Murphy appearing in person and by his attorney of record, Peter Barrett.

WHEREAS, the verified Complaint for Forfeiture *In Rem* was filed in this action on the 27th day of May, 1998, alleging that the defendant motorcycle is subject to forfeiture pursuant to 21 U.S.C. §881(a)(4) because it is a conveyance which was used, or intended to be used, to transport or in any manner or part to facilitate transportation, sale, receipt, possession or concealment of controlled substances, raw materials, products, equipment used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance, or chemicals or drug manufacturing

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equipment; and that the defendant currency and motorcycle are subject to forfeiture pursuant to 21 U.S.C. §881(a)(6) because they were furnished or intended to be furnished in exchange, or are proceeds traceable to, or were to be used to facilitate transportation, sale, receipt, possession or concealment of controlled substances, raw materials, products, equipment used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance, or chemical or drug manufacturing equipment; that the defendant currency and motorcycle are subject to forfeiture pursuant to 18 U.S.C. § 981 because they had been involved in a transaction or an attempted transaction in violation of §§ 5313(a) or 5324 of Title 31 United States Code or of §§ 1956 or 1957 of Title 18 or were traceable to property involved in such transaction.

AND WHEREAS, Warrant of Arrest and Notice *In Rem* was issued on the 27th day of May, 1998, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant currency and motorcycle and for publication in the Northern District of Oklahoma;

AND WHEREAS, the United States Marshals Service personally served a copy of the Complaint for Forfeiture *In Rem* and the Warrant of Arrest and Notice *In Rem* on the defendant motorcycle on June 5, 1998;

AND WHEREAS, the United States Marshals Service personally served a copy of the Complaint for Forfeiture *In Rem* and the Warrant of Arrest and Notice *In Rem* on the defendant currency on June 15, 1998;

AND WHEREAS, DUANE W. MURPHY has been determined to be the only individual with possible standing to file a claim to the defendant currency or motorcycle,

and, therefore the only individual to be served with process in this action;

AND WHEREAS, the Government filed its verified Amended Complaint for Forfeiture *In Rem* on the 9th day of June, 1999, alleging that the defendant currency and motorcycle are subject to seizure and forfeiture pursuant to 21 U.S.C. §881(a)(6) because they were furnished or intended to be furnished in exchange for a controlled substance, or are proceeds traceable to such an exchange or moneys, negotiable instruments and securities used or intended to be used to facilitate any violation of the drug control laws of the United States; and that the defendant currency is subject to seizure and forfeiture pursuant to 26 U.S.C. § 7301 because it is property which was concealed with design to avoid payment of taxes imposed by internal revenue laws or were concealed with the intent to defraud the United States of such tax or any party thereof; and that the defendant vehicle and currency was involved in a transaction or an attempted transaction in violation of Section 5313(a) or 5324 of Title 31, U.S.C., or of Section 1956 or 1957 of Title 18, U.S.C., or was traceable to property involved in such violation.

AND WHEREAS all persons and/or entities interested in the defendant currency or motorcycle were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice *In Rem*, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s);

AND WHEREAS, DUANE W. MURPHY filed his Claim to the defendant currency and motorcycle on the 4th day of June, 1998, his Answer on the 17th day of June, 1998, his Amended Claim on the 21st day of June, 1999, and his Answer to the Amended

Complaint for Forfeiture on the 21st day of June 1999;

AND WHEREAS, no other claims or answers have been filed of record in this action with the Clerk of the Court, in respect to the defendant currency or motorcycle, and no other persons or entities have plead or otherwise defended in this suit as to said defendant currency or motorcycle, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, upon information and belief, default exists as to the defendant currency and motorcycle and all persons and/or entities interested therein, save and except the claim of Duane W. Murphy.

AND WHEREAS, the United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant currency was located, on July 2, 9 and 16, 1998. Proof of Publication was filed July 22, 1998;

AND WHEREAS, on the 30th and 31st days of August, 1999, the case was presented to the Court for trial. Pursuant to the Findings of Fact and Conclusions of Law entered September 29, 1999, the Court found that there is sufficient probable cause that the defendant currency and motorcycle are subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6) because they were furnished or intended to be furnished in exchange for a controlled substance in violation of the drug control laws or were proceeds traceable to such an exchange, and/or the currency was money used or intended to be used to facilitate any violation of the drug control laws of the United States. The Court further found that there is sufficient probable cause that the defendant motorcycle is subject to

forfeiture as having been involved in a transaction or attempted transaction with drug proceeds in excess of \$10,000 (18 U.S.C. § 1957) with the intent to evade taxes, specifically registration and sales taxes (18 U.S.C. § 1956(a)(1)(A)(i)) and was a knowing transaction designed to avoid a reporting requirement, specifically, sales taxes (18 U.S.C. § 1956(a)(1)(B)(ii)). The Court found that Claimant Murphy failed to establish a defense to the forfeiture of the defendant currency and motorcycle by a preponderance of the evidence. The Court found that Claimant Murphy failed to establish that his Fourth Amendment rights were violated, and that, based on the totality of the circumstances in this case, the stop and detention of Claimant Murphy and the search and seizure were not conducted in violation of the Fourth Amendment .

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that, in accordance with the Court's Findings of Fact and Conclusions of Law that the following-described defendant properties:

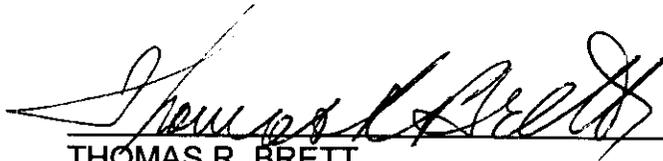
**THE SUM OF FORTY-THREE THOUSAND FOUR HUNDRED
TEN DOLLARS (\$43,410.00) IN UNITED STATES
CURRENCY**

and

**ONE (1) 1993 HARLEY DAVIDSON MOTORCYCLE FXDWG
ANNIVERSARY, VIN # 1HD1GEL16PY311203;**

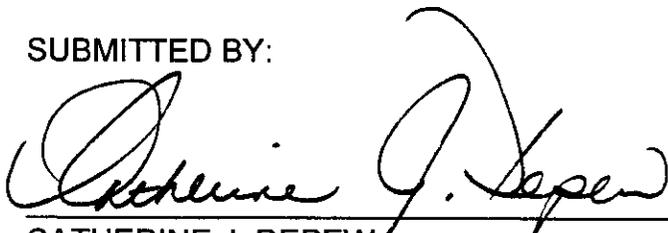
be, and they hereby are, forfeited to the United States of America for disposition according to law.

Entered this 7th day of October, 1999.



THOMAS R. BRETT
Senior Judge of the United States District Court
for the Northern District of Oklahoma

SUBMITTED BY:



CATHERINE J. DEPEW
Assistant United States Attorney

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

FILED

OCT 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KATHRYN S. DUKE,)

Plaintiff,)

vs.)

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

Defendants.)

NO. 98-CV-459B (E) /

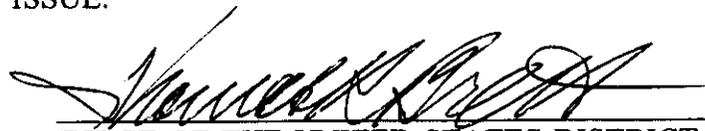
ENTERED ON DOCKET
DATE OCT 08 1999

JOURNAL ENTRY OF JUDGMENT

NOW on this 7 day of ~~September~~ ^{Oct}, 1999, the above entitled matter came on for hearing; the Plaintiff appeared in person and by her attorney of record, Theodore P. Gibson. The Defendant, Paradigm Financial Group, appeared neither by person nor counsel. The Court having heard testimony, reviewed the files, and being fully advised in the premises, and having made separate Findings of Fact and Conclusions of Law, finds:

Plaintiff is entitled to a judgment against the Defendant, Paradigm Financial Group, in the principal sum of \$1,000.00, punitive damages of \$1,000.00, which both draw interest at 5.285 per cent per annum from this date, and the Plaintiff is further entitled to attorney fees in the sum of \$5,200.00 and reimbursement of accrued costs of \$150.00, and all accruing costs.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, Kathryn S. Duke, have and recover judgment against the Defendant, Paradigm Financial Group, in the principal sum of \$1,000.00, punitive damages of \$1,000.00, which both draw interest at 5.285 per cent per annum from this date; Plaintiff is further entitled to attorney fees in the sum of \$5,200.00, reimbursement of accrued costs of \$150.00, and for all accruing costs; FOR ALL OF WHICH LET EXECUTION ISSUE.



JUDGE OF THE UNITED STATES DISTRICT COURT

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3. In June, 1998, Plaintiff was denied credit from Fred Jones Lincoln Mercury in Tulsa, Oklahoma. Plaintiff testified she was told the major reason for the denial was the negative credit information from Paradigm.

4. Plaintiff contacted a representative of Paradigm, who refused her request to remove the inaccurate information and told her that she owed the money and that she must pay the obligation or she would be sued and lose her job.

5. Plaintiff contacted her attorney, who wrote Paradigm and, thereafter, Paradigm requested that the various credit reporting agencies delete the erroneous information.

6. Thereafter, Plaintiff was able to purchase an automobile at reasonably favorable financial terms.

7. The Plaintiff has suffered humiliation, loss of sleep and loss of financial opportunities by her inability to purchase a vehicle within financial terms available to her at the time she wished.

II. CONCLUSIONS OF LAW

1. The Court has jurisdiction and venue over this cause of action and the parties hereto.

2. The Defendant, Paradigm, has violated several sections of the Fair Debt Reporting Act (15 U.S.C. §1681, *et seq.*) and the Fair Debt Collection Procedures Act (15 U.S.C. §1692).

3. The Plaintiff was a consumer within the terms and meanings of the Act, and the Defendant was a debt collector within the terms and meanings of the Act (15 U.S.C. §1692a).

4. The Defendant, Paradigm, is in violation of 15 U.S.C. §1692e, in that, in a conversation between a representative of Paradigm and the Plaintiff, the representative used abusive language, "the natural consequences of which was to harass, oppress or abuse" the Plaintiff.

5. The Defendant, Paradigm, violated §1692e(2)(A), in that it falsely represented the character, amount or legal status of the debt; (5), threatened to take an action that could not legally be taken or that was not intended to be taken; and (8), communicating or threatening to communicate to any person credit information which is known, or which should be known, to be false.

6. The Defendant, Paradigm, violated 15 U.S.C. §1692g in that, within the statutory time period after an initial communication, it did not, by written communication, verify the debt or send the Plaintiff the written information as to how a debt could be disputed.

7. The Plaintiff is entitled to damages for the Defendant's violation of the Fair Debt Collection Procedures Act, as shown in 15 U.S.C. §1692k and 15 U.S.C. §1681n, granting Plaintiff punitive damages as a "user of information."

8. Plaintiff is entitled to a judgment against the Defendant, Paradigm, for the sum of \$1,000.00 actual damages, \$1,000.00 punitive damages, attorney fees for her attorney of \$5,200.00, and a reimbursement of her costs of \$150.00.

9. A Journal Entry of Judgment will be submitted contemporaneously with these Findings of Fact and Conclusions of Law.

DATED this 7th day of ~~September~~ ^{October}, 1999.



JUDGE OF THE UNITED STATES DISTRICT COURT

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

FILED
OCT 7 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

TINA K. SCHMAUSS, individually and as)
mother and next friend of BRANDON M.)
SCHMAUSS and BRITITNI M. SCHMAUSS,)
minors, and MICHAEL SCHMAUSS, husband)
of Tina K. Schmauss,)

Plaintiffs,)

v.)

JONATHAN W. FLEMING, GREAT WEST)
CASUALTY COMPANY and STATE FARM)
MUTUAL AUTOMOBILE INSURANCE)
COMPANY,)

Defendants.)

Case No. 99 CV 0033 B (M)

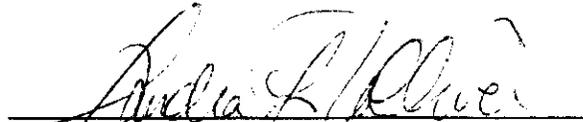
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DATE OCT 08 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW Tina K. Schmauss (Schmauss), individually and as natural mother and next friend of Brandon M. Schmauss and Brittini M. Schmauss, minors, and Jonathan W. Fleming and Great West Casualty Company, represented by their attorneys of record, and stipulate that the Court may enter its order of dismissal with prejudice herein as to any claims brought by Schmauss, individually and as next friend of Brandon M. Schmauss and Brittini M. Schmauss (Brandon and Brittini), minors, arising out of injuries alleged to have been incurred by Brandon and Brittini as a result of a certain motor vehicle accident which occurred on June 30, 1997, with all parties to bear their own costs as to said claims. The parties further stipulate that only those claims arising out of injuries suffered by Brandon and Brittini are dismissed and that said dismissal does not affect any other claims Schmauss and/or Michael Schmauss may have arising out of injuries allegedly suffered by Schmauss in the same accident.

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Sandra L. Tolliver, OBA No. 11117

P. O. Box 14271

Tulsa, OK 74159-1271

and

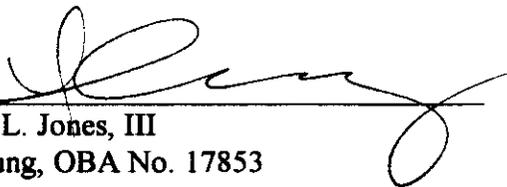
Cathlyn J. Mills, OBA No. 13403

Mills Law Office

2431 E. 51st St., #401

Tulsa, OK 74135

Attorneys for Tina K. Schmauss, Individually
and as mother and next friend of Brandon M.
Schmauss and Brittini M. Schmauss, minors
and Michael Schmauss, husband of Tina K.
Schmauss



Robert L. Jones, III

Niki Cung, OBA No. 17853

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Fort Smith, AR 72902-8070

James M. Sturdivant, OBA No. 8723

Elsie Draper, OBA No. 2482

Gable & Gotwals

2000 Bank of America Center

15 West 6th Street

Tulsa, OK 74119-5447

Attorneys for Jonathan W. Fleming and
Great West Casualty Company

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

FILED

OCT 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TINA K. SCHMAUSS, individually and as)
mother and next friend of BRANDON M.)
SCHMAUSS and BRITTNI M. SCHMAUSS,)
minors, and MICHAEL SCHMAUSS, husband)
of Tina K. Schmauss,)

Plaintiffs,)

v.)

JONATHAN W. FLEMING, GREAT WEST)
CASUALTY COMPANY and STATE FARM)
MUTUAL AUTOMOBILE INSURANCE)
COMPANY,)

Defendants.)

Case No. 99 CV 0033 B (M) /

ENTERED ON DOCKET

DATE OCT 08 1999

ORDER GRANTING STIPULATION OF DISMISSAL WITH PREJUDICE

Now, on this 7th day of Oct, 1999, comes on to be heard the Stipulation of Dismissal With Prejudice herein as to claims brought by Tina K. Schmauss, (Schmauss), individually and as natural mother and next friend of Brandon M. Schmauss and Brittni M. Schmauss (Brandon and Brittni), minors, by reason of injuries alleged to have been suffered by said minors as a result of a certain motor vehicle accident which occurred on June 30, 1997, and only as to such claims and without any effect as to any other claims by Schmauss and/or Plaintiff Michael Schmauss arising out of injuries allegedly suffered by Schmauss in said motor vehicle accident.


UNITED STATES DISTRICT COURT JUDGE

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FILED

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

OCT 7 1999

Paul Lombardi, Clerk
U.S. DISTRICT COURT

TINA K. SCHMAUSS, individually and as)
mother and next friend of BRANDON M.)
SCHMAUSS and BRITTONI M. SCHMAUSS,)
minors, and MICHAEL SCHMAUSS, husband)
of Tina K. Schmauss,)

Plaintiffs,)

v.)

JONATHAN W. FLEMING, GREAT WEST)
CASUALTY COMPANY and STATE FARM)
MUTUAL AUTOMOBILE INSURANCE)
COMPANY,)

Defendants.)

Case No. 99 CV 0033 B (M)

ENTERED ON DOCKET
OCT 08 1999

COURT ORDER APPROVING SETTLEMENT
AGREEMENT WITH MINOR

NOW on this 7th day of October, 1999, this matter coming on
for hearing before me, the undersigned Judge of the United States District Court for the Northern
District of Oklahoma, and having heard testimony of witnesses sworn and statements of counsel and
being fully advised in the premises herein, finds as follows:

That on June 30, 1997, the parties hereto were involved in a motor vehicle accident. That as
a result of the motor vehicle accident, the minors, Brandon M. Schmauss and Brittoni M. Schmauss
(Brandon and Brittoni), were allegedly injured, and a claim has arisen against the Co-
Petitioner/Defendants Jonathan W. Fleming and Great West Casualty Company (hereinafter Fleming
and Great West) that is disputed both as to liability and damages. The parties have reached a
compromise agreement in the amount of \$12,500.00 and have requested that the Court approve the

settlement.

The Court finds that Tina K. Schmauss (Schmauss) is the proper party to act on behalf of Brandon and Brittnei, the minor children.

The Court finds that a compromise agreement has been reached wherein Fleming and Great West have offered to pay to Schmauss, individually, and as natural mother and next friend of the minors, Brandon and Brittnei, the total sum of \$12,500.00 to be distributed as follows:

1. The sum of \$3,750.00 representing any and all expenses Schmauss incurred, or to be incurred, because of the alleged injuries to the minor children, Brandon and Brittnei, including attorney's fees and costs.

2. The sum of \$8,750.00 invested into equally funded annuities to provide payments as follows:

- a. In the amount of \$2,110.00 to Brittnei on each of the following dates: March 15, 2009, March 15, 2010, March 15, 2011 and March 15, 2012.
- b. In the amount of \$2556.00 to Brandon on each of the following dates: December 26, 2011, December 26, 2012, December 26, 2013 and December 26, 2014.

The Court further finds that the parties agree that the above sum represents full payment of any and all claims the minor children, or anyone acting on their behalf, may have now, or may arise in the future, known or unknown, resulting from the motor vehicle accident which occurred on or about June 30, 1997,

The Court further finds the attorney's fees and expenses of Schmauss incurred on behalf of Brandon and Brittnei, minors, should be approved as set forth above.

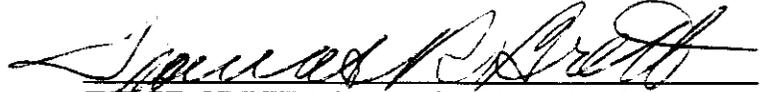
The Court finds that Schmauss, has reached an informed decision to waive the right to trial by jury as to the claims brought by reason of alleged injuries to Brandon and Brittni and on behalf of Brandon and Brittni; that Schmauss is fully aware of the consequences of settlement of this matter as to the claims arising out of their injuries, and said claims only, and is aware that once the Court approves this settlement and the settlement proceeds have been paid, that both she, as the natural parent, and the minors, even after reaching the age of majority, shall be forever barred from making any additional claims arising out of injuries to Brandon and Brittni as a result of the subject accident, even if the medical condition of the minor children, or either of them, does not continue as presently anticipated or shall unexpectedly change for the worse after this settlement.

The Court finds that the parties have agreed, and the Court so orders, that the natural parent, individually, shall pay any and all outstanding medical bills, liens, attorney's fees and any other claims made against the settlement proceeds and shall indemnify and defend Fleming and Great West from any further loss related to services rendered to or on behalf of Brandon and Brittni, as set out in the Joint Petition for Approval Of Settlement herein.

The Court has heard testimony as to the medical condition and prognosis of the minors, Brandon and Brittni, and as to the other elements of damage and liability in the case, and finds that the settlement agreement is fair, equitable and in the best interest of the minor children and that it was entered into free from fraud, coercion and duress by either of the parties, their agents, insurers or attorneys.

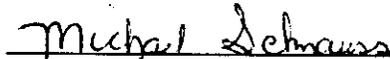
The Court finds and hereby orders that the proposed settlement, as set forth above and in the Joint Petition For Approval Of Settlement, should be and is hereby approved, and upon payment of the settlement proceeds, Fleming and Great West shall be deemed to be released from any and all

further liability to Schmauss, Brandon and Brittni, as a result of any injuries allegedly suffered by Brandon and Brittni as a result of the motor vehicle accident described herein, but only as to claims arising out of said injuries.

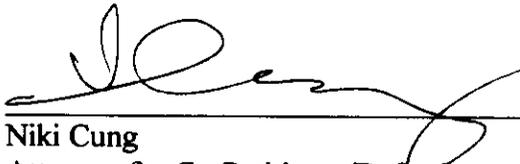

JUDGE, UNITED STATES DISTRICT COURT

APPROVED AS TO FORM AND CONTENT:


Tina K. Schmauss, Individually and as Mother
and Next Friend of Brandon M. Schmauss and
Brittni M. Schmauss, Minors


Michael Schmauss, Husband of Tina K. Schmauss


Sandra L. Tolliver
Attorney for Petitioners/Plaintiffs


Niki Cung
Attorney for Co-Petitioner/Defendants
Jonathan W. Fleming and Great West Casualty Company

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

FILED

OCT 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

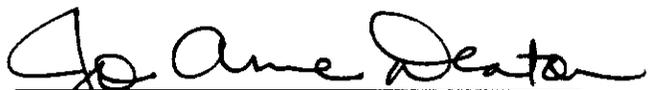
PENNY SCOTT,)
)
Plaintiff,)
)
vs.)
)
UNITED ENGINES, INC., a Delaware)
Corporation, and PHILIP MILDREN,)
individually and as an agent for UNITED)
ENGINES, INC.,)
)
Defendants.)

NO. 99 CV 018 B (M)

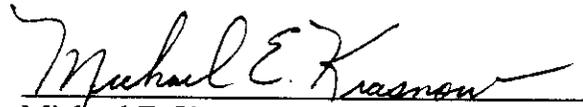
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DATE OCT 7 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

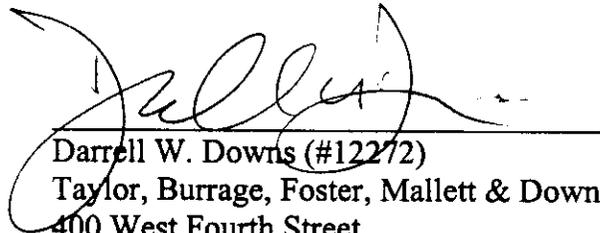
Pursuant to Rule 41 of the Federal Rules of Civil Procedure, Plaintiff, Penny Scott, hereby dismisses with prejudice all claims asserted herein against the Defendant, United Engines, Inc., and against the Defendant, Philip Mildren.



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Attorney for Defendant,
United Engines, Inc.



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

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

OCT 6 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-457-K (E) ✓

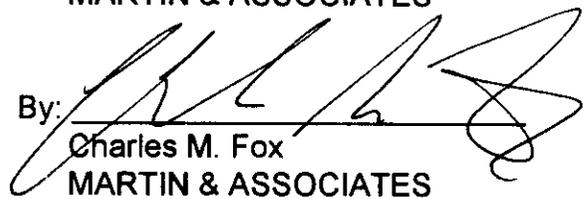
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DATE OCT 7 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

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

MARTIN & ASSOCIATES

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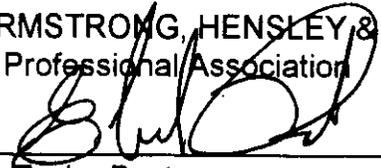
Attorneys for Plaintiff Marie Bontemps

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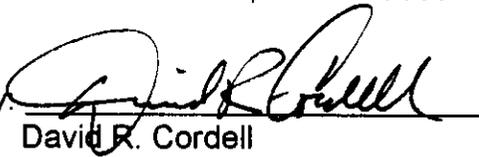
ARMSTRONG, HENSLEY & LOWE,
A Professional Association

By: 

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Attorneys for Plaintiff Marie Bontemps

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

MT

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

FILED

OCT 6 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RUFORD HENDERSON, et al.,)

Plaintiffs,)

vs.)

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

Defendants.)

Case No. 97-CV-457-K (E) ✓

ENTERED ON DOCKET

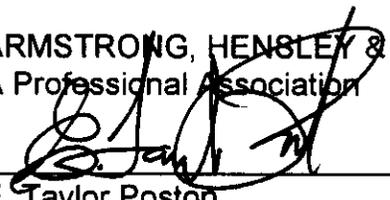
DATE OCT 7 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

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

ARMSTRONG, HENSLEY & LOWE,
A Professional Association

By: _____


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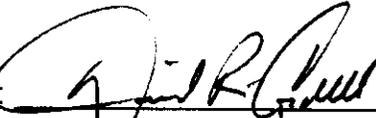
Attorneys for Plaintiff Helen Perkins

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DAVID R. CORDELL, OBA #11272
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Attorneys for Defendants,
AMERICAN AIRLINES, INC.,
THE SABRE GROUP, INC. and
AMR CORPORATION

MT

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

FILED
OCT 6 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

HELEN FAYE CHANCE, *et al.*,)
)
Plaintiffs,)
)
v.)
)
HOMELAND STORES, INC., a)
Delaware corporation,)
)
Defendant.)

Case No. 98-CV-901-H ✓

ENTERED ON DOCKET
OCT 7 1999
DATE _____

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW Plaintiffs and Defendant (the parties having mediated this action, and the United States Bankruptcy Court for the District of Delaware having entered its Order authorizing the Debtor to enter into and approving the Settlement Agreement with regard to this action, and the merits of this action being governed by said Order) and stipulate to the dismissal with prejudice of the above styled and numbered cause, each party to their, her or its own costs.

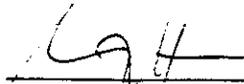
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Respectfully submitted,

FRASIER, FRASIER & HICKMAN

By:



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ATTORNEYS FOR PLAINTIFFS

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ATTORNEYS FOR DEFENDANT

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

SHERMAN AND PAULETTA PYATT, as)
parents and next friend of AMBER)
FLANIGAN a minor child; CATHERINE)
HAAR, mother and next friend of)
TABITHA POWERS-HAAR, a minor child;)
BARBARA SUE DALE, mother and next)
friend of DESARAE NORGARD; and)
BRENDA LEE LOVELL REYNOLDS,)
mother and next friend of KIMBERLY)
ANN REYNOLDS,)

Plaintiffs,)

vs.)

INDEPENDENT SCHOOL DISTRICT NO.)
1 OF TULSA COUNTY, OKLAHOMA,)
and BILL BAGLEY in his individual and)
official capacity, and JAMES HART in his)
individual and official capacity,)

Defendants.)

FILED
IN OPEN COURT

OCT 05 1999

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

Case No. 99 CV-204BU (M)

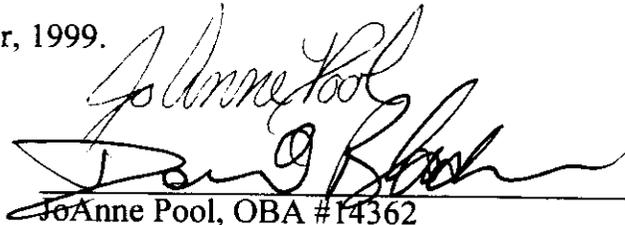
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DATE **OCT 06 1999**

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The plaintiffs, Sherman and Pauletta Pyatt, as parents and next friends of Amber Flanigan, Catherine Haar, mother and next friend of Tabitha Powers-Haar, Barbara Sue Dale, mother and next friend of Desarae Norgard, and Brenda Lee Lovel Reynolds, mother and next friend of Kimberly Ann Reynolds, and the defendants, Independent School District No. 1 of Tulsa County, Oklahoma (the "Tulsa School District"), Bill Bagley ("Bagley") and James Hart ("Hart"), advise the court of a settlement agreement reached between the parties and, pursuant to Rule 41(a)(1)(ii), FED. R. CIV. P., jointly stipulate that the plaintiffs' action against the defendants, the Tulsa School District, Bagley and Hart, be dismissed with

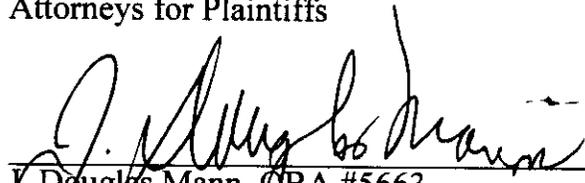
prejudice, the parties to bear their respective costs, including all attorneys fees and expenses of this litigation.

Dated this 5th day of October, 1999.



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Attorneys for Defendants, Tulsa School District,
Bill Bagley and James Hart

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LONNIE J. BUMPHUS,)
SSN: 441-48-2581,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner,)
Social Security Administration,)
)
Defendant.)

F I L E D

OCT - 6 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-1045-EA

ENTERED ON DOCKET

DATE OCT 06 1999

ORDER

On October 6, 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 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) 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 November 1, 1993, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.). Claimant's application for benefits was denied in its entirety initially and on reconsideration. A hearing before Administrative Law Judge (ALJ) Leslie J. Hauger was held July 18, 1994, in Tulsa, Oklahoma. (R. 150-68) By decision dated November 22, 1994, the ALJ found

that claimant was not disabled. (R. 116-24) On March 13, 1995, the Appeals Council remanded for further development of the record concerning claimant's alleged eye problem. (R. 25-27, 133-35) After claimant appeared for a consultative examination, a supplemental hearing was held on February 20, 1996. (R. 169-82) By decision dated March 28, 1996, the ALJ again found that claimant was not disabled. (R. 10-19) On September 23, 1997, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 404.981.

Claimant's Background

Claimant was born on August 31, 1950, and was 45 years old at the time of the supplemental administrative hearing in this matter. He has a ninth grade education and some vocational training as a mechanic. Claimant worked as a janitor, nursing home housekeeper, automobile mechanic, car washer and parts runner. Claimant alleges an inability to work beginning October 31, 1992, due to heart, back, arm, vision, hearing, bladder and breathing problems, as well as pain and limited mobility. (Complaint, Docket # 1, at 2.) In his memorandum brief, he characterizes his disability as short limb dwarfism, pain in his arms, numbness in his legs, urinary incontinence, blurred vision in his left eye, and a 90% hearing loss in one ear. (Cl. Br. Docket # 11, at 1.) Claimant testified that he was working part-time as a janitor at the time of the first hearing in this matter, but he was laid off from that position in November 1994, and could not find another janitorial job. (R. 154, 172-73, 175-76)

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 a full range of sedentary work, as defined in 20 C.F.R. § 404.1567, and of an unskilled nature as defined in 20 C.F.R. § 404.1568.

He stated that there are no nonexertional impairments to reduce further the sedentary work base. 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. (R.13-19)

Issues

Claimant asserts as error that:

- (1) the ALJ failed to adequately develop the record as to claimant's impairments;
- (2) the ALJ's findings of fact regarding claimant's vision problems are not supported by the record;
- (3) the ALJ applied the grids while ignoring claimant's non-exertional impairments at step five; and
- (4) the ALJ's RFC analysis was not a function-by-function analysis as required by Social Security rulings.

Applicable Law

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, a claimant must show "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. Isolated and unsupported comments by the claimant are insufficient, by themselves, to raise the suspicion of the existence of a nonexertional impairment." Hawkins v. Chater, 113 F.3d 1162, 1167 (10th Cir. 1997) (citations omitted). Further, 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).

When a claimant's medical sources do not give sufficient medical evidence about an impairment to determine whether the claimant is disabled, a consultative examination may be ordered. 20 C.F.R. § 404.1517. However, the ALJ does not have a duty to order a consultative examination in all cases. 20 C.F.R. §§ 404.1512(f), 404.1519a. The Tenth Circuit has stated:

where there is direct conflict in the medical evidence requiring resolution, . . . or where the medical evidence in the record is inconclusive, . . . a consultative examination is often required for proper resolution of a disability claim. Similarly, where additional tests are required to explain a diagnosis already contained in the record, resort to a consultative examination may be necessary.

Hawkins, 113 F.3d at 1166 (citations and footnote omitted).

The grids contain tables of rules which direct a determination of disabled or not disabled on the basis of a claimant's RFC category, age, education, and work experience. 20 C.F.R. Pt. 404 Subpt. P, App. 2. "Under the [Commissioner's] own regulations, however, 'the grids may not be applied conclusively in a given case unless the claimant's characteristics precisely match the criteria of a particular rule.'" Frey v. Bowen, 816 F.2d 508, 512 (10th Cir. 1987) (quoting Teter v. Heckler, 775 F.2d 1104, 1105 (10th Cir. 1985) (other citation omitted). The presence of a nonexertional impairment generally precludes reliance on the grids. See, e.g., Frey, 816 F.2d at 513; Talbot v. Heckler, 814 F.2d at 1456, 1461 (10th Cir. 1987). In Evans v. Chater, 55 F.3d 530 (10th Cir. 1995), the court held that, to deny social security disability benefits at step five using the grids, an ALJ need not show that the claimant can perform a substantial majority of the work in the designated residual functional capacity category, but rather that he can perform one or more occupations which encompass a significant number of available jobs.

Sedentary work is defined as involving the lifting of no more than ten pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. It involves sitting for about 6 hours of an 8-hour workday, and it occasionally requires a certain amount of walking and standing necessary to carry out job duties. 20 C.F.R. § 404.1567(a) (1997). "Occasionally" means that it occurs from very little up to one-third of the time, and totals no more than 2 hours of an 8-hour workday. Social Security Ruling 96-9p.

Findings

Duty to Develop the Record

Claimant received medical treatment in June 1994 after he had inhaled some chemicals he used in his cleaning duties at work. (R. 113-14) X-rays taken at that time revealed "inferior displacement of the humeral heads of the glenoid fossa bilaterally." (R. 115) This meant that the bones in his arm were out of socket. He alleged that this caused him disabling pain. There was also "some reversal of normal curvature of the thoracic spine." (R. 115) Thus, he made the threshold showing of some objective evidence "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). There is no other evidence in the record sufficient to determine whether the claimant is disabled, and the ALJ should have ordered a consultative examination. See 20 C.F.R. § 404.1517.

Instead, the ALJ relied on the absence of evidence. He specifically emphasized the vocational expert's testimony that claimant's past relevant work was classified as medium work, which required that claimant lift, stand and walk more than he testified he could do. (R. 16) The ALJ also focused on the fact that claimant had not seen any doctors for his problems other than to sit for the

consultative eye examination. He found no objective evidence supporting claimant's hearing loss, and no diagnosis of any urinary problem. As to claimant's arm and leg problems, he pointed to Dr. Dalessandros' report, emphasizing that the only problem noted was claimant's "decreased movements of his limbs due to his short limb stature, not due to any numbness or pain." (Id.) However, the absence of evidence is not evidence. Thompson v. Sullivan, 987 F.2d 1482, 1491 (10th Cir. 1993) Claimant testified that he had not seen any doctors about his condition because he could not afford it. (R. 159-60) A claimant is not precluded from recovering disability benefits because of failure to pursue medical treatment if the claimant cannot afford medical treatment. See Thompson, 987 F.2d at 1489-90 (10th Cir. 1993); Teter v. Heckler, 775 F.2d 1104, 1107 (10th Cir. 1985).

Vision Problems

When Angelo Dalessandro, M.D., examined claimant in January 1994, he found that claimant had a pterygium¹ that extended over his left cornea, with resultant decrease in vision. (R. 95-96) His main complaint was numbness in his legs that caused his legs to occasionally give way. He commented that he had not seen a physician about his condition. Dr. Dalessandro found that claimant had chronic fatigue and decreased control of urination and hypertension. (R. 94, 96) Due to claimant's dwarfism, all of his extremities were shortened, his arms were fixed at a 25 degree angle, and his legs were slightly bowed. Dr. Dalessandro observed that claimant's restricted movements of the extremities and shoulders "are probably due to the short limb stature." (R. 95) However,

¹ A "wing-like structure, applied especially to an abnormal triangular fold of membrane, in the interpallebral fissure, extending from the conjunctiva to the cornea, being immovably united to the cornea at its apex, firmly attached to the sclera throughout its middle portion, and merged with the conjunctiva at its base. Dorland's Illustrated Medical Dictionary 1384-85 (28th ed. 1994)

claimant's gait was normal, and he had dexterity of gross and fine manipulation. Dr. Dalessandro remarked that claimant was not getting the medical attention he needed. (R. 96)

Ophthalmologist David L. Schwartz, M.D. evaluated claimant on September 6, 1995, finding that claimant had a scar on his cornea from the pterygium and a myelinated nerve fiber that was not pathologic. He reported claimant's vision as 20/20 (distance), 20/50 (near) in claimant's right eye and 20/50 (distance), 20/40 (near) in his left eye. The best vision that could be obtained upon refractions was 20/20 (distance), 20/20(near) in claimant's right eye and 20/40 (distance), 20/20 (near) in his left eye. (R. 139) He did not recommend treatment. (R. 140)

The ALJ's observations about claimant's eye problems misstate the record. Claimant did not testify at the second hearing that "his eye problems had cleared up, and were no longer a problem," as indicated by the ALJ. (R. 14) He testified at the second hearing that he has blurry vision because of the scar. (R. 177) Further, the consultative examiner did not find, as the ALJ indicated, that claimant's vision in both eyes was correctable to 20/20. (R. 14) Instead, he found that claimant's distance vision in his left eye was correctable only to 20/40. (R. 139)

Application of the Grids

At both hearings in this matter, the ALJ asked the vocational expert to identify the exertional levels for claimant's past relevant work, but he did not question the vocational expert about the number of jobs existing in the regional and national economies that claimant could perform. Instead, he relied on Rule 201.19 of the Medical-Vocational Guidelines, (the "Grids"), 20 C.F.R. part 404, Subpt. P, App. 2, to reach a determination that claimant was not disabled. (R. 18, 124) In the earlier decision, the ALJ found that claimant was impaired by short limb dwarfism and a hearing loss, but that claimant had the RFC to perform sedentary work, subject to alternating sitting and standing. (R.

123-24) On remand, the Appeals Council specifically rejected the ALJ's decision because his conclusion regarding the claimant's eye impairment was not supported by substantial evidence, and the Appeals Council directed the ALJ to obtain additional evidence concerning claimant's impairments, give further consideration to the claimant's RFC, discuss the evidence in support of the assessed limitations, and question a vocational expert to clarify the effect of the assessed limitations on the claimant's occupational base. (R. 26-27) On remand, the ALJ obtained the consultative examination about claimant's eye condition, but altered his findings to delete his finding that claimant had a hearing loss and his finding that claimant's RFC was reduced by a need to alternate sitting and standing. (R. 18-19)

There is evidence that claimant suffered from vision and hearing loss, as well as pain from the problems associated with his dwarfism, including his arm and leg problems. There is no evidence that claimant's impairment precisely matched the criteria of a particular rule, and his application of the grids was erroneous.

RFC Assessment

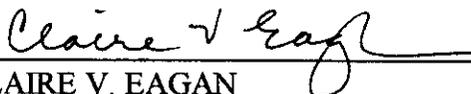
The ALJ determined that claimant could perform a full range of sedentary work after he recited claimant's testimony related to the physical requirements of sedentary work, and after he analyzed claimant's complaints of disabling pain. Claimant testified that he could lift 15-25 pounds, stand 1 hour, walk ½ block and sit for 1 hour. (R. 161-62) These findings are consistent with some but not all of the exertional requirements of sedentary work. 20 C.F.R. § 404.1567(a) (1997); Social Security Ruling 96-9p. The ALJ did not fail to perform a function-by-function analysis with regard to claimant's exertional limitations, but his analysis is otherwise flawed by his failure to analyze claimant's non-exertional impairments related to reaching and hearing, his failure to develop the

record, his failure to support his finding regarding claimant's vision problems, and his misapplication of the grids, given the lack of evidence regarding claimant's nonexertional impairments.

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. 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 6th day of October, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT - 6 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CARRIE L. CRAINE,
SSN: 372-82-3691,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0240-EA

ENTERED ON DOCKET

DATE OCT 06 1999

ORDER

On October 6, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny her application for supplemental security income, 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) 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 January 20, 1995, claimant protectively filed for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's application for benefits was denied in its entirety initially and on reconsideration. A hearing before Administrative Law Judge (ALJ) Leslie S. Hauger, Jr., was held November 21, 1996, in Tulsa, Oklahoma. (R. 255-273) By decision dated December 2, 1996, the ALJ found that claimant was not disabled at any time through the date of the

decision. (R. 13-26) On January 23, 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 protectively filed a previous application for Supplemental Security Income benefits on February 12, 1990. That application was granted, and claimant received benefits from February 1, 1990 until August 31, 1993, when she was incarcerated in a public institution. See 42 U.S.C. § 1382(e); 20 C.F.R. §§ 416.211, 416.1325, 416.1335. After her release on January 11, 1995, claimant filed a new application for benefits under 42 U.S.C. § 1383(j). (R. 227)

Claimant's Background

Claimant was born on June 2, 1971, and was 25 years old at the time of the administrative hearing in this matter. She completed eleven years of special education classes. Claimant has worked at a fast-food restaurant, a steak house, and a donut shop performing very basic tasks. Claimant alleges an inability to work due to memory problems, blackout spells, low IQ, learning disabilities, and problems with reading and writing. (Complaint, Docket # 1, at 2.) She specifically claims that two conditions are permanent: her borderline mental retardation reflected by a low IQ and her borderline personality disorder developed in response to abuse by her parents when she was a child. She also claims to suffer from eye and stomach problems, and she is obese. (Cl. Br., Docket # 5, at 1-2.) Claimant was incarcerated in 1993 for criminal sexual conduct with two children for whom she babysat. (Id., at 2.)

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 a full range of basic work

activities subject only to non-exertional limitations caused by a borderline intelligence with an IQ in the 70s; and some depressive and personality problems. He deemed claimant able to do only simple, repetitive tasks due to her limitations. The ALJ determined that claimant had no past relevant work, but there were 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. (R.19, 21)

Issues

Claimant asserts as error that:

- (1) the ALJ breached his duty to see that the record was fully developed regarding material issues and otherwise failed to demonstrate that he evaluated the longitudinal record as required by law;
- (2) the ALJ's findings regarding the severity of claimant's mental impairments are not supported by substantial evidence;
- (3) the ALJ's credibility determination is not supported by substantial evidence; and
- (4) the vocational expert's testimony was not elicited by a proper hypothetical.

Applicable Law

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, a claimant must show "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. Isolated and unsupported comments by the claimant are insufficient, by themselves,

to raise the suspicion of the existence of a nonexertional impairment.” Hawkins v. Chater, 113 F.3d 1162, 1167 (10th Cir. 1997) (citations omitted). Further, 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).

When a claimant’s medical sources do not give sufficient medical evidence about an impairment to determine whether the claimant is disabled, a consultative examination may be ordered. 20 C.F.R. § 416.917. However, the ALJ does not have a duty to order a consultative examination in all cases. 20 C.F.R. §§ 416.912(f); 416.919a. The Tenth Circuit has stated:

where there is direct conflict in the medical evidence requiring resolution, . . . or where the medical evidence in the record is inconclusive, . . . a consultative examination is often required for proper resolution of a disability claim. Similarly, where additional tests are required to explain a diagnosis already contained in the record, resort to a consultative examination may be necessary.

Hawkins, 113 F.3d at 1166 (citations and footnote omitted).

Evaluating Mental Impairments

The Tenth Circuit requires an ALJ to follow the procedure in 20 C.F.R. § 416.920a when he or she evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey 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).

Credibility Determinations

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 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).

Vocational Expert Testimony

In forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). However, “testimony

elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the [Commissioner's] decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)).

Findings

In 1989, claimant began treatment at a mental health center in Michigan after she was placed on probation for aberrant sexual behavior with a six-year-old child. In April 1990, a mental health professional and a psychiatrist diagnosed claimant as having mild mental retardation and a borderline personality. (R. 215) Erol Ucer, M.D., a psychiatrist who completed a Michigan Disability Determination Service form in May 1990, diagnosed claimant as having depressive neurosis, mild mental retardation, and passive/depressive personality disorder. (R. 224)

A PRT form completed in June 1990 indicates that claimant equaled the listing for 12.05C (mental retardation and autism), and she also demonstrated signs and symptoms of affective and personality disorders. (R. 56) She was diagnosed as having depressive neurosis (R. 59); she had a verbal IQ score of 76, a performance IQ score of 71 and a full-scale IQ of 73 (R. 60; see also R. 216); and she was assessed as having a borderline personality, characterized by pathological dependence, passivity, or aggressivity. (R. 61). The psychiatrist who evaluated her indicated that her degree of limitation with regard to social functioning was "marked," and she had "continual" episodes of deterioration or decompensation in work or work-like settings which caused her to withdraw from that situation or to experience exacerbation of signs and symptoms. (R. 63)

In August 1993, claimant submitted for an "intake diagnostic evaluation" by a clinician prior to her incarceration. The psychologist who evaluated her noted that her recent and remote memory

and general intelligence, as well as her calculation/abstract reasoning ability, were within average ranges. He reported that her scores on the MMPI-2 indicated, among other things, that claimant may have deliberately attempted to present herself in an unfavorable light; she was immature, narcissistic, and self-indulgent; she lacked insight or planning skills; and she experienced weak egostrength, ideas of fantasy, insecurity and lack of autonomy. (R. 234-37) He stated that the "essential feature" of claimant's disorder "is a pervasive pattern of instability of self-image, interpersonal relationships and mood beginning by early adulthood and present in a variety of context." (R. 236) Her score on the Global Assessment of Functioning (GAF) scale was 55/50. A score of 51-60 indicates moderate symptoms or moderate difficulty in social, occupational, or school functioning, and a score of 41-50 indicates serious symptoms or any serious impairment in social, occupational, or school functioning. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed.1994).

Claimant was reevaluated on February 20, 1995, for purposes of determining her eligibility for social security benefits, by psychologist Joseph A. Jeney. Ph.D. She reported to Dr. Jeney that she had "no particular difficulty" with her job at Burger King despite her difficulty with comprehension, math, and reading, and her difficulty following instructions and directions. (R. 240) Claimant took the Wechsler Adult Intelligence Scale-Revised (WAIS-R) test. Her verbal IQ score was 74, her performance IQ score was 76, and her full-scale IQ score was 74. (Id.) Her scores on the Wide Range Achievement Test - Revised (WRAT-R) indicated poor performance in arithmetic. Dr. Jeney indicated that claimant was functioning at a borderline range of intelligence and her level of achievement matched that performance, but that claimant did not have a true learning disability. (R. 242) He recommended individual psychotherapy to address her sense of loss and abandonment

by her parents, and he concluded that she needed to work out her feelings of depression, hurt, anger and resentment with a skilled female therapist. (Id.) He diagnosed her with dysthymia,¹ in a personality disorder NOS with borderline intellectual functioning. (R. 243). He wrote that claimant's "social functioning is significantly negatively influenced by her emotional difficulties." (R. 244) She was "in contact with reality" at the interview, but Dr. Jeney deemed her self-esteem "very damaged and defective." However, he observed "[n]o evidence of psychotic phenomena. . . ." (R. 246) He assigned her a GAF score of 45. (R. 247)

A few days later psychologist Rom Kriauciunas, Ph.D., completed a PRT form and mental RFC assessment in which he reiterated Dr. Jeney's diagnosis and IQ findings. (R. 138-46) Dr. Kriauciunas did not deem claimant's degree of limitation sufficient to meet the Listing of Impairments (20 C.F.R. Pt. 404, Subpt. P. App. 1) at 12.04 (affective disorders), 12.05 (mental retardation and autism) or 12.08 (personality disorders). (R. 145) He concluded that claimant was not significantly limited for unskilled work although she was moderately limited in her ability to carry out detailed instructions, to maintain attention and concentration for extended periods, to accept instructions and respond appropriately to criticism from supervisors, and to respond appropriately to changes in the work setting. (R. 147-49) Two other sets of PRT and mental RFC forms were completed for claimant by different medical consultants in October 1995, after claimant relocated to Oklahoma. These forms indicate insufficient medical evidence to evaluate claimant. (R. 157-74) In December 1995, claimant was taking Triavil 2-25 for mood swings, and she used an inhaler for her asthma. (R.

¹ Dysthymia is defined as "a mood disorder characterized by depressed feeling (sad, blue, low, down in the dumps) and a loss of interest or pleasure in one's usual activities and in which the associated symptoms have persisted for more than two years but are not severe enough to meet the criteria for major depression." Dorland's Illustrated Medical Dictionary 519 (28th ed. 1994)

248) In January 1996, another physician indicated that a detailed report about claimant's daily activities and social functioning was necessary to document the severity of the mental impairment, but the file containing information related to claimant's past receipt of SSI benefits was not provided to her. (R. 151) In January 1997, claimant was taking Amitriptyline for depression and Lorazepam for anxiety. (R. 254)

The ALJ did not fulfill his duty to fully and fairly develop the record as to material issues in this matter. Further, the ALJ performed no step three analysis, and, other than the mention of a conclusory finding, he never discusses whether claimant meets any listings. (See R. 20) Claimant showed that her mental impairments were sufficient for an award of benefits prior to her incarceration, and there is nothing in the record to suggest that her condition changed during her incarceration. The ALJ never discusses the pre-1994 medical evidence with regard to any chronic mental impairment, suggested by Listing 12.00E, from which claimant appears to suffer. The report by Dr. Jeney is consistent with the diagnoses and reports of the physicians and psychologists in Michigan which indicate that claimant suffers from mental retardation and a personality disorder reflected in her low IQ and GAF scores. His conclusions, and those of Dr. Kriauciunas, are not consistent with the Michigan reports. Later medical consultants refuse to evaluate the degree of severity of claimant's alleged impairments because of insufficient evidence. Nonetheless, the ALJ relied on Dr. Jeney's report and the claimant's testimony to find that claimant was not disabled without ever having performed an analysis of claimant's daily activities and social functioning.

Although the ALJ does not have a duty to order a consultative examination in all cases, 20 C.F.R. §§, 416.912(f); 416.919a, the claimant's medical sources do not give sufficient medical evidence about an impairment to determine whether the claimant is disabled, and a consultative

examination should have been ordered. 20 C.F.R. § 416.917. Further, there appears to be a direct conflict in the medical evidence requiring resolution, and the medical evidence in the record appears inconclusive. See Hawkins, 113 F.3d at 1166. Although the relevant time period for purposes of claimant's review begins in 1995, there is nothing to suggest that the ALJ could not consider whether her condition prior to that date continued to exist after that date. The ALJ failed to fully develop the record regarding claimant's mental impairments.

Since claimant did not allege any physical problems, he was not required to order a consultative examination with regard to any physical limitations. Claimant failed to show "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." Id., at 1167. However, claimant has alleged various physical problems in this appeal and, on remand, the ALJ should consider whether these physical limitations merit a consultative examination, and whether they are severe enough to be disabling.

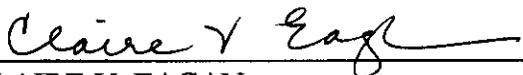
Finally, the ALJ's evaluation of claimant's mental impairments and her credibility are defective. Although he followed the procedure for evaluating mental impairments as set forth in the regulations and by Tenth Circuit law, see 20 C.F.R. § 404.1520a; Winfrey 92 F.3d 1017, 1024 (10th Cir. 1996); Cruse v. United States Dep't of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994), his discussion of the evidence upon which his conclusions are based is quite limited and mirrors the evaluation by Dr. Kriauciunas. (R. 19). As claimant points out, the ALJ's credibility evaluation is even more limited, where she finds her testimony incredible because there is no evidence that she ever claimed blackouts to any treating source. Her blackouts are merely a small part of the mental limitations to which she testified. The ALJ's analysis falls short of the extensive framework

set forth in Luna v. Bowen, 834 F.2d 161, 163-64 (10th Cir. 1987), and the required explanation of why specific evidence relevant to each fact led him to conclude that claimant's subjective complaints were not credible, as set forth in Kepler v. Chater, 68 F.3d 387, 390 (10th Cir. 1995). Since the ALJ failed to fully develop the record and his RFC findings are defective, his hypothetical question to the vocational expert was not well-founded, but any decision on this issue is unnecessary to this determination.

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. 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 6th day of October, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT - 6 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LONNIE J. BUMPHUS,
SSN: 441-48-2581,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 97-CV-1045-EA

ENTERED ON DOCKET

DATE OCT 06 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 6th day of October 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

OCT - 6 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CARRIE L. CRAINE,)
SSN: 372-82-3691,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 98-CV-0240-EA

ENTERED ON DOCKET

DATE **OCT 06 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 6th day of October 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

FILED

OCT 5 - 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MODULAR STORAGE SYSTEMS, INC.,)
and GREAT HOUSE,)
)
Plaintiffs,)
)
vs.)
)
THE SHERWIN WILLIAMS COMPANY,)
an Ohio Corporation,)
)
Defendant.)

Case No. 98-CV-774-BU

ENTERED ON DOCKET
DATE **OCT 06 1999**

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is 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 proceedings.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiffs' action shall be deemed to be dismissed with prejudice.

Entered this 4th day of ~~September~~ ^{October}, 1999.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

IN RE:)
)
TARANTINO, WILLIAM JOHN,)
)
Debtor,)
)
WILLIAM JOHN TARANTINO,)
)
Appellant,)
)
v.)
)
DELAWARE PLACE, INC.,)
)
Appellee.)

FILED
OCT 04 1999
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

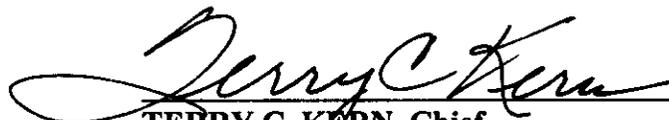
Case No. 99-CV-272-K (M)

ENTERED ON DOCKET
DATE OCT 05 1999

ORDER

There being no objection, the Court adopts the Magistrate Judge's Report and Recommendation filed September 3, 1999 (# 12). IT IS THEREFORE ORDERED that the Bankruptcy Court Order is AFFIRMED.

ORDERED this 4th day of October, 1999.


TERRY C. KERN, Chief
United States District Judge

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 ESTATE OF RONALD L. McMUNN,)
 Deceased, George S. Stoia, Administrator;)
 SHIRLEY ANN McMUNN, individually)
 and as personal representative of the)
 Estate of Ronald L. McMunn; STEPHEN)
 LEE McMUNN; LINDA KAY MEAKES;)
 MARC McMUNN; BRAD MURRAY;)
 LORI O'DELL; BOARD OF COUNTY)
 COMMISSIONERS OF WASHINGTON)
 COUNTY,)
)
 Defendants.)

ENTERED ON DOCKET
DATE **OCT 05 1999**

Case No. 96-CV-601-K /

F I L E D
IN OCT 04 1999
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised by counsel for Plaintiff on February 3, 1997, that the parties to this action have reached an agreement as to the remaining issue in the above-captioned matter, namely the settlement of Shirley A. McMunn's claim in

Lot Four (4), Block One (1), Lannom Addition,
including a 10 foot strip on west side of Lot 4,
Block 1, Bartlesville, Washington, County,
Oklahoma,

finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is

21

necessary.

ORDERED this 4 day of October, 1999.

A handwritten signature in cursive script, reading "Terry C. Kern", written over a horizontal line.

**TERRY C. KERN, Chief
United States District Judge**

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

VERNETTA B. CARTER,)
)
)
 Plaintiff,)
)
)
 v.)
)
)
 KENNETH S. APFEL,)
)
 Commissioner, Social)
 Security Administration,)
)
)
 Defendant.)

OCT 01 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-451-J ✓

ENTERED ON DOCKET
OCT 4 1999
DATE _____

ORDER

On June 7, 1999, this Court reversed and remanded the Commissioner's decision. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of \$2,430.50 for attorney fees and no costs for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of \$2,430.50 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

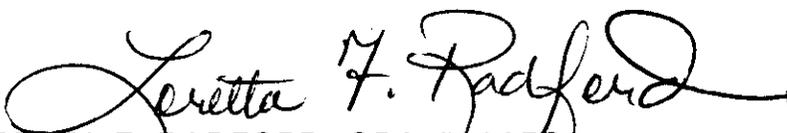
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It is so ORDERED THIS 1 day of October 1999.


SAM A. JOYNER
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


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

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

F I L E D

OKLAHOMA MUNICIPAL POWER)
AUTHORITY, as agency of the State of)
Oklahoma,)

Plaintiff,)

v.)

SOUTHWESTERN ELECTRIC POWER)
COMPANY, a Delaware corporation,)

Defendant.)

SEP 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CIV-0063-BU(E)

ENTERED ON DOCKET

DATE OCT 01 1999

ADMINISTRATIVE CLOSING ORDER

On this 30th day of ~~August~~^{Sept}, 1999, this matter comes on for consideration before me, the undersigned judge, pursuant to the Joint Motion For Administrative Closing And Brief In Support (hereinafter the "Motion") filed by Plaintiff Oklahoma Municipal Power Authority and Defendant Southwestern Electric Power Company. In the Motion, the moving parties have advised this Court of their settlement agreement, which is contingent only upon the completion of the merger between Central and South West Company and American Electric Power Company, Inc., and have requested that this case be administratively closed pending completion of the merger.

IT HEREBY IS ORDERED that this case is administratively closed until August 1, 2000, or until such earlier date, if requested by either of the parties. If neither of the parties has requested the reopening or dismissal of this case prior to August 1, 2000, this case, including all of Plaintiff's claims and Defendant's Counterclaim, shall be deemed dismissed with prejudice.

DATED this 30th day of Sept 1999.

Michael B. ...
UNITED STATES DISTRICT COURT JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WOODROW WILSON,

Plaintiff,

vs.

Case No. 99 CV-0161K(E)

THE HOUSING AUTHORITY OF THE
CHEROKEE NATION; JOEL
THOMPSON; MARK McCULLOUGH;
BOB POWELL; individuals; and
JOHN DOE(S), Defendants not yet
known,

Defendants

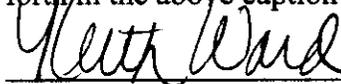
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DATE OCT 01 1999

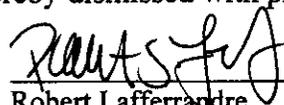
STIPULATION FOR DISMISSAL WITH PREJUDICE

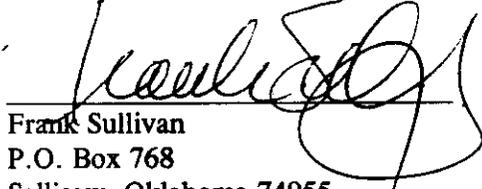
The plaintiff, Woodrow Wilson, and the defendants set forth above, pursuant to FED. R. CIV.

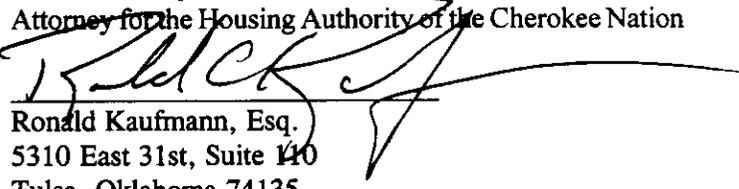
P. 41(a), hereby stipulate that the claims asserted by Woodrow Wilson against the defendants set

forth in the above caption may be and are hereby dismissed with prejudice to its refileing.


Keith A. Ward, OBA # 9346
6555 South Lewis, Suite 200
Tulsa, Oklahoma 74136
Attorney for Plaintiff Woodrow Wilson


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1109 N. Francis
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Frank Sullivan
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Ronald Kaufmann, Esq.
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Attorney for Bob Powell

Attorney for Mark McCollough

Joel Thompson
SPC El Reno
03574-063
P.O. Box 1500
El Reno, Oklahoma 73036



WR

11

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

WOODROW WILSON,)

Plaintiff,)

vs.)

Case No. 99 CV-0161K(E)

THE HOUSING AUTHORITY OF THE)
CHEROKEE NATION; JOEL)
THOMPSON; MARK McCULLOUGH;)
BOB POWELL; individuals; and)
JOHN DOE(S), Defendants not yet)
known,)

Defendants.)

STIPULATION FOR DISMISSAL WITH PREJUDICE

The plaintiff, Woodrow Wilson, and the defendants set forth above, pursuant to FED. R. CIV.

P. 41(a), hereby stipulate that the claims asserted by Woodrow Wilson against the defendants set forth in the above caption may be and are hereby dismissed with prejudice to its refileing.

Keith A. Ward, OBA # 9346
6555 South Lewis, Suite 200
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Attorney for Plaintiff Woodrow Wilson

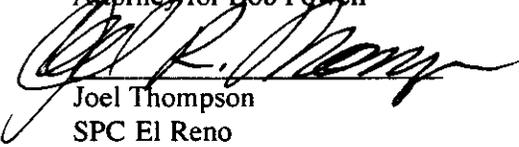
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

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

Plaintiffs,)

v.)

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

Defendants.)

SEP 25 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-0187K (E)

ENTERED ON DOCKET

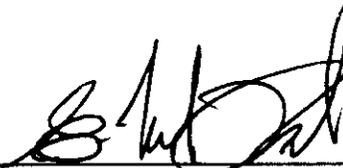
DATE OCT 01 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs, Brenda Moore (a/k/a Brenda Roberts), Cynthia Dutton, and Penny Guerin, by and through their counsel of record, E. Taylor Poston, and the Defendants, Board of County Commissioners of Rogers County, Rogers County Sheriff's Department, and Eugene Roderiguiz, individually and in his official capacity, and jointly stipulate to the dismissal of this case with prejudice.

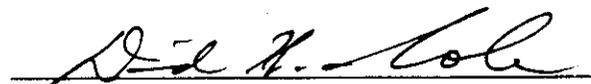


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*Attorney for Defendants,
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County of Rogers; and Rogers County
Sheriff's Department*



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David H. Cole (OBA. #01776)

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GIVENS & WITZKE

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Attorneys for Defendant,

Eugene Roderiguiz

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 30 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PHYLLIS R. THOMAS,
SSN: 443-76-6086,

PLAINTIFF,

vs.

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

DEFENDANT.

CASE No. 98-CV-463-M

ENTERED ON DOCKET
DATE OCT 01 1999

ORDER

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

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

¹ Plaintiff's May 8, 1995 application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held March 12, 1996. By decision dated April 18, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on January 2, 1997. Plaintiff's new counsel requested the Appeals Council reopen the decision and submitted additional medical records on July 3, 1997. The Appeals Council considered the newly submitted evidence and declined to reopen the decision on May 13, 1998. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born November 2, 1965 and was 30 years old at the time of the hearing. [R. 111, 161]. Her past relevant work (PRW) consisted of medium to light work as a janitor, housekeeper and bagger/checker. [R. 130-135, 216]. She claims to have been unable to work since May 3, 1995 due to low back pain. [R. 161, 177].²

The ALJ determined that Plaintiff has severe impairments consisting of severe degenerative disc disease status post spondylolisthesis L5 on S1, acute sciatica, L5-S1 fusion with hardware implantation, and bilateral L4-5 spinal stenosis decompression but that she retained the residual functional capacity (RFC) to perform work-related activities except for work requiring lifting more than 5 pounds, prolonged walking and

² In her brief on appeal, Plaintiff asserts an onset date of March 2, 1994 and claims the finding of the ALJ that the onset date was May 3, 1995 is error. That contention is addressed later in this order.

standing and more than occasional bending and stooping . [R. 85]. He determined that Plaintiff is unable to return to her past relevant work but that, using the grids as a framework and based upon the testimony of a Vocational Expert (VE), there are a significant number of jobs in the regional and national economies that Plaintiff could perform with these limitations. He found, therefore, that Plaintiff is not disabled as defined by the Social Security Act. [R. 86]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff's medical history has been adequately set forth in the parties' briefs. Therefore, the court will not repeat that information contained in the medical portion of the record in this order. Plaintiff asserts several grounds for reversal, which are addressed below in the order presented in Plaintiff's Brief.

Plaintiff's First Statement of Error

Plaintiff claims the ALJ failed to give the treating physician's opinion proper weight. She asserts the rating of permanent partial disability for purposes of Workers' Compensation benefits that was determined by her treating physician was disregarded by the ALJ without specific, legitimate reasons as required by the regulations and case law.

A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments including the claimant's symptoms, diagnosis and prognosis, and any physical and mental restrictions. See 20 C.F.R. § 5

404.1527(a)(2), 416.927(a)(2). The Commissioner will give controlling weight to that type of opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. §§ 404.1527(d)(2), 416.927(d)(2). However, it is the ALJ, rather than the physician, who is authorized to make a final decision concerning disability. *Castellano v. Secretary of Health and Human Services*, 26 F.3d 1027 (10th Cir. 1994)(final responsibility for determining the ultimate issue of disability is reserved to the [Commissioner]).

The report to which Plaintiff refers is a "To Whom It May Concern" letter dated May 2, 1995 and signed by Chris M. Boxell, M.D. [R. 152]. In that letter, Dr. Boxell rated Plaintiff with a permanent partial disability of the whole person at 51%. *Id.* As stated by the ALJ in his decision, however, a permanent disability rating for purposes of obtaining Workers' Compensation benefits does not mandate a finding of disability by the Commissioner. See *Baca v. Department of Health & Human Servs.*, 5 F.3d 476, 480 (10th Cir.1993)(findings by other agencies are entitled to weight and must be considered, but are not binding on the Commissioner); 20 C.F.R. § 404.1504 (another agency's determination is based on different rules, and is not binding on the Social Security Administration). Furthermore, although the doctor assessed some permanent disability for Workers' Compensation benefits purposes, he did not state an opinion that Plaintiff was totally disabled from doing any work. In fact, shortly before the report was written, Dr. Boxell stated in his treatment notes: "I suspect that her fusion is solid. I am very doubtful that she has as severe pain as she implies." [R.

153]. As admitted by Plaintiff, the report was written before Plaintiff's second back surgery to remove the devices which were the suspected cause of Plaintiff's "hardware sensitivity." [R. 19]. Records submitted to the Appeals Council reveal that after the second surgery, Dr. Boxell made comments in his treatment notes indicating he did not believe Plaintiff was following prescribed treatment for improvement of her condition. See Record at 16: "She was more interested in obtaining a permanent disability or handicap parking permit than learning the appropriate exercises for stabilizing her back." The regulations provide that a claimant will not be found disabled if he or she, without good reason, fails to follow prescribed treatment that can restore the ability to work. 20 C.F.R. 416.930(a),(b). There is also evidence in Dr. Boxell's treatment records after May 1995, that he thought Plaintiff was exaggerating her symptoms. See Record at 19: "I did observe her after she left the office and her gait changed to a much more normal appearance." Although the ALJ did not have access to these records at the time of his decision, the Appeals Council considered them before affirming the ALJ's conclusion that "there is no evidence that claimant's condition would be expected to be disabling from November 1995, continuously to November 1996, or expected to result in death, as required by 20 C.F.R. 404.1505 and 416.905." [R. 87].

Furthermore, the court finds no merit to Plaintiff's contention that the ALJ disregarded the treating physician's opinion. The ALJ obviously considered the report of Dr. Boxell in concluding that Plaintiff was unable to perform her PRW and in assessing her limitations in performing sedentary work. The court finds the

Commissioner accorded the treating physician's opinion proper weight under the established legal standards. *Frey v. Bowen.*, 816 F.2d 508, 512 (10th Cir. 1987).

Plaintiff's Second Statement of Error

Plaintiff contends the ALJ's hypothetical questions to the VE were incomplete. Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, in posing a hypothetical question, the ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990).

According to the Plaintiff, the ALJ ignored Plaintiff's testimony regarding her nonexertional impairments when presenting the VE with a hypothetical question. It is clear, however, that the ALJ did not accept as true Plaintiff's allegations that because her eyesight blurred at night, [R. 211]; that she had headache three days out of a week which was remedied with two aspirin and laying down for 30 minutes to an hour, [R. 205-206]; that the pain medication makes her drowsy so that she takes it only at night, [R. 190]; and that she sleeps "straight" five hours a night, [R. 195] she was unable to engage in any gainful activity. The ALJ's RFC findings are supported by the record. The vocational expert identified two sedentary jobs that Plaintiff could perform with the RFC and restrictions properly assessed by the ALJ. Thus, the ALJ's reliance upon the VE's testimony in finding Plaintiff not disabled was proper and his decision was based upon substantial evidence.

Plaintiff's Third Statement of Error

Plaintiff complains the ALJ did not properly develop the record because he failed to obtain "appropriate neurological and psychiatric consultative examinations" and he failed to complete a Psychiatric Review Technique Form (PRT).³ She claims her complaints "could indicate a state of depression." [Plaintiff's Brief, p. 3].

The ALJ has broad latitude in ordering a consultative examination. *Diaz v. Secretary of Health & Human Servs.*, 898 F.2d 774, 777 (10th Cir. 1990). A consultative examination is required only if the record establishes that such an examination is necessary to enable the ALJ to make the disability decision. See *Turner v. Califano*, 563 F.2d 669, 671 (5th Cir. 1977). The record in this case contains no evidence to suggest that a consultative examination would have produced material information. There is no direct conflict in the medical evidence requiring resolution and additional tests are not required to explain a diagnosis already contained in the record. *Hawkins v. Chater*, 113 F.3d 1162, 1166 (10th Cir. 1997). There is no suggestion in the record that Plaintiff believed the record was incomplete and no request was made by the Plaintiff at any time before or during the hearing for a consultative examination. The ALJ was not obligated to obtain a consultative examination.

³ The procedure for evaluation of a mental impairment is outlined at 20 C.F.R. § 1520a. If a claimant has a mental impairment, the degree of functional loss resulting from the impairment must be rated in four areas: (1) activities of daily living, (2) social functioning, (3) concentration, persistence or pace; and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. §1520a(b)(3). If each of the four areas is rated as having an impact of "none", "never", "slight", or "seldom", the conclusion is that the impairment is not severe, unless the evidence otherwise indicates there is significant limitation of the claimant's mental ability to do basic work activities. See 20 C.F.R. §1520a(c)(1). An ALJ must attach to his decision a PRT form detailing his assessment of the claimant's level of mental impairment. 20 C.F.R. §1520a(d).

Furthermore, Plaintiff was represented by counsel at the hearing, and was provided ample opportunity to submit any additional evidence to support her claims. There is nothing in the record that indicates Plaintiff claimed depression as an impairment at any time, either in her applications or at the hearing. The Tenth Circuit has discussed at some length the ALJ's duty "to ensure that an adequate record is developed . . . consistent with the issues raised." *Hawkins v. Chater*, 113 F.3d 1162, 1164 (10th Cir. 1997)(quotation omitted). In particular, *Hawkins* addressed the question: "How much evidence must a claimant adduce in order to raise an issue requiring further investigation?" The court instructed that some objective evidence in the record must suggest the existence of a condition which could have a material impact on the disability decision requiring further investigation. However, isolated and unsupported comments by the claimant will not suffice to raise the issue. The claimant must in some fashion raise the issue, which on its face must be substantial. The claimant has the burden to make sure the record contains evidence to suggest a reasonable possibility that a severe impairment exists. Once that burden is satisfied, it becomes the ALJ's burden to investigate further. *Id.* Although the ALJ has a basic obligation to ensure that an adequate record is developed during the disability hearing consistent with the issues raised, it is not the ALJ's duty to become the claimant's advocate. *Henrie v. United States Dept. of Health and Human Servs.*, 13 F.3d 359, 360-61 (10th Cir. 1993). The *Hawkins* Court said that an "ALJ does not have to exhaust every possible line of inquiry in an attempt to pursue every potential line of questioning. The standard is one of reasonable good judgment." 113 F.3d at 1168.

Applying this precept, the court finds that the ALJ exercised reasonable good judgment with respect to development of the record. There is no objective medical evidence in the record that suggests Plaintiff suffers from depression. Thus the ALJ had no duty to complete a PRT.

Plaintiff's Fourth Statement of Error

The framework for the proper analysis of the evidence of allegedly disabling pain was set out in *Luna v. Bowen*, 834 F.2d 161 (10th Cir.1987). Plaintiff asserts the ALJ's "*Luna*" analysis in this case was faulty. Essentially, Plaintiff asks this court to reweigh the evidence. This it cannot do. It is not the Court's function to weigh the evidence and substitute its discretion for the Secretary/Commissioner. *Musgrave, v. Sullivan*, 966 F.2d 1371, 1375-76 (10th Cir.1992). The Commissioner, not the courts, has the duty to weigh the evidence, resolve material conflicts in the evidence and decide the case, *Johnson, id.*, (citing *Chaparro v. Bowen*, 815 F.2d 1008 (5th Cir. 1987)). See also *Brown v. Bowen*, 801 F.2d, 361 (10th Cir. 1986) and *Ellison v. Sullivan*, 929 F.2d 534 (10th Cir. 1990).

In reviewing the decision of the Commissioner, the court "must 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." *Glass v. Shalala*, 43 F.3d 1392, 1395 (10th Cir.1994) (quoting *Musgrave, supra*

(citing *Luna*, 834 F.2d at 163-64)); see also *Thompson v. Sullivan*, 987 F.2d 1482, 1488 (10th Cir.1993).

Here, the ALJ did address claimant's complaints of disabling pain. The ALJ properly considered Plaintiff's medical history, complaints of back pain and other symptoms, daily activities and her testimony. He limited her ability to work in accordance with his findings and determined those limitations did not preclude her from engaging in other work. The ALJ listed the guidelines set forth in *Luna*, 20 C.F.R. 404.1529, 20 C.F.R. 416.929, and Social Security Rulings 88-13 and 90-1p as superseded by SSR 95-5p, and appropriately applied the evidence to those guidelines. The decision is supported by substantial evidence in the record and complied with the "*Luna* analysis" requirement.

Plaintiff's Fifth Statement of Error

Plaintiff asserts the ALJ did not give precise reasons for finding her not credible.

"To determine whether a claimant's pain is disabling, the [Commissioner] is entitled to examine the medical record and evaluate a claimant's credibility. Moreover, a claimant's subjective complaint of pain is by itself insufficient to establish disability." *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). Also see: *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). The ALJ is required to properly consider and evaluate plaintiff's testimony regarding her pain. Subjective complaints of pain must be evaluated in light of plaintiff's credibility and the medical evidence. *Brown v. Bowen*, 801 F.2d 361, 362-63 (10th Cir.1986); *Broadbent v. Harris*, 698 F.2d 407, 413 (10th Cir.1983).

Plaintiff established that she suffers from a pain-producing impairment. Therefore, the ALJ was required to consider her complaints of pain by evaluating her use of pain medication, her attempts (medical or nonmedical) to obtain relief, the frequency of her medical contacts, and the nature of her daily activities as well as subjective measures of credibility including the consistency or compatibility of nonmedical testimony with the objective medical evidence. See *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir. 1995).

Plaintiff's argument on this issue rests upon her contention that because she underwent two surgical procedures, her complaints of disabling pain must be true. And, while she acknowledges that Dr. Boxell expressed doubt as to the credibility of her complaints of pain and her motivation in improving her condition, she faults the ALJ's reliance upon her treating physician's negative statements in assessing her credibility.

As noted above, the court finds the ALJ sufficiently discussed his conclusions and his reasoning in reaching his conclusions, including his assessment of Plaintiff's credibility as to the severity of her pain. Contrary to Plaintiff's argument, the ALJ did not find Plaintiff's allegations of pain totally not credible, but rather, that Plaintiff exaggerates her symptoms as to the extent of her inability to perform work activities. In his decision, the ALJ discussed Plaintiff's own testimony concerning her daily activities and limitations, the medication she takes on a regular basis, and the inconsistencies between Plaintiff's testimony and the medical record. Based on that evaluation, the ALJ concluded that, although Plaintiff does experience some pain, the

pain does not preclude all work activity. [R. 28]. *Gossett v. Bowen*, 862 F.2d 802, 807 (10th Cir. 1988)(the inability to work pain-free is not a sufficient reason to find a claimant disabled).

The court finds there is sufficient evidence in the record to support the ALJ's finding in this regard. Because the court concludes that there is sufficient evidence in the record to support the ALJ's credibility findings and that the ALJ properly linked his credibility findings to the record, there is no reason to deviate from the general rule to accord deference to the ALJ's credibility determination, see *James v. Chater*, 96F.3d 1341, 1342 (10th Cir. 1996)(witness credibility is province of Commissioner whose judgment is entitled to considerable deference).

Plaintiff's Sixth Statement of Error

Plaintiff claims she was confused about the onset date of her disability. She asserts the actual date she became disabled for the performance of any gainful activity was March 2, 1994, rather than the May 3, 1995 date she wrote on her application and testified to during her hearing. Because the court finds substantial evidence in the record using either onset date to affirm the ALJ's decision that Plaintiff's condition would not be expected to result in disability as required by 20 C.F.R. § 404.1505 and § 416.905, the court finds no merit in this statement of error.

Plaintiff's Seventh Statement of Error

Plaintiff claims the "substantial evidence of disability is overwhelming" and that she "nearly meets *Listing 1.05C*." "[T]o show that [an] impairment matches a listing, it must meet all of the specified medical criteria. An impairment that manifests only

some of those criteria, no matter how severely, does not qualify." *Sullivan v. Zebley*, 493 U.S. 521, 530, 110 S.Ct. 885, 107 L.Ed.2d 967 (1990). It is a claimant's burden to show he meets these criteria. See *Nielson v. Sullivan*, 992 F.2d 1118, 1120 (10th Cir.1993). The court finds the evidence supports the finding of the Commissioner that Plaintiff is not disabled. Contrary to Plaintiff's allegation, the court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Commissioner and the courts. This statement of error is also without merit.

Conclusion

The record as a whole contains substantial evidence to support the determination of the Commissioner that Plaintiff is not disabled. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 30th day of sept., 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

PHYLLIS R. THOMAS,
SSN: 443-76-6086,

Plaintiff,

v.

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

Defendant.

SEP 30 1999

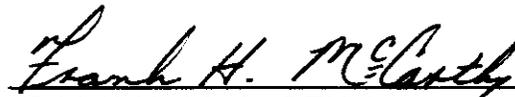
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 98-CV-463-M

ENTERED ON DOCKET
DATE OCT 01 1999

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 30th day of Sept, 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

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

Plaintiffs,

v.

CONTEMPORARY INDUSTRIES CORP., and
STAR MANUFACTURING INTERNATIONAL,
INC.,

Defendants.

ENTERED ON DOCKET
DATE OCT 01 1999

Case No. 97-CV-1056-H

FILED

SEP 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

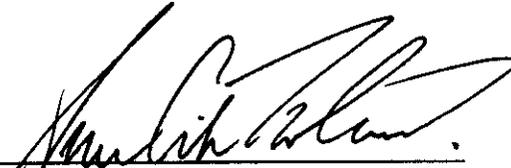
ADMINISTRATIVE CLOSING ORDER

Defendant having filed its 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 30TH day of September, 1999.


Sven Erik Holmes
United States District Judge

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FILED

SEP 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 SHARON R. CLARK,)
)
 Defendant.)

Case No. 99CV06834(E) ✓

ENTERED ON DOCKET
DATE OCT 1 1999

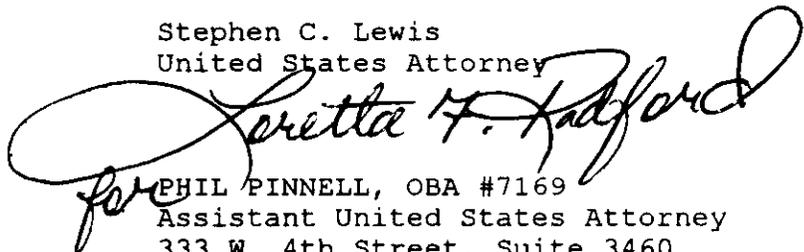
NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis,
United States Attorney for the Northern District of Oklahoma, Plaintiff
herein, through Phil Pinnell, Assistant United States Attorney, and
hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules
of Civil Procedure, of this action without prejudice.

Dated this 30th day of September, 1999.

UNITED STATES OF AMERICA

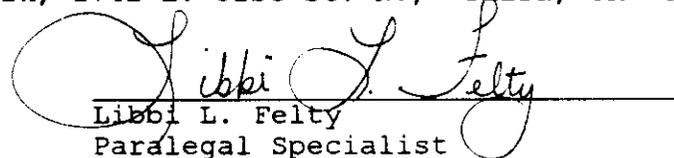
Stephen C. Lewis
United States Attorney

for 

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

CERTIFICATE OF SERVICE

This is to certify that on the 30th day of September, 1999,
a true and correct copy of the foregoing was mailed, postage prepaid
thereon, to: Sharon R. Clark, 1742 E. 51st St. N., Tulsa, OK 74130.


Libbi L. Felty
Paralegal Specialist

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c/s

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

SOUTHWESTERN ELECTRIC POWER)
COMPANY,)

Plaintiff,)

v.)

OKLAHOMA MUNICIPAL POWER)
AUTHORITY,)

Defendant.)

F I L E D

SEP 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CIV-568-BU(E) /

RECEIVED

DATE **OCT 01 1999**

ADMINISTRATIVE CLOSING ORDER

On this 30th day of ~~August~~^{Sept}, 1999, this matter comes on for consideration before me, the undersigned judge, pursuant to the Joint Motion For Administrative Closing And Brief In Support (hereinafter the "Motion") filed by Plaintiff Southwestern Electric Power Company and Defendant Oklahoma Municipal Power Authority. In the Motion, the moving parties have advised this Court of their settlement agreement, which is contingent only upon the completion of the merger between Central and South West Company and American Electric Power Company, Inc., and have requested that this case be administratively closed pending completion of the merger.

IT HEREBY IS ORDERED that this case is administratively closed until August 1, 2000, or until such earlier date, if requested by either of the parties. If neither of the parties has requested the reopening or dismissal of this case prior to August 1, 2000, this case, including all of Plaintiff's claims and Defendant's Counterclaim, shall be deemed dismissed with prejudice.

DATED this 30th day of ~~August~~^{Sept}, 1999.


UNITED STATES DISTRICT COURT JUDGE

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

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

ENTERED ON DOCKET
DATE **OCT 01 1999**
No. 97-CV-457-K

F I L E D

SEP 29 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of the defendant American Airlines, Inc. ("American") for summary judgment against plaintiff Opal Harris ("Harris"). Harris brings this action asserting the following claims: (1) discrimination because of age in violation of the Age Discrimination in Employment Act ("ADEA"); (2) discrimination because of race and sex in violation of Title VII of the Civil Rights Act of 1964; (3) retaliation; (4) what is referred to in plaintiff's response brief as "illegal disparate impact". Harris brought her claims against three defendants but has dismissed the Sabre Group, Inc. and AMR Corporation.

The Court construes the factual record and the reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. See *Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir.1998). Summary judgment is appropriate if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c) F.R.Cv.P. An issue of material fact is genuine only if a party presents facts sufficient to show that a reasonable jury could find in favor of the nonmovant. *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Harris was employed by American commencing October 31, 1968. She did not receive a single promotion during her employment and remained at an entry level position. However, she does not recall bidding on any positions after 1991. On July 12, 1993, Harris filed a complaint with the U.S. Department of Labor ("DOL"), alleging race, sex and age discrimination. The complaint variously alleges that Harris and "other similarly situated African-American employees" of American receive different and adverse treatment than whites in connection with in-house training, evaluations, promotions and other matters. On August 26, 1993, the DOL sent Harris a letter stating that the Equal Employment Opportunity Commission ("EEOC") enforces the ADEA. Upon receipt of that letter, Harris understood that she needed to contact the EEOC regarding her age claim.

In the fall of 1993, American began to institute a reduction in force program to reduce its workforce. Employees were offered a package of incentives to be received if they elected to take early retirement. On September 29, 1993, Harris signed and dated a Voluntary Layoff Election form. In her deposition, Harris states that she understood her election to be completely voluntary and that she had not been pressured in any way to volunteer for layoff.

American first argues that certain of Harris' claims are time-barred. Title VII and the ADEA require that a claimant file a charge of discrimination within 180 days after the alleged unlawful employment practice. This filing period may be extended to 300 days where the claimant has initially instituted proceedings with a state or local agency. See 42 U.S.C. §2000e-5(e)(1) and 29 U.S.C. §626(d)(2). Harris filed her complaint with the DOL on July 12, 1993. Even granting her the maximum time period, any race or sex discrimination claim premised upon the alleged denial of positions or promotions, or any conduct occurring more than 300 days prior to July 12, 1993 is

time-barred. Harris' complaint with the EEOC (the proper agency to hear her age claims) was filed March 17, 1994. Any age discrimination claim based upon the alleged denial of positions and promotions, or any other conduct occurring more than 300 days prior to March 17, 1994 is time-barred. Because Harris could not testify that she even bid on any position after 1991, American argues, these claims are barred.

Harris responds that no claims are barred because American's violation is a continuing one. She argues that because she was illegally passed over for promotion, her "loss of compensation" is continuous and may be addressed by the present action. The Court disagrees. The "continuing violation" doctrine is premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights have been violated. If an event or a series of events should have alerted a reasonable person to act to assert his or her rights at the time of violation, the victim cannot later rely on the doctrine. Martin v. Nannie & the Newborns, 3 F.3d 1410, 1415 n.6 (10th Cir.1993). Here, if Harris was illegally denied promotions on positions before 1992, she was sufficiently alerted that she should have asserted her rights at that time. The Court concludes American's position is correct¹.

A prima facie case for disparate treatment requires evidence that (1) plaintiff is a member of a racial minority; (2) she suffered an adverse employment action, and (3) similarly situated employees were treated differently. Trujillo v. University of Colo. Heath Sciences Ctr., 157 F.3d

¹Even if the claims are timely, the Court finds Harris has failed to present evidence to support a prima facie case of failure to promote. The elements are (1) there were promotional opportunities available that were filled by someone outside the protected class; (2) Harris was qualified for the promotion; and (3) despite her qualifications, she was not promoted. See Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1362 (10th Cir.1997).

1211, 1215 (10th Cir.1998). Assuming for purposes of the present motion that Harris suffered an adverse employment action, she has failed to present any evidence regarding the third prong. A motion to compel by Harris seeking statistical information was deemed abandoned by Magistrate Judge Eagan at a hearing held May 19, 1999. Because of change of counsel, this Court effectively granted Harris over five months to respond to American's motion. This was adequate time to produce contrary evidence, if such existed.

Harris next contends that an employee can establish a constructive discharge by proving she was given a choice between retirement and discharge. This is an accurate statement, so far as it goes. See Mitchell v. Mobil Oil Corp., 896 F.2d 463, 467 (10th Cir.), cert. denied, 498 U.S. 898 (1990). Harris' evidence utterly fails to demonstrate that her decision to accept the early retirement package was anything other than voluntary. Because of her seniority with the company, Harris could not have been laid off in 1993, unless American first offered her an alternative position in Tulsa. No "take it or leave it" offer appears in the record. The voluntariness of the decision to retire is reflected in the documents signed by Harris and her statements made at her exit interview. No genuine issue of material fact exists.

Generally, to assert a prima facie case of employment discrimination, a plaintiff must demonstrate that (1) the plaintiff is a member of a protected class; (2) plaintiff applied for and/or was qualified for an available position; (3) plaintiff was adversely affected by the defendant's employment decision; and (4) the position remained open as the employer continued to search for applications or the position was filled by someone outside the protected group. Randle v. City of Aurora, 69 F.3d 441, 451 n.13 (10th Cir.1995). Because the plaintiff is not always replaced with another employee during a reduction in force, the Tenth Circuit has modified the burden-shifting

scheme for reduction in force cases so that a plaintiff may demonstrate the fourth element by producing “evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.” Jones v. Unisys Corp., 54 F.3d 624, 630 (10th Cir.1995). American concedes that Harris is within the class of persons protected under Title VII and the ADEA and that she was qualified for her position. American argues that plaintiff cannot demonstrate that her voluntary acceptance of the retirement package was the result of illegal discrimination. The Court agrees, for the reasons previously stated. Even if Harris has established a prima facie case, American has stated a legitimate, non-discriminatory reason for its 1993 reduction in force. Harris has not shown that the economic reasons given were a sham or raised an issue of fact regarding pretext for a jury’s consideration.

Finally, American moves for judgment as to Harris’ retaliation claim. The elements of a prima facie case are (1) protected employee action; (2) adverse action by an employer either after or contemporaneous with the employee’s protected action; and (3) a causal connection between the employee’s action and the employer’s adverse action. Morgan v. Hilti, Inc., 108 F.3d 1319, 1324 (10th Cir.1997). Whether Harris can establish a prima facie case depends upon whether her retirement was an “adverse action” by American. The Court has already concluded that Harris’ decision in this regard was completely voluntary; therefore, the Court finds it does not constitute an adverse employment action. Even if it were so considered, and the third element inferred because of the timing of the offer, Harris has once again failed to raise a genuine issue of material fact regarding pretext. The Court sees no evidence that the reduction in force was conducted pretextually, for the purpose of masking unlawful discrimination.

It is the Order of the Court that the motion of the defendant American Airlines, Inc. for summary judgment (#67) against plaintiff Opal Harris is hereby GRANTED.

SO ORDERED THIS 29 DAY OF SEPTEMBER, 1999.

A handwritten signature in black ink, appearing to read "Terry C. Kern", written over a horizontal line.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

SOUTHWESTERN BELL TELEPHONE)
COMPANY,)

Plaintiff,)

v.)

BROOKS FIBER COMMUNICATIONS)
OF OKLAHOMA, INC.; BROOKS FIBER)
COMMUNICATIONS OF TULSA, INC.;)
ED APPLE, CHAIRMAN, BOB ANTHONY,)
VICE CHAIRMAN, AND DENISE BODE,)
COMMISSIONER (IN THEIR OFFICIAL)
CAPACITIES AS COMMISSIONERS OF)
THE OKLAHOMA CORPORATION)
COMMISSION); AND OKLAHOMA)
CORPORATION COMMISSION,)

Defendants.)

ENTERED ON DOCKET
DATE OCT 01 1999

Case No. 98-CV-468-K (J)

F I L E D

SEP 29 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before this Court is Plaintiff's appeal of the Oklahoma Corporation Commission ("OCC") Order No. 423626 in Cause No. PUD 970000548 ("OCC Order"), enforcing an interconnection agreement approved under 47 U.S.C. § 252 (the "Interconnection Agreement").

Brief History of Case

Plaintiffs filed this appeal on June 1, 1998. In the January 14, 1999, scheduling order, the Court provided for the filing of Plaintiff's Initial Brief on the Merits on February 22, followed by a response and a reply. The Plaintiffs filed this summary judgment motion in the place of the Initial Brief on the Merits, and the Court will treat the motion, responses, and reply as the appeal briefs outlined in the scheduling order. The Court is therefore empowered to enter judgment in favor of the Defendants, if appropriate, despite the fact that defendants did not move for summary judgment.

Subject Matter Jurisdiction & Standard of Review

The Court has jurisdiction to review a state commission's interpretation of an interconnection agreement but only to determine its compliance with 47 U.S.C. §§ 251, 252. Section 252(e)(6) provides,

In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

The OCC accepted the parties' Interconnection Agreement under section 252(e)(1) and has issued the current order in an attempt to enforce that agreement. At least one circuit has held that the federal district court has the jurisdiction to review orders enforcing agreements under this section. *See Illinois Bell Tel. Co. v. WorldCom Techs., Inc.*, 179 F.3d 566, 570-71 (7th Cir. 1999); *cf. Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd.*, — F.3d —, —, No. 98-2228, 1999 WL 618061, at *7 (1st Cir. Aug. 19, 1999) (finding that section 252(e)(6) requires at least a substantial nexus between the state commission's determination and the interconnection agreement). This review is limited to determining compliance with 47 U.S.C. §§ 251, 252. *See* 47 U.S.C. § 252(e)(6). Therefore, this Court will not review the OCC's application of contract law. *See Puerto Rico Tel. Co.*, 1999 WL 618061, at *13 (federal court can only review state commission's application of state law to extent it conflicts with sections 251 and 252); *Illinois Bell*, 179 F.3d at 571, 572 (refusing to review state commission's actions for compliance with state law). Federal courts will give deference to FCC pronouncements and interpretations of its own regulations. *See Farmers Tel. Co. v. FCC*, 184 F.3d 1241, ----, Nos. 97-9522, 97-9547, 1999 WL 507633, at *5 (10th Cir. July 19, 1999); *Illinois Bell*, 179 F.3d at 571.

Discussion

Both sides in this appeal wish to take advantage of a recent FCC ruling, Declaratory Ruling in CC Docket No. 96-98 & Notice of Proposed Rulemaking in CC Docket No. 99-68 ("FCC Declaratory Ruling"), 14 F.C.C.R. 3689 (1999). Plaintiff relishes that the ruling adopts its perception of ISP-bound traffic as largely interstate. *See id.* ¶ 1. Defendants take comfort where it concludes that existing interconnection agreements, as interpreted by state commissions, are still binding until the FCC issues a rule on this subject. *See id.* Not surprisingly, then, neither side can agree whether this ruling mandates an affirmance or vacation of the OCC Order.

Plaintiff argues that the OCC Order rested on an erroneous understanding of the Telecommunications Act of 1996¹ and FCC decisions. More specifically, Plaintiff argues that the OCC based its decision on the mistaken belief that federal law views calls to ISPs as telecommunications that terminate at the ISP, as opposed to information services which travel from the ISP to points beyond. Plaintiff is correct that the OCC Order makes this distinction. *See* OCC Order, at 7-8. Moreover, the FCC recently rejected this telecommunications-information services interpretation of ISP-bound traffic. *See* FCC Declaratory Ruling ¶¶ 12, 13. This determination, while based on precedent and consistency with the 1996 Act, is the first FCC ruling on this specific issue. The FCC recognizes this when it notes that some state commissions may decide to re-examine those determinations "based on a finding that [ISP-bound] traffic terminates at an ISP server." *Id.* ¶ 27. The parties, however, dispute whether the OCC Order rests on this interpretation of federal law.

¹Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at 15 U.S.C. 79z-5c, 47 U.S.C. §§ 160-61, 222, 230, 251-76, 336, 363, 549, 560-73, 613-14).

While containing statements that could be construed in Plaintiff's favor, the OCC Order's overall form indicates that the OCC made these determinations of federal law in order to establish the context in which the parties formed the Interconnection Agreement. Following its discussion of information services versus telecommunications, the OCC Order states that "federal law dictates that the termination point of a call to an ISP for reciprocal compensation purposes is the location of the ISP." OCC Order, at 8. "Thus," the Order continues,

where an interconnection agreement defines local traffic as traffic which originates and terminates within a given local calling area (as does the SWBT-Brooks interconnection agreement), calls from an end-user to an ISP located in the same local calling area are subject to the reciprocal compensation rate specified for local traffic.

Id. However, referring back to this discussion, the OCC Order states that the Interconnection Agreement should be interpreted in the context of the "policy established by the FCC and followed by SWBT" that "ISPs be treated as end-users." *Id.* After further analysis, the OCC Order then finds that these calls are "terminating traffic" under the Interconnection Agreement. *Id.* at 8-9. After examining several factors forming the context around the agreement, the OCC continues to find this the most reasonable construction of the Agreement. *See id.* At 8-11.

It is on this context-based analysis that Defendants hinge their argument for affirmance. In its Declaratory Ruling, the FCC notes that it has no rule governing inter-carrier compensation in this instance and that parties negotiating, and state commissions interpreting, interconnection agreements in the past had to determine as a matter of first impression how to compensate interconnecting carriers for ISP-bound traffic. *See* FCC Declaratory Ruling ¶ 9. The FCC finds "no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an

appropriate interstate compensation mechanism." *Id.* ¶ 21. Parties reasonably could have decided to treat ISP-bound traffic as local traffic for reciprocal compensation purposes against the backdrop of the FCC's prior policy, certain incumbent local exchange carriers' ("LECs") prior practices, and the absence of a FCC rule. *See id.* ¶ 24.

The FCC notes that state commissions are the arbiters of what constitutes relevant factors but mentions several illustrative factors it considers relevant. *See id.* These factors include the following: (1) negotiation of the agreement in the context of the FCC's long-standing policy of treating ISP-bound traffic as local; (2) conduct of the parties pursuant to the interconnection agreement; (3) whether LECs serve ISPs out of intra- or interstate tariffs; (4) whether LECs count revenues from services to ISPs as intra- or interstate; (5) whether LECs segregate ISP-bound traffic from local traffic; (6) whether LECs include ISP-bound calls in local telephone charges; and (7) whether LECs would be compensated for ISP-bound traffic if it were not included in the local traffic reciprocal compensation. *See id.*

As mentioned above, the OCC Order interprets the Interconnection Agreement in the context of the FCC policy mentioned in factor one. *See* OCC Order, at 8, 9. Like FCC factor three, the OCC Order also notes that Plaintiff offers local exchange services to ISPs and charges them at intrastate local tariff rates. *See id.* at 9. Similar to factor six, the OCC finds that the parties' treat calls from an end-user to an ISP within the same local calling area as a local, rather than toll, call. *See id.* Finally, mirroring FCC factor seven, the OCC order notes that, absent this interpretation, the OCC would have to find that the parties agreed to no compensation for ISP calls. *See id.* at 10. The OCC also considers other factors in its decision, such as the number dialed by a calling party and the overall structure of a contract containing various compensation rates for different types of traffic,

including local and interexchange. *See id.* at 8, 11. The OCC Order concludes that is more reasonable to infer ISP calls are local traffic than to infer an implied no-compensation agreement in these circumstances. *See id.* at 11.

The OCC rejected Plaintiff's claim that federal law requires calls to ISPs be viewed as non-local. *See* OCC Order, at 9. While the FCC has not accepted the OCC's interpretation of federal law and, in fact, adopted Plaintiff's theory, the FCC has also noted that its decision does not *require* a state commission to find that a reciprocal compensation agreement does not cover ISP-bound traffic. *See* Declaratory Ruling ¶ 21; *see also Illinois Bell*, 179 F.3d at 574 ("it seems clear that the FCC would not agree . . . that it has had a long-standing policy against treating calls to ISPs as local calls").

There is ample evidence that the OCC considered several factors in order to interpret the parties' Interconnect Agreement and did not allow a misapprehension of federal law to control its decision. Moreover, the agreement, as interpreted by the OCC, does not violate current federal law. The OCC, as "arbiters of what factors are relevant in ascertaining the parties' intentions," FCC Declaratory Ruling ¶ 24, focused on several it found probative and determined the most reasonable construction of the agreement. Therefore, the Court will affirm the OCC Order.²

²Defendants Brooks Fiber Communications of Tulsa, Inc. and Brooks Fiber Communications of Oklahoma, Inc. request remand if the Court finds the OCC Order deficient. Plaintiff strongly opposes remand. Having found the OCC's interpretation of the Interconnection Agreement consistent with federal law, the Court feels that remand is unnecessary in this case.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment (# 14) is DENIED. Oklahoma Corporation Commission Order No. 423626 in Cause No. PUD 970000548 is AFFIRMED.

ORDERED this 28 day of September, 1999.

A handwritten signature in black ink, appearing to read "Terry C. Kern", written over a horizontal line.

**TERRY C. KERN, Chief
United States District Judge**

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

SOUTHWESTERN BELL TELEPHONE)
COMPANY,)

Plaintiff,)

v.)

BROOKS FIBER COMMUNICATIONS)
OF OKLAHOMA, INC.; BROOKS FIBER)
COMMUNICATIONS OF TULSA, INC.;)
ED APPLE, CHAIRMAN, BOB ANTHONY,)
VICE CHAIRMAN, AND DENISE BODE,)
COMMISSIONER (IN THEIR OFFICIAL)
CAPACITIES AS COMMISSIONERS OF)
THE OKLAHOMA CORPORATION)
COMMISSION); AND OKLAHOMA)
CORPORATION COMMISSION,)

Defendants.)

ENTERED ON DOCKET

DATE OCT 01 1999

Case No. 98-CV-468-K (J)

F I L E D

SEP 29 1999

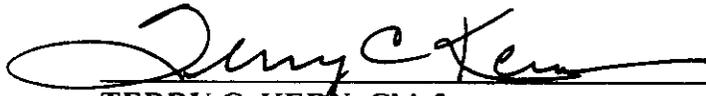
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of Plaintiff's Motion for Summary Judgment (# 14). The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED that judgment is hereby rendered for Defendants Brooks Fiber Communications of Oklahoma, Inc.; Brooks Fiber Communications of Tulsa, Inc.; Ed Apple, Chairman, Bob Anthony, Vice Chairman, and Denise Bode, Commissioner (in their official capacities as commissioners of the Oklahoma Corporation Commission); and Oklahoma Corporation Commission and against Plaintiff, Southwestern Bell Telephone Company.

ORDERED this 28 day of September, 1999.

A handwritten signature in cursive script, reading "Terry C. Kern", written over a horizontal line.

TERRY C. KERN, Chief
United States District Judge

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

F I L E D

SEP 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

OKLAHOMA MUNICIPAL POWER)
AUTHORITY, as agency of the State of)
Oklahoma,)

Plaintiff,)

v.)

SOUTHWESTERN ELECTRIC POWER)
COMPANY, a Delaware corporation,)

Defendant.)

Case No. 98-CIV-0063-BU(E)

ENTERED ON DOCKET

DATE **OCT 01 1999**

ADMINISTRATIVE CLOSING ORDER

On this 30 day of ~~August~~^{Sept}, 1999, this matter comes on for consideration before me, the undersigned judge, pursuant to the Joint Motion For Administrative Closing And Brief In Support (hereinafter the "Motion") filed by Plaintiff Oklahoma Municipal Power Authority and Defendant Southwestern Electric Power Company. In the Motion, the moving parties have advised this Court of their settlement agreement, which is contingent only upon the completion of the merger between Central and South West Company and American Electric Power Company, Inc., and have requested that this case be administratively closed pending completion of the merger.

IT HEREBY IS ORDERED that this case is administratively closed until August 1, 2000, or until such earlier date, if requested by either of the parties. If neither of the parties has requested the reopening or dismissal of this case prior to August 1, 2000, this case, including all of Plaintiff's claims and Defendant's Counterclaim, shall be deemed dismissed with prejudice.

DATED this 30th day of ^{Sept}~~August~~, 1999.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT COURT JUDGE

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

FILED

SEP 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PAMELA P. JONES, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 CITY OF BROKEN ARROW, et al,)
)
)
)
 Defendants.)

No. 98-CV-479-K ✓

ENTERED ON DOCKET
DATE OCT 01 1999

ORDER

Before the Court is the motion of the defendant E.A. Ferguson ("Ferguson") for summary judgment. Plaintiffs bring this action asserting claims under federal and state law. On April 25, 1997, Keith Jones (the stepfather of Zachary Nobile), called the Broken Arrow 911 emergency operator and advised that Nobile had apparently gone beserk and was in his bedroom with a large machete, a fixed blade knife and a pellet pistol. Officers Walls and Helveston of the Broken Arrow Police Department were dispatched. After their arrival, Walls and Helveston attempted to talk to Nobile, who pulled the pellet pistol out of his waistband and aimed it at the officers. The officers recognized it as a pellet pistol. Nobile attempted to fire the pistol at the officers, but it failed to discharge. Nobile put the pistol aside and picked up a large machete. Walls and Helveston were unable to get Nobile to put the machete down, despite spraying him in the face with pepper spray at one point.

Approximately ten minutes after the officers' arrival, Helveston called the Broken Arrow Police dispatch and requested that Sergeant Ferguson, the on-duty shift supervisor, come to the

scene. Ferguson headed toward the Jones home and asked the dispatcher to send a fourth officer to the scene. Mr. and Mrs. Jones, Nobile's stepparents, have testified that shortly after his arrival, Ferguson looked at his watch and said "We have to take him now." Ferguson directed a stratagem, which proved unsuccessful, of having another officer throw a brick through Nobile's bedroom window from the outside to distract Nobile. The officers have testified that Nobile was becoming increasingly aggressive with the machete, swinging it in an "X" pattern, and telling the officers to bow down before him so he could cut off their heads. Under Ferguson's direction, Nobile was sprayed in the face with pepper spray two or three additional times as he advanced too close to the officers. Mr. and Mrs. Jones have testified that a coffee table was partially barricading the door to Nobile's bedroom from the inside during the encounter, so that Nobile would have had to slip through a narrow opening sideways to actually reach the officers.

About eight minutes after he arrived, Ferguson called the dispatcher and requested the Broken Arrow Police Department Special Operations Team ("SOT") be sent to assist disarming Nobile. Nobile was subsequently sprayed with pepper spray two more times as the officers perceived an aggressive movement toward them. There is testimony that the pepper spray became so thick in the air that it bothered the officers themselves. Finally, under the officers' version of events, Nobile approached Walls with the machete raised. Walls retreated down the hallway several steps and repeatedly asked Nobile to put down the machete. Nobile continued his advance, and as Nobile entered his bedroom doorway, Walls fired his handgun once and Nobile fell back into the bedroom. Nobile was shot approximately twenty-four minutes after Walls arrived at the house. As stated, the stepparents contend that Nobile could not have left the bedroom without difficulty, and that he was killed while still inside his bedroom.

As to defendant Ferguson, the present movant, plaintiffs seek to impose liability primarily under 42 U.S.C. §1983 for excessive force. While Walls fired the fatal shot, plaintiffs contend that Ferguson was the supervising officer and, although he did not order Walls to shoot, that Ferguson “rushed” and exacerbated the situation, and in that sense helped “cause” excessive force to be used. They cite the breaking of the bedroom window, the repeated use of pepper spray after it had proven ineffective, “stacking up” of officers in the narrow hallway which made retreat difficult, and the failure to wait for the arrival of the SOT unit. Ferguson moves for judgment on this claim on the ground of qualified immunity.

The Court construes the factual record and the reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. See *Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir.1998). Summary judgment is appropriate if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c) F.R.Cv.P. An issue of material fact is genuine only if a party presents facts sufficient to show that a reasonable jury could find in favor of the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Qualified immunity is an affirmative defense against section 1983 claims. *Quezada v. County of Bernalillo*, 944 F.2d 710, 718 (10th Cir.1991). However, qualified immunity is not a defense when officials’ actions violate clearly established constitutional rights. *Wilson v. Meeks*, 52 F.3d 1547, 1552 (10th Cir.1995). The inquiry as to qualified immunity and the substantive inquiry in a section 1983 actions are identical in an excessive force action. *Id.*

Reduced to its essence, plaintiffs’ position is that Ferguson may be held liable due to his employment of deficient tactics and his exacerbation of a dangerous situation. Ferguson argues that

this theory does not encompass a right “clearly established” in a “particularized” sense under Tenth Circuit authority, which is plaintiffs’ burden to defeat qualified immunity. The Court disagrees with movant. In Bella v. Chamberlain, 24 F.3d 1251, 1256 n.7 (10th Cir.1994), the court stated “events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable.” In Sevier v. City of Lawrence, 60 F.3d 695, 699 (10th Cir.1995), the following principle was set forth: “The reasonableness of Defendants’ actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants’ own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.” The Court is not persuaded that the events preceding the shooting in this case were so “attenuated by time or intervening events” as to not be considered. Id. at 699 n.8.

In the excellent discussion in Diaz v. Salazar, 924 F.Supp. 1088 (D.N.M.1996), the district court discusses the pertinent authority and concludes that a non-shooting officer may only be liable in a similar context if he demonstrated “reckless conduct”, inasmuch as mere negligence is not actionable under §1983. Id. at 1097¹. The distinction between negligent conduct and reckless conduct is no doubt a fine one. Viewing the record in the light most favorable to plaintiffs, the Court concludes that sufficient factual issues exist such that a jury could find recklessness on Ferguson’s part. No extreme exigency presented itself, as Nobile did not have a firearm or explosive device, for example. Ferguson and the officers continued to confront Nobile and apply pepper spray even after the SOT unit, which is specially trained to deal with such matters, had been called. Sufficient

¹The court in Diaz also rejected defendants’ reading of Wilson v. Meeks, 52 F.3d 1547 (10th Cir.1995), which is essentially the reading presented by movant herein. See 924 F.Supp. at 1096.

evidence exists to survive summary judgment. A reasonable jury could conclude that the continued confrontation ultimately led to the need to use deadly force. The Court is unable to conclude as a matter of law that Ferguson's conduct was "objectively reasonable" and therefore declines to grant his motion on qualified immunity grounds. See Goff v. Bise, 173 F.3d 1068, 1073 (8th Cir.1999)(summary judgment based on qualified immunity is inappropriate if the plaintiff challenges the officer's description of the facts and presents a factual account where a reasonable officer would not be justified in his actions).

Nobile's family also apparently seeks to assert a First Amendment claim and a Fifth Amendment due process claim, both arising out of the violation of the "right of association" guaranteed under the First Amendment. Plaintiffs have cited no authority for such claims and the Court rejects them. Plaintiffs have made no showing that Nobile's death was motivated by or implicated the political values protected by the right of association under the First Amendment. The alleged use of excessive force in this case has an adequate remedy available as a violation of the Fourth Amendment. Cf. Smith v. City of Fontana, 818 F.2d 1411, 1423-24 (9th Cir.1987). The motion is granted in this regard.

Plaintiffs have stipulated to the dismissal of any state law claims asserted, and therefore the motion shall also be granted in this respect.

It is the Order of the Court that the motion of the defendant E.A. Ferguson for summary judgment (#49) is hereby DENIED as to plaintiffs' Fourth Amendment claim for excessive force.

- In all other respects, the motion is GRANTED.

SO ORDERED THIS 30 DAY OF SEPTEMBER, 1999.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SAINT FRANCIS HOSPITAL, INC. and)
ST. JOHN MEDICAL CENTER, INC.,)

Plaintiffs,)

v.)

Case No. 98-CV-648-K (E) ✓

FOUNDATION HEALTH, AN)
OKLAHOMA HEALTH PLAN, INC. and)
THE DEPARTMENT OF HEALTH -)
STATE OF OKLAHOMA,)

Defendants.)

FOUNDATION HEALTH, AN)
OKLAHOMA HEALTH PLAN, INC.,)

Third-Party Plaintiff,)

ENTERED ON DOCKET
OCT 01 1999
DATE _____

v.)

THE OKLAHOMA HEALTH CARE)
AUTHORITY,)

Third-Party Defendant.)

ORDER

Before this Court is Defendant Department of Health - State of Oklahoma's ("DOH's") motion to dismiss all claims against it as barred by state sovereign immunity. Plaintiffs assert a state law claim against the DOH. This claim is before the Court as supplemental to Plaintiffs' federal claims against Defendant Foundation Health, an Oklahoma Health Plan, Inc. ("Foundation Health").

Supplemental Jurisdiction

When the Court has original jurisdiction over a civil action, the Court has "supplemental jurisdiction over all other claims that are so related to claims in the action . . . that they form part of

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the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). This supplemental jurisdiction extends to claims involving joinder of additional parties.

See id. The Court may decline to exercise supplemental jurisdiction if "(1) the claim raises a novel or complex issue of State law . . . or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." *Id.* § 1367(c). Because Plaintiffs' supplemental claim raises important issues of federalism and involves a fairly uninterpreted state agency regulation, the Court finds compelling reasons to decline jurisdiction over this matter.

Discussion

Plaintiffs base their claim on Okla. Admin. Code § 310:655-25-3(a), which authorizes health maintenance organization ("HMO") enrollees to "file a bill in a court of competent jurisdiction or with the Department [of Health]" to subject deposits held by the state to that debt. Oklahoma law requires HMO's to deposit funds with the DOH as a guarantee that the HMO will perform its obligations to its enrollees. *See* Okla. Stat. tit. 63, § 2509. The regulations promulgated by the DOH pursuant to this section provide for minimum deposit requirements and the procedure by which HMO enrollees can recover from these deposits. *See* Okla. Admin. Code §§ 301:655-25-2, 301:655-25-3. The code further provides that, "[t]he enrollees, without preference, shall have a lien on the deposits for the amounts due or which may become due as a result of any failure of the HMO to meet its obligations." *Id.* § 301:655-25-3(a). Such liens will be satisfied ratably from the deposits. *See id.* Plaintiffs wish to step into the shoes of Foundation Health's enrollees under this section. It is these enrollees, as lienholders, that

may file a bill in a court of competent jurisdiction or with the Department for the benefit of himself or herself and all others given a lien by this section to subject such deposits to the payment of the liens thereon. The Department shall be made a party

to any such suit, and a copy of such bill shall be served upon the Department as if it were a party to such suit. The funds shall be distributed by the Department.

See id. Plaintiffs ask this court to enjoin the DOH from expending any of Foundation Health's deposit pending final decision and, at the close of the case, to order the DOH to distribute the funds in accordance with its above-quoted regulation.

The DOH objects to this suit in federal court as barred by sovereign immunity. The DOH, as a statewide agency, is part of the state for sovereign immunity analysis. *See, e.g., Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981).

If sovereign immunity applies to this sort of claim, the DOH will not have waived its immunity in federal courts. It is long settled that a state can waive sovereign immunity in its own courts without doing so in federal court. *See Smith v. Reeves*, 178 U.S. 436, 441-42, 445 (1900). A state will have waived its immunity in federal court "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673 (citation omitted) (alterations in original). A DOH regulation authorizing parties to "file a bill in a court of competent jurisdiction or with the Department [of Health]" is not sufficient to pass the "stringent" test for waiver. *See, e.g., College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, — U.S. —, —, 119 S. Ct. 2219, 2226 (1999) ("Nor does [a State] consent to suit in federal court merely by stating its intention to 'sue and be sued,' or even by authorizing suits against it 'in any court of competent jurisdiction.'" (citations omitted)); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 578, 579-80 (1946).

While the Court is not ruling on the DOH's sovereign immunity, it is important to note that

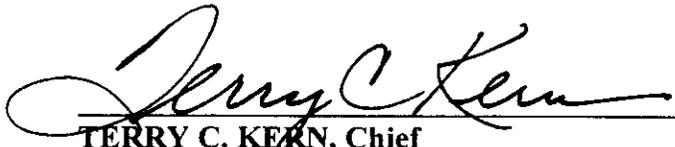
a state generally has immunity for alleged violations of its own, rather than federal, laws. Plaintiffs have not cited to any cases in which a state's sovereign immunity is inapplicable to a suit against a state for violation of that state's own laws. In an analogous situation, the Supreme Court has held that a claim that state *officials* violated state law is a claim against the state and protected by sovereign immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984).

Exercising supplemental jurisdiction in this claim implicates these serious issues of federalism while requiring the Court to interpret a state agency regulation of which there has been little to no interpretation in Oklahoma courts. *Pennhurst* noted that "allowing claims against state officials based on state law to be brought in the federal courts does not necessarily foster the policies of 'judicial economy, convenience and fairness to litigants,' on which pendent jurisdiction is founded." *Id.* at 122 n.32 (citations omitted). The Supreme Court has noted in this context that a federal construction of state law is often "uncertain and ephemeral." *Id.* The Court, lacking any state decisions regarding section 310:655-25-3, would be required to interpret the DOH's regulation for the DOH in this precedential void.

These exceptional circumstances raise compelling reasons for declining supplemental jurisdiction over Plaintiffs' claim against Defendant Department of Health - State of Oklahoma.

IT IS THEREFORE ORDERED that Defendant State's Motion to Dismiss (# 17) is GRANTED. Plaintiffs' claims against Defendant Department of Health - State of Oklahoma are DISMISSED without prejudice.

ORDERED this 30 day of September, 1999.

A handwritten signature in cursive script, reading "Terry C. Kern", written over a horizontal line.

TERRY C. KERN, Chief
United States District Judge

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

OLIVER MANUEL,)
)
 Petitioner,)
)
 vs.)
)
 H. N. (SONNY) SCOTT, Warden,)
)
 Respondent.)

ENTERED ON DOCKET
DATE OCT 01 1999
Case No. 96-CV-307-H ✓

FILED

SEP 30 1999 SA
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, appearing *pro se*, is currently confined in the Oklahoma Department of Corrections. He challenges the final Judgments and Sentences entered in Tulsa County District Court, Case Nos. CRF-83-1415 and CRF-83-1416. Respondent has filed a Rule 5 response to which Petitioner has replied. Also, the parties have filed supplemental briefs as directed by the Court. As more fully set out below, the Court concludes that this petition should be denied.

BACKGROUND

Petitioner was convicted by a jury in 1983 in Tulsa County District Court on two counts of Shooting with Intent to Kill After Former Conviction of Two or More Felonies, Case No. CRF-83-1415, and on one count each of Robbery with Firearms and Assault and Battery with a Dangerous Weapon, both After Former Conviction of Two or More Felonies, Case No. CRF-83-1416. On direct appeal, the Oklahoma Court of Criminal Appeals ("OCCA") reversed the convictions finding a Batson violation. Manuel v. State, 751 P.2d 764 (Okla. Crim. App. 1988). On retrial, Petitioner, represented by attorney Richard O'Carroll from the Tulsa County Public Defender's Office, was

again convicted by a jury of the same offenses. Petitioner appealed, represented by attorney Barry Derryberry from the Tulsa County Public Defender's Office, and his convictions were affirmed on all counts; but, after finding an erroneous jury instruction, the OCCA remanded the case for re-sentencing. Manuel v. State, 803 P.2d 714 (Okla. Crim. App. 1990). On remand, Petitioner, represented by attorney Julie O'Connell from the Tulsa County Public Defender's Office, waived a jury trial and a non-jury sentencing trial was held. After hearing the evidence, the court sentenced Petitioner to consecutive terms of life imprisonment for each count in CRF-83-1415 and to two concurrent twenty-five (25) year terms in CRF-83-1416. Petitioner again appealed, represented by Public Defender Derryberry. On direct appeal from the resentencing, Petitioner argued that (1) his sentences were improperly enhanced with the documents of prior convictions which were facially unconstitutional, and (2) the sentencing court abused its discretion in considering evidence outside the record in determining punishment (see #4, Ex. A). On July 28, 1994, the OCCA, by summary opinion, found no error and upheld the sentences (#4, Ex. B).

Thereafter, Petitioner, represented by attorney Herb Elias, sought post-conviction relief, alleging ineffective trial counsel (see #4, Ex. C). The district court denied relief finding the claim to be procedurally barred but also concluding that Petitioner's counsel provided effective assistance under the standard stated in Strickland v. Washington, 466 U.S. 668 (1984) (#4, Ex. D). The Oklahoma Court of Criminal Appeals affirmed the decision in an opinion entered February 7, 1995 (#4, Ex. E).

In the present petition for a writ of habeas corpus, filed April 18, 1996,¹ Petitioner challenges his conviction on three (3) grounds: (1) enhancement of his sentences was unlawful since the records from his prior convictions do not conclusively demonstrate that he was represented by counsel, (2) the sentencing court abused its discretion by considering evidence outside the record, and (3) he received ineffective assistance of counsel at trial. Respondent filed a Rule 5 response to the petition (#4) and Petitioner filed a reply to Respondent's response (#5).

In his response, Respondent argues that Petitioner's first two claims are without merit and that his third claim, ineffective assistance of trial counsel, is procedurally barred and should be denied on that basis. However, on December 22, 1998, the Court directed Respondent to brief Petitioner's ineffective assistance of trial counsel claim on the merits, after finding that because the Oklahoma Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief after discussing both Petitioner's procedural default as well as merits of the ineffective assistance of trial counsel claim, the claim was not procedurally barred. See #12. Respondent filed his supplemental response on January 19, 1999 (#14) and Petitioner filed a reply to the supplemental response (#16). By Order dated May 13, 1999 (#17), the Court directed Respondent to rebrief the ineffective assistance of counsel claim under pre-AEDPA law and to provide the trial transcripts from Petitioner's trials. On May 25, 1999, Respondent filed his second supplemental response (#18) and provided the requested state court records. Petitioner filed his reply to the second supplemental response on June 1, 1999 (#19).

¹Petitioner filed his petition six (6) days prior to the April 24, 1996, enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Because the provisions of the AEDPA are not applicable to cases pending at the time of enactment, Lindh v. Murphy, 521 U.S. 320, 117 S.Ct 2059, 2068 (1997), Petitioner's claims will be reviewed pursuant to pre-AEDPA standards.

ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Respondent concedes, and the Court finds, that the Petitioner meets the exhaustion requirements under the law.

The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). The granting of such a hearing is within the discretion of the district court, and this Court finds that a hearing is not necessary.

A. Improper Enhancement

As his first ground justifying habeas relief, Petitioner states that his "sentences were unlawfully enhanced on the basis of prior convictions document which were factually Unconstitutional." (Docket #1, at 6). As pointed out by Respondent, Petitioner completely fails to provide any supporting facts for this claim. He does cite to his "brief in support," but the attached brief discusses only Petitioner's ineffective assistance of counsel claim. Respondent has provided a copy of Petitioner's brief on appeal which provides the factual basis of the improper enhancement claim as presented to the Oklahoma Court of Criminal Appeals. In essence, Petitioner challenges the validity of the sentences he is now serving on the basis of the alleged facial invalidity of the "Judgments and Sentences" submitted by the prosecution as evidence of Petitioner's prior felony convictions.

Under Oklahoma law, the prosecution is allowed to make its prima facie case of prior

convictions through the introduction of the certified copies of judgments from the defendant's prior cases. Rosteck v. State, 749 P.2d 556, 558 (Okla. Crim. App. 1988); Sanders v. State, 706 P.2d 909, 911 (Okla. Crim. App. 1985). The burden of production then shifts to the Defendant to produce evidence demonstrating the invalidity of the prior convictions. Rosteck, 749 P.2d at 558. The Tenth Circuit Court of Appeals has ruled that this procedure is constitutionally sufficient. Mansfield v. Champion, 992 F.2d 1098, 1105-06 (10th Cir. 1993). The Court has reviewed the copies of the judgments introduced as evidence of Petitioner's prior convictions as well as the transcript from the March 27, 1991 second stage sentencing hearing (#9). The judgments from Petitioner's prior convictions were certified copies (#9, marked as "State's Exhibit 1" and "State's Exhibit 2"). In addition, Petitioner failed to present any evidence during the resentencing to show that the judgments were invalid. In fact, Petitioner's counsel stipulated to the admission of the documents into evidence at the sentencing hearing (#9, March 27, 1991 Trans. at 7). The procedure used by the trial court comports with constitutional due process requirements. See Mansfield, 992 F.2d at 1105-06. Therefore, the Court concludes that Petitioner's attack on the validity of his prior convictions in this collateral proceeding is without merit. Habeas corpus relief on this ground should be denied.

B. Sentencing Error

As his second claim, Petitioner asserts that "[t]he sentencing Court abused its discretion by considering evidence outside the record in the course of determining punishment." Again, Petitioner fails to provide any supporting facts, and merely cites to his "brief in support of." However, the attached brief does not provide any facts in support of this allegation of error. Nonetheless, the brief filed by Petitioner in the Oklahoma Court of Criminal Appeals addresses this allegation of error.

Petitioner complains that the sentencing judge referred to "a fact not in evidence," specifically, that one of the victims still had a bullet lodged near his heart, in describing the seriousness of the crimes committed by Petitioner.² On direct appeal, Petitioner argued that because the trial court considered improperly admitted evidence at sentencing, his "fundamental right of confrontation and the corollary right of cross-examination, assured by the Sixth Amendment and Okl. Const. Art. 2, § 21, are inextricably put at stake." (#4, Ex. A at 13).

To the extent Petitioner's habeas corpus challenge mirrors his direct appeal challenge, the Court finds the claim should be denied. Decisions regarding the admission of evidence as well as sentencing matters involve issues of state law. This Court will not review errors of state law unless the error "deprived [the petitioner] of fundamental rights guaranteed by the Constitution of the United States." Jackson v. Shanks, 143 F.3d 1313, 1317 (10th Cir. 1998); see also Lewis v. Jeffers, 497 U.S. 764, 780 (1990); Brinlee v. Crisp, 608 F.2d 839, 843 (10th Cir. 1979). The Court has reviewed the transcripts from the March 27, 1991 and the April 3, 1991 hearings (#10) as well as the arguments contained in Petitioner's direct appeal brief submitted to the OCCA (# 4, Ex. A). Nothing in the record indicates Petitioner's fundamental rights guaranteed by the Constitution were violated by the sentencing judge's reference to the victim's testimony. Habeas corpus relief on this ground should be denied.

²The prosecution had apparently made a reference to the inoperable condition of one of the victims, Mr. Heater, in closing argument at the sentencing hearing. According to Petitioner's brief submitted to the Oklahoma Court of Criminal Appeals on direct appeal, during Petitioner's second trial, Mr. Heater was asked on direct examination, where he had been shot. Mr. Heater answered, "Shot right here. It broke two ribs and the bullet is in the heart muscles." Petitioner's counsel objected and the trial court overruled the objection. Petitioner contends the statement was unresponsive and, therefore, improperly admitted.

C. Ineffective assistance of counsel

Both the state trial court and the OCCA considered the merits of Petitioner's ineffective assistance of trial counsel claim, first raised in his application for post-conviction relief. As a result, this Court may consider the merits of the claim. See #12, December 22, 1998 Order.

Petitioner claims that during his retrial, his attorney's performance was deficient and unprofessional in that he (1) failed to investigate and prepare adequately prior to trial, (2) failed to call exculpatory witness, and (3) conceded Petitioner's guilt in closing argument. Petitioner also argues that errors prejudiced the defense. To succeed on an ineffective assistance of counsel claim, Petitioner must satisfy the two-pronged standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984). The Strickland test requires a showing of both deficient performance by counsel and prejudice to Petitioner as a result of the deficient performance. 466 U.S. at 687. To satisfy the deficient performance prong of the test, Petitioner must overcome a strong presumption that counsel's conduct fell within the "wide range of reasonable professional assistance [that] . . . might be considered sound trial strategy." Brecheen, 41 F.3d 1365 (citations omitted). "A claim of ineffective assistance must be reviewed from the perspective of counsel at the time and therefore may not be predicated on the distorting effects of hindsight." Id. (citations omitted). Finally, the focus of the first prong is "not what is prudent or appropriate, but only what is constitutionally compelled." Id. To establish the prejudice prong of the test, Petitioner must show that the allegedly deficient performance prejudiced the defense; namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 694. Failure to establish either prong of the Strickland standard will result in denial of relief. Id. at 696.

1. *Failure to investigate and prepare adequately for trial, failure to call exculpatory witnesses*

Petitioner contends that his alleged partner in the robbery, Bobby Culbreth,³ had written a note exculpating Petitioner of any wrongdoing. During the first trial, the note was marked but was never entered as evidence. See 2d Trial Trans. at 6; 1st Trial Trans. at 552. At the time Petitioner's second trial commenced, Petitioner's counsel represented to the trial court that he had only recently learned of the note and requested and received a one-day continuance in order to locate Culbreth. However, nothing in the record evidences the outcome of any effort to locate Culbreth. Petitioner speculates that "[counsel] simply never made the effort to contact Culbreth about testifying for Petitioner." (#19 at 3).

Without addressing the first prong of the Strickland test, the Court finds trial counsel's alleged failure to contact Culbreth was not ineffective assistance because Petitioner cannot demonstrate that he was prejudiced by his trial counsel's allegedly deficient performance. Petitioner has not identified any exculpatory evidence that further investigation would have yielded. To satisfy the prejudice prong of the Strickland test for ineffective assistance of counsel, a defendant must specifically show what beneficial evidence an "adequate" investigation would have produced. United States v. Boone, 62 F.3d 323, 327 (10th Cir. 1995) (stating that where a Defendant urges only speculation and does not establish a reasonable probability that the outcome would have been different, he cannot establish prejudice); Hendricks v. Calderon, 70 F.3d 1032, 1042 (9th Cir. 1995); United States v. Ashimi, 932 F.2d 643, 649 (7th Cir. 1991). Simply speculating that an investigation might have resulted in something useful will not suffice. Furthermore, in the instant case, even if

³The record indicates Bobby Culbreth entered a plea of *nolo contendere* and was sentenced to ten (10) years imprisonment for his role in the April 18, 1983 robbery (see 2d Tr. Trans. at 4).

counsel had located Culbreth, the effect of his testimony on the jury is highly speculative in light of the overwhelming evidence of Petitioner's guilt. See United States v. Prows, 118 F.3d 686, 693 (10th Cir.1997) (overwhelming evidence of defendant's guilt rendered attorney's failure to investigate potentially impeaching materials on government witness nonprejudicial). Evidence of guilt presented during Petitioner's second trial included the testimony of two eye-witnesses who positively identified Petitioner as the robber and the gunman (2d Tr. Trans. at 157, 159-160, 173, 193, 204), testimony that Petitioner's hand was wrapped with a blood soaked towel when he was arrested shortly after the robbery (2d Tr. Trans. at 234), evidence that the getaway vehicle belonged to Petitioner (2d Tr. Trans. at 203, 229), the gun used in the robbery and shooting as well as material stolen during the robbery were found hidden in the oven and stolen goods were also found in the freezer at Petitioner's home shortly after the robbery (2d Tr. Trans. at 239-242, 257, 259), and Petitioner's fingerprints were found on a bank envelope taken during the robbery (2d Tr. Trans. at 304).

Petitioner also argues that during his second trial, his counsel provided ineffective assistance when he failed to call two "exculpatory" witnesses, specifically, Paulette Watson and Dr. Merle Jennings, who had testified for the defense at Petitioner's first trial. However, the Court finds Petitioner's argument to be nothing more than a challenge to counsel's trial strategy and tactics. After reviewing the transcripts from both of Petitioner's trials, the Court finds that Defense counsel's decision not to call the two prior defense witnesses at Petitioner's second trial was clearly a matter of trial tactics. At Petitioner's first trial, Willa Paulette Watson admitted that Petitioner was a friend of her husband's and testified that at about 10:05 a.m. on the day of the robbery, she saw Petitioner's car in the vicinity of the robbery but that Petitioner was not in the car. (1st Tr. Trans. at 521, 529.)

Also at Petitioner's first trial, Merle Jennings, M.D., testified that on February 14, 1983, or approximately two (2) months before the April 18, 1983 robbery, Petitioner had undergone back surgery (1st Tr. Trans. at 559), and that it would have been "anatomically impossible" for an individual with Petitioner's medical history to have run for several hundred yards. Nonetheless, counsel at Petitioner's second trial knew of the witnesses' testimony at the first trial. Significantly, neither witness offered testimony as to Petitioner's whereabouts at the time of the 10:30 a.m. robbery and shooting and in spite of these witnesses' testimony, the first jury returned a verdict of guilty.

Defense counsel's decision not to call these witnesses, including Culbreth, does not constitute ineffective assistance of counsel. Those accused of crimes, even capital crimes, are entitled only to a reasonable and adequate defense, not the defense which, in hindsight, they believe would have been the best. Even assuming, without finding, that Petitioner has established deficient performance, he has shown no prejudice under Strickland, i.e., no reasonable probability that, had counsel not committed the errors he now claims were committed, the outcome of the case would have been different. Bearing in mind that, in evaluating prejudice, the Court looks at the "totality of the evidence," Cooks v. Ward, 165 F.3d 1283, 1293 (10th Cir. 1998), the Court finds no reasonable probability that the jury would have reached a different verdict. The record in this case is "replete with evidence of [Petitioner's] guilt," id., including eyewitness testimony, indicating that Petitioner committed the crimes of which he was convicted. While his counsel could have called the additional witnesses, there was no reasonable probability of success, given the strength and amount of evidence against Petitioner presented by the State and the credibility problems associated with the testimony at issue. The Court concludes that trial counsel did not render ineffective assistance by failing to call these witnesses.

Petitioner also argues that his trial counsel rendered ineffective assistance when, during closing argument, his counsel conceded Petitioner's guilt as to two of the four charges. Petitioner cites to two statements made by his counsel. First, in discussing the State's evidence, counsel said:

Think about the dynamics of the evidence here. Think about the circumstances attendant to this. But, ladies and gentlemen, also think about the fact that there are four allegations here. There's nothing magical about them. The State has alleged four felonies. I submit to you that they didn't prove two of them beyond a reasonable doubt at all. At all. Please read the law.

(2d Tr. Trans. at 329-330). Second, in closing his argument, counsel stated that:

You are observers. You are the triers of fact. You get to decide. Don't be competitive. It's not your job to help. It's your job to make sure the job is done and done correctly according to the law and the evidence and your oath. And I submit when you consider all those, you will have to make a finding of not guilty as to two of these charges as you said you would. Thank you very much.

(2d Tr. Trans. at 331). In addressing this allegation of error in his second supplemental response, Respondent argues that Petitioner again attempts only to second guess his trial counsel's strategy and fails to satisfy either prong of the Strickland standard.

Although the sort of conduct alleged here, i.e., the admission by counsel of his client's guilt to the jury, represents the sort of departure from counsel's duty to his client that can trigger a presumption of prejudice, this Court must "focus [] on whether, in light of the entire record, the attorney remained a legal advocate of the defendant who acted with 'undivided allegiance and faithful, devoted service' to the defendant." United States v. Williamson, 53 F.3d 1500, 1511 (10th Cir. 1995) (citing Osborn v. Shillinger, 861 F.2d 612, 624 (10th Cir. 1988)). The statements at issue in this case cannot be characterized as direct concessions of guilt as to two of the four charges. After reviewing counsel's entire closing argument, the Court finds counsel asked the jury to consider the sufficiency of the evidence as to each of the four charges. He also attempted to focus the jury's attention on the

sufficiency of the evidence as to each of the four charges. He also attempted to focus the jury's attention on the jury instructions. The Court further notes that just prior to making the first statement cited above, counsel also stated:

Ladies and gentlemen, I have been straightforward with you about this whole case. There's some circumstances here that indicate I'm not going to address certain issues. But think about it. Five years ago. Have any of you ever had a traumatic event? I submit to you once the event happens, it's gone. All that's left is your recitation of it. How many times did you tell the story, after a while the story is the reality and the reality is never recovered. We do not know what happened on April 18th, 1983. Nobody will ever know what happened as to all these allegations.

(2d Tr. Trans. at 329). During the cited portion of his argument, counsel attempted to take the reasonable strategic approach of establishing his credibility with the jury thereby enhancing the possibility that the jury would accept his arguments and acquit Petitioner on at least two of the charges. The Court finds Petitioner's allegation of deficient performance by trial counsel to be without merit.

Also, the Court finds that Petitioner cannot satisfy the prejudice prong of the Strickland standard. As stated above, under Strickland, there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The Court again notes that the evidence linking Petitioner to the crimes was overwhelming. Abundant support for the conviction found in the record reduces the likelihood that error affected the verdict which was returned. See id. at 696.

The Court finds that Petitioner's counsel remained Petitioner's legal advocate throughout the trial and his statements during closing argument do not constitute ineffective assistance of counsel. Petitioner's request for habeas corpus relief based on ineffective assistance of counsel should be denied.

CONCLUSION

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

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

IT IS SO ORDERED.

This 30th day of September, 1999.



Sven Erik Holmes
United States District Judge

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

OLIVER MANUEL,)
)
Petitioner,)
)
vs.)
)
H. N. (SONNY) SCOTT, Warden,)
)
Respondent.)

ENTERED ON DOCKET
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DATE _____

Case No. 96-CV-307-H

FILED
SEP 30 1999 SA
Phil Lombardi, Clerk
U.S. DISTRICT COURT

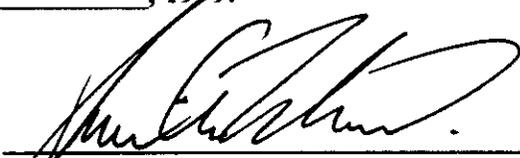
JUDGMENT

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.

IT IS SO ORDERED.

This 30th day of SEPTEMBER, 1999.


Sven Erik Holmes
United States District Judge

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

F I L E D

SEP 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SOUTHWESTERN ELECTRIC POWER)
COMPANY,)

Plaintiff,)

v.)

OKLAHOMA MUNICIPAL POWER)
AUTHORITY,)

Defendant.)

Case No. 99-CIV-568-BU(E)
ENTERED ON DOCKET

DATE **OCT 01 1999**

ADMINISTRATIVE CLOSING ORDER

On this 30th day of ~~August~~^{Sept}, 1999, this matter comes on for consideration before me, the undersigned judge, pursuant to the Joint Motion For Administrative Closing And Brief In Support (hereinafter the "Motion") filed by Plaintiff Southwestern Electric Power Company and Defendant Oklahoma Municipal Power Authority. In the Motion, the moving parties have advised this Court of their settlement agreement, which is contingent only upon the completion of the merger between Central and South West Company and American Electric Power Company, Inc., and have requested that this case be administratively closed pending completion of the merger.

IT HEREBY IS ORDERED that this case is administratively closed until August 1, 2000, or until such earlier date, if requested by either of the parties. If neither of the parties has requested the reopening or dismissal of this case prior to August 1, 2000, this case, including all of Plaintiff's claims and Defendant's Counterclaim, shall be deemed dismissed with prejudice.

DATED this 30 day of ^{12 p.m.} August, 1999.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT COURT JUDGE