

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES of AMERICA,

Plaintiff,

vs.

BRICE DAUNAY,

Defendant.

Case No. 99-CV-645-E(J) ✓

ENTERED ON DOCKET

DATE OCT 20 1999

REPORT AND RECOMMENDATION

The following motions in the above matter came for hearing before the undersigned Magistrate Judge on October 18, 1999:

1. Defendant's Motion to Stay Civil Action [doc. no. 4-1], filed January 15, 1999.

2. Defendant's Motion for Protective Order with Respect to Discovery [doc. no. 5-1], filed September 15, 1999.

3. Plaintiff's Motion to Compel Production of Bank Documents or In the Alternative Issue an Order Compelling Execution of a Release to Allow the United States to Obtain Bank Documents [doc. no. 9-1], filed September 29, 1999.

Plaintiff appeared by Stephanie Page, trial attorney, Tax Division of the United States Department of Justice on behalf of Steven C. Lewis, United States Attorney. Defendant appeared by his attorneys, Doerner, Saunders, Daniel & Anderson, L.L.P. by Sam G. Bratton II.

The Court, having heard the statements and arguments of counsel, and having reviewed the pleadings and the applicable law, makes the following findings and recommendations:

FINDINGS

1. This is an action brought by the United States for collection of an assessment to which an election has been made for relief by the taxpayer under 26 U.S.C. § 6015(b) or (c), the "innocent spouse" provisions of the United States Tax Code. By virtue of the election for relief, this action is stayed pursuant to 26 U.S.C. § 6015(e)(1)(B)(i) unless one of the exceptions to stay provided by 26 U.S.C. § 6851 or 6861 applies.

2. The exception to the stay provided by 26 U.S.C. § 6861 does not apply because the present action is not a jeopardy assessment or levy proceeding as contemplated by 26 U.S.C. § 6861. None of the procedural safeguards of § 6861 have been provided or utilized. Plaintiff concedes that it is not an action under § 6851. Therefore, no exception to the general stay provision of § 6015 applies.

3. If a determination as to whether or not jeopardy exists as contemplated by 26 U.S.C. § 6861 is necessary, the Court finds that jeopardy does not exist. The Defendant has no assets within the jurisdiction of the United States to preserve. Whatever assets might have been within the jurisdiction of the United States at one time, have not been within the United States' jurisdiction since before the commencement of this action. A stay of this action results in no prejudice to the Plaintiff. Plaintiff suffers no prejudice based on jeopardy. Upon the facts submitted

to the Court and pursuant to the expedited review provisions contained in 26 U.S.C. § 7429, this Court rejects the government's attempts to pursue the assets in this action on a jeopardy basis.

4. The Court additionally notes that the stay is granted pending the determination of the innocent spouse exception by the Internal Revenue Service. The administrative agency making this determination is also the Plaintiff in this action. Therefore the Plaintiff has some measure of control with regard to the length of the stay.

Based upon the findings set forth above, the Court recommends that the District Court **GRANT** Defendant's Motion to Stay Civil Action [doc. no. 4-1].

In addition, the Magistrate Judge finds that the Defendant's Motion for Protective Order with Respect to Discovery [doc. no. 5-1] and Plaintiff's Motion to Compel Production of Bank Documents or in the Alternative Issue an Order Compelling the Execution of a Release to Allow the United States to Obtain Bank Documents [doc. no. 9-1] are **MOOT** by virtue of the stay of this action. The Magistrate Judge recommends that the District Court, upon issuance of the stay of this action, find Defendant's Motion for a Protective Order and Plaintiff's Motion to Compel moot. Each party should be permitted to reassert their positions after the lifting of the stay. If the District Court declines to stay the action, the motions should be determined on their merits. The Magistrate Judge recommends that, in that event, the motions be referred back to the Magistrate Judge.

OBJECTIONS

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

Dated this 19th day of October 1999.


Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

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

20th Day of October, 1999.
C. Portillo, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID MARVIN BAKER,

Petitioner,

vs.

L.L. YOUNG,

Respondent.

Case No. 99-CV-135-H(J)

ENTERED ON DOCKET

DATE OCT 20 1999

REPORT AND RECOMMENDATION

Now before the Court is Respondent's Motion to Dismiss this habeas corpus action filed by Petitioner pursuant to 28 U.S.C. § 2254. [Doc. No. 4-1]. This case has been referred to the undersigned for all further proceedings consistent with Rules 10 and 11 of the Rules Governing Section 2254 Cases, 28 U.S.C. § 636, and Fed. R. Civ. P. 72. Respondent argues that Petitioner's Petition should be dismissed because he has failed to exhaust his claims in state court. Petitioner pled guilty and was sentenced in Rogers County. Petitioner did file a post-conviction appeal, but Petitioner's claims have never been appealed to or decided by the Oklahoma Court of Criminal Appeals. The Magistrate Judge therefore recommends that the District Court dismiss this action due to Petitioner's failure to exhaust his state court remedies.

I. PROCEDURAL BACKGROUND

Petitioner initially filed this action in the Western District of Oklahoma. [Doc. No. 1-1]. The action was transferred to this District by Order dated February 18, 1999. Petitioner pled guilty to unlawful delivery of a controlled drug and failure to

affix a tax stamp to a controlled drug. Petitioner notes that he was sentenced to ten years.

Petitioner did not withdraw his guilty plea or appeal his sentence. Petitioner did file a motion for post-conviction relief in the state district court on March 9, 1998.

Respondent filed a Motion to Dismiss for failure to exhaust state court remedies on March 24, 1999. Petitioner never responded to the Motion to Dismiss. By Order dated June 1, 1999, the Court noted Petitioner's lack of response and directed a response by June 25, 1999. No response was filed.

The Court contacted the District Court Clerk's office of Rogers County on October 14, 1999. The Rogers County Court denied Petitioner's motion for post-conviction relief on April 21, 1999. The court clerk had no indication that an appeal to the Oklahoma Court of Criminal Appeals had been filed.

II. DISCUSSION

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). "[E]xhaustion of state remedies is not required where the state's highest court has recently decided the precise legal issue that petitioner seeks to raise on his federal habeas petition." Goodwin v. State of

Oklahoma, 923 F.2d 156, 157 (10th Cir. 1991). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

As a preliminary matter, a court must determine whether a Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by establishing that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal petition. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986).

The Tenth Circuit has stated that a "rigorously enforced" exhaustion policy is necessary to serve the ends of protecting and promoting the state's role in resolving the constitutional issues raised in federal habeas petitions. Naranjo v. Ricketts, 696 F.2d 83, 87 (10th Cir. 1982). The general rule that a federal court must dismiss unexhausted claims has a few exceptions. For example, the "futility exception" provides that a petition should not be dismissed "if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render

futile any effort to obtain relief." Duckworth v. Serrano, 454 U.S. 1, 3 (1981).^{1/}

Petitioner has not attempted to explain how he could meet an exception to the exhaustion rule. And, although Petitioner was directed to file a response to Respondent's Motion to Dismiss, no response was filed.

Under the facts presented in this case, the Magistrate Judge concludes that Petitioner has not exhausted the remedies available to him in state court. In Lozoya v. State of Oklahoma, 932 P.2d 22 (Okla. Crim. App. 1997), the petitioner, after entering a plea of guilty, did not properly perfect his appeal or file an application to withdraw his guilty plea. The Oklahoma Court of Criminal Appeals granted an appeal out of time, and addressed the issues presented by the petitioner. Id. at 25. The procedure for filing an "application out of time" was described in Smith v. State of Oklahoma, 611 P.2d 276 (Okla. Crim. App. 1980).

The prior statutory appeal out of time remedy found at 22 O.S. Supp 1965, § 1073 was repealed upon enactment of and has been subsumed within the Post Conviction Procedures Act, 22 O.S. 1971, § 1080 *et seq.*

. . . . [T]he proper procedure to secure the remedy is the filing of a post conviction application in the District Court, where Findings of Fact and Conclusions of Law should be made as to whether applicant was denied a direct appeal

^{1/} Utilizing the "futility exception" to excuse exhaustion imposes additional consequences on the Petitioner. The court is required to find that a Petitioner has "procedurally defaulted" his issues in state court. Instead of initially addressing the issues on the merits, a Petitioner is required to show "cause and prejudice" before the issues he presents can be addressed. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. A petitioner is additionally required to establish prejudice, which requires showing " 'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The alternative is proof of a "fundamental miscarriage of justice," which requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

through no fault of his own, which issue is the crucial one to appeal out of time, followed by an application, or "appeal", as it were, filed in this Court, with the District Court findings and conclusions.

Id. at 276 (footnotes and citations omitted). The Oklahoma Court additionally footnotes,

In some instances it may be appropriate for the District Court to simply vacate the original judgment and sentence and impose a new judgment and sentence, so that the appeal time will begin to run anew.

Id. at 276 n.1. See also White v. Meachum, 838 F.2d 1137 (10th Cir. 1988).

Oklahoma courts have previously permitted and addressed issues in which a Petitioner failed to file an appeal but did file an application for post-conviction relief. The case presented by Petitioner seems additionally complicated because Petitioner may have failed to perfect his appeal to the Oklahoma Court of Criminal Appeals within the imposed time limitations. The docket sheet for Rogers County indicates that the District Court of Rogers County entered an Order denying Petitioner's request for post-conviction relief, but that no appeal was filed following the entry of that order. Oklahoma statutes impose a 30 day time limit, from the date of the judgment or order denying post-conviction relief, for filing a petition in error with the Oklahoma Court of Criminal Appeals. 22 O.S. 1991, § 1087.

Therefore, the time within Petitioner may appeal the post-conviction decision of the trial court may have already passed. However, in Banks v. State of Oklahoma, 953 P.2d 344 (Okla. Ct. Crim. App. 1998), the Oklahoma Court of Criminal Appeals went

to great lengths to note the procedure a prisoner may follow when attempting to file an appeal out of time.

The procedures established for criminal proceedings in Oklahoma provide for an appeal out of time when a prisoner could not appeal or his appeal was not timely filed "through no fault of his own. . . ." Under our appeal out of time procedure, a delay in filing the appeal or even the inability to file the appeal – for any reason . . . that is not the fault of the pro se prisoner, can result in relief. Moreover, our procedures allow the trial court to initially resolve factual disputes concerning why the appeal was not timely filed.

Banks v. State, 953 P.2d at 346 (citing Rules 5.2(a) and 2.1(e) of the Rules of the Oklahoma Court of Criminal Appeals, and Smith v. State, 611 P.2d 276 (Okla. Ct. Crim. App. 1980)). Therefore, the Magistrate Judge concludes that the Petitioner's claim is unexhausted and should be presented to the Oklahoma Courts.

The only other option for declaring Petitioner's claims exhausted is to determine that presentation to the Oklahoma Courts would be futile. Petitioner has presented no facts to this Court and this Court is unable to make that determination. Furthermore, as noted above, a determination of futility imposes additional burdens upon Petitioner. The Magistrate Judge concludes that the best course of action is to **GRANT** Respondent's Motion to Dismiss and require Petitioner to first exhaust his remedies in state court.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the

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

Dated this 19th day of October 1999.


Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

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

21st Day of October 1999.
C. Cantello, Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY CHAPMAN and ALICE
CHAPMAN, surviving parents of
JEFFREY WILLIAM CHAPMAN,
deceased,

Plaintiffs,

v.

GENERAL KIDDIE RIDES, INC.,

Defendant.

ENTERED ON DOCKET

DATE OCT 20 1999

FILED

OCT 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

98-CV-860-H

ORDER OF DISMISSAL WITHOUT PREJUDICE

The Court finds that Plaintiffs' Application should be granted and an Order filed dismissing this action without prejudice so that it may be refiled within a year if the Defendant or a representative of the Defendant can be found.

This 19TH day of October, 1999.



Sven Erik Holmes
United States District Judge

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

KRYSTAL CARMAN,)
)
Plaintiff,)
)
vs.)
)
BARTLESVILLE EXAMINER)
ENTERPRISE,)
)
Defendant.)

ENTERED ON DOCKET

DATE OCT 20 1999

Case No. 98-CV-878-H(J)

F I L E D

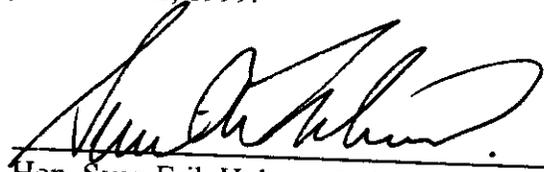
OCT 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

On October 8, 1999, the above-styled case came on for hearing on the Court's September 17, 1999 Order requiring Plaintiff Krystal Carman to personally appear before the Court on October 8, 1999 at 11:30 a.m. to produce the responsive documents and show cause why she should not be required to reimburse Defendant for its costs and fees incurred as a result of having to file a Motion to Compel and a Motion for Sanctions. Said Order further stated that should the Plaintiff fail to appear as directed by the Court that Defendant's Request for Dismissal would be deemed confessed and that Plaintiff's case would be dismissed with prejudice. This Court, being fully advised, finds that Plaintiff did not comply with the September 17, 1999 Order and failed to appear at the October 8, 1999 hearing at 11:30 a.m. Accordingly, the Court finds that Plaintiff's claims against Defendant Bartlesville Examiner Enterprise shall be dismissed with prejudice with each party to bear their own costs and attorneys' fees.

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



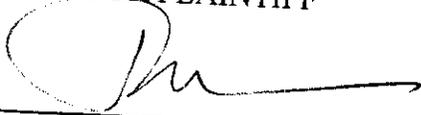
Hon. Sven Erik Holmes, Judge
United States District Court

READ AND APPROVED:

Katherine T. Waller

Katherine T. Waller, OBA #15051
403 South Cheyenne, Suite 1100
Tulsa, Oklahoma 74103
(918) 582-9339

ATTORNEY FOR PLAINTIFF



J. Patrick Cremin, OBA #2013
William D. Fisher, OBA #17621
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0400

ATTORNEYS FOR DEFENDANT

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

F I L E D

OCT 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 BRIAN MAURICE FULLER,)
)
 Defendant.)

Case No. 91-CR-143-E
99-CV-411-E

ENTERED ON DOCKET

DATE OCT 20 1999

ORDER

Now before the Court is the Motion for Review and Modification of Sentence Due to Changed Circumstances (Docket #44) of the Defendant, Brian Maurice Fuller.

In his motion, Fuller requests review and modification of his sentence because of a medical condition. Fuller complains of lower back problems which have caused him to be "in constant agony," "confined to a wheel chair unable to walk or stand," and unable to work. He contends that his condition leaves him susceptible to attack by other inmates, that his condition is made worse by incarceration and that he can't get adequate treatment while incarcerated. Although this motion was originally filed in the United States District Court for the Southern District of Texas, it was transferred to this Court as the sentencing court for Fuller.

Before this matter was transferred, but around the same time he filed his motion in Texas, this Court considered Fuller's medical condition in a Motion for Dismissal of Restitution. At that time, the Court found that the records accompanying Fuller's motion did not support his claims, that the radiological interpretation describes Fuller's condition as "mild to moderate," and that personnel at the Health Services Unit at FMC Fort Worth, Fort Worth, Texas reported that Fuller had recently

45

had a disc fused, and was in anticipation of full recovery with only minor work restrictions. Fuller did not appeal that Order. There is nothing in Fuller's presentation to the Court on this current motion that would cause the Court to change its earlier conclusion.

Fuller's Motion for Review and Modification of Sentence Due to Changed Circumstances (Docket #44) is Denied.

IT IS SO ORDERED THIS ^{B²H}10 DAY OF OCTOBER, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED
OCT 1 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
CEDRIC SEBASTIAN STUBBS,)
)
Defendant.)

Case No. 93-CR-108-E
(99-CV-731-E)

ENTERED ON DOCKET
DATE OCT 20 1999

ORDER

Now before the Court is the Motion Pursuant to 28 U.S.C. §2255 to Vacate, Set Aside, or Correct a Sentence by a person in Federal Custody (Docket #15).

Stubbs plead guilty to one count of Possession of a Firearm During Commission of a Drug Trafficking Crime in violation of 18 U.S.C. §924(c), and was sentenced to sixty months imprisonment to run consecutively to any sentence imposed in Tulsa County Case CF93-0235. Stubbs was sentenced on February 24, 1994, and, because he did not appeal, his judgment of conviction became final March 6, 1994. He filed this Motion to Vacate asserting that his guilty plea is constitutionally invalid because he was misinformed of the true nature of the charge against him. In essence, Stubbs is arguing that he plead guilty to a charge that is not supported by the facts because of the ruling in Bailey v. United States, 516 U.S. 137, 144, 116 S.Ct. 501, 506, 133 L.Ed. 2d 472 (1995), Stubbs argues that, under Bailey, §924(c)'s "use" prong requires the government to show "active employment of the firearm," and no such active employment occurred in this case.

The government does not address the merits of Stubbs' argument. Rather, the government contends that Stubbs' motion is barred by the one year period of limitation governing motions for

18

collateral relief under 28 U.S.C. §2255. Pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA) provisions, which took effect on April 24, 1996, there is a one year period of limitation governing §2255 motions. The one year period runs from the latest of 1) “the date on which the judgment of conviction becomes final”; 2) “ the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removes, if the movant was prevented from making a motion by such governmental action”; 3) “the date on which the right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review”; or 4) “the date on which the facts supporting the claim or claims could have been discovered through the exercise of due diligence.” 28 U.S.C. §2255

It is undisputed that Stubbs’ judgment of conviction became final prior to the effective date of the AEDPA. Moreover, Stubbs, fails to allege any event that would justify a tolling of the limitations period or addresses the second, third or fourth specified events from which a limitations period would run. Therefore the rule of United States v. Simmonds, 111 F.3d 737, 745-46, “prisoners whose convictions became final on or before April 24, 1996 must file their §2255 motions before April 24, 1997,” is dispositive. Stubbs motion is out of time because it was not filed before April 24, 1997.

In his reply to the government’s response, Stubbs does argue that his “actual innocence” of the firearm violation causes his guilty plea to be constitutionally invalid. This argument, however, does not help Stubbs who simply brings his claim out of time. Nothing in Bousley v. United States, 118 S.Ct. 1604 (1998), relied on by Stubbs, addresses the one year limitation period imposed by the AEDPA.

Stubbs' Motion Pursuant to 28 U.S.C. §2255 To Vacate, Set Aside, Or Correct Sentence By
a Person In Federal Custody (Docket # 15) is Denied.

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


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

MT

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

FILED
OCT 19 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

G. THELMA EIDSON,)
)
Plaintiff,)
)
v.)
)
INSURANCE OF AMERICA)
AGENCY, INC.,)
)
Defendant.)

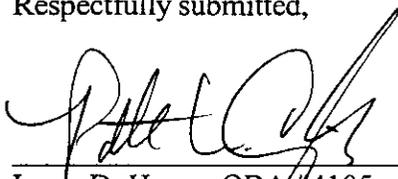
Case No. 99-CV-0330-B ✓

ENTERED ON DOCKET
OCT 20 1999
DATE _____

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), Plaintiff, by and through her attorney, hereby dismisses **with prejudice** the above-entitled action.

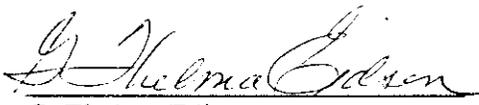
Respectfully submitted,



Larry D. Henry, OBA #4105
Patrick W. Cipolla, OBA #15203

GABLE & GOTWALS
A Professional Corporation
100 West 5th Street
Suite 1000
Tulsa, Oklahoma 74103-4219
918/585-8141

Attorneys for Plaintiff

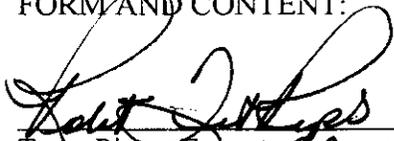


G. Thelma Edison
Plaintiff

15

CH

APPROVED AS TO
FORM AND CONTENT:



Trent Pipes, Esq. OBA 11471

Shadid & Pipes

641 N.E. 39th Street

Oklahoma City, Oklahoma 73105

(405) 528-3400

Attorney for Defendant

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

MIDWEST MUTUAL INSURANCE
COMPANY,

Plaintiff,

v.

LLOYD A. SCHERWINSKI and
RETA M. SCHERWINSKI

Defendants.

ENTERED ON DOCKET

DATE OCT 19 1999

Case No. 97-CV-1125-BU (M)

FILED

OCT 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Having duly considered the parties' settlement of this dispute and their Joint Stipulation of Dismissal with Prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), the Court, accordingly ORDERS that plaintiff Midwest Mutual Insurance Company's claims in this case are DISMISSED WITH PREJUDICE. Each party will bear their own costs and fees.

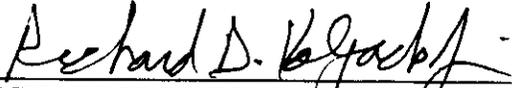
ENTERED this 15th day of October, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

10

Submitted by:

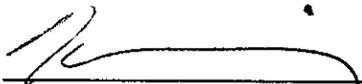


RICHARD D. KOLJACK, JR., OBA #11662
GABLE GOTWALS MOCK SCHWABE
KIHLE GABERINO
2000 NationsBank Center
15 West Sixth Street
Tulsa, OK 74119-5447
(918) 582-9201

and

JENNIFER GILLE BACON, MBA #27432
JOEL R. MOSHER, MBA #32447
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, MO 64105
(816) 421-3355
(816) 374-0509 fax

ATTORNEYS FOR PLAINTIFF,
MIDWEST MUTUAL INSURANCE COMPANY



KENNETH N. MCKINNEY, OBA #006036
MARY E. NELSON, OBA #011940
KRIS T. LEDFORD, OBA #017552
McKINNEY & STRINGER, P.C.
101 North Broadway, Suite 800
Oklahoma City, OK 73102
405/239-6444
405/239-7902 fax

ATTORNEYS FOR DEFENDANTS
LLOYD A. SCHERWINSKI and RETA M. SCHERWINSKI

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

ENTERED ON DOCKET

DATE OCT 19 1999

UNITED STATES OF AMERICA)
Plaintiff,)
)
vs.)
)
Lawrence B. Keel;)
Daniel D. Johnson;)
Joseph D. Honerkamp; and,)
Robert Jean.)
Defendants.)

Case No. 98CV0267 E (M)

FILED
OCT 19 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Upon the Motion To Dismiss Based Upon Settlement filed by the Plaintiff
United States and good cause being shown therein,

IT IS THEREFORE ORDERED that the above styled action is dismissed with
prejudice to refiling;

IT IS FURTHER ORDERED that the parties will pay their own costs and
attorney fees associated with this matter.

IT IS SO ORDERED on October 18, 1999.


JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED

OCT 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEBRA R. TERRY,)
)
 Plaintiff,)
)
 vs.)
)
 BOARD OF COUNTY)
 COMMISSIONERS OF OTTAWA)
 COUNTY and BEVERLY STEPP,)
 in her official capacity as Court Clerk)
 of Ottawa County,)
)
 Defendants.)

No. 99-CV-125-E

ENTERED ON DOCKET
DATE OCT 19 1999

DEFAULT JUDGMENT

Plaintiff's Motion for Default Judgment was granted on August 3, 1999. A hearing on the issue of damages was held before the Court on September 28, 1999, and an order awarding damages was entered on October 12, 1999.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court, in accordance with its August 3, 1999 and October 12, 1999 orders, that plaintiff Debra R. Terry be awarded default judgment against the defendants Board of County Commissioners of Ottawa County and Beverly Stepp in her official capacity as Court Clerk of Ottawa County in the amount of \$28,711.00, with post-judgment interest thereon as provided by law. (5.411% p^{er} annum)

ORDERED this 18th day of October, 1999.


JAMES O. ELLISON
United States District Judge

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

FILED

OCT 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THOMAS EUGENE JOHNSON,)
)
Petitioner,)
)
vs.)
)
GARY GIBSON, Warden,)
)
Respondent.)

Case No. 99-CV-054-H (E) ✓
(Base File)

99-CV-571-H (E)

ENTERED ON DOCKET

DATE OCT 19 1999

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed with prejudice as barred by the statute of limitations. The Clerk shall file a copy of this Judgment in Case No. 99-CV-571-H.

IT IS SO ORDERED.

This 14th day of October, 1999.


Sven Erik Holmes
United States District Judge

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

THOMAS EUGENE JOHNSON,)
)
 Petitioner,)
)
 vs.)
)
 GARY GIBSON, Warden,)
)
 Respondent.)

ENTERED ON DOCKET
DATE OCT 19 1999

Case No. 99-CV-054-H (E)
(Base File)

99-CV-571-H (E)

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

ORDER

The Court has for consideration the Second Report and Recommendation (the "Second Report") of the United States Magistrate Judge, entered September 21, 1999 (#14) in this habeas corpus action brought pursuant to 28 U.S.C. § 2254. Upon supplementation of the record by Respondent, the Magistrate Judge stands by her original recommendation (see #6) that Petitioner's petition for a writ of habeas corpus be dismissed as barred by the statute of limitations. Neither party has filed an objection to the Second Report and the time for filing objections has passed.

Having reviewed the Second Report and the facts of this case, pursuant to Rule 8(b) of the Rules Governing Section 2254 Cases and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Second Report should be adopted and affirmed.

IT IS THEREFORE ORDERED that:

1. The Second Report and Recommendation of the Magistrate Judge (#14), supplementing the first Report and Recommendation (#6), is **adopted and affirmed**.
2. Respondent's motion to dismiss (#4) is **granted**.

15

3. The petition for a writ of habeas corpus is **dismissed with prejudice**.
4. The Clerk shall file a copy of this Order in Case No. 99-CV-571-H.

IT IS SO ORDERED.

This 14th day of October, 1999.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BECKY WEST,)
)
 Plaintiff,)
)
 v.) 98-CV-728-H)
)
 DELAWARE COUNTY SOLID,)
 WASTE AUTHORITY, et. al.)
)
 Defendants.)

ENTERED ON DOCKET
DATE OCT 19 1999

FILED
OCT 15 1999 *SA*
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Plaintiff's Motion for Order Allowing Dismissal Without Prejudice (Docket # 16), filed September 17, 1999. Pursuant to Fed.R.Civ.P. 41(a)(2), the Court finds that this action should be dismissed without prejudice. Plaintiff's motion to dismiss this action without prejudice (Docket # 16) is granted.

IT IS SO ORDERED.

This 14th day of October, 1999.


Sven Erik Holmes
United States District Judge

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

DERRICK DEON McBEE,)
)
 Petitioner,)
)
 vs.)
)
 THE ATTORNEY GENERAL)
 OF THE STATE OF OKLAHOMA; and)
 J. W. BOOKER, Warden, United States)
 Penitentiary, Leavenworth, Kansas,)
)
 Respondents.)

ENTERED ON DOCKET
DATE OCT 19 1999

Case No. 99-CV-147-H (E)

FILED

OCT 15 1999 *SA*

Phil Lombardi, Clerk-
U.S. DISTRICT COURT

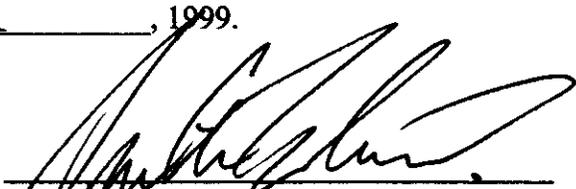
JUDGMENT

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

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

IT IS SO ORDERED.

This 14th day of OCTOBER, 1999.


Sven Erik Holmes
United States District Judge

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

DERRICK DEON McBEE,)
)
Petitioner,)
)
vs.)
)
THE ATTORNEY GENERAL)
OF THE STATE OF OKLAHOMA; and)
J. W. BOOKER, Warden, United States)
Penitentiary, Leavenworth, Kansas,)
)
Respondents.)

ENTERED ON DOCKET

DATE OCT 19 1999

Case No. 99-CV-147-H (E) ✓

FILED

OCT 15 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge entered on August 2, 1999 (Docket #10), in this habeas corpus action brought pursuant to 28 U.S.C. § 2254. The Magistrate Judge recommends that Respondent's motion to dismiss petition as barred by the statute of limitations (#5) be granted, Respondent's motion to substitute proper party (#6) be denied, and Petitioner's petition for a writ of habeas corpus be dismissed. None of the parties has filed an objection to the Report and the time for filing an objection has passed.

Having reviewed the Report and the facts of this case, pursuant to Rule 8(b) of the Rules Governing Section 2254 Cases and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the Magistrate Judge (#10) is **adopted and affirmed**.
2. Respondent's motion to dismiss (#5) is **granted**.
3. Respondent's motion to substitute proper party (#6) is **denied**.
4. The petition for a writ of habeas corpus is **dismissed with prejudice** as barred by the statute of limitations.

IT IS SO ORDERED.

This 14TH day of OCTOBER, 1999.



Sven Erik Holmes
United States District Judge

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

LYNDELL EDWARDS,

Plaintiff,

vs.

BIG FOUR FOUNDARIES CORP.

Defendant.

ENTERED ON DOCKET

DATE OCT 19 1999

Case No. 99-CV-0423-H(E) ✓

FILED

OCT 15 1999 SA

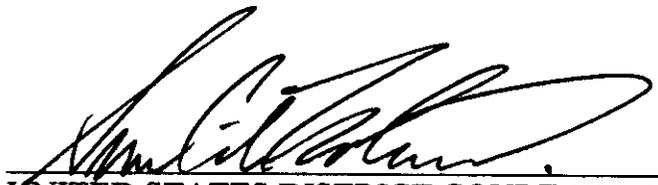
Phil Lombardi, Clerk
U.S. DISTRICT COURT

FILED
SEP 2 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now on this 14TH day of OCTOBER, 1999, for good cause shown, the
Plaintiff's Application to Dismiss the Case without prejudice is granted.

IT IS SO ORDERED


UNITED STATES DISTRICT COURT JUDGE

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

CHARLEY HART WILSON,)
)
) Petitioner,)
)
)
 vs.)
)
) REGINALD HINES, Warden of the Jess Dunn)
) Correctional Center,)
)
) Respondent.)

ENTERED ON DOCKET
OCT 19 1999
DATE _____

Case No. 99-CV-13-Bu(J) ✓

F I L E D

OCT 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court is Petitioner's Petition for a Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254. At the time Petitioner filed his Petition, he was serving an eight year prison sentence at the Jess Dunn Correctional Center in Taft, Oklahoma after being convicted for robbery with a firearm. On April 7, 1999, Petitioner filed a document with the Court indicating that he has been released from custody and is now residing in Tulsa, Oklahoma. See Doc. No. 9.

Prior to Petitioner's release, the Court ordered Respondent to show cause why a writ of habeas corpus should not be issued. [Doc. No. 3]. Respondent filed its response on April 8, 1999. Petitioner never responded to Respondent's submission. The Court entered an Order on June 1, 1999 directing Petitioner to file a response to Respondent's April 8th submission. [Doc. No. 11]. To date, Petitioner has filed no response to Respondent's April 8th submission.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996) establishes a deferential standard of review^{1/} for state court decisions. Prior to the AEDPA's passage, federal courts reviewing habeas petitions were not required to pay any special deference to the underlying state court decision. See, e.g., Brown v. Allen, 344 U.S. 443, 458 (1953) (remarking that the state court decision was nothing other than "the conclusion of a court of last resort of another jurisdiction"). In sharp contrast, the AEDPA's amendments to § 2254 elevate the role that a state court's decision is to play in a habeas proceeding. The AEDPA's amendments specifically direct courts reviewing habeas petitions to make the state court decision the focal point of review. Habeas relief can now only be granted if the state court decision deviates from the standard articulated in 28 U.S.C. § 2254(d). See DuBois, 1998 WL 257206, at *3.

Section 2254(d) provides as follows:

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

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined

^{1/} Referring to standards of review in a habeas action filed in district court is somewhat of a misnomer. A habeas petition is considered to be an original proceeding, not an appeal of a state court judgment. See Fay v. Noia, 372 U.S. 391, 423-24 (1963). Nevertheless, 28 U.S.C. § 2254(d) serves the same purpose as traditional standards of review. The undersigned, as does the First Circuit, will, therefore, exercise literary license and refer to the standards articulated in § 2254(d) as standards of review. See O'Brien v. DuBois, 145 F.3d 16, 18 n.1 (1st Cir. 1998).

by the Supreme Court of the United States;
or

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

28 U.S.C. § 2254(d).

Petitioner raises three grounds for relief. First, Petitioner argues that he was denied his constitutional right to effective assistance of counsel. Petitioner alleges that his trial counsel's representation of Petitioner and Petitioner's co-defendant created an irreconcilable conflict of interest under the facts of his case. Second, Petitioner argues that the police conducted a suggestive, one-man line up which violated his constitutional right to due process. Petitioner also argues that the lineup was the fruit of an unconstitutional arrest. Third, Petitioner argues that his constitutional right to a speedy trial was violated.

Petitioner raised each of the issues identified above in a direct appeal to the Oklahoma Court of Criminal Appeals ("OCCA"). The OCCA reviewed each of these claims on the merits and found that none of them required reversal or modification of Petitioner's conviction or sentence. See Doc. No. 10, Exhibit "A." In his response to the show cause order, Respondent argues that the OCCA (1) did not decide the issues raised by Petitioner contrary to clearly established Supreme Court precedent, (2) did not apply an unreasonable application of clearly established Supreme Court precedent to the issues raised by Petitioner, and (3) did not decide the issues raised by Petitioner based on an unreasonable determination of the facts in light of the

evidence presented at Petitioner's trial. See Doc. No. 10. Petitioner has not responded to any of Respondent's arguments.

The Court has reviewed Respondent's brief and finds it persuasive. The Court agrees that Petitioner has failed to demonstrate that the OCCA either decided the issues raised by Petitioner contrary to clearly established Supreme Court precedent, applied an unreasonable application of clearly established Supreme Court precedent to the issues raised by Petitioner, or decided the issues raised by Petitioner based on an unreasonable determination of the facts in light of the evidence presented at Petitioner's trial. Consequently, the OCCA's decision must be respected, and a writ of habeas corpus may not be granted in this case. See 28 U.S.C. § 2254(d).

Petitioner's Petition for a Writ of Habeas Corpus is **DENIED** on the merits. The Court Clerk is directed to terminate this case.

IT IS SO ORDERED.

Dated this 15 day of October 1999.


Michael Burrage
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 CHARLES D. JAMISON,)
)
 Defendant.)

DATE OCT 19 1999

No. 99CV0489H(E)

F I L E D

OCT 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

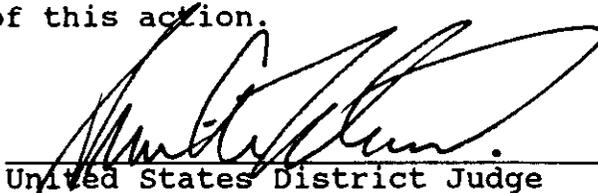
DEFAULT JUDGMENT

This matter comes on for consideration this 14TH day of OCTOBER, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Charles D. Jamison, appearing not.

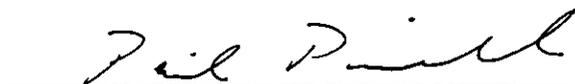
The Court being fully advised and having examined the court file finds that Defendant, Charles D. Jamison, was served with Summons and Complaint on August 3, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Charles D. Jamison, for the principal amount of \$3,726.66, plus accrued interest of \$3,065.83, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of

\$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.411 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

PEP/11f

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

JUDY A. GRIMM,
445-44-6814

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

OCT 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-872-M ✓

ENTERED ON DOCKET

DATE OCT 19 1999

ORDER

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

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

¹ Plaintiff's May 4, and June 13, 1995, applications for disability benefits were denied and the denials were affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held February 3, 1997. By decision dated February 11, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on October 7, 1998. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born May 26, 1944, and was 52 years old at the time of the hearing. She has an 8th grade education and formerly worked as an assembler, line worker and housekeeper. She claims to have been unable to work since May 13, 1995, as a result of hand problems; neck, shoulder and back pain; varicose veins; shortness of breath; sinus problems; allergies; and depression. The ALJ found that Plaintiff does not have a severe impairment, and therefore is not disabled. [R. 27-28]. The case was thus decided at step two of the five-step evaluative sequence for determining whether Plaintiff is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) should have proceeded beyond step two to fully evaluate her alleged impairments and (2) did not have good cause for rejecting the opinion of Dr. Lee, Ph.D., whose opinion establishes the

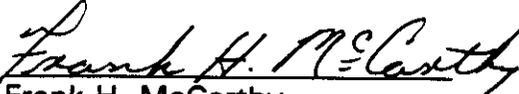
existence of a severe impairment. The court finds that the ALJ's analysis should have proceeded beyond step two and therefore the case must be remanded.

It is well-settled that Plaintiff has the burden to prove disability. *Hawkins v. Chater*, 113 F.3d 1162, 1164 (10th Cir. 1997). At step two to demonstrate that an impairment is severe, the plaintiff must show that it "significantly limits [her] physical or mental ability to do basic work activities." 20 C.F.R. § 416.920(c). The Tenth Circuit has characterized the step two showing as "de minimis." *Hawkins*, 113 F.3d at 1169. The mere presence of a condition or ailment documented in the record is not sufficient to prove that the claimant is significantly limited in the ability to do basic work activities. The claimant must establish by objective medical evidence that she has a medically determinable physical or mental impairment and that the impairment could reasonably be expected to produce the alleged symptoms. *See Hinkle v. Apfel*, 132 F.3d 1349, 1352 (10th Cir. 1997). Once the relationship between a medically determinable impairment and the symptoms is established, the intensity, persistence, and limiting effects of the symptoms must be considered along with the objective medical and other evidence in determining whether the impairment is severe. SSR 96-3p. If the symptom related limitations have more than a minimal effect on the ability to do basic work activities, the ALJ must find that the impairment is "severe" and must proceed to the next step in the evaluative sequence, even if the objective medical evidence would not in itself establish that the impairment is severe. *Id.*

Plaintiff complains of limitations in her ability to walk and stand attributable to having varicose veins. [R. 48]. On January 12, 1988, well before the alleged onset date, Plaintiff underwent a physical evaluation for work fitness. The physician found her to be in the category of "limited acceptability" for work. Because she was symptomatic with varicose veins, she was limited to "no constant standing or walking." [R. 185]. The consultative exam performed on July 31, 1995, confirmed the existence of varicose veins. [R. 302]. Plaintiff also complains of shortness of breath. An X-ray report dated March 2, 1992, reported the existence of chronic obstructive pulmonary disease. [R. 217]. Another X-ray report dated April 9, 1996, reported that chronic obstructive pulmonary disease was suspected. [R. 363]. Plaintiff complained of anxiety and depression. The consultative examiner found her to be depressed and to have a generalized anxiety disorder. [R. 324]. These findings establish the existence of medically determinable impairments that could reasonably be expected to produce the leg pain, breathing difficulties, and mental problems which Plaintiff claimed interfered with her ability to work. Therefore the court finds that the ALJ should have proceeded beyond step-two in the sequential evaluation.

The decision of the Commissioner finding Plaintiff not disabled is REVERSED and the case REMANDED for further proceedings. In remanding this case, the court does not dictate the result, nor does it suggest that the record is insufficient. Rather, remand is ordered to assure that a proper analysis is performed and the correct legal standards are invoked in reaching a decision based upon the facts of the case.

SO ORDERED this 18th Day of October, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

BRIAN ALAN LAND,)
)
Plaintiff,)
)
vs.)
)
SUE BAKER and STANLEY GLANZ,)
)
Defendants.)

ENTERED ON DOCKET

DATE OCT 19 1999

No. 99-CV-556 H (J)

FILED

OCT 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

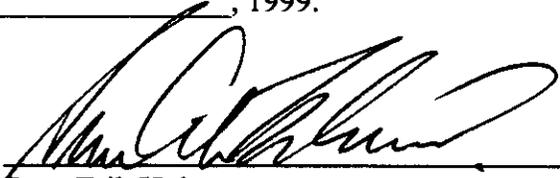
On July 12, 1999, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983 along with a motion for leave to proceed *in forma pauperis*. By order entered July 27, 1999, the Court granted Plaintiff leave to proceed *in forma pauperis* and advised Plaintiff that this action could not proceed unless he paid an initial partial filing fee of \$3.35 by August 26, 1999. Plaintiff was further advised that "unless by [August 26, 1999] he has either (1) paid the initial partial filing fee, or (2) shown cause in writing for the failure to pay, this action will be subject to dismissal without prejudice to refile" (#3). To date, Plaintiff has neither submitted the initial partial filing fee nor shown cause in writing for failing to do so. Further, no correspondence from the Court to Plaintiff has been returned.

Because Plaintiff has not paid the initial partial filing fee in compliance with the Court's Order of July 27, 1999, the Court finds that this action may not proceed and should be dismissed without prejudice for failure to prosecute.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's civil rights Complaint is
dismissed without prejudice for lack of prosecution.

IT IS SO ORDERED.

This 14TH day of October, 1999.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BETTY J. McMAHAN,
Plaintiff,
v.
KENNETH S. APFEL, Commissioner of
Social Security,
Defendant.

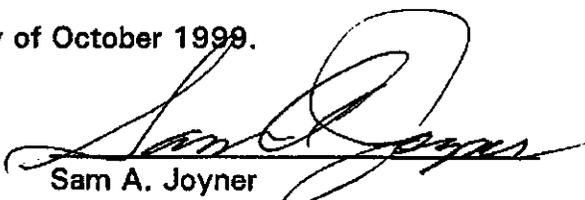
No. 97-CV-598-J ✓

ENTERED ON DOCKET
DATE OCT 19 1999

ORDER REMANDING CASE TO COMMISSIONER

Pursuant to the mandate of the United States Court of Appeals for the Tenth Circuit, the above-referenced matter is **REMANDED** to the Commissioner for further proceedings consistent with the Court of Appeals' Order and Judgment entered on August 16, 1999, and filed in this Court on October 14, 1999.

It is so ordered this 18th day of October 1999.


Sam A. Joyner
United States Magistrate Judge

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

SERCEL, S.A.,)
)
Plaintiff,)
)
v.)
)
AVALON INTERNATIONAL, L.C.,)
)
Defendant.)

ENTERED ON DOCKET

DATE OCT 19 1999

Case No. 98-CV-800-H (E)

FILED

OCT 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF ADMINISTRATIVE CLOSURE

On joint motion of the parties and for good cause shown, this action case is hereby placed in administrative closure until a joint motion to reopen the case is filed or June 1, 2000, whichever occurs first. If a motion to reopen the case has not been filed on or before that date, then as of that date all Plaintiff's claims herein shall be deemed dismissed with prejudice, with each party to bear its own attorneys' fees and costs.

DATED this 14TH day of October, 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

MARSHALL C. GASTON,
SSN: 440-54-6821,

Plaintiff,

v.

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

Defendant.

OCT 15 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 98-CV-706-M

ENTERED ON DOCKET

DATE OCT 18 1999

JUDGMENT

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


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

MARSHALL C. GASTON,
440-54-6821

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-706-M ✓

OCT 15 1999 SA
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE OCT 18 1999

ORDER

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

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

¹ Plaintiff's November 15, 1994, applications for disability benefits were denied the denials were affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held March 5, 1996. By decision dated May 20, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on July 13, 1998. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born October 19, 1952, and was 43 years old at the time of the hearing. He has a high school education and formerly worked in maintenance and repair, as an insulation installer, cable repairer, and as a machine operator. He claims to have been unable to work since August 4, 1994, as a result of back and leg pain, and depression. The ALJ determined that although Plaintiff is unable to perform his past relevant work, he has the capacity to perform a full range of light work subject to alternating between sitting and standing about every half hour and doing no more than occasional bending or stooping. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of light and sedentary jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that: (1) the ALJ failed to develop the record as to Plaintiff's mental impairment; (2) the findings on the PRT form are not supported by substantial evidence; and (3) the ALJ failed to properly evaluate Plaintiff's subjective complaints. The Court concludes that the record contains substantial evidence supporting the ALJ's denial of benefits in this case, and therefore affirms the Commissioner's denial of benefits.

The ALJ has a basic obligation in every case to ensure that an adequate record is developed, consistent with the issues raised. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992), *Henrie v. U.S. Dept. of Health and Human Services*, 13 F.3d 359, 360-1 (10th Cir. 1993). In particular, 42 U.S.C. § 423(d)(5)(B) requires:

In making any determination with respect to whether an individual is under a disability or continues to be under a disability, the Commissioner or Social Security . . . shall develop a complete medical history of at least the preceding twelve months for any case in which a determination is made that the individual is not under a disability. In making any determination the Commissioner of Social Security shall make **every reasonable effort** to obtain from the individual's treating physician . . . all medical evidence. . . [emphasis supplied].

The court finds that the record was fully developed as to Plaintiff's mental impairment. The alleged date of Plaintiff's onset of disability is August 1994. Plaintiff did not seek medical attention for either physical or mental ailments from October 1993 until April 17, 1995, when he saw Dr. Xing one time for complaints of back pain and skin

rashes. [R. 167]. At the time of the hearing, March 5, 1996, Plaintiff had another appointment scheduled with Dr. Xing on March 21. [R. 48, 58]. At the hearing the ALJ and Plaintiff's counsel discussed the need for a mental examination, counsel expected Dr. Xing to refer Plaintiff for a mental examination and the record was held open to receive the examination report. [R. 55-57]. A psychiatric examination did occur and the record contains the report of that evaluation, performed March 25, 1996. [R. 174]. Although Plaintiff makes unsupported claims to the contrary, there is no indication that other records were in existence at the time of the decision for the ALJ to have gathered.

Plaintiff asserts that the ALJ erred in failing to order a consultative medical examination. "[T]he ALJ should order a consultative exam when evidence in the record establishes the reasonable possibility of the existence of a disability and the result of the consultative exam could reasonably be expected to be of material assistance in resolving the issue of disability." *Hawkins v. Chater*, 113 F.3d 1162, 1169 (10th Cir. 1997) However, the record contains no evidence to suggest that a consultative examination would have produced material information.

Plaintiff claims to have been disabled since August 1994, in part because of depression. On January 18, 1995, Plaintiff told the consultative examiner that he was depressed due to the recent (October 1994) death of his wife, and the examiner found him to be depressed. [R. 153-54]. On April 17, 1995, Dr. Xing prescribed Amitriptyline, an anti-depressant, although Dr. Xing's notes do not indicate a diagnosis of depression. [R. 167]. On March 25, 1996, Plaintiff underwent a psychiatric

examination wherein the doctor recorded that Plaintiff reported decreased sleep the past 9 months; ok appetite; feelings of helplessness and some anhedonia present; energy level is up and down; money problems and some difficulty with concentration. [R. 174]. The psychiatrist's assessment of Plaintiff indicated major depression; alcohol and cannabis abuse in remission; and antisocial traits. [R. 177]. He prescribed Zoloft, an antidepressant, and referred him for therapy. *Id.* The Court finds that the ALJ did not err in failing to order a consultative examination. There is no direct conflict in the medical evidence requiring resolution; the medical evidence in the record is not inconclusive; and additional tests are not required to explain a diagnosis already contained in the record. *See Hawkins*, at 1166.

Plaintiff argues that the case should be remanded because the ALJ's findings on the Psychiatric Review Technique Form ("PRT") are not supported by substantial evidence. The Tenth Circuit has ruled that "there must be competent evidence in the record to support the conclusion recorded on the [PRT] form and the ALJ must discuss in his opinion the evidence he considered in reaching the conclusions expressed on the form." *Washington v. Shalala*, 37 F.3d 1437, 1442 (10th Cir. 1994) (quoting *Woody v. Secretary of Health & Human Servs.*, 859 F.2d 1156, 1159 (3rd Cir. 1988)).

Concerning his conclusions on the PRT, the ALJ noted:

The claimant does not have any significant limitation on his ability to perform his activities of daily living, as he does not have enough time to get everything done. . . . The claimant's social function is not significantly affected; he continues to visit his neighbor and any limitations are those related to his pain. . . . There is no demonstrated problem with the claimant's concentration because he can play a

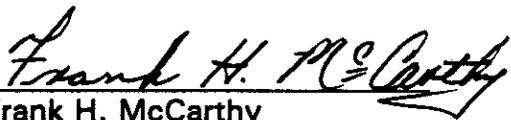
guitar and build a model with his son. . . .The claimant has never had any episodes of deterioration or decompensation in work or work-like settings.

[R. 14-15]. The Court finds that the ALJ adequately discussed the evidence he considered in reaching the conclusions expressed on the PRT form.

The ALJ explained his reasons for discounting claimant's pain allegations, including that Plaintiff takes pain medication only a couple of times a week; his daily activities; and Plaintiff's testimony he can lift 35-40 pounds. Because the court concludes that the ALJ properly linked his credibility finding to the record, the court finds no reason to deviate from the general rule to accord deference to the ALJ's credibility determinations. See *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir. 1995)(factors to be considered by ALJ in assessing credibility to include extensiveness of attempts, medical or nonmedical to obtain relief and frequency of medical contacts); *James v. Chater*, 96 F.3d 1341, 1342 (10th Cir. 1996) (witness credibility is province of Commissioner whose judgment is entitled to considerable deference).

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

SO ORDERED this 15th Day of October, 1999


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JACKIE D. THOMASON,
SSN: 442-54-3529

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

FILED

OCT 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-807-J ✓

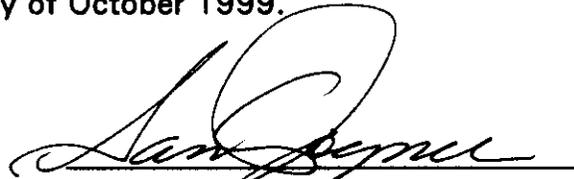
ENTERED ON DOCKET

DATE OCT 18 1999

JUDGMENT

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

It is so ordered this 15th day of October 1999.



Sam A. Joyner
United States Magistrate Judge

10

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JACKIE D. THOMASON,
SSN: 442-54-3529

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

FILED

OCT 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-807-J ✓

ENTERED ON DOCKET

DATE OCT 18 1999

ORDER^{1/}

Plaintiff, Jackie D. Thomason, 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 failed to apply the appropriate legal standards in evaluating the opinion of Plaintiff's treating physician, and (2) the ALJ relied on an "absence of evidence" at Step Five. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was 49 years old at the time of the hearing before the ALJ. [R. at 39]. Plaintiff testified that he completed high school, that he attended two years at a Tulsa

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

^{2/} Administrative Law Judge R.J. Payne (hereafter "ALJ") concluded that Plaintiff was not disabled on April 13, 1997. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on September 4, 1998. [R. at 5].

vocational school, and that he attended Oklahoma State Technical school for two years. [R. at 41].

According to Plaintiff, he initially injured his back in May of 1984 when he lifted and carried an air conditioning unit. Plaintiff sought treatment and was able to return to work. [R. at 42]. Plaintiff testified that he aggravated the injury in 1994, and had surgery to fuse disks and insert hardware in May of 1994. [R. at 44]. Plaintiff noted that although his surgeon continually recommended physical therapy, Plaintiff was unable to afford it. According to Plaintiff, after the surgery he did fairly well for approximately three months, but he then began to deteriorate. [R. at 46]. Plaintiff additionally testified that he had a second surgery in December 1995 to remove the hardware and to insert other hardware. Plaintiff again stated that he initially felt fairly well after the surgery, but approximately three months post-surgery he began to decline. [R. at 46]. Plaintiff testified that he was unable to put on his shoes, socks or underwear, and that his wife dressed him. [R. at 48].

According to Plaintiff, the pain he experiences is on the level of approximately a six on a scale from one to ten. [R. at 50]. Plaintiff stated that he takes pain medications approximately every five hours. [R. at 49]. Plaintiff additionally noted that he receives cortisone injections for his knees and that he experiences pain in his knees. [R. at 52]. Plaintiff testified that his right leg swells after walking only one block. [R. at 64].

A Residual Functional Capacity ("RFC") Assessment completed October 24, 1995 indicated that Plaintiff could occasionally lift 20 pounds, frequently lift 10

pounds, stand or walk six hours in an eight hour day, and sit six hours in an eight hour day. [R. at 86]. In addition, the reviewer noted that pain did not further limit Plaintiff's RFC. [R. at 86]. A second RFC Assessment was completed April 9, 1996. [R. at 101]. Plaintiff's physical limitations were listed as identical to the October 24, 1995 assessment. The reviewer additionally noted that Plaintiff had some decreased range of motion in his knees.

Plaintiff was examined by Gregory Wilson, D.O., on March 18, 1994. [R. at 153]. He noted that Plaintiff had tried an epidural for pain relief but that Plaintiff's condition was unchanged. [R. at 153].

In April of 1994, Plaintiff's physician noted that Plaintiff was imbalanced while sitting. [R. at 156]. The doctor noted that Plaintiff's X-rays indicated straightening lumbar lordosis, decreased disk space, and no evidence of spondylolisthesis. The doctor indicated that he wanted to try a facet injection. [R. at 156-159].

An MRI dated January 24, 1994, was interpreted as showing a diffuse bulge at L4-S1 and a mild bulge at L4-L5. [R. at 160].

Plaintiff's doctor, John M. Bauer, D.O., noted on April 28, 1994, that he wanted to perform a two level decompression and discectomy on Plaintiff. The doctor noted that Plaintiff should be able to perform light duty work. [R. at 160-61].

Plaintiff had a bilateral hemilaminectomy on L4-L5 and L5-S1 on May 24, 1994. Plaintiff was discharged on May 28, 1994. [R. at 178].

One of Plaintiff's doctors notes indicates that Plaintiff had seven prior knee surgeries.

A July 7, 1994, letter by Dr. Bauer indicates that Plaintiff will be temporarily totally disabled for six weeks and that Plaintiff will not be able to return to heavy lifting. [R. at 198]. By June of 1994 Plaintiff reported being able to walk two miles per day after the surgery but that he was "going backwards."

Plaintiff was given a work release on August 18, 1994. Plaintiff was told not to lift over 25 pounds and to be careful. [R. at 206].

On November 22, 1994, Plaintiff's doctor noted that Plaintiff's condition was worse since his previous visit because he had not participated in any physical therapy. [R. at 205]. On December 7, 1994, Plaintiff was again told that he needed physical therapy. [R. at 205].

In March of 1995 Plaintiff's doctor indicated that Plaintiff experienced pain relief for only one day following an injection. [R. at 154].

On May 16, 1995, Plaintiff's main complaint was recorded as "finances." The doctor noted that Plaintiff would benefit from vocational rehabilitation and that Plaintiff could not perform hard physical labor. [R. at 204]. Plaintiff's X-rays were interpreted as revealing some bone incorporation. The doctor noted that Plaintiff needed to begin physical therapy. [R. at 204].

On July 19, 1995 Plaintiff reported to the emergency room with complaints of back pain. The doctor noted that Plaintiff's back surgery had failed due to Plaintiff's continued smoking; Plaintiff's lack of physical therapy; Plaintiff's weight gain of 40 pounds, and Plaintiff's possible narcotic addiction. [R. at 221]. The doctor noted that

Plaintiff needed revision surgery and that in the interim Plaintiff should continue to try to ambulate and exercise, and should not "lie around in bed." [R. at 221].

Plaintiff had a second back fusion on December 20, 1995. [R. at 225].

Plaintiff was examined by a social security examiner on March 16, 1996. The examiner noted that Plaintiff was only somewhat depressed and should be able to work if his back presented no physical obstacles. [R. at 250].

Plaintiff was additionally examined by a social security examiner on March 21, 1996. The examiner noted that Plaintiff had some pain in his right knee, some limitation in his wrists, and that Plaintiff could walk without assistive devices. [R. at 255]. The examiner commented that his exam revealed contradictory findings in that Plaintiff seemed to exhibit more limitations during the examination, but that when Plaintiff did not know he was being observed some of the limitations were not evident. [R. at 255].

Jerry Patton, D.O., wrote on March 7, 1997, that he had treated Plaintiff since 1980, that Plaintiff had had two surgeries and suffered from severe arthritis in his knees. Dr. Patton concluded that "in my opinion Jackie is 100% disabled. . . ." [R. at 269].

Dr. Patton wrote a second letter on May 8, 1997. [R. at 276]. Dr. Patton elaborated that "if he is on his knees excessively walking, etc., his knees swell and become more painful." [R. at 276]. The doctor noted that Plaintiff injured his spine and his condition has deteriorated. "He is an air-conditioning licensed person and this requires heavy lifting and frequent awkward postures. This obviously worsens his

lower back." [R. at 276]. Dr. Patton concluded, "because of bilateral deteriorating knees and constant painful and failed lower back, Jackie Thomason is and has been 100% unable to work." [R. at 276].

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/}

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

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

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

"The finding of the Secretary^{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

^{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."

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

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

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff could perform sedentary work with no repetitive pushing or pulling of arm or leg controls, infrequent stooping, crouching, bending, kneeling, or crawling, no climbing ladders, ropes, or scaffolds, no repetitive overhead reaching, and a sit or stand option every hour at will. [R. at 20]. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff was not disabled.

IV. REVIEW

TREATING PHYSICIAN OPINION

Plaintiff initially asserts that the ALJ did not properly evaluate the treating physician's opinion. Plaintiff states that the correct legal standard is to give the opinion substantial weight unless good cause is shown to disregard it. Plaintiff suggests that the ALJ disregarded the treating physician's opinion because it was an ultimate conclusion with regard to Plaintiff's disability and that that conclusion is

reserved to the ALJ. Plaintiff asserts that this is an incorrect application of the law. Plaintiff asserts that the ALJ should have recontacted the treating physician. Plaintiff additionally notes that the treating physician clarified his opinion before the Appeals Council stating that the reason Plaintiff was disabled was due to his disabling pain. Plaintiff asserts that this second letter and the reasoning was ignored by the Appeals Council.

A treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). In Goatcher v. United States Dep't of Health & Human Services, 52 F.3d 288 (10th Cir. 1995), the Tenth Circuit outlined factors which the ALJ must consider in determining the appropriate weight to give a medical opinion.

(1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed; (3) the degree to which the physician's opinion is supported by relevant evidence; (4) consistency between the opinion and the record as a whole; (5) whether or not the physician is a

specialist in the area upon which an opinion is rendered; and
(6) other factors brought to the ALJ's attention which tend
to support or contradict the opinion.

Id. at 290; 20 C.F.R. § 404.1527(d)(2)-(6).

The ALJ rejected the treating physician's conclusion that Plaintiff was "100% disabled" because the ultimate conclusion with regard to disability is reserved to the Commissioner and because the physician provided no specifics to support his opinion that the Plaintiff was disabled. Although the ALJ could have provided more analysis with regard to the treating physician's opinion, the Court cannot conclude that it is error. Brief and conclusory opinions can be rejected by the ALJ. In addition, the ALJ referenced the opinions of other physicians which support the conclusion of the ALJ.

Plaintiff additionally argues that if the ALJ concluded that the treating physician's opinion was not properly supported by the record the ALJ had a duty to recontact the treating physician to obtain a more detailed opinion. In this case, however, the Plaintiff obtained a second letter from Dr. Patton and submitted that letter to the Appeals Council. This Court can consider such evidence on appeal. Q'Dell v. Shalala, 44 F.3d 855 (10th Cir. 1994). The doctor wrote that Plaintiff had pain and swelling in his knees if he walked excessively, that Plaintiff had a back injury and prior back surgeries. "[Plaintiff] is an air-conditioning licensed person and this requires heavy lifting and frequent awkward postures. This obviously worsens his lower back." [R. at 276]. The doctor concluded that due to his deteriorating knees and painful lower back Plaintiff was disabled.

The Court concludes that the treating physician's opinion is not inconsistent with the opinion of the ALJ. The treating physician is focused upon Plaintiff's ability to perform work as an air-conditioning repairman and Plaintiff's difficulty with excessive walking. Nothing in the letter suggests that Plaintiff would be prohibited from performing the type of work which the ALJ concluded Plaintiff could perform - that is, sedentary work with a sit and stand option at will. Furthermore, other evidence in the record supports the opinion of the ALJ that Plaintiff can perform such work. Plaintiff was released to return to work with no lifting over 25 pounds in August of 1994.^{5/} [R. at 207]. Plaintiff had additional back surgery in December 22, 1995. [R. at 225]. The social security examiner indicated Plaintiff could walk without assistive devices. [R. at 255]. Plaintiff's RFC Assessment indicates Plaintiff can occasionally lift 20 pounds, frequently lift 10 pounds, stand or walk for six out of eight hours, and sit for six out of eight hours. [R. at 86, 101].

Plaintiff additionally asserts that the ALJ did not properly address Plaintiff's complaints of pain. Plaintiff asserts that he takes daily medication for his pain, that he sought treatment for his pain, had two surgeries, and underwent therapy. The record also indicates, however, that Plaintiff was told on numerous occasions that he needed to limit or stop his smoking for his bone fusion to be successful, that he needed to participate in physical therapy, that he should be more active, and that his weight gain of forty pounds was counterproductive to his recovery.

^{5/} The record suggests that due to a lack of physical therapy, continued smoking, and weight gain, Plaintiff did require subsequent surgery in December 1995.

Specifically, the ALJ noted that Plaintiff did not take a significant amount of medication for severe pain, that Plaintiff was not frequently examined by physicians and did not frequently complain of severe pain, and that Plaintiff showed a lack of discomfort at the hearing. The ALJ also noted that although the Plaintiff exhibited several limitations during the examination by the social security examiner, Plaintiff was able to walk to his pickup truck, as observed by the examiner, with no evidence of a limp.

Plaintiff suggests that he submitted a pharmacy bill for Plaintiff at the Appeals Council level for \$3,463.63. The record does contain a bill. The bill does not indicate the medications which were purchased, or the time frame in which the purchases were made. [R. at 278]. The medications list submitted March 4, 1997, indicates Plaintiff was taking "meperial/prometh" four times per day for pain. Plaintiff notes that it was initially prescribed in June of 1994. In August of 1994, Plaintiff's treating surgeon released him to return to work. Finally Plaintiff suggests that the "sit and squirm" approach has been rejected. Plaintiff is correct that the "sit and squirm" approach as the sole method utilized for judging credibility is not favored. However, in this case, the ALJ did not rely solely upon it. Certainly it makes sense for the ALJ to be able to utilize his observations of Plaintiff's demeanor at the hearing. This Court must affirm the ALJ's decision if it is supported by substantial evidence in the record. Substantial evidence is more than a scintilla, but less than a preponderance. The Court concludes that under the facts of this case the ALJ's analysis and decision with regard to Plaintiff's complaints of pain is supported by substantial evidence.

ABSENCE OF EVIDENCE

Plaintiff suggests that the ALJ improperly based his Step Five conclusion on an "absence of evidence" in the record. Plaintiff relies on Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993).

The Court in Thompson did conclude that an "absence of evidence is not evidence." Id. at 1490. Regardless, the Thompson court noted that "the ALJ, finding no evidence upon which to make a finding as to RFC, should have exercised his discretionary power to order a consultative examination of Ms. Thompson to determine her capabilities." Id.

Unlike Thompson, sufficient evidence exists in this record for the ALJ to determine Plaintiff's capabilities. At least two RFC Assessments indicate that Plaintiff could perform sedentary work. Plaintiff's surgeon released him after his first back surgery to perform work with no lifting over 25 pounds. Plaintiff testified that his surgeon released him after his second back surgery.^{6/} Nothing in the record is contrary to the ALJ's findings. The treating physician letter which suggests that Plaintiff is "100 percent disabled" does not specify any restrictions and seems to be consistent with a conclusion that Plaintiff cannot return to his past relevant work. Nothing in the letter suggests Plaintiff cannot perform the limited range of sedentary work (with a sit and stand option) outlined by the ALJ.

^{6/} The record does not contain the release from the surgeon and Plaintiff did not specify any restrictions that were placed on him.

V. CONCLUSION

Plaintiff's back surgeon released him with restrictions of lifting no more than 25 pounds. The record indicates that Plaintiff had a second back surgery and was also released following that back surgery. The record contains no other limitations placed on Plaintiff following the second back surgery.

The record contains a letter from one of Plaintiff's treating physicians which states that Plaintiff is 100 percent disabled. The record provides no specific lifting or other limitations upon Plaintiff which are inconsistent with the performance of sedentary work.

The record contains two RFC Assessments indicating Plaintiff can perform sedentary work. The report of the social security examining physician is consistent with a finding that Plaintiff can perform sedentary work.

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

Dated this 15 day of October 1999.



Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES KENNEDY,)
)
Plaintiff(s),)
)
vs.)
)
KENNETH S. APFEL, Commissioner, Social)
Security Administration,)
)
Defendant(s).)

Case No. 99-CV-167-J ✓

ENTERED ON DOCKET

DATE OCT 18 1999

ORDER

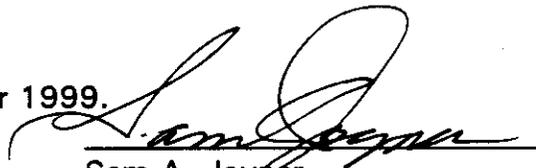
IT IS ORDERED, ADJUDGED, AND DECREED that this case is hereby remanded to the Defendant for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). Melkonyan v. Sullivan, 501 U.S. 89 (1991).

Defendant requests that upon remand the ALJ do the following.

The ALJ should reconsider Plaintiff's alleged impairments and residual functional capacity ("RFC"). The ALJ should weigh each medical opinion in the record including Dr. Edwin Yeary's opinion and provide appropriate explanations for accepting or rejecting such opinions in accordance with 20 C.F.R. § 404.1527 and S.S.R. 96-5p. In addition, the ALJ should evaluate the prior medical expert ("ME") testimony, and if appropriate, arrange for supplemental ME testimony. Lastly, the ALJ will obtain supplemental vocational expert ("VE") testimony and incorporate Plaintiff's RFC in the hypothetical questions to the VE.

IT IS SO ORDERED.

Dated this 15 day of October 1999.



Sam A. Joyner
United States Magistrate Judge

13

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES KENNEDY,)
)
 Plaintiff(s),)
)
 vs.)
)
 KENNETH S. APFEL, Commissioner, Social)
 Security Administration,)
)
 Defendant(s).)

Case No. 99-CV-167-J ✓

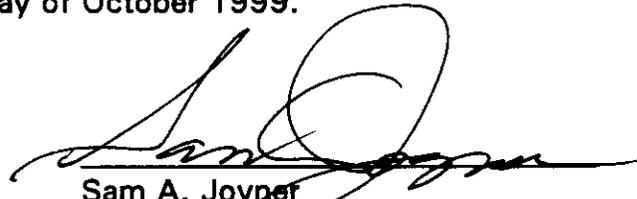
ENTERED ON DOCKET

DATE OCT 18 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 15th day of October 1999.



Sam A. Joyner
United States Magistrate Judge

14

FILED

OCT 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JACQUELINE A. EVANS,

Plaintiff,

v.

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

Defendant.

Case No. 99-CV-638-EA

ENTERED ON DOCKET

DATE OCT 18 1999

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 6 of section 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 1383(c)(3).

DATED this 15th day of October 1999.

Claire V. Eagan

Claire V. Eagan
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



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

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

WILLIAM HAMILTON,)
)
Plaintiff,)
)
vs.)
)
THE CITY OF SAPULPA, a municipal)
corporation, CAROL JONES, individually)
and in her official capacity as Court Clerk)
for the Municipal Court for the City of)
Sapulpa, and TOM DeARMON, individually)
and in his official capacity as City Manager,)
of the City of Sapulpa,)
)
Defendants.)

OCT 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-0140-B (E)

ENTERED ON DOCKET

DATE OCT 18 1999

**STIPULATION OF DISMISSAL WITH PREJUDICE
OF PLAINTIFF'S SECOND CAUSE OF ACTION**

All parties to this case stipulate that Plaintiff's second cause of action can be dismissed with prejudice, with each party to pay its own attorney fees.

William Hamilton
William Hamilton, Plaintiff

By: Allen Mitchell
Allen Mitchell, OBA #6264
P.O. Box 190
Sapulpa, Oklahoma 74067
(918) 224-5750

ATTORNEY FOR PLAINTIFF

ELLER AND DETRICH,
A Professional Corporation

By: 

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

ATTORNEYS FOR DEFENDANTS

\\SBSEVER\ELLERDETRICH\MAG\Hamilton\Stip Dismissal.doc

MT

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

F I L E D

OCT 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BEVERLY TAYLOR,)
)
 Plaintiff,)
)
 vs.)
)
 COMMERCIAL FINANCIAL SERVICES,)
 INC., and CF/SPC, INC.,)
)
 Defendants.)

Case No. 99-CV-0773BU(E)

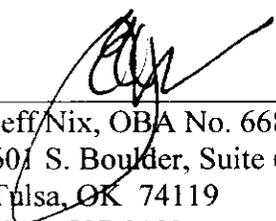
ENTERED ON DOCKET

DATE OCT 18 1999

DISMISSAL WITHOUT PREJUDICE AS TO DEFENDANT CF/SPC, INC.

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, Plaintiff dismisses without prejudice all causes of action in this case against Defendant CF/SPC, Inc.

DATED this 12 day of October, 1999.



Jeff Nix, OBA No. 6688
601 S. Boulder, Suite 610
Tulsa, OK 74119
(918) 587-3193
(918) 587-3491 (Fax)
Attorney for Plaintiff

CF/SPC

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

FILED
OCT 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONNIE HOLMES,)
)
 Plaintiff,)
)
 v.)
)
 WONDER BREAD COMPANY,)
)
 Defendants.)
 _____)

Case No. 99-CIV-0150-C (E) ✓

ENTERED ON DOCKET
DATE OCT 15 1999

ORDER OF DISMISSAL

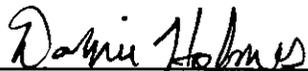
This cause having come before this Court on the Joint Application for Dismissal with Prejudice of the parties, and this Court being fully advised in the premises, and the parties having stipulated and the Court having found that the parties have reached a private settlement of the claims of Plaintiff, and that such claims should be dismissed with prejudice, it is, therefore,

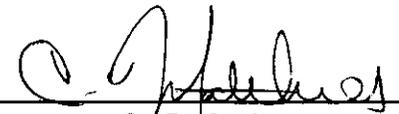
ORDERED, ADJUDGED AND DECREED that the Complaint of Plaintiff, together with any causes of action asserted therein, be and hereby are dismissed with prejudice. Each party is to bear its own attorney fees and costs.

So Ordered this 17th day of oct., 1999.


United States District Judge

APPROVED AS TO FORM AND CONTENT:


Attorney for Plaintiff


Attorney for Defendants

WZ

FILED

OCT 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

BANK HAPOALIM B.M., an Israeli banking)
corporation,)

Plaintiff,)

vs.)

Case No. 99-CV-0828K (J) ✓

CHASE SECURITIES, INC., a Delaware)
corporation, SECURITIES MULTIPLE ASSET)
RATED TRUST 1997-6, a Delaware business)
trust, ANDERSON WORLDWIDE, successor to)
ARTHUR ANDERSEN, L.L.P., a partnership,)
MAYER, BROWN & PLATT, a partnership,)
DUFF & PHELPS CREDIT RATING CO.,)
an Illinois corporation, STANDARD &)
POOR'S RATINGS SERVICE, a division of)
MCGRAW-HILL COMPANIES, INC., a New)
York corporation, FITCH IBCA, INC., a)
Delaware corporation, WILLIAM BARTMANN,)
an individual, DIMAT CORPORATION, an)
Oklahoma corporation, JAY L. JONES, an)
individual, KATHRYN A. BARTMANN, an)
individual, GERTRUDE BRADY, an individual,)
MIKE C. TEMPLE, an individual, JAMES D.)
SILLS, an individual, CHARLES C. WELSH,)
an individual, and JOHN DOES 1 THROUGH)
30, individuals or business organizations,)

ENTERED ON DOCKET
DATE OCT 15 1999

Defendants.)

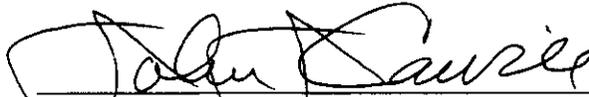
PLAINTIFF'S DISMISSAL OF CERTAIN DEFENDANTS WITHOUT PREJUDICE

The Plaintiff, Bank Hapoalim B.M. pursuant to Fed. R. Civ. P. 41(a)(1)(i), hereby dismisses its claims in the above action against Defendants Andersen Worldwide successor to Arthur Andersen LLP; Mayer, Brown & Platt; Duff & Phelps Credit Rating Co.; Standard & Poor's Rating Service a division of McGraw-Hill Companies, Inc.; and Fitch IBCA, Inc., without prejudice to the refiling thereof,

3

CJS

**ATKINSON, HASKINS, NELLIS, BOUDREAUX,
HOLEMAN, PHIPPS & BRITTINGHAM**



K. Clark Phipps, OBA #11960

John J. Carwile, OBA #10757

1500 ParkCentre

525 South Main

Tulsa, OK 74103-4524

Telephone: (918) 582-8877

Facsimile: (918) 585-8096

Attorneys for Plaintiff, Bank Hapoalim B.M.

G:\FILES\517\1\dismissal01-kas.wpd

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARCAP VENDOR FINANCE CORP.,)
a California corporation,)
)
Plaintiff,)

v.)

Case No. 99 CV-0769 BU

TOP NOTCH PRECISION MACHINE)
INCORPORATED d/b/a ALL-FAB,)
an Oklahoma corporation;)
SHEILA R. WILSON, an)
individual; and DANIEL L.)
WILSON, an individual,)
)
Defendants.)

ENTERED ON DOCKET

DATE OCT 15 1999

NOTICE OF DISMISSAL

To: Douglas A. Wilson, Esq.
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
502 West Sixth Street
Tulsa, Oklahoma 74119

Attorney for Defendants

COMES NOW, Plaintiff, MarCap Vendor Finance Corp. and,
pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure,
dismisses without prejudice its cause of action filed herein
against Defendants, Top Notch Precision Machine Incorporated d/b/a
All-Fab, Sheila R. Wilson and Daniel L. Wilson. Said dismissal is
filed without prejudice since Defendants have not served an answer
to the Complaint filed by Plaintiff.

CL

DATED this 13th day of October, 1999.



Mark K. Stonecipher, OBA #10483
Fellers, Snider, Blankenship,
Bailey & Tippens
Bank One Tower
100 N. Broadway, Suite 1700
Oklahoma City, Oklahoma 73102
Telephone: 405/232-0621
Facsimile: 405/232-9659

Attorneys for Plaintiff, Marcap
Vendor Finance Corp.

- and -

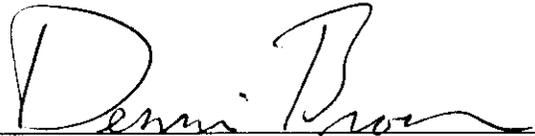
Dennis D. Brown, OBA #13662
Fellers, Snider, Blankenship,
Bailey & Tippens
The Kennedy Building
321 South Boston, Suite 800
Tulsa, Oklahoma 74103
Telephone: 918/599-0621
Facsimile: 918/583-9659

Attorneys for Plaintiff, MarCap
Vendor Finance Corp.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the
above and foregoing instrument was sent by U.S. Mail, postage
prepaid, on the 13th day of October, 1999 to:

Douglas A. Wilson, Esq.
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
502 West Sixth Street
Tulsa, Oklahoma 74119


Dennis D. Brown

40224.1:48215

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID L. DIEDRICH,)
)
Plaintiff,)
)
vs.)
)
KENNETH S. APFEL, Commissioner)
of the Social Security Administration,)
)
Defendant.)

Case No. 99-CV-400-J

ENTERED ON DOCKET

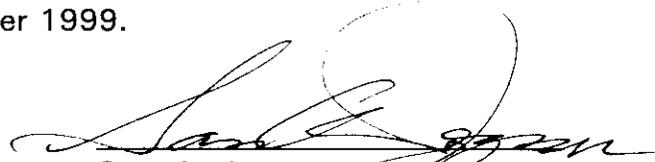
DATE OCT 15 1999

ADMINISTRATIVE CLOSURE ORDER

Pursuant to N.D. LR 41.0, the Court Clerk is directed to administratively close this case. At the request of the parties, the Court has remanded this case for further administrative action pursuant to sentence 6 of 42 U.S.C. § 405(g). The case may be reopened by either party once Defendant has completed its additional administrative action.

IT IS SO ORDERED.

Dated this 14 day of October 1999.



Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID L. DIEDRICH,

Plaintiff,

v.

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

Defendant.

Case No. 99-CV-400-J

ENTERED ON DOCKET

DATE OCT 15 1999

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 6 of section 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 1383(c)(3).

DATED this 14 day of October 1999.

S/Sam A. Joyner
U.S. Magistrate

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHARON M. CHASTAINE,)
SSN: 495-48-4260,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 98-CV-0478-EA

ENTERED ON DOCKET

OCT 14 1999

DATE _____

ORDER

On October 13, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny her application for disability insurance benefits, the disposition of which both parties have consented to before this Court. Gayle L. Troutman, Esq., appeared on behalf of the plaintiff, and Loretta Radford, 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 March 15, 1995, 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) Richard J. Kallsnick was held November 15, 1996, in Miami, Oklahoma. (R. 212-44) By decision dated December 16, 1996, the

ALJ found that claimant was not disabled at any time prior to the date that claimant was last insured for disability insurance benefits. (R. 10-24) On April 29, 1998, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981.

Claimant previously filed an application in 1990 which was denied on January 10, 1991. That application was not pursued further; nor was it reopened. Therefore, the relevant time period in this case is from January 11, 1991, through March 31, 1995, the date plaintiff was last insured for Title II benefits.

Claimant's Background

Claimant was born on August 2, 1945, and was 49 years old on the date she was last insured for disability benefits. She has a high school education. Claimant worked as a bus driver, maid, security guard, clerk, and she has done assembly work. Claimant alleges an inability to work beginning September 7, 1989, due to seizures, high blood pressure, chronic bronchitis and asthma, arthritis, incontinence, overweight, right foot problems, bursitis, headaches, degenerative arthritis, sciatic nerve, pain, and limited mobility. She also claims to have mini-strokes or TIAs (transient ischemic attacks). (Complaint, Docket # 1, at 2.) In her memorandum brief, she characterizes her disabilities as weakness in both hands due to carpal tunnel syndrome, epilepsy, pain in her feet and right shoulder, weight gain, arthritis in her lower back, acute and chronic bronchitis, and bladder problems. (Cl. Br., Docket # 5, at 1.)

The ALJ's Decision

The ALJ made his decision at the fifth step of the sequential evaluation process. In his opinion, the medical evidence established that claimant had severe impairments consisting of status

post bilateral carpal tunnel release and bursitis of the right shoulder, but she did not have an impairment or combination of impairments listed in, or medically equal to one listed in, 20 C.F.R. Pt. 404, Subpt. P, App. 1. He found that claimant had the residual functional capacity (RFC) to perform the full range of light work, reduced by her inability to perform work activity requiring more than occasional reaching with her right upper extremity. The ALJ determined that claimant could not perform her past relevant work, and the Medical-Vocational Guidelines, 20 C.F.R. Pt. 404, Subpt. P, App. 2 (the "grids") would direct a conclusion of "not disabled." However, he also found that there were other jobs existing in significant numbers in the national and regional economies that she could perform, based on her RFC, age, education, and work experience. The ALJ concluded that claimant was not disabled under the Social Security Act at any time through March 31, 1995, the date she was last insured for title II purposes. (R.21-23)

Issues

Claimant asserts as error that the ALJ:

- (1) failed to consider the combined effect of all impairments when assessing claimant's RFC;
- (2) relied on vocational testimony in response to a hypothetical question that did not match the RFC with precision; and
- (3) breached his duty to fully develop the record with regard to claimant's physical and mental impairments.

Applicable Law

Combined Effect of Impairments

At step two, the claimant has to the burden to demonstrate a medically severe impairment or combination of impairments that significantly limits her ability to do basic work activities. See 20

C.F.R. § 404.1920(c); Bowen v. Yuckert, 482 U.S. 137, 146 & n. 5 (1987). A claimant is required only to make a “de minimus showing” at step two. Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988). To determine whether the claimant’s impairments are sufficiently severe, the Commissioner must “consider the combined effect of all of the individual’s impairments without regard to whether any such impairment, if considered separately, would be of such severity.” 42 U.S.C. § 423(d)(2)(B); 20 C.F.R. § 404.1523. The ALJ may not dismiss any of a claimant’s impairments as nonsevere and disregard them thereafter. See Soc. Sec. Rul. 96-8p, 1996 WL 374184 (S.S.A.), at *5 (clarifying that the ALJ must consider both severe and nonsevere impairments when assessing residual functional capacity). If the claimant’s combined impairments are medically severe, the Commissioner must consider “the combined impact of the impairments throughout the disability determination process.” 42 U.S.C. § 423(d)(2)(B); 20 C.F.R. § 404.1523; see also Soc. Sec. Rul. 85-28, 1985 WL 56856 (S.S.A.), at *4.

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)).

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. § 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).

Findings

Claimant’s first assignment of error focuses on the ALJ’s discussion, or lack thereof, regarding claimant’s epilepsy and carpal tunnel syndrome. Claimant argues that the ALJ’s analysis is flawed because the ALJ failed to include claimant’s epilepsy as a severe impairment at step two,

and then failed to find that her epilepsy would negatively affect her RFC at step four. In so doing, claimant argues, the ALJ used the wrong legal standard. Claimant argues that the ALJ improperly evaluated claimant's epilepsy to determine if it met the listings for severity instead of properly evaluating her epilepsy, which may not have been severe, in combination with claimant's other impairments to determine if it was disabling.

At step two, a claimant is required only to make a "de minimus showing." Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988). To determine whether the claimant's impairments are sufficiently severe, the Commissioner must "consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity." 42 U.S.C. § 423(d)(2)(B); 20 C.F.R. § 404.1523. The ALJ may not dismiss any of a claimant's impairments as nonsevere and disregard them thereafter. See Soc. Sec. Rul. 96-8p, 1996 WL 374184 (S.S.A), at *5 (clarifying that the ALJ must consider both severe and nonsevere impairments when assessing residual functional capacity). If the claimant's combined impairments are medically severe, the Commissioner must consider "the combined impact of the impairments throughout the disability determination process." 42 U.S.C. § 423(d)(B); 20 C.F.R. § 404.1523; see also Soc. Sec. Rul. 85-28, 1985 WL 56856 (S.S.A.), at *4.

In other words, an ALJ is required initially to look at the combined effect of claimant's impairments to advance beyond step two and proceed to step three of the evaluation process. In this instance, the ALJ found that claimant's carpal tunnel syndrome and bursitis were severe, but not severe enough, by themselves or in combination with any other impairment (including claimant's epilepsy), to meet a listing at step three. Apparently, he did not deem claimant's epilepsy severe at step two, but he waited to explain his reasons until he arrived at step four, where he expressly

discussed why he found that claimant's epilepsy would not affect her ability to perform work-related activity. The ALJ did not disregard claimant's epilepsy; he discounted its impact on her ability to work.

The ALJ's reason for discounting her epilepsy is flawed because he evaluated it in terms of whether it met the severity of the listings; however, the ALJ should have considered her epilepsy as part of the combined effects of all impairments. His finding concerning claimant's epilepsy was, in part, because the record did not contain a third party description of claimant's seizures, as required by Social Security Ruling 87-6, 1987 WL 109184 (S.S.A.). (R. 17) Apparently the ALJ overlooked exhibits 21, 25 and 26 (R. 98-100, 111-13). These exhibits are reports from claimant's friend, claimant's husband, and claimant's sister describing claimant's seizures. However, claimant would not have met the listings in any event because she did not have an ongoing treatment relationship as required by Social Security Ruling 87-6. Thus, the ALJ was required to evaluate the severity of the impairment and expected RFC in conjunction with vocational factors, and to address to issue of claimant's failure to follow prescribed treatment. Id.

The ALJ discussed the history of claimant's epilepsy, including the medical evaluations, treatment, and claimant's testimony. He noted that she had been diagnosed with adult seizure disorder and her EEG was "abnormal" in 1989. He also pointed out that Leslie H. Gaelen, M.D., examined claimant in 1990 and reported that claimant had not taken steps to control her epilepsy by "faithful" visits to a physician or by taking medication. (R. 17-18). However, Dr. Gaelen indicated that the reason claimant did not seek treatment was because of her financial indigency. (R. 148) A claimant is not precluded from recovering disability benefits because of failure to pursue medical treatment if the claimant cannot afford medical treatment. See Thompson v. Sullivan, 987 F.2d 1482,

1489-90 (10th Cir. 1993); Teter v. Heckler, 775 F.2d 1104, 1107 (10th Cir. 1985). Claimant testified that she continued to have seizures at night (R. 229), and she reported this to her treating physician in October 1996. (R. 206-07) She did not include anti-convulsive medications on her list of current medications at that time. (R. 211) While the ALJ did not fail to consider claimant's epilepsy in combination with her other impairments, his evaluation of her epilepsy itself is defective because he failed to consider the third party reports of her seizures and to address the reason she failed to seek or follow prescribed treatment.

Claimant also specifically faults the ALJ for not discussing claimant's carpal tunnel syndrome at step four. The ALJ found that claimant's status post bilateral carpal tunnel release was a severe impairment at step two, and, at step four, he set forth the medical evidence regarding the impairment, including the diagnosis, treatment, follow-up, and recovery. (R. 15-16) It was not necessary for him to include more discussion of claimant's carpal tunnel problems in connection with pain and other symptoms as part of his discussion of claimant's alleged impairments "in combination." (R. 17-18) The ALJ did not breach his duty to consider the combined effect of claimant's impairments insofar as it relates to carpal tunnel syndrome.

Claimant's second assignment of error is that, while the ALJ found that claimant had the RFC to perform the full range of light work, reduced by her inability to perform work activity requiring more than occasional reaching with her right upper extremity, his hypothetical to the vocational expert includes a limitation to "occasional overhead reaching" with her right arm. (R. 240) 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)). The vocational expert testified that claimant could perform assembly work, office help, and telephone solicitation, among other jobs. (R. 241-42)

Claimant argues that assembly and office helper jobs require "frequent" reaching, see Dept. of Labor, Dictionary of Occupational Titles ("DOT) 706.684-022, 239.567-010 (4th ed. 1991), and thus, the vocational expert's testimony is not substantial evidence to support the ALJ's decision. The Court notes that the telephone solicitation job requires occasional, not frequent, reaching (DOT, Code 299.357-014). This issue is not dispositive, given that the Court remands on the issue of whether claimant's epilepsy is disabling when viewed in combination with claimant's other impairments. Nonetheless, the ALJ may wish to alter his hypothetical on remand to indicate whether claimant's RFC is reduced by overhead reaching, as opposed to all other reaching.

Finally, claimant argues that the ALJ breached his duty to fully develop the record with regard to the claimant's epilepsy and a possible mental impairment. 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).

Claimant relies on claimant's statement that she was "depressed - a lot" in her reconsideration disability report (R. 122), a doctor's indication that she was "somewhat tearful" at the consultation examination in 1990 (R. 144), and the ALJ's comment that claimant "exhibited emotional lability" at the hearing. (R. 19) These tidbits of evidence do not appear to rise to a level requiring further investigation. Nonetheless, the ALJ considered them and concluded that claimant did not have a medically determinable mental impairment. There was no direct conflict in the medical evidence requiring resolution or inconclusive medical evidence in the record to trigger the need for a consultative examination. See 20 C.F.R. §§ 404.1517, 404.1512(f), 404.1519a; Hawkins, 113 F.3d at 1166. The ALJ did not breach his duty to fully develop the record.

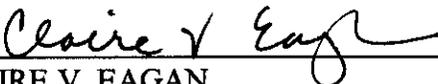
However, the ALJ's failure to consider the third party reports of her seizures and to address the reason she failed to seek or follow prescribed treatment for her epilepsy is reversible error.

Conclusion

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. **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 13th 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 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LESTER L. BAKER,)
SSN: 444-46-4701,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 98-CV-0501-EA

ENTERED ON DOCKET

OCT 14 1999

CASE _____

JUDGMENT

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

It is so ordered this 13th day of 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 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LESTER L. BAKER,
SSN: 444-46-4701,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0501-EA

ENTERED ON DOCKET

DATE OCT 14 1999

ORDER

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

Procedural History

On June 30, 1994, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.) and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's application for benefits was denied in its entirety initially and on reconsideration. A hearing before Administrative Law Judge (ALJ) Stephen C. Calvarese was held September 4,

1996, in Miami, Oklahoma. (R. 351-400) By decision dated October 25, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. (R. 18-36) On June 6, 1998, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Claimant's Background

Claimant was born on October 3, 1947, and was 48 years old at the time of the administrative hearing in this matter. He completed the tenth grade and obtained a general equivalency diploma (GED). He also has some vocational training in residential electrical wiring. Claimant worked as a circuit bit operator and inspector, plastic molding machine operator, textile fixer, insurance agent, apprentice electrician, maintenance person, quality control ammunition plant processor, and a lay minister. He was in the Navy and served in Vietnam. Claimant alleges an inability to work beginning in April 1994, due to post-traumatic stress disorder, diverticulitis, diabetes mellitus, hypertension, pain, and limited mobility. (Complaint, Docket # 1, at 2.) In his memorandum brief, he characterizes his disabling problems as back problems, diabetes, diverticulosis, obesity, hiatal hernia, testicle pain, prostate stones, ingrown toe nails, plantar's warts on his left foot, and recurring indigestion. (Cl. Br., Docket # 7, at 1.) Claimant alleged initially and on reconsideration that he suffered from back problems, numbness in leg and foot, tuberculosis, emphysema, high blood pressure, chest pain (history of heart attack), nerves, anxiety, depression, anger outbursts, diabetes, post-traumatic stress disorder, diverticulosis, obesity, hiatal hernia, testicle pain, prostate stones, ingrown left toe nail, plantar's wart on left foot, and recurring indigestion. (R. 107-15, 121-24)

The ALJ's Decision

The ALJ made his decision at the fifth step of the sequential evaluation process. He deemed claimant's impairments of degenerative joint disease, chronic obstructive pulmonary disease, hypertension, obesity, posttraumatic stress disorder, depression and anxiety, and myocardial ischemia to be severe impairments. (R. 23, 31) However, he determined that these impairments, either singularly or in combination, did not meet or equal the severity of any impairment listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. (Id.) He specifically referenced Listings 1.05 (Disorders of the spine); Listing 3.02 (Chronic pulmonary insufficiency), Listing 4.04 (Ischemic heart disease); Listing 9.08 (Diabetes mellitus), and Listing 12.04 (Affective Disorders). (R. 23-24)

He found that claimant had the residual functional capacity (RFC) to perform the physical exertional and nonexertional requirements of work that requires lifting or carrying no more than 20 pounds at a time with frequently lifting and carrying of objects weighing up to 10 pounds (light work); that does not require more than occasional bending, crouching, squatting or stooping; that requires no repetitive overhead reaching; that requires no repetitive pushing or pulling of arm or leg controls; that does not require understanding, remembering, or carrying out detailed or complex job instructions; that does not require more than minimal interaction with the public; and that can be performed in a low stress environment. (R. 28, 31) The ALJ determined that claimant could not perform his past relevant work as a maintenance man, textile fixer or apprentice electrician, and the Medical-Vocational Guidelines, 20 C.F.R. Pt. 404, Subpt. P, App. 2 (the "Grids") would direct a conclusion of "not disabled." However, the ALJ also found that there were other jobs existing in significant numbers in the national and regional economies that claimant could perform, based on his

RFC, age, education, and work experience. The ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision. (R. 31-32)

Issues

Claimant asserts as error that:

(1) the Commissioner failed to properly consider claimant's physical and mental limitations in combination to meet his step five burden to prove claimant could perform a significant number of alternative jobs given his RFC; and

(2) the ALJ's analysis of the severity of claimant's mental impairment is flawed by his failure to even discuss his rationale behind the findings he recorded on the Psychiatric Review Technique ("PRT") form.

Applicable Law

Combined Effect of Impairments

At step two, the claimant has the burden to demonstrate a medically severe impairment or combination of impairments that significantly limits his ability to do basic work activities. See 20 C.F.R. §§ 404.1920(c), 416.920(c); Bowen v. Yuckert, 482 U.S. 137, 146 & n. 5 (1987). A claimant is required only to make a "de minimus showing" at step two. Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988). To determine whether the claimant's impairments are sufficiently severe, the Commissioner must "consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity." 42 U.S.C. § 423(d)(2)(B); 20 C.F.R. §§ 404.1523, 416.923. The ALJ may not dismiss any of claimant's impairments as nonsevere and disregard them thereafter. See Soc. Sec. Rul. 96-8p, 1996 WL 374184 (S.S.A.), at *5 (clarifying that the ALJ must consider both severe and nonsevere impairments when

assessing residual functional capacity). If the claimant's combined impairments are medically severe, the Commissioner must consider "the combined impact of the impairments throughout the disability determination process." 42 U.S.C. § 423(d)(2)(B); 20 C.F.R. §§ 404.1523, 416.923; see also Soc. Sec. Rul. 85-28, 1985 WL 56856 (S.S.A.), at *4.

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)).

Evaluating Mental Impairments

The Tenth Circuit requires an ALJ to follow the procedure in 20 C.F.R. §§ 404.1520a, 416.920a when he or she evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey v. Chater, 92 F.3d 1017, 1024 (10th Cir. 1996); Cruse v. United States Dep't of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedure first requires the ALJ to determine the presence or absence of certain medical findings pertaining to claimant's ability to work. Next, the ALJ is to evaluate the degree of functional loss resulting from claimant's impairment. The ALJ must then complete a Psychiatric Review Technique ("PRT") form and attach it to a written decision in which he or she discusses the evidence upon which the conclusions

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

Findings

Claimant's first assignment of error is that the Commissioner failed to properly consider claimant's physical and mental limitations in combination to meet his step five burden to prove claimant could perform a significant number of alternative jobs given his RFC. A review of claimant's brief indicates that claimant's true challenge is to a failure by the ALJ to incorporate into his questioning of the vocational expert the precise mental limitations he ultimately set out in his findings. As claimant points out, the ALJ found that claimant's RFC was limited to work that did not require the ability to understand, remember, or carry out detailed or complex job instructions, work that did not require more than minimal interaction with the public, and work that took place in a low stress environment. (R. 31)

When the ALJ posed his hypothetical question to the vocational expert, however, he selected portions of the October 1994 report from John W. Hickman, Ph.D., indicating that claimant had two or three anxiety attacks per week and sometimes experienced paranoia and had some difficulty with recent memory. (R. 395) He then stated:

Okay. I'm going to Exhibit Number 22 to add additional restrictions onto the physical restrictions I gave in the first hypothetical. He has an accurate knowledge of current events, good math skills. Has pretty good memory. He has average to low average intellectual ability. Let's see. He has some dysphoria concerning his current life and recent difficulty with back pain. He's diagnosed as mild depression and it says making it somewhat difficult to concentrate and focus -- have difficulty concentrating and difficulty focusing. It may be from the depression or it may be from pain. It also says his depression is interacting with his back pain and magnifying his perception. So with those restrictions, both physical and mental now, would there be any jobs in the regional and national economies such a person could perform?

(R. 395-96)

After asking the length of time the anxiety attacks lasted, the vocational expert testified that claimant could not perform some jobs that would involve dealing directly with the public. However, he opined that claimant could be a teacher's aide, parking lot attendant, file clerk, or mail clerk. (R. 396-97) Since the ALJ's hypothetical question does not relate with precision all of the impairments found by the ALJ, the testimony elicited cannot constitute substantial evidence to support the [Commissioner's] decision." See Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). The ALJ cannot delegate his fact-finding and evaluation responsibilities to the vocational expert in this manner. Cf. Winfrey v. Chater, 92 F.3d 1017, (10th Cir. 1996).¹

Claimant second assignment of error is that the ALJ's analysis of the severity of claimant's mental impairment is flawed by his failure to discuss his rationale behind the findings he recorded on the PRT form. The ALJ reiterates Dr. Hickman's findings (R. 24-25) and mentions that he completed a PRT form (R. 27), but he does not adequately discuss 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). While Dr. Hickman's findings may constitute substantial evidence to support the ALJ's conclusions on the PRT form, and, ultimately, the findings expressed in his opinion, the ALJ does not discuss the relationship, if any, between the two. The combined effect of an imprecise question to the vocational expert and the inadequate

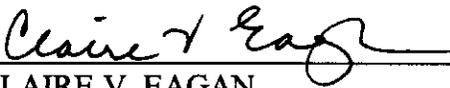
¹ The Court acknowledges that, if the proper hypothetical question had been posed, the limitations found by the ALJ may have precluded several of the jobs identified by the vocational expert as jobs claimant could perform. However, at least one of the jobs, mail clerk, would not have been precluded, as there were a significant number of jobs available in the national economy even if other jobs identified by the vocational expert were eliminated. See Trimiar v. Sullivan, 966 F.2d 1326 (10th Cir. 1996); 20 C.F.R. §§ 404.1566(b), 416.966(b).

discussion of the findings on the PRT form leads the Court to conclude that there is not substantial evidence to support the ALJ decision.

Conclusion

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. **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 13th day of October, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

ENTERED ON DOCKET

DATE OCT 14 1999

MULTIMEDIA GAMES, INC., a Texas corporation,)

Plaintiff,)

vs.)

Case No. 99-CV-0723-C (M)

WLGC ACQUISITION CORP. (f/k/a WORLDLINK GAMING CORP.),)

an Oklahoma corporation,)

MAGELLAN RESOURCES GROUP,)

a Canadian corporation,)

MAGELLAN GAMING TECHNOLOGIES,)

INC., a Canadian corporation,)

RON HARRIS, an individual, and)

NELSON JOHNSON, an individual,)

Defendants.)

FILED

OCT 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DISMISSAL WITH PREJUDICE

Comes now the Plaintiff, Multimedia Games, Inc., and hereby dismisses, **with prejudice**, all claims asserted herein against Gary Watkins, pursuant to Rule 41 of the Federal Rules of Civil Procedure. Each party to bear their own costs and attorneys' fees.

Respectfully submitted,

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

By: Heather E. Brown

Donald L. Kahl, OBA #4855
Heather E. Brown, OBA #17333
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0400

**ATTORNEYS FOR PLAINTIFF
MULTIMEDIA GAMES, INC.**

C15

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ^{4th}~~13th~~ day of October 1999, a true and correct copy of the above and foregoing instrument was forwarded by U.S. Mail, with proper postage thereon fully prepaid, to the following counsel of record:

Robert B. Sartin, Esq.
Barrow, Gaddis, Griffith & Grimm
610 South Main, Suite 300
Tulsa, OK 74119-1226

Clark O. Brewster, Esq.
Brewster, Shallcross & Deangelis
2021 South Lewis
Tulsa, OK 74104

Linda Sanders

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

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

DEBRA R. TERRY,)
)
Plaintiff,)
)
vs.)
)
BOARD OF COUNTY)
COMMISSIONERS OF OTTAWA)
COUNTY and BEVERLY STEPP,)
in her official capacity as Court)
Clerk of Ottawa County,)
)
Defendants.)

Case No. 99-CV-125-E ✓

ENTERED ON DOCKET
DATE OCT 13 1999

ORDER

The Court, upon consideration of the evidence presented at the hearing, held on September 28, 1999, and the arguments of counsel, enters the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff claims that defendants violated the Americans with Disabilities Act, the Oklahoma Anti-Discrimination Act, and the Rehabilitation Act by terminating her from her position as the Ottawa County Sheriff's Department Dispatcher while she was hospitalized as a result of her bi-polar disorder. Defendants failed to Answer plaintiff's Complaint, and a default judgment was granted on August 3, 1999.
2. Plaintiff exhausted her administrative remedies and received a Notice of Right to Sue on November 19, 1998. The Court has subject matter jurisdiction. Despite plaintiff's disability, she was able to perform the essential functions of her employment position, and a factual basis exists for her claims under the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.*, the Rehabilitation Act, 29 U.S.C. §794, and the Oklahoma Anti-Discrimination Act, Okla. Stat. tit. 25, §1302.

3. At a hearing on September 28, 1999, plaintiff testified regarding her damages resulting from the wrongful actions of defendants, and presented a "Summary of Damages Pursuant to Fed.R.Evid. 1006."
4. Plaintiff's gross monthly income at the Ottawa County Clerk's Office was \$1,252. She was fired on September 16, 1997 and re-employed on January 5, 1998. Her efforts at mitigating damages and seeking other employment were reasonable.
5. Plaintiff was hired by Mercy Health Services Corp, at an hourly wage of \$7.20. She worked approximately 180 hours per month, for a monthly pay of \$1,278.
6. Plaintiff received a pension through the Oklahoma Public Employees Retirement System equal to 10% of her gross wages while employed by the Ottawa County Clerk's Office. In her current employment, she does not receive a pension. In her current employment, the employer will match employee contributions to a retirement plan only after 5 years of employment. Five years of contributions from Ottawa County would equal \$7,510, five years of contributions at 10% earning compounded annually would equal \$12,095.
7. Plaintiff had \$4,572 in expenses relating to medical and dental services that were not covered by insurance at her new job but would have been covered by the health insurance provided by Ottawa County.
8. Plaintiff's claimed relocation expenses, including the purchase of furniture and a mobile home are not reasonable damages directly attributable to the wrongful actions of defendants. The record does not contain any evidence of the expenses incurred by plaintiff while traveling to her new job in Joplin before she was able to move there.
9. Defendant Beverly Stepp told plaintiff, while she was hospitalized for her bi-polar disorder on

September 8, 1997, that plaintiff needed to get back to work because Stepp could not hold her job for her. At that time Plaintiff checked out of the hospital against her Doctor's advice.

10. While plaintiff was again hospitalized for her condition on September 16, she was terminated by Ms. Stepp. The Court finds that plaintiff suffered mental anguish and embarrassment because of the circumstances under which she was terminated, the difficulties she experienced while unemployed, and the destruction of her plan to remain with Ottawa County in order to build a retirement.

11. Any findings of fact that are actually conclusions of law should be considered as such.

Conclusions of Law

1. The equitable compensatory damages to which plaintiff is entitled include back pay, medical expenses and compensation for emotional distress. 42 U.S.C. § 12117, 42 U.S.C. §2000e-5.

2. Plaintiff is entitled to damages in the amount of \$4,544 for lost wages, \$12,095 for lost benefits, \$4,572 for out of pocket expenses, and \$7,500 for emotional distress, for a total of \$28,711.

3. Any conclusions of law that are actually findings of fact should be considered as such.

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


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

MT
10-7-99

RECEIVED

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

FILED

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 NADINE E. REEVES,)
)
 Defendant.)

OCT 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 99CV0515B

ENTERED ON DOCKET
DATE OCT 13 1999

AGREED JUDGMENT AND ORDER OF PAYMENT

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

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.
2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.
3. The defendant hereby agrees to the entry of Judgment in the principal sum of \$5,140.00 and \$5,264.46, plus accrued interest of \$2,079.78 and \$1,848.93, plus administrative costs in the amount of \$1.87, plus interest thereafter at the rate of 5% and 8% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the legal rate 5.285% until paid, plus costs of this action, until paid in full.
4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express

representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that Nadine E. Reeves will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 15th day of October, 1999, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$60.00, and a like sum on or before the 15th day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

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

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

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

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

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

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

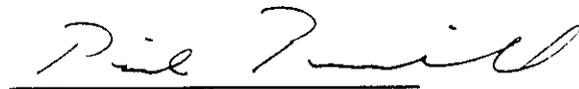
7. The defendant has the right of prepayment of this debt without penalty.

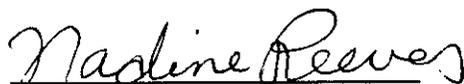
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Nadine E. Reeves, in the principal amount of \$5,140.00 and \$5,264.46, plus accrued interest in the amount of \$2,079.78 and \$1,848.93, plus interest at the rate of 5% and 8% until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate of 5.285 percent per annum until paid, plus the costs of this action.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney


PHIL PINNELL, OBA #7169
Assistant United States Attorney


NADINE E. REEVES

PEP/alh

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

VBF, INC., an Oklahoma Corporation, Vernon
Lawson, Bill Coday & Fred Smith,

Plaintiffs,

vs.

CHUBB GROUP OF INSURANCE
COMPANIES, GREAT NORTHERN
INSURANCE CO., FEDERAL
INSURANCE COMPANY and
CHUBB & SON, INC.,

Defendants.

ENTERED ON DOCKET

DATE OCT 13 1999

Case No. 97 C-535-H (M) ✓

FILED
OCT 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER ON STIPULATION OF DISMISSAL

On the 1st day of OCTOBER, 1999, the Court considered the parties' stipulation to dismiss. After considering the stipulation and being fully advised in the premises, the Court,

GRANTS the stipulation and dismisses the Defendant Chubb Group of Insurance Companies from the suit.

Dated this 1st day of OCTOBER, 1999.


UNITED STATES DISTRICT JUDGE

80

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

JADCO PURCHASING CORP. and)
JADCO MANUFACTURING)
CORPORATION)

Plaintiffs,)

v.)

FEDERAL INSURANCE COMPANY,)
CHUBB AND SON, INC., d/b/a/ CHUBB)
GROUP OF INSURANCE COMPANY,)
CONSOLIDATED INSURANCE)
AGENCY, INC., and BILL WILSON)

Defendant.)

ENTERED ON DOCKET
DATE OCT 13 1999

Case No. 98-CV-817-H ✓

F I L E D
OCT 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

J U D G M E N T

This matter came before the Court on Defendant's motion for summary judgment. The Court duly considered the issues and rendered a decision in accordance with the order filed on June 7, 1999.

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

IT IS SO ORDERED.

This 7TH day of October, 1999.


Sven Erik Holmes
United States District Judge

217

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

GLOBAL TECHNOLOGIES)
INTERNATIONAL, INC., an Oklahoma)
corporation,)

Plaintiff and Defendant on)
Counterclaim,)

v.)

ELECTRONIC DATA SYSTEMS)
CORPORATION, a Texas corporation,)

Defendant and Counterclaimant.)

ENTERED ON DOCKET

DATE OCT 13 1999

Civil Action No. 98-CV-529-K(J) ✓

FILED
OCT 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER DISMISSING ALL CLAIMS WITH PREJUDICE

CAME ON TO BE HEARD the "Joint Motion for Dismissal of All Claims," which was filed pursuant to a settlement agreement among the parties. For good cause shown, the motion is hereby GRANTED. It is therefore

ORDERED that all claims and counterclaims in this action are hereby dismissed, with prejudice. The Court hereby retains continuing jurisdiction to enforce the confidential settlement agreement reached between the parties.

DONE this the 12 day of October, 1999.


TERRY C. KEEN
UNITED STATES DISTRICT JUDGE

DISTRICT COURT FOR THE
OKLAHOMA

ROCKET

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 MARGIE K. DELK,)
)
 Defendant.)

ENTERED ON DOCKET

DATE OCT 13 1999

No. 99CV0644K(£) ✓

FILED
OCT 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 12 day of October, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Margie K. Delk, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Margie K. Delk, was served with Summons and Complaint on August 6, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Margie K. Delk, for the principal amount of \$2,697.89, plus accrued

interest of \$2,463.67, plus administrative charges in the amount of \$8.00, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.285 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

PEP/alh

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

PEGGY HARDER,)
)
 Plaintiff,)
)
 vs.) No. 99-CV-159-K)
)
 AMERICA'S RENT-TO-OWN CENTER,)
 INC.,)
)
 Defendant.)

ENTERED ON DOCKET
DATE **OCT 13 1999**

FILED

OCT 13 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. 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 to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. 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 necessary.

ORDERED this 12 day of October, 1999.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

FILED

OCT 8 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

VALERIE GRAMM,)
)
 Plaintiff(s),)
)
 vs.)
)
 FLEMING COMPANIES, INC.,)
)
 Defendant(s).)

Case No. 99-C-113-B ✓

ENTERED ON DOCKET

DATE 10/12/99

ADMINISTRATIVE CLOSING ORDER

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

If, by 12-10-99, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this ^{8th} day of October, 1999.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

OCT 8 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM HAMILTON,)
)
 Plaintiff(s),)
)
 vs.)
)
 CITY OF SAPULPA, et al,)
)
 Defendant(s).)

Case No. 99-C-140-B /

ENTERED ON DOCKET
DATE OCT 12 1999

ADMINISTRATIVE CLOSING ORDER

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

If, by 12-10-99, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this ^{8th} day of October, 1999.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

DELMER B. GARRETT,
DELMER GENE GARRETT, and
RUTH GARRETT'S ESTATE,

Plaintiffs,

v.

JOHN LANNING, Judge; TEC;
MIKE ALLEN; GARY MADDUX,
Attorney; TEC THERMAL ENERGY
CORP.; et al.

Defendants.

ENTERED ON DOCKET
DATE ~~OCT~~ 12 1999

No. 99-CV-510-K (M) ✓

F I L E D

OCT 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the Defendant John Lanning's motion to dismiss under Fed. R. Civ. Pro. 12(b)(6) for failure to state a claim upon which relief can be granted.

The Plaintiffs in this case have failed to respond to the Defendant's motion to dismiss. Pursuant to *N.D. LR 7.1(C)*, all claims asserted in the motion to dismiss will be considered confessed when the opposing party has failed to respond. We have, nevertheless, reviewed the Defendant's motion to dismiss, and, through an independent inquiry, have determined that the Plaintiffs have failed to state a claim for which relief can be granted.

For the reasons stated herein, the Defendant Judge John G. Lanning's Motion to Dismiss (# 5) is GRANTED and all claims in the above-captioned action against Defendant Lanning are DISMISSED.

6

ORDERED this 8 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**