

112

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 10 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) Case No. 99CV1058E(E))
)
BETTY BARTON,)
)
Defendant.)

ENTERED ON DOCKET

DATE MAR 10 2000

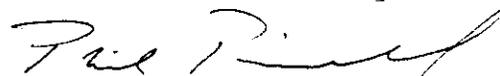
NOTICE OF DISMISSAL

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

Dated this 10th day of March, 2000.

UNITED STATES OF AMERICA

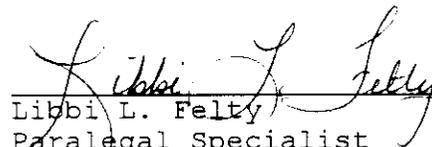
Stephen C. Lewis
United States Attorney



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

CERTIFICATE OF SERVICE

This is to certify that on the 10th day of March, 2000, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Betty Barton, 5420 S. Louisville Ave., Tulsa, OK 74135.



Libbi L. Felty
Paralegal Specialist

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

JOE HAND PROMOTIONS, INC.,)
a Pennsylvania corporation,)
)
Plaintiff,)
)
vs.)
)
MIKE WEAVER, Individually and)
SHOTS, INC. d/b/a SHOTS BAR)
& GRILL,)
)
Defendants.)

ENTERED ON DOCKET
DATE MAR 10 2000

Case No. 99-CV-0499-H(M)

F I L E D

MAR 10 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NOTICE OF DISMISSAL

Plaintiff, JOE HAND PROMOTIONS, INC., by and through Ronald A. White, its attorney, hereby dismisses pursuant to Fed. R. Civ. P. 41(a)(1), without prejudice, all claims against Defendants Michael Scott Weaver, individually, and Shots, Inc. d/b/a Shots Bar & Grill.

Respectfully submitted,

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

BY: Ronald A. White

Ronald A. White, OBA # 12037
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103
Telephone: (918) 594-0452
Facsimile: (918) 594-0505

ATTORNEYS FOR PLAINTIFF

ck

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

FILED

MAR - 9 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ASSOCIATED BUSINESS TELEPHONE
SYSTEMS CORP.,

Plaintiff,

vs.

Case No. 96-CV-274-H

XETA CORP.,

Defendant and
Third-Party Plaintiff,

FILED ON DOCKET

MAR 10 2000

vs.

D&P INVESTMENTS, INC. and
COMMUNICATIONS EQUIPMENT
BROKERS, INC.,

Third-Party Defendants

REPORT AND RECOMMENDATION

The following matters have been referred to the undersigned United States Magistrate Judge for resolution: "A.B.T.S.' MOTION TO STRIKE CERTAIN DAMAGE RELATED EVIDENCE AND CLAIMS" [Dkt. 226]; "DEFENDANT XETA CORPORATION'S APPLICATION FOR AWARD OF ATTORNEY FEES AND COSTS AS SANCTIONS AGAINST PLAINTIFF ABTS" [Dkt. 255]; and "DEFENDANT XETA CORPORATION'S MOTION TO STRIKE ALL CLAIMS OF PLAINTIFF ABTS . . ." [Dkt. 305-1].

ABTS' Motion to Strike [Dkt. 226]

This motion concerns information contained in 188 files belonging to Defendant and Third-Party Plaintiff, XETA Corporation (XETA). The 188 files each represent a transaction between U.S. Long Distance and XETA. The contracts within those files are referenced in Defendant's (XETA) Exhibit 649 and are the source documents for

the database that was summarized in Exhibit 649. ABTS seeks to strike "all damage claims of XETA which rely upon those documents" [Dkt. 226, p. 4] because ABTS claims it has not been afforded the opportunity to make a copy of all of the documents contained within the 188 files.

XETA has responded that the 188 files were available to ABTS's counsel during the July 2, 1998, deposition of Mr. Jack Ingram. ATBS counsel pulled documents from the files during Mr. Ingram's deposition and made the documents exhibits to the deposition. XETA has provided ABTS with copies of the contracts contained within those files. Therefore ABTS has received copies of the source documents for the Exhibit 649 summary. Further, none of the documents within the 188 files are listed as exhibits in the case. ABTS did not file a reply disputing these factual assertions.

On the basis of the papers before it, the court finds that there is no basis upon which to strike XETA's damage related evidence or claims. Therefore, ABTS's motion to strike [Dkt. 226] should be DENIED.

XETA's Application for Award of Attorney Fees and Costs [Dkt. 255]

The undersigned United States Magistrate Judge has previously recommended that ABTS be assessed the reasonable expenses, including attorney fees, XETA incurred in conducting discovery related to ABTS's claim for damages. [Dkt. 241]. The recommendation was adopted by the district court and determination of the amount of reasonable expenses and attorney fees was referred back to the undersigned. [Dkt. 250].

XETA filed the instant application [Dkt. 255] seeking a total of \$58,944.61 in attorney fees and costs. ABTS has objected, arguing that XETA has included virtually all costs of discovery in its request. ABTS also argues that XETA's billing records lack the specificity required to support a fee award.

More specifically, ABTS asserts that: XETA failed to produce documentation for \$4,820.97 for "Expenses Advanced;" \$1,038.25 attributable to Defendants First Interrogatories And Request for Production is beyond the scope of the court's order; fees and expenses for initial depositions of primary witnesses in the amount of \$8,291.94 should not be included in the award; items relating to events prior to the June 28, 1998, production of documents should be excluded; only a percentage of the \$2,930.96 for Mr. Kassel's deposition should be taxed, as he would have been deposed in any event; and Ms. Jones' bill for dates between December 17, 1995, and April 18, 1996, totaling \$1,043.50 should be excluded. In sum, ABTS argues that XETA's bill should be reduced by at least \$21,271.91, and that the remaining entries should be scrutinized for their "overbreadth and non-specific nature." [Dkt. 257, p. 5-6].

It is well established that in seeking an award of attorney's fees, the number of hours requested must be proven "by submitting meticulous, contemporaneous time records that reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks." *Case v. Unified School District No. 233, Johnson County, Kansas*, 157 F.3d 1243,1250 (10th Cir. 1998) citing *Ramos v. Lamm*, 713 F.2d 546, 552 (10th Cir. 1983). The

district court has an obligation to exclude hours not reasonably expended. However, the district court need not identify and justify every hour allowed or disallowed because to do so would essentially convert a fee request into a second major litigation. *Malloy*, 73 F.3d at 1018; *Ellis v. University of Kansas Medical Center*, 163 F.3d 1186, 1202 (10th Cir. 1998).

In determining the appropriate award, the court refers to the findings in the January 13, 1999, Report and Recommendation which were adopted by the district court:

(1) [B]eginning in January 1996 XETA has diligently attempted to discover the documents which ABTS contends support its damage claims. Yet it took ABTS two and a half years to fully respond to XETA's request for the production of documents. [Dkt. 241, p.7-8];

(2) [T]he Court finds that XETA has incurred additional expense related to ABTS' failure to produce the subject documentation and failure to list the documents as exhibits. *Id.* at 7.

(3) ABTS [should] be assessed the reasonable expenses, including attorney fees, XETA incurred in conducting all discovery directed to the documents at issue. *Id.* at 8. [emphasis supplied].

(4) This sanction will compensate XETA for the necessary expenses and fees associated with the additional discovery necessitated by ABTS's late listing of the documents as exhibits and includes the necessary expenses and fees associated with XETA's Motion to Compel and the June 1997 trip to New Jersey for document production. *Id.* at 8-9.

ABTS argues that by including fees and expenses associated with XETA's first interrogatories and requests for production of documents, XETA has exceeded the scope of the court's order. The court finds that ABTS has read the court's order too narrowly. The court's use of the phrase "all discovery directed to the documents at issue" includes XETA's first discovery requests. Since ABTS has not asserted that XETA did not seek the subject information in the first discovery requests, the court rejects this objection as a basis for reducing the fee award.

Regarding ABTS's assertion that XETA should not recover fees and expenses associated with initial depositions, the court finds that the late production by ABTS caused waste of attorney time and expense related to those depositions. However, the court acknowledges that the depositions were not entirely a waste of effort. Since the parties' agreed pretrial order submitted January 4, 1999, lists three principle claims by ABTS, and since the late documents pertain to only one of those claims, the Omni Shoreham Hotel, the court reasons that it is fair to assess ABTS one-third of the expense for those depositions. Therefore the \$8,291.94 sought for fees and expenses related to initial depositions should be reduced to \$2,763.98.

The court rejects ABTS's contention that all fee and expense items listed in Sections B(2) and (C) of XETA's request for fees should be excluded from the fee award. Section B(2) outlines fees and expenses related to subsequent depositions and Section (C) relates to witness and exhibit lists. In the report and recommendation adopted by the district court, the court found that "XETA incurred additional expenses related to ABTS' failure to list the documents as exhibits." [Dkt. 241, p. 7]. To an

extent, XETA's work preparing witness and exhibit lists was wasted by ABTS's failure to fully disclose the documents at issue. Again, the court finds that assessing one-third of the fees and expenses in these categories is an appropriate way to apportion the fees. Accordingly, the court will assess against ABTS one-third of the \$11,479.75 or \$3,826.58 for category (B)(2) "Subsequent Depositions;" and one-third of the \$4,068 or \$1,356 for category (C) "Witness and Exhibit Lists."

The court rejects ABTS's assertion that only a portion of the fees listed in Section (E) "Comtel (Omni Shoreham) Discovery" should be assessed. The documents at issue relate directly to ABTS's Omni Shoreham damage claim. Further, all fees requested in Section (E) were incurred after ABTS's 3/20/96 response to XETA's request for production of documents and after the 11/1/96 filing of ABTS's preliminary exhibit list.

In conducting its review of the XETA fee request, the court finds that the work performed by attorney Regina A. Jones consisted primarily of telephone conferences and review of correspondence and documents prepared by others. From the billing description, it appears her work was performed in an ancillary capacity and is somewhat redundant of other billing. The court therefore declines to recommend that ABTS be assessed any of the \$5,770.50 sought for her time.

ABTS has objected to an award of any amount for "expenses advanced" because XETA did not provide any supporting documentation for those expenses. ABTS has not cited any authority for its position that further documentation is required before such expenses can be awarded. However, the court is obligated to review the

expenses to discern their reasonableness. The court finds that the \$985.34 requested for the June 1997 trip to New Jersey is reasonable and was directly related to the documents ABTS failed to produce. Similarly, the court finds that the airfare, hotel and travel expenses of \$2,838.26 is reasonable for travel and related expenses related to the Kassel deposition in San Francisco. Expenses related to the Dalia depositions have been reduced to one-third of the amount requested, as specified above.

The court notes that ABTS has not objected to the hourly billing rates which range between \$100 and \$140 per hour. Based upon the court's familiarity with the rates in the local community and the lack of objection, the court finds that the rates requested are reasonable.

Finally, the court has scrutinized the billing submitted by XETA and finds that the entries sufficiently describe the tasks performed. Therefore the court rejects ABTS's objection that overall the entries are too vague. However, in determining the amount of fees to be awarded, the court has made some reductions for entries which appear to be redundant or which entail clerical or overhead-type tasks.

The undersigned United States Magistrate Judge recommends that ABTS be assessed the following amounts of attorneys fees and expenses in the following categories as sanctions related to the January 13, 1999, report and recommendation:

A. Activity Related to Written Discovery Request, Responses Thereto, And Related Motions To Compel.

1. Initial Requests and Motion to Compel	\$6,043.50
2. Julie T. Lombardi's Trip to New Jersey	5,757.75
Expenses	985.34
3. Subsequent Requests and Motion to Compel	5,608.50

ABTS's pre-marked exhibits contained a series of 104 documents concerning ABTS's Omni Shoreham damage claim which documents XETA asserts had not previously been produced or identified as exhibits despite XETA's numerous discovery requests and the court's order of April 2, 1997, directing that all such documents be produced.

ABTS argues that XETA's motion is moot because the court granted XETA alternative relief of trial continuance and additional discovery. The court rejects this argument. ABTS also argues that the prerequisites of Rule 37 have not been met in that the documents at issue have not been the subject to a motion to compel or court order. The court also rejects this assertion. This court has previously outlined XETA's diligent efforts to discover the basis for ABTS's calculation of damages. See Dkt. 241, p.2-4. Further, this court has previously found that despite proper discovery requests and court orders requiring production,² ABTS failed to produce all documents related to its claimed damages. *Id.* at 7. And, this court has previously determined that admission of ABTS's summary damage calculations would be denied unless the

² On April 2, 1997, the undersigned held a hearing on XETA's motion to compel [Dkt. 14]. The minute entered reflects that XETA's motion to compel was granted. ABTS was required to file a pleading listing all responsive documents and affirming that all responsive documents have been provided to defendant. ABTS was further instructed to make all documents located in New Jersey available for inspection.

At the Pretrial Conference had before Judge Holmes on June 18, 1998, Judge Holmes ordered the parties to exchange damage witness designations and supporting documentation on June 25, 1998. On July 30, 1998, XETA filed a motion to strike ABTS's damage related claims for ABTS's failure to produce certain documentary evidence in support of its damage claims. [Dkt. 218]. On March 10, 1999, Judge Holmes entered an order adopting the findings in the magistrates January 13, 1999, report [Dkt. 250], that report included the finding that "ABTS failed to obey [the] order of April 2, 1997, in that all documents were not provided for inspection by XETA's counsel. [Dkt. 241, p. 8].

underlying supporting data for those calculations was produced within the extended discovery time frame. *Id.* at 9.

ABTS states its belief that most of the documents were made available to XETA or were identified but perhaps not attached to an interrogatory response. In particular, ABTS argues:

ABTS cannot state with certainty that the documents referenced in its response were attached to its response since the attorney making the response is not longer ABTS' counsel. However, given the contentious nature of the discovery phase of this case, it seems highly improbable that XETA did not receive these documents following their identification by Plaintiff. Counsel for XETA has not on a single occasion failed to follow up on making sure that Plaintiff has complied fully with all discovery requests in a timely fashion and making sure that all identified documents are promptly produced. While there is no "paper trail" regarding these particular documents, the assumption would be that XETA received them or surely they would have filed a motion to compel their production in order to bring to the Court's attention more of what they consider "discovery abuses" by ABTS.

[Dkt. 321, p. 5-6]. The court rejects ABTS's attempt to place the onus for its production of documents on XETA. Given ABTS's history of apparent indifference to its production responsibilities in this litigation, since "ABTS cannot state with certainty" that it has produced the documents, the court concludes that the documents were not produced.

The Tenth Circuit has adopted several factors which are to be considered in determining an appropriate sanction: (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability

of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions. *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992). These factors do not constitute a rigid test, but are criteria to be considered in choosing a sanction. Further, the chosen sanction must be both "just" and related to the particular 'claim' which was at issue in the order to provide discovery." *Id.* at 920, quoting *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707, 102 S.Ct. 2099, 2106, 72 L.Ed.2d 492 (1982). Applying these factors, the court concludes that it is appropriate to strike ABTS's claims regarding the Omni Shoreham Hotel.

The court finds that ABTS's failure to produce all relevant documents concerning calculation of damages related to the Omni Shoreham Hotel has resulted in actual prejudice to XETA in the form of unneeded expenses and delay. Further, ABTS's failure to produce has resulted in considerable interference with the judicial process. This case was filed in 1996, since that time XETA has attempted to discover the basis for ABTS's damage calculations. Despite the court's orders to ABTS on April 2, 1997, and June 18, 1998, directing it to supply such information, on November 1, 1999, with trial scheduled for November 15, 1999, new documentation pertaining to ABTS's Omni Shoreham damage claim was produced for the first time. ABTS's failure to obey court orders has resulted in yet another delay in getting this nearly 4 year old case to trial.

The third factor to consider, culpability of the litigant, requires the court to assess whether the non-compliance is fairly attributable to the litigant, or counsel. It is no excuse that ABTS has changed local counsel several times during the pendency of this case. [Dkt. 41, 42, 48, 49, 67, 68, 227, 228, 232, 235, 258, 268, 270]. Attorney Stuart A. Wilkins, of West Berlin, New Jersey has continually served as counsel for ABTS. Moreover, ABTS executive vice president, Michael Dalia, has been identified as being "the person" involved in the production of documents. [Dkt. 240, p. 2]. The court therefore concludes that culpability for non-production resides with the litigant.

The fourth factor to be considered is whether the party was notified that its failures to comply with court orders might result in dismissal. The court has ruled that it would deny admission of ABTS's summary damage calculations concerning the Omni Shoreham claim unless the underlying supporting data for the calculations were produced within the extended discovery time frame. [Dkt. 241, p. 9; 250, p. 2]. Striking ABTS's Omni Shoreham claim is a logical application of that ruling to the facts at hand.

Finally, the court is required to consider the efficacy of a lesser sanction. In view of XETA's continued efforts to discover the basis for ABTS's damage calculations and ABTS's continued pattern of unjustified resistance to that discovery, the court finds that a lesser sanction would not be effective. In fact, striking the Omni Shoreham claim is a lesser sanction than the striking of all ABTS's claims which XETA

requested and which might also be justified on this record. Although striking the Omni Shoreham claim is a severe sanction, the court finds it is justified.

CONCLUSION

The undersigned United States Magistrate Judge makes the following recommendations:

ABTS's Motion to Strike Certain Damage Related Evidence and Claims [Dkt. 226] should be DENIED.

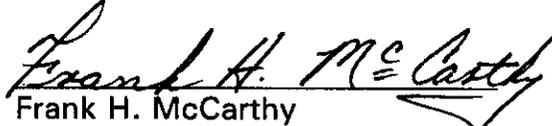
Defendant XETA Corporation's Application for Award of Attorney Fees and Costs as Sanctions Against Plaintiff ABTS [Dkt. 255] should be GRANTED and ABTS should be assessed a total of \$36,575.91, as follows:

A. Activity Related to Written Discovery Request, Responses Thereto, And Related Motions To Compel.	
1. Initial Requests and Motion to Compel	\$6,043.50
2. Julie T. Lombardi's Trip to New Jersey	5,757.75
Expenses	985.34
3. Subsequent Requests and Motion to Compel	5,608.50
B. Dalia Depositions	
1. Initial Depositions and Expenses	2,763.98
2. Subsequent Depositions	3,826.58
C. Witness and Exhibit Lists and Exhibit Exchanges	1,356.00
D. Inn on the Lakes Discovery	660.00
E. Comtel (Omni Shoreham) Discovery	4,086.25
Expenses	2,838.26
F. Pretrial Order Preparation	
1. January 1998 Pretrial	331.25
2. June 1998 Pretrial	1,837.25
G. Activity Following June Pretrial Related to Damages	<u>481.25</u>
TOTAL	\$36,575.91

Defendant XETA Corporation's Motion to Strike All Claims of Plaintiff ABTS [Dkt. 305-1] should be GRANTED IN PART and ABTS's claims related to the Omni Shoreham Hotel should be STRICKEN.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the District Court for the Northern District of Oklahoma within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Haney v. Addison*, 175 F.3d 1217, 1219-20 (10th Cir. 1999), *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 8th Day of March, 2000.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

LEONARD MCDANIEL,)
PLAINTIFF,)
vs.)
STATE OF OKLAHOMA ex rel.)
OFFICE OF JUVENILE AFFAIRS;)
DEFENDANT.)

ENTERED ON DOCKET
DATE MAR 10 2000

Case No.: 99-CV-40-BU (M)

FILED

MAR 9 - 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

Now, on the 23rd and 24th day of February 2000, the above captioned case came on for jury trial. Plaintiff, Leonard McDaniel, appeared by and through his attorneys of record: Terry A. Hall and Leslie V. Williams of Armstrong and Lowe, Tulsa, Oklahoma. Defendant, State of Oklahoma, ex rel. Office of Juvenile Affairs, appeared by and through its attorney of record, Wayne Johnson, Assistant Attorney General, Oklahoma City, Oklahoma. Witnesses were sworn, testimony and documentary evidence was admitted, and argument of counsel was presented.

At the conclusion of the evidence, Defendant moved for judgment as a matter of law, which motion was denied by the Court.

Whereupon, the Jury, empanelled and sworn in the above-entitled cause, did unanimously FIND that Plaintiff, Leonard McDaniel, had proven by a preponderance of the evidence that Plaintiff's filing of his claim or grievance of racial discrimination was a motivating factor in Defendant's disciplinary actions against Plaintiff; and awarded Plaintiff compensatory damages on his retaliation claim in the principal amount of Two Hundred Twenty Five Thousand Dollars and no cents (\$225,000.00).

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The Jury further unanimously FOUND that Plaintiff, Leonard McDaniel, had not proven by a preponderance of the evidence that Plaintiff's race was a motivating factor in Defendant's employment decision not to promote Plaintiff.

THEREUPON, based upon the Jury Verdict, and after reviewing the evidence, other matters of record, and hearing statements of counsel, the Court FINDS that a final judgment should be entered in favor of Plaintiff, Leonard McDaniel, and against Defendant, State of Oklahoma, ex rel. Office of Juvenile Affairs, in the principal amount of Two Hundred Twenty Five Thousand Dollars and no cents (\$225,000.00); with postjudgment interest in the amount of Thirty Eight Dollars and seventy-five cents (\$38.75) per day until paid in full.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Plaintiff, Leonard McDaniel, and against Defendant, State of Oklahoma, ex rel. Office of Juvenile Affairs, in the principal amount of Two Hundred Twenty Five Thousand Dollars and no cents (\$225,000.00; with postjudgment interest in the amount of Thirty Eight Dollars and seventy-five cents (\$38.75) per day until paid in full.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is no just reason for delay in entry of this final judgment and it is expressly directed such judgment be entered.

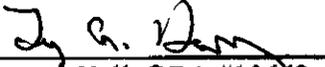
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the question of the amount for attorneys' fees and expenses of litigation to be granted Plaintiff is taken under advisement to be addressed by a separate judgment and order.

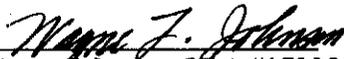
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all other costs of this action shall be taxed in accordance with federal law and the Federal Rules of Civil Procedure.

DATED THIS 9th day of March, 2000.


U. S. DISTRICT COURT JUDGE

APPROVED AS TO FORM:


Terry A. Hall, OBA #10668
Leslie V. Williams, OBA # 9665
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Attorneys for Plaintiff


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Assistant Attorney General
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Attorney for Defendant

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

FILED

MAR 9 - 2000 *SL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GEMSTAR DEVELOPMENT CORPORATION,)
SUPERGUIDE, INC., and STARSIGHT)
TELECAST, INC.,)

Plaintiffs,)

v.)

Case No. 99-CV-127-H ✓

PREVUE NETWORKS, INC. and TCI)
COMMUNICATIONS, INC.,)

Defendants.)

ENTERED ON DOCKET
DATE MAR 10 2000

ADMINISTRATIVE CLOSING ORDER

Upon consideration of the parties' joint application for entry of an order administratively closing this case, and for good cause shown, it is hereby ordered that the Clerk shall administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

The parties are further ordered to supplement their joint application, or to otherwise advise the Court as to the continued need to maintain the administrative closure of this action, on or before August 24, 2000.

IT IS SO ORDERED.

This 9TH day of March, 2000.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 9 - 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Case No. 95-CV-1126-H

ENTERED ON DOCKET
DATE MAR 10 2000

ORDER

This matter comes before the Court on the application for dismissal of Plaintiffs Donald R. Nichols and Virginia Nichols (Docket # 194), filed March 2, 2000. Plaintiffs seek to have this case dismissed without prejudice with respect to the remaining defendants. A review of the record reveals that the only defendant remaining in the case is Defendant R.A. Deison, who filed a notice of bankruptcy on August 22, 1997 (Docket #120). Pursuant to Fed.R.Civ.P. 41(a)(2), the Court finds that this action should be dismissed without prejudice as to Mr. Deison. Accordingly, Plaintiff's motion to dismiss this action without prejudice (Docket # 194) as to the remaining defendants is hereby granted, and the Clerk is directed to terminate the case.

IT IS SO ORDERED.

This 9TH day of March, 2000.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR -9 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LESTER C. QUINN,
SSN: 495-62-3399,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0543-EA

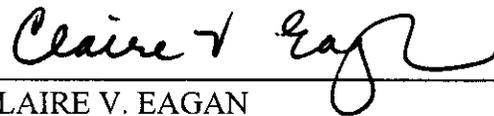
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DATE MAR 10 2000

JUDGMENT

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

It is so ordered this 9th day of March, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR -9 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LESTER C. QUINN,
SSN: 495-62-3399,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0543-EA

ENTERED ON DOCKET

DATE MAR 10 2000

ORDER

Claimant, Lester C. Quinn, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration (“Commissioner”) denying claimant’s application for disability benefits under the Social Security Act. In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals. Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **AFFIRMS** the Commissioner’s decision.

Social Security Law and Standard of Review

Disability under the Social Security Act is defined as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment” 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his “physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any

other kind of substantial gainful work in the national economy” Id. § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. §§ 404.1520, 416.920.¹

Judicial review of the Commissioner’s determination is limited in scope by 42 U.S.C. § 405(g). This Court’s review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted). The term substantial evidence has been interpreted by the U.S. Supreme Court to require “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Court may not reweigh the evidence nor substitute its discretion for that of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). Nevertheless, the court must review the record as a whole, and “the substantiality of the evidence

¹ Step one requires claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510, 416.910. Step two requires that claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See id. §§ 404.1521, 416.921. If claimant is engaged in substantial gainful activity (step one) or if claimant’s impairment is not medically severe (step two), disability benefits are denied. At step three, claimant’s impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment or impairments “medically equivalent” to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If claimant’s step four burden is met, the burden shifts to the Commissioner to establish at step five that work exists in significant numbers in the national economy which claimant--taking into account his age, education, work experience, and RFC--can perform. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work. See generally Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

must take into account whatever in the record fairly detracts from its weight.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); see also Casias, 933 F.2d at 800-01.

Claimant’s Background

Claimant was born on May 11, 1955, and was 41 years old at the time of the ALJ’s decision. He has an eighth grade education. Claimant’s past relevant work included work as a truck driver, cab driver, and dispatcher. He alleges an inability to work beginning June 28, 1993, due to pain in his back, neck, left arm, and left shoulder. These problems appear to be related to two motor vehicle accidents, a work injury, and hernia problems. He also claims to suffer from chest pain and depression, although he did not claim that his chest pain and depression were disabling when he filed his 1995 applications, and he did not claim that his depression was disabling when he gave his testimony at the administrative hearing.

Procedural History

On October 13, 1995, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.), and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Prior applications for Title II and Title XVI benefits filed by claimant in 1991 and 1993 were denied and not pursued further. Claimant’s 1995 applications were denied in their entirety initially and on reconsideration before claimant requested a hearing. The hearing was held May 8, 1997, in Tulsa, Oklahoma, before Administrative Law Judge Richard J. Kallsnick (ALJ). By decision dated June 13, 1997, the ALJ found that claimant was not disabled at any time through the date of the decision. On June 8, 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.

Decision of the Administrative Law Judge

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform light work activity in a relatively clean air environment that does not require more than occasional overhead reaching with his left upper extremity or more than occasional bending, stooping, and squatting. The ALJ determined that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his RFC, age, education, and work experience. The ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Review

Claimant lists his errors on appeal as:

- (1) Claimant meets Listing § 12.04 and Listing § 12.08;
- (2) The ALJ failed to evaluate all of claimant's non-exertional impairments and their impact upon his disability, including mental impairments, a lung impairment, and pain;
- (3) The ALJ erroneously relied upon an old psychological consultative examination, filled out the Psychological Review Technique (PRT) form without addressing all the evidence, and merely concluded that claimant did not meet a Listing;
- (4) The ALJ should have allowed the reopening of the August 1993 application;
- (5) The ALJ improperly exercised his own medical expertise;
- (6) The ALJ's hypothetical questions to the vocational expert were erroneous; and
- (7) The 1996 consultative examination should be discarded because it is biased, conclusory, and contains serious errors.

As the Commissioner points out, many of these arguments overlap. Many are also misplaced. The threshold issue involves the appropriate time period for review.

Reopening

The Social Security Administration regulations govern the reopening of prior determinations. The relevant portions clearly indicate that reopening is discretionary. See 20 C.F.R. §§ 406.987; 406.988; 416.1487; 416.1488. The ALJ found no basis for reopening the claimant's 1993 applications. (R. 19) Therefore, he considered the relevant period to be from October 19, 1993 (the day following the prior determination) through March 31, 1996 (the date the claimant was last insured) for purposes of eligibility under Title II of the Social Security Act, and through June 13, 1997 (the date of his decision) for purposes of eligibility under Title XVI. The ALJ's finding is not reviewable by this Court absent a valid Constitutional claim. Califano v. Sanders, 430 U.S. 99, 107-08 (1977); Nelson v. Sec'y of Health & Human Servs., 927 F.2d 1109, 1111 (10th Cir. 1990). Claimant has failed to demonstrate that the ALJ's exercise of regulatory discretion violated claimant's Constitutional rights. The decision of the ALJ not to reopen is, therefore, not reviewable by the Court.

The Listings

At step three of the sequential evaluation process, a claimant's impairment is compared to the Listing of Impairments (20 C.F.R. Pt. 404, Subpt. P, App. 1). If claimant has an impairment, or a combination of impairments, which meets or equals an impairment in the Listing of Impairments, claimant is presumed disabled without considering his age, education, and work experience. 20 C.F.R. §§ 404.1511(a); 404.1520(d); 416.911(a); 416.920(d). Equivalence is determined "on medical evidence only." Id. §§ 404.1526(b); 416.926(b). The ALJ is "required to discuss the

evidence and explain why he found that [claimant] was not disabled at step three.” Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996). However, a claimant has the burden of proving that a Listing has been equaled or met. Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

Claimant argues that he meets the criteria of Listing § 12.04 (Affective Disorders) and Listing § 12.08 (Personality Disorders). All of the medical evidence to which claimant refers, however, falls outside the relevant time period of October 19, 1993 through June 13, 1997. Claimant alleged depression (an affective disorder) as part of his 1993 application, which was denied. Apparently, in an attempt to be thorough or in an abundance of caution, the ALJ in this matter considered a psychological consultative examination prepared on September 23, 1993, by Jean Jose, Ph. D., in connection with claimant’s 1993 application. (R. 23, 26; see R. 258-62) Dr. Jose diagnosed claimant as having depression, but she concluded that he had no mental impairments that would limit his ability to engage in work activities. (R. 261) The ALJ agreed. (R. 26)

Claimant never alleged or claimed that depression or any type of personality disorder was disabling when he filed for benefits in 1995. (See R. 149-60; 169-70). Nor did he testify that he was disabled by any affective or personality disorder. (See R. 374-76) He did testify that he had low energy (R. 376) and problems sleeping (R.381-82), but his testimony indicates that he associated those problems with his physical condition.

Several months after the ALJ issued his decision, claimant presented to Parkside Community Psychiatric Services & Hospital for treatment. (R. 332-59) He was diagnosed with major recurrent severe depression, cocaine dependency, dysthymia, antisocial personality disorder, and low General Assessment of Functioning (GAF) scores in addition to his back pain. (R. 340, 353, 355, 359) Even

if the Parkside diagnosis could be considered retrospective, “the relevant analysis is whether the claimant was actually disabled prior to the expiration of [his] insured status.” See Potter v. Secretary of Health & Human Servs., 905 F.2d 1346, 1348-49 (10th Cir. 1990). No treating physician opined that claimant had an disabling affective or personality disorder prior to March 31, 1996, the relevant date for purposes of Title II, or prior to June 13, 1997, the relevant date for purposes of Title XVI.

It is true that, as new evidence submitted to the Appeals Council, the Parkside documents become part of the administrative record that the Court must consider. O’Dell v. Shalala, 44 F.3d 855, 859 (10th Cir. 1994). Pursuant to 20 C.F.R. §§ 404.970(b), 416.1470(b), the Appeals Council must consider evidence submitted with a request for review “if the additional evidence is (a) new, (b) material, and (c) relate[d] to the period on or before the date of the ALJ’s decision.” Box v. Shalala, 52 F.3d 168, 171 (8th Cir. 1995) (internal quote omitted); see also O’Dell, 44 F.3d at 858. The Parkside documents are new and material, but they do not relate to the period on or before the date of the ALJ’s decision. The Appeals Council considered the Parkside documents and properly concluded that it did not provide a basis for changing the ALJ’s decision.² (R. 6) Plaintiff’s disability for the relevant period cannot be inferred from subsequent deterioration of his condition. Cf. Flint v. Sullivan, 951 F.2d 264, 267-68 (10th Cir. 1991). Claimant’s argument that he met the criteria for Listings §12.04 and Listing §12.08 is not valid.

² Since the Appeals Council did not return the additional evidence to claimant with an explanation as to why it did not accept the additional evidence and advise him of his right to file a new application, as required by 20 C.F.R. §§ 404.976, 416.1476, the Court’s conclusion as to the effect of the new and additional evidence on claimant’s current claim for disability within the relevant time period under review should not be viewed as *res judicata* for purposes of any application claimant may have filed, or may file, subsequent to the decision of the ALJ in this matter.

RFC Assessment

Claimant's argument that the ALJ failed to evaluate all claimant's non-exertional impairments and their impact upon his disability is three-fold. He claims that the ALJ did not consider his mental impairments or his lung impairment, and that the ALJ did not properly consider his pain.

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).

The ALJ followed this procedure. He acknowledged the claimant's history of problems with his "nerves," his diagnosis of depression, and Dr. Jose's conclusions. The ALJ was "persuaded that the claimant's depressed mood and memory difficulty are not of disabling proportions and would no more than minimally affect his ability to perform substantial gainful activity." (R. 26) He also completed a PRT form and attached it to his decision. (R. 32-34)

Nonetheless, claimant argues that the ALJ erroneously relied upon an old psychological consultative examination, filled out the Psychological Review Technique (PRT) form without addressing all the evidence, and merely concluded that claimant did not meet a Listing. These arguments are invalid for many of the same reasons set forth above. The evidence to which claimant refers in an effort to prove his mental impairment does not relate to the relevant time period, and claimant did not allege that he suffered from any mental impairment during the relevant time period.

Claimant's argument that the ALJ erroneously relied upon an old psychological consultative examination is particularly invalid. Claimant faults the ALJ for relying on Dr. Jose's 1993 examination instead of ordering a new consultative psychiatric examination during the relevant time period. Aside from the fact that claimant himself asks this Court to rely on factors from Dr. Jose's 1993 examination (Cl. Br., Docket # 12, at 4-5), claimant failed to sufficiently raise the issue he wants the ALJ to further develop.

Ordinarily, the claimant must in some fashion raise the issue sought to be developed . . . which, on its face, must be substantial. . . . Specifically, the claimant has the burden to make sure there is, in the record, evidence sufficient to suggest a reasonable possibility that a severe impairment exists. When the claimant has satisfied his or her burden in that regard, it then, and only then, becomes the responsibility of the ALJ to order a consultative examination if such an examination is necessary or helpful to resolve the issue of impairment.

Hawkins v. Chater, 113 F.3d 1162, 1167 (10th Cir. 1997) (citations omitted).

The ALJ has broad latitude in ordering a consultative examination. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 778 (10th Cir. 1990) Claimant failed to establish the need for a second consultative examination. Claimant did not allege in his 1995 applications or in his testimony before the ALJ that he suffered from any mental impairment. Nonetheless, the ALJ considered the possibility that claimant might have had a severe mental impairment during the

relevant time period and properly determined that further development of the record in this regard was not warranted.

Lung Impairment

Claimant alleges that the ALJ did not consider his lung impairment and should have ordered a pulmonary evaluation. A review of the ALJ's decision establishes that the ALJ did consider claimant's allegation that he was disabled by a lung impairment. At step two, the ALJ found that claimant's chronic obstructive pulmonary disease (COPD) was expected to interfere more than minimally with his ability to perform work-related activities, and, thus, was a severe impairment by Social Security definition. (R. 21) However, the ALJ determined at step three that claimant's COPD did not meet or equal the severity of Listing § 3.02 (Chronic pulmonary insufficiency) of the Listings (20 C.F.R. Pt. 404, Subpt. P, App. 1). Claimant testified that he suffered from a "collapsed lung" (R. 375-76), but an x-ray report from August 22, 1996, indicates that he had a large emphysematous bleb (distended area) occupying his upper right lung (R. 277-78). The ALJ noted this finding (R. 23), and incorporated a need to work in reasonably clean air, as in a controlled environment, in his hypothetical question to the vocational expert (R. 398). The ALJ found that claimant's impairments limit him to light work activity in a relatively clean air environment. (R. 24, 29)

The cases to which claimant refers for the proposition that the ALJ had the latitude and duty to order pulmonary function testing deal with the ALJ's general duty to develop the record and the ALJ's latitude to order a consultative examination or obtain medical records already created by medical sources. See Cl. Br., Docket # 12, at 5 (citing Hawkins, 113 F.3d at 1166; Baca v. Department of Health and Human Servs., 5 F.3d 476, 479-80 (10th Cir. 1993); Thompson v.

Sullivan, 987 F.2d 1482, 1492 (10th Cir. 1993)). None of them require that the ALJ order any test on claimant.

The claimant has the burden of providing medical evidence proving his disability, 20 C.F.R. §§ 404.1512(a)-(c), 404.1513, 416.912(a)-(c); 416.913. He did not allege that a lung impairment was disabling when he filed for benefits in 1995. (See R. 149-60; 169-70). He did provide three pages which show that he went to a clinic in August 1996 complaining of shortness of breath, chills, fever, coughing, and vomiting associated with pneumonia. (R. 279) The interpretation of his August 22, 1996 chest x-ray indicates that the large emphysematous bleb occupying his upper right lung was “consistent with vanishing lung disease.” (R. 278). However, there are no records indicating that claimant sought treatment for any respiratory problem after he reported to the clinic again on September 5, 1996.

Claimant also participated in many activities which are inconsistent with a disabling lung impairment. He testified that he could sweep and mop once a week and wash dishes once a day. (R. 382-83) He can drive, but he does not have a car so he takes the bus or rides with a friend if he needs transportation. (R. 366) He goes to the “Day Center” almost daily and to church almost every Sunday. (R. 380-82) He listens to the radio, reads books, and plays cards. (R. 381) The Day Center, the church, and “lady friends” help him purchase medication. (R. 384) As of September, 1996, he was playing volleyball. (R. 312)

Further, claimant was represented by counsel at the administrative hearing; thus, the ALJ is entitled to rely on claimant’s counsel to “structure and present claimant’s case in a way that the claimant’s claims are adequately explored,” “to identify the issue or issue requiring further development,” and to request a consultative examination “unless the need for one is clearly

established in the record.” Hawkins, 113 F.3d at 1167-68. The need for a pulmonary function test is not clearly established in the record, and claimant’s counsel did not request one prior to the ALJ’s decision. “The ALJ does not have to exhaust every possible line of inquiry in an attempt to pursue every potential line of questioning. The standard is one of reasonable good judgment. The duty to develop the record is limited to ‘fully and fairly develop[ing] the record as to material issues.’” Id. at 1168 (citing Baca, 5 F.3d at 479-80). The ALJ did not commit reversible error by failing to order a pulmonary function test or to adequately consider claimant’s lung impairment.

Pain and Credibility

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

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

Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992); accord Kepler v. Chater, 68 F.3d 387, 390 (10th Cir. 1995). The factors that an ALJ should consider when determining the credibility of subjective complaints of pain include, but are not limited to, “the levels of medication and their effectiveness, the extensiveness of attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical

evidence.” Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991) (quoting Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988)); accord Luna, 834 F.2d at 165-66 (citations omitted).

The ALJ fully considered claimant’s subjective complaints of disabling pain. He specifically referenced the parameters and the criteria set forth in the regulations, the case law, and Social Security Ruling 96-7p. He analyzed many of the relevant factors to determine the weight to be given claimant’s subjective allegations of pain, and, as required by Kepler, the ALJ made express findings as to the credibility of claimant’s objective complaints of disabling pain, with an explanation of why specific evidence led to the conclusion that claimant’s subjective complaints were not fully credible. (R. 24-27)

Credibility determinations made by an ALJ are generally entitled to great deference. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). “Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence.” Diaz v. Secretary of Health and Human Servs, 898 F.2d 774, 777 (10th Cir. 1990); Social Security Ruling 82-59, 1982 WL 31384. The ALJ’s credibility determination in this matter is supported by substantial evidence and, therefore, entitled to great deference.

ALJ’s Improper Exercise of Medical Expertise

Claimant also argues that the ALJ improperly exercised his own medical expertise when he stated that there was no evidence of physical deficits such as loss of appetite, muscle atrophy, functional disease, or retarded movements to demonstrate the presence of severe disabling pain. (See R. 26) These remarks were clearly part of the ALJ’s extensive pain and credibility analysis. The evidence on which claimant relies for his challenge to the ALJ’s remark about loss of appetite is

from an occasion in 1991 when claimant apparently had the flu (R. 246) and when he reported that he did not eat well because he could not afford to eat, but he did smoke a pack and a half of cigarettes per day (R. 250). Claimant also points to the September 1993 consultative examination by James L. Schutzenhofer, M.D., at which time he weighed 175 pounds. Claimant reported that he did not have a good appetite and had lost approximately eight pounds in the preceding two weeks. (R. 264-65)³ On the same day, however, he reported to Dr. Jose that his appetite was good but he did not always have the money to buy food. (R. 258) All of these references are prior to the relevant time period, and do not evidence severe disabling pain.

The one reference within the relevant time period on which claimant relies is recorded by Roy Fielding, M.D., on May 2, 1996 (R. 273), and claimant later argues that the ALJ erred by not rejecting Dr. Fielding's report. (Cl. Br., Docket # 12 at 7-8.) Apparently, claimant infers muscle atrophy from Dr. Fielding's observation that claimant's left forearm was .5 centimeters smaller than his right, and his left arm was one centimeter smaller than his right. (R. 273) Dr. Fielding did not report that claimant had muscle atrophy. In fact, Dr. Fielding reported that claimant was right-handed and claimant felt that his left hand was weaker than it used to be. (R. 270) Claimant told Dr. Fielding that he had no problem moving his arms, shoulders, hands, or wrists, and Dr. Fielding observed that claimant's extremities were "grossly normal." (R. 271) Claimant's grip strength was less in his left hand than his right, but Dr. Fielding felt that "this man was really not trying his best

³ By January 1998, more than four years later, claimant's weight had dropped another 25 lbs., from 175 lbs. to 150 lbs. (R. 346) However, in 1991, he weighed 167 lbs. (R. 231); in 1995, he weighed 160 lbs. (R. 156); and in 1996, he weighed 153 lbs. and was described as "well-nourished" (R. 271). The 1998 notes indicate that claimant was being treated for cocaine addiction. (R. 332-59) There is no evidence that claimant's weight fluctuation was due to pain.

on the left side.” (R. 272) Claimant’s argument that the ALJ improperly exercised his own medical expertise mischaracterizes the record and lacks merit.

Hypothetical Questions to the Vocational Expert

Claimant argues that the ALJ’s hypothetical questions to the vocational expert were erroneous because (a) they place a new requirement on credibility; and (b) they do not state claimant’s impairments with precision. These issues were not raised when claimant filed his administrative appeal. Accordingly, they would be deemed waived for purposes of subsequent judicial review under James v. Chater, 96 F.3d 1341, 1343 (10th Cir. 1996). However, the Court recognizes that the Tenth Circuit considers the James opinion to be “on questionable footing” and the Supreme Court has granted *certiorari* to consider the administrative waiver doctrine. Jones v. Apfel, No. 99-7039, 2000 WL 3875 at *1, n. 1 (10th Cir. Jan. 4, 2000) (unpublished) (citing to Sims v. Apfel, 68 U.S.L.W. 3345 (U.S. Nov. 29, 1999) (No. 98-9537)). Further, since the Commissioner did not object to claimant’s failure to raise these issues on administrative appeal, the Court will address the merits of the issues. Even if James is not applicable, the issues do not require reversal or remand.

At the administrative hearing, the ALJ posed a hypothetical question to the vocational expert which included all of the impairments supported by substantial evidence in the record. (R. 395-96). The vocational expert responded with the past relevant work that the hypothetical individual, whose RFC and past relevant work matched that of claimant, could perform. (R. 396) Then the ALJ modified his inquiry to include other jobs the hypothetical individual could perform, and the vocational expert named several. (R. 396-97) The ALJ then modified his question a third time, stating that “I would like to assume that the testimony of Mr. Quinn as given at the hearing today

is found to be credible, substantially verified by third party medical evidence which is a part of the record without any significant contradictions.” (R. 397) The vocational expert testified that the individual could not perform any of his past relevant work or the other jobs that the vocational expert previously listed. (R. 397-98) Claimant alleges that, by this line of questioning, the ALJ placed a new requirement on credibility.

The ALJ did not place a new requirement on credibility. He simply asked the vocational expert to assume that claimant’s testimony was credible to the extent that it was substantially verified by third party medical evidence and lacked any significant contradictions. Even if this could be construed as a new, insurmountable obstacle for claimant, as claimant argues, the vocational expert testified that there would be no jobs that claimant could perform. The vocational expert’s response to the so-called “new requirement” did not operate in the Commissioner’s favor, but in claimant’s favor. As the Commissioner argues, the ALJ’s words did not create an improper result in this case and the error, if any, was harmless. (Resp. Br., Docket # 14, at 9.) Further, the ALJ’s decision does not indicate that he erroneously applied any such “new requirement.”

Claimant also argues that the ALJ’s hypothetical questions do not state claimant’s impairments with precision. “[T]estimony 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)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Shepherd v. Apfel, 184 F.3d 1196, 1203 (10th Cir. 1999); Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995). As discussed above, the record does not contain

substantial evidence to support the inclusion of claimant's inability to sleep due to pain, and he did include the "clean air environment" for lung problems. The ALJ's questions were proper.

Dr. Fielding's Opinion

Claimant's final argument is that the ALJ should have rejected the Dr. Fielding's 1996 report because it is "biased, conclusory, and contains serious errors." Dr. Fielding's opinion as a consultative examiner is not entitled to controlling weight, see generally 20 C.F.R. §§ 404.1527; 416.927, but it is clear that the ALJ did not rely exclusively on Dr. Fielding's report. The ALJ summarized all of the medical evidence and noted Dr. Fielding's findings as part of that summary. (R. 23) In particular, Dr. Fielding found that claimant's extremities were grossly normal with no evidence of joint disease, swelling, redness, pain or tenderness, although claimant seemed tender over the posterior cervical area. (R. 271-72) Claimant ambulated well with no gait disturbance or weakness. (Id.) His dexterity of gross and fine manipulations were normal although his grip strength was 100 pounds and his grip strength on the left was 40 pounds. (R. 272) The ALJ reported these findings. (R. 23)

Claimant argues that Dr. Fielding should have stated "the significance of hyporeflexia⁴ in the arms of a person with possible cervical disc disease," and Dr. Fielding failed to test any extremity for hypesthesia.⁵ (Cl. Br., Docket # 12, at 7-8.) Dr. Fielding did not find that claimant had

⁴ Hyporeflexia is "dysreflexia characterized by weakening of the reflexes," Dorland's Illustrated Medical Dictionary 809 (28th ed. 1994), and dysreflexia is "disordered response to stimuli." Id., at 519.

⁵ Hypesthesia is hypoesthesia, "a dysesthesia consisting of abnormally decreased sensitivity, particularly to touch." Dorland's Illustrated Medical Dictionary 803, 806 (28th ed. 1994). Dysesthesia is "1. distortion of any sense, especially of that of touch. . . 2. an unpleasant abnormal sensation produced by normal stimuli." Id., at 515.

hyporeflexia. Dr. Fielding stated that claimant's extremities were "grossly normal" and that claimant was "hypersensitive to pain to touch to pressure [sic] over much of his body." (R. 271) As the Commissioner argues, this finding appears to be the exact opposite of hypesthesia -- abnormally *decreased* sensitivity to touch. See Dorland's Illustrated Medical Dictionary 803, 806 (28th ed. 1994).

The medical reports to which claimant refers for the proposition that none of claimant's doctor's indicated poor grip effort, as Dr. Fielding did, are from a 1989 chiropractor's report (R. 185) and an undated report that appears to be part of medical reports in the 1991-1992 time frame. (R. 239) Both of these references are outside the relevant time period. Nonetheless, the fact that these reports do not indicate that claimant gave a poor effort when his grip was tested does not mean that Dr. Fielding's observation was wrong. Regardless, the ALJ did not even mention claimant's poor effort in his decision. (R. 23)

In his final effort to discredit Dr. Fielding's report, claimant points out that Dr. Fielding recorded in his written opinion that claimant's neck was tender, but Dr. Fielding failed to note that on the form accompanying his report. (Cl. Br., Docket # 12, at 8.) There is no evidence that the ALJ relied on this extraordinarily minor inconsistency, or even noticed it. There is evidence that the ALJ noticed, and acknowledged, Dr. Fielding's observation that claimant "seemed tender over the posterior cervical area." (R. 23) Claimant's argument is groundless.

Conclusion

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

DATED this 9th day of March, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

HAROLD R. FREEMAN,)
)
 Petitioner,)
)
 vs.)
)
 BOBBY BOONE, Warden,)
)
 Respondent.)

ENTERED ON DOCKET

DATE MAR 09 2000

Case No. 99-CV-584-H (M)

F I L E D

MAR 9 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

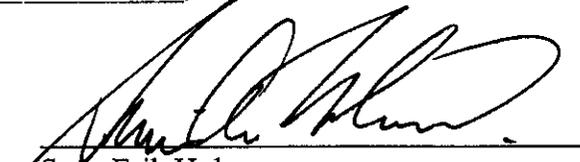
JUDGMENT

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 9TH day of MARCH, 2000.


Sven Erik Holmes
United States District Judge

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

HAROLD R. FREEMAN,)
)
 Petitioner,)
)
 vs.)
)
 BOBBY BOONE, Warden,)
)
 Respondent.)

Case No. 99-CV-584-H (M)

ENTERED ON DOCKET
DATE MAR 09 2000

F I L E D

MAR 9 2000 *SL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Respondent's motion to dismiss petition for habeas corpus as time barred by the statute of limitations (Docket #7). Petitioner, a state inmate appearing *pro se*, has filed a response to the motion to dismiss (#10). Respondent's motion is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition is not timely filed and Respondent's motion to dismiss should be granted.

BACKGROUND

In his § 2254 petition for writ of habeas corpus, Petitioner challenges his convictions entered in Tulsa County District Court, Case No. CF-94-3262. Petitioner appealed his convictions and sentences to the Oklahoma Court of Criminal Appeals ("OCCA"). On July 25, 1996, in an unpublished summary opinion, the OCCA affirmed Petitioner's convictions (#8, Ex. A). Petitioner did not seek *certiorari* review in the United States Supreme Court.

On December 21, 1998, Petitioner first filed an application for post-conviction relief in the state district court. (See #8, Ex. A). After the trial court denied the requested relief, Petitioner filed a timely post-conviction appeal in the OCCA. Post-conviction proceedings were concluded on May

19, 1999, when the OCCA entered its Order affirming the trial court's denial of post-conviction relief. (#8, Ex. A).

Petitioner originally filed the instant federal petition for writ of habeas corpus on June 24, 1999 (#1-1) in the United States District Court for the Eastern District of Oklahoma. Along with his petition, petitioner submitted a motion for leave to file a Brief in Support (#1-3) with the proposed brief attached to the motion. On July 12, 1999, Petitioner also filed his Application for Uniform Certification of Question of Oklahoma State Law (#1-4) and his Motion to Stay Proceedings (#1-5) in the Eastern District. By Order entered July 16, 1999, the case was transferred to this district court. Upon receipt of the case, this Court granted leave to file the supporting brief, denied the motion to stay, and directed Respondent to show cause why the writ should not issue (#2).

ANALYSIS

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

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

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

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

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

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

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

28 U.S.C. § 2244(d). In general, the limitations period begins to run from the date on which a prisoner's conviction becomes final, but can be extended under the terms of § 2244(d)(1)(B), (C), and (D). Also, the limitations period is tolled or suspended during the pendency of a state application for post-conviction relief properly filed during the limitations period. § 2244(d)(2).

Application of the provisions of § 2244(d) to the instant case leads to the conclusion that this habeas petition was filed more than one year after Petitioner's convictions became final. Petitioner's challenged convictions became final for purposes of § 2244(d)(1)(A) on or about October 23, 1996, after the 90 day time period for filing a petition for writ of *certiorari* in the United States Supreme Court had lapsed. See Rhine v. Boone, 182 F.3d 1153 (10th Cir. 1999) (distinguishing the tolling provisions of § 2244(d)(1)(A) and § 2244(d)(2)). Therefore, his conviction became final after enactment of the AEDPA. As a result, his one-year limitations clock began to run on October 23, 1996, and, absent a tolling event, a federal petition for writ of habeas corpus filed after October 23, 1997, would be untimely.

Although the limitations period is tolled while a state post-conviction proceeding, filed during the one-year period, is pending, see § 2244(d)(2), the post-conviction proceeding pursued by Petitioner in the instant case does not toll the limitations period because it was commenced on December 21, 1998, or more than one year after the period expired on October 23, 1997. A collateral petition filed in state court after the limitations period has expired no longer serves to toll the statute of limitations. Rashad v. Khulmann, 991 F. Supp. 254, 259 (S.D. N.Y. 1998) (stating that "[t]he tolling provision does not, however, 'revive' the limitations period (i.e., restart the clock at zero); it can only serve to pause a clock that has not yet fully run"). Therefore, unless Petitioner can demonstrate that he is entitled to other statutory or equitable tolling of the limitations period,

his petition filed June 24, 1999 is clearly untimely.

At the time he filed his petition, Petitioner recognized that he would be confronted with the bar imposed by § 2244(d). See "Petitioner's motion to supplement with brief in support," #1-3, filed June 24, 1999; "Petitioner's brief in support," #3, filed August 11, 1999. In his brief in support, Petitioner cites 28 U.S.C. § 2244(d)(1)(B) and argues that the limitations period should be tolled in this case because the Oklahoma Department of Corrections ("DOC") instituted a program in 1995 restricting inmates' access to new legal materials. Petitioner argues that "denial of adequate resources is precisely the type of condition envisioned by § 2244(d)(1)(B)." (#3 at 4). Citing Bounds v. Smith, 430 U.S. 817 (1977), Petitioner further argues that prevention of access to current legal materials is a denial of any right to "adequate, effective and meaningful" access to the courts. See #3 at 4. In support of his argument, Petitioner attaches a copy of an affidavit, executed by Ron Turner, Law Library Supervisor at Mack Alford Correctional Center, dated April 30, 1998. (#3, Ex. A). In his affidavit, Mr. Turner states that DOC policy instituted in August, 1995, restricted delivery of new legal materials to prison libraries, with the exception of the main library at the Oklahoma State Penitentiary in McAlester, until further notice.

Petitioner also contends that his ability to submit an accurate and complete State post-conviction application as required to satisfy the exhaustion requirement of § 2254(b) was hampered by his inability to obtain copies of his case file from either his counsel or the Clerk of the trial court. Petitioner states that his retained counsel, C. Rabon Martin, failed to inform him of the OCCA's affirmance of his conviction until April 14, 1997, or more than eight months after issuance of the mandate. Once he learned of the decision by the OCCA, Petitioner claims he tried repeatedly without success to obtain copies of his case file from his attorney. Finally, on April 15, 1998, Petitioner claims he received his trial transcripts from his attorney. As a result of these events,

Petitioner argues that, pursuant to § 2244(d)(1)(B), his limitations period should begin on April 15, 1998.

In his brief in support of motion to dismiss time barred petition, Respondent addresses Petitioner's arguments concerning statutory tolling of the limitations period under § 2244(d)(1)(B) and equitable tolling. In response to Petitioner's argument challenging the adequacy of the prison's law library, Respondent attaches to his brief another affidavit of Ron Turner, executed August 31, 1999. (#8, Ex. D). In this more recent affidavit, Mr. Turner states that while "[i]t is true that our USCA's were outdated from July 1995 through January 1998 . . . all inmates were made aware by myself and my inmate Research Assistant's (sic) that any Federal or State Law and/or Case Law would be made available (and was) by the Oklahoma State Penitentiary Law Library and the Department of Corrections Legal Division." Mr. Turner further states that a copy of the AEDPA was provided to all inmate Research Assistants and that for well over a year, copies were posted on the Bulletin Boards and displayed on work tables in the library. Respondent contends that Mr. Turner's affidavit refutes Petitioner's claim that he did not have access to the AEDPA or relevant case law during the limitations period.

Citing case law from other federal district courts, Respondent also asserts that Petitioner's inability to obtain his trial transcripts and other trial materials does not justify equitable tolling. In addition, Respondent cites an unpublished opinion from the Tenth Circuit Court of Appeals, Osborne v. Boone, No. 99-7015, 1999 WL 203523 (10th Cir. 1999) (finding that State failure to provide transcripts was insufficient to equitably toll the limitations period) in support of his position.

After reviewing the authorities cited by the parties, the Court finds Petitioner is not entitled to tolling under § 2244(d)(1)(B) or equitable tolling. Section 2244(d)(1)(B) provides that the limitations period may commence on "the date on which the impediment to filing an application

created by State action in violation of the Constitution or laws of the United States is removed." The Court rejects Petitioner's argument that DOC's restrictions on access to legal materials constituted a denial of access to courts in violation of Bounds v. Smith, 430 U.S. 817 (1977), *modified by Lewis v. Casey*, 518 U.S. 343 (1996). In order for this Court to find a constitutional violation of the right of access to the courts under Lewis, Petitioner must show that he diligently pursued his federal claims but was prevented from doing so as a result of deficiencies in the prison library. Lewis, 518 U.S. at 349. Petitioner in this case has failed to prove that the identified deficiencies in the prison's law library prevented him from pursuing his federal claims. Although he may have been forced to acquire some legal materials from other DOC libraries, Petitioner has not demonstrated that he was prevented from pursuing his claims as a result of the alleged restrictions. Therefore, the Court rejects Petitioner's argument that his limitations period should be extended due to restrictions on his access to legal materials.

In addition, the Court rejects Petitioner's argument that pursuant to § 2244(d)(1)(B), his limitations period did not begin to run until April 15, 1998, the date he finally received copies of his trial transcripts from his attorney. In this case, any delay in filing attributable to Petitioner's privately retained counsel does not qualify as State action as required under the statute.¹ As a result, the Court concludes § 2244(d)(1)(B) does not apply because no illegal state impediment occurred.

The Court also finds Petitioner is not entitled to equitable tolling of the limitations period. Courts have historically limited equitable tolling of a statutory limitations period to those rare situations where a petitioner "has actively pursued his judicial remedies by filing a defective

¹An attorney's status as an "officer of the court" does not transform him into a "state actor" or render his actions "state action" for purposes of § 2244(d)(1)(B). Cf. Berg v. Cranor, 209 F.2d 567 (9th Cir. 1954) (stating that attorney's role as officer of the court did not make him a state actor for purposes of the Fourteenth Amendment).

pleading during the statutory period, or where the [petitioner] has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990). To be entitled to equitable tolling, a petitioner must demonstrate the existence of extraordinary circumstances over which he had no control. Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (citing Calderon v. United States District Court, 128 F.3d 1283, 1289 (9th Cir. 1997)). A habeas petitioner is not entitled to equitable tolling of the limitations period based on conclusory allegations concerning a lack of access to legal materials. Id. (stating that "[i]t is not enough to say that the ... prison facility lacked all relevant statutes and case law or that the procedure to request specific materials was inadequate"). Nor do the difficulties allegedly encountered by Petitioner in his efforts to obtain his trial transcripts and other records constitute sufficient reason to allow equitable tolling of the limitations period. Other than asserting that the trial materials were necessary in order to present all possible claims, Petitioner fails to specify why the transcripts and other materials were necessary for preparation of either his state post-conviction application or his federal habeas corpus petition. The Court concludes that Petitioner is not entitled to equitable tolling of the limitations period.

Lastly, Petitioner asserts in his response to Respondent's motion to dismiss that denial of equitable tolling in this case would render the Great Writ "inadequate and ineffective" as a remedy in violation of the Suspension Clause of the United States Constitution. (#10 at ¶ 11). However, after reviewing the claims Petitioner seeks to raise in this case, the Court finds constitutional concerns protected by the Suspension Clause are not implicated. See Miller v. Marr, 141 F.3d 976, 977-78 (10th Cir. 1998).

Therefore, the Court concludes that this petition is time-barred and must be dismissed.

CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period, Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss time barred petition (#7) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.
3. Petitioner's Application for Uniform Certification of Question of Oklahoma State Law (#1-4) is **denied as moot**.

IT IS SO ORDERED.

This 9TH day of MARCH, 2000.



Sven Erik Holmes
United States District Judge

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

F I L E D

MAR - 9 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**CUSTOM HEATING & AIR
CONDITIONING, INC., AN OKLAHOMA
CORPORATION,**

Plaintiff,

vs.

**CUSTOM AIR HEATING & AIR OF
TULSA, L.L.C., AN OKLAHOMA LIMITED
LIABILITY COMPANY, and JIM HURD, AN
INDIVIDUAL,**

Defendants.

Case No. 99-CV-1124-K (J)
JURY TRIAL DEMANDED

ENTERED ON DOCKET
DATE MAR 09 2000

**ORDER OF
DISMISSAL WITH PREJUDICE**

This action is before the Court on the Parties' Joint Stipulation of Dismissal, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure. The Court finds that the above-entitled action should be dismissed with prejudice.

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

DATED this 8 day of March, 2000.


UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 9 - 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 WILLIAM J. HUDSON,)
)
 Defendant.)

No. 99CV1075BU(E)

ENTERED ON DOCKET
DATE MAR 9 2000

DEFAULT JUDGMENT

This matter comes on for consideration this 9th day of MARCH, 2000, 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, William J. Hudson, appearing not.

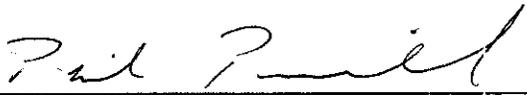
The Court being fully advised and having examined the court file finds that Defendant, William J. Hudson, was served with Summons and Complaint on February 18, 2000. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The 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, William J. Hudson, for the principal amount of \$2,750.00, plus accrued

interest of \$455.40, plus interest thereafter at the rate of 8.25 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 6.197 percent per annum until paid, plus costs of this action.

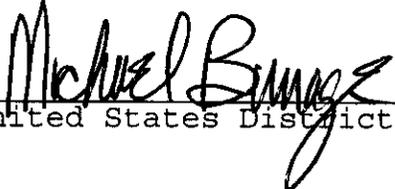

United States District Judge

Submitted By:


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

PEP/llf

respectively, plus interest thereafter at the rates of 9.13 percent and 8 percent per annum respectively 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 6.197 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

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR - 9 2000 *FL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MATHEY-LELAND MANUFACTURING CO.,)
)
Plaintiff,)
v.)
)
H. G. KEY and H.O.S.S., INC.,)
)
Defendants.)

Case No. 99 CV 0558K (M)

ENTERED ON DOCKET

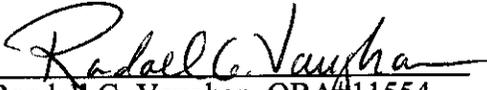
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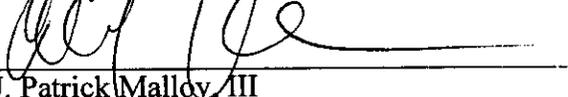
ORDER OF DISMISSAL

In accordance with the terms of a settlement agreement between Plaintiff Mathey-Leland Manufacturing Co. and Defendants H.G. Key and H.O.S.S., Inc. Inc. entered into pursuant to court-ordered mediation, the Court hereby dismisses this case with prejudice. Each party shall bear his or its own costs, expenses, and attorney fees. The Court shall retain jurisdiction to enforce the terms of the settlement agreement.


HONORABLE TERRY C. KERN
Chief District Judge

APPROVED:


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WILLIAMSON & MARLAR
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March 2, 2000

J. Patrick Malloy, III
Malloy & Malloy, Inc.
1924 S. Utica St., Suite 850
Tulsa, OK 74104-6515

RE: *Mathey-Leland Manufacturing Co. v. H. G. Key and H.O.S.S., Inc.*,
Case No. 99CV0558K (M) (U.S. District Court of Northern District, Oklahoma)

Dear Pat:

I am enclosing the Order of Dismissal for signature and filing with the Court. Please return a file-stamped copy for our records.

A Mathey employee should have contacted Mr. Key concerning transfer of the website but I was unable to confirm the transfer. You may want to call Mr. Key and make inquiry. I will advise when I receive the executed documents from Mr. Ted Key.

Sincerely,



Randall G. Vaughan

12145.006

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

FILED

MAR 8 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MONROE THOMAS BOYD,)

Plaintiff,)

vs.)

AIRCRAFT CYLINDERS OF)

AMERICA, INC.)

an Oklahoma corporation,)

Defendant.)

Case No. 99-CV-0624K (E)

ENTERED ON DOCKET

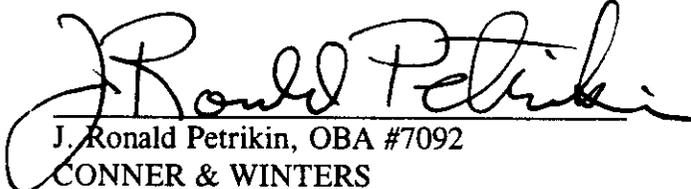
DATE MAR 08 2000

STIPULATION OF DISMISSAL WITH PREJUDICE

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their undersigned counsel of record, that the above-entitled matter is dismissed with prejudice and without costs to any party herein.

DATED this 8th day of March, 2000.

ATTORNEYS FOR THE DEFENDANT

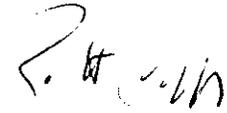


J. Ronald Petrikin, OBA #7092
CONNER & WINTERS
3700 First Place Tower
15 East Fifth Street
Tulsa, OK 74103-4344

ATTORNEY FOR PLAINTIFF

S
d/s

Respectfully submitted,



Robt. S. Coffey #17001
1927 South Boston 204
Tulsa OK, 74119
(918) 582-1249

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR -7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PAULETTE STRAND, o/b/o)
WILLIAM STRAND, deceased,)
SSN: 443-40-0878)

Substituted Party Plaintiff,)

v.)

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

Defendant.)

Case No. 98-CV-394-EA

FILED ON ORDER

MAR 8 2000

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 7th day of March, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

FILED

MAR - 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

RAE CORP.,)	
)	
Plaintiff(s),)	
)	
vs.)	Case No. 99-C-382-B
)	
BURLEY'S RINK SUPPLY, INC.,)	
)	
Defendant(s).)	

**ORDER DISMISSING ACTION
BY REASON OF SETTLEMENT**

ENTERED ON DOCKET
DATE **MAR 08 2000**

The Court has been advised by counsel that this action has been 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 ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Order by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 7th day of March, 2000.



 THOMAS R. BRETT, SENIOR JUDGE
 UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

PAULETTE STRAND, o/b/o)
WILLIAM STRAND, deceased,)
SSN: 443-40-0878)

MAR -7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Substituted Party Plaintiff,)

v.)

Case No. 98-CV-394-EA

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

FILED ON DOCKET

MAR 8 2000

Defendant.)

ORDER

Substituted plaintiff, Paulette Strand, on behalf of claimant, William Strand, requests judicial review of the decision of the Commissioner of the Social Security Administration (“Commissioner”) denying claimant’s application for disability benefits under the Social Security Act. In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals. Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **REVERSES AND REMANDS** for further proceedings consistent with this opinion.

Social Security Law and Standard of Review

Disability under the Social Security Act is defined as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment” 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his “physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any

other kind of substantial gainful work in the national economy” Id. § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. §§ 404.1520, 416.920.¹

Judicial review of the Commissioner’s determination is limited in scope by 42 U.S.C. § 405(g). This Court’s review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted). The term substantial evidence has been interpreted by the U.S. Supreme Court to require “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Court may not reweigh the evidence nor substitute its discretion for that of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). Nevertheless, the court must review the record as a whole, and “the substantiality of the evidence

¹ Step one requires claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510, 416.910. Step two requires that claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See id. §§ 404.1521, 416.921. If claimant is engaged in substantial gainful activity (step one) or if claimant’s impairment is not medically severe (step two), disability benefits are denied. At step three, claimant’s impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment or impairments “medically equivalent” to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If claimant’s step four burden is met, the burden shifts to the Commissioner to establish at step five that work exists in significant numbers in the national economy which claimant—taking into account his age, education, work experience, and RFC—can perform. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work. See generally Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

must take into account whatever in the record fairly detracts from its weight.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); see also Casias, 933 F.2d at 800-01.

Procedural History

On March 21, 1995, claimant applied 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 Steven C. Calvarese (ALJ) was held May 3, 1996, in Tulsa, Oklahoma. By decision dated June 28, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. On March 31, 1998, the Appeals Council denied claimant’s request for review. Thus, the decision of the ALJ represents the Commissioner’s final decision for purposes of further appeal. 20 C.F.R. § 404.984(b)(2).

Claimant died on August 4, 1998, while his claim was pending in this Court. The cause of claimant’s death was respiratory failure due to pneumonia and acute myocardial ischemia. (See Certificate of Death, attached to Plaintiff’s Opening Brief, Docket # 12.) His surviving spouse filed a suggestion of death upon the record and a motion for substitution of party on December 14, 1998 (Docket # 10). The Court granted the motion on December 15, 1998.

Claimant’s Background and Medical History

Claimant was born on February 22, 1943, and was 53 years old at the time of the ALJ’s decision. He had a high school education and two years of college. His past relevant work was as a telephone operator, car salesman, and social worker. Claimant alleged an inability to work beginning November 23, 1994, due to a severe cardio-respiratory problems, back problems, limited

range of motion, and pain. He also claimed to suffer from an anxiety/depressive disorder and myelodysplasia.²

Claimant testified that he hurt his back in a Jeep accident while he was on military duty in 1964. (R. 513) He was awarded Veteran's Administration benefits after he was discharged from the military in 1967. (R. 514) Claimant stated that he was terminated from his last job as a social worker, where he drove children to and from appointments, interviews, or visits, because of his complaints of back and leg pain. (R. 512-13, 523) He had a bulging disc which caused pain in his lower back, especially when he sat or stood too long. (R. 516) It also caused numbness in his legs, and pain sometimes shot down his back to his feet. (R. 518) He could sit for only 5-10 minutes before he had to stand (R. 516-17) The pain was constant, but worse in the morning. (R. 519)

According to claimant, a VA doctor advised him in 1993 that he could have surgery, but his chances of obtaining relief were 50/50, and claimant opted to take medication instead. (R. 519) He took Ampicillin with codeine, Ibuprofen, and Darvocet for pain. (R. 520) He had to take food with his medication or it made him dizzy. (R. 538-39) He began using a walker about six months before the hearing. (R. 521) Without a walker, claimant thought he could walk about ten yards, but he could go farther with his walker. (R. 539) He thought that he could lift about a quart of milk. (R. 541)

Claimant also testified that he had an enlarged heart, and had heart problems since 1969. (Id.) He claimed to have suffered two heart attacks, and he took cyclobenzaprine and used

² Myelodysplasia is "1. a neural tube defect (q.v.) causing defective development of any part (especially the lower segments) of the spinal cord. Called also *myelotelia*. 2. dysplasia of myelocytes and other elements in bone marrow. It may take the form of myelosuppression or of abnormal proliferation; in the latter case it may precede myelogenous leukemia." Dorland's Illustrated Dictionary 1089 (28th ed. 1994).

nitroglycerine patches for his heart problems. (R. 521-23) Claimant stated that he also had bronchitis, and took medication for that illness. (R. 523-24) In addition, he had two inhalers to aid his breathing. (R. 524)

According to claimant, his wife assisted him with getting dressed in the morning because he had trouble bending over. (R. 525-26) His daily activities included watching television and reading. (R. 526, 535-36) He did not cook, exercise, drive, clean house, shop, or do yard work. (R. 526-27, 534-35) When he rode in a vehicle, he had to stop, get out, and move around every fifteen to twenty minutes. (R. 527-29) He stated that he stopped smoking two weeks before the administrative hearing. (R. 536-37) He did not go to events such as concerts or movies because he was afraid he would cough and interfere with others who came to the event. (R. 537-38)

In 1988 and 1989, claimant was hospitalized twice with complaints of chest pain. (R. 146-69) In 1993, he was hospitalized three times with complaints of chest pain and shortness of breath. (R. 170-245) From September 1990 through September 1995, claimant was consistently treated at the VA hospital and outpatient clinic for complaints of low back pain. (R. 97-121, 246-419) X-rays taken in 1989, 1990, 1993, and 1994 showed that claimant had a bulging disc at L4-5 level, a bulging or herniated disc at the L5-S1 level and signs of degenerative disc disease. (R. 111, 114-15, 121, 230, 232, 405-06) He was presented with the option of surgery or conservative treatment for his back problems in November 1994, and he opted for continue conservative treatment because, according to the progress notes, he was "scared of surgery." (R. 105)

Terence M. Williams, D.O., examined claimant on behalf of the Social Security Administration in June 1995. (R. 124-32) Dr. Williams observed that claimant appeared to have no problems with movement and did not use any type of assistance device for ambulation. (R. 125)

Claimant's lungs were clear to auscultation, and he had no wheezing or other adventitious sounds, and no rubs. His heart had a regular rate and rhythm. (Id.) Claimant had a diminished range of motion and low back pain, but Dr. Williams thought claimant's range of motion "suspect" due to claimant's tendency to report pain, grab his lower back, and stop the motion requested by Dr. Williams during the examination. (R. 125-27) Dr. Williams found some sensory deficit in claimant's lower extremities and some weakness when claimant walked. (R. 126)

Dr. Williams opined that claimant had low back discomfort, "which appears to be more due to a soft tissue lesion. There is no documentation of a herniated disc in his back." (R. 127) Although claimant complained of cramping in his legs when he walked, Dr. Williams reported that claimant had equal pulses at the femoral and dorsalis pedis. He noted that claimant had no problems sitting, standing, or moving, but claimant would grab his lower back when he had to bend or move. (R. 127) Dr. Williams concluded that claimant could lift no more than 40-50 pounds, and he could carry no more than ten to twenty pounds, but he could handle objects, hear, speak, and travel without any difficulty. (R. 128)

After the ALJ's decision, claimant submitted additional evidence to the Appeals Council. On September 22, 1997, claimant submitted the VA medical records from July 21, 1992 through September 3, 1997; a letter, dated September 3, 1997, from Manjula Krishnamurthi, M.D., regarding treatment of claimant's myelodysplasia; and a Residual Functional Capacity Questionnaire completed on September 9, 1997, by Harvey Gaspar, M.D., regarding claimant's back pain. (R. 423-507)

Dr. Gaspar reported that claimant could not sit, stand, walk, or work for more than 1 hour in an 8-hour workday; he could not lift or carry more than 20 pounds; he could occasionally bend,

squat, crawl, climb, reach above, stoop, crouch, and kneel; and he could occasionally tolerate exposure to unprotected heights, being around moving machinery, exposure to big temperature changes, and driving automotive equipment. (R. 505-06) He indicated that claimant had limitations due to objective signs of severe pain such as joint deformity, muscle spasm and abnormal gait. (R. 507) He noted that claimant had been seen for chronic back pain from 1990 to 1997. (Id.)

Decision of the Administrative Law Judge

The ALJ made his decision at the fourth step of the sequential evaluation process. He found that claimant had marked degenerative disc disease at L5-S1 with the suggestion of posterior subluxation (incomplete or partial dislocation) or retrolisthesis (posterior displacement or one vertebral body on the subjacent body) of L5 on S1; a history of smoking and treatment for right upper lobe infiltrate on September 1993 involving intravenous antibiotics therapy; a history of two possible heart attacks in the past and possible vascular claudication (limping or lameness); and hypertension, controlled through use of medication. However, the ALJ concluded that claimant did not have an impairment or combination of impairments listed in, or medically equal to an impairment listed in, 20 C.F.R. Pt. 404, Subpt. P, App. 1.

The ALJ did not find claimant's allegations of inability to work, pain, shortness of breath, and dizziness credible or supported by the medical documents in evidence to the extent alleged. He determined that claimant had the residual functional capacity (RFC) to perform a full range of light work. The ALJ concluded that claimant could perform his past relevant work as a car salesman and, thus, he was not disabled under the Social Security Act at any time through the date of the decision.

Review

In the opening paragraph of his brief, claimant asserts as error that the ALJ:

- (1) failed to follow the treating physician rule;
 - (2) failed to properly evaluate the claimant's non-exertional pain impairment;
 - (3) failed to pose a proper hypothetical question to the vocational expert;
 - (4) did not fully develop the record;
 - (5) did not consider the synergistic affect [sic] of the claimant's impairments in combination;
- and
- (6) failed to properly apply the regulations as to the Listing of Impairments, as well as the Medical-Vocational Guidelines.

However, in the text of his brief, claimant more specifically challenges the failure of the ALJ and Appeals Council to consider the results of a 1994 pulmonary function test and the 1997 opinions of VA doctors which comprise new or additional evidence submitted after the ALJ made his decision. Further, claimant challenges the ALJ's step four analysis, which led to errors in the hypothetical question the ALJ posed to the vocational expert and errors in assessing claimant's mental RFC. Finally, claimant challenges the ALJ's analysis of his pain. Claimant does not explicitly explain or expound on his complaints that the ALJ failed to consider his impairments in combination or that the ALJ failed to properly apply the regulations, and his arguments do not follow the order set forth in the opening paragraph of his brief. (See Plaintiff's Opening Brief, Docket # 12.)

New or Additional Evidence

At the hearing on May 3, 1996, the ALJ questioned claimant about whether recent pulmonary function studies were performed on him, and the ALJ left the record open for claimant to submit additional evidence of those tests. (R. 557-61). Claimant's attorney submitted a letter, dated June 13, 1996, which indicated that he was unable to obtain a copy of the test. (R. 422) Claimant's

argument that the ALJ failed to fully develop the record is misplaced. Although 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), the ALJ is not under a duty to act as counsel for the claimant. Musgrave v. Sullivan, 966 F.2d 1371, 1377 (10th Cir. 1992).

The error occurred at the appellate level, where the Appeals Council either ignored or overlooked the pulmonary function test submitted by claimant subsequent to the ALJ's decision. Claimant submitted the test as part of the new evidence consisting of VA medical records of treatment from July 21, 1992³ through September 3, 1997. The Appeals Council erroneously stated that it "reviewed the evidence from the Department of Veteran's Affairs from May 5, 1997 through September 3, 1997," and concluded that "[t]his later information, provided by your representative, is not material to the issue of whether you were disabled beginning on or before June 28, 1996," (the date of the ALJ's decision). (R. 5)

New evidence submitted to the Appeals Council becomes part of the administrative record that the Court must consider. O'Dell v. Shalala, 44 F.3d 855, 859 (10th Cir. 1994). Pursuant to 20 C.F.R. § 404.970(b), the Appeals Council must consider evidence submitted with a request for review "if the additional evidence is (a) new, (b) material, and (c) relate[d] to the period on or before the date of the ALJ's decision." Box v. Shalala, 52 F.3d 168, 171 (8th Cir. 1995) (internal quote omitted); Wilkins v. Secretary, Dep't of Health and Human Servs. 953 F.2d 93, 95-96 (4th Cir.

³ This is the date indicated by the Appeals Council as the earliest date of the medical records submitted by claimant and made part of the record. (R. 7) Claimant's attorney merely indicated that the records included were dated "from the date of onset through September 1997. (R. 8) A review of these records indicates that the earliest record dates from April 12, 1993 (R. 479). However, claimant's submission also include records from 1994, 1995, 1996, and 1997. (See R. 423-505)

1991) (internal quote omitted); see also O'Dell, 44 F.3d at 858. If the Appeals Council fails to consider qualifying new evidence, the case should be remanded for further proceedings.

Although the information regarding treatment for claimant's myelodysplasia does not appear related to the period on or before the date of the ALJ's decision, the additional evidence regarding claimant's respiratory and back problems was new, material, and related to the period prior to June 28, 1996. The May 13, 1994 pulmonary function report (R. 495), in particular, is "new" because "it is not duplicative or cumulative," see Wilkins, 953 F2d at 96, and it is material because "there is a reasonable possibility that [it] would have changed the outcome." Id. It calls into question the ALJ's conclusion that claimant's subjective complaints of chest pain, shortness of breath, and dizziness did not preclude light work and his conclusion that claimant's condition was not disabling. The ALJ erred in assuming that the results of the pulmonary function study were "not necessary for a fair disposition of the claimant's claim." (R. 22) The new evidence should have been considered by the Appeals Council.

Similarly, the Appeals Council summarily disregarded Dr. Gaspar's RFC evaluation, which explicitly states that claimant was seen for chronic back pain from 1990-1997. (R. 507) Claimant faults the ALJ for disregarding Dr. Gaspar's opinion, but that opinion was not in evidence when the ALJ made his decision on June 28, 1996. The ALJ relied extensively on the report of the consultative examiner, Dr. Williams, and rejected the October 28, 1992 report of Kenneth J. Kirk, M.D. (R. 21) Dr. Kirk stated that claimant had ongoing chronic severe lower back pain, his condition had progressed, and it was exacerbated by sitting for long periods of time. (R. 282) The ALJ rejected Dr. Kirk's opinion because "it is felt such statement is not supported by the medical record, overall." (R. 21). However, claimant did not challenge the ALJ's assessment of Dr. Kirk's

opinion; he challenged the ALJ's reliance on Dr. Williams' report, and the failure of the Appeals Council to consider the opinion of Dr. Gaspar, a treating physician.

A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments, including the claimant's symptoms, diagnosis and prognosis, what claimant can do despite the claimant's impairment, and any physical or mental restrictions. 20 C.F.R. § 404.1527(a)(2). The Commissioner will give controlling weight to that type of opinion if it is well-supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. Id. § 404.1527(d)(2). A treating physician may also proffer an opinion that a claimant is totally disabled. However, such an opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Commissioner. Id. § 404.1527(e)(2).

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

The Appeals Council did not set forth specific, legitimate reasons for rejecting Dr. Gaspar's opinion. As stated above, Dr. Gaspar's opinion was not rendered until after the ALJ made his decision. However, the Council's failure to discuss the additional evidence indicates that it may not

have been properly considered at the appellate level. See Hodgson v. Apfel, No. 98-2067, 1999 WL 46689 (10th Cir. Feb. 3, 1999) (unpublished); Aragon v. Apfel, No. 98-2097, 1998 WL 889400 (10th Cir. Dec. 22, 1998) (unpublished). The omission by the Appeals Council constitutes substantial legal error necessitating a remand for further proceedings consistent with this opinion.

Step Four

The errors of the Appeals Council were preceded by the error of the ALJ in his determination that claimant could perform his past relevant work as a car salesman. In making his determination at the fourth step of the sequential evaluation process, an ALJ is required to: (1) assess the nature and extent of claimant's physical and mental limitations to determine claimant's RFC for work activity on a regular and continuing basis, supported by substantial evidence from the record; (2) make findings regarding the physical and mental demands of claimant's past relevant work (either as claimant actually performed that work or as is customarily performed in national economy), based on factual information regarding those work demands which bear on medically established limitations; and (3) make findings about claimant's ability to meet the physical and mental demands of that past relevant work. Winfrey v. Chater, 92 F.3d 1017, 1023-26 (10th Cir. 1996).⁴

The ALJ in this instance performed no fact-finding as to the physical and mental demands of claimant's past relevant work ; instead, he relied exclusively on the vocational expert's testimony that light work (the RFC found by the ALJ) was compatible with the demands of claimant's past relevant work as a car salesman. (R. 22) Although the ALJ questioned the vocational expert about

⁴ Although the ALJ's decision was entered approximately six weeks before Winfrey was decided, Winfrey was a restatement of existing law, incorporating Social Security regulations and rulings, and the Tenth Circuit decisions in Henrie v. U.S. Dep't of Health & Human Servs., 13 F.3d 359 (10th Cir. 1993), and Washington v. Shalala, 37 F.3d 1437 (10th Cir. 1994).

the strength demands and transferable skills of a car salesman (R. 545, 547, 550), he did not question claimant about the physical and mental demands of that past relevant work or discuss those demands in his decision other than to state, in a conclusive fashion, that they were consistent with light work. (R. 22) At step four, a vocational expert's (VE) role is limited: the VE may supply information about the demands of claimant's past relevant work; however, the VE cannot perform the ALJ's fact-finding responsibilities regarding the claimant's past relevant work demands and the claimant's ability to perform past relevant work. Winfrey, 92 F.3d at 1025.

The ALJ's error was compounded by his failure to "obtain a precise description of the particular job duties which are likely to produce tension and anxiety . . . ," where a mental impairment is involved. Id. at 1024 (quoting S.S.R. 82-62, 1975-1982 Rulings, Soc. Sec. Rep. Serv. 809, 812 (West 1983)). The Tenth Circuit requires an ALJ to follow the procedure in 20 C.F.R. § 404.1520a when he or she evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey 92 F.3d at 1024; Cruse v. United States Dep't of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedure first requires the ALJ to determine the presence or absence of certain medical findings pertaining to claimant's ability to work. Next, the ALJ is to evaluate the degree of functional loss resulting from claimant's impairment. The ALJ must then complete a Psychiatric Review Technique ("PRT") form and attach it to a written decision in which he or she discusses the evidence upon which the conclusions expressed on the form are based. Winfrey, 92 F.3d at 1024; Cruse, 49 F.3d at 617-18; see also Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994).

The ALJ did not follow this procedure. Claimant did not initially allege that he was disabled by anxiety and depression (see R. 81, 89), but he did mention that he had seen a doctor for these

problems when he filed a statement when he requested a hearing (R. 95). He was diagnosed and treated for anxiety and depression in February 1992 (R. 304), July 1993 (R. 116), September 1995 (R. 499), and May 1997 (R. 477-78). The medical evidence of claimant's anxiety and depression is sparse, but the ALJ does not even mention these problems in his decision. Thus, he failed to obtain a precise description of the particular job duties which are likely to produce tension and anxiety, or to determine the presence or absence of any medical findings pertaining to claimant's mental impairment, if any, and their effect on his ability to work. The ALJ's failure to do so constitutes reversible error.

Remaining Issues

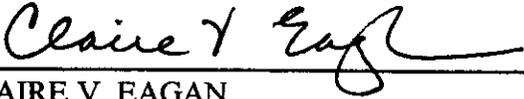
The Court declines to reach the remaining issues on appeal, which relate to the ALJ's assessment of claimant's pain and credibility, the combined effect of his impairments, and his application of certain regulations regarding the Listing of Impairments and the Medical-Vocational Guidelines. These issues may be mooted by the proceedings or disposition or remand.

Conclusion

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. If the Commissioner "failed to apply the correct legal test, there is ground for reversal apart from a lack of substantial evidence." Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993) (citation omitted). The ALJ's decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. This remand "simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case." Huston v. Bowen, 838 F.2d 1125, 1132 (10th

Cir. 1988). The decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

DATED this 7th day of March, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 JEFF L. OGREN,)
)
 Defendant.)

ENTERED ON DOCKET
DATE MAR 08 2000

No. 99CV0727K(E)

FILED

MAR 07 2000 *SAK*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 7th day of March, 2000, 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, Jeff L. Ogren, appearing not.

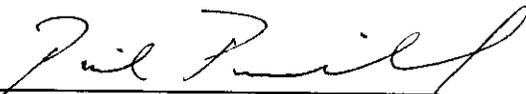
The Court being fully advised and having examined the court file finds that Defendant, Jeff L. Ogren, was served with Summons and Complaint on December 1, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant 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, Jeff L. Ogren, for the principal amount of \$5,250.00, plus accrued interest

of \$737.95, plus interest thereafter at the rate of 8.25 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 6.197 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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 MAUISE RICARD,)
)
 Defendant.)

ENTERED ON DOCKET
DATE MAR 08 2000

No. 99CV0959K(E) ✓

F I L E D

MAR 07 2000 ✓

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 7th day of March, 2000, 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, Mauise Ricard, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Mauise Ricard, was served with Summons and Complaint on February 4, 2000. 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, Mauise Ricard, for the principal amounts of \$500.00 \$1,750.00 and

\$1,500.00, plus accrued interest of \$303.17, \$813.69 and \$941.68, plus administrative charges in the amount of \$87.00, plus interest thereafter at the rates of 5%, 3% and 4% 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 6.197 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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PEP/llf

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY WHITESIDE, an individual,)
)
Plaintiff,)
)
v.)
)
HONOR BOOKS, INC., a corporation,)
)
Defendant.)

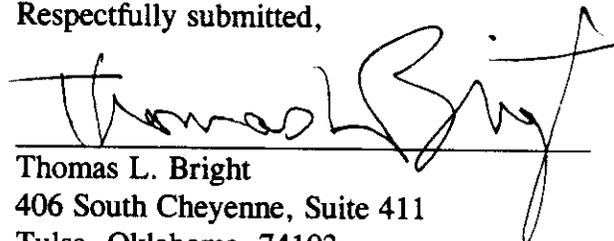
Case No. 99-CV-578-BU (E)

ENTERED ON DOCKET
DATE MAR 07 2000

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW Plaintiff and Defendant and hereby jointly stipulate that the instant action in its entirety should be, and hereby is, dismissed with prejudice. It is also stipulated that each party shall bear its own attorney fees, costs, and litigation-expenses.

Respectfully submitted,



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ATTORNEY FOR PLAINTIFF

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ATTORNEYS FOR DEFENDANT

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

F I L E D

MAR 06 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONALD W. STEPHENS, d/b/a)
RALLY DISTRIBUTING,)
)
Plaintiff,)
)
v.)
)
TOYO TIRE (U.S.A.) CORPORATION,)
)
Defendant.)

No. 99-CV-566-K (J) ✓

ENTERED ON DOCKET
DATE **MAR 7 2000**

ORDER

Before the Court is defendant's motion to dismiss. Plaintiff brought this action in state court based upon theories of breach of contract and fraud. Defendant removed the action to this Court. Defendant seeks to dismiss plaintiff's claims based upon expiration of the applicable statutes of limitation. Defendant asserts that plaintiff originally filed a lawsuit against defendant on June 20, 1995, alleging essentially identical claims. On October 15, 1997, the parties filed a stipulated dismissal without prejudice. On October 20, 1997, Judge Wiseman (assigned to the case) entered the following on the docket: "Joint Dismissals Filed - Case Dismissed Without Prejudice By the Parties." Plaintiff commenced the present litigation in state court by the filing of a petition on October 16, 1998.

In its motion, defendant notes that the Oklahoma statute of limitation for oral contracts is three years pursuant to 12 O.S. §95(2) and for fraud is two years pursuant to 12 O.S. §95(3). It appears to be undisputed that plaintiff's claims arise out of transactions which took place in 1992 and 1993. Thus, defendant contends, the claims are time-barred.

First, plaintiff asserts that the agreement between the parties was evidenced by a series

12

of writings, thereby constituting a written contract subject to the five-year statute of limitation in 12 O.S. §95(1). Defendant raises no argument that the present claims would be untimely under a five-year statute of limitation, but instead rejects plaintiff's characterization. Defendant reiterates that any contract between the parties was oral, because the writings of which plaintiff speaks are "vague, lack reference to material terms, and fail to sufficiently describe the subject matter of the alleged agreements." The Court cannot make such a ruling in regard to a 12(b)(6) motion, because it requires consideration of materials outside the pleadings. Therefore, under the present record, the motion will be denied as to the breach of contract claims.

Regarding the fraud claims, plaintiff makes no argument that they are timely under the applicable statute of limitation, with the exception of reliance upon the Oklahoma "savings" statute, 12 O.S. §100. That statute operates to extend a plaintiff's cause of action one year beyond the action's failure other than on the merits. Plaintiff argues that the effective date of dismissal was Judge Wiseman's docket entry (which plaintiff calls the "order of dismissal") on October 20, 1997. Defendant insists that the effective date was October 15, 1997, when the joint stipulation of dismissal was filed.

It does not appear that this issue has been addressed by an Oklahoma appellate court. In the absence of case authority, the Court is persuaded by defendant's citation of statutory language. 12 O.S. §684 provides in part that "[a]ll parties to a civil action may at any time before trial, without an order of the court, and on payment of costs, by agreement, dismiss the action." (emphasis added). The effect of a valid dismissal under the statute is to deprive the trial court of further jurisdiction over the suit or parties. McCully v. Wil-MC Oil Corp., 879 P.2d 150, 153 (Okla.Ct.App.1994). The entry of the dismissal on the trial court's docket sheet

appears to be merely a ministerial task. This Court therefore agrees with defendant that it is the date of the joint stipulation of dismissal which is the measuring date for the one year period prescribed by 12 O.S. §100. Thus, plaintiff's fraud claims are time-barred because the new action was commenced more than one year after the stipulation of dismissal of the first action.

It is the Order of the Court that the motion of the defendant to dismiss (#3) is hereby GRANTED as to plaintiff's fraud claims and is hereby DENIED as to plaintiff's breach of contract claims.

ORDERED this 3rd day of March, 2000.



**TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE**

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR -6 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SANDRA J. CAMPBELL,)
SSN: 527-76-1698,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 98-CV-0435-EA

ENTERED ON DOCKET

DATE MAR 07 2000

ORDER

Claimant, Sandra J. Campbell, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration (“Commissioner”) denying claimant’s application for disability benefits under the Social Security Act. In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals. Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **REVERSES AND REMANDS** for further proceedings consistent with this opinion.

Social Security Law and Standard of Review

Disability under the Social Security Act is defined as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment” 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if her “physical or mental impairment or impairments are of such severity that [she] is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage

in any other kind of substantial gainful work in the national economy” Id. § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. §§ 404.1520, 416.920.¹

Judicial review of the Commissioner’s determination is limited in scope by 42 U.S.C. § 405(g). This Court’s review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted). The term substantial evidence has been interpreted by the U.S. Supreme Court to require “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Court may not reweigh the evidence nor substitute its discretion for that of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). Nevertheless, the court must review the record as a whole, and “the substantiality of the evidence

¹ Step one requires claimant to establish that she is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510, 416.910. Step two requires that claimant establish that she has a medically severe impairment or combination of impairments that significantly limit her ability to do basic work activities. See id. §§ 404.1521, 416.921. If claimant is engaged in substantial gainful activity (step one) or if claimant’s impairment is not medically severe (step two), disability benefits are denied. At step three, claimant’s impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment or impairments “medically equivalent” to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that she does not retain the residual functional capacity (RFC) to perform her past relevant work. If claimant’s step four burden is met, the burden shifts to the Commissioner to establish at step five that work exists in significant numbers in the national economy which claimant--taking into account her age, education, work experience, and RFC--can perform. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work. See generally Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

must take into account whatever in the record fairly detracts from its weight.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); see also Casias, 933 F.2d at 800-01.

Claimant’s Background

Claimant was born on July 15, 1947, and was 50 years old at the time of the ALJ’s decision. She has a high school education. She worked as a grocery store courtesy clerk, checker, inventory control clerk, and stocker. Claimant alleges an inability to work beginning February 10, 1996, after she sustained a shoulder injury at work. She claims she is disabled due to pain in her arm, shoulder, knee, and back, numbness in her hands, limited mobility, fibromyalgia, fatigue, depression, and short term memory loss. The ALJ characterized her allegations of disability as arising from two knee surgeries, shoulder surgery (left arm), a bulging disk in her lower back, a deteriorating hip, possible surgery on her right shoulder, headaches, and her “mental state of mind.” (R. 18)

Procedural History

On August 15, 1996, claimant applied 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 R. J. Payne (ALJ) was held November 13, 1997, in Tulsa, Oklahoma. By decision dated January 29, 1998, the ALJ found that claimant was not disabled at any time through the date of the decision. On June 30, 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.

Decision of the Administrative Law Judge

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform a full range of light work, reduced by the following limitations: (1) no repetitive pushing or pulling of left arm controls or leg controls; (2) no more than occasional stooping, crouching, bending, kneeling, crawling, or climbing of ramps, stairs, ladders, ropes, or scaffolds; (3) no vibration affecting the left arm, neck, or mid-back area; (4) no repetitive or prolonged overhead reaching with the left arm; (5) no repetitive or prolonged extreme rotation, flexion, or extension of the neck; and (6) the need to alternate sitting and standing at least once every hour for about five minutes. The ALJ determined that claimant could not perform her past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that she could perform, based on her RFC, age, education, and work experience. The ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Review

Claimant asserts the ALJ erred by finding that the claimant had the RFC to perform the prolonged standing required of light work, by failing to accord appropriate weight to the opinion of the treating physician, and by failing to support his findings by reference to substantial evidence. Specifically, claimant challenges the ALJ's treatment of the findings of four physicians (one treating physician and three consultative examiners) who examined claimant and evaluated her physical problems after her injury at work on September 12, 1995. The injury occurred when she was accidentally pinned between her desk and a file cabinet by someone operating a power jack at the grocery store where she worked. (See R. 204, 215, 239, 241-42)

Terrill H. Simmons, M.D., an orthopedic surgeon, began treating claimant for her knee problems prior to her shoulder injury in September 1995. He performed surgical decompression surgery on her left shoulder on February 20, 1996. (R. 130-31, 226-27) After the surgery, Dr. Simmons reported that her pain was under control, and he referred her for physical therapy. (R. 223, 227) Physical therapy appeared to help, but she began reporting pain in her back, neck and knees. (Id.) Her prognosis for returning to normal vocational activities was guarded. (R. 221, 227) Claimant continued to complain of pain and her family doctor, Richard N. Marple, M.D., placed her on medication for depression (R. 166-70, 210-13, 215, 217-20). Dr. Marple stated that she had a “mild disability on the basis of left shoulder arthrosis.” (R. 166) He indicated that the “extent of this disability could be better determined by the orthopedic surgeon. She should be able to do most activities with the exception of heavy lifting.” (Id.)

On December 16, 1996, Dr. Simmons noted that claimant had “give-way weakness of both upper extremities. It is hard to demonstrate why. She has tenderness in the mid-neck area and pain with the compression of the cervical spine. She has restricted motion of the cervical spine and decreased sensation in a stocking-like fashion.” (R. 209) He ordered an MRI of her cervical spine and EMG of both extremities, but both were normal. (R. 208; see R. 125, 128) On January 10, 1997, Dr. Simmons stated that claimant needed “to begin to tolerate her situation. Pain will continue with over-activity.” (Id.) He diagnosed her with fibromyalgia and discharged her from his care except on an “as-needed basis.” (Id.)

On February 7, 1996, Dr. Simmons submitted a “final medical report” to an insurance company and provided a final diagnosis of (1) soft tissue injury, cervical spine; (2) soft tissue injury, left shoulder; (3) chronic impingement syndrome, left shoulder aggravated by soft tissue injury; (4)

soft tissue injury, lumbar spine with intermittent sciatica; and (5) "fibromyalgia, complicating as above." (R. 206) He rated her as having a 22% impairment to the body as a whole. (R. 207) The ALJ rejected Dr. Simmons' diagnosis of fibromyalgia because "this diagnosis is not supported by objective medical findings. There is no evidence of the claimant suffers [sic] pain at the necessary 'tender points.'" (R. 23)

After the ALJ rendered his decision on January 29, 1998, Dr. Simmons reported, on March 6, 1998, that claimant was "currently at a state where she is in pain at all times and has limited ability to walk and ambulate." (R. 266) He opined that she was "unable to return to any vocation that she is trained for. It is my opinion she would be considered totally disabled and I feel she should be considered for evaluation of same." (Id.) A few days later, he stated "it is my opinion she is totally disabled from vocational activities." (R. 269) The Appeals Council rejected Dr. Simmons statement as duplicative. (R. 6)

A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments, including the claimant's symptoms, diagnosis and prognosis, what claimant can do despite the claimant's impairment, and any physical or mental restrictions. 20 C.F.R. § 404.1527(a)(2). The Commissioner will give controlling weight to that type of opinion if it is well-supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. Id. § 404.1527(d)(2). A treating physician may also proffer an opinion that a claimant is totally disabled. However, such an opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Commissioner. Id. § 404.1527(e)(2).

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

Neither the ALJ nor the Appeals Council gave legitimate reasons for rejecting Dr. Simmons' opinion. Fibromyalgia indicates pain in fibrous tissues, muscles, tendons, ligaments and other sites. The Merck Manual of Diagnosis and Therapy 481 (17th ed. 1999). The pain "is aggravated by straining or overuse. Tenderness *may* be present, usually localized to specific small sites (ie, tender points)." (Id.) (emphasis added). Although the test results of claimant's MRI and EMGs were normal, negative test results cannot support a conclusion that claimant does not suffer from a potentially disabling condition because fibromyalgia is diagnosed by ruling out other diseases through medical testing. Lantow v. Chater, No. 95-5262, 98 F.3d 1349, 1996 WL 576012 (10th Cir. Oct. 8, 1996) (unpublished) (citing Lisa v. Secretary of Dep't of Health & Human Servs., 940 F.2d 40, 44-45 (2d Cir. 1991)).

Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. 20 C.F.R. § 404.1567. The ALJ

found that claimant could perform light work, as long as it did not require repetitive pushing or pulling of arm (with left arm) or leg controls, and as long as claimant could alternate sitting and standing at least once every hour for about five minutes. (R. 28) He imposed numerous other restrictions as well. Dr. Simmons' opinion does not support this finding. While they are not entitled to controlling weight, the opinions of claimant's consultative examiners do not support the ALJ's finding, either.

Angelo Dalessandro, D.O., performed a consultative examination of claimant on September 26, 1996. (R. 142-45) While he did not rate claimant's disability, he concluded that "[w]ork-related activities requiring standing, moving about or lifting probably would be difficult for this patient to do." (R. 145) Michael D. Farrar, D.O., and Kenneth R. Trinidad, D.O., rated claimant's disability for workers' compensation purposes on April 17, 1997 and August 18, 1997, respectively. (See R. 250-58). Both doctors opined that claimant was 100% permanently and totally disabled. (R. 253, 257) Dr. Trinidad, in particular, stated that claimant had difficulty sitting for more than fifteen minutes and was not able to stand for more than five minutes. (R. 257). The ALJ rejected the opinions of Dr. Farrar and Dr. Trinidad because they appeared to be related to claimant's worker's compensation claim; hence, they did not demonstrate that claimant necessarily met the disability requirements of the Social Security Act. (R. 25) The ALJ also rejected these opinions because Dr. Farrar and Dr. Trinidad were not treating physicians and their opinions appeared to be based on a one-time evaluation. (Id.)

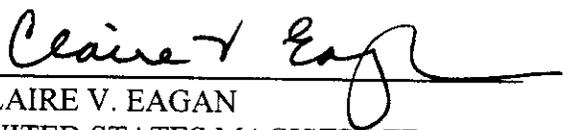
Although these reasons may constitute good cause for not according controlling weight to the consultative examiners' opinions, the opinions lend support to the opinion of the treating physician, Dr. Simmons, whose opinion the ALJ rejected. The ALJ thus rejected all of the medical

opinions indicating that claimant could not perform light work as reduced by the limitations he listed, but the ALJ failed to reference any medical opinion or substantial evidence in the record that legitimately supports his conclusion. The ALJ's finding that claimant could perform light work, even as reduced by the numerous limitations he listed, is not supported by substantial evidence.

Conclusion

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. If the Commissioner "failed to apply the correct legal test, there is ground for reversal apart from a lack of substantial evidence." Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993) (citation omitted). The ALJ's decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. This remand "simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case." Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988). The decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

DATED this 6th day of March, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UK
2-29-00

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

DONALD O'CONNOR and 707 others as)
named herein, individually, and on behalf)
of all other persons similarly situated,)

Plaintiffs,)

vs.)

UNITED STATES OF AMERICA,)

Defendant.)

ENTERED ON DOCKET

DATE MAR 7 2000

CASE NO. 99-CV-813-H (M) ✓

FILED

MAR 8 2000

FILED IN
CLERK'S OFFICE
NORTHERN DISTRICT OF OKLAHOMA

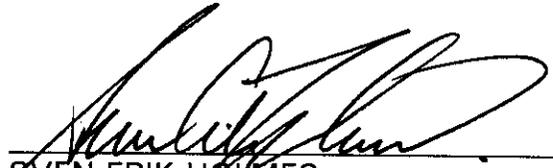
ORDER

On February 18, 2000, the Court heard oral argument on the Defendant's motion to dismiss Plaintiffs' complaint or in the alternative to transfer to the United States Court of Federal Claims. Steven R. Hickman, Esquire, appeared on behalf of the Plaintiffs, and Peter Bernhardt, Assistant United States Attorney, appeared on behalf of the United States. Following oral argument, and upon review of the authorities, the Court finds that this case should be transferred to the United States Court of Federal Claims. *Favereau v. United States*, 44 F. Supp. 2d 68, 69-70 (D. Me. 1999); *Saraco v. Hallett*, 831 F. Supp. 1154, 1162-63 (E.D. Pa. 1993), *aff'd*, 61 F. 3d 863 (Fed. Cir. 1995), *cert. denied*, 517 U.S. 1166 (1996).

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IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1631, this case is transferred to the United States Court of Federal Claims.

DATED this 2ND day of MARCH, 2000.

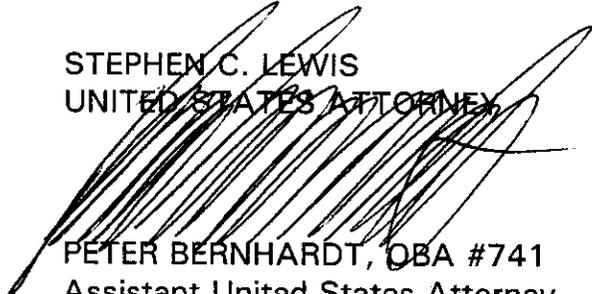

SVEN ERIK HOLMES
United States District Judge

APPROVED:

FRASIER, FRASIER & HICKMAN


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

F I L E D

MAR - 6 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM SCOTT SOURS,)

Plaintiff,)

vs.)

Case No. 98-C-50-B(E) ✓

STANLEY GLANZ and GREGORY)

L. TURLEY, in their individual and)

official capacities; and DEBBIE A.)

WALTERS, WARREN C.)

CRITTENDEN, and BRENT)

LOWE, in their individual capacities,)

Defendants.)

ENTERED ON DOCKET

DATE MAR 07 2000

ORDER

The Court has for consideration the Report and Recommendation of the Magistrate Judge (hereinafter "R&R") filed December 3, 1999, in which the Magistrate Judge recommends granting defendants' motion to dismiss or in the alternative, motion for summary judgment¹ in part and denying it in part on plaintiff William Scott Sours' ("Sours") claims under 42 U.S.C. §1983. Specifically, the Magistrate Judge recommends that the motion for summary judgment be (1) granted as to defendants Stanley Glanz ("Glanz") and Gregory L. Turley ("Turley") on all claims against them for supervisory liability; (2) granted as to defendants Debbie A. Walters ("Walters") and Turley with regard to plaintiff's due process claims; (3) denied as to defendants Walters, Brent Lowe ("Lowe") and Warren C. Crittenden ("Crittenden") on Sours' claim of excessive force; and (4) denied as to defendants Lowe and Crittenden on Sours' claim of assault and battery under state law. Defendants have not filed any objection to the R&R.

¹ Although pled in the alternative, the Magistrate Judge treated the motion as one for summary judgment as the parties relied on matters outside the pleadings.

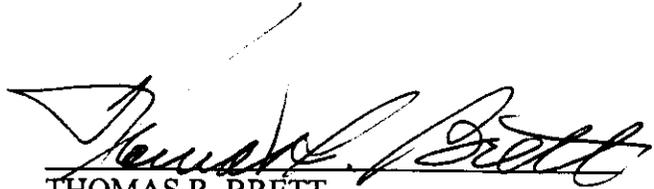
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Sours objects to recommendation (1) *i.e.*, that summary judgment be granted Glanz and Turley on all claims against them based on supervisory liability. Sours argues he was not allowed sufficient time for discovery of the personnel files of defendants Lowe, Crittenden and Walters to establish defendants Glanz and Turley had actual knowledge and acquiesced in the use of excessive force as a custom or policy in the Sheriff's department.

The Court agrees. From a review of Sours' response to defendants' motion to dismiss or in the alternative, motion for summary judgment, the Court notes Sours correctly recited the different standards applicable to each dispositive motion, and was aware defendants were seeking summary judgment on his supervisory liability claims against Glanz and Turley. However, Sours stated in his response that he required additional discovery to establish his claim of supervisory liability against Glanz and Turley. None, however, was given. As Sours required information unavailable to him to establish this claim, the Court concludes Sours did not have a reasonable opportunity to respond to the motion for summary judgment on the supervisory liability claims. Therefore, the Court denies defendants' motion for summary judgment on the supervisory liability claims against Glanz and Turley, but will allow defendants the opportunity to file another summary judgment motion solely on this issue at the close of discovery, pursuant to the dispositive motion schedule set forth in the scheduling order entered simultaneously herein.

With this exception, the Court concurs with and therefore adopts the Magistrate Judge's findings and recommendations. Accordingly, the Court grants summary judgment to defendants Walters and Turley with regard to plaintiff's due process claims; denies summary judgment to defendants Walters, Lowe and Crittenden on Sours' claim of excessive force; and denies summary judgment to defendants Lowe and Crittenden on Sours' claim of assault and battery.

IT IS SO ORDERED, this 1st day of March, 2000.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

2

FILED

MAR 6 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

DOUGLAS M. DEBEVETZ,

Plaintiff,

vs.

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE CO., et al.,**

Defendant.

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)

Case No. 98-C-804-B

ENTERED ON DOCKET
MAR 07 2000
DATE _____

ORDER OF DISMISSAL

Upon review of the parties' Stipulation of Dismissal for reason of settlement of the above-styled matter, it is ordered that the action be dismissed, with prejudice, with the parties to bear their own costs and attorney fees.


UNITED STATES DISTRICT COURT JUDGE
3-6-00

76

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

FILED

MAR 6 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROGER MURRAY AND HOPE)
MURRAY, husband and wife,)

PLAINTIFFS,)

V.)

CASE NO. 99-CV-0128-B

FIRST MARINE INSURANCE)
COMPANY,)

DEFENDANT.)

ENTERED ON DOCKET
DATE MAR 07 2000

AMENDED JUDGMENT

Pursuant to Fed. R. Civ. Pro. 60 and Okla. Stat. tit. 36 §3629 (1991), the Court hereby amends the Judgment entered on Friday, March 3, 2000 to provide for prejudgment interest at the statutory rate of 15% from August 10, 1998 through date of Judgment.¹

IT IS THEREFORE ORDERED AND ADJUDGED that the Plaintiffs, Roger and Hope Murray, recover of the Defendant, First Marine Insurance Company, the sum of

¹In support of this conclusion, the Court finds Plaintiffs are prevailing parties and that August 10, 1998, the date Plaintiffs' claim was denied, is the date the loss was payable pursuant to the provisions of the contract as set forth in §3629. The policy provides at page 6, in the first paragraph, that "payment of loss will be made within thirty days (30) after you meet all conditions of the contract." Section 3629 provides that a submitted claim must be accepted or rejected in writing within 90 days of receipt of loss, which in this case would be September 15, 1998. By rejecting the claim prior to the 90 days allowed by statute, First Marine acknowledged that all conditions of the contract had been met by the filing of the claim on June 17, 1998, which under the terms of the policy could have triggered prejudgment interest beginning to run on July 17, 1998. By determining that prejudgment interest shall run from the date of the denial under the facts of this case, the Court finds the public interest and the interest of the insured in prompt resolution of claims, deemed by statute to be determinable within 90 days, and the insurers interest in thoroughly investigating submitted claims are best served.

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\$5,890.45 with prejudgment interest thereon from August 10, 1998 through March 3, 2000 at the rate of 15% and post-judgment interest at the statutory rate of 6.197% from March 3, 2000 forward plus costs to be determined upon timely application pursuant to N.D. LR 54.1. Motion for award of attorney fees must be timely filed pursuant to N.D. LR 54.2.

DATED at Tulsa, Oklahoma this 6rd day of March, 2000.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UK

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

BIZJET INTERNATIONAL SALES &)
SUPPORT, INC. an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
TACK 1, INC.; UNITED WEST)
AIRLINES, INC. and CONSECO)
FINANCE LOAN COMPANY,)
)
Defendants.)

FILED

MAR 6 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

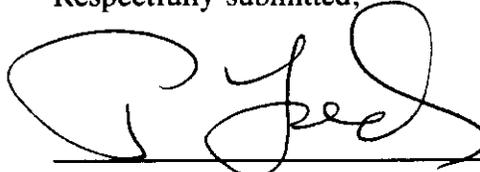
Case No. 99-CV-1006B (E)

ENTERED ON DOCKET
DATE MAR 06 2000

STIPULATION OF DISMISSAL

Plaintiff, BizJet International Sales & Support, Inc., and defendants, Tack 1, Inc., United West Airlines, Inc., and Textron Financial Corporation, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby dismiss this proceeding and all claims and counterclaims with prejudice to the refiling of same.

Respectfully submitted,

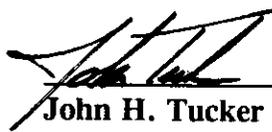


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17

clj



John H. Tucker

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- and -

Mark A. Schneider

MARK A. SCHNEIDER, P.A.

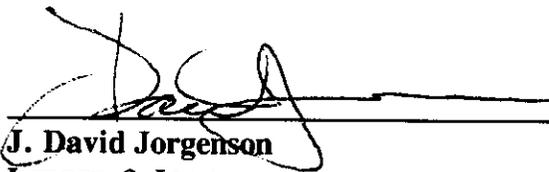
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**ATTORNEYS FOR DEFENDANT, TEXTRON
FINANCIAL CORPORATION**

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

FILED

MAR 6 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HENRY L. ADAMS,)
)
PLAINTIFF,)

vs.)

Case No. 99CV0290C (M)

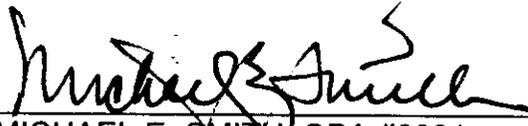
AMERICA'S AIRCRAFT ENGINES, INC.;)
WALTER BROWN, Individually;)
RALPH WYNN, Individually; and)
WALTER BROWN and RALPH WYNN)
d/b/a/ WYNN AVIATION,)

DEFENDANTS.)

ENTERED ON DOCKET
DATE MAR 06 2000

STIPULATION FOR DISMISSAL WITH PREJUDICE

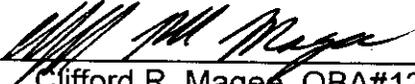
Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties stipulate that the above entitled action be dismissed with prejudice, against the Defendants, AMERICA'S AIRCRAFT ENGINES, INC., WALTER BROWN, individually, RALPH WYNN, individually, and WALTER BROWN and RALPH WYNN d/b/a WYNN AVIATION, with each party to bear its own costs and fees. This settlement is indicative that no other cause of action exists between these parties.

By: 

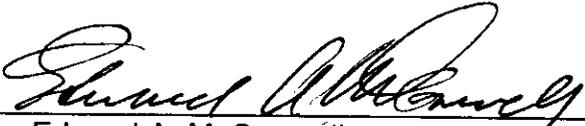
MICHAEL E. SMITH, OBA #8391
HOLLOWAY, DOBSON, BACHMAN & JENNINGS
211 N. Robinson, Ste. 900
Oklahoma City, OK 73012
Telephone #: 405/235-8593
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ATTORNEYS FOR PLAINTIFF

mail-copy
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5

By: 

Clifford R. Magee, OBA#12757
6130 South Maplewood, Suite B
Tulsa, OK 74136
**ATTORNEY FOR RALPH WYNN, individually
and RALPH WYNN d/b/a WYNN AVIATION**

BY: 

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5925 Beverly
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AND

Danny Allis
1560 E. 21st, Suite 201
Tulsa, OK 74114
**ATTORNEYS FOR DEFENDANT
AMERICA'S AIRCRAFT ENGINES, INC.**

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

FILED

MAR 3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DOUGLAS M. DEBEVETZ,)

Plaintiff,)

vs.)

Case No. 98-C-804-B

STATE FARM MUTUAL AUTOMOBILE)

INSURANCE CO., et al.,)

Defendant.)

ENTERED ON DOCKET
MAR 06 2000

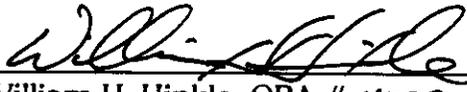
DATE _____

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties and advise the Court that a settlement has been reached in the above-styled matter and hereby stipulate to the dismissal with prejudice of the Defendant, with each party to bear their own costs and attorneys' fees.

Respectfully submitted,

HINKLE & SMITH



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ATTORNEY FOR PLAINTIFF

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Tel: 918/583-7129
Fax: 918/764-3005

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

JOLENE SMITH and JAN PRAWDZIK,)
)
 Plaintiffs,)
)
 v.)
)
 MORRISON KNUDSEN CORP., an Ohio)
 corporation, and SECOR)
 INTERNATIONAL, INC., a Delaware)
 corporation,)
)
 Defendants.)

ENTERED ON DOCKET
DATE MAR 6 2000

Case No. 98-CV-843-H

FILED
MAR 9 2000
U.S. DISTRICT COURT

J U D G M E N T

This matter came before the Court on Defendants' motions for summary judgment against each Plaintiff. The Court duly considered the issues and rendered a decision in accordance with the orders filed on February 25, 2000.

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

IT IS SO ORDERED.

This 2ND day of MARCH, 2000.



Sven Erik Holmes
United States District Judge

71

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

JAMES H. COUTS,
Plaintiff,

v.

CENTRILIFT,
Defendant.

ENTERED ON DOCKET
MAR 6 2000
DATE

Case No. 97-CV-0336-H ✓

FILED
MAR 3 2000
S. J. [unclear]
U.S. DISTRICT COURT

ORDER

This matter comes before the Court pursuant to the Court's minute order of February 2, 2000, and Defendant Centrilift's motion to dismiss Plaintiff's second cause of action (Docket # 21). Under Local Rule 7.1(c), a party opposing a motion has fifteen days after the filing of the motion in which to respond, and failure to timely respond authorizes the Court to deem the matter confessed. Defendant Centrilift's motion to dismiss Plaintiff's second cause of action was filed on December 8, 1999. Plaintiff Coutts failed to timely respond to that motion. In its minute order of February 2, 2000, the Court directed Plaintiff to respond to Defendant's motion to dismiss on or before February 15, 2000, and stated that a failure to do so would result in Defendant's motion being confessed. Plaintiff has not responded within the time specifically ordered by the Court. Therefore, Defendant's motion is hereby confessed, and Plaintiff's second cause of action is hereby dismissed without prejudice.

IT IS SO ORDERED.

This 2ND day of March, 2000.


Sven Erik Holmes
United States District Judge

23

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

CHRISTI CRAFTON,
Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE MAR 6 2000

Case No. 99-CV-152-H(E) ✓

FILED
MAR 8 2000
U.S. DISTRICT COURT

ORDER

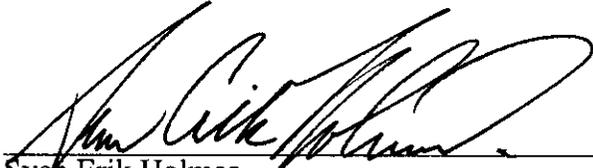
Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge (Docket # 8).

In accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(a), any objections to the Report and Recommendation must be filed within ten (10) days of the receipt of the report. The time for filing objections to the Report and Recommendation has expired, and no objections have been filed.

Based on a review of the Report and Recommendation of the Magistrate Judge, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge. The decision of the Commissioner denying disability benefits to Claimant is hereby reversed and remanded for further proceedings consistent with the Magistrate Judge's Report and Recommendation.

IT IS SO ORDERED.

This 4th day of March, 2000.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
RALPH E. MANNING,)
)
Defendant.)

No. 99CV1009K(J) ✓

ENTERED ON DOCKET
MAR 6 2000

DEFAULT JUDGMENT

This matter comes on for consideration this 3rd day of March, 2000, 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, Ralph E. Manning, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Ralph E. Manning, was served with Summons and Complaint on November 23, 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, Ralph E. Manning, for the principal amounts of \$2,024.62, \$6,901.39, and

\$5,324.79 plus accrued interests of \$830.97, \$4,929.18, and \$3,989.51, plus administrative charges in the amounts of \$39.76 and \$31.13, plus interest thereafter at the rate of 9% and 10.20% 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 6.197 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/llf

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

REVEREND MELVIN E. EASILEY, et al.,)
)
Plaintiffs,)
)
vs.)
)
NORRIS, a Dover Resources Company,)
)
Defendant.)

MAR 3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-196-K(J)

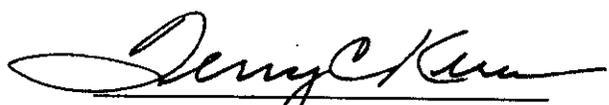
ENTERED ON DOCKET
MAR 6 2000

ORDER

Now before the Court is the motion to dismiss filed by Plaintiffs Terri McConnell, Donald McConnell, David Burkes and Patricia Clark. [Doc. No. 96]. Defendant has not objected to Plaintiffs' motion. Plaintiffs' motion to dismiss is granted. All claims asserted by Terri McConnell, Donald McConnell, David Burkes and Patricia Clark against Defendant are hereby dismissed without prejudice.

IT IS SO ORDERED.

Dated this 3rd day of March, 2000.


Terry C. Kern
United States District Judge

127

4/2
2-18-00

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

SULLIVAN SUPPLY, INC.,)
)
Plaintiff,)
)
v.)
)
BUEL JOBE,)
)
Defendant.)

ENTERED ON DOCKET
MAR 6 2000
DATE

Case No. 98-CV-0430H(M)

MAR 8 2000

PERMANENT INJUNCTION

This matter came before the Court on the motion of Plaintiff Sullivan Supply, Inc. for a permanent injunction pursuant to this Court's Order dated May 17, 1999, granting judgment in favor of Plaintiff Sullivan Supply and against Defendant Buel Jobe and awarding to Plaintiff, as statutory damages pursuant to 17 U.S.C. § 504(c), Seventeen Thousand Five Dollars and no/100 (\$17,005.00) for a single copyright infringement; providing for entry of an injunction against Jobe pursuant to the provisions of 17 U.S.C. § 502 on such grounds as the Court deems just and equitable; and permitting the impounding and destruction of those original, copies, facsimiles or duplicates of Jobe's 1997 Blue Ribbon Show Supply Catalog, Vol. 12, on such grounds as the Court deems just and equitable, pursuant to 17 U.S.C. § 503.

Based on the submissions of the parties and counsel, and all the files and proceedings herein, and finding that it is just and equitable to enjoin Defendant Buel Jobe, d/b/a Blue Ribbon Show Supply, permanently from future infringement of copyrights owned by the plaintiff Sullivan Supply, Inc., in the Sullivan Supply livestock and grooming catalog(s)."

90

IT IS HEREBY ORDERED that the motion of Plaintiff Sullivan Supply, Inc. for a permanent injunction is granted and Defendant Buel Jobe, d/b/a Blue Ribbon Show Supply, his successors, assigns, and those in privity with him are hereby permanently enjoined pursuant to the provisions of 17 U.S.C. § 502:

- A. From publishing or distributing Volume 12 of the Blue Ribbon Show Supply catalog, a copy of which is attached to this Order; and
- B. From publishing, distributing, or preparing derivative works in any form based upon the following product descriptions or portions of product descriptions that appear in the Blue Ribbon Show Supply catalog, Volume 12, a copy of which is attached to this order, and which are enumerated herein:
 - 1. Blue Ribbon Show Supply catalog's description of its "EXHIBITOR'S NUMBER HARNESS," on page 4, in the Blue Ribbon Show Supply catalog, Volume 12.
 - 2. Blue Ribbon Show Supply catalog's description of its "COMB HOLDER," page 4, in the Blue Ribbon Show Supply catalog, Volume 12.
 - 3. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S NECK TIES," page 4, in the Blue Ribbon Show Supply catalog, Volume 12.
 - 4. Blue Ribbon Show Supply catalog's description of its "COTTON NOSE PADS," page 4, in the Blue Ribbon Show Supply catalog, Volume 12.

5. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S SINGLE MISTER," page 17, in the Blue Ribbon Show Supply catalog, Volume 12.
6. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S FUTURE FLOOR," page 5, in the Blue Ribbon Show Supply catalog, Volume 12.
7. Blue Ribbon Show Supply catalog's description of its "RUBBER MAT," page 5, in the Blue Ribbon Show Supply catalog, Volume 12.
8. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S WHITE MOUSSE," page 6, in the Blue Ribbon Show Supply catalog, Volume 12.
9. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S BLACK TOUCH-UP," page 6, in the Blue Ribbon Show Supply catalog, Volume 12.
10. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S SHAZAM," page 6, in the Blue Ribbon Show Supply catalog, Volume 12.
11. Blue Ribbon Show Supply catalog's description of its product "MAGIC," page 6, in the Blue Ribbon Show Supply catalog, Volume 12, but only as to the following phrase: "Popular with dairy showmen for top lines."
12. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S BASE COAT," page 7, in the Blue Ribbon Show Supply catalog, Volume 12.

13. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S SHOW TIME," page 7, in the Blue Ribbon Show Supply catalog, Volume 12.
14. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S SHOW BLOOM," page 7, in the Blue Ribbon Show Supply catalog, Volume 12.
15. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S SHO-SHEEN," page 7, in the Blue Ribbon Show Supply catalog, Volume 12.
16. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S WHITE LIGHTING," page 7, in the Blue Ribbon Show Supply catalog, Volume 12.
17. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S HAIR AND WOOL SET," page 7, in the Blue Ribbon Show Supply catalog, Volume 12.
18. Blue Ribbon Show Supply catalog's description of its "FARNAM REPEL-X," page 8, in the Blue Ribbon Show Supply catalog, Volume 12.
19. Blue Ribbon Show Supply catalog's description of its "MANE'N TAIL CONDITIONER," page 8, in the Blue Ribbon Show Supply catalog, Volume 12.

20. Blue Ribbon Show Supply catalog's description of its "ABSORBINE LINIMENT," page 8, in the Blue Ribbon Show Supply catalog, Volume 12.
21. Blue Ribbon Show Supply catalog's description of its "BLACK HAIR DYE," page 8, in the Blue Ribbon Show Supply catalog, Volume 12.
22. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S SERVICE DEPARTMENT," page 9 and 15, in the Blue Ribbon Show Supply catalog, Volume 12.
23. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S UPRIGHT FAN STAND," page 11, in the Blue Ribbon Show Supply catalog, Volume 12.
24. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON SHOW CATTLE SWEATS," page 12, in the Blue Ribbon Show Supply catalog, Volume 12.
25. Blue Ribbon Show Supply catalog's description of its "LEATHER NECK SWEATS," page 12, in the Blue Ribbon Show Supply catalog, Volume 12.
26. Blue Ribbon Show Supply catalog's description of its "LAMB DRENCH GUN," page 13, in the Blue Ribbon Show Supply catalog, Volume 12.
27. Blue Ribbon Show Supply catalog's description of its "COTTON LAMB TUBES & HOODS," page 13, in the Blue Ribbon Show Supply catalog, Volume 12.

28. Blue Ribbon Show Supply catalog's description of its "MESH LAMB MUZZLE," page 13, in the Blue Ribbon Show Supply catalog, Volume 12, but only as to the following phrases: "One piece elastic strap holds muzzle in place. No buckles or strings to tie."
29. Blue Ribbon Show Supply catalog's description of its "SHEEP BLANKET WITH NECK," page 13, in the Blue Ribbon Show Supply catalog, Volume 12.
30. Blue Ribbon Show Supply catalog's description of its "ANDIS GROOM CLIPPER," page 14, in the Blue Ribbon Show Supply catalog, Volume 12, except for the phrase "14,400 cutting strokes per minute."
31. Blue Ribbon Show Supply catalog's description of its "ANDIS 2-SPEED DETACHABLE PLUS+," page 14, in the Blue Ribbon Show Supply catalog, Volume 12, but only as to the following phrases: "Detachable blades for ease of changing and cleaning. Model A-5 Oster blades fit this clipper and with slight modification Oster Groom-Master blades can also be used."
32. Blue Ribbon Show Supply catalog's description of its "KNEE PADS," page 15, in the Blue Ribbon Show Supply catalog, Volume 12, but only as to the following phrase: "A quality knee pad with the same outside leather design as the deluxe knee pad."
33. Blue Ribbon Show Supply catalog's description of its "HALOGEN LIGHTS," page 15, in the Blue Ribbon Show Supply catalog, Volume 12.

34. Blue Ribbon Show Supply catalog's description of its "CEDAR FIBER BEDDING," page 16, in the Blue Ribbon Show Supply catalog, Volume 12.
35. Blue Ribbon Show Supply catalog's description of its "RICE ROOT BRUSH," page 17, in the Blue Ribbon Show Supply catalog, Volume 12.
36. Blue Ribbon Show Supply catalog's description of its "RICE ROOT MIX BRUSH," page 17, in the Blue Ribbon Show Supply catalog, Volume 12.
37. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S ARTIC CIRCLE," page 17, in the Blue Ribbon Show Supply catalog, Volume 12.
38. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S ARTIC MIST LIVESTOCK COOLING SYSTEM," page 17, in the Blue Ribbon Show Supply catalog, Volume 12.
39. Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S MISTING FILTER," page 17, in the Blue Ribbon Show Supply catalog, Volume 12.

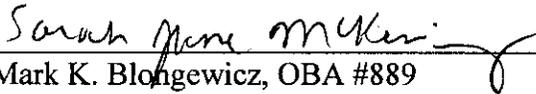
C. This injunction shall take effect upon entry by the Clerk of Court.

IT IS SO ORDERED.



Honorable Sven Erik Holmes
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:


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Sarah Jane McKinney, OBA #17099
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Kent B. Rainey, OBA #14619
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Tulsa, OK 74119
Telephone: (918) 592-7070
Facsimile: (918) 592-7071

ATTORNEYS FOR DEFENDANT

No One Equips You for Success Like . . .

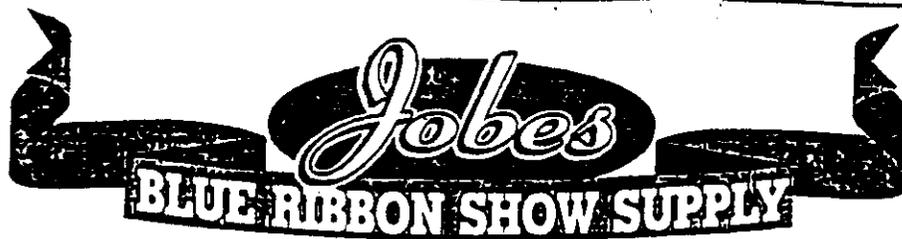
Jobes

BLUE RIBBON
Show Supply

SS 0354

Blue Ribbon Show Supply
Route 2, Box 235 • Sperry, OK 74073
Orders - (918) 288-7396
FAX - (918) 288-7396

Blue Ribbon Show Supply - East
Orders - (870) 683-2583
Blue Ribbon Show Supply - South
Orders - (254) 578-1705



Dear Customer,

Here at Jobe's Blue Ribbon Show Supply, we are a family - owned business that caters to the demands of the Livestock Show Circuit.

We have evolved over the years from producing market and show cattle. We are graduates of Oklahoma State University and between the three of us and our staff we have over 310 years of experience in the livestock industry.

We spent several years in the education field as agricultural advisors and 4-H leaders so we share your desire to be the very best.

We believe it is our responsibility to bring to you the very best there is in equipment and supplies so you might be the very best. It is with great pleasure we present you with the latest edition of our catalog of livestock supplies. We appreciate you taking the time to consider our line of supplies, and hope we can be of service to you.

We have tried to include all our most popular livestock products available today. However, if you need an item that is not listed in our catalog, give us a call and we will gladly order it for you immediately.

Blue Ribbon Show Supply would like to attend your show. For more information, please contact Buel Jobe, at our main office at (918) 288-7396.

One equips you for success like Blue Ribbon Show Supply and we truly appreciate your business. We are looking forward to seeing and talking to you at future livestock shows. If we can be of assistance, in any way, please let us know.

Sincerely,
Blue Ribbon Show Supply

Buel, Robert, & David Jobe

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Blue II Dryer

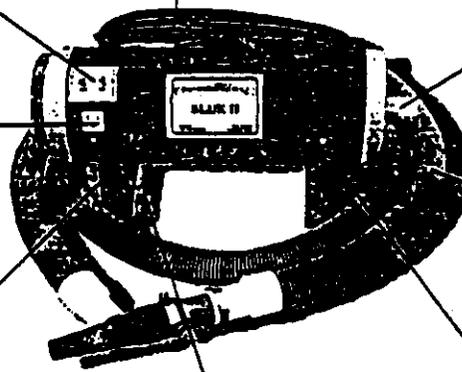
Blue II offers you a Full Two Year Warranty on your blow dryer motors.

Heavy-duty industrial switches for longer life and less down time.

A 20 foot cord to let you move your dryer to more locations.

Solidly constructed end-caps to produce more air power giving you more velocity of air to dry your livestock in less time.

Grounded receptacle for your added safety and convenience.



Your choice of a 10 foot or 15 foot high output velocity hose that is guaranteed for 120 days.

Heavy-duty motors to give you more air and longer life for your blow dryers.

Heavy-duty legs, keeps your blow dryer standing level, even after years of use.

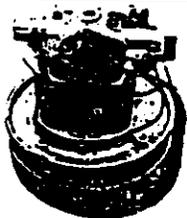
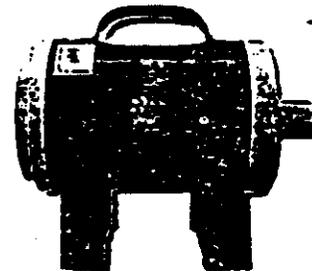
Baked on enamel paint finish, to make your blow dryer keep its new look for years to come.



Models available with the heavy duty **TURBINE FILTER SYSTEM.**

Baby Blue Dryer

The single motor Baby Blue has all the same features as the Blue II Dryer. Will fit easily in the corner of the smallest property boxes.



Large Blower Motor

The most powerful amp motor on the market. Fits any blower.



Water Blower Fogger

Heavy duty plastic bottle connects to blower nozzle for fine misting or fogging.



TURBINE AIR FILTER

Heavy duty dryer filter. Modification kits available for Blue II Dryers. Call for details.

Blowers Parts and Services:

Our service staff repairs, rebuilds and accepts trade-ins on your blow dryer. We stock the replacement parts for all types of Blow Dryers:

- Hose Nozzle
- Hose Clamp
- Hose Coupling
- Switches
- Filters
- Heavy Duty Power Cords
- 10' or 15' Hoses
- Electrical outlet

SS 0356

Main Office (918) 288-7396

East Office (870) 683-2583

South Office (254) 578-1705

4 - SHOW RING SUPPLIES

FIBERGLASS SHOW STICKS

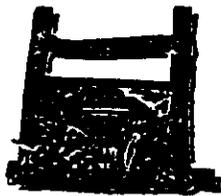
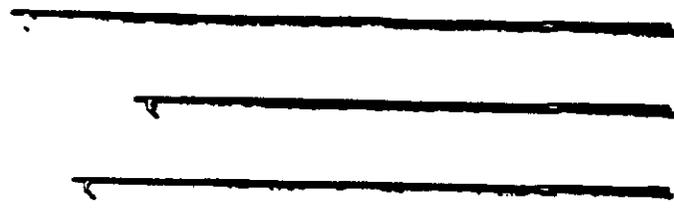
Short 54"

Long 60"

ALUMINUM SHOW STICKS

Available Sizes: 48" 54" 60" 68"

Colors Available: Maroon, Red, Blue, Black, Silver, Red Fade, Purple Fade, Green Fade



EXHIBITOR'S NUMBER HARNESS

For the professional look. Made out of quality nylon for a stronger, longer lasting harness. Elastic adjustable waist.

SIZES:

- Small: Black or Brown
- Medium: Black or Brown
- Large: Black or Brown



EXHIBITOR'S NUMBER CLIP

For holding exhibitor numbers. Clips on or straps through belt. Colors: Black or Brown



COMB HOLDER

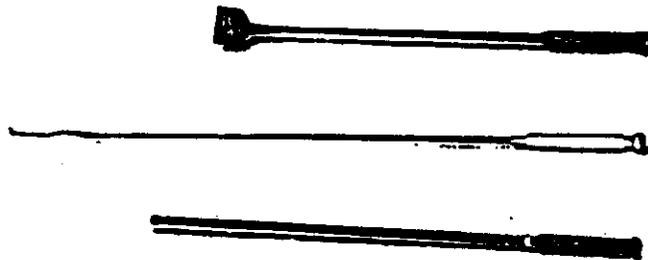
Holds comb for exhibitor's who don't have pockets. Clips on or straps through belt. Colors: Black or Brown

NEW!

Name: _____
 Sire: _____
 Dam: _____
 Date of Birth: _____
 Owners: _____

PEDIGREE SIGNS

Includes name, sire, dam, date of birth and owner. Black print on white background. Sign rings sold separately. Will custom design and print with school, club or ranch name. Stock cards ready to ship today. Custom cards allow 2 - 4 weeks.



HOG BAT

25" long shaft, 2" leather slapper

WHITE HANDLED WHIP WITH CHROME TIP

39" & 36" long shaft, 4" long popper

HOG SORTING POLE

30" long solid fiberglass shaft.

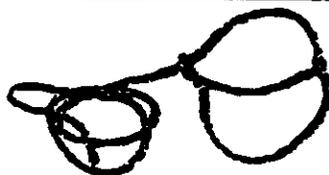
All whips & bats come in assorted colors.



LEATHER ROLLED NOSE SHOW HALTER

Available in black or brown. Made of quality leather.

Sizes	Animal Size
XSmall	350 - 650 lbs
Small	650 - 1000 lbs
Medium	850 - 1400 lbs
Large	1400 - 1650 lbs
XLarge	1650 lbs and over



BLUE RIBBON'S ROPE HALTERS

High quality handmade rope halters including an extra foot of rope.

Size: 1/2" rope, 13 ft. rope.

Special pricing for dozens. You can mix and match colors with dozen pricing.

Available in assorted colors.



BLUE RIBBON'S NECK TIES

Adjustable to fit any animal. Security for your animal. Size: 1/2" rope, 13 ft. rope.

Special pricing for dozens. You can mix and match colors with dozen pricing.

Available in assorted colors.

SS 0357



LEATHER NOSE LEAD WITH SNAP

For use with nose rings. Available in black or brown.



COTTON NOSE PADS

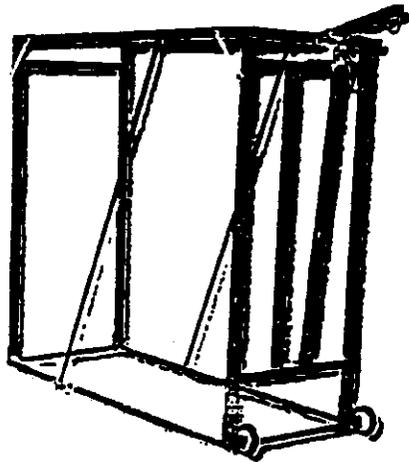
Prevents chaffing that occurs on the nose after prolonged halter use. Velcro makes it easy on, easy off.



FAST MAIL ORDER SERVICE

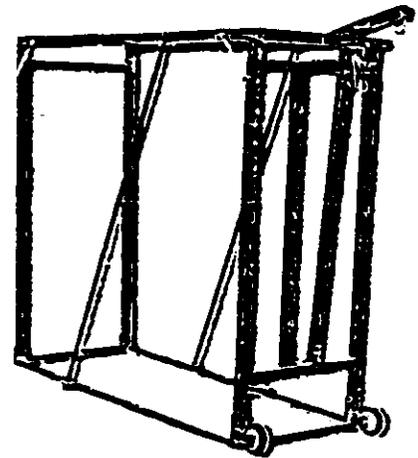


5 - BLOCKING & GROOMING CHUTES & ACCESSORIES



Blue Ribbon's Blocking & Grooming Chute

The ideal blocking chute to haul; breaks down in minutes to only 6" tall. Handle for head gate does not stick out past side of chute. New head-tie angles up to allow for more head room. Durable wheels and built to withstand rugged treatment. Built with 2 inch square tubing.



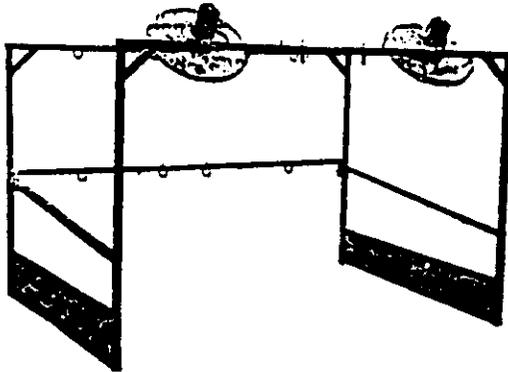
NEW

Aluminum Blocking & Grooming Chute

- Easy one person setup and handling design.
- Portable for shows.
- Can be set up or taken down in minutes.
- Durable wheels.
- 2 inch square tubing.

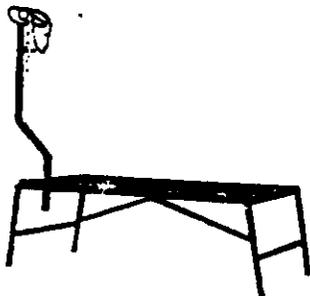
Blue Ribbon's Heavy Duty Cattle Display

A complete professional setup that includes 2 stall dividers, 4 front tie ups, 4 front tie downs and 4 fan hangers. Display extends 8' to 5'. Holds 2 - 4 head. Easy to haul, heavy duty 2" steel construction. Fans sold separately.



Cattle Display Extension

Extension package used to double the size of your cattle display to hold up to 8 head. Includes 2 T's, 8 front tie ups, 8 front tie downs and 4 fan hangers. Display extends from 15' to 30'.



Lamb Blocking Stand

Folds up to compact size. Adjustable head piece for any size lamb. *Optional offset neck extension.*

BLUE RIBBON'S FUTURE FLOOR

1 1/2 inch thick mat is dense and spongy to help keep cattle from becoming fatigued while standing in the chute. Water and mold resistant.



NEW

Knee pad:
32" x 20"

Chute floor 7'



RUBBER MAT

36" wide matting. Works well to display cattle. Cattle will not paw up bedding. Also excellent as trailer matting. *Sold in any length.*

SS 0358

Main Office (918) 288-7396

East Office (870) 683-2583

South Office (254) 578-1705

6 - GROOMING PRODUCTS



Blue Ribbon's EASY COMB

Light weight adhesive for use on animals with well trained hair. Light enough for use on body and legs. *Use Shazam to remove.*



Blue Ribbon's SHOW RING ADHESIVE

A medium strength adhesive for use when more hold is needed. Quality at its best when working with medium length, thinner type hair. Clear natural coloring. Show day calls for Show Ring Adhesive. *Use Shazam to remove.*



Blue Ribbon's TAIL ADHESIVE

A heavy adhesive to use on coarse or unmanageable hair. Great for balling tails, building legs and to hold that hard to manage hair. Perfect for use on humid days for maximum setting power. *Use Shazam to remove.*



Blue Ribbon's WHITE MOUSSE

A multi-purpose grooming product for training of hair, show day or before clipping. It creates a stronger, thicker appearing hair coat. Hair will look natural with the hold power you desire. Works great with Show Bloom. *Available in white and black.*



Blue Ribbon's FINAL MIST

Finishing touch to show day preparation. Spray lightly on neck, body and head as you enter the showing. Light oil requires no washing out. Do not spray over adhesive as oil will break down fitting efforts. Effective and economical show day dressing.



Blue Ribbon's BLACK TOUCH-UP

The blackest, most natural color touch-up ever! Black Touch-Up covers completely and the hair will appear thicker, fuller, and a deeper black. Works well on dull hair and will not break down your adhesives. *Use Shazam to remove.*



Blue Ribbon's SHAZAM

A great product used for the safe and effective removal of show-day preparations. Shazam contains NO harsh products that effect hair coat or skin. Simply spray on, rub in, and shampoo with E-Z Rinse Shampoo. Hair will perform naturally upon completion.



Blue Ribbon's WHITE TOUCH-UP

The most natural color touch-up ever! White Touch-Up covers completely and the hair will appear thicker, fuller, and a brighter white. Works well on dull hair and will not break down your adhesives. *Use Shazam to remove.*



MAGIC

Popular with dairy showmen for top lines. Not a paint or a lacquer, but tames hair that is hard to control. Available in Black or Clear. *Use Shazam to remove.*



BLUE RIBBON'S SMOKE

The ultimate swine grooming product. Can be used daily and show day. Conditions skin and hair. Gives your hog a glossy shine. Just spray on and brush. *Does not* have to be washed out. For best results use daily.



BLUE RIBBON'S SWINE SHEEN

A great product to use showday. Provides a glossy shine without oil. Spray on and brush in. Cover with a light mist of water for best results. Does not have to be washed out.



GROOMING ADHESIVE

Tames hard to hold and unmanageable hair. *Use Shazam to remove.*

5% DISCOUNT IF ORDERED BY THE CASE.

SS 0359



FAST MAIL ORDER SERVICE



7 - GROOMING PRODUCTS

Blue Ribbon's BASE COAT



A showday dressing that delivers a set and shine to stubborn or untrained hair. Makes hair pop. Spray on lightly. Blow dry to set. Performs best in cool weather or low humidity situations. Wash out with E-Z Rinse. Available in quart bottle only.

Blue Ribbon's SHOW TIME



Gives hair the bloom and body you want. Hair pops naturally. Gives set and body to hair. Just spray on and blow dry to set. Works well in the hot or cold weather. Requires no washing out. Available in quart bottle only.

NEW

Blue Ribbon's SHOW BLOOM



Gives hair the bloom, pop and shine you want. Gives set and body to hair. Just spray on and blow dry to set. Works well in hot or cold weather. Requires no washing out. Available in quart bottle only.

Blue Ribbon's MAGIC SHEEN



Great for daily use and show day. Gives hair body and shine. Spray on and blow dry 10 - 15 minutes. Magic Sheen is also the ultimate hog product. Requires no washing out. Available in quart and gallon bottles only.

Blue Ribbon's SHO-SHEEN



The very best daily hair care formula with ultra shine. Sho-Sheen builds hair strength and body. It contains a built-in hair and skin conditioner and helps train hair. Helps repel dirt and keeps stains from setting in. Requires no washing out. Available in quart and gallon bottles only.

Blue Ribbon's PURPLE OIL



Purple oil is used to remove adhesives, paints and other show-day products. Wash out with E-Z Rinse. Available in quart and gallon bottles only.

Blue Ribbon's E-Z OUT



Tough remover for show day oils, adhesives and other grooming products. Shampoo out with E-Z Rinse. Available in quart and gallon bottles only.

Blue Ribbon's RAG OIL



Promotes beautiful hair coats. Use as a skin and hair conditioner to restore natural oil, bring life to dull hair and control flaking of skin. Apply with a rag or just spray an even coat over entire body and blow dry. For best results mix with Sho-Sheen. Available in quart and half gallon bottles only.

Blue Ribbon's WHITE LIGHTING



The easiest of all coat dressings to use and one of the best. A show day dressing for sheen and set. Will not build up or stain hair. Just spray on an even coat over entire body and blow dry. Available in quart bottle only.

Blue Ribbon's HAIR AND WOOL SET



Ideal to use to train hair. Does not build up. Cuts training time in half. Requires no washing out. Just spray on and brush hair to develop hair pattern. Available in half gallon bottle only.

Blue Ribbon's E-Z RINSE



The ultimate shampoo. A shampoo that rinses out easily and leaves the hair with body and fluff. Will not strip the hair of its natural oils. Perfect for all livestock. Available in quart and gallon bottles only.

NEW

C.R. "Hot" Sweat



A proven and effective tissue reducer, when used under a sweat collar. Apply for three consecutive days, for 12 hours, each day. Available in quart bottle only.

SS 0360

5% DISCOUNT IF ORDERED BY THE CASE.

Main Office (918) 288-7396

East Office (870) 683-2583

South Office (254) 578-1705

8 - GROOMING PRODUCTS

NEW



**UNFIT
"THE ULTIMATE"**
Used for show day removal of oils and adhesives. Extremely gentle to skin and hair. Rinses out with water. Will not cause dandruff.



**BIO GROOM
QUICK-CLEAN
WATERLESS SHAMPOO**
Ideal to clean animals. Waterless shampoo with optical brighteners. The shortcut to a bath. Requires no washing. Contains lanolin, removes stains, non-irritating.



**BIO GROOM
SHOW WHITE
SHAMPOO**
Shampoos away yellow and stained hair. Brightens white and gray hair.



**BIO GROOM
INSECT CONTROL
SPRAY**
An effective fly spray that repels flies for 3-5 days. Gentle, non-irritating and safe for repeated use.



**FARNAM
REPEL-X**
A fly spray concentrate that works well as a hair training aid. Not a greasy fly spray. Does not build up tacky, but actually helps condition hair.



**MANE'N TAIL
CONDITIONER**
Nourishes and stimulates hair and skin to aid hair growth. Helps repair split ends. Eliminates flaking of dandruff. A non-greasy conditioner that can be applied liberally with hands.



**ABSORBINE
LINIMENT**
A dual purpose product. Provides temporary relief for muscular soreness. Often used as a grooming aid. Helps hair to stand out or pop during hair preparation.



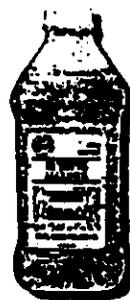
**EXHIBITOR'S
QUIC SILVER**
Creates whiter whites, silvery greys, and shimmering highlights on light colors. Gentle, safe, and has a neutral pH.



BLACK HAIR DYE
Turns grey or faded hair jet black. Requires 4-5 boxes to do a 1000 lb. animal. Combine ingredients of boxes together and apply to hair coat. Work deep into hair with comb and rinse after 45 minutes. Will slowly rinse away from hair after 7 - 10 days. Will not towel off.



LASER SHEEN
Concentrated hair polish. Mixes with water.



ALCOHOL
A 70% Isopropyl alcohol. Excellent for hair pop and reduces body temperature when lightly misted.



BABY POWDER
Used on white haired animals to help brighten and whiten.

5% DISCOUNT IF ORDERED BY THE CASE.

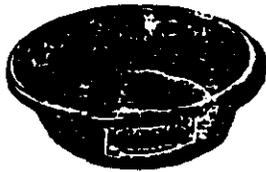
SS 0361



FAST MAIL ORDER SERVICE



9 - BUCKETS, FEED PANS AND FEEDERS



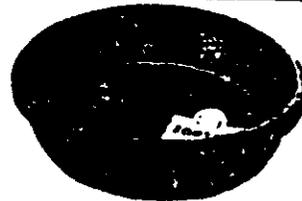
**FEED PAN
SMALL**

1 gallon feed pan. Durable, lightweight and won't rust. Great for use in goat, hog or lamb barns. Available in green, red, black and blue.



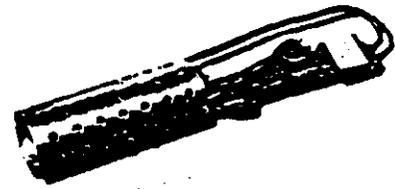
**WATER BUCKET
SMALL**

2 gallon plastic water bucket. Lightweight and durable. Stacks easily. Great for use in goat, hog or lamb barns. Available in green, red, black and blue.



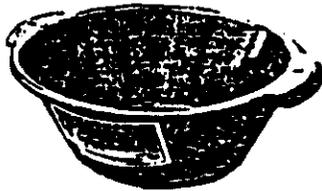
**RUBBER FEED PAN
SMALL**

3 gallon rubber feed pan. *Black only.*



BUCKET HEATER

Small enough to fit in your bucket. Heats each gallon of water in 10 minutes.



**FEED PAN
LARGE**

6 gallon feed pan. Durable, lightweight, won't rust, handles for easy carrying, smooth finish for easy cleaning. Available in green, red, black and blue.



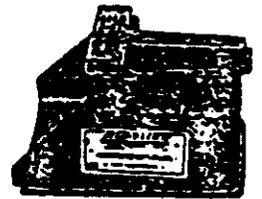
**WATER BUCKET
LARGE**

20 quart plastic water bucket. Lightweight and durable. Stacks easily. Available in green, red, black and blue.



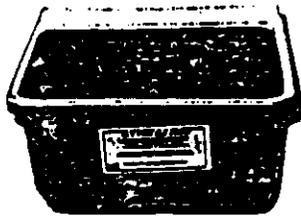
**RUBBER FEED PAN
LARGE**

6.5 gallon rubber feed pan. Great for at home use. *Black only.*



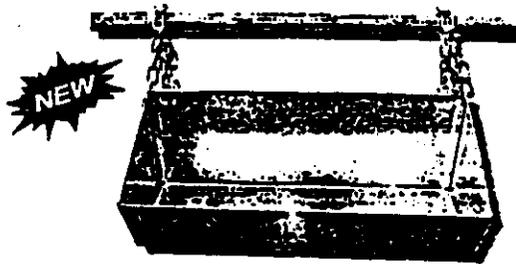
FEED SCOOP

Handy feed scoop holds up to 3 lbs. feed. Available in assorted colors



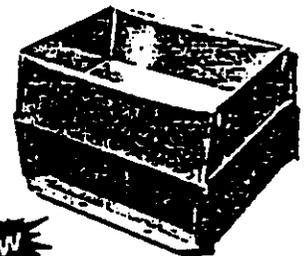
UTILITY FEEDER

Can be used as sheep or goat feeder or as a holder for loose mineral, grain, or salt for cattle or horses. Hangs on fence or stall. Holds up to 5 quarts. Available in assorted colors



**BLUE RIBBON'S HANGING
FEEDER**

Galvanized steel hanging feeder. Ideal for sheep and goats. Chains allow feeder to hang level on all types of fences. Available in: small 8" x 6" x 14"; medium 8" x 6" x 19"; large 8" x 6" x 24".



**BLUE RIBBON'S
SHOW PIG FEEDER**

8" x 12" x 16" galvanized steel feeder. Great for use at home or on the road. Will easily stack on top of each other and fit most feeding stall setups.

**Clippers
Repaired:
Blades
Sharpened**
• Stewart
• Andis
• Lister

Blue Ribbon's Service Department

• **FAST** • KNOWLEDGEABLE • QUALITY

We take trade-ins on clippers and blow dryers. We offer a complete line of rebuilt clippers and blow dryers. If you have any questions or problems with your equipment be sure to send it to

Blue Ribbon's Service Department. SS 0362

**Blow Dryers
Repaired:**

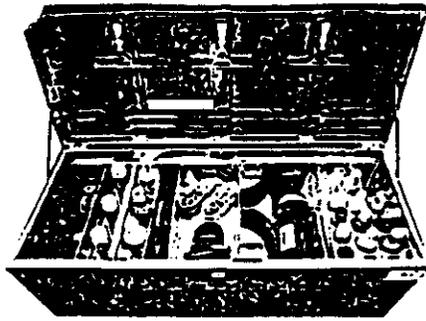
- Circulteer
- Champion
- Hamm's Dryers

Main Office (918) 288-7396

East Office (870) 683-2583

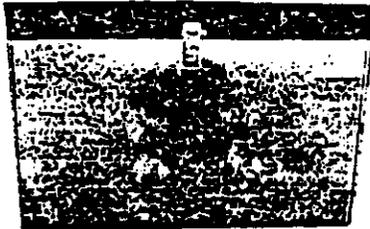
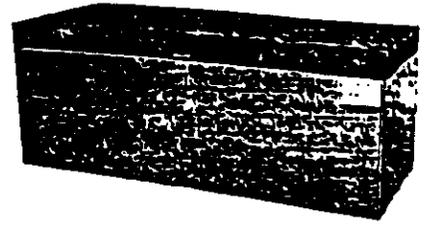
South Office (254) 578-1705

10 - GALVANIZED STEEL SHOW BOXES



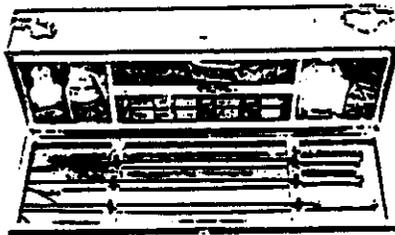
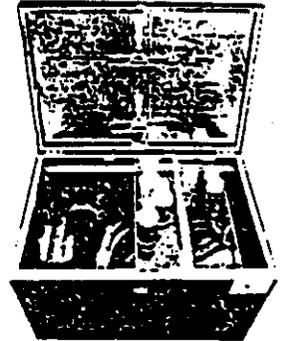
Blue Ribbon's Large Show Box (21" x 24" x 58")

Strong and durable galvanized box. Two removable trays add the perfect touch to help you organize your show supplies. Lid has 3 show stick holders, 3 scotch comb holders and registration paper holder. Spray bottle and can holder, holds 6 spray cans and 5 quart bottles. Dual handles on each end for easy carrying. Dual top chains. Easy on/off Velcro cushion top. Top available in black, royal blue, maroon, green and red.



Blue Ribbon's Small Show Box (24" x 24" x 34")

An economically priced box. Solid construction. Removable tray adds the perfect touch to help you organize your show supplies. Lid has 2 scotch comb holders. Handles on each end for easy carrying. Dual top chains. Easy on/off Velcro cushion top. Top available in black, royal blue, maroon, green and red.



Blue Ribbon's Hanging Show Box (16" x 9" x 40")

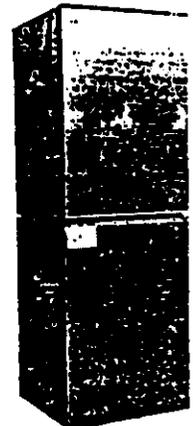
Perfect for the hog barn or sheep barn where floor boxes are not allowed. This box hangs on the fence and is large enough for several spray bottles, clippers, brushes and other necessary items. Lid has 3 pig whip holders. Inside tray for small equipment and clippers. Features a large handle on each end for easy carrying.



Blue Ribbon's Double Stack Upright Show Box (24" x 24" x 68")

- Great Design.
- Great Space Saver.
- Top Box Size 24" x 24" x 34".
- Bottom Box Size 24" x 24" x 34".
- Doors swing a full 180° for greater accessibility.
- Halter rack.
- Individual shelves.
- Door trays will hold cans or quart bottles.
- Top box shelves will hold cans, quarts or gallon bottles.
- Large handles on each side for easy carrying.

Custom Built Boxes Available

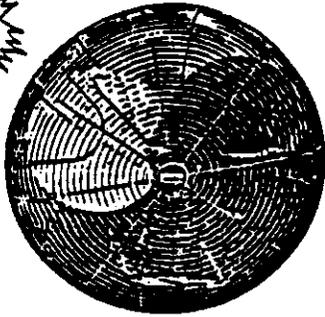
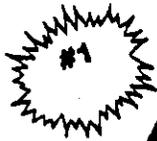


FAST MAIL ORDER SERVICE

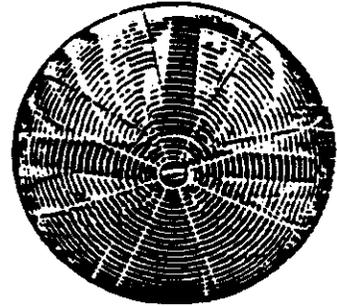


SS 0363

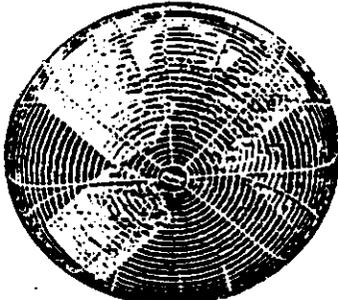
11 - FANS AND ACCESSORIES



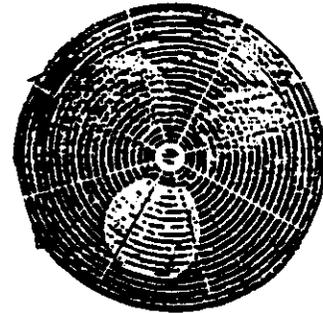
Blue Ribbon's *FAST AIR* Livestock Fan
 A 24" fan with 1/2 hp, 5 Amp Motor. Includes: motor, cord, blade & guard. Shipped completely assembled. *Fan bracket hanger sold separately.*



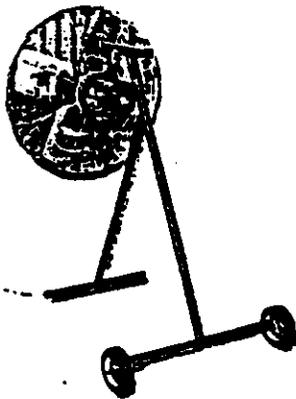
Blue Ribbon's *AIRPLANE* Livestock Fan
 A 24" fan with 1/2 hp, 5 Amp Motor and polypropylene blade. Includes: motor, cord, blade & guard. Shipped completely assembled. *Fan bracket hanger sold separately.*



Blue Ribbon's *TURBINE* Livestock Fan
 New blade design blows at a higher velocity and a wider path of air movement to provide more air flow. A 24" fan with 1/2 hp, 5 Amp Motor. Includes: motor, cord, blade & guard. Shipped completely assembled. *Fan bracket hanger sold separately.*



Barnstormer Fan
 A 24" white cage style fan with 1/2 hp, 5 Amp Motor. Includes: motor, cord, blade & guard. Shipped completely assembled. *Fan bracket hanger sold separately.*



Blue Ribbon's Fan Stand
 Convenient, easy to use and store. Rear wheel folds up. *Fan sold separately.*



Blue Ribbon's Double Fan Stand
 Can be mounted with two fans or one fan by itself. Holds one 30" fan and one 24" fan or two 24" fans. *Fans sold separately.*



Blue Ribbon's Upright Fan Stand
 Set up or take down in minutes. Height is adjustable. No heavy base required. Mounting brackets are included to nail to front of stall. Made of 2" tubing. Holds two 24" fans or one 30" fan. *Fans sold separately.*

LOWEST AMP FAN MOTORS ON THE MARKET!

SS 0364

Main Office (918) 288-7396

East Office (870) 683-2583

South Office (254) 578-1705

12 - CATTLE SWEATS

The BLUE RIBBON SHOW CATTLE SWEATS are a must for the serious showman. This blue double sided neoprene show cattle sweat allows you to leave the sweat on cattle for up to 12 hours per day. This will reach the maximum sweating potential. The sweat must be removed daily to allow the hair coat to breath.

BLUE RIBBON SHOW CATTLE SWEATS are made of a strong durable material and are completely machine washable. The removable Velcro Straps allow you to move and position them where desired. You may also custom fit your Show Cattle Sweat by simply trimming to your desired shape. Using the Show Cattle Sweat with C.R. "HOT" SWEAT will make an obvious difference.



SIZES:
 Medium 500 - 900 lbs.
 Large 800 - 1300 lbs
 X-Large 1000 lbs and over

EXTRA PARTS AVAILABLE:
 Velcro Strap
 Nose piece with 2 Velcro straps.



C.R. "Hot" Sweat

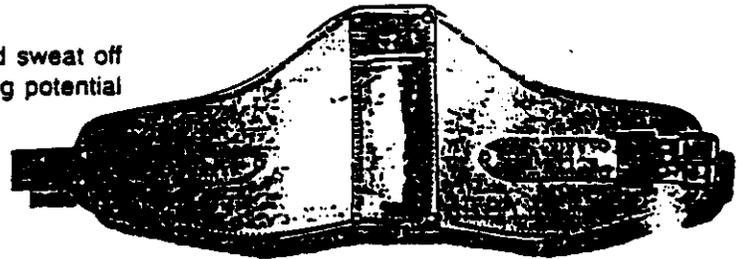
A proven and effective tissue reducer, when used under a sweat collar. Apply for three consecutive days, for 12 hours, each day. Available in quart bottle only.



LEATHER NECK SWEATS

Made from top quality leather. Designed to hold up and sweat off excess dewlap. Lined with fleece for maximum sweating potential and fiberglass rod for long stability.

SIZES:
 Calf size 650 lbs. & under
 Large 650 - 1400 lbs.
 X-Large 950 - 1500 lbs.



12 - HARDWARE



PRO SPRAY BOTTLE

High output trigger pump and bottle.



DOUBLE MIST SPRAYER

Special sprayer that delivers two sprays, once as the trigger is squeezed and sprays again as the trigger is released.



NEW

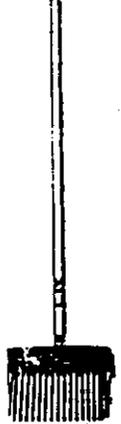
PUMP UP SPRAYER

Heavy duty hand pump. Has an adjustable nozzle for a wide range of spray. Can lock trigger for a continuous spray.



GLOVES

Cool, poly/cotton knit gloves are value priced and machine washable. Available in white.



APPLE PICKER

A heavy duty fork constructed from a high quality, high strength material blended to withstand hot as well as cold temperatures. Long life expectancy. Comes with a varnished wonder handle. Available in assorted colors.



SINGLE CUT OFF VALVE



DOUBLE CUT OFF VALVE



HOSE NOZZLE SPRAY VALVE



GRILL BRICK

For removing coarse or dead hair on cattle and hogs.

SS 0365



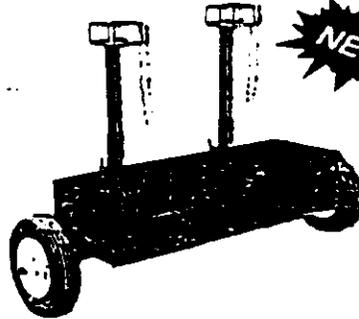
FAST MAIL ORDER SERVICE



See Page 5 for SHEEP BLOCKING STANDS

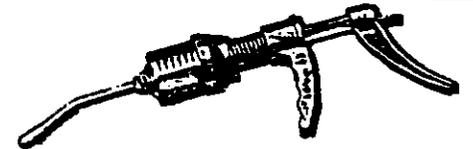
LAMB CHARIOT

The best training tool on the market for the showperson who is concentrating on just a few select lambs rather than an entire herd. Attaches easily to riding lawn mower or 4 wheeler. A small rubber mat is recommended for floor. Trains one or two lambs singly or simultaneously. Head pieces are from side to center. Available in single head model; two head model; three head model; four head model.



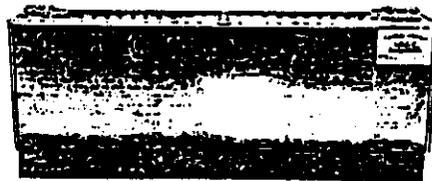
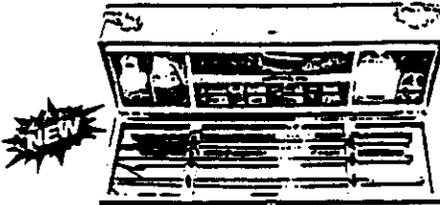
HOOF & HIDE

A fungicide used for the treatment and prevention of wool fungus, ringworm, foot-rot and other funguses that affect cattle, sheep and swine.



LAMB DRENCH GUN

Ideal for use on sheep. A pistol grip drench gun with stainless steel probe. Used in drenching lambs with medication or rehydrating lambs that will not drink. Replacement O-rings available.



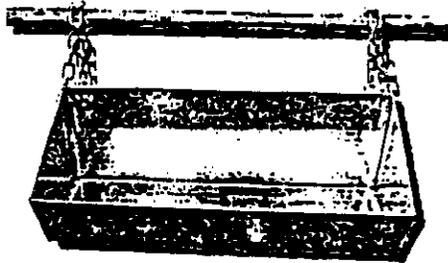
Blue Ribbon's Hanging Show Box (16" x 9" x 40")

Perfect for the hog barn or sheep barn where floor boxes are not allowed. This box hangs on the fence and is large enough for several spray bottles, clippers, brushes and other necessary items. Lid has 3 pig whip holders. Inside tray for small equipment and clippers. Features a large handle on each end for easy carrying.



SHEEP HALTERS

Great for training sheep. Adjustable for any size, and available in a variety of colors to match any display scheme.



BLUE RIBBON'S HANGING FEEDER

Galvanized steel hanging feeder. Ideal for sheep, goats, etc. Chains allow feeder to hang level on all types of fences. Available in small 8" x 6" x 14"; medium 8" x 6" x 19"; Large 8" x 6" x 24".

HOOF TRIMMER



Lightweight, easy action, and very sharp. Small size makes for easy cutting. Used on sheep & goats.

COTTON LAMB TUBES & HOODS

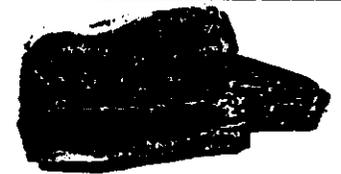
A stretch blanket tube and hood that is lighter in weight than nylon tubes. Allows wool to breath easier during hot summer days. Keeps lambs tight hided and clean until show time.

Medium (fits 80 - 110 lbs)

Large (fits 110 - 140 lbs)

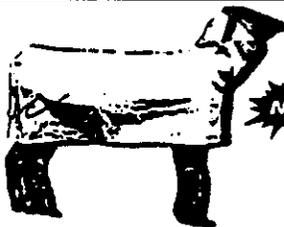
Cotton hoods sold separately.

Available in assorted colors, with or without legs.



MESH LAMB MUZZLE

Synthetic mesh muzzle prevents overfill on bedding but allows animal to drink. One piece elastic strap holds muzzle in place. No buckles or strings to tie. Made with Pfifer-Tex mesh, a virtually indestructible awning material.



SHEEP BLANKET WITH NECK

These new style lamb blankets have an added neck that provides more warmth and cleanliness. The material is a tightly woven canvas that will last longer and be less water absorbent than other blankets. This fitted design has one strap behind the front legs, thus eliminating leg strags.



CHAMOIS

Perfect for shedding water quickly and easily. SS 0366

Main Office (918) 288-7396

East Office (870) 683-2583

South Office (254) 578-1705

Lister Stablemate

The best all purpose clipper. Clips cattle, horses, sheep, goats, and llamas with ease. Does it all -- legs, heads, bellies, ears, backs and sides. Combines small, lightweight size (2 lbs.) with higher blade speed and power. Features sleek shape to fit comfortable in the hand.



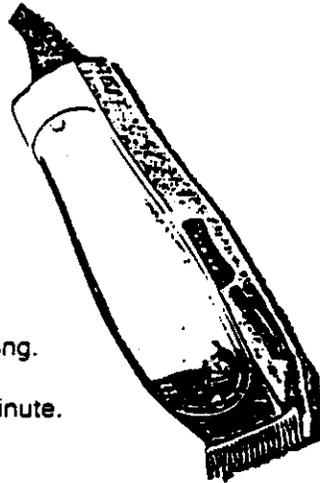
Oster Groom-Master

Most versatile clipper you can buy. Its wide blade makes it an excellent tool for overall body clipping. Heavy-duty clipper.



Andis Groom Clipper

- A very fine small clipper.
- Adjustable blade.
- Andis' finest aluminum housing.
- Runs smoothly.
- 14,400 cutting strokes per minute.



Oster Show Master

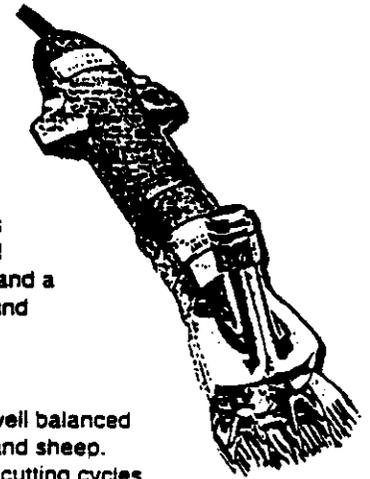
Variable Speed Model

Variable speed motor adjusts from 700 to 3,000 cutting strokes per minute. Unit is equipped with a 3" shearing head that is fitted with a 4-point cutter and a 20-tooth comb. Clipper has 4 pound operation weight.

Single Speed Model

Single speed unit is lightweight, well balanced and the perfect clipper for cattle and sheep. Powerful and fast with over 3000 cutting cycles per minute.

Also available individually; Flatheads, Show Master Heads, single speed and variable speed motors.



Andis 2-Speed Detachable Plus+

2-speed motor for extra power and fast, smooth clipping. Runs cool, will not heat up. Detachable blades for ease of changing and cleaning. Model A-5 Oster blades fit this clipper and with slight modification Oster Groom-Master Blades can also be used.

...so available in single speed model.



Oster Clipmaster

Single Speed Model

Single speed unit is light weight, well balanced and the perfect clipper for cattle, horses, dogs and swine. Powerful and fast with over 3000 cutting cycles per minute. Comes equipped with a flathead and blades.

Variable Speed Model

Variable speed motor adjusts from 700 to 3000 cutting strokes per minute. Built in fan. Solid state silicone rectifier allows infinite speed settings. Clipper has 4 pound operating weight.



SS 0367

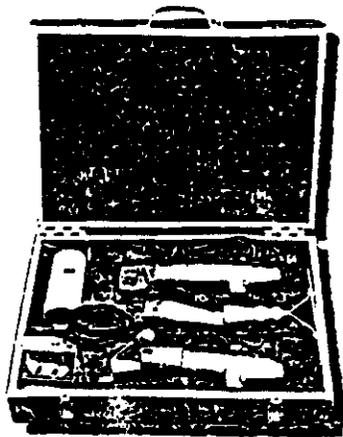
We take trade-ins on Clippers • Repair Clippers • Blades Sharpened



FAST MAIL ORDER SERVICE

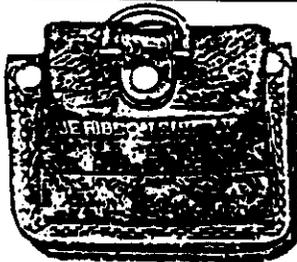
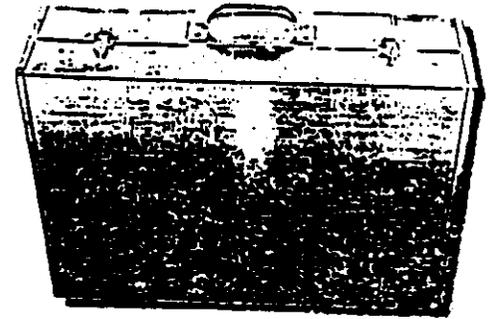


15 - CLIPPER ACCESSORIES



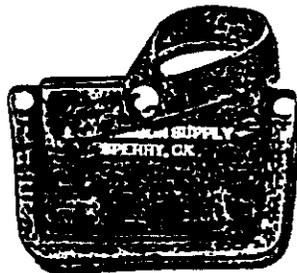
BLUE RIBBON'S CLIPPER CADDY

A high quality galvanized clipper caddy. Lightweight but durable container with room enough to keep all your clipper items in one place. Will hold three large clippers, one small clipper, blades, scissors, and oil. Features poly foam insert to prevent dulling of blades or breaking your clippers. Case dimensions are 16" x 6.5" x 22".



LEATHER CLIPPER GUARDS

athread guard. Fits snugly over clipper blades to protect them from dirt and breaks.



LEATHER CLIPPER GUARDS

Sheephead guard. Fits snugly over clipper blades to protect them from dirt and breaks.



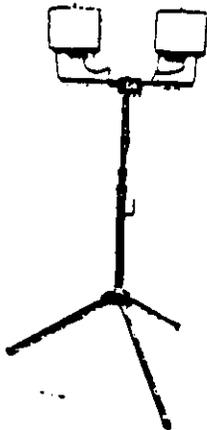
KNEE PADS

A quality knee pad with the same outside leather design as the deluxe knee pad. Inside of knee pad is felt lined. Protects knees while clipping, fitting, or any task requiring kneeling.



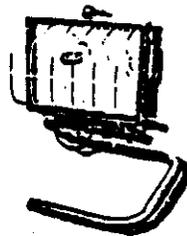
DELUXE KNEE PADS

A deluxe leather knee pad. Inside contains a molded padding that provides the most comfort while kneeling or standing.



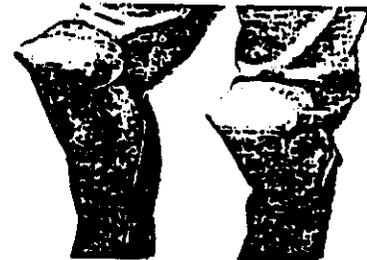
HALOGEN LIGHTS

The ideal lighting system to use while clipping and fitting. The portable light is very popular with fitters for lighting up display area. The floor model halogen light is versatile for many applications. *Replacement bulbs available.*



CLIPPER LUBE

Specially formulated to reduce heat, friction, and blade wear without leaving a heavy residue. A built in coolant will prolong the life of your blades and clippers.



ECONOMY KNEE PADS

A leather knee pad. Inside of knee pad is felt lined. Protects knees while clipping, fitting, or any task requiring kneeling.

SS 0368

Clippers Repaired:
Blades Sharpened
• Stewart
• Andis
• Lister

Blue Ribbon's Service Department

• **FAST** • KNOWLEDGEABLE • QUALITY

We take trade-ins on clippers and blow dryers. We offer a complete line of rebuilt clippers and blow dryers. If you have any questions or problems with your equipment be sure to send it to Blue Ribbon's Service Department.

Blow Dryers Repaired:

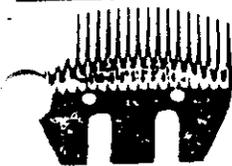
• Circulteer
• Champion
• Hamm's Dryers

Main Office (918) 288-7396

East Office (870) 683-2583

South Office (254) 578-1705

16 - CLIPPER BLADES



BR-20TBC

20 - tooth blocking comb cuts on edge with sharp tip.



BR-P7112

20 - tooth goat comb with dull tip.



BR-AAA

4 pt. cutter with wider angle of teeth.

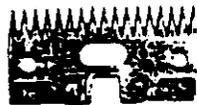


BR-SS

Wizard Blade with a sharp tip comb set.

BR-LW

Wizard Blade with beveled edge comb set.



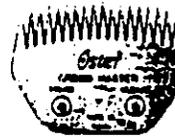
LISTER HAIRHEAD BLADES

BR-HS - Surgical, A-2S set.
BR-HF - Fine, A2F/AC, set.
BR-HM - Medium, A2/AC, set.
BR-HC - Coarse, CA-2/AC Set.



BR-9PT

Lister 9 pt. cutter.



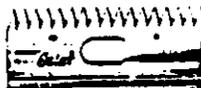
GROOM MASTER BLADES

BR-GMCB - Coarse Blade.
BR-GMMB - Medium Blade.
BR-GMFB - Fine Blade.
BR-GMBI - Blocking Blade.



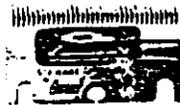
BR-A510

Blade for A-5 Clipper. Standard Blade.



OSTER CLIPMASTER BLADES

3AU - Top Blade.
-84AU - Bottom Blade.
-PLUCK - Plucking Blade.
-SURG - Surgical Blade.



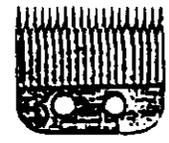
LISTER SHEEPHEAD BLADES

BR-23LB - 23 tooth low block beveled edge, dull tip.
BR-23HP - 23 tooth high block cuts on edge, sharp tip.
BR-9PT - 9 pt. cutter.
BR-4PT - 4 pt. cutter.



ANDIS GROOM CLIPPER BLADES

BR-AGCFS - Fast Speed Set.
BR-AGCSS - Surgical Set.



SPEED-O-GUIDE



SIZE 00



SIZE 0



SIZE 0A



SIZE 1



SIZE 1A



SIZE 2

Assures hair is all one length. Designed to fit small or large clippers. Use one for small clippers and two on large clippers.

16 - BEDDING

SS 0369



NEW

CEDAR FIBER BEDDING

Cedar fiber bedding is so effective that the cost and amount needed to fill and maintain a stall is greatly reduced compared to other beddings. With proper care and spot cleaning this bedding can last for months while neutralizing bad odors and adding a pleasant fragrance. Cedar fiber soaks up more moisture and odor than any other bedding. This will help keep a clean healthy hair coat on your animal. Packs much better than any other wood shaving bedding. Is preferred over sand because it is not hard on the feet and legs and stays much cleaner. One 40 lb. bag will cover approximately two square feet of floor space to a depth of four inches. Call for special pricing on half or full semi loads of cedar fiber in bulk form or bag shipped directly to your location. Because of the high expense of shipping cedar fiber, it is best to pick up smaller quantities at one of our stores or call and we will deliver it to a show.

THE PREFERRED LIVESTOCK BEDDING.



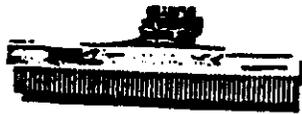
FAST MAIL ORDER SERVICE



17 - BRUSHES & COMBS



9" GROOMING COMB
Handle: Wood
Replacement Blades available.



9" GROOMING COMB
Handle: Aluminum
Replacement Blades available.



FLUFFER COMB
Handles: Wood or Aluminum
Replacement Blades available.



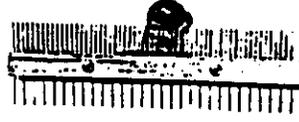
FRANKLIN COMB
Handles: Wood or Aluminum
Replacement Blades available.



**FRANKLIN COMB
SKIP TOOTH**
Handles: Wood or Aluminum.
Replacement Blades available.



**FRANKLIN FLUFFER
DOUBLE SIDED COMB**
Handles: Wood or Aluminum
Replacement Blades available.



**FRANKLIN COMB
SKIP TOOTH
DOUBLE SIDED COMB**
Handles: Wood or Aluminum
Replacement Blades available.



CHAMOIS
Perfect for shedding water quickly and easily.



**WASH RACK
BRUSHES**
Available in assorted colors.



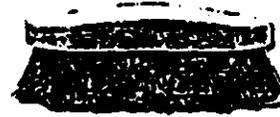
**RICE ROOT
BRUSH**
Wooden handle. The rice root brushes are hand made. Bristles are trimmed to 1 3/4 inches to keep them firmer.



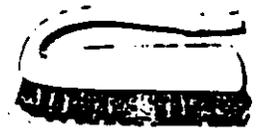
**RICE ROOT
MIX BRUSH**
The rice root & synthetic mix brush has bristles that contain 1/2 rice roots & 1/2 synthetic bristles to help stand up to continuous use.



**WHITE HOG
BRUSH**
Ultra soft white bristle brush. Softest brush on the market.

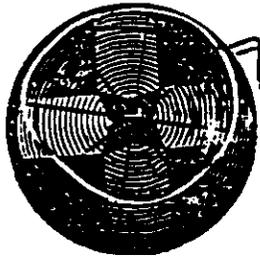


**HORSE HAIR
HOG BRUSH**
Soft horse hair bristle brush.



HOG BRUSH
A real time saver. Soft fiber brush, perfect for fitting in back pocket of jeans.

17 - LIVESTOCK COOLING SYSTEMS



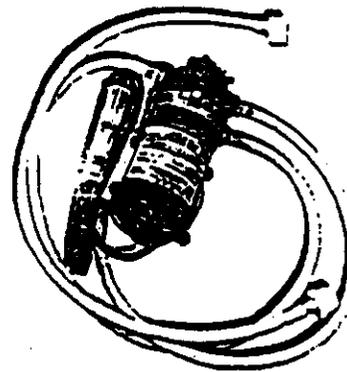
**Blue Ribbon's
Arctic Circle**

The Arctic Circle uses a unique nozzle that creates a microfine mist which flash evaporates, cooling the air by up to 25 degrees. Three nozzles are placed on an 18" diameter circle that has a six foot lead line that connects directly to a garden hose. The Arctic Circle will attach to any or 30" Fan. Fan sold separately.



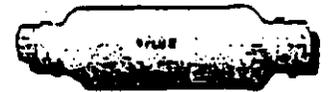
**Blue Ribbon's Arctic Mist
Livestock Cooling
System**

This kit is perfect for use on the Blue Ribbon's Cattle Display. It has a 10 foot lead line and a 15 foot line with six nozzles spaced 30" apart. Perfect for use in show barns and trailers.



**Blue Ribbon's
Arctic Pump**

150 PSI 110 Volt Pump. Runs up to 30 mister tips.



**Blue Ribbon's
Misting Filter**

This 3-stage carbon phosphate filter suspends particles that could clog nozzles. This filter is a must for all misting systems. Attaches in line to all garden hose connections.

SS 0370



Blue Ribbon's Single Mister

Hooks directly to garden hose. Emits a light evaporation mist of water at the rate of 1/2 gallon per hour. Length is approximately 12".

Main Office (918) 288-7396

East Office (870) 683-2583

South Office (254) 578-1705

18 - SWINE SUPPLIES

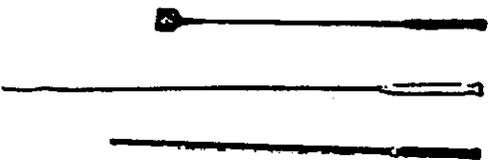


NEW

Blue Ribbon's Hanging Show Box (16" x 9" x 40")

Perfect for the hog barn or sheep barn where floor boxes are not allowed. This box hangs on the fence and is large enough for several spray bottles, clippers, brushes and other necessary items. Lid has 3 pig whip holders. Inside tray for small equipment and clippers. Features a large handle on each end for easy carrying.

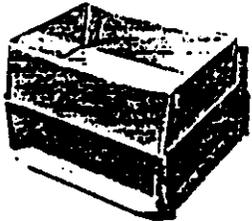
- **HOG BAT**
25" long shaft, 2" leather slapper
- **WHITE HANDLED WHIP WITH CHROME TIP**
39" & 36" long shaft, 4" long popper
- **HOG SORTING POLE**
30" long solid fiberglass shaft.



All whips & bats come in assorted colors.

BLUE RIBBON'S SHOW PIG FEEDER

6" x 12" x 16" galvanized steel feeder. Great for use at home or on the road. Will easily stack on top of each other and fit most feeding stall setups.



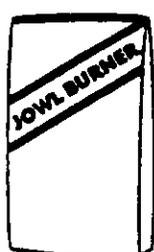
SHOW PIG CALM - MICRO B-1

2000 milligrams of pure U.S.P. vitamin B-1 (Thiamin), which is essential for normal weight gain, maintaining peak feed consumption, and nervous system functioning. No withdrawal period. Administer 2-3 hours prior to show or training session.



SHOW LEAN

Ready to use chromium, all natural supplement especially formulated for show pigs. Converts fat to muscle without slowing the rate of gain. Top dress ration with 2 oz. per day, per head.



JOWL BURNER

A 16 day supply used to slim the jowl area of swine and increase overall leanness.

NEW



LEAN SHEEN

Protein and vitamin supplement for show animals. Packed full of blood meal, feed grade egg products and other feed additives. Helps burn fat and increase slimness and add sheen to hair coat. Available in 25 lb. bag.

NEW



BLUE RIBBON'S SMOKE

The ultimate swine grooming product. Can be used daily and show day. Conditions skin and hair. Gives your hog a glossy shine. Just spray on and brush. Does not have to be washed out. For best results use daily.

NEW



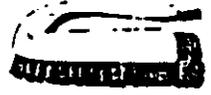
BLUE RIBBON'S SWINE SHEEN

A great product to use showday. Provides a glossy shine without oil. Spray on and brush in. Cover with a light mist of water for best results. Does not have to be washed out.



GRILL BRICK

For removing course or dead hair on cattle and hogs.



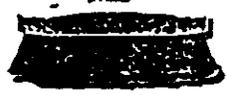
HOG BRUSH

A real time saver. Soft fiber brush, perfect for fitting in jeans back pocket.



WHITE HOG BRUSH

Ultra soft white bristle brush. Softest brush on the market.



HORSE HAIR HOG BRUSH

Soft horse hair bristle brush.



DOUBLE MIST SPRAYER

Special sprayer that delivers two sprays, once as the trigger is squeezed and sprays again as the trigger is released.

SS 0371



PUMP UP SPRAYER

Heavy duty hand pump. Has an adjustable nozzle for a wide range of spray. Can lock trigger for a continuous spray.



FAST MAIL ORDER SERVICE



19 - FEED ADDITIVES

WINNERS EDGE



A chelated mineral & vitamin additive, that contains probiotics, in granular form. Increases hair bloom - feed efficiency and much more. Not a protein additive. Available in formulas for cattle, sheep, pig, chicken and emu. Cattle: feed one 2 oz. twice a day. Sheep: feed 2 to 4 oz. per day. Hogs: feed 4 oz per day. Available in 15 lb., 25 lb. and 50 lb. containers.

GOLDEN FLO

Pure Liquid Energy. It's made up of 90% Fatty Acid. Feed cattle 8 oz. per day. Lambs and pigs 4 oz. per day. Improves feed consumption and efficiency. Enhances feed aroma and texture with a "fruity" flavor. Economical and efficient. Can be used for cattle, sheep, goats and hogs. Available in 40 lb. bucket.



SHOW BLOOM

An all natural high protein blend of dried brewers yeast, milk of whey, essential vitamins and minerals. Show Bloom will:

- Produce outstanding hair growth with richer coloration.
- Assist in developing healthy skin condition.
- Increase your animal's appetite and feed utilization.
- Help to maintain and increase weight and muscling.
- Improve hoof and nail conditions.

Available in 25 lb. bucket and 50 lb. bag.



VI-TAL

A water vitamin, electrolyte and mineral supplement to provide supplemental vitamins, electrolytes and trace minerals when animals are off feed. Stimulate water consumption and maintain balance of body fluids.



GOAT FAME

A 20% protein, all natural feed supplement containing essential vitamins and amino acids. Helps to promote muscle, healthy hair coat and increased appetite. Feed 2 oz. per day, per head. Available in 5 lb. bucket.



NEW

SHOW LEAN

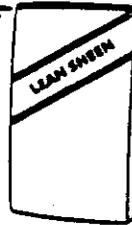
A ready to use chromium, all natural supplement especially formulated for show pigs. Converts fat to muscle without slowing the rate of gain. Top dress ration with 2 oz per day, per head.

JOWL BURNER

A 16 day supply used to slim the jowl area of swine and increase overall leanness.

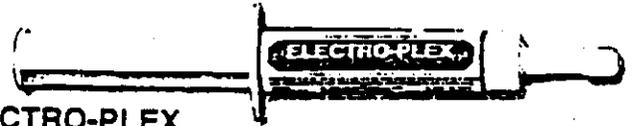


NEW



LEAN SHEEN

Protein and vitamin supplement for show animals. Packed full of blood meal, feed grade egg products and other feed additives. Helps burn fat and increase slimness and add sheen to hair coat. Available in 25 lb. bag.



ELECTRO-PLEX

An electrolyte formula that replaces vitamins and minerals lost due to dehydration from shipping, stress, sickness, etc.



PROBIOS

A probiotic paste that contains lactic acid producing bacteria that help maintain the digestive tract and encourage appetite. Highly effective for use in show cattle that won't stay on feed.



CALF CALM

An all-natural calmer formulated specifically for show calves. Calf Calm is an easy to administer oral paste. To be given two - three hours prior to show or training session. Can be used for cattle, sheep, hogs or horses.



SHOW PIG CALM - MICRO B-1

2000 milligrams of pure U.S.P. vitamin B-1 (Thiamin), which is essential for normal weight gain, maintaining peak feed consumption, and nervous system functioning. No withdrawal period. Administer 2-3 hours prior to show or training session.

SS 0372

Main Office (918) 288-7396

East Office (870) 683-2583

South Office (254) 578-1705

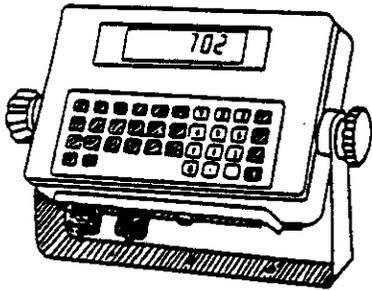
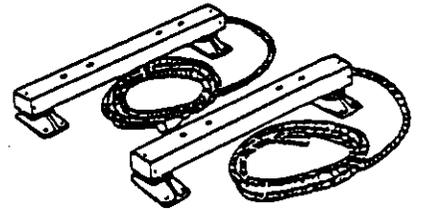
All Tru-Test systems are designed with the producer's needs first. They are easy to install, easy to set up, durable, weather proof and accurate. They utilize the most advanced electronics, yet are as easy to use as a hand held calculator.

The 700 series Livestock Weighing System is the most cost effective, efficient, and versatile weighing system available. Install them beneath platforms, crates, squeeze chutes or cages and whole herds can be weighed quickly and easily.

The Tru-Test Livestock Weighing System consists of two load bars and a weight readout indicator.

LOAD BARS

Multipurpose load bars (portable) - use under platforms, hog crates and manual squeeze chutes. Available in 23" for weights up to 3,300 lbs.; 32" for weights up to 4,400 lbs.; 39" for weights up to 4,400 lbs. Heavy duty load bars available for use under stationary hydraulic and manual squeeze chutes.



INDICATORS

700 - Basic weight readout with memory for animal weights, and basic statistics such as count, total weight, average weight, low and high weights.

701 - Basic weight readout. Is upgradeable to 702 or 703 at a later date.

702 - Has animal record memory for 3500 I.D. numbers on 99 separate files. Once I.D. and weight information is stored in indicator, it can be downloaded to a computer or printed out on a Tru-Test printer. The 702 will also calculate basic weight statistics.

703 - Has animal record memory for 7500 I.D. numbers on 99 separate files. Information can also be downloaded to computer or printed out on a Tru-Test printer. The 703 is also compatible with Electronic I.D. Systems



Show Ring Adhesive
Page 6



Show Bloom
Page 7



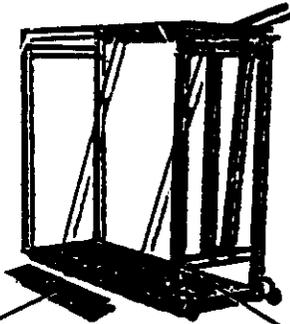
Smoke
Page 6



Magic Sheen
Page 7



Show Lean
Page 19

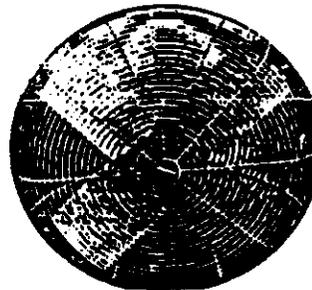


Knee pad:
32" x 20"

Future Floor Chute
floor 7
Page 5

NEW PRODUCT!

Dolly Box
Call for
Information!



TURBINE Fan
Page 11

NEW PRODUCT!

Blue Ribbon Show Supply
Route 2, Box 235
Sperry, Oklahoma 74073



Leesa King
1512 3rd ave
Harrison, Okla

SS 0373

Jobes

BLUE RIBBON SHOW SUPPLY

Main Office: (918) 288-7396

Price Sheet Effective: July, 1997

FAX: (918) 288-7396

PAGE 5 - BLOWERS AND PARTS

Blue II Dryer.....	265.00
With <i>TURBINE</i> Filter.....	295.00
Baby Blue Dryer.....	225.00
Large Blower Motor.....	60.00
Water Blower Fogger.....	9.50
<i>TURBINE</i> Air Filter.....	9.50
Hose Nozzle.....	6.50
Hose Clamp.....	1.25
Hose Coupling.....	3.50
On/Off Switch.....	3.75
Filters.....	4.00
Heavy Duty Power Cord.....	13.50
10' Dryer Hose.....	30.00
15' Dryer Hose.....	40.00
Electrical Receptacle.....	4.50
Circuiteer 2 Dryer.....	299.00

PAGE 6 - SHOW RING SUPPLIES

Cerglass Show Stick - 54".....	14.50
Cerglass Show Stick - 60".....	14.50
Aluminum Show Stick - 48".....	12.75
Aluminum Show Stick - 54".....	12.75
Aluminum Show Stick - 60".....	12.75
Aluminum Show Stick - 68".....	13.50
Exhibitor's Number Harness.....	8.75
Exhibitor's Number Clip.....	5.00
Comb Holder.....	5.00
Pedigree Sign.....	4.75
Hog Bat - 25".....	5.00
Hog Whip - Chrome Tip - 36".....	9.00
Hog Whip - Chrome Tip - 39".....	9.00
Hog Sorting Pole - 30".....	3.50
Leather Halter - XSmall.....	29.75
Leather Halter - Small.....	29.75
Leather Halter - Medium.....	29.75
Leather Halter - Large.....	32.00
Leather Halter - XLarge.....	35.00
Rope Halter.....	3.00
Dozen Price.....	33.00
Neck Tie.....	4.75
Dozen Price.....	54.50
Leather Nose Lead w/snap.....	5.75
Cotton Nose Pad.....	3.25

PAGE 5 - BLOCKING & GROOMING CHUTES & ACCESSORIES

Metal Grooming Chute.....	325.00
Aluminum Grooming Chute.....	575.00
Title Display.....	375.00
Title Display Extension.....	150.00

PAGE 5 - BLOCKING & GROOMING CHUTES & ACCESSORIES (cont)

Future Floor Chute Floor.....	60.00
Future Floor Knee Pad.....	20.00
Future Floor Set.....	90.00
(Includes Floor & 2 Knee Pads)	
Lamb Blocking Stand.....	130.00
With offset neck extension.....	135.00
Rubber Mat - per foot.....	5.00

PAGE 6 - GROOMING PRODUCTS

Easy Comb.....	4.00
Show Ring Adhesive.....	4.00
Tail Adhesive.....	4.00
White Mousse.....	4.00
Black Mousse.....	4.00
Final Mist.....	4.00
Black Touch-Up.....	5.00
Shazam.....	4.75
White Touch-Up.....	5.00
Magic.....	5.75
Smoke - Qt.....	12.50
Gallon.....	35.00
Swine Sheen - Qt.....	7.00
Gallon.....	16.50
Grooming Adhesive.....	4.50

PAGE 7 - GROOMING PRODUCTS

Base Coat - Qt.....	15.00
Show Time - Qt.....	9.00
Show Bloom - Qt.....	10.00
Magic Sheen - Qt.....	6.50
Gallon.....	17.00
Sho-Sheen - Qt.....	6.50
Gallon.....	17.00
Purple Oil - Qt.....	4.00
Gallon.....	10.00
E-Z Out - Qt.....	4.00
Gallon.....	11.00
Rag Oil - Qt.....	10.00
Half-Gallon.....	19.50
White Lighting - Qt.....	10.00
Hair and Wool Set - Half Gallon.....	8.00
E-Z Rinse - Qt.....	4.50
Gallon.....	12.50
C.R. "Hot" Sweat - Qt.....	19.50

GROOMING PRODUCTS - NOT PICTURED

Mineral Oil - Half Gallon.....	8.00
Deft Spray Stain.....	6.50
Tail Tie.....	20
Pkg of 100.....	12.50
Leg Builder - Box.....	15.00
Horse Hair Bundle - 1lb.....	12.50

PAGE 8 - GROOMING PRODUCTS

Unfit.....	19.50
Waterless Shampoo - Qt.....	8.50
Show White Shampoo - Qt.....	8.75
Insect Control Spray - Qt.....	12.50
Repel-X - Pt.....	13.50
Mane'n Tail Conditioner.....	7.25
Absorbine Liniment.....	7.50
Quic Silver.....	8.75
Black Hair Dye.....	6.50
Laser Sheen.....	11.50
Alcohol - Pt.....	1.00
Gallon.....	8.50
Baby Power.....	3.00

PAGE 9 - SUCKED, FEED PANS AND FEEDERS

Feed Pan - Small.....	4.50
Feed Pan - Large.....	9.00
Water Bucket - Small.....	5.50
Water Bucket - Large.....	9.50
Rubber Feed Pan - Small.....	6.75
Rubber Feed Pan - Large.....	9.75
Bucket Heater.....	29.75
Feed Scoop.....	3.00
Utility Feeder.....	7.75
Hanging Feeder - Small.....	19.50
Medium.....	21.50
Large.....	22.50
Show Pig Feeder.....	25.00
Hay Bag.....	5.00

PAGE 10 - SHOW BOXES

Large Show Box without top.....	225.00
With Top.....	265.00
Small Show Box without top.....	145.00
With Top.....	185.00
Hanging Show Box.....	95.00
Double Stack Upright Show Box.....	375.00

PAGE 11 - FANS & ACCESSORIES

<i>FAST AIR</i> Livestock Fan.....	155.00
<i>AIRPLANE</i> Livestock Fan.....	185.00
<i>TURBINE</i> Livestock Fan.....	175.00
Barnstormer Fan.....	210.00
Fan Stand.....	45.00
Double Fan Stand.....	55.00
Upright Fan Stand.....	40.00

PAGE 12 - CATTLE SWEATS

Cattle Sweats - Medium.....	35.00
Large.....	40.00
X-Large.....	45.00
Velcro Strap.....	1.00

**SPECIAL PRICING ITEMS: CPS PUMP \$ 235.00 • JIFFY JACK - \$ 95.00 • STACK THE DECK T-SHIRTS: 15.00
PAUL SCALES: CATTLE SCALE MODEL 305S • SHEEP & HOG SCALE MODEL 50S - CALL FOR PRICING!!**

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

DAVID LEE MAYWALD,)
nka, David Lee Graham,)
)
Petitioner,)
)
vs.)
)
TWYLA SNIDER, Warden,)
)
Respondent.)

No. 98-CV-484-H (J) ✓

FILED
MAR 3 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE MAR 06 2000

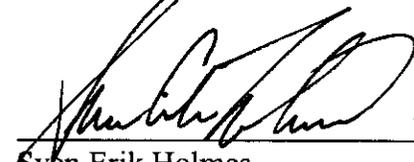
JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's petition is dismissed with prejudice as moot and judgment is hereby entered for Respondent and against Petitioner.

IT IS SO ORDERED.

This 3RD day of MARCH, 2000.


Sven Erik Holmes
United States District Judge

FILED

MAR 6 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

INTELICAD COMPUTERS, INC.,)
)
Plaintiff,)
)
vs.)
)
MASSACHUSETTS BAY INSURANCE)
COMPANY,)
)
Defendant.)

Case No. 97-CV-912 B (M)

ENTERED ON DOCKET

DATE MAR 06 2000

ORDER OF DISMISSAL WITH PREJUDICE

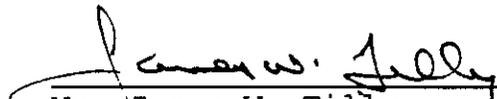
ON this 6th day of March, 2000, 1999, the joint application of Intelicad Computers, Inc., Plaintiff, and Massachusetts Bay Insurance Company, Defendant, for an Order of Dismissal with Prejudice came on before the Court for hearing. The Court finds that the parties have settled all claims.

IT IS THEREFORE, adjudged and decreed that the above captioned matter is dismissed with prejudice to refileing.



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

APPROVED AS TO FORM AND CONTENT:



Mr. James W. Tilly
Attorney for Plaintiff
Intelicad Computers, Inc.



Mr. Dennis King
Attorney for Defendant
Massachusetts Bay Insurance
Company

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

MAR 3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROGER MURRAY AND HOPE)
MURRAY, husband and wife,)
)
PLAINTIFFS,)
)
V.)
)
FIRST MARINE INSURANCE)
COMPANY,)
)
DEFENDANT.)

CASE NO. 99-CV-0128-B

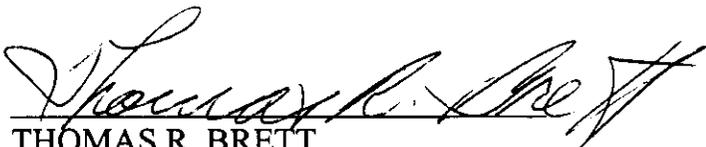
ENTERED ON DOCKET
DATE MAR 06 2000

JUDGMENT

This action came on for jury trial before the Court, Honorable Thomas R. Brett, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered by the jury,

IT IS ORDERED AND ADJUDGED that the Plaintiffs, Roger and Hope Murray, recover of the Defendant, First Marine Insurance Company, the sum of \$5,890.45 with interest thereon at the statutory rate of 6.197% from this date forward plus costs to be determined upon timely application pursuant to N.D. LR 54.1. Motion for award of attorney fees, if applicable, must be timely filed pursuant to N.D. LR 54.2.

DATED at Tulsa, Oklahoma this 3rd day of March, 2000.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

94

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID W. PALMER,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

ENTERED ON DOCKET

DATE MAR 06 2000

No. 99CV1074K(M)

F I L E D

MAR 03 2000 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

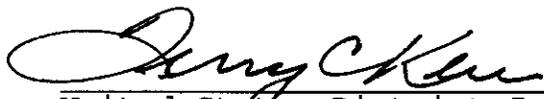
DEFAULT JUDGMENT

This matter comes on for consideration this 3rd day of March, 2000, 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, David W. Palmer, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, David W. Palmer, was served with Summons and Complaint on December 17, 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, David W. Palmer, for the principal amount of \$2,468.95, plus accrued

interest of \$2,201.33, 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 6.197 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/llf

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

DAVID LEE MAYWALD,)
nka, David Lee Graham,)
)
Petitioner,)
)
vs.)
)
TWYLA SNIDER, Warden,)
)
Respondent.)

ENTERED ON DOCKET
DATE MAR 06 2000

No. 98-CV-484-H (J) ✓

MAR 06 2000
5:12 PM
CLERK OF COURT
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
TULSA, OKLAHOMA

ORDER

Before the Court is Respondent's "request that habeas petition be dismissed as moot" (#16). Petitioner, appearing *pro se*, has not filed a response to Respondent's request for dismissal.

In his 28 U.S.C. § 2254 petition, originally filed June 9, 1998, in the United States District Court for the Western District of Oklahoma, Petitioner challenges his conviction entered in Tulsa County District Court, Case No. CF-97-2857. According to Respondent, the Judgment and Sentence entered in Case No. CF-97-2857 was vacated on September 10, 1998. Therefore, Respondent asserts that Petitioner's request for habeas corpus relief has been rendered moot.

The documents provided by Respondent indicate that the trial court has vacated the conviction challenged by Petitioner in this action. (#16, Ex. A). In an order denying application for writ of habeas corpus on the basis of improper venue, the trial court stated that "[o]n October 6, 1998, Judge Clarke dismissed Petitioner's case in [Case No. CF-97-2857], costs to State and with bond exonerated. Petitioner is in custody of the Department of Corrections on another case." (#16, Ex. C at 1). Although the motion to dismiss filed by the State in the state district court, see #16, Ex. B, indicates that Case No. CF-97-2857 was refiled as CF-98-4711 and that a bench warrant had been

issued, the conviction at issue in the instant petition was entered in Case No. CF-97-2857, a case which has in fact been dismissed. As a result, as to Case No. CF-97-2857, the state court's dismissal of Petitioner's conviction afforded Petitioner all the relief this Court could have granted him. Cf. Hayes v. Evans, 70 F.3d 85, 86 (10th Cir.1995). Therefore, the Court finds Petitioner's claims have been rendered moot and Respondent's motion to dismiss should be granted. The petition for writ of habeas corpus should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss habeas petition as moot (#16) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.
3. Petitioner's "motion for action" (#15) is **denied as moot**.

IT IS SO ORDERED.

This 2ND day of MARCH, 2000.


Sven Erik Holmes
United States District Judge

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

MONROE THOMAS BOYD,

Plaintiff,

v.

AIRCRAFT CYLINDERS OF
AMERICA, INC.,

Defendant.

) ENTERED ON DOCKET
)

) DATE MAR 06 2000
)

) Case No. 99-CV-624-K (E)
)

) **F I L E D**
)

) MAR 03 2000 *SR*
)

) Phil Lombardi, Clerk
) U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised by Settlement Judge Angie Dale on March 1, 2000, that the parties to this action have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

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

ORDERED THIS 3rd DAY OF MARCH, 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

F I L E D

MAR 3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STEPHANIE J. SANDITEN,)

Plaintiff,)

vs.)

SHEARSON SMITH BARNEY and)
EVEREN SECURITIES, INC.,)

Defendants.)

Case No. 99-CV-0418 K(M)

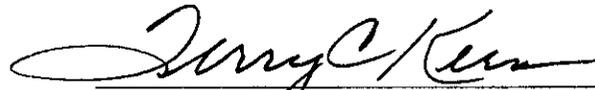
ENTERED ON DOCKET

DATE MAR 06 2000

ORDER OF DISMISSAL

NOW on this 3rd day of March, 2000, comes on for hearing Plaintiff's Application for an Order of dismissal with prejudice. After reviewing the Application, noting the unopposed nature of the Application, the Court finds Plaintiff's Application should be granted.

IT IS SO ORDERED.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

F I L E D

VICKI L. SANDITEN,)
)
Plaintiff,)
)
vs.)
)
SHEARSON SMITH BARNEY and)
EVEREN SECURITIES, INC.,)
)
Defendants.)

Case No. 99-CV-0419K(E)

MAR 3 2000 *SA*

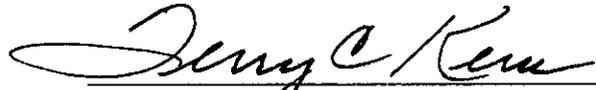
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE MAR 06 2000

ORDER OF DISMISSAL

NOW on this 3rd day of March, 2000, comes on for hearing Plaintiff's Application for an Order of dismissal with prejudice. After reviewing the Application, noting the unopposed nature of the Application, the Court finds Plaintiff's Application should be granted.

IT IS SO ORDERED.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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B

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

F I L E D

MAR 3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SUSAN L. SANDITEN,)

Plaintiff,)

vs.)

Case No. 99-CV-0417K(M) ✓

SHEARSON SMITH BARNEY and)

EVEREN SECURITIES, INC.,)

Defendants.)

ENTERED ON DOCKET

DATE MAR 06 2000

ORDER OF DISMISSAL

NOW on this 3rd day of March, 2000, comes on for hearing Plaintiff's Application for an Order of dismissal with prejudice. After reviewing the Application, noting the unopposed nature of the Application, the Court finds Plaintiff's Application should be granted.

IT IS SO ORDERED.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 2 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
JOHN K. MALLOY,)
)
Defendant.)

No. 99CV1096C(M)

ENTERED ON DOCKET
DATE MAR 03 2000

DEFAULT JUDGMENT

This matter comes on for consideration this 2nd day of March, 2000, 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, John K. Malloy, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, John K. Malloy, was served with Summons and Complaint on December 21, 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, John K. Malloy, for the principal amount of \$2,765.96, plus accrued

interest of \$2,081.84, 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 6.197 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/llf

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 2 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 DONALD V. ROOT,)
)
 Defendant.)

No. 99CV0958C(J)

ENTERED ON DOCKET
DATE MAR 03 2000

DEFAULT JUDGMENT

This matter comes on for consideration this 2nd day of March, 2000, 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, Donald V. Root, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Donald V. Root, was served with Summons and Complaint on January 10, 2000. 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, Donald V. Root, for the principal amount of \$2,746.31, plus accrued

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interest of \$1,661.24, plus administrative charges in the amount of \$5.65, 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 6.197 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/llf

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

F I L E D
MAR 2 2000 *plw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NEAL E. FREEMAN,)
)
Plaintiff,)
)
vs.)
)
BUREAU OF INDIAN AFFAIRS,)
)
Defendant.)

Case No. 99-C-002-E ✓

ENTERED ON DOCKET
DATE MAR 02 2000

ORDER

Now before the Court is the Motion to Dismiss (docket #7) of the defendant, Bureau of Indian Affairs.

Plaintiff, Neal Freeman, filed this Complaint on January 4, 1999, essentially seeking "guidance" with respect to his efforts to lease certain lands in Wagoner County held in trust for his family by the Bureau of Indian Affairs. The land was purchased under section 1 of the Oklahoma Indian Welfare Act of 1936. Freeman claims that he has had difficulty either leasing or selling the land. Freeman is seeking to "straighten out" these issues "so there can be no misunderstanding as to who has jurisdiction and whether we can lease this land or not." The BIA seeks dismissal of Plaintiff's complaint, asserting that it should be dismissed for lack of jurisdiction and that Plaintiff has failed to join an indispensable party. Although Plaintiff failed to respond to the motion to dismiss, this Court stayed ruling on the motion on September 9, 1999 so that Plaintiff could take advantage of advice from the representative of the Bureau of Indian Affairs as to how to proceed to get the land leased. At the status hearing of March 1, 2000, Plaintiff reported that, although the land

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is not now leased, and no potential lessees responded to the publication regarding the property, he has established communication with the realty office of the Creek Nation, which is apparently the proper entity.

Given this status, the Court finds that it is now appropriate to address the motion to dismiss. With respect to jurisdiction the BIA argues that Plaintiff must exhaust his administrative remedies before this Court can have jurisdiction. Harr v. Federal Home Loan Bank Bd. 557 F.2d 747, 749 (10th Cir. 1977), Fargas v. Hodel, 845 F.2d 202 (9th Cir. 1988). In absence of any allegation in Plaintiff's complaint that the Creek nation has refused to lease or approve a lease on Plaintiff's property, this Court finds that it is without jurisdiction over Plaintiff's claims.

Defendant's motion to dismiss (docket #7) is granted.

IT IS SO ORDERED THIS 1st DAY OF MARCH, 2000.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

MAR - 1 2000 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DARREL W. STOKLEY,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner of the Social Security)
Administration,)
)
Defendant.)

CASE NO. 99-CV-522-M /

ENTERED ON DOCKET
DATE MAR - 2 2000

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 1ST day of MARCH, 2000.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

DARREL W. STOKLEY,)
)
Plaintiff)
)
vs.)
)
KENNETH S. APFEL,)
Commissioner,)
Social Security Administration,)
)
Defendant)

MAR - 1 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 99-CV-522-M

ENTERED ON DOCKET
DATE MAR - 2 2000

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).

Upon remand, the ALJ will consider the additional evidence received by the Appeals Council and re-evaluate Plaintiff's mental condition pursuant to 20 C.F.R. § 404.1520a. Additionally, the ALJ should fully address Plaintiff's other impairments including his obesity, blackouts, and hearing loss. Further, a step three of the sequential evaluation process, the ALJ should discuss whether Plaintiff's impairments meet or equal a listed impairment, particularly Plaintiff's pulmonary condition, and provide detailed rationale. Lastly, if appropriate, the ALJ will obtain supplemental

vocational expert testimony and will include Plaintiff's complete residual functional capacity in the hypothetical questions.

THUS DONE AND SIGNED on this 1ST day of MARCH, 2000.


FRANK H. McCARTHY
United States District Court Judge

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

ROBERT LOWARY,)
)
Plaintiff,)
)
)
STANLEY GLANZ, Tulsa)
County Sheriff, in his official)
Capacity; BOARD OF COUNTY)
COMMISSIONERS FOR TULSA)
COUNTY, and UNKNOWN)
SHERIFF DEPUTIES, in their)
Official and individual capacities,)
)
Defendant.)

ENTERED ON DOCKET

DATE MAR - 2 2000

Case No. 97-CV-586-H(E) ✓

F I L E D

FEB 29 2000 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**JOINT STIPULATION FOR DISMISSAL WITHOUT PREJUDICE
BETWEEN PLAINTIFF AND DEFENDANTS**

Pursuant to Fed.R.Civ.P. 41(a), the Plaintiff, Robert Lowary, Pro Se, and the Defendants Stanley Glanz, Tulsa County Sheriff, in his official capacity and the Board of County Commissioners for Tulsa County, by and through their attorney, Dick A. Blakeley, Assistant District Attorney, jointly stipulate that the Plaintiff's action against the Defendants shall be dismissed without prejudice.

Dated this 29th day of February, 2000.

ROBERT LOWARY, Plaintiff

Robert Lowary
Robert Lowary, Pro Se
324 E. College
Broken Arrow, OK 74012
(918) 258-2825

Stanley Glanz, Tulsa County Sheriff &
Board of County Commissioners for
Tulsa County, Defendants

By: *Dick A. Blakeley*

Dick A. Blakeley
Assistant District Attorney
Tulsa County Courthouse
500 S. Denver, Room 406
Tulsa, OK 74103

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

JAMES RONALD BUSBY,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

ENTERED ON DOCKET

MAR 1 2000

DATE

Case No. 99-CV-589-K (M)

FILED

FEB 29 2000

JUDGMENT

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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.

SO ORDERED THIS 29 day of February, 2000.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

JAMES RONALD BUSBY,)

Petitioner,)

vs.)

THE STATE OF OKLAHOMA,)

Respondent.)

ENTERED ON DOCKET

MAR 1 2000

Case No. 99-CV-589-K (M)

FILED

FEB 29 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Respondent's motion to dismiss time barred petition (Docket #5). Petitioner, a state inmate represented in this matter by counsel, has filed a response to the motion to dismiss (#9). Respondent's motion is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition is not timely filed and Respondent's motion to dismiss should be granted.

BACKGROUND

In his § 2254 petition for writ of habeas corpus, Petitioner challenges his convictions entered in Ottawa County District Court, Case Nos. CRF-95-64, CM-95-154, and CM-95-155. Petitioner appealed his convictions and sentences to the Oklahoma Court of Criminal Appeals ("OCCA"). On November 14, 1996, in an unpublished summary opinion, the OCCA affirmed Petitioner's convictions challenged in the instant action¹ (#1, copy of "Summary Opinion" attached to petition). Nothing in the record indicates Petitioner sought *certiorari* review in the United States Supreme Court.

¹As set forth in the Summary Opinion, the OCCA also modified one of Petitioner's sentences and reversed and remanded for a new trial a conviction not challenged in the instant action.

On July 27, 1998, Petitioner first filed an application for post-conviction relief in the state district court. (#6, Ex. A). After the trial court denied the requested relief, Petitioner filed a timely post-conviction appeal in the OCCA. Post-conviction proceedings were concluded on December 4, 1998, when the OCCA entered its Order affirming the trial court's denial of post-conviction relief. (#6, Ex. G).

Petitioner filed the instant federal petition for writ of habeas corpus on July 20, 1999 (#1).

ANALYSIS

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

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

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

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

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

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

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

28 U.S.C. § 2244(d). In general, the limitations period begins to run from the date on which a prisoner's conviction becomes final, but can be extended under the terms of § 2244(d)(1)(B), (C),

and (D). Also, the limitations period is tolled or suspended during the pendency of a state application for post-conviction relief properly filed during the limitations period. § 2244(d)(2).

Application of the provisions of § 2244(d) to the instant case leads to the conclusion that this habeas petition was filed after the expiration of the one-year limitations period. Petitioner's challenged convictions became final on or about February 12, 1997, after the 90 day time period for filing a petition for writ of *certiorari* in the United States Supreme Court had lapsed. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994). Therefore, his conviction became final after enactment of the AEDPA. As a result, his one-year limitations clock began to run on February 12, 1997, and, absent a tolling event, a federal petition for writ of habeas corpus filed after February 12, 1998, would be untimely.

Although the limitations period is tolled while a state post-conviction proceeding, filed during the one-year period, is pending, see § 2244(d)(2), the post-conviction proceeding pursued by Petitioner in the instant case does not toll the limitations period because it was commenced more than five (5) months after the period expired on February 12, 1998. A collateral petition filed in state court after the limitations period has expired no longer serves to toll the statute of limitations. Rashad v. Khulmann, 991 F. Supp. 254, 259 (S.D. N.Y. 1998) (stating that "[t]he tolling provision does not, however, 'revive' the limitations period (i.e., restart the clock at zero); it can only serve to pause a clock that has not yet fully run"). Therefore, unless Petitioner can demonstrate that he is entitled to other statutory or equitable tolling of the limitations period, his petition filed July 20, 1999 is clearly untimely.

In his response to the motion to dismiss (#8), Petitioner cites 28 U.S.C. § 2244(d)(2) and argues that the petition in this case was in fact timely because it was filed within one year of the OCCA's denial of his application for post-conviction relief. However, the Court disagrees with Petitioner's interpretation of § 2244(d)(2). The final disposition of a post-conviction application

does not trigger the commencement of the limitations period. Instead, the limitations period typically begins to run when the challenged conviction becomes final by the conclusion of direct review. 28 U.S.C. § 2244(d)(1)(A); see Hoggro v. Boone, 150 F.3d 1223, 1225 (10th Cir.1998). Furthermore, pursuant to § 2244(d)(2), the pendency of a properly filed post-conviction application tolls or suspends the running of the period; the conclusion of a post-conviction proceeding or other collateral challenge is not an event triggering commencement of the limitations period. See § 2244(d)(1)(A), (B), (C), and (D). Therefore, the Court rejects Petitioner's argument and concludes that this action is time-barred.

CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period, Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss time barred petition (#5) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED THIS 29 day of February, 2000.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED ON DOCKET
MAR 1 2000

MICHAEL AUSTIN FOWLER,)
)
Petitioner,)
)
vs.)
)
STEVE HARGETT, Warden,)
)
Respondent.)

Case No. 99-CV-495-K (J)

FILED
FEB 29 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Respondent's motion to dismiss due to expiration of the limitations period (Docket #5). Petitioner has not filed a response to the motion. Respondent's motion to dismiss is premised on the allegation that Petitioner, a state inmate appearing *pro se*, failed to file this petition for writ of habeas corpus within the one-year limitations period prescribed by 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). For the reasons discussed below, the Court finds that the petition is untimely filed and Respondent's motion to dismiss should be granted.

BACKGROUND

Petitioner was convicted by a jury of Shooting with Intent to Kill in Rogers County District Court, Case No. CRF-86-48. He was sentenced to forty-five (45) years imprisonment. Petitioner appealed his judgment and sentence to the Oklahoma Court of Criminal Appeals ("OCCA") where, on December 11, 1990, his conviction was affirmed (see #6, discussion of procedural history in OCCA's "Order Affirming Denial of Post-Conviction Relief," attached as an exhibit). Nothing in the record indicates Petitioner sought *certiorari* review in the United States Supreme Court.

On September 26, 1996, Petitioner filed an application for post-conviction relief in the state

trial court. (See #6, "Order Denying Application for Post Conviction Relief," at ¶ 9, attached as an exhibit). By order entered June 9, 1998, the state trial court denied post-conviction relief. Petitioner appealed and, on September 1, 1998, the OCCA affirmed the denial of post-conviction relief. (#6, OCCA's order attached as an exhibit).

Petitioner originally filed the instant petition for writ of habeas corpus (#1) on May 6, 1999 in the United States District Court for the Western District of Oklahoma. On June 17, 1999, the case was transferred to this district court.

ANALYSIS

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

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

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

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

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

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

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

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction becomes final, a literal application of the AEDPA

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

In addition, the tolling provision of 28 U.S.C. § 2244(d)(2) applies in § 2254 cases to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). Therefore, the one-year grace period is tolled while state post-conviction or other collateral proceedings, properly filed during the grace period, are pending.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Petitioner's conviction became final on or about March 11, 1991, after the 90 day time period for filing a petition for writ of *certiorari* in the United States Supreme Court had lapsed. See Rhine v. Boone, 182 F.3d 1153 (10th Cir. 1999). Therefore, his conviction became final before enactment of the AEDPA and, as a result, his limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Petitioner had one year, or until April 23, 1997, to file his petition for writ of habeas corpus.

However, as discussed above, the limitations period is tolled while Petitioner had "a properly filed application for State post-conviction or other collateral review" pending in the state courts. 28 U.S.C. § 2244(d)(2). In this case, Petitioner had an application for post-conviction relief pending in the state courts from September 26, 1996 to September 1, 1998, or for 705 days. Thus, the

limitations deadline in this case was extended 705 days beyond April 23, 1997, or until March 29, 1999. However, Petitioner did not file his habeas corpus petition until May 6, 1999, or more than one (1) month beyond the deadline. Therefore, unless Petitioner demonstrates that he is entitled to other statutory or equitable tolling of the limitations period, his petition filed May 6, 1999 is clearly untimely.

As stated above, Petitioner has not filed a response to Respondent's motion to dismiss. After reviewing the record in this case, the Court finds nothing to suggest that the filing deadline should be extended beyond March 29, 1999. Therefore, the Court concludes that the petition, filed May 6, 1999, is untimely. Respondent's motion to dismiss should be granted and the petition for writ of habeas corpus should be dismissed with prejudice.

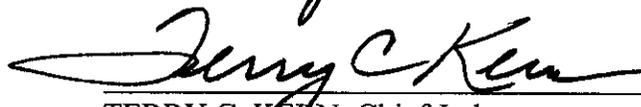
CONCLUSION

Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period. Therefore, Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted. The petition for writ of habeas corpus should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus (#5) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED THIS 29 day of February, 2000.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

MICHAEL AUSTIN FOWLER,

Petitioner,

vs.

STEVE HARGETT, Warden,

Respondent.

ENTERED ON DOCKET

MAR 1 2000

Case No. 99-CV-495-K (J) ✓

FILED

FEB 29 2000

JUDGMENT

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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.

SO ORDERED THIS 29 day of February, 2000.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

ANB BANKCORP, INC.,)
)
Plaintiff,)
)
v.)
)
THE EQUITABLE LIFE ASSURANCE)
SOCIETY OF THE UNITED STATES and)
MIKE E. SIMMONS,)
)
Defendants.)

ENTERED ON DOCKET
DATE MAR 1 2000

Case No. 99-CV-469-K ✓

F I L E D
FEB 29 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before this Court is Plaintiff's motion to remand. Plaintiff commenced this action in Creek County District Court alleging the following. In 1993, plaintiff had an existing Employee Stock Ownership/401K plan, but was considering the implementation of new plan in order to improve the rate of return for its employees, allow for employee-directed investments and allow for employee loans. Plaintiff contacted defendants (a financial service provider and its agent) among other, to receive general information. In the course of negotiations, plaintiff emphasized to defendants the desire of plaintiff to maintain the Employee Stock Ownership Plan (ESOP) aspect.

Plaintiff alleges that, based on defendants' representations that the new plan contained the appropriate ESOP provisions and 401K Plan provisions, plaintiff selected one of defendants' plans in reliance on defendants' expertise and representations. Plaintiff alleges that, unknown to plaintiff, the new plan did not in fact contain necessary and appropriate ESOP provisions. This omission, plaintiff alleges, has resulted in the new plan failing to meet Internal Revenue Code requirements governing employee pension plans and has caused plaintiff to incur Internal Revenue Service penalties, in addition to attorney fees and accounting fees.

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Plaintiff's petition filed in state court alleges state law claims of negligence, fraud in the inducement, negligent misrepresentation, breach of fiduciary duty, reformation of contract, deceptive trade practice and unjust enrichment. Defendants removed the action to this Court on the basis that all of plaintiff's claims were preempted by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§101 et seq. Plaintiff filed an amended complaint in this Court, deleting the claim for reformation of contract. Plaintiff now moves to remand, arguing against ERISA preemption.

Under 29 U.S.C. §1144(a), state laws which relate to employee benefit plans are preempted by ERISA. Such laws relate to ERISA when they have a connection with or reference to the plan. Shaw v. Delta Air Lines, 463 U.S. 85, 96-97 (1983). The Tenth Circuit has concluded that ERISA will preempt state common law claims where the factual basis for the claim involves an employee benefit plan. Settles v. Golden Rule Ins. Co., 927 F.2d 505, 509 (10th Cir.1991). It will not, however, preempt state claims which only tangentially involve such a plan. What triggers ERISA preemption is an effect on the primary administrative functions of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit. Airparts Co. v. Custom Benefit Services of Austin, 28 F.3d 1062, 1065 (10th Cir.1994).

Plaintiff argues that the case is governed by Woodworker's Supply, Inc. v. Principal Mut. Life, 170 F.3d 985 (10th Cir.1999). In that instance, plaintiff sued its former insurer for unfair trade practices and fraud. Defendant had provided plaintiff contingent premium insurance, a plan which offered greater premium payment flexibility in exchange for slightly higher maximum liability. Because defendant failed to fully disclose its rate calculation methods, however, plaintiff received a large and unexpected surcharge and rate increase after its first year of coverage. Plaintiff sued, claiming that defendant had fraudulently induced it to obtain the coverage. The Tenth Circuit

rejected defendant's argument that ERISA preempted plaintiff's pre-plan fraud claims against the insurer. A state's "efforts to prevent sellers of goods and services, including benefit plans, from misrepresenting . . . the scope of their services is 'quite remote from the area with which ERISA is expressly concerned—reporting, disclosure, fiduciary responsibility and the like.'" Id. at 992. The court noted that plaintiff was suing defendant with respect to its pre-plan activity in its role as a seller of insurance, "not as an administrator of an employee benefits plan." Id. at 991.

In response, defendant argues that this is a lawsuit over the administration of a benefit plan, because the IRS penalties referenced in the petition are only triggered when the plan is improperly administered. Thus, defendant contends, plaintiff's are alleging an operational failure of plan administration and thereby implicating ERISA.

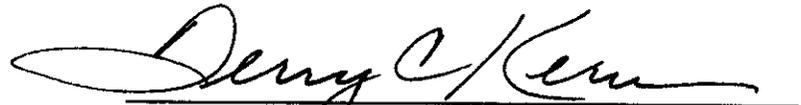
The Court agrees with plaintiff. The issue involved has generated a split of authority, but the Woodworker's decision has settled the issue within the Tenth Circuit. Under defendant's theory, once a fraudulently-induced plan is put into operation, by definition the fraud is subsumed into the "administration" of the plan and the broad sweep of ERISA preemption. The Court is not persuaded that such a reading comports with Congressional intent or the Woodworker's case, which is of course binding on this Court.

The Court wishes to touch briefly upon another issue. As noted, the state court petition alleged a claim for reformation of contract, which was deleted by the Amended Complaint filed in this Court. Defendant has noted that a claim seeking to reform this contract would necessary involve reformation of the plan itself, which is a cause of action preempted by ERISA. Defendant has not raised the argument that the amended complaint, dropping this claim, is ineffectual to deprive this Court of jurisdiction. However, had the argument been made, the Court would have rejected it. The

amended complaint is not an attempt at forum manipulation but merely a "legitimate attempt to try [plaintiff's] state law claims in the forum of [its] choice." Giles v. Nylcare Health Plans, Inc., 172 F.3d 332, 340 (5th Cir.1999). Cf. Moscovitch v. Danbury Hosp., 25 F.Supp.2d 74, 79 (D.Conn.1998).

It is the Order of the Court that the motion of the plaintiff to remand (#8) is hereby GRANTED. Pursuant to 28 U.S.C. §1447(c), this action is hereby REMANDED to the District Court for Creek County, State of Oklahoma.

ORDERED this 29 day of February, 2000.

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

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

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

FILED
MAR -1 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ALLLYSON L. FURR,
Plaintiff(s),
vs.
ICON HEALTH & FITNESS, INC.,
Defendant(s).

Case No. 99-C-344-B ✓

ENTERED ON DOCKET
DATE MAR 01 2000

ORDER DISMISSING ACTION
BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been 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 ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Order by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 1st day of March, 2000.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

FEB 29 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CRAIG NEON, INC., an Oklahoma Corporation, Reza Toraby-Payhan, also known as Ray Toraby.)
)
)

Plaintiff,)
)

vs.)

Case No. 99-CV-63-B-(E) ✓

TRENT MCKENZIE; NEW RAPID OF KANSAS, L.L.C. a Kansas L.L.C., and NEW RAPID OF OKLAHOMA, L.L.C., a Kansas L.L.C.,)
)
)

Defendants.)

ENTERED ON DOCKET
DATE MAR 01 2000

J U D G M E N T

This case came on for jury trial from February 22 through February 28, 2000. After deliberation, the jury entered its verdict on February 29, 2000 in favor of Plaintiff Craig Neon, Inc. and against Defendants Trent McKenzie, New Rapid of Kansas, L.L.C. and New Rapid of Oklahoma, L.L.C. on Plaintiff's claim for deceit, and in favor of Defendants and against Plaintiff Craig Neon, Inc. on Plaintiff's claim under the Oklahoma Uniform Trade Secrets Act, 78 O.S. §§85-92.¹

¹ At the end of Plaintiffs' case-in-chief, the Court granted Defendants' motion pursuant to Fed.R.Civ.P. 50(a) against Plaintiff Reza Toraby-Payhan, also known as Ray Toraby. Accordingly, all claims brought by Plaintiff Reza Toraby-Payhan, individually, are hereby dismissed on the merits. Regarding Plaintiff Reza Toraby-Payhan's claims, individually, the parties are to pay their own respective costs and attorneys' fees.

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Judgment therefore is hereby entered in favor of Plaintiff Craig Neon, Inc. and against Defendants Trent McKenzie, New Rapid of Kansas, L.L.C. and New Rapid of Oklahoma, L.L.C., jointly and severally, on Plaintiff's claim for deceit in the amount of \$75,000.00, plus prejudgment interest from January 22, 1999 through December 31, 1999 at an interest rate of 8.87% per annum and from January 1, 2000 through date of Judgment at an interest rate of 8.73% per annum, plus post-judgment interest from date of Judgment forward at the legal rate of 6.197% per annum.

Judgment is entered against Plaintiff Craig Neon, Inc. and in favor of Defendants Trent McKenzie, New Rapid of Kansas L.L.C. and New Rapid of Oklahoma, L.L.C. on Plaintiff's claim pursuant to the Oklahoma Uniform Trade Secrets Act, 78 O.S. §§85-92. Plaintiff is awarded no damages on this claim.

Costs are awarded to Plaintiff Craig Neon, Inc. and against Defendants Trent McKenzie, New Rapid of Kansas, L.L.C. and New Rapid of Oklahoma, L.L.C., upon proper and timely application pursuant to N.D. LR 54.1. The parties are to pay their respective attorneys' fees.

IT IS SO ORDERED THIS 29TH DAY OF FEBRUARY, 2000.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE