

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

SANGO WHITEHORN,)
)
 Plaintiffs,)
)
 vs.)
)
 FINTUBE LIMITED PARTNERSHIP,)
)
 Defendant.)

FILED

MAR 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-C-176-E ✓

ENTERED ON DOCKET

DATE MAR 31 2000

JUDGMENT

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Fintube Limited Partnership, and against the Plaintiff, Sango Whitehorn.

IT IS SO ORDERED THIS 31st DAY OF MARCH, 2000.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

heat-exchanging equipment and operates a manufacturing facility in Tulsa. Plaintiff was first employed by Fintube on September 15, 1995 as a Bell Furnace Operator. When first employed, he was given a safety orientation wherein he was instructed to report all accidents to his supervisors and to complete an accident investigation report whenever there was an accident or injury. He was also told about Shop Work Rule No. 11, which provides for termination when an employee is guilty of "[w]illfully/carelessly spoiling work, defacing, damaging, or destroying company property, or property of other employees."

On July 15, 1996, Whitehorn dropped a coil of steel from a forklift, crushing a motor on a machine called the "up ender." Whitehorn reported to a maintenance employee that the up ender was damaged, but did not tell him that the damage was due to an accident, nor did he report the accident to his supervisors. Fintube learned of the accident when the plant manager questioned a requisition order for a part to repair the motor to the up ender. On July 17, 1996, the plant manager questioned Whitehorn about the accident and was told that Whitehorn did not know why he failed to report the accident. In a meeting between the plant manager and the human resources manager, it was decided that based on the accident, the failure to report the accident, and Whitehorn's entire employment history,¹ termination was appropriate.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no

¹Whitehorn had a serious attendance problem during his employment that resulted in a three day suspension during July, 1996.

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, the court stated:

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

A recent Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment

determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

* * *

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Id. at 1521.

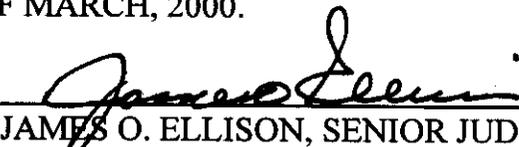
In this case, Fintube argues that summary judgment is appropriate because Whitehorn cannot prove a *prima facie* case, and because Whitehorn has not put forward any proof to raise a question of fact as to whether the legitimate non-discriminatory reason for termination is pretextual. A *prima facie* case requires plaintiff to prove "(i) that [the plaintiff] belongs to a [protected class]; and (ii) that he was discharged for violating a work rule. . . .; and (iii) that similarly situated non-minority employees . . . were treated differently." EEOC v. Flasher Co., Inc., 986 F.2d 1312, 1316 (10th Cir. 1992). Defendant concedes that plaintiff can prove the first two elements, but argues that there is no proof of the third required element.

Whitehorn asserts in his Complaint that various work policies and regulations "are not equally applied to white employees." However, Whitehorn did not respond to the motion for summary judgment, and has not provided any evidence sufficient to prove this assertion. On

the other hand, Fintube, through the affidavit of Al Shneider, plant manager, has established that only one other violation of Work Rule 11 has occurred, and that violation, by a white male employee, resulted in a three day suspension rather than a termination. However, the other employee reported the accident to his supervisors, and did not have any previous attendance problems. In light of this uncontroverted evidence, the Court finds that Whitehorn cannot prove a prima facie case, because he cannot prove that similarly situated non-minority employees were treated differently. Moreover, Whitehorn, by his failure to respond, has completely failed in his ultimate burden of proving that the legitimate non-discriminatory reason for termination advanced by Fintube was actually pretext.

Fintube's Motion for Summary Judgment (docket # 13) is granted.

DATED, THIS 30th 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

THE PROFESSIONAL INDEPENDENT
TRUCKERS ASSOCIATION,)
By and Through its President,)
Jerry Don Cartwright,)

Plaintiff,)

vs.)

STATE OF OKLAHOMA ex rel,)
JERRY V. MATHESON, DIRECTOR)
OF TRANSPORTATION OKLAHOMA)
CORPORATION COMMISSION,)

Defendant.)

No. 97-CV-575 E (J)

FILED
MAR 30 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE MAR 31 2000

ORDER

Now before the Court is the Second Motion to Dismiss and the Motion for Summary Judgment (Docket # 15) filed by Defendant, State of Oklahoma. ("State").

Plaintiff, The Professional Independent Truckers Association ("PITA"), by and through its President, Jerry Don Cartwright ("Cartwright"), asserts that Okla. Stat. tit. 47 §14-109 is invalid due to its alleged violation of several provisions of the United States Constitution. Okla. Stat. tit. 47 §14-109 establishes the maximum weight limitations for vehicles traveling on Oklahoma highways. This dispute centers around a complaint for contempt which was issued against Cartwright as a motor carrier on or about January 7, 1997 citing him for driving a dump truck that violated Oklahoma's statutory weight limitations. PITA claims that Okla. Stat. tit. 47 §14-109 is invalid because:

1. The statute is in conflict with 23 U.S.C. §127 and, therefore, violates the Supremacy Clause of the United States Constitution;
2. The statute interferes with interstate commerce and therefore violates

the Commerce Clause of the United States Constitution; and

3. The exceptions to the statute violate the equal protection provisions of the United States Constitution.

PITA asks that the Court enter judgment in its favor and against the State for damages in excess of \$50,000; for declaratory relief that the pertinent statutes are unconstitutional; and for injunctive relief prohibiting the enforcement of the same statutes.

The State's Motion to Dismiss is based upon its argument that¹:

1. Okla. Stat. tit. 47 §14-109 does not infringe upon interstate commerce and does not violate the Commerce Clause;
2. Okla. Stat. tit. 47 §14-109 does not conflict with 23 U.S.C. §127 and does not violate the Supremacy Clause;
3. The Eleventh Amendment to the United States Constitution prohibits a citizen from bringing a suit for damages in federal court against a state; and
4. The State of Oklahoma is not a "person" to whom liability may attach under 42 U.S.C. §1983

The State also asks the Court to enter Judgment on the Pleadings or Summary Judgment in favor of the State on PITA's equal protection claim.

Chapter 14 of Title 47 of the Oklahoma Statutes is designated by the state legislature as the "Highway Safety Code". As such, Chapter 14 contains various provisions governing weights, lengths and other characteristics of vehicles traveling on roads and highways within the State of Oklahoma. Okla. Stat. tit. 47 §14-109 provides maximum weights on a per axle basis and maximum gross weights for any vehicle, or combination of vehicles, traveling on Oklahoma highways. The statute contains a table which is used to determine the maximum weight allowable, depending on the number of axles on the vehicle and the distance between the axles. The ultimate maximum gross weight for any vehicle is 90,000 pounds. Section 14-101 requires that any of the restrictions found in Chapter 14 shall be subject to

¹The Court agrees with the State that it does not have jurisdiction under 28 U.S.C. §1343(a)(3), but since there is no question that jurisdiction would be correct under 28 U.S.C. §1331, the Court will rule on the substantive issues of the State's motion.

the limitations imposed by 23 U.S.C. §127, which is the federal counterpart of §14-109. Section 127 is found in the chapter of Title 23 of the United States Code that contains provisions dealing with "Federal Aid Highways". Section 127 allows the federal government to withhold highway funds from any state which does not allow vehicles of certain weights to use the Dwight D. Eisenhower System of Interstate and Defense Highways ("interstate highways") which are located within the state's boundaries. Section 127 also establishes the maximum weight allowable of vehicles traveling on the interstate highways.

1. The Commerce Clause

The Commerce Clause of the United States Constitution states that "Congress shall have Power to ...regulate Commerce with foreign Nations, and among the several States ..." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause, even without implementing legislation by Congress, is a limitation upon the power of the States. *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 371, 96 S.Ct. 923, 928, 47 L.Ed.2d 55 (1976), citing *Freeman v. Hewit*, 329 U.S. 249, 252, 67 S.Ct. 274, 276, 91 L.Ed. 265 (1946). However, states retain broad power to legislate protection for their citizens in matters of local concern. *Great Atlantic*, 424 U.S. at 371, 96 S.Ct. at 928, citing *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531-532, 69 S.Ct. 657, 661- 62, 93 L.Ed. 865 (1949).

The United States Supreme Court has consistently held that "a State has a legitimate interest in regulating motor vehicles using its roads in order to promote highway safety." *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 442, 98 S.Ct. 787, 794, 54 L.Ed.2d 664 (1978). Similarly, it is well established that a statute designed to effect such purposes carries a "strong presumption of validity," *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524, 79 S.Ct. 962, 965, 3 L.Ed.2d 1003 (1959), and that "[i]n no field has this deference to state regulation been greater than [in] that of highway safety regulation." *Raymond* 434 U.S. at 443, 98 S.Ct. at 795. Because of this greater deference to the state legislative process, courts are said to have been generally "reluctant to invalidate," statutes intended to promote highway safety. *Raymond* at 443, 98 S.Ct. at 795. In fact, so strong is

this deference to state regulation in matters of highway safety that "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." *Raymond* at 449, 98 S.Ct. at 798. (Blackmun, J., concurring).

The Supreme Court has outlined the test for determining the validity of state statutes that have an effect on interstate commerce:

"Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 371-72, 96 S.Ct. 923, 928, 47 L.Ed.2d 55 (1976) (citations omitted).

The statute at issue in this case has nothing to do with economic protectionism and does not discriminate between residents of Oklahoma and motor carriers from other jurisdictions. It applies, by its terms, to every person who operates a vehicle on the highways of this state, residents and nonresidents alike. Its purpose, according to the State, is to enhance highway safety and that purpose is not illusory. Statutes that limit the weight of vehicles are commonly referred to as "bridge laws" because their purpose is to protect the structural integrity of the bridges that are part of the state road system. This is a legitimate safety concern of the State and this court will not attempt to second-guess the wisdom of the Oklahoma Legislature. *American Trucking Associations, Inc. v. Larson*, 683 F.2d 787 (3rd Cir. 1982), cert denied, 459 U.S. 1036, 103 S.Ct. 448, 74 L.Ed.2d 603 (1982)

PITA also complains that §14-109 creates a burden on interstate commerce. However, the Plaintiff's contention is not correct. Section 14-101 limits the weight restrictions of §14-109 if such restrictions conflict with 23 U.S.C. §127. Since §127 applies to the interstate highways only, any conflict between the two statutes would make §14-109 invalid only as

it applies to *interstate highways* within the state. However, such is not the case because the weight restrictions of both the Oklahoma statute and the federal statute are the same. In fact, the Oklahoma statute is more liberal.² Furthermore, the last “catch all” exception to the federal statute defers to the various state statutes by stating that overweight vehicles “which cannot be easily dismantled or divided” are excepted from the statute if they have received a special permit from the relevant state or if they meet the laws and regulations established by the appropriate state authority. Therefore, the Oklahoma statute does not create an undue burden on interstate commerce.

Under the standards established by the United States Supreme Court, §14-109 does not violate the Commerce Clause of the United States Constitution.

2. The Supremacy Clause

PITA also claims that §14-109 violates the Supremacy Clause of the United States Constitution. Therefore, the Court’s next inquiry is whether the state law in this case actually conflicts with the federal law. The test is whether it is impossible to comply with both state and federal law or whether the state law stands as an obstacle to the accomplishment of the full purposes and objectives of federal law. *Feikema v Texaco, Inc.*, 16 F.3d 1408 at 1411, (4th Cir. 1994) citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984). As stated above, there is no conflict between the state and the federal law because the weight limitations are the same. The one difference is that the state law contains penalties to be enforced against vehicle operators while the federal law does not.

PITA’s argument that a conflict exists because the Oklahoma statute contains exceptions that are not contained in the federal statute is unfounded. If anything, the

²The Oklahoma statute sets a maximum gross weight of 90,000 pounds while the federal statute sets a maximum gross weight of 80,000 pounds. The federal statute contains a formula to be used to calculate the maximum gross weight of a vehicle depending on the number of axles and the distance between axles. The formula produces the same weight values that are in the table found in §14-109.

Oklahoma exceptions make the Oklahoma weight limitations to be less restrictive, not more restrictive. In addition, as stated above, the federal statute defers to the states to establish certain exceptions to the rule on overweight vehicles. Therefore there is no conflict between the state and the federal law and §14-109 does not violate the Supremacy Clause of the United States Constitution.

3. State's Motion for Judgment on the Pleadings or Summary Judgment on Plaintiffs' Equal Protection Claim

The State has also asserted that the Court should enter judgment on the pleadings or summary judgment on PITA's claim that §14-109 violates the equal protection provisions of the Fourteenth Amendment. Specifically, PITA claims that the exclusions found at §14-109(B) and (E) discriminate against the Plaintiffs and, therefore, violate the equal protection clause of the United States Constitution.

A Motion for Judgment on the Pleadings is treated as a motion to dismiss for failure to state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b)6. *Bishop v. Federal Intermediate Credit Bank of Wichita*, 908 F.2d 658, 663; *Bishop v. Moore*, 2000 WL 246583 (D. Kan., 2000) Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Windon Third Oil and Gas v. Federal Deposit Insurance Corporation*, 805 F.2d 342 (10th Cir. 1986). The Court can determine the validity of PITA's equal protection claim as a Rule 12(b)(6) Motion to Dismiss rather than a Rule 56 Motion for Summary Judgment as it is not necessary for the Court to determine whether the evidence submitted by the parties leaves unresolved issues of material fact.

Neither the Plaintiffs' Complaint nor Plaintiffs' response to the State's motions assert that the Plaintiffs are members of a suspect class or that a fundamental right is involved in

Plaintiffs' equal protection claim. In fact, Plaintiffs' response brief fails to address the equal protection claim at all.

Therefore, since neither a protected class nor a fundamental right are at issue, the Court shall review the statute to determine whether it bears a rational basis to a legitimate state purpose. *Vacco v. Quill*, 521 U.S. 793, 117 S. Ct. 2293, 138 L.Ed.2d 834 (1997). As discussed earlier, a State has a legitimate interest in regulating motor vehicles using its roads in order to promote highway safety and "[i]n no field has this deference to state regulation been greater than [in] that of highway safety regulation."³ It is also clear that a state's exercise of its police powers is entitled to a presumption of validity when viewed in the light of the Due Process Clause of the Fourteenth Amendment. *Bibb, supra*, at 529. The exceptions to the weight limits of §14-109 are 1) truck-tractor and dump semitrailer when such are used as a combination unit; 2) Utility or refuse collection vehicles used by counties, cities or towns or by private companies who have contracted with the same; and 3) vehicles transporting timber, pulpwood and chips in their natural state and vehicles transporting grain from the field to the elevator. The fact that these "classes" discriminate against the Plaintiffs is irrelevant. Plaintiffs are not members of a suspect class and driving an overweight vehicle is not a fundamental right. Therefore, the Court need only apply the rational basis standard. *Heller v. Doe*, 509 U.S. 312, 113 S. Ct. 2637, 125 L.Ed 2d. 257 (1993).

Under §14-109, the vehicles that fall into the exceptions to the weight restrictions must purchase a annual special overload permit and none of the exception vehicles are allowed to travel on the interstate highways. The Oklahoma Legislature has empowered the Transportation Commission to promulgate rules and regulations for the movement of overweight and oversized loads on Oklahoma highways and to publish maps showing the weight and height restrictions of highway structures and bridges. Okla. Stat. tit. 47 §14-118. The legislature has also required that the Commissioner of Public Safety develop a system for the issuing of permits for oversized and overweight loads and to include in the special

³See Order at page 3, *supra*

permits other safety requirements for the movement of such vehicles. *Id.* The legislative purpose for empowering and requiring the state agencies to enact such a system is to “permit the movement of necessary overweight and oversize vehicles or loads” while at the same time providing for the 1) protection of the motoring public from potential traffic hazards; 2) protection of highway surfaces, structures, and private property, and 3) provision for the normal flow of traffic with a minimum of interference. Okla. Stat. tit. 47 §14-118A4. It is for the legislature, not the courts, to decide what are “necessary overweight and oversize vehicles and loads”. The Court finds that there is a rational basis between the overweight exceptions and the legitimate state purpose of the safe and orderly use of the state’s highways and the wisdom or validity of the exceptions to §14-109 will not be second-guessed by the Court. Therefore, Okla. Stat. tit. 47 §14-109 does not violate the Equal Protection provisions of the Fourteenth Amendment.

In conclusion, Defendant’s Motion to Dismiss (Docket #15) is granted.⁴

ORDERED this 30th day of March, 2000.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

⁴The Court’s determination of the Constitutional issues raised by the parties makes it unnecessary for the Court to rule upon whether the State is a “person” under §1983 or whether the state is immune from liability for monetary damages.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 30 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LAVERN DALTON WALLACE and)
PHILLINA LYNN WALLACE,)
individually and as Parents and Next)
Friends of RYAN WILLIAM WALLACE,)
a Minor Child,)

Plaintiffs,)

v.)

DENNIS BIGERSTAFF, and SYSCO)
FOOD SERVICES OF OKLAHOMA, INC.,)
an Oklahoma corporation,)

Defendants.)

Case No. 98 CV 0602C (M)

ENTERED ON DOCKET

DATE MAR 31 2000

STIPULATION FOR DISMISSAL

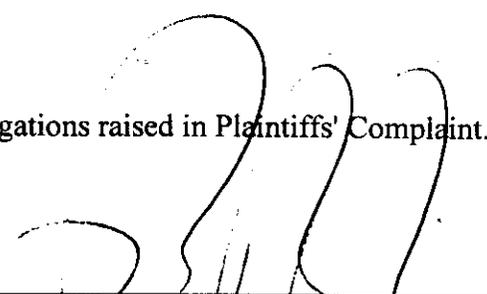
Plaintiffs, Lavern Dalton Wallace and Phillina Lynn Wallace, individually and as parents and next friends of Ryan William Wallace, a minor child, and Defendants, Dennis Biggerstaff and Sysco Food Services of Oklahoma, Inc., an Oklahoma corporation, hereby stipulate that Plaintiffs' claims against Defendants are hereby dismissed with prejudice, each party to bear his, her or its own costs.

In consideration of payment to Lavern Dalton Wallace and Phillina Lynn Wallace, individually and as parents and next friends of Ryan William Wallace, Plaintiffs hereby release Defendants, Dennis Biggerstaff and Sysco Food Services of Oklahoma, Inc., an Oklahoma corporation, from any and all liability in regard to a vehicle accident on or about August 28, 1997,

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on I-44 in Tulsa County, Oklahoma and all allegations raised in Plaintiffs' Complaint.

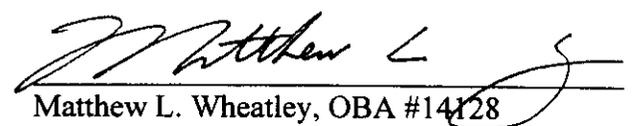


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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STEPHENS PROPERTY COMPANY,)
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Plaintiff,)
)
vs.)
)
FLEET NATIONAL BANK,)
)
Defendant.)

No. 98-CV-633-K ✓

ENTERED ON DOCKET

DATE MAR 31 2000

ORDER

Before the Court are the cross-motions of the parties for summary judgment. Plaintiff is the owner of certain bonds which were issued pursuant to a Trust Indenture under which the defendant served as Trustee. The bonds were issued as part of an elaborate financing plan put in place with respect to the Mid-Continent Tower in Tulsa, Oklahoma. In December 1994, plaintiff and defendant entered into a Debt Purchase Agreement ("DPA"), pursuant to which defendant agreed to sell to plaintiff debt instruments which had been assigned to defendant to be held as collateral for the bonds. Plaintiff contends that defendant has wrongfully declared the DPA terminated as a result of an alleged breach of the DPA by plaintiff.

In this action, plaintiff seeks (1) a determination by the Court that the DPA remains in full force and effect; (2) a determination that plaintiff has not breached the DPA; (3) specific performance of the DPA; (4) a determination that petitions in intervention in Fleet National Bank v. Fourth Street Associates, et al., Case No. CJ-94-03054, District Court of Tulsa County, Oklahoma, constituted interference with the transaction contemplated by the DPA and, pursuant

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to DPA Section 11, plaintiff's obligation to close under the DPA is suspended until the interferences are removed; (5) a determination of whether the property sold to plaintiff includes accounts which contain proceeds of the debt instruments sold to plaintiff pursuant to the DPA.

Defendant denies plaintiff's allegations and has asserted counterclaims against plaintiff. Defendant contends that plaintiff breached the DPA by its failure and refusal to close on December 8, 1995; that the DPA has otherwise terminated; and that defendant is entitled to retain deposits tendered by plaintiff in relation to the DPA. Defendant is therefore seeking the following determinations and relief in this action: (1) a determination that plaintiff breached the DPA and that defendant is entitled to recover liquidated damages (retain the deposits) in the total sum of \$300,000.00; (2) alternatively, a determination that the DPA has otherwise terminated and that the defendant is entitled to retain the non-refundable deposit as defined in the DPA; and (3) specific performance by plaintiff with respect to the requirement that upon termination of the DPA, plaintiff deliver to the defendant a recordable release of the notice as defined in the DPA.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c) F.R.Cv.P. In applying this standard, the Court views the evidence and draws reasonable inferences therefrom in a light most favorable to the non-moving party. See Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir.1996).

A default occurred on rental payments by the tenant, which led to a default under the Indenture. After years of negotiations, the Indenture Trustee filed a foreclosure action on or about July 26, 1994, styled Fleet National Bank v. Fourth Street Associates, et al., CJ-94-3054 in Tulsa County District Court. In 1994, the present plaintiff Stephens Property Company ("SPC")

made inquiries about purchasing the Mid-Continent Tower from the Indenture Trustee. Because of the pending foreclosure action, the property itself could not be sold, but the parties negotiated a sale of the Trustee's interest in the notes, mortgage and related documents. The parties entered into the DPA. SPC was to purchase the Trustee's interest for \$10,450,000. One of the conditions for closing under the DPA was the entry of a judgment in favor of the Trustee in the foreclosure action. In the event a judgment was not entered by June 30, 1995 (the "Outside Date") SPC could elect to close in the absence of a judgment. Should SPC so elect, the Closing Date was to be July 3, 1995. In the event SPC refused to close without a judgment, the Trustee could elect to (i) cancel the DPA or (ii) to extend the Outside Date.

Two bondholders intervened in the foreclosure action, which prevented the entry of judgment. SPC and the Trustee elected to extend the deadlines, an action which took place several times. Finally, in November 1995, the Trustee declined to agree to further extensions. SPC responded that it elected to close the DPA even though a judgment had not been entered in the foreclosure action. The Closing Date was extended a final time until December 8, 1995. On that date, the Trustee tendered to SPC the Debt, the Notes and the Security Documents. SPC, however, declined to proceed.

The resolution of the lawsuit depends upon the interpretation of Section 11 of the DPA. Therefore, the Court will set it forth in full:

11. Uniform Commercial Code Sale. Buyer and Seller acknowledge that the transaction contemplated hereby is a private sale of collateral under the Oklahoma Uniform Commercial Code. This sale is subject to the rights of a debtor under the Oklahoma Uniform Commercial Code, including without limitation any right of redemption. After the Election Date, Seller shall give notice of the transaction contemplated hereby to the Debtor involved, the Owner, and to any other party which Seller deems in its sole discretion to be entitled to notice pursuant to the Oklahoma

Uniform Commercial Code, the Collateral Trust Indenture dated as of June 1, 1984, or otherwise. Such notice may include, without limitation, notice of the identity of the Buyer, the amount of the Purchase Price, the terms of the sale, and the date, time and place of the closing. Any action by the Owner herein or any other party which interferes, or attempts to interfere, with the transaction contemplated hereby shall not constitute a default or breach by Seller, but the failure to complete the sale within a reasonable time after the Closing Date by reason of such interference by the Owner but after allowing the Seller the opportunity to use its reasonable commercial efforts to complete the sale, shall constitute a basis for the termination of this Agreement by the Buyer in accordance with Section 10(b), but without payment by the Seller of any expenses or costs or other damages, liquidated or otherwise, to the Buyer other than the return of the Nonrefundable Deposit and the Good Faith Deposit. (emphasis added)

SPC's argument herein is that the interventions by the bondholders in the foreclosure action constitute interference in the sale which permits SPC to extend time for performance until the interference is removed.

The Court agrees with the Trustee that the language does not support this interpretation. The interventions in the foreclosure action prevented only the entry of a judgment. SPC could have withdrawn on that basis. However, SPC expressly waived this requirement and elected to proceed. By virtue of the extensions to which the parties agreed, the Closing Date was extended to December 8, 1995. The provision upon which SPC relies excuses the Seller (but not the Buyer) from any default in the performance of the DPA if an "interference" prevents the Seller's performance. Further, the "interference" must be by the Owner, which in this instance was Fourth Street Associates. SPC has not alleged there was any interference by Fourth Street Associates. SPC refused to perform, thus breaching the DPA. Interpretation of an unambiguous contract is a question of law for the Court. Dillard & Sons Constr., Inc. v. Burnup & Sims Comtec. Inc., 51 F.3d 910, 914 (10th Cir.1995).

SPC has not disputed that, in the event of breach, it owes the Trustee the amount of its deposits (\$300,000.00) as liquidated damages. SPC has also protested the Trustee's submission of expert testimony on contract interpretation and the negotiations in this case. The Court has not relied upon the tendered expert testimony in making its determination.

It is the Order of the Court that the motion of the plaintiff for partial summary judgment (#19) is hereby DENIED. The motion of the defendant for summary judgment (#16) is hereby GRANTED. All other pending motions are declared moot.

IT IS SO ORDERED THIS 31 DAY OF MARCH, 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

FILED
MAR 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STEPHENS PROPERTY COMPANY,)
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Plaintiff,)
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v.)
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FLEET NATIONAL BANK,)
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)
)
Defendant.)

No. 98-CV-633-K ✓

ENTERED ON DOCKET
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JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendant and against the Plaintiff. Defendant shall recover from plaintiff the sum of \$300,000.00 with interest thereon as provided by law.

ORDERED this 31 day of March, 2000.


TERRY C. KEEN, CHIEF
UNITED STATES DISTRICT JUDGE

37

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

MAR 31 2000

Phil Lombardi, Clerk
 U.S. DISTRICT COURT

SHIRLEY J. MANLEY)
 SSN: 448-52-2133,)
)
 Plaintiff,)
)
 v.)
)
 KENNETH S. APFEL, Commissioner,)
 Social Security Administration,)
)
 Defendant.)

Case No. 99-CV-0211 EA

ENTERED ON DOCKET

DATE MAR 31 2000 ✓

ORDER

Claimant, Shirley J. Manley, 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 Administrative Law Judge (“ALJ”) and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **REVERSES and REMANDS** the Commissioner’s decision.

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 May 21, 1951, and was 45 years old at the time of the ALJ’s decision. She has an 11th grade education, a General Equivalency Diploma (GED), some college credits, and some vocational training. Claimant worked as a bartender, waitress, cleaner, cashier, checker, stock person, babysitter, concession worker, short order cook, and supervisor. Claimant alleges an inability to work beginning May 1, 1995, due to nerves, depression, isolation, foot pain, numbness in her legs and arms, neck pain, back pain and burning, pain and limited mobility.

Procedural History

On November 27, 1995, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.) and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant’s applications for benefits were denied in their entirety initially and on reconsideration. A hearing before ALJ Larry Marcy was held November 20, 1996, in Tulsa, Oklahoma. By decision dated January 29, 1997, the ALJ found that claimant was not disabled at any time through the date of the decision. On January 15, 1999, 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 fourth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform a full range of light work, subject to no more than occasional bending or stooping; no work around dangerous moving machinery or

unprotected heights; and no work requiring her to carry out detailed instructions, but she could carry out simple or moderately detailed instructions. The ALJ determined that claimant could perform her past relevant work as a short order cook, cashier, checker, waitress, or bartender, and therefore she was not disabled under the provisions of the Social Security Act.

Review

Claimant asserts that (1) the ALJ's step four analysis is error as a matter of law, and his findings at step four are not supported by substantial evidence; and (2) the ALJ erred in failing to consider the effect of the claimant's mental impairment on the RFC. Although claimant does not specifically list as error the ALJ's pain and credibility analysis, claimant does challenge that analysis as part of her statement of facts.

Step Four Analysis

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

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 short order cook, cashier, checker, waitress, or bartender. (R. 22) The ALJ questioned claimant about certain of her past relevant work exertional demands (e.g., lifting and standing) (R. 38-44), and the vocational expert testified as to the strength demands and transferable skills of her past relevant work (R. 71-72). Nonetheless, the ALJ did not discuss those demands in his decision, nor did he discuss the mental demands of her past relevant work. He merely stated:

Based on the testimony of Dr. Young, the qualified vocational expert, concerning the residual functional capacity necessary to perform the claimant's past relevant, I find that the claimant can perform her past relevant work as a short order clerk, as generally performed in the national economy, cashier, checker, waitress, or bartender, and therefore I find that the claimant is not disabled.

(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 erred by delegating his fact-finding responsibilities to the vocational expert at phase two of the required step four analysis.

Evaluating Mental Impairments

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. § 416.920a 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 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, but he did not link his findings to any particular job duties required of claimant's past relevant work. He did qualify his RFC assessment by indicating that claimant was unable to carry out detailed instructions, but she could carry out simple or moderately detailed instructions. However, there is no discussion or indication as to whether the instructions claimant was required to carry out at her past relevant jobs were simple or moderately detailed. Nor is there any discussion or indication as to whether any of her particular job duties were likely to produce tension and anxiety, or any other mental problems that could be disabling. There is simply no discussion of particular job duties at all.

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. Claimant did not specifically assert error as to that issue, and it 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 of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

DATED this 31st 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 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GERALD ROLAND,
SSN: 442-60-2921,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

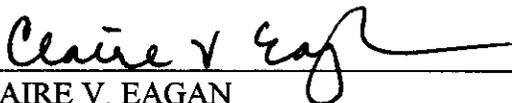
Case No. 98-CV-0721-EA

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MAR 31 2000 ✓
DATE _____

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 31st 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

GERALD ROLAND,
SSN: 442-60-2921,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

MAR 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-0721-EA

ENTERED ON DOCKET
DATE MAR 31 2000 ✓

ORDER

Claimant, Gerald Roland, 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 Administrative Law Judge (“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 February 18, 1963, and was 34 years old at the time of the ALJ's decision. He has an eleventh grade education. Claimant worked as a welder, plumbing and heating repairman, truck driver, gas station attendant, commercial maintenance worker, and plumber. Claimant alleges an inability to work beginning February 11, 1994, due to degenerative disc disease. He also claims to suffer from pain, weakness, numbness, headaches, sleep disturbance, irritability, and depression.

Procedural History

On April 26, 1995, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.). Claimant's application for benefits was denied in its entirety initially and on reconsideration. A hearing before ALJ Stephen J. Calvarese was held May 28, 1997, in Tulsa, Oklahoma. By decision dated August 22, 1997, the ALJ found that claimant was not disabled at any time through the date of the decision. On July 18, 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 fourth and fifth steps of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform a wide range of light work. The ALJ determined that claimant could perform his past relevant work of gas station attendant and, alternatively, 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 asserts one error: that the ALJ specifically requested an RFC assessment from claimant's treating physician and failed to consider it. The record is clear that the ALJ is not at fault.

During the administrative hearing on May 28, 1997, the ALJ asked claimant's counsel if the treating physician, Chris M. Boxell, M.D., had rendered a residual functional capacity assessment. (R. 62) Counsel responded that Dr. Boxell had not, but that counsel "would be happy to do that for you as well." (Id.) The ALJ left the record open for ten days for Dr. Boxell's assessment, and stated that the treating physician's statement would be given "great weight." (Id.)

Apparently, Dr. Boxell completed a Residual Functional Capacity Assessment ("RFCA") form dated July 5, 1997. (Pl. Br., Docket #14, Ex. A.) Claimant's counsel represents that the RFCA form was "forwarded to the ALJ" (Pl. Br. at 2), but there is no evidence that it was sent to the ALJ. It is not of record in the certified transcript (R. 1-316),² and it is not referenced by the ALJ in his unfavorable decision. (R. 12-19) The ALJ did not render his decision until August 22, 1997, giving Dr. Boxell or claimant's counsel ample time to file it of record.

² Counsel for claimant does not contend that it is in the record, and he felt compelled to attach it to his brief.

Claimant requested review of the ALJ decision by the Appeals Council (R. 7), and sought an additional thirty days to file a brief³ because “[w]e are in the process of obtaining additional medical reports for submission to the Appeals Council.” (R. 8) In March 1998, the Appeals Council deferred action for 45 days so that counsel could submit additional evidence that was “both new and material” (R. 6) The Appeals Council received no new evidence and denied the request for review on July 18, 1998. (R. 4)

Claimant argues that the ALJ’s failure to consider the RFC form, which contains a treating physician’s opinion, requires remand. (Pl. Br. at 3.) The ALJ cannot consider what he does not have before him. Nor can the Appeals Council. This Court is not at liberty to consider evidence not in the certified record. Atteberry v. Finch, 424 F.2d 36, 39 (10th Cir. 1970); see Selman v. Califano, 619 F.2d 881, 885 (10th Cir. 1980). The Court can only consider the new evidence for the limited purpose of determining the propriety of a remand for consideration of new evidence.

The Court assumes that claimant is requesting a sentence six remand:

The court . . . may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.

42 U.S.C. § 405(g).

It is undisputed that the evidence, Dr. Boxell’s RFC assessment, is new. To determine if it is material, the test is whether it relates to the relevant period and there is a “reasonable probability that the Commissioner would have reached a different conclusion had the evidence been

³ For some reason, counsel requested the extension “from request of the hearing tape.” (R. 8) Failure to receive a tape (or transcript) does not excuse submission of the RFC form to the Appeals Council. Counsel claims that not receiving the tape prevented “the opportunity to show the Appeals Council that the ALJ specifically requested the form.” (Pl. Br. at 2.)

considered.” Hargis v. Sullivan, 945 F.2d 1482, 1493 (10th Cir. 1991). Additionally, claimant must show good cause for failure to submit the evidence in the prior proceeding. 42 U.S.C. § 405(g).

The new evidence meets the first part of the materiality test -- it relates to the period for which benefits were denied. However, meeting the second part of materiality test is problematic for claimant because Dr. Boxell’s RFCA form differs from his contemporaneous treatment notes. (Compare Pl. Br., Ex. A, with R. 220-66, 272-316.) In January 1997, Dr. Boxell reported that there was “nothing seriously wrong here with [claimant]. . . . He needs to stop ‘somatosizing.’” (R. 312) In late March 1997, Dr. Boxell described claimant with good (neck) and excellent (low back) range of motion, and his strength as “superb.” (R. 310) On the RFCA form in July 1997, however, Dr. Boxell noted numerous and severe limitations as to claimant’s RFC. He also stated that “I do not believe we will ever be successful in returning him to his prior work, similar work, or any strenuous physical work” (Pl. Br., Ex. A, at 6), and that claimant “will eventually require job retraining.” (Id. at 8)

Not only are these statements inconsistent with Dr. Boxell’s prior evaluations, but they also do not support a finding of disability under the Social Security Act. Thus, claimant does not meet the second part of the materiality test -- that there be a reasonable probability that the Commissioner would have reached a different conclusion had the evidence been considered. The ALJ may reject a treating physician’s opinion if it is not supported by specific findings, inconsistent with treatment notes, or contrary to the record as a whole. Castellano v. Secretary of Health and Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). The Court has reviewed the record as a whole and finds that Dr. Boxell’s July 1997 RFC opinion is contrary to the record as a whole.

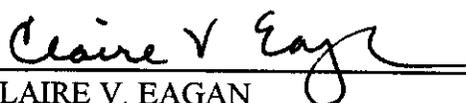
More important is the fact that claimant has failed to meet the last remand requirement -- good cause for failure to incorporate the evidence into the record. If the RFCA form was completed on July 5, 1997, as it states, claimant had six weeks to get it to the ALJ, and failing that, had a year to get it to the Appeals Council. The Appeals Council did not deny review until July 18, 1998.

Counsel for claimant asserts that he requested the hearing tape, and that upon receipt of the tape, he intended to "resubmit" the RFCA form to the Appeals Council. (Pl. Br. at 2.) Whether a tape was requested or not, there is no excuse for not submitting the form to the Appeals Council for more than a year. Claimant has failed to satisfy the good cause requirement for a sentence six remand, and his request is denied.

Conclusion

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

DATED this 31st day of March, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

COSTON L. MOORE,)
)
Petitioner,)
)
vs.)
)
STEVE HARGETT, Warden,)
)
Respondent.)

Case No. 97-CV-273-K

FILED

MAR 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

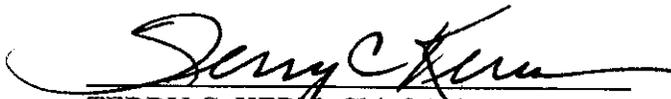
DATE MAR 31 2000

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 judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 30 day of March, 2000.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

Public Defenders Office, was tried by a jury before the Hon. Clifford E. Hopper. The jury found Petitioner guilty of Manslaughter in the First Degree, as well as guilty on all five counts of Assault and Battery with a Dangerous Weapon and Maiming, and recommended that Petitioner be sentenced to thirty (30) years imprisonment on the manslaughter conviction, twenty (20) years on each of counts 2-6, and twenty-five (25) years on count 7. The trial court sentenced Petitioner according to the jury's recommendation with the sentences to be served consecutively.

Petitioner, represented by Tulsa County Assistant Public Defender Barry Derryberry, perfected a direct appeal in the Oklahoma Court of Criminal Appeals ("OCCA") where he raised the following claims:

- Proposition No. I: The conviction for first degree manslaughter is not based on sufficient evidence and is therefore contrary to law.
- Proposition No. II: Convictions on all counts not based on sufficient proof of the mental elements, and are therefore contrary to law.
- Proposition No. III: The conviction for assault and battery with a dangerous weapon upon Fay Adams is not supported by sufficient evidence of battery and must be dismissed.
- Proposition No. IV: The trial court performed reversible error by instructing on the credibility of the Defendant but not the credibility of the State's witnesses.
- Proposition No. V: Failure to fully instruct on all the requisite elements of assault and assault and battery with a dangerous weapon constitutes reversible error.
- Proposition No. VI: The trial court committed reversible error in rendering a flight instruction.
- Proposition No. VII: The verdicts of punishment for the dangerous weapon counts are fundamentally defective.
- Proposition No. VIII: The Defendant was improperly punished seven times for a single act.

(#10, attachment to Ex. A). On February 24, 1994, the OCCA affirmed Petitioner's convictions and sentences in an unpublished opinion. (#10, Ex. A).

Petitioner sought post-conviction relief in the state district court. After the trial court denied the requested relief, Petitioner filed a post-conviction appeal in the OCCA alleging that: (1) erroneous instructions were given to the jury by the trial judge, citing Flores v. State, 899 P.2d 1162, 1167 (Okla. Crim. App. 1995); (2) trial counsel was ineffective for failure to object to these instruction; (3) appellate counsel was ineffective for his failure to raise the Flores issue on direct appeal; and (4) the trial court erred in denying post-conviction relief. The OCCA affirmed the trial court's denial of post-conviction relief, finding that the claim of ineffective assistance of trial counsel and the claim based on the Flores issue had been waived. (#10, Ex. B). The OCCA also rejected Petitioner's claim of ineffective assistance of appellate counsel on the merits. (Id.)

Petitioner filed the instant federal petition for writ of habeas corpus (#1) on March 25, 1997, alleging thirteen (13) propositions of error. The first eight (8) grounds of error correspond to the eight (8) grounds raised on direct appeal. Grounds 9-13 correspond to the grounds urged by Petitioner on post-conviction appeal. In response to the petition (#10), Respondent argues that grounds 9, 10, 11, and part of 12 are procedurally barred from federal habeas corpus review and that Petitioner's claim of ineffective assistance of appellate counsel is without merit, that grounds 1, 2, and 3 are without merit because sufficient evidence was presented to support Petitioner's convictions, Petitioner's challenges to the jury instructions (grounds 4, 5, and 6) should be rejected, Petitioner's challenge to the verdict forms used at trial (ground 7) should be rejected, and Petitioner's convictions were not entered in violation of the prohibition against double jeopardy (ground 8). Respondent also

states that it is impossible to respond to Petitioner's ground 13 because Petitioner's equal protection and due process allegations lack specificity.

ANALYSIS

A. Exhaustion/Evidentiary Hearing

Respondent concedes, and this Court finds, that Petitioner presented each of his claims either on direct appeal or post-conviction appeal and that, therefore, Petitioner has satisfied the exhaustion requirement of 28 U.S.C. § 2254(b).

The Court also finds that an evidentiary hearing is not warranted as Petitioner has not met his burden of proving entitlement to an evidentiary hearing. See Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998). In his petition in error filed in the OCCA on post-conviction appeal, Petitioner states that in denying post-conviction relief, "Judge Hopper denied Appellant due Process of Law and a Impartial Hearing." (#10, attachment to Ex. B at page 13). The OCCA affirmed the trial court's denial of post-conviction relief without remanding for a hearing. Thus, it appears the state courts denied an evidentiary hearing on Petitioner's claims and he shall not be deemed to have "failed to develop the factual basis of a claim in state court." Id. Therefore, his request is governed by standards in effect prior to the April 24, 1996 enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA") rather than by 28 U.S.C. § 2254(e)(2). Id. Under pre-AEDPA standards, in order to be entitled to an evidentiary hearing, Petitioner must make allegations which, if proven true and "not contravened by the existing factual record, would entitle him to habeas relief." Id. In this case, Petitioner has not made allegations which, if proven true, "would entitle him to habeas relief." Therefore, the Court finds that an evidentiary hearing is not necessary.

B. Standard of Review

The AEDPA amended the standard of review in habeas corpus cases to provide as follows:

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

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

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

28 U.S.C. § 2254(d). As stated above, Petitioner raised each of his instant claims either on direct appeal or post-conviction appeal. After considering the merits Petitioner's arguments, the OCCA rejected each of Petitioner's direct appeal claims as well as his ineffective assistance of appellate counsel claim raised on post-conviction appeal. Thus, the § 2254(d) standard of review governs this Court's review of Petitioner's claims previously adjudicated on the merits by the OCCA.

C. Petitioner's claims adjudicated by the OCCA

After careful review of the record in this case, the Court finds Petitioner has failed to demonstrate that the decisions of the OCCA were contrary to clearly established federal law as set forth by the Supreme Court or that there was an unreasonable application of Supreme Court law to the facts of this case. For the reasons discussed below, the Court finds habeas corpus relief should be denied on each of Petitioner's claims adjudicated on the merits by the OCCA on direct or post-conviction appeal.

1. Challenges to the sufficiency of the evidence (claims 1, 2, and 3)

As his first, second and third propositions of error, Petitioner argues that the evidence was insufficient to sustain any of his convictions. Specifically, Petitioner alleges in ground 1 that his conviction for First Degree Manslaughter cannot stand because (a) there was not sufficient suddenness between the provocation, the heat of passion, and the alleged homicidal act, and (b) under Oklahoma law, the provocation must be performed by the deceased, which did not occur in this case. (#2 at 11-14). In ground 2, Petitioner claims that each of his convictions, with the exception of his conviction for Assault with a Dangerous Weapon against David Nelson, is subject to reversal because the State did not present sufficient evidence of specific intent. (#2 at 17). As ground 3, Petitioner asserts that the conviction for Assault and Battery With a Dangerous Weapon upon Faye Adams is not support by sufficient evidence of battery. Petitioner presented these claims to the OCCA on direct appeal. (#10, attachment to Ex. A).

The OCCA rejected Petitioner's challenge to the First Degree Manslaughter conviction finding that “[w]hat is or is not an adequate cooling off period is not defined by law as any set time period” and is an issue “of fact for the jury to determine.” (#10, Ex. A at 3). The state appellate court concluded that “the evidence amply supports the conclusion of the jury.” (*Id.*) Also, the OCCA rejected Petitioner’s argument that his manslaughter conviction could not stand because the person killed was not the provocateur. Citing opinions from Washington and Alaska, the OCCA determined that the fact another is killed other than the provoking agent does not foreclose a manslaughter conviction where the provocation caused the passion of the Defendant and caused the act which resulted in the death. (*Id.*)

The OCCA also rejected Petitioner’s challenges based on sufficiency of the evidence regarding

intent, finding that the evidence supported the conclusion that Petitioner intended to cause harm and that, under Oklahoma law, if the requisite intent is present as to any one person, then the element is complete as to all persons. According to the OCCA, the issue of intent as to the Assault and Battery charges was an issue for the jury and the record amply supported the jury's conclusion.

Lastly, as to Petitioner's challenge to his conviction for Assault and Battery with a Dangerous Weapon as against Faye Adams, the OCCA concluded that the evidence presented at trial was sufficient to submit this issue to the jury and to support the jury's verdict.

In the instant action, Petitioner has failed to demonstrate that the OCCA's rejection of these claims on direct appeal warrants issuance of the writ under 28 U.S.C. § 2254(d). To the extent Petitioner challenges the OCCA's application of state law, his claims are not cognizable in federal habeas corpus. Estelle v. McGuire, 502 U.S. 62 (1991) (recognizing that the role of a federal habeas corpus court is not to correct errors of state law). Furthermore, sufficiency of the evidence claims are evaluated based on the following standard established by the Supreme Court:

. . . the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.

Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (citations omitted). In evaluating the evidence

presented at trial, this Court does not weigh conflicting evidence or consider witness credibility. Wingfield v. Massie, 122 F.3d 1329, 1332 (10th Cir. 1997); Messer v. Roberts, 74 F.3d 1009, 1013 (10th Cir. 1996). Instead, the Court must view the evidence in the “light most favorable to the prosecution,” Jackson, 443 U.S. at 319, and “accept the jury’s resolution of the evidence as long as it is within the bounds of reason.” Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir. 1993).

The trial transcript indicates that during Petitioner's trial, the jury heard testimony and viewed evidence supporting the conclusion that Petitioner, after being hit in the jaw by David Nelson, drove his car into the apartment occupied by the victims with the intent to cause harm. Furthermore, the evidence indicated that as a result of Petitioner’s actions, Floretta Nelson died, Shannon Soles lost, at the least, use of her right leg, and Rebecca Mattison, David Nelson, Johnny Swaim, and Faye Adams all sustained injury. The Court concludes that this evidence, when viewed in a light most favorable to the State, was sufficient to allow the jury as a rational trier of fact to have found beyond a reasonable doubt the essential elements of First Degree Manslaughter, Assault and Battery with a Dangerous Weapon and Maiming. Petitioner has failed to demonstrate that the OCCA's resolution of these claims was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. As a result, the Court finds habeas corpus relief should be denied on this claim.

2. Challenges to jury instructions (claims 4, 5, and 6)

As his fourth, fifth and sixth propositions of error, Petitioner argues that the trial court committed numerous errors in instructing the jury. Specifically, Petitioner alleges that it was error for the trial court to instruct on the impact of Petitioner’s former convictions on his credibility, but

to omit a similar instruction concerning the credibility of two of the State's witnesses, Nelson and Swaim, both of whom also had prior felony convictions. Petitioner also alleges that because an automobile is not dangerous per se, the trial court erred in failing to include the definitional instruction for a dangerous weapon. Lastly, Petitioner alleges that the trial court erred in giving a flight instruction. The OCCA considered and rejected each of these claims on direct appeal. The state appellate court held that Petitioner was not prejudiced by the trial court's omission of an instruction concerning the impact of prior convictions on Nelson's and Swaim's credibility, and that any error was harmless beyond a reasonable doubt. (#10, Ex. A at 7-8). The OCCA also determined that although a definition was omitted, the trial court properly instructed the jury on the elements of Assault and Battery with a Dangerous Weapon and that the evidence presented clearly places the automobile within the definition of a dangerous weapon. (#10, Ex. A at 9). As to the propriety of the flight instruction given in this case, the OCCA determined that the instruction given was a correct statement of the law and that the evidence warranted the giving of the instruction. (#10, Ex. A at 9-10).

In the instant action, Petitioner has failed to assert a basis for finding that the OCCA's rejection of these claims on direct appeal warrants issuance of the writ under 28 U.S.C. § 2254(d). Furthermore, in a habeas proceeding attacking a state court judgment based on an erroneous jury instruction, a petitioner has a great burden. Lujan v. Tansy, 2 F.3d 1031, 1035 (10th Cir.1993). A state conviction may only be set aside on the basis of erroneous jury instructions when the errors had the effect of rendering the trial so fundamentally unfair that a fair trial was denied. Shafer v. Stratton, 906 F.2d 506, 508 (10th Cir.1990). It is not sufficient to show that "the instruction is undesirable, erroneous, or even universally condemned." Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (quoting

Cupp v. Naughten, 414 U.S. 141, 146 (1973)). Rather, Petitioner must establish the instruction "so infected the entire trial that [the] resulting conviction violates due process." Id. (quoting Naughten, 414 U.S. at 147). The degree of prejudice from the challenged instruction must be evaluated in the context of the events at the trial. United States v. Frady, 456 U.S. 152, 169 (1982). Having carefully reviewed the record, the court is not convinced that the instructions challenged by Petitioner constituted a violation of due process. Therefore, after reviewing the record, the Court finds habeas relief is not warranted under § 2254(d).

3. *Challenge to verdict forms*

As his seventh proposition of error, Petitioner alleges that the verdict forms for his convictions on the charges of Assault and Battery With a Dangerous Weapon were vague and fundamentally defective in that they reflected the jury's decision to "fix punishment at not less than 20 years." (Trans. at 412-13). In contrast, the jury set forth a definite term of punishment for Counts 1 and 7. Petitioner argues that the ambiguous verdict forms violated his "right to a verdict which enables the Trial Court to 'conclude with certainty exactly what the jury intended to set as punishment.'" (#2 at 39 (citation omitted)). The OCCA considered this claim on direct appeal and concluded that although the trial judge should have returned the matter to the jury, it was not reversible error as the minimum sentence was imposed and, as a result, Petitioner suffered no prejudice.

It is well established that the role of a federal habeas corpus court is not to correct errors of state law. Estelle v. McGuire, 502 U.S. 62 (1991). "Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional

dimension.” Smith v. Phillips, 455 U.S. 209, 221 (1982) (citations omitted). Petitioner has failed to demonstrate that the OCCA's resolution of this claim warrants habeas corpus relief under § 2254(d). Because the trial court imposed the minimum sentence, it is clear to the Court that any error in the verdict forms caused no prejudice to Petitioner. Habeas corpus relief on this claim should be denied.

4. Challenge to imposition of multiple sentences for single act

As his eighth claim, Petitioner argues that he was improperly punished seven times for a single act. Petitioner premises this argument on application of Okla. Stat. tit. 21, § 11A (1987). The OCCA considered and rejected this claim on direct appeal, citing its resolution of the identical issue in Clay v. State, 593 P.2d 509 (Okla. Crim. App. 1979), *overruled on other grounds*, Davis v. State, 993 P.2d 124 (Okla. Crim. App. 1999).

As stated above, it is well established that the role of a federal habeas corpus court is not to correct errors of state law. Estelle v. McGuire, 502 U.S. 62 (1991). Petitioner emphasizes that this claim is not premised on the constitutional prohibition against double jeopardy. Instead, the claim arises from the application of a state statute. Whether the interpretation by the Oklahoma courts of Section 11 is correct or not is a matter of state law that is not actionable in a habeas proceeding. See Bond v. State of Oklahoma, 546 F.2d 1369 (10th Cir. 1976). As a result, this claim is not cognizable in federal habeas corpus. Furthermore, Petitioner has failed to demonstrate that the OCCA's resolution of this claim warrants habeas corpus relief under § 2254(d). The Court concludes that habeas corpus relief on this claim should be denied.

5. *Ineffective assistance of appellate counsel (part of claim 12)*

As part of his twelfth proposition of error asserted in his petition, Petitioner, citing Flores v. State, 896 P.2d 558 (Okla. Crim. App. 1995), alleges that appellate counsel provided ineffective assistance when he failed to challenge the trial court's jury instruction modifying the presumption of innocence and shifting the burden of proof ("the Flores issue"). On post-conviction appeal, the OCCA evaluated the merits of Petitioner's claim that he had received ineffective assistance of appellate counsel. In rejecting the claim, the state appellate court stated that "[a]ppellate counsel is not ineffective, and counsel's actions do not establish 'sufficient reason' for a default, by the mere fact that counsel failed to recognize either the factual or legal basis for a constitutional claim; or failed to raise the claim even if recognized." (#10, Ex. B at 2).

To prevail on a claim of ineffective assistance of appellate counsel, Petitioner must show that his appellate counsel's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); Hickman v. Spears, 160 F.3d 1269, 1273 (10th Cir. 1998). There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Strickland, 466 U.S. at 688. In making this determination, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. To establish the prejudice prong of the Strickland test, Petitioner must show that the allegedly deficient performance prejudiced the defense; namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694.

Petitioner claims that appellate counsel's failure to challenge an allegedly improper jury instruction on the presumption of innocence constitutes ineffective assistance. In Flores v. State, 896

P.2d 558, 562 (Okla. Crim. App. 1995), the Oklahoma Court of Criminal Appeals held that Judge Hopper's deviation from the uniform jury instructions regarding the presumption of innocence and the state's burden of proof when the jury was deciding the guilt or innocence of a defendant was reversible error. In the instant case, Petitioner's trial attorney did not object to the jury instructions proposed by the trial court (#11 at 372). Petitioner was represented by different counsel on appeal, however, who argued eight grounds but did not raise an issue relating to the modified jury instruction. The Court of Criminal Appeals decided Flores on January 24, 1995, after Petitioner's trial in May, 1990, after Petitioner filed his notice of appeal, after Petitioner's appellate counsel filed his brief-in-chief on October 21, 1991, and almost eleven (11) months after affirming Petitioner's convictions on direct appeal.

As noted above, the state courts determined that appellate counsel's failure to challenge the jury instruction on direct appeal did not constitute ineffective assistance of counsel. The state courts correctly noted that counsel need not pursue every meritorious claim in order to render reasonably effective counsel. See Murray v. Carrier, 477 U.S. 478 (1986). Furthermore, the Tenth Circuit Court of Appeals has held that appellate counsel's failure to challenge the instruction at issue in Flores prior to issuance of the Flores opinion did not constitute ineffective assistance of appellate counsel. Sherrill v. Hargett, 184 F.3d 1172, 1175-76 (10th Cir. 1999). The Tenth Circuit has also stated that "counsel is not ineffective for failing to anticipate arguments or appellate issues which are based on decisions issued after the appeal was submitted." Burton v. Martin, No. 98-7034, 1998 WL 694531 (10th Cir. Oct. 6, 1998) (rejecting claim of ineffective assistance of appellate counsel for failing to raise Flores issue prior to issuance of Flores opinion and citing Lilly v. Gilmore, 988 F.2d 783, 786 (7th Cir. 1993)). Therefore, the Court finds Petitioner has failed to satisfy the performance prong

of the Strickland standard. The state courts' adjudication of Petitioner's ineffective assistance of appellate counsel claim does not warrant habeas corpus relief under § 2254(d).

D. Petitioner's Flores claims (claims 9, 10, and 11) and ineffective assistance of trial counsel claim (part of claim 12) are procedurally barred

The alleged procedural default in this case results from Petitioner's failure to raise his ineffective assistance of trial counsel claim and the claims related to the Flores decision on direct appeal and his failure to provide the state courts with sufficient reason for that failure. In its opinion affirming the trial court's denial of post-conviction relief, the Oklahoma Court of Criminal Appeals cited Castro v. State, 880 P.2d 387 (Okla. Crim. App. 1994) in concluding that Petitioner had waived his right to raise his claim of ineffective assistance of trial counsel when he failed to raise the claim on direct appeal. Citing Webb v. State, 835 P.2d 115, 116 (Okla. Crim. App. 1992), the state appellate court found Petitioner had waived his Flores claim and also rejected Petitioner's argument that the failure to raise the claims on direct appeal was attributable to ineffective assistance of appellate counsel. (#10, Ex. B).

As a general rule, the doctrine of procedural default prohibits a federal court from considering specific habeas claims where the state's highest court declined to reach the merits of those claims on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural

default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

Applying these principles to the instant case, the Court concludes that Petitioner's ninth, tenth and eleventh claims, i.e., those claims raising the Flores issue, are barred by the procedural default doctrine. The Oklahoma Court of Criminal Appeals' procedural bar as applied to Petitioner's Flores claim first presented in his state application for post-conviction relief was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently applied a procedural bar and has denied such claims unless the petitioner provides "sufficient reason" for his failure to raise the claim earlier. Moore v. State, 889 P.2d 1253 (Okla. Crim. App. 1995); see also Sherrill v. Hargett, 184 F.3d 1172 (10th Cir. 1999) (finding that Oklahoma's procedural rule barring post-conviction relief for claims petitioner could have raised on direct appeal constitutes an independent and adequate ground barring review of the Flores jury instruction claim).

When the underlying claim is ineffective assistance of counsel, the Tenth Circuit Court of Appeals has recognized that countervailing concerns justify an exception to the general rule. Brecheen, 41 F.3d 1343, 1363 (10th Cir. 1994) (citing Kimmelman v. Morrison, 477 U.S. 365 (1986)). The unique concerns are "dictated by the interplay of two factors: the need for additional fact-finding, along with the need to permit the petitioner to consult with separate counsel on appeal in order to obtain an objective assessment as to trial counsel's performance." Id. at 1364 (citing Osborn v. Shillinger, 861 F.2d 612, 623 (10th Cir. 1988)). The Tenth Circuit explicitly narrowed the

circumstances requiring imposition of a procedural bar on ineffective assistance of counsel claims first raised collaterally in English v. Cody, 146 F.3d 1257 (10th Cir. 1998). In English, the circuit court concluded that:

Kimmelman, Osborn, and Brecheen indicate that the Oklahoma bar will apply in those limited cases meeting the following two conditions: trial and appellate counsel differ; and the ineffectiveness claim can be resolved upon the trial record alone. All other ineffectiveness claims are procedurally barred only if Oklahoma's special appellate remand rule for ineffectiveness claims is adequately and evenhandedly applied.

Id. at 1264 (citation omitted).

After reviewing the record in the instant case in light of the factors identified in English, the Court concludes Petitioner's claim of ineffective assistance of trial counsel premised on trial counsel's failure to object to the modified jury instruction is procedurally barred. At trial, Petitioner was represented by attorneys Robert Nigh and Paula Alfred from the Tulsa County Public Defender's Office. On appeal, Petitioner was represented by Barry Derryberry, a different attorney from the Tulsa County Public Defender's Office. Thus, although the attorneys worked in the same office, Petitioner nonetheless had the opportunity to confer with separate counsel on appeal. Petitioner alleges his trial counsel provided ineffective assistance when he failed to object to the modification of the Oklahoma Uniform Jury Instruction given at trial. Because the fact that trial counsel did not object to the modified jury instruction is contained within the trial record, the issue could have been raised by appellate counsel and resolved without any additional fact finding. Therefore, under English, the Court concludes Petitioner's claim of ineffective assistance of trial counsel is procedurally barred.

Because of his procedural default, this Court may not consider Petitioner's Flores claims and his ineffective assistance of trial counsel claim unless he is able to show cause and prejudice for the

default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The "cause" standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The "fundamental miscarriage of justice" exception requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause by alleging his appellate counsel provided ineffective assistance in failing to raise these claims on direct appeal. Ineffective assistance of counsel may serve as "cause" excusing a procedural bar, Murray v. Carrier, 477 U.S. at 488, and to establish ineffective assistance of counsel a petitioner must show that his counsel's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984). However, as discussed in Part C(5) above, Petitioner's appellate counsel did not render ineffective assistance in failing to raise the Flores claim on direct appeal. Thus, Petitioner has failed to demonstrate "cause" sufficient to excuse his procedural default.

Petitioner's only other means of gaining federal habeas review of these claims is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 506 U.S. 390, 403-404 (1993); Sawyer v. Whitley, 505 U.S. 333, 339-341 (1992). However, Petitioner does not claim that he is actually innocent of the underlying crimes. Therefore, the fundamental miscarriage of justice exception has no applicability to this case.

Because Petitioner has failed to demonstrate "cause and prejudice" or a "fundamental miscarriage of justice," the Court concludes his Flores claims and his ineffective assistance of trial counsel claim are procedurally barred and should be denied on that basis.

E. Denial of due process/equal protection (claim 13)

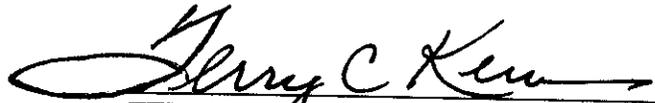
As his thirteenth proposition of error, Petitioner asserts that the "State Court proceedings (sic) denied petitioner equal protection and benefits (sic) of the laws, and due process rights of petitioner." He provides no statement of facts or legal argument in support of this claim. Without an explanation from Petitioner, the Court cannot determine the basis for his claim. However, after reviewing the trial transcript and the state court record, the Court finds no basis for either a due process or an equal protection claim. In addition, to the extent Petitioner asserts a claim of cumulative error, the Court finds the claim should be denied. For the reasons discussed above, each of Petitioner's claims has been found to be without merit. Thus, there was no cumulative error in this case. Moore v. Reynolds, 153 F.3d 1086, 1113 (10th Cir.1998), *cert. denied*, --- U.S. ---, 119 S.Ct. 1266, 143 L.Ed.2d 362 (1999) ("Cumulative-error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors."); see Newsted v. Gibson, 158 F.3d 1085, 1097 (10th Cir.1998) ("A non-error and a non-prejudicial error do not cumulatively amount to prejudicial error."), *cert. denied*, --- U.S. ---, 119 S.Ct. 1509, 143 L.Ed.2d 661 (1999). Habeas corpus relief on this claim should be denied.

CONCLUSION

Petitioner has failed to demonstrate that he is in custody in violation of the Constitution or laws of the United States. Therefore, the petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for writ of habeas corpus (#1) is **denied**.

SO ORDERED THIS 30 day of March, 2000.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHRISTINA M. COLLINS,
SSN: 446-68-1840

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

No. 98-CV-870-J

ENTERED ON DOCKET

DATE MAR 31 2000

JUDGMENT

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

It is so ordered this 31st day of March 2000.

Claire V. Eagan, for

Sam A. Joyner
United States Magistrate Judge

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

DON MARSHALL,
Plaintiff,

v.

WILLIAM HENDERSON, POSTMASTER
FOR THE UNITED STATES
POSTAL SERVICE

Defendant.

ENTERED ON DOCKET

DATE MAR 31 2000

Case No. 99-CV-536-H ✓

FILED

MAR 30 2000

CLERK OF COURT

ADMINISTRATIVE CLOSING ORDER

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

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

IT IS SO ORDERED.

This 30th day of March, 2000.


Sven Erik Holmes
United States District Judge

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

BARBARA MARSHALL,

Plaintiff,

v.

PIZZA HUT, CHISHOLM
ENTERPRISES,

Defendant.

ORDER

ENTERED ON DOCKET

MAR 31 2000

DATE

No. 99-CV-629-H

F I L E D

MAR 30 2000

U.S. DISTRICT COURT

This matter comes before the Court on the Court's February 25, 2000 order to submit a joint case management plan by March 20, 2000.

Plaintiff has not filed a case management plan and therefore has failed to comply with the Court's order. Additionally, Plaintiff filed her complaint on August 2, 1999, but does not appear to have served Defendant or filed any papers with the Court other than her complaint. Rule 41(b) of the Federal Rules of Civil Procedure allows the Court to dismiss an action "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court." The Court also has inherent authority to dismiss an action for failure to prosecute. See Stanley v. Continental Oil Co., 536 F.2d 914, 917 (10th Cir.1976). Plaintiff has not complied with the Court's order and has not diligently prosecuted this matter. Accordingly, Plaintiff's action is hereby dismissed without prejudice.

IT IS SO ORDERED.

This 30TH day of March, 2000.


Sven Erik Holmes
United States District Judge

13-30-00
SVC

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

In re:

WHITE, DEBORAH ELAINE (441-52-8583)
pdba KIDS PLAYTIME
Debtor.

Bankruptcy Case No.: **94-00296-M**
Chapter 13

ENTERED ON DOCKET
DATE **MAR 31 2000**

Gayle E. Towry
and
Norma Jean Towry,

Appellants

District Court No.: **99-CV-1068-H**

-vs-

Deborah Elaine White,

Appellee

FILED

MAR 30 2000

CLERK OF DISTRICT COURT

ORDER DISMISSING APPEAL

Having entered the *ORDER APPROVING COMPROMISE SETTLEMENT OF APPEAL*, which Order shall govern further administration of the above captioned bankruptcy case, the Court finds that the above captioned appeal should be and is hereby **DISMISSED**. The bankruptcy case shall hereafter be administered consistent with the *ORDER APPROVING COMPROMISE SETTLEMENT OF APPEAL* entered/filed March 16, 2000.

AND IT IS SO ORDERED, ADJUDGED AND DECREED.

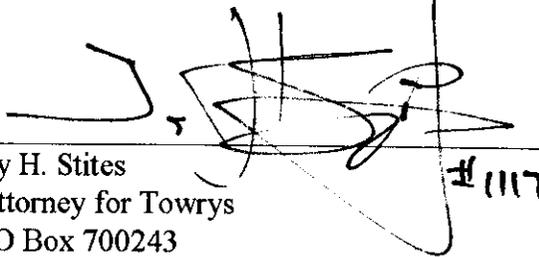

Sven Erik Holmes, United States District Court Judge

Date: 3/30/00

ORDER DISMISSING APPEAL (N.D. OK 99-CV-1068-H)
APPROVED AS TO FORM AND CONTENT:

Gayle Towry and Norma J. Towry, Secured Creditors

By:



Ty H. Stites
Attorney for Towrys
PO Box 700243
Tulsa, OK 74170-0243
(918) 481-0577

30 Mar 2000

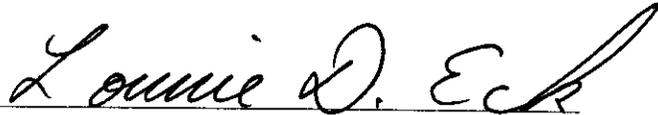
#11176

Deborah Elaine White, Debtor

By:



J. Scott McWilliams #11676
Attorney for the Debtor
1612 South Cincinnati
Tulsa, OK 74119
(918) 583-8197



Lonnie D. Eck, Standing Chapter 13 Trustee
PO Box 2038
Tulsa, OK 74101-2038
(918) 599-9901

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

DR. MARK HAYES, et al.,)
)
 Plaintiffs,)

vs.)

CAROL M. BROWNER, in her)
 capacity as Administrator)
 of the United States)
 Environmental Protection)
 Agency; et al.,)
)
 Defendants.)

OKLAHOMA WILDLIFE FEDERATION,)
 an Oklahoma non-profit)
 corporation, et al.,)
)
 Plaintiffs,)

vs.)

CAROL M. BROWNER, in her)
 capacity as Administrator)
 of the United States)
 Environmental Protection)
 Agency; et al.,)
)
 Defendants.)

Case No. 97-CV-1090-BU

ENTERED ON DOCKET
DATE MAR 31 2000

Consolidated With

Case No. 99-CV-20-BU

FILED

MAR 30 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon Plaintiffs' motion for summary judgment and Defendants' cross-motion for summary judgment and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendants, Carol M. Browner, in her capacity as Administrator of the United States Environmental Protection Agency, United States Environmental Protection Agency Region VI,

and Jane Saginaw/Gregg A. Cooke, in her/his capacity as Regional Administrator for the United States Environmental Protection Agency Region VI, and against Plaintiffs, Dr. Mark Hayes, Ed Brocksmith, Oklahoma Wildlife Federation and Save The Illinois River, Inc.

DATED at Tulsa, Oklahoma, this 30th day of March, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

DR. MARK HAYES, et al.,
Plaintiffs,

vs.

CAROL M. BROWNER, in her
capacity as Administrator
of the United States
Environmental Protection
Agency; et al.,

Defendants.

OKLAHOMA WILDLIFE FEDERATION,
an Oklahoma non-profit
corporation, et al.,

Plaintiffs,

vs.

CAROL M. BROWNER, in her
capacity as Administrator
of the United States
Environmental Protection
Agency; et al.,

Defendants.

Case No. 97-CV-1090-BU ✓

ENTERED ON DOCKET

DATE MAR 31 2000

Consolidated With

Case No. 99-CV-20-BU

FILED

MAR 30 2000 *SP*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On January 26, 2000, United States Magistrate Judge Sam A. Joyner issued a Report and Recommendation, wherein he recommended that Plaintiffs' motion for summary judgment be denied and that Defendants' cross-motion for summary judgment be granted. In the Report and Recommendation, Magistrate Judge Joyner found that based upon the record before him, the State of Oklahoma had submitted and the Environmental Protection Agency ("EPA") had approved Total Maximum Daily Loads (TMDLs) prior to the filing of Plaintiffs'

SD

lawsuit. Because TMDLs had been submitted and approved, Magistrate Judge Joyner found that a constructive submission of "no TMDLs" by the State of Oklahoma had not occurred. Consequently, Magistrate Judge Joyner concluded that Plaintiffs had no cause of action under the Clean Water Act or under the Administrative Procedures Act for failure of the EPA to perform its non-discretionary duty to promulgate TMDLs. Magistrate Judge Joyner further concluded that Plaintiffs' challenges to the content of the EPA's actions in approving the TMDLs submitted by the State of Oklahoma had to be brought pursuant to Section 706(2)(A) of the Administrative Procedures Act. Because no such cause of action under Section 706(2)(A) had been brought against Defendants, as conceded by Plaintiffs, and no constructive submission of no TMDLs had occurred, Magistrate Judge Joyner found that summary judgment in favor of Defendants on Plaintiffs' claims under the Clean Water Act and the Administrative Procedures Act was appropriate.

This matter now comes before the Court upon Plaintiffs' Objection to Report and Recommendation of Magistrate Judge, or in the Alternative, Motion to Reconsider Portions of October 29, 1998 Order in Light of Magistrate Judge's Report and Recommendation. Defendants have responded to the objection and motion. Pursuant to 28 U.S.C. § 636(b)(1), the Court has conducted a de novo review of the matter. Having done so, the Court rejects Plaintiffs' stated objections to the Report and Recommendation. The Court agrees with the analysis of Magistrate Judge Joyner and adopts the Report and

Recommendation in its entirety.¹

The Court also declines to reconsider portions of its October 29, 1998 Order as requested by Plaintiffs. The Court finds that Magistrate Judge Joyner's recommendation is consistent with the October 29, 1998 decision. In their Complaints, Plaintiffs alleged that no TMDLs had been submitted by the State of Oklahoma for 18 years and that Defendants' failure to act to establish TMDLs for the State of Oklahoma constituted arbitrary and capricious final agency action. In its October 29, 1998 Order, the Court dismissed Plaintiffs' claim, which had been brought pursuant to Section 706(2)(A) of the Administrative Procedures Act, because Plaintiffs had failed to identify any final action by Defendants relating to whether they should establish TMDLs. In the Report and Recommendation, Magistrate Judge Joyner found from the record presented that the State of Oklahoma had, in fact, submitted TMDLs for approval and that Defendants' action in approving the TMDLs had to be challenged by Plaintiffs under Section 706(2)(A) of the Administrative Procedures Act but that Plaintiffs had not brought such claim. The Court finds that Magistrate Judge Joyner's finding does not contradict the Court's finding that Plaintiffs cannot bring a Section 706(2)(A) claim for failure to act to establish

¹ In the Report and Recommendation, Magistrate Judge Joyner additionally recommended that Defendants' Motion to Strike Plaintiffs' Expert Affidavit be granted. Magistrate Judge Joyner found that the affidavit submitted by Plaintiffs addressed issues not relevant to his decision. Plaintiffs have not objected to Magistrate Judge Joyner's recommendation, and therefore, the Court adopts Magistrate Judge Joyner's recommendation in regard to Defendants' motion.

TMDL's. As stated by Defendants, there is a difference between a claim that Defendants acted arbitrarily and capriciously in failing to act to establish TMDLs and a claim that Defendants acted arbitrarily and capriciously in approving the TMDLs submitted by the State of Oklahoma.

Contemporaneous with their objection, Plaintiffs have filed an Application for Leave to File First Amended Complaint. Plaintiffs seek leave to amend their Complaint to add a claim under Section 706(2)(A) of the Administrative Procedures Act to challenge Defendants' approval of the TMDLs submitted by the State of Oklahoma. Defendants have objected to the application.

Rule 15(a), Fed. R. Civ. P., provides that leave to amend "shall be freely given when justice so requires." Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment. Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). The Tenth Circuit has held that untimeliness alone is a sufficient reason to deny leave to amend. Viernow v. Euripides Development Corporation, 157 F.3d 785, 799 (10th Cir. 1998). Whether leave to amend should be granted is within the district court's discretion. Las Vegas Ice & Cold Storage Co. v. Far West Bank, 893 F.2d 1182, 1185 (10th Cir. 1990).

In the present case, Plaintiffs seek leave to amend over two years since the filing of the original Complaint and after

Magistrate Judge Joyner has recommended that Defendants' motion for summary judgment be granted. The Court finds that Plaintiffs' application is untimely. The Court additionally finds that Plaintiffs have failed to provide sufficient justification for the undue delay.

In their application, Plaintiffs suggest that the delay in seeking leave to amend was caused by the delay of the filing of the administrative record and the subsequent position taken by Defendants in the summary judgment papers, based upon that administrative record, that the EPA had taken final agency action in regard to the State of Oklahoma's TMDL program. The Court, however, notes that the administrative record was produced to Plaintiffs in August of 1998, over 18 months ago. Clearly, Plaintiffs could have amended their Complaints before now.² The Court also notes that Defendants expressly advised Plaintiffs in their motion to dismiss to Plaintiffs' original Complaint that TMDLs had been submitted by the State of Oklahoma and had been approved by the EPA. They also advised that if Plaintiffs wished to pursue a claim regarding the EPA's decision to approve the TMDLs, they had bring such claim pursuant to the APA.

Plaintiffs represent that they are amending their Complaints

² The Court notes that Plaintiffs, Oklahoma Wildlife Federation and Save the Illinois River, Inc., re-filed their Complaint against Defendants after receipt of the administrative record. The Tenth Circuit has held that a motion to amend is subject to denial "[w]here the party seeking amendment knows or should have known of the facts upon which the proposed amendment is based but fails to include them in the original complaint." Las Vegas Ice & Cold Storage Co., 893 F.2d at 1185.

merely to clarify the claims alleged against Defendants. The Court, however, finds that Plaintiffs are not clarifying their claims, but are alleging entirely new claims against Defendants.³ As stated, Plaintiffs could have sought to amend the Complaints to allege these new claims long before now. The Court opines that Plaintiffs are seeking to advance claims that they previously could have sought leave to advance simply because of Magistrate Judge Joyner's recommendation in regard to the primary claims. This situation is similar to that in Viernow, wherein the Tenth Circuit, upholding the district court's refusal to permit an amendment, stated "we do not favor permitting a party to attempt to salvage a lost case by untimely suggestion of new theories of recovery." Viernow, 157 F.3d at 800. In the instant case, the Court concludes that Plaintiffs should not be permitted to pursue new claims some eighteen months after the receipt of the administrative record and after a recommendation of summary judgment in favor of Defendants on Plaintiffs' primary claims. The Court therefore concludes that Plaintiffs' application for leave to amend should be denied.

Based upon the foregoing, the Report and Recommendation issued by United States Magistrate Judge Sam A. Joyner (Docket Entry #74) is **AFFIRMED**. Plaintiffs' Motion for Summary Judgment (Docket Entry #44) is **DENIED** and Defendant's Motion for Summary Judgment (Docket

³ The Court notes that in their summary judgment papers, Plaintiff made clear that they were not seeking a review of the propriety of the EPA's approval of the TMDLs. However, in the proposed First Amended Complaint, Plaintiffs are seeking review of the propriety of the EPA's approval of the TMDLs.

Entry #49) is **GRANTED**. Defendant's Motion to Strike Plaintiffs' Expert Affidavit (Docket Entry #48) is **GRANTED**. Plaintiffs' Motion to Reconsider Portions of October 29, 1998 Order in Light of Magistrate Judge's Report and Recommendation (Docket Entry #77) is **DENIED**. Plaintiffs' Application for Leave to File First Amended Complaint (Docket Entry #78) is **DENIED**. Judgment shall issue forthwith.

ENTERED this 30th day of March, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 30 2000

Paul Lombardi, Clerk
U.S. DISTRICT COURT

GARY DEAN CHILDERS,)
)
Plaintiff,)
)
vs.)
)
DON ALLEN, MAX NEWBERRY,)
BOB TOMLINSON, and DANNY)
BROWN,)
)
Defendants.)

Case No. 99-CV-84-BU(E) ✓

ENTERED ON DOCKET
DATE MAR 31 2000

JUDGMENT

This matter came before the Court upon the Motion for Summary Judgment filed by Defendants, Max Newberry, Bob Tomlinson and Danny Brown and the issues have been duly considered and a decision having been duly rendered and Defendant, Don Allen, having been previously dismissed with prejudice,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendants, Max Newberry, Bob Tomlinson and Danny Brown, and against Plaintiff, Gary Dean Childers.

DATED at Tulsa, Oklahoma, this 30th day of March, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

GARY DEAN CHILDERS,)
)
Plaintiff,)
)
vs.)
)
DON ALLEN, MAX NEWBERRY,)
)
BOB TOMLINSON, and DANNY)
)
BROWN,)
)
Defendants.)

ENTERED ON DOCKET

DATE MAR 31 2000

Case No. 99-CV-84-BU(E)

FILED

MAR 30 2000 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On January 31, 2000, United States Magistrate Judge Claire V. Eagan issued a Report and Recommendation, wherein she recommended that the motion to dismiss and for summary judgment filed by Defendants, Max Newberry, Bob Tomlinson and Danny Brown, be denied and that the motion for discovery filed by Plaintiff, Gary Dean Childers, be granted. In the Report and Recommendation, Magistrate Judge Eagan found that Plaintiff's action brought pursuant to 42 U.S.C. § 1983 was not barred under the doctrine of res judicata and was not barred by the applicable statute of limitations. Magistrate Judge Eagan also found that Plaintiff had stated a claim under § 1983 for violation of his Eighth Amendment rights; that Plaintiff had stated a § 1983 claim against Defendants, Max Newberry and Bob Tomlinson, based upon the theory of supervisor liability; that Plaintiff had alleged a § 1983 claim only against

Defendants in their individual capacities and not against Defendants in their official capacities; and that Defendants were not entitled to qualified immunity on the § 1983 claim because Plaintiff had stated a claim for violation of his Eighth Amendment rights and the Eighth Amendment rights were clearly established such that a reasonable person in any of the Defendants' position would have known that their conduct violated those rights.

This matter now comes before the Court upon the timely objection of Defendants, Max Newberry, Bob Tomlinson and Danny Brown, to the Report and Recommendation. In the objection, Defendants challenge Magistrate Judge Eagan's findings that Plaintiff's § 1983 action was not barred by the doctrine of res judicata and that Defendants were not entitled to qualified immunity. Pursuant to 28 U.S.C. § 636(b)(1), the Court has conducted a de novo review of the objection. Having done so, the Court concludes that Plaintiff's action is barred by the doctrine of res judicata. The Court therefore finds that Defendants are entitled to summary judgment.

In the Report and Recommendation, Magistrate Judge Eagan, relying upon the parties' assertions, determined that Plaintiff's previous state court action did not preclude this action because the state court action was not decided on the merits. Magistrate Judge Eagan found that the state court action was decided on a procedural issue since it was dismissed based upon Plaintiff's

failure to file his tort claim against Defendants within the 180-day time period required by the Governmental Tort Claims Act, Okla. Stat. tit. 51, §§ 156, 157. As Plaintiff's action was not decided on the merits, Magistrate Judge Eagan found that the doctrine of res judicata was not applicable.

At the time she made her finding in regard to the applicability of the doctrine of res judicata, Magistrate Judge Eagan did not have copies of the decision of the Osage County District Court granting Defendants' motions to dismiss or the decision of the Court of Civil Appeals for the State of Oklahoma affirming the Osage County District Court decision. Indeed, Magistrate Judge Eagan noted that the copies of the decisions had not been provided to her. With their objection, Defendants have provided these decisions. In reviewing these decisions, particularly the Oklahoma Court of Civil Appeals's decision, the Court finds that the § 1983 claim alleged by Plaintiff in the state court action was addressed and decided on its merits. The Oklahoma Court of Civil Appeals ruled that Plaintiff's § 1983 claim was subject to dismissal because the claim was premised upon negligence and § 1983 did not provide for a cause of action premised upon negligence. The Court therefore found that Plaintiff had failed to state a claim under § 1983.¹

¹ In his papers, Plaintiff suggests that the decision of the Oklahoma Court of Civil Appeals was not final because it had never ruled on his petition for rehearing. The Court, however,

"Under res judicata, a final judgment on the merits of an action precludes the parties . . . from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90 (1980). The Court finds that the Oklahoma Court of Civil Appeals made a final decision on the merits in regard to Plaintiff's § 1983 claim. The Court also finds that Plaintiff's current § 1983 action, which is premised upon deliberate indifference, could have been raised in the state court action. Because this action could have been brought in the state court, the Court finds that the doctrine of res judicata is applicable to this case and bars Plaintiff's § 1983 action against Defendants, Max Newberry, Bob Tomlinson and Danny Brown. Consequently, the Court finds that Defendants are entitled to summary judgment as to Plaintiff's § 1983 action.²

The remaining Defendant in this case is Don Allen. The record reflects that Defendant, Don Allen, has not answered or otherwise pleaded to Plaintiff's Complaint. The Court, however, concludes that Plaintiff's action against Defendant, Don Allen, is subject to dismissal based upon the Court's finding that the doctrine of res

takes judicial notice of an order by the Oklahoma Court of Civil Appeals, attached to this Order, denying the petition for rehearing.

² Because the Court has found that Plaintiff's action is barred by the doctrine of res judicata and that summary judgment is appropriate, the Court need not address Defendants' other objections to the Report and Recommendation.

judicata is applicable and bars Plaintiff's action. The Court therefore concludes that the action against Defendant, Don Allen, must be dismissed.

In the Report and Recommendation, Magistrate Judge Eagan recommended that Plaintiff's Objection to Special Report be denied and that Plaintiff's Motion for Trial by Jury be denied. Plaintiff has not objected to those recommendations. The Court accepts and adopts those recommendations. Magistrate Judge Eagan also recommended that Plaintiff's Motion for Discovery be granted. In light of the Court's finding that the doctrine of res judicata bars Plaintiff's action, the Court finds that Plaintiff's motion is moot. The Court likewise finds that the motions which have been filed by Plaintiff since the filing of Magistrate Judge Eagan's Report and Recommendation are moot.

Based upon the foregoing, the Report and Recommendation issued by United States Magistrate Claire V. Eagan (Docket Entry #23) is **AFFIRMED in part** and **OVERRULED in part**. The Motion for Summary Judgment filed by Defendants, Max Newberry, Bob Tomlinson and Danny Brown (Docket Entry #16-2), is **GRANTED**. In light of the Court's ruling, the Motion to Dismiss filed by Defendants, Max Newberry, Bob Tomlinson and Danny Brown (Docket Entry #16-1) is **DECLARED MOOT**.

Plaintiff's Motion for Discovery (Docket Entry #18-1) is **DECLARED MOOT**. Plaintiff's Objection to Special Report (Docket

Entry #19) and Plaintiff's Motion for Trial by Jury (Docket Entry #20) are also **DENIED**.

In light of the Court granting summary judgment in favor of Defendants, Max Newberry, Bob Tomlinson and Danny Brown, Plaintiff's Request of Court (Docket Entry #27), Plaintiff's Motion for Appointment of Counsel (Docket Entry #29), Plaintiff's Motion to Produce (Docket Entry #30) and Plaintiff's Motion for Temporary Restraining Order (Docket Entry #32) are **DECLARED MOOT**.

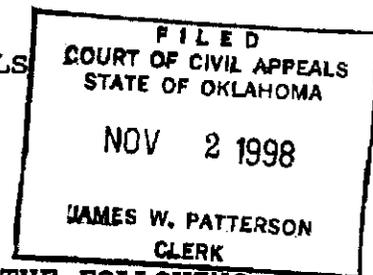
In light of the Court finding that the doctrine of res judicata is applicable and bars Plaintiff's action, the Court also finds that Plaintiff's action against Defendant, Don Allen, must be dismissed. Therefore, Plaintiff's action against Defendant, Don Allen, is **DISMISSED WITH PREJUDICE**.

ENTERED this 30th day of March, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION 4



THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF THE FOLLOWING ORDER(S):

- 89,826 JANE E. MARTIN, Appellant, v. INDEPENDENT SCHOOL DISTRICT NO. I-001 OF MCINTOSH COUNTY, OKLAHOMA, a/k/a EUFAULA PUBLIC SCHOOLS, Appellee.
Petition for Rehearing of Appellant is DENIED.
- 90,072 KATHERINE M. DETWILER, Appellant, v. KARL N. DETWILER, Appellee.
Petition for Rehearing of Appellee is DENIED.
- 90,088 GARY CHILDERS, Appellant, v. OKLAHOMA STATE INDUSTRIES; TO WIT: MAX NEWBERRY, BOB TOMLIN, DANNY BROWN, and DON ALLEN, Appellees.
Petition for Rehearing of Appellant is DENIED.
- 91,174 BARBARA JEAN DURANT, Petitioner, v. ZEBCO, Respondent; NATIONAL UNION FIRE INSURANCE, Insurance Carrier.
Petition for Rehearing of Petitioner is DENIED.
- 90,194 THELMA ALFORD, Appellee, v. CITY OF TULSA, a municipal corporation, Appellant.
Petition for Rehearing of Appellant is DENIED.
- 91,510 BOBBY LYNN STONE, II, and KATHLEEN STONE, individually, and as parents and next friend of BRITTANY STONE, a minor child, Appellants, v. ESTATE OF ANDREA SIGMAN, deceased, Appellee.
Petition for Rehearing of Appellee is DENIED.

Done in conference this 30th day of October, 1998.

John F. Reif
JOHN F. REIF
Acting Presiding Judge
Division 4

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TULSA DIVISIONS

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

AARON MICHAEL TUHACEK,

Petitioner,

vs.

STEPHEN KAISER,

Respondent.

ENTERED ON DOCKET

DATE MAR 30 2000

Case No. 97-CV-734-H (M)

F. F. J. ID

MAR 30 2000

F. F. J. Clerk
U.S. DISTRICT COURT

ORDER

By Order entered February 22, 2000, the Court found that Petitioner's amended petition for writ of habeas corpus (Docket #4) presently pending before the Court was subject to dismissal without prejudice as a "mixed petition," i.e., a petition containing both exhausted and unexhausted claims. The Court advised Petitioner that he could proceed on his exhausted claim by filing an amended petition for writ of habeas corpus asserting only his exhausted claim (claim 1) and deleting his unexhausted claims (claims 2 and 3). The Court set a deadline of March 14, 2000, for submission of the amended petition. Petitioner was advised that should he fail to submit an amended petition by the deadline, the Court would enter an order granting Respondent's motion to dismiss and dismissing this action without prejudice for failure to exhaust state judicial remedies.

To date, Petitioner has failed to submit an amended habeas corpus petition as directed by the Court. The Court also notes that no mail from the Court to Petitioner has been returned. As a result, the Court finds that because the amended petition presently before the Court is a "mixed petition" and Petitioner has an available remedy in the state courts, Respondent's motion to dismiss for failure to exhaust state remedies (#11) should be granted and this action dismissed without prejudice for failure to exhaust state remedies.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Respondent's motion to dismiss for failure to exhaust state remedies (#11) is granted.
- (2) The petition for writ of habeas corpus is **dismissed without prejudice** for failure to exhaust state remedies.

IT IS SO ORDERED.

This 30th day of March, 2000.



Sven Erik Holmes
United States District Judge

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

AARON MICHAEL TUHACEK,

Petitioner,

vs.

STEPHEN KAISER,

Respondent.

ENTERED ON DOCKET

MAR 30 2000

DATE

Case No. 97-CV-734-H (M)

FILED

MAR 30 2000

U.S. DISTRICT COURT

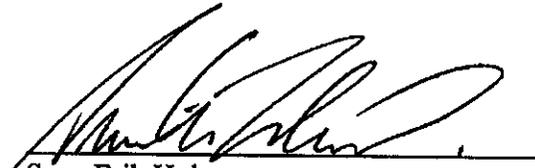
JUDGMENT

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 without prejudice to refiling same, for failure to exhaust state remedies.

IT IS SO ORDERED.

This 30th day of March, 2000.


Sven Erik Holmes
United States District Judge

15

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

HERBERT WHITEMAN, BOBBY LEE,
DONALD WHEELER, JOSHUA
SCHMEISSER, for themselves and all
others similarly situated,

Plaintiffs,

v.

NORRIS SUCKER RODS, a DOVER
RESOURCES INC. Company; D.A.
STUART COMPANY; and OTHER
UNKNOWN DOES,

Defendants.

ENTERED ON DOCKET
MAR 30 2000
DATE

No. 99-CV-611-H ✓

FILED
MAR 30 2000
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the Court's March 3, 2000 minute order requiring Plaintiffs to show cause by March 17, 2000 why they have not properly served Defendants within the time period prescribed by the Federal Rules of Civil Procedure. Plaintiffs filed their complaint on July 27, 1999 but do not appear to have served Defendants.

Plaintiffs have not provided any evidence of service or submitted any filing explaining their lack of timely service, thus failing to obey the Court's March 3, 2000 order. Rule 41(b) of the Federal Rules of Civil Procedure allows the Court to dismiss an action "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court." The Court also has inherent authority to dismiss an action for failure to prosecute. See Stanley v. Continental Oil Co., 536 F.2d 914, 917 (10th Cir.1976). Plaintiffs have not complied with the Court's order directing them to show cause, and Plaintiffs have not diligently prosecuted this matter.

Accordingly, Plaintiffs' action is hereby dismissed without prejudice.

IT IS SO ORDERED.

This 30th day of March, 2000.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff,

v.

JIMMY RAY HABER
aka Jimmy R. Haber aka Jimmy Haber;
FIRST BANK AND TRUST CO., Sand Springs,
Oklahoma;
BANCFIRST, Glenpool, Oklahoma;
STATE OF OKLAHOMA ex rel.
Oklahoma Tax Commission;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE MAR 30 2000

FILED
MAR 30 2000
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 99-CV-0994-H (J)

ORDER

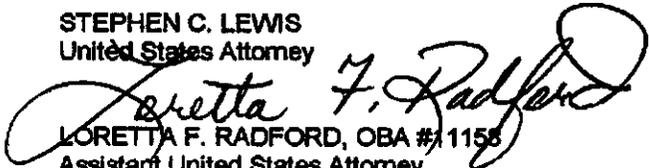
Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that this action shall be dismissed without prejudice.

Dated this 30th day of MARCH, 2000.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney


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

LFR:cse

10

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

ADVANTAGE BUILDERS AND)
EXTERIORS, INC., an)
Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
CONTROLLED CONSTRUCTION, INC.,)
a New Jersey corporation, and)
AMERICAN CASUALTY COMPANY OF)
READING, PENNSYLVANIA, a)
Pennsylvania corporation,)
)
Defendants.)

ENTERED ON DOCKET
DATE MAR 30 2000

Case No. 00-CV-144-BU(M) ✓

FILED

MAR 30 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

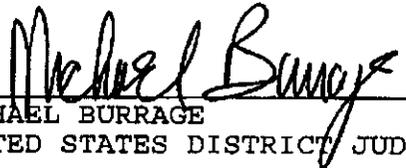
This matter comes before the Court on the parties' Joint Motion to Stay Proceedings Pending Arbitration. Upon review, the Court finds that a stay of these proceedings pending arbitration is appropriate.

Accordingly, the Court **ORDERS** as follows:

1. The parties' Motion to Stay Proceedings Pending Arbitration (Docket Entry #5) is **GRANTED**.
2. The case management conference scheduled for April 27, 2000 at 11:00 a.m. is **STRICKEN**.
3. For statistical purposes, the Clerk of the Court is **DIRECTED** to administratively close this matter in his records pending resolution of the arbitration proceedings. The parties are **DIRECTED** to notify the Court when resolution of the arbitration proceedings has

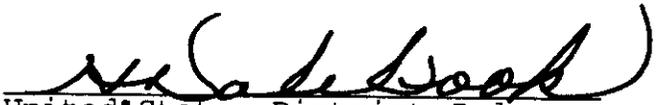
occurred so that the Court may reopen these proceedings,
if necessary, for final resolution of the action.

ENTERED this 30th day of March, 2000.

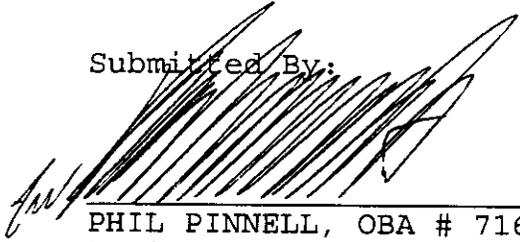


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

of \$2,832.24, 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/dlo

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

CHRISTINA M. COLLINS,)
SSN: 446-68-1840)

) Plaintiff,)

v.)

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

) Defendant.)

MAR 30 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-870-J ✓

ENTERED ON DOCKET
DATE MAR 30 2000

ORDER^{1/}

Plaintiff, Christina M. Collins, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because the ALJ's determination that Plaintiff was not disabled prior to October 2, 1996, is not supported by substantial evidence. For the reasons discussed below, the Court **REVERSES** and **REMANDS** the Commissioner's decision.

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

^{2/} Administrative Law Judge Richard J. Kallsnick (hereafter "ALJ") entered a partially favorable decision with regard to Plaintiff's disability on July 21, 1997. Judge Kallsnick concluded that Plaintiff was not disabled prior to October 2, 1996, but was disabled after that date. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on September 16, 1998. [R. at 4].

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I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was born May 23, 1959, and was 37 years old at the time of her hearing before the ALJ in May of 1997. [R. at 271]. Plaintiff completed the ninth grade and obtained her GED. [R. at 272].

Plaintiff ruptured a disk in her neck in a 1993 accident, and received a workers' compensation settlement in 1995 for approximately \$17,000. Plaintiff testified that she could no longer work due to the pain in her neck, her arm, and her hip. [R. at 277]. Plaintiff additionally testified that she had headaches each day and sometimes blacked out twice each week. Plaintiff testified that she was unable to sleep more than one or two hours at a time at night. [R. at 282].

According to Plaintiff, she weighed approximately 150 pounds in February of 1993, but after her accident gained over 80 pounds. [R. at 284]. Plaintiff stated that her appetite was not very good and that she does not eat much, but gains weight because she is unable to exercise. [R. at 284].

Plaintiff testified that she could sit for approximately 30 - 40 minutes, stand approximately 15 minutes, and walk perhaps one-half of one block. [R. at 296]. Plaintiff testified that although she could drive she had not driven in four years.^{3/} [R. at 271].

In Plaintiff's Disability Report, apparently completed August 2, 1995, Plaintiff reported that she was unable to lift over 30 pounds, that she did some cooking, that

^{3/} Plaintiff's 1995 disability report seems to contradict her 1997 testimony. In her disability report, Plaintiff indicated that she did drive. [R. at 62].

she checked her mail, that she visited friends approximately two times each week, and that she went fishing and drove. [R. at 62].

A Residual Functional Capacity Assessment, completed October 11, 1995, by Thurma Fiegel, M.D., indicates Plaintiff can occasionally lift 50 pounds, frequently lift 25 pounds, stand or walk six hours in an eight hour day, and sit six hours in an eight hour day. The doctor noted that Plaintiff's pain did not further limit her RFC. A second doctor noted that the 1995 RFC was "affirmed as written," on February 1, 1996. [R. at 74].

On April 30, 1996, Plaintiff indicated that her medications included Equate, an inhaler, and arthritis tabs. [R. at 82]. On her "medications list" completed April 18, 1997, Plaintiff wrote that she had no income, and had had no medical attention since September 1996. [R. at 83]. Plaintiff listed Tylenol, Alleve, and Advil as medications she took for pain. [R. at 83].

Plaintiff suffered an on the job accident in 1993. Plaintiff was initially treated conservatively, but the conservative treatment did not, according to Plaintiff, alleviate her pain.

An MRI of Plaintiff's cervical spine, on April 30, 1993, revealed a disk herniation at C5-C6. Plaintiff was admitted on June 2, 1993, and had surgery for her ruptured disc. [R. at 84]. Plaintiff also complained of and was diagnosed with chronic obstructive pulmonary disease. [R. at 84]. Plaintiff complained of pain and stated that she had been unable to use her left arm since the surgery. Plaintiff reported that she drank at least one six-pack of beer each day. [R. at 86].

Plaintiff was evaluated for her workers' compensation claim on October 11, 1993, Karl Detwiler, M.D., noted Plaintiff complained of pain in her neck radiating to her arm, but denied any pain radiating to her legs. Plaintiff was described as moderately obese with a disk herniation at C5-C6. He concluded that Plaintiff had had no improvement with her previous surgery and ordered an MRI and x-rays.

An MRI on October 13, 1993, was interpreted as showing a post anterior fusion at C5-6, an effacement of the anterior thecal sac at C5-6, and no other significant abnormalities. [R. at 109].

Plaintiff was examined by Randall Hendricks, M.D., on November 3, 1993. [R. at 113]. He noted that Plaintiff had been injured on February 26, 1993, and had had a microdiskectomy in June of 1993, but apparently did not do well after the surgery. [R. at 113]. Plaintiff had her back manipulated, but her problems apparently became worse. He noted that in his opinion Plaintiff had a cervical instability at C5-6, and no evidence of the prior fusion was present. He concluded that Plaintiff had a foraminal impingement and an instability problem. He recommended that Plaintiff have a revision anterior decompression and fusion. [R. at 112].

On October 27, 1993, Dr. Detwiler wrote that, in his opinion, Plaintiff needed a revision anterior cervical diskectomy at C5-C6. [R. at 115].

On November 23, 1993, Plaintiff had an anterior cervical diskectomy at C5-C6 with fusion. Plaintiff was reported as ambulating without difficulty on November 25, 1993. [R. at 123].

On February 11, 1994, approximately two months after her surgery, Plaintiff was reported as doing well, and having "normal strength." [R. at 161]. On April 26, 1994, five months after the surgery, Dr. Detwiler reported that Plaintiff had no arm pain, some neck pain, and was doing well. [R. at 157]. On August 24, 1994, Dr. Detwiler assessed Plaintiff eight months after her surgery. He reported that Plaintiff complained only of intermittent neck pain and no arm pain, and that Plaintiff was doing well. He concluded that Plaintiff could return to normal activities. [R. at 156].

Plaintiff was examined on September 21, 1994, by Kenneth R. Trinidad, D.O., for a workers' compensation evaluation. Plaintiff complained of pain in her neck which increased if she lifted anything or stooped. Plaintiff was reported as being five foot four inches tall and weighing 218 pounds. No atrophy was reported in Plaintiff's upper extremities, and Plaintiff's grip strength in her left hand was weak. The doctor concluded that Plaintiff had a 17% impairment to her cervical spine and a 40% impairment to the whole person. [R. at 161]. In his opinion, Plaintiff was temporarily totally disabled from February 26, 1993, until September 21, 1994, with the exception of three days (August 1993) in which Plaintiff attempted to work. [R. at 161]. [R. at 161]. He noted that, in his opinion, Plaintiff would be unable to return to her previous work, and would require retraining and placement in a job which did not require her to lift over 50 pounds. [R. at 164].

On September 29, 1995, Plaintiff reported chest discomfort which Plaintiff stated was sometimes stress-related and caused by yelling or walking for one and one-half blocks. [R. at 171].

In August 1996, Plaintiff was examined based on complaints of increasing hip and groin pain over the preceding six months, and in particular the three months prior to the examination. [R. at 262]. Plaintiff was described as moderately obese with an antalgic gait. X-rays revealed necrosis, and Bradford Boone, M.D., concluded that Plaintiff should have a total left hip arthroplasty. [R. at 262].

In October 1996, Plaintiff was examined by Dr. Boone, in regard to Plaintiff's complaints of increasing left hip pain. [R. at 186]. Plaintiff described her hip pain as increasing in intensity over the prior eight or nine months. The doctor wrote that the pain significantly interfered with Plaintiff's ability to perform her activities of daily living. He noted that Plaintiff was 5 foot two inches tall and weighed 236 pounds. Plaintiff had surgery for left hip degenerative joint disease in October 1996. [R. at 185]. Plaintiff's discharge instructions were to avoid excessive activity and maintain her hip exercises. [R. at 232].

Plaintiff was examined two weeks after her surgery on October 21, 1996, and was reported as healing "nicely." Plaintiff walked with a walker. [R. at 260].

Plaintiff was examined on May 27, 1997, by Dr. Trinidad. He noted that Plaintiff complained of pain and stiffness in her left hip and knee, and stated she was unable to sit or stand for more than ten minutes. [R. at 263]. Plaintiff was reported as being five foot four and one-half inches tall and 240 pounds. Plaintiff was described as having an antalgic gait favoring her left leg, atrophy of her left thigh, and decreased sensation and strength in her left arm and left hip. [R. at 263]. Plaintiff's x-rays revealed a fusion at C5-6, and a hip arthroplasty. In Dr. Trinidad's opinion,

Plaintiff was significantly impaired due to injuries to her left hip, neck, left arm, and chronic obstructive pulmonary disease. [R. at 263]. In his opinion, Plaintiff was unlikely to be employable over the next twelve months and perhaps indefinitely. [R. at 265].

Plaintiff testified that when Dr. Detwiler released her he informed her that she could perform light work activity. According to Plaintiff, however, the only job she had ever worked was not light work, and she did not know of any job that she could perform. [R. at 293].

Plaintiff's medication list indicates that she has taken only Tylenol and over-the-counter medications since October of 1996. [R. at 294].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

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

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

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

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

42 U.S.C. § 423(d)(2)(A).^{4/}

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

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

^{4/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

"The finding of the Secretary^{5/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

III. THE ALJ'S DECISION

The ALJ issued a partially favorable decision on July 21, 1997. [R. at 25]. The ALJ concluded that Plaintiff became disabled on October 2, 1996, but that Plaintiff was not disabled prior to that date. [R. at 13]. The ALJ found that prior to October 2, 1996, Plaintiff was capable of performing light and sedentary work activity. [R. at 16].

^{5/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

IV. REVIEW

Plaintiff asserts that the ALJ's decision is not supported by substantial evidence.^{6/} Plaintiff notes that the ALJ found her disabled as of the date of her hip replacement surgery, but that the record indicates that she was disabled prior to that date. Both Plaintiff and Defendant agree that Plaintiff is insured for the purposes of disability only through March 31, 1996. [R. at 22]. The ALJ found Plaintiff disabled as of October 6, 1996. Plaintiff contends that the ALJ's finding limits her recovery to supplemental security income which is less than she would receive if she was awarded disability income. Plaintiff asserts that she was disabled on February 26, 1993, and that the ALJ erred by not finding her disabled prior to October 2, 1996.

In Reid v. Chater, 71 F.3d 372 (10th Cir. 1995), the Tenth Circuit Court of Appeals noted the Social Security regulations governing establishing the "onset date."

Plaintiff first challenges the ALJ's findings that the disability onset date was after June 30, 1989, contending the ALJ failed to follow Social Security Ruling 83-20 by not calling a medical advisor at the hearing. Ruling 83-20 (West's Soc. Sec. Rptg. Serv. Rulings 1983-91, at 49 (1992)), defines the onset date as "the first day an individual is disabled as defined in the Act and the regulations." Factors relevant to the determination are the claimant's allegation of an onset date, his work history, and the medical evidence, with medical evidence being the primary element in determining onset date.

Ruling 83-20 recognizes that it sometimes may be necessary to infer the onset date. The ALJ then should call on the services of a medical advisor at the hearing. Id. at

^{6/} Defendant states that Plaintiff has not raised any specific error. Although Plaintiff's brief could have more precisely framed the issue, Plaintiff clearly asserts that the record does not contain substantial evidence to support the ALJ's decision that she is disabled only as of October 2, 1996, and not prior to that date.

51. However, a medical advisor need be called only if the medical evidence of onset is ambiguous.

Reid, 71 F.3d at 373-74. The regulation provides:

In some cases, it may be possible, based on the medical evidence to reasonably infer that the onset of a disabling impairment(s) occurred some time prior to the date of the first recorded medical examination, *e.g.*, the date the claimant stopped working. How long the disease may be determined to have existed at a disabling level of severity depends on an informed judgment of the facts in the particular case. This judgment, however, must have a legitimate medical basis. At the hearing, the administrative law judge (ALJ) should call on the services of a medical advisor when onset must be inferred. If there is information in the file indicating that additional medical evidence concerning onset is available, such evidence should be secured before inferences are made.

Ruling 83-20, 1983 WL 31249 (emphasis added).

The ALJ concluded that Plaintiff was disabled as of October 2, 1996, the date of her hip surgery. The ALJ does not specifically discuss why he determined October 2, 1996 as the onset date. Plaintiff's medical records indicate that Plaintiff was examined in August 1996 complaining of increasing hip pain over the preceding six months. [R. at 262]. Plaintiff had surgery in October 1996, and the doctor's notes indicate Plaintiff described her hip pain as increasing in intensity over the preceding eight or nine months. [R. at 186]. The record is simply unclear as to why the ALJ concluded that Plaintiff was disabled as of October 2, 1996. If the ALJ determined Plaintiff was disabled based on the injuries to her hip which required surgery, the medical record suggests that that injury was increasing in severity prior to the date of surgery. Consequently, Plaintiff may have been disabled prior to the date of the

surgery. If Plaintiff was disabled prior to March 1996, she may qualify for disability benefits. On remand, the ALJ should determine the onset date of Plaintiff's disability, paying particular attention to the factors listed by the Social Security Administration in SSR 83-20. The ALJ should then discuss the factors which were considered in the ALJ's opinion.

In addition, the record suggests that Plaintiff may have been disabled for a one year period in 1993. Plaintiff was injured, on the job, in February 1993. Plaintiff was initially treated conservatively. Plaintiff had surgery related to the injury in June of 1993, but the surgery was termed unsuccessful. Plaintiff did attempt to work four days, but was unable to return to work. Plaintiff had a second surgery in November 1993. [R. at 123]. By February 1994, Plaintiff's doctor reported that she was "doing well." In August 1994, Plaintiff's doctor reported that she could return to normal activities. [R. at 156]. Therefore, Plaintiff may have been disabled from the date of her work injury (February 1993) until her doctor released her to return to work (August 1994). On remand the ALJ should additionally consider whether or not Plaintiff was disabled for any one year period during this time frame.⁷¹

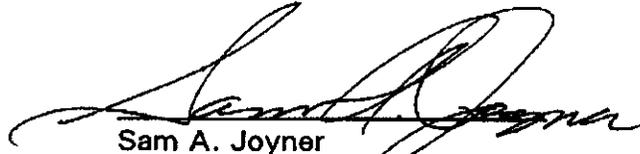
V. CONCLUSION

The ALJ did not discuss his decision with regard to the onset of Plaintiff's disability. On remand, the ALJ should evaluate the onset date, with regard to the social security regulations, and discuss the reasons supporting his decision.

⁷¹ The Court notes that the record suggests Plaintiff may have a protective filing date of June 26, 1995. [R. at 12].

For the above stated reasons, this action is **REVERSED AND REMANDED** to the Commissioner for further proceedings consistent with this opinion.

Dated this 30th day of March 2000.



Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NICKI A. SNIDER
SSN: 450-66-4848,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0762-EA ✓

ENTERED ON DOCKET

DATE MAR 30 2000

F I L E D
MAR 30 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Claimant, Nicki A. Snider, 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 Administrative Law Judge ("ALJ") and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

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

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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 January 9, 1943, and was 54 years old at the time of the ALJ's decision. She has a General Equivalency Diploma, as well as vocational training and certificate as a Licensed Practical Nurse (“LPN”). Claimant has past relevant work experience as an LPN in hospitals, nursing homes and in-home patient care. Claimant alleges an inability to work beginning November 30, 1990, due to connective tissue disease, rheumatoid arthritis, and anxiety disorder. She has also claimed to suffer from personality disorder NOS (not otherwise specified), polysubstance abuse disorder, peptic ulcer disease, hepatitis B, and status post closed head injury. (Claimant fell and hit her head in 1986.)

Her subjective complaints have included severe disabling pain, fatigue, headaches, dizziness, blurred vision, nausea, vomiting, flashbacks, loss of memory, mental confusion, panic attacks, impaired judgment, profuse sweating, palpitations, chest pain, muscle twitches, irritability, angry outbursts, hearing dysfunction, fainting spells, and nervousness to the extent that she cannot engage in any work activities. She initially claimed to be disabled due to substance (drug) addiction.

Procedural History

On April 30, 1993 claimant applied for disability benefits under Title II (42 U.S.C. § 401 et seq.). Her application for benefits was denied in its entirety initially on July 9, 1993, and she did not pursue further review. On March 24, 1994, claimant filed a second application for Title II benefits. The second application was denied in its entirety initially and on reconsideration. A hearing was held on June 16, 1995, but the ALJ recessed the hearing to give claimant's attorney an opportunity

to complete the record. A second hearing was held before a different ALJ on February 19, 1997, in Tulsa, Oklahoma. By decision dated March 28, 1997, the second ALJ, Stephen C. Calvarese, found that claimant was not disabled at any time through the date of the decision. On July 31, 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 unskilled work at all exertional levels. 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 as error that the ALJ improperly disregarded the opinion of claimant's treating physician,² George F. McCoy, Ph.D. 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

² The Court recognizes that Dr. McCoy is a psychologist, not a physician, but the regulations direct the ALJ to consider "medical opinions from physicians and psychologists . . ." 20 C.F.R. § 404.1527(a)(2), and psychologists may be considered a "treating source." *See id.*, § 404.1527(d). For ease of reference, the court will refer to Dr. McCoy as one of claimant's treating physicians throughout the remainder of this Order.

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).

Dr. McCoy began treating claimant at the Indian Health Care Resource Center of Tulsa, Inc. (the "Center") on October 29, 1996, although other doctors also saw claimant at the Center for other problems, and they occasionally noted her mental problems as well. (See R. 246-50, 316-35, 343-61) On February 14, 1997, Dr. McCoy affirmed that claimant had been provided health care at the Center. (R. 361) He summarized her physical problems and then stated:

Ms. Snider-White also has a psychiatric disorder which significantly impairs her ability to function. This condition, which as been diagnosed as an anxiety disorder, is characterized by chronic heightened worry with frequent acute episodes of profuse sweating, heart palpitations, chest pains, muscle twitches, irritability, angry outbursts, severe headaches, vision and hearing dysfunctions, fainting, and intense dread. She is unable to control these symptoms and becomes afraid of being afraid, thus aggravating and prolonging the acute episode. Ms. Snider-White has many abnormal fears which cause her to worry excessively (fears of bridges, fires, driving, taking medicines, having a heart attack, being assaulted, crowds, light). During acute episodes, which may last three or four days, Ms. Snider-White becomes totally dysfunctional, often staying in bed.

Treatment given Ms. Snider-White for the psychiatric disorder combines antidepressant and antianxiety medications (Nortriptyline, Alprazolam, and Sertraline) prescribed daily with bi-weekly psychotherapy sessions. Ms. Snider-White's health condition has not improved with treatment, but has in fact steadily declined. It is anticipated that her condition will continue to deteriorate since her physical health is also of a progressive nature and will take away resources which might otherwise be available for assisting recovery. Ms. Snider-White has not been able to work for more than three years.

(Id.) This report was one month before the ALJ's decision.

Dr. McCoy also completed a Mental Residual Functional Capacity Assessment form in which he indicated that numerous mental abilities were markedly limited in claimant within the categories of understanding and memory, sustained concentration and persistence, social interaction, and adaptation. (R. 362-63) In particular, Dr. McCoy determined that claimant was markedly limited in her ability to: (1) remember locations and work-like procedures; (2) understand and remember detailed instructions; (3) carry out detailed instructions; (4) maintain attention and concentration for extended periods; (5) perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances; (6) sustain an ordinary routine without special supervision; (7) work in coordination with or proximity to others without being distracted by them; (8) complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods; (9) interact appropriately with the general public; (10) accept instructions and respond appropriately to criticism from supervisors; (11) get along with coworkers or peers without distracting them or exhibiting behavioral extremes; (12) respond appropriately to changes in the work setting; (13) be aware of normal hazards and take appropriate precautions; and (14) set realistic goals or make plans independently of others. (Id.) Dr. McCoy described various manifestations and consequences of claimant's anxiety disorder, including her panic attacks, her abnormal fears, and her deteriorating mental health. (R. 364)

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 ALJ rejected Dr. McCoy's findings in this manner:

Although her treating psychologist, George F. McCoy, Ph.D., was of the opinion, in February 1997, that claimant exhibited numerous markedly limited abilities in all areas of function, the physician's assessments are not in accord with his treatment notes of claimant (Exhibits 50-52) or the findings of the consultative psychiatrists. Accordingly, the undersigned gives more weight to the findings of the consultative psychiatrists as supporting the abilities to perform a variety of activities of daily living, social functioning, attention and concentration and no deterioration or decompensation at all relevant times herein.

(R. 17) The ALJ did not discuss which treatment notes he deemed inconsistent with Dr. McCoy's mental assessment. Nor did he indicate specifically how or why the treatment notes failed to support Dr. McCoy's assessment.

The treatment notes show that claimant visited the Center as early as December 1992. Abel Lau, M.D., noted that she had a history of depression that was treated at one time with antidepressants. (R. 248) On May 10, 1994, claimant visited the Center complaining of fatigue, irritability, crying, dysthymia, and insomnia. Progress notes indicate that claimant had depression, and doctors at the Center started her on Zoloft. On October 26, 1995, M. Scott, M.D., noted that claimant had many vegetative signs, as well as compulsive behaviors, such as constantly checking the stove, doors and windows. He also noted that she had many phobias (bridges, driving, medicines). He recommended that she be evaluated for depression due to her anxiety and phobias. (R. 360) On March 19, 1996, Dr. Scott noted that claimant was depressed, anti-depressants were

not helping, she had sleep problems, and she was taking Zoloft and Nortriptyline. (R. 322) On October 22, 1996, Dr. Scott reported that claimant had anxiety, primarily due to fear of violence by her husband. (R. 316)

On October 29, 1996, Dr. McCoy noted claimant's anxiety with depressive episodes. She looked angry and unhappy. She expressed fears that her husband would find her and harm her; yet, when Dr. McCoy got her to talk about her favorite granddaughter, she was "transformed, has no restriction in movement, relaxes, laughs and suddenly says 'I don't know why I'm feeling better.'" He began to pressure her to get out of the house and have more activities. Yet, he diagnosed her as having generalized anxiety disorder. (R. 359) On November 19, 1996, claimant saw Dr. McCoy and again reported anxiety with depressive episodes, along with somatic complaints. He again diagnosed generalized anxiety disorder. He encouraged her to get out and do things, but to continue her prescription medications. (R. 357)

On December 17, 1996, she told Dr. Scott that she was concerned about house fires and would check the stove and floor furnace "500 x/d!" She also checked the door 500 times per day to make sure it was locked. She even got up at night to check it. He noted "OC behaviors"³ as part of his diagnosis. (R. 350) On January 24, 1997, Dr. McCoy again indicated his diagnosis of generalized anxiety disorder. (R. 346) She reported having a panic episode. (Id.) On the same day, Dr. Scott reported that her "OC tendencies are not improved." Claimant felt compelled to check the locks, furnace, stove, gate, and windows before she could sleep. Dr. Scott recommended that she make a list of concerning behaviors and check the date and time before bed. (R. 345)

³ The Court assumes that "OC" stands for "Obsessive-Compulsive."

The last note from the Indian Health Clinic is dated February 13, 1997. Dr. Scott diagnosed her as having tension headaches, anxiety, and arthralgia. (R. 343) Throughout the time claimant visited the Indian Health Center in 1996 and 1997, she obtained medication and refills for medication to treat her anxiety and depression. Dr. McCoy accurately summarized his own treatment notes and those of other doctors at the Indian Health Center. His report was not brief, conclusory, or unsupported by medical evidence.

The two consultative psychiatrists who evaluated claimant based their reports on one-time examinations which took place four and three years before the ALJ decision, respectively. Donald R. Inbody, M.D., examined claimant on June 22, 1993. (R. 258-60) He diagnosed her as having “[p]olysubstance drug dependency and addiction, especially to narcotics, currently being treated with methadone treatment” as well as “[g]eneralized anxiety disorder, moderate” and “[p]ersonality disorder, NOS.” (R. 260) He noted that she had “[h]eadaches, etiology unknown, currently being treated” and that “[p]sychosocial stressors are moderate.” (*Id.*) He gave a global assessment of functioning (GAF) of 60 (current and highest in the past year).⁴ Dr. Inbody did not think she was able to handle her own funds because of her ongoing drug addiction. (*Id.*)

Ronald C. Passmore, M.D., evaluated claimant on May 17, 1994. (R. 264-66) He remarked that the only medical information he had was Dr. Inbody’s report from 1993. Dr. Passmore’s impression was that claimant had “[p]oly-substance drug dependency, being treated in a methadone program, where she has now been for three years. She does have some anxiety symptoms but there are moderate to minimal.” (R. 265) He also reported that she had personality disorder NOS, she

⁴ A score of 51-60 indicates moderate symptoms or moderate difficulty in social, occupational, or school functioning. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders § 245.2 (4th ed.1994).

looked healthy, her stressors were moderate, her functioning good, and she was capable of handling her own funds. (R. 266)

Claimant testified at the first hearing that she was not forthright with the consultative examiners because her daughter told her "not to go in there acting crazy, because they'd libel [sic] to put me in a State Hospital or something." (R. 57-58) She did not tell them about her prior hospitalizations or her prior incidents of decompensation in the workplace. Claimant also claimed that at least one of the consultative examiners turned on a 10-15 minute timer when she entered the room for her examination. (R. 74, 111) She apparently inferred that he would not allow the examination to proceed past 10 or 15 minutes.

The first hearing was recessed, in part, because the prior ALJ determined that the consultative examinations were not reliable, given the lack of candor by claimant at the examinations. (R. 281) The prior ALJ instructed claimant's attorney to submit a letter listing each of the hospitalizations that claimant had not disclosed, listing each medical source that had information on any other medical problems, and advising whether additional consultative examinations would be necessary. (Id.)

Claimant's attorney submitted the letter on June 22, 1995. He stated that he had not been able to locate a psychiatrist who would see claimant on a sliding scale fee basis. The Associated Centers for Therapy (ACT) and the Family Mental Health Center had rejected claimant for evaluation and treatment because she was not seeking treatment there and would not discontinue taking methadone. Claimant's attorney set up an appointment for claimant with David Patterson, a counselor who held a master's degree and specialized in drug and alcohol abuse cases. (R. 282) The attorney advised that he would submit new mental evidence from Patterson. (R. 284)

However, the attorney also requested that the ALJ order a consultative psychiatric examination "specifically designed to detect post traumatic stress syndrome, personality disorders (antisocial), organic brain dysfunction from drug abuse, and psychotic hallucinations and delusions." He also requested that the examiner document the correct number of hospitalizations claimant had for mental or substance abuse problems, inquire into the "flashbacks" claimant said she suffered when she drove, and document the correct number of times claimant decompensated under work-related conditions. (R. 282-83) The attorney specifically stated:

In spite of the new evidence that Ms. Snider wishes to submit from her counselor, I feel that it is important that she still receive a psychiatric consultative examination from SSA. This is due to the very incomplete nature of the reports of Dr. Inbody (File exhibit 21) and Dr. Passmore (File exhibit 23). Both doctors failed to question the claimant on such topics as her "flashbacks" whenever she approaches a stop light in her car, the fact that Ms. Snider's daughter drives Snider nearly everywhere Snider goes, Snider's belief that her dead relatives control her life and counsel her, her dramatic and constant decompensations at every job she has held since 1979, and so forth. I would ask that SSA's official position on this claimant, through a consultative exam by a doctor of SSA's own choice, be amended to at least contain references to these most important facts of the case. While the claimant's attorney can submit new evidence that addresses these same issues, it is still important to have SSA develop its own independent view of them.

(R. 283) The SSA did not order additional consultative examinations. There is no explanation in the record as to why. A new ALJ began handling the case, and claimant obtained new counsel because she felt that her prior counsel was too busy. (R. 292) Claimant testified that she saw David Patterson a few times, but she stopped going to him because he was not a "real doctor" and she did not feel that he could help her. (R. 108) The SSA requested records from Patterson (R. 295), but he did not respond.

The ALJ did not mention that the prior ALJ questioned the reliability of the 1993 and 1994 consultative examinations. Nor did he mention the request by claimant's attorney for another

consultative examination. He did not order any consultative examinations or explain why he chose not to do so. The ALJ did not show good cause for rejecting Dr. McCoy's report. Dr. McCoy's treatment notes are not inconsistent with his report, and the vocational expert testified that claimant could perform no jobs with the restrictions noted by Dr. McCoy. (R. 128) The consultative examination reports, upon which the ALJ relied, are unreliable because of claimant's lack of candor. The ALJ's failure to give legitimate reasons for disregarding the treating physician's report is reversible error.⁵

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, 838 F.2d at 1132. The decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

DATED this 30th day of March, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

⁵ The Court notes that the ALJ and the Commissioner discussed claimant's physical problems as well, but claimant did not raise any issues in this appeal as to the ALJ's assessment of her physical impairments. Hence, the Court declines to review the ALJ's findings regarding her physical capabilities.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 30 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

NICKI A. SNIDER
SSN: 450-66-4848,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

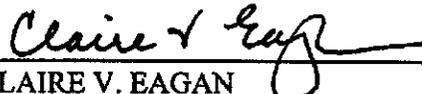
Case No. 98-CV-0762-EA ✓

ENTERED ON DOCKET
MAR 30 2000
DATE _____

JUDGMENT

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

It is so ordered this 30th day of March, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GARY L. JONES,
SSN: 448-52-0579,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0907-EA ✓

F I L E D
MAR 30 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE MAR 30 2000

ORDER

Claimant, Gary L. Jones, 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 Administrative Law Judge ("ALJ") and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

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 July 20, 1949, and was 47 years old at the time of the ALJ's decision. He has a high school education. Claimant has worked as a building maintenance chief engineer, a maintenance apprentice, and a cattle owner/operator. He alleges an inability to work beginning February 16, 1995, due to low back pain caused by three herniated discs and spondylolisthesis.

Procedural History

On April 16, 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 ALJ Stephen C. Calvarese was held March 18, 1997, in Tulsa, Oklahoma. By decision dated July 11, 1997, the ALJ found that claimant was not disabled. On October 1, 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 complete range of medium work, subject to only occasional stooping. 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.

Review

Claimant asserts as error that the ALJ: (1) improperly rejected the opinion of claimant's treating physician; and (2) failed to provide the appropriate weight to the opinion of the vocational expert. Claimant also challenges the ALJ's determination that claimant's pain allegations were not credible. The ALJ rejected the opinion of claimant's treating physician as part of the ALJ's pain and credibility determination.

Pain/Credibility and Treating Physician Opinion

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 must explain why specific evidence relevant to each factor led him to conclude that the claimant's subjective complaints were not credible. Kepler, 68 F.3d at 391.

The ALJ considered claimant's subjective complaints of disabling pain. He specifically referenced the parameters and the criteria set forth in Luna, as well as 20 C.F.R. § 404.1529 and Social Security Ruling 96-7p. However, the ALJ analyzed very few of the relevant factors to determine the weight to be given claimant's subjective allegations of pain.² The ALJ explained why specific evidence led to his conclusion that claimant's subjective complaints were not fully credible (R. 14-15), but specific evidence does not necessarily constitute *substantial* evidence sufficient to support his conclusion.

The ALJ recited the medical evidence from three physicians. On December 20, 1995, Jim Martin, M.D., examined claimant for purposes of providing claimant with an impairment rating. (R. 171) He found that claimant had herniated disks at the L4 and L5-S1 levels of his spine with a first degree spondylolisthesis, and he gave claimant a total permanent partial impairment rating of 63 % to the whole person. (R. 13; 171-73) He opined that claimant was "100% permanently, economically disabled and unemployable." (R. 173) The ALJ mentioned Dr. Martin's findings, but not his impairment ratings. (R. 13) Dr. Martin specifically referenced and relied, in part, on the findings of Chris M. Boxell, M.D. (R. 171)

² As part of his analysis, and by reference to claimant's 1995 income tax returns, the ALJ determined that claimant had been performing substantial gainful activity through 1995. (R. 14; see R. 103-26) However, the ALJ also found that claimant had not been engaged in any substantial gainful activity since February 16, 1995. (R. 16) The ALJ did not stop at step one, and in fact found no substantial gainful activity since February 16, 1995. Thus, the inconsistency is immaterial.

Dr. Boxell, a neurological surgeon, examined claimant from June 6, 1994 until April 9, 1996. When claimant initially saw Dr. Boxell, on June 6, 1994, he was not taking any medication except when his back hurt. When that happened, he used Voltaren, Norflex, Vicodin, Relafen, and chlordiazepoxide. (R. 185) Claimant was in no acute distress but walked with a slight limp. (R. 185) Radiographic studies showed degenerative disk disease on CT scan with small central disk herniations at L4-5 and L5-S1. Claimant also had a grade I spondylolisthesis of L5 on S1 which was lytic in nature. (R. 186) Dr. Boxell discussed the option of surgical treatment, and specifically informed claimant that the procedure he would use had not been approved by the FDA. Claimant was "not ready" for surgery at that time. (R. 186)

Claimant saw Dr. Boxell again on May 11, 1995. Dr. Boxell's findings did not differ significantly from his June 6, 1994 findings, and he recommended surgery again. Claimant expressed fear of the procedure and elected not to have surgery again. (R. 184) On May 18, 1995, Dr. Boxell completed a form for an insurance company which indicates that claimant was totally disabled and could not work at his current job or any other work. (R. 180) Nor did Dr. Boxell consider claimant a candidate for occupational rehabilitation. (Id.) Dr. Boxell repeated those findings in August 1995. (R. 182-83) However, he stated on this second form that claimant could resume work or become employed on January 1, 1997. (Id.) Dr. Boxell saw claimant in July and August, 1995, and reported that claimant's condition had worsened. Claimant continued to indicate that he was not ready for surgery. (R. 177-79)

On April 9, 1995, Dr. Boxell reported: "Gary Jones professes to ongoing back and leg pain. He does not feel that he could resume his prior employment. He has been out of work now for 14 months. On examination, he has a lot of functional overlay today. He displays a lot of grimacing

and back holding. His effort is considerably poorer than on any prior visit to see me.” (R. 176) Dr. Boxell noted that claimant did not want to have surgery for his back problem. He summarized his impressions as follows:

I think that [claimant] has reached maximum medical benefit. I doubt that his condition is going to change any time within the near future. He does not desire a trial of return to work. I think he should simply accept a permanent partial disability rating and get on with his life. He has already made application for Social Security Disability benefits. I wish him well in his pursuit. I am very doubtful at this stage that if he were to elect to pursue surgical treatment, that he would get a good outcome. I do not think he is motivated to return to work at this time.

(R. 176) The ALJ recounted Dr. Boxell’s April 9, 1995 report, in part, in his decision. (R. 13) Finally, the ALJ referenced the report by Mark A. Hayes, M.D., who examined claimant on February 13, 1997. He noted that Dr. Hayes “found a reduced flexion and extension of the back. There was a symmetric weakness of the tibialis anterior bilaterally, but no other weakness.” (R. 13; see R.226)

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 findings were not supported by substantial evidence because they were based on the ALJ’s improper rejection of the treating physician’s opinion.

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 issue here is whether the ALJ gave specific, legitimate reasons for disregarding certain of the treating physician's opinions.

The ALJ found that claimant was not credible because in April 1996 Dr. Boxell stated that claimant "had a great deal of functional overlay, that is, he was exaggerating his symptoms." (R. 15; see R. 176) The ALJ gave full weight to that opinion because Dr. Boxell "detailed the reasons for claimant's exaggeration." (Id.) However, the ALJ did not give any weight to Dr. Boxell's opinions set forth in the forms he completed in May and August 1995, which indicate that he thought claimant was totally disabled, at least until 1997. The ALJ found statements indicating that claimant was disabled to be "inconsistent with the objective medical evidence and the evaluation of the claimant's credibility." (R. 15) The only objective medical evidence which the ALJ relies upon is the February

1997 two-page letter written by Dr. Hayes. The ALJ credited Dr. Hayes' opinion, stating "Dr. Hayes' examination of the claimant showed that there was evidence which was consistent with mild to moderate pain because he did not find any exaggerated problems with the claimant's back." (Id., see R. 226) He also found that Dr. Hayes' finding with respect to the lower extremities are consistent with a medium exertional capacity. (Id.)

Dr. Hayes' opinion does not provide the necessary support for the ALJ's conclusion. Dr. Hayes notes that he had not reviewed Dr. Boxell's records or radiographs, and he did not order any radiographs for himself because he was trying to save claimant money. (R. 226) Dr. Hayes recommended "for further consultation he should obtain his records and radiographs." (Id.) Without claimant's records or radiographs, Dr. Hayes noted that claimant

was actually having a pretty good day. His strength was satisfactory. He had quite a bit of limitation with extension. Flexion was limited as well but not as much as extension. He had symmetrical weakness of the tibialis anterior bilaterally but no weakness of the extensor hallucis longus, peroneal muscles or gastrosoleus muscle. His ankle reflexes were satisfactory. The pulses were good in the lower extremities. Straight leg raising maneuver caused back pain but not any radicular symptoms down to his calf or feet.

(Id.) Dr. Hayes also told claimant that Dr. Boxell was an excellent physician and surgeon. (R. 227)

Dr. Hayes expressed no opinion regarding the severity of claimant's pain or any physical or mental restrictions. Dr. Hayes mistakenly stated that claimant "currently is caring for one of his grandbabies." (R. 226) At the hearing, the ALJ determined that claimant's wife was caring for a grandchild, but not in claimant's home. (R. 29, 60-61) There are no other records from Dr. Hayes in the record even though claimant testified that he was going for a follow-up evaluation with Dr. Hayes. (See R. 36, 75-76)

The ALJ did not discuss any records submitted by claimant's treating family physician, David M. Nierenberg, M.D., who referred claimant to Dr. Boxell. That evidence provides a strong indication of the severity of claimant's back problems, even before claimant stopped working. On July 1, 1993, claimant called Dr. Nierenberg requesting an appointment because he was "down in back." (R. 221) He indicated that he had "stayed down" all week using Flexeril and Norflex without relief. (Id) Dr. Nierenberg saw claimant on July 2, 1993. (R. 214) Claimant reported that his back problems had been "bad" for about a week. He informed Dr. Neirenberg about prior examinations and CT scans which revealed foraminal narrowing and spondylolisthesis in his spine. He stated that he had a "flare" of back problems every few months. He had pain in his hips and buttocks, as well as spasms. Lying on his back and prolonged standing or walking caused pain. Dr. Neirenberg reported that claimant was very uncomfortable. His examination of claimant indicated "paraspinous spasm in the LS region. There is straight leg raising which is positive at 45 to 50 degrees on the right and 60 degrees on the left. DTR's are 1+ in the knee and ½+ at the ankle. No sensory loss. Strength is symmetrical in the lower extremities with exception of a questionable slight decrease in great toe strength on the left." (R. 214) Dr. Nierenberg recommended strict bedrest for three days, instructed claimant to lie on his side with his knees up and a pillow between his knees, and prescribed Tylox, Flexeril, and Relafen for claimant.

On July 23, 1993, Dr. Nierenberg gave claimant a complete physical examination. (R. 217-19) He noted that claimant had "chronic back pain with radiculopathy - history of spondylolisthesis and foraminal encroachment by CT & MRI, 1991 and 1992." (R. 219) On July 27, 1993, Dr. Nierenberg reviewed the results of some laboratory tests on claimant and indicated that he would probably refer claimant to Dr. Hayes. (R. 214) On May 16, 1994, claimant again called Dr.

Nierenberg to report that he had "been down all week with back pain" and he had not gone to see Dr. Hayes because Dr. Hayes was not on his insurance plan. (R. 212) Dr. Neirenberg saw claimant on May 17, 1994. They discussed claimant's recurring back problems and the recent "flare" he had experienced. Claimant was hesitant to proceed with any invasive procedures, but agreed to see Dr. Boxell. (R. 212)

On January 27, 1995, Dr. Nierenberg examined claimant again. (R. 205-09) Dr. Nierenberg reported Dr. Boxell's findings from June 1994, and he noted: "I feel the patient will likely need surgery in the future but it is hard to tell because he acts like he hurts all the time but doesn't seem to be very eager to get anything done about it. (R. 208). He recommended, among other things, that claimant follow up with Dr. Boxell and participate in a diet, exercise and weight loss program. (Id.)

On April 11, 1995, claimant called Dr. Nierenberg to report lower back pain, that his right knee "goes out" periodically, and he had spasms in his left shoulder and neck. (R. 201) Dr. Nierenberg saw him on April 14, 1995. He stated:

The patient continues to postpone surgery because of his fear of having possible multiple surgeries and missing time from work. The patient is already missing time from work in that he has to take time off because his back hurts and he gets hip and buttock pain and occasionally pain down into the right lower leg. He has had a lot more trouble with it here recently. He even says his right knee occasionally "gives out". However, he is also having problems with the right knee with intermittent sharp pains and crepitus when he does heavy activity.

(R. 201) Dr. Nierenberg again referred him to a neurosurgeon or orthopaedist for consideration of back surgery. He indicated that he could not offer claimant any other options. (Id.)

Dr. Nierenberg saw claimant again on July 27, 1995. (R. 199) He noted claimant's continuing problems with his back, as well as claimant's continuing postponement of surgery. He indicated that claimant had not worked since February, that he continued to have flares of pain, and

he also had some neck pain and spasm secondary to his low back pain. (Id.) Claimant had a physical examination again on February 7, 1996. His back problems, treatment, and recommendations were consistent with Dr. Neirenberg's January 27, 1995 examination. (R. 195-98) Dr. Nierenberg stated: "He still has a lot of pain and he is not working. He has some days where he can hardly do anything at all because of the back pain, and yet he is unwilling to go through surgery still.³ He takes Voltaren and Norflex for his discomfort. He occasionally has paresthesias in the legs and he has been told by Dr. Boxell that these are related to the back difficulties." (R. 195)

Although many of Dr. Nierenberg's treatment notes date from prior to claimant's alleged onset date, they show that claimant continued to try to work despite chronic back pain until he ceased his prior work due to his problems and pain. They highlight that the problem with his impairment is not necessarily the severity, but the unpredictability of when his back problems will "flare" up and the length of time they will cause him to be "down." "[R]eliability is a factor in determining whether an individual can perform work for which he will receive remuneration. See Wright v. Sullivan, 900 F.2d 675, 680 (3d Cir. 1990). In the social security context, however, the term 'reliability' refers to the claimant's ability to work on a consistent basis. See id. Thus, the focus is on capability, not historical performance." Collins v. Apfel, No. 98-2037, 1998 WL 781029 at ** 2 (Nov. 6, 1998) (unpublished). The ALJ did not consider reliability as a factor.

³ Before an ALJ may rely on a claimant's failure to pursue treatment or take medication as support for his determination of noncredibility, he should consider "(1) whether the treatment at issue would restore claimant's ability to work; (2) whether the treatment was prescribed; (3) whether the treatment was refused; and, if so, (4) whether the refusal was without justifiable excuse." Thompson v. Sullivan, 987 F.2d 1482, 1489 (10th Cir. 1993) (quotations omitted). The ALJ did not consider these factors, presumably because he did not rely on claimant's failure to elect surgery. However, the Court notes that claimant may have had a justifiable excuse, given the fact that the instrumentation procedure was described by Dr. Boxell as not approved by the FDA in 1993, and there were numerous reports as to problems caused by such procedures.

Vocational Expert

Claimant argues that the ALJ erred because he did not rely upon the vocational expert's response to one of four hypothetical questions posed by the ALJ.⁴ The question claimant challenges was one based on Dr. Boxell's May and August 1995 findings. It included, among other assumptions, that a person (like claimant) could not sit or stand more than an hour at a time and had a decreased range of motion in the lumbar spine. (R. 72-73) The vocational expert responded that, given that hypothetical, there were no jobs in the regional or national economy that such a person could perform. (R. 73) When the ALJ posed a third hypothetical, based solely upon Dr. Boxell's August 1995 finding, the vocational expert opined that claimant could perform some jobs at the sedentary exertional level. (R. 73-84)

The Tenth Circuit has held that "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the [Commissioner's] decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, the ALJ need only include impairments in his hypothetical question 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). The ALJ ultimately relied on the vocational expert's responses to his first hypothetical, which included all of the impairments that he ultimately found in his RFC assessment. (R. 70-71) The vocational expert responded to that hypothetical by listing jobs at the light and

⁴ Claimant states that the question is the third one asked by the ALJ. (Cl. Br., Docket # 6, at 5). However, the record indicates that it was the second question. In response to the third hypothetical, the vocational expert responded that there *were* jobs in the regional and national economies claimant could perform. (See R. 72-74.)

sedentary exertional level. (R. 71-72) Although the ALJ ultimately found that claimant could do medium work (R. 17), the vocational expert did not list any jobs at the medium exertional level. However, the regulations provide that, if someone can do medium work, he or she can also do sedentary and light work. 20 C.F.R. § 404.1567(c).

The Court assumes that the ALJ intended to indicate that claimant could perform light and sedentary work (although he stated "medium" work) because the jobs he listed that claimant was capable of performing were light and sedentary (R. 16), and he recited claimant's testimony that "he can walk 50-60 yards, sit one hour, lift 20 pounds, stand one hour and he cannot bend well." (R. 13) "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. However, the Court need not rely on this assumption since the Court reverses and remands based on the ALJ's errant pain and credibility analysis and his improper rejection of the treating physician's opinion. All of the medical evidence should be evaluated with regard to the reliability factor.

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, 838 F.2d at 1132. The decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

DATED this 30th day of March, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 30 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GARY L. JONES,
SSN: 448-52-0579,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0907-EA ✓

ENTERED ON DOCKET

DATE MAR 30 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 30th day of March, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

MAR 30 2000 *SL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TAMARA THOMAS,)
)
Plaintiff,)
)
v.)
)
AMERICAN AIRLINES,)
)
Defendant.)

Case No. 99-CV-98-K (J) ✓

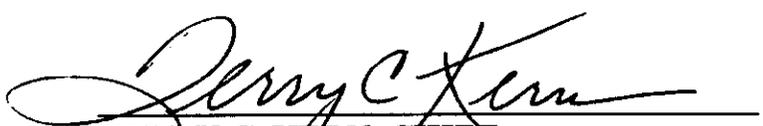
ENTERED ON DOCKET
DATE MAR 30 2000

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised by the Adjunct Settlement Judge on March 28, 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 30 DAY OF MARCH, 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

JOE HAND PROMOTIONS, INC.
a Pennsylvania, corporation,

CASE NO. 99 CV 0497K (J)

Plaintiff,

vs.

KELLY OHMEN, Individually and
d/b/a JAKE'S PLACE, and CHN, Inc.

Defendants.

FILED

MAR 30 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE MAR 30 2000

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO DEFENDANT, CHN, INC.

COMES NOW, the Plaintiff, JOE HAND PROMOTIONS, INC. and Defendant CHN, INC.,
by and through undersigned counsel hereby stipulate and agree to a Dismissal with Prejudice as to
Defendant of all pending claims, counterclaims and cross-claims by each other and all parties to bear
their own attorney's fees and costs.

Dated: March 30, 2000

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
320 S. Boston Avenue, Suite 400
Tulsa, Oklahoma 74103
Attorneys for Plaintiff

By: Ronald A. White
Ronald A. White, Esq.
OBA # 12037

MARK A. GRAZIANO, ESQ.
Two Main Plaza, Suite 310
616 South Main Street
Tulsa, Oklahoma 74119
Attorney for Defendant

By: Mark A. Graziano
Mark A. Graziano, Esq.

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

F I L E D

MAR 30 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DWAYNE M. GARRETT,)

Plaintiff,)

v.)

SHELLY CLEMENES, JERRY)

MADDUX, and CITY OF)

BARTLESVILLE,)

Defendants.)

Case No. 99-CV-407-K (E)

ENTERED ON DOCKET

MAR 30 2000

DATE _____

ORDER

Before the Court is Defendant City of Bartlesville's motion to dismiss for failure to state a claim upon which relief can be granted and for failure to comply with the Federal Rules of Civil Procedure by refusing to accept mail. *See* Fed. R. Civ. P. 5(b), 12(b)(6), 41(b). Bartlesville notes that Plaintiff's complaint makes no mention of the City or the actions for which it is liable.

Plaintiff has failed to respond to Defendant Bartlesville's motion to dismiss. Pursuant to N.D. LR 7.1(C), all claims asserted in a motion may be considered confessed when the opposing party has failed to respond. The Court has, nevertheless, reviewed the motion to dismiss and, through an independent inquiry, has determined that Plaintiff has failed to state a claim for which relief can be granted. In order to state a 42 U.S.C. § 1983 claim against a municipality, Plaintiff must allege that the unconstitutional actions of the employee were representative of Bartlesville's official policy or custom or were carried out by an employee with final policy-making authority. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 690-91 (1978); *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1249-50 (10th Cir. 1999).

The City, however, is not subject to section 1983 liability under the theory of *respondent superior*, for merely employing a tortfeasor. *See Mondell*, 436 U.S. at 692.

The Court also warns Plaintiff that he cannot avoid the judgment of the Court or the service of motions by refusing to accept mail at his residence. Federal Rule of Civil Procedure 5(b) allows for service by mail. Under Rule 41(b), the Court may dismiss a suit if the plaintiff fails to comply with the Rules of Civil Procedure or any order of the Court. A dismissal of this nature would constitute an adjudication on the merits, meaning that Plaintiff would never be able to bring the dismissed claims again. Plaintiff has represented to the Court that his address is Rt. 2, Box 1481, Ramona, Oklahoma. Unless Plaintiff recently has moved, he has either misrepresented his address to the Court or has been acting in bad faith to multiply and delay the proceedings by refusing to accept mail. If the address above is not correct, Plaintiff should correct it immediately. If this address is accurate, Plaintiff should make no further attempts to refuse mail for "wrong address" or any other deceptive reason.

IT IS THEREFORE ORDERED that the Motion to Dismiss of Defendant City of Bartlesville (# 6) is GRANTED.

ORDERED THIS 29 DAY OF MARCH, 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 JAMES R. KUNKLE,)
)
 Defendant.)

ENTERED ON DOCKET
DATE MAR 30 2000

No. 00CV0071K(B) ✓

F I L E D

MAR 29 2000 ✓

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 29 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, James R. Kunkle, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, James R. Kunkle, was served with Summons and Complaint on January 25, 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, James R. Kunkle, for the principal amount of \$15,469.00, plus accrued

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interest of \$10,762.51, plus interest thereafter at the rate of 10 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

FILED

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

MAR 29 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-CV-457-K

ENTERED ON DOCKET

DATE MAR 30 2000

ORDER

Before the Court is the motion of the defendant The SABRE Group, Inc. ("SABRE") to dismiss or for summary judgment against plaintiff Kathy Wells ("Wells"). Wells brings this action asserting discrimination because of race in violation of Title VII of the Civil Rights Act of 1964. SABRE moves to dismiss, on the ground it was not named in plaintiff's charge filed with the EEOC, citing Gonzalez-Aller Balseyro v. GTE Lenkurt, Inc., 702 F.2d 857 (10th Cir.1983). Wells agrees that Gonzalez-Aller is dispositive, but contends that her charge falls within exceptions acknowledged by that decision, namely Sabre was informally implicated in the filed charge and received constructive notice of the charge.

Specifically, plaintiff notes that the charge lists Sabre's street address as the respondent's street address. Clearly, a charging party may not create an identity of interest by placing an incorrect address on a charge. Wells also states that the name of her supervisor listed in the charge is Lillian Maahs, who was a SABRE employee. Wells has provided no evidence to support this proposition, and SABRE has submitted an affidavit contradicting it. The same may be said of Wells' allegation

that she named two co-workers in the charge who were SABRE employees. Finally, plaintiff appears to contend that SABRE is a subsidiary of American. However, she acknowledges that SABRE did not become a separate corporate entity until 1996. The acts of which plaintiff complains took place in 1993.

Plaintiff has failed to raise a genuine issue of material fact. Rule 56(c) F.R.Cv.P. The record reflects that she failed to name SABRE as a respondent in her charge, and no exception applies. Summary judgment is appropriate.

It is the Order of the Court that the motion of the defendant The SABRE Group, Inc. to dismiss or for summary judgment (#156) against plaintiff Kathy Wells is hereby GRANTED.

SO ORDERED THIS 29 DAY OF MARCH, 2000


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 29 2000 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL B. CLARK,)
)
Plaintiff,)

v.)

WILLIAM HENDERSON, as Postmaster)
for the United States Postal Service,)

Defendant.)

Case No. 99-CV-271-K (J) /

ENTERED ON DOCKET

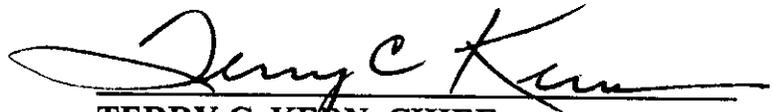
DATE MAR 30 2000

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for the Defendant, William Henderson, and against the Plaintiff, Michael B. Clark.

ORDERED THIS 29 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**

MICHAEL B. CLARK,)
)
) Plaintiff,)
)
)
 vs.)
)
)
 WILLIAM HENDERSON, as Postmaster)
 for the United States Postal Service,)
)
)
 Defendant.)

MAR 29 2000 *SLB*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-271-K(J)

ENTERED ON DOCKET

DATE MAR 30 2000

ORDER

Plaintiff, an employee of the United States Postal Service, has filed a Complaint which alleges age discrimination as its first three causes of action, and retaliation for union activities as its fourth cause of action. Defendant has filed a "Motion to Dismiss, or in the alternative, Motion for Summary Judgment," seeking dismissal of all claims pled in Plaintiff's Complaint. [Doc. No. 2]. For the reasons discussed below, the Court grants Defendant's motion and dismisses Plaintiff's Complaint. Plaintiff's first three causes of action are untimely claims under the Age Discrimination in Employment Act, and Plaintiff's fourth cause of action is preempted by the National Labor Relations Act.

I. DECISIONAL STANDARDS

Defendant has attached materials to its motion which are outside of the Complaint, and the Court has considered these materials. Consequently, Defendant's motion must be treated as a motion for summary judgment, not a motion to dismiss. See Fed. R. Civ. P. 12(b) (last sentence). The Court will, therefore, treat and decide Defendant's motion as a motion for summary judgment.

A court may grant summary judgment only when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court will find no genuine issue of triable fact if it determines that the summary judgment record taken as a whole could not lead a rational trier of fact to find for Plaintiff. Because Plaintiff will bear the burden of proof at trial, Plaintiff must go beyond his pleadings and identify specific facts which establish the existence of each element essential to its case. Defendants need only point to an absence of evidence to support a single element of Plaintiff's case. The court will, however, resolve all doubts in favor of Plaintiff, the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988); Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

II. FACTUAL SUMMARY^{1/}

Plaintiff was born on August 20, 1953. At some point in the late 1970's or early 1980's, Plaintiff went to work for the United States Postal Service ("USPS" or "Postal Service") in Cushing, Oklahoma. Plaintiff worked at the Cushing station for more than 15 years, and for most of that time, he was a local steward for the National Letter Carrier's Union.

On August 30, 1997 (when Plaintiff was 44 years old), he was "excessed" from his position at the Cushing station. Plaintiff was reassigned to the Gilcrease station in Tulsa, Oklahoma, which is approximately 53 miles away from his home in Cushing. In late June 1998, after talking with Allen Southard, the officer in charge at the Cushing station, Plaintiff learned that younger employees had been hired at the Cushing station. Plaintiff alleges that this was the first time he was aware of facts which would have led him to believe that his transfer to the Gilcrease station was motivated by his age.

Plaintiff first contacted the Postal Service's Equal Employment Office ("EEO") regarding his transfer from the Cushing station to the Gilcrease station sometime between June 29, 1998 and July 7, 1998. On October 19, 1998, Plaintiff appointed counsel in this case, Jean Walpole Coulter, as his representative in connection with the processing of the complaint he filed with the USPS EEO.

^{1/} The Court finds no genuine dispute regarding the facts summarized in this section. See Fed. R. Civ. P. 56(d).

On January 11, 1999, the Postal Service issued its final decision on the complaint filed by Plaintiff with its EEO. The Postal Service dismissed Plaintiff's complaint as untimely. The Postal Service determined that the complaint was untimely because Plaintiff had not contacted an EEO counselor within 45 days of the date he was transferred from the Cushing station to the Gilcrease station. The Postal Service's written decision notified Plaintiff that he had a right to file suit in a federal district court within 90 days after receiving a copy of the Postal Service decision, or appeal the decision to the Equal Employment Opportunity Commission ("EEOC") within 30 days after receiving a copy of the decision. Plaintiff's attorney received the Postal Service's written decision by certified mail on January 14, 1999. Plaintiff did not file an appeal with the EEOC. Instead, Plaintiff filed this action on April 15, 1999.

III. SUMMARY OF CLAIMS PLED IN PLAINTIFF'S COMPLAINT

Plaintiff pleads the following causes of action in his Complaint:

First Cause of Action Plaintiff alleges that the Postal Service violated federal law, namely 42 U.S.C. § 1981, by intentionally subjecting him to different treatment on the basis of his age. [Doc. No. 1, ¶¶ 13-17].

Second Cause of Action Plaintiff alleges that the Postal Service violated Oklahoma law, namely 25 Okla. Stat. § 110, by intentionally subjecting him to different treatment on the basis of his age. [Doc. No. 1, ¶¶ 18-22].

Third Cause of Action Plaintiff alleges that due to the Postal Service's violation of federal and state law, he is entitled to an injunction requiring his reinstatement at the Cushing station with all tenure, seniority, rights and benefits

he had before he was illegally discriminated against. [Doc. No. 1, ¶¶ 23-25].

Fourth Cause of Action Plaintiff alleges that the Postal Service violated "the common law of the State of Oklahoma, the U.S. Constitution and Title 25 of the Oklahoma Statutes" by retaliating against him for his activities as a union steward while at the Cushing station. [Doc. No. 1, ¶¶ 26-29].

With its motion for summary judgment, the Postal Service seeks dismissal of each of these causes of action.

IV. PLAINTIFF'S FIRST, SECOND AND THIRD CAUSES OF ACTION ARE UNTIMELY CLAIMS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA").

A. THE FIRST AND SECOND CAUSES OF ACTION STATE A CLAIM SOLELY UNDER THE ADEA, 29 U.S.C. § 633a.

On their face, the first two causes of action pled in Plaintiff's Complaint fail to state a claim. In the first cause of action, Plaintiff cites and relies on 42 U.S.C. § 1981 as the federal law which supplies the basis for his federal age discrimination claim. Section 1981 only provides a cause of action for discrimination based on race (i.e., treatment different than that enjoyed by "white citizens"). See Daemi v. Church's Fried Chicken, Inc., 931 F.2d 1379, 1387 n.7 (10th Cir. 1991). Thus, the statute Plaintiff relies on in his first cause of action provides no support for his federal age discrimination claim.

In the second cause of action, Plaintiff relies on 25 Okla. Stat. § 110, *et seq.* as the Oklahoma law which supplies the basis for his state age discrimination claim.

Section 110 provides newspaper owners who enlist in the Armed Forces during a war or other national emergency a procedural method to suspend and resume the publication of their newspaper. Thus, the statute Plaintiff relies on in his second cause of action provides no support for his state age discrimination claim.

Plaintiff apparently intended to rely on 25 Okla. Stat. §§ 1101-1801. These provisions prohibit discrimination with regard to housing, employment and public accommodations in Oklahoma. In particular, § 1302(A)(1) prohibits employers from discriminating against an employee with respect to the terms or conditions of the employee's employment because of the employee's age. However, nothing in sections 1101-1801 provides Plaintiff with a private cause of action to remedy a violation of § 1302(A)(1). Oklahoma has established a Human Rights Commission and has authorized this Commission to file lawsuits on behalf of persons aggrieved by a discriminatory practice. See 25 Okla. Stat. § 1502.15. Specifically, § 1502.15 authorizes the Commission to bring suit, through the Oklahoma Attorney General, on behalf of parties aggrieved by certain discriminatory practices. An aggrieved party may intervene in such a lawsuit, but the lawsuit must first have been authorized by the Commission and filed by the Oklahoma Attorney General. Id. at § 1502.15(C). In other words, the statutory sections Plaintiff apparently intended to rely on in his second cause of action do not provide him with a private cause of action -- the action must be maintained by the Oklahoma Human Rights Commission.

In its motion for summary judgment, the Postal Service argues that if Plaintiff wishes to assert claims of age discrimination, he must proceed under the ADEA. In

particular, the Postal Service argues that Plaintiff must proceed under 29 U.S.C. § 633a, which is titled "Nondiscrimination on account of age in Federal Government employment." The Postal Service seeks dismissal of the first and second causes of action in Plaintiff's Complaint to the extent they are premised on any law other than 29 U.S.C. § 633a. Plaintiff apparently concedes this point in his response brief. In response, Plaintiff only argues that, pursuant to Fed. R. Civ. P. 8(a)'s "short and plain statement" language, his Complaint states facts sufficient to allege a violation of § 633a, even though he did not specifically cite or rely on that statutory provision in his Complaint.

The Court agrees with the Postal Service and Plaintiff. As framed, Plaintiff's Complaint is sufficient to give the Postal Service notice under Rule 8 of an age discrimination claim under 29 U.S.C. § 633a. To the extent, however, that the first and second causes of action are premised on anything other than a violation of 29 U.S.C. § 633a, they are dismissed for failure to state a claim on which relief can be granted. See Migneault v. Peck, 158 F.3d 1131, 1140 (10th Cir. 1998), rev'd on other grounds by 120 S. Ct. 928 (2000), and on remand to 2000 WL 219960, at *1 n.1 (10th Cir. Feb 25, 2000); and Peterson v. Weinberger, 644 F.2d 521, 524-35 (5th Cir. 1981) (holding that as of May 1, 1974, the effective date of § 633a, the ADEA is the exclusive federal remedy available to federal employees aggrieved by age discrimination).

B. PLAINTIFF'S ADEA CLAIM WAS NOT TIMELY FILED WITH THIS COURT.

Congress did not provide a statute of limitations for age discrimination claims brought by federal employees pursuant to 29 U.S.C. § 633a. In the face of such Congressional silence, the United States Supreme Court has directed federal district courts to borrow either a state statute of limitations or a limitations period from an analogous federal statute. See, e.g., Stevens v. The Dept. of the Treasury, 500 U.S. 1, 7 (1991). When borrowing a statute of limitations, courts should select one which balances the same interests as those at stake in the litigation before the court. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 169 (1983). Applying the Supreme Court's mandate with regard to ADEA claims brought by federal employees, federal courts of appeal have divided on whether to borrow an analogous limitations period from Title VII (e.g., 42 U.S.C. § 2000e-16(c)), or use the general six year limitations period for non-tort actions against the federal government (e.g., 28 U.S.C. § 2401(a)). This Court need not, however, engage in a discussion of the various sides of this issue because the Court of Appeals for the Tenth Circuit has resolved the issue in this Circuit. See Jones v. Runyon, 32 F.3d 1454 (10th Cir. 1994).

In Runyon, the Tenth Circuit rejected the application of state statutes of limitation to ADEA claims brought by federal employees, finding that applying varying state rules would burden the EEOC's administrative efforts and would provide an unsatisfactory vehicle for enforcing federal law. Runyon, 32 F.3d at 1456. In choosing between the statute of limitations in Title VII or the general non-tort statute of limitations for claims against the federal government, the Tenth Circuit chose the

limitations period in Title VII, finding Title VII to be "more analogous to ADEA than the general limitations period" Id. Title VII's 90 day statute of limitations is, therefore, applicable to ADEA claims brought by federal employees. See 42 U.S.C. § 2000e-16(c).

As Runyon was being decided, the EEOC adopted regulations interpreting various provisions of the ADEA. The EEOC's regulations now supply a limitations period for the filing of civil actions under the ADEA. See 29 C.F.R. § 1614.407. Pursuant to this regulation, a party must file a civil action in federal court within 90 days of either the employing agency's decision, if no appeal is taken to the EEOC; or within 90 days of the EEOC's final decision, if an appeal is taken to the EEOC. Id. The EEOC's interpretation of the ADEA, a statute which it is authorized to implement, is entitled to judicial deference. Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 696-98 (1991) (citing Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 866 (1984)). Given that the Tenth Circuit and the EEOC are now in agreement, and given the fact that Plaintiff did not file an appeal with the EEOC, the Court finds that the applicable statute of limitations in this case is 90 days, and that the statute began to run from the date Plaintiff's counsel received a copy of the Postal Service's final decision on January 14, 1999.^{2/} See Million v. Frank, 47 F.3d 385 (10th Cir. 1995) (limitations period under § 2000e-16(c) begins to run upon receipt of final agency decision); Noe

^{2/} The letter which Plaintiff's counsel received from the Postal Service, communicating the Postal Services' final decision, also contained the following language: "If you are dissatisfied with this final agency decision, you may file a civil action in an appropriate U.S. District Court within 90 calendar days of your receipt of this decision." Doc. No. 3, Exhibit "D," p. 2.

v. Ward, 754 F.2d 890, 892 (10th Cir. 1985) (notice to attorney is imputed to client); and Irwin v. Veterans Affairs, 498 U.S. 89, 92 (1990) (limitations period begins to run from date letter is received by attorney).

Plaintiff's counsel filed the Complaint in this case on April 15, 1999, which is 91 days from January 14, 1999 – the date Plaintiff's counsel received notice of the Postal Service's final decision. Plaintiff argues that April 15, 1999 is in reality only 90 days from January 14, 1999 by operation of Fed. R. Civ. P. 6(a), which states that when computing a period of time "the day of the act, event, or default from which the designated period of time begins to run shall not be included." Plaintiff argues that the Postal Service has erred in its calculation of the 90 day time period because it has included January 14, 1999 in its calculations. Plaintiff is, however, not correct. A simple review of a calendar establishes that there are 91 days between January 14, 1999 and April 15, 1999, not including January 14, 1999. Plaintiff's Complaint was, therefore, not timely filed pursuant to Ruynon or 29 C.F.R. § 1614.407.

Compliance with the ADEA's 90 day filing requirement is not a jurisdictional prerequisite. Rather, it is a "condition precedent" to suit which functions like a statute of limitations. The 90 day limitations period is, therefore, subject to waiver, estoppel, and equitable tolling. Million, 47 F.3d at 389. Plaintiff argues, therefore, that even if his Complaint is untimely, the Court should exercise its equitable powers to extend the 90 day deadline by one day. See Martinez v. Orr, 738 F.2d 1107, 1110 (10th Cir. 1984) (applying the equitable tolling doctrine to suits brought by federal employees which are governed by the limitations period in § 2000e-16(c)).

"Equitable tolling may be appropriate where 'the defendant has actively misled the plaintiff respecting the cause of action, or where the plaintiff has in some extraordinary way been prevented from asserting his rights.'" Million, 47 F.3d at 389. In the Tenth Circuit, there must be some "active deception" before a court may equitably toll the statute of limitations applicable to a Title VII or ADEA claim. Johnson v. United States Postal Service, 861 F.2d 1475, 1481 (10th Cir. 1989). See also, Hulsey v. Kmart, Inc., 43 F.3d 555, 557 (10th Cir. 1994) (holding that it is well settled that equitable tolling of the ADEA is appropriate only where the circumstances of the case rise to the level of active deception). Plaintiff has offered no explanation for his untimely filing of the Complaint. Plaintiff presents no evidence that he was misled by the Postal Service. In fact, the Postal Service's letter specifically informed Plaintiff that he had 90 days to file a lawsuit with this Court. Plaintiff has provided no evidence to establish that in some extraordinary way he was prevented from filing this action within the 90 day time period. In short, Plaintiff has not provided the Court with any reason for invoking its equitable powers in this case.

In Million, Plaintiff filed a handicap discrimination claim against the Postal Service. Plaintiff appealed his claim to the EEOC. The EEOC sent its final decision to Plaintiff *via* certified mail, which was signed for by Plaintiff's wife on August 10, 1991. Due to his "hectic work schedule," Plaintiff did not have a chance to review the EEOC letter until August 16, 1991. Plaintiff argued that the limitations period should have been equitably tolled from August 10, 1991 to August 16, 1991 -- the period during which he was unable to review his mail. The Tenth Circuit rejected

Plaintiff's tolling argument. Million, 47 F.3d at 389. Relying on Million, the District of Kansas has rejected a similar tolling argument by a Plaintiff who argued that "owing to my work schedule and other time commitments, I was unable to get to the [post office], where the certified letter was being held" Bergman v. Sprint/United Management Co., 981 F. Supp. 1399, 1402 (D. Kan. 1997). The Million and Bergman decisions are consistent with the Tenth Circuit's pronouncement that "in this circuit, a Title VII time limit will be tolled only if there has been 'active deception.'" Johnson, 861 F.2d at 1481. See also, Hulsey, 43 F.3d at 557.

In support of his equitable tolling argument, Plaintiff has offered no basis for tolling which is any more compelling than those reasons rejected in Million and Bergman. The Court finds, therefore, no basis upon which to exercise its equitable powers to extend the 90 day limitations period applicable in this case. Even if the Court wanted to extend the statute of limitations in this case by one day it is precluded from doing so. "In the absence of a recognized equitable consideration, the court cannot extend the limitations period by even one day." Rice v. New England College, 676 F.2d 9, 11 (1st Cir. 1982) (dismissing Plaintiff's sexual discrimination complaint, which was filed on the 91st day after receipt of an EEOC right to sue letter, as untimely).

The Court also agrees with the following statements of the Sixth Circuit in Johnson v. United States Postal Service, No. 86-2189, 1988 WL 122962 (6th Cir. Nov. 16, 1988):

If courts were to toll the limitation period whenever a plaintiff was one day late, the effect would be to create a [ninety]-one-day limitation period. Of course, a plaintiff who filed her appeal on the [ninety]-second day could then argue that the doctrine of equitable tolling applied to her because she missed the effective filing date by only one day. The line must be drawn somewhere

Id. at *3.

Plaintiff's first two causes of action are hereby dismissed as untimely.

Having determined that Plaintiff's first and second causes of action were untimely filed with this Court, the Court declines to address the Postal Service's argument that Plaintiff also failed to timely exhaust his administrative remedies before filing this lawsuit.

As pled, Plaintiff's third cause of action is derivative of and dependent on his first two causes of action. Plaintiff's third cause of action does not state an independent ground for relief. Rather, the third cause of action simply asserts that Plaintiff is entitled to reinstatement at the Postal Service's Cushing station if Plaintiff can establish age discrimination under his first two causes of actions. Having found that Plaintiff's first two causes of action should be dismissed, the Court also finds that Plaintiff's third cause of action should be dismissed.

V. PLAINTIFF'S FOURTH CAUSE OF ACTION IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT ("NLRA").

The Postal Reorganization Act ("PRA") authorizes the Postal Service to collectively bargain with postal unions. See 39 U.S.C. § 1206. The PRA also makes

the Postal Service subject to the National Labor Relations Act. Id. at § 1209.^{3/} Section 8 of the NLRA makes it "an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). In his fourth cause of action, Plaintiff alleges that the Postal Service illegally transferred him from its Cushing station to its Gilcrease station in retaliation for his activities as a union steward while at the Cushing station.

Whether Plaintiff understands it to be so or not, his fourth cause of action is premised on "an allegation of an unfair labor practice in violation of § 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a)." Viestenz v. Fleming Companies, 681 F.2d 699, 701-702 (10th Cir. 1982). It is well settled that "[w]hen an activity is arguably subject to . . . § 8 of the National Labor Relations Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." Id. at 702 (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959)). Garmon's preemption holding "is premised on Congress' desire to avoid conflicting rules of substantive law and remedy, thereby ensuring a consistent national labor policy." Id.

In connection with his fourth cause of action, Plaintiff cites no legal authority in his response brief. Plaintiff does not respond at all to the Postal Service's argument

^{3/} This section makes clear that the PRA is intended to "bring postal labor relations within the same structure that exists for nationwide enterprises in the private sector." See Muday v. Cleaver, 590 F. Supp. 1209, 1210 (W.D. Mich. 1984) (citing 2 U.S. Code Cong. and Admin. News 1970, pp. 3649, 3662).

that his claim is preempted as a matter of law by the NLRA. Plaintiff has offered nothing which would take the Postal Service's alleged retaliatory conduct outside the realm of an unfair labor practice as defined by § 8 of the NLRA. Plaintiff's fourth cause of action is, therefore, preempted by the National Labor Relations Act. This Court must defer to the exclusive competence of the National Labor Relations Board to resolve Plaintiff's retaliation claim. Plaintiff's fourth cause of action is hereby dismissed.

CONCLUSION

The reference to the Magistrate Judge of the defendant's motion (#2) is withdrawn. The motion is **GRANTED**. Plaintiff's first three causes of action are untimely claims under the Age Discrimination in Employment Act. Plaintiff's fourth cause of action for retaliation based on union activities is preempted by the National Labor Relations Act. Plaintiff's Complaint is dismissed.

IT IS SO ORDERED.

Dated this 29 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 29 2000

MARY ELAINE PARMLEY,

Petitioner,

vs.

JAMES SAFFLE,

Respondent.

HOMER LEE PARMLEY

Petitioner,

vs.

JAMES SAFFLE, Director Oklahoma
Dept. of Corrections

Respondent.

Case No. 99-CV-163-B (M)

ENTERED ON DOCKET

DATE **MAR 29 2000**

Case No. 99-CV-164-B (M)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

Petitioners have filed separate identical petitions¹ for a writs of habeas corpus pursuant to 28 U.S.C. § 2254. The Petitions have been referred to the undersigned United States Magistrate Judge for report and recommendation.

Petitioners challenge their convictions entered in District Court of Delaware County, Oklahoma, Case No. CF 92-137. Respondent has moved to dismiss the petitions, asserting that Petitioners have failed to exhaust state remedies or alternatively, because their Fourth Amendment claims are not cognizable on federal habeas under the dictates of *Stone v. Powell*, 428 U.S. 465, 489-496, 96 S.Ct. 3037, 3050-3053, 49 L.Ed.2d 1067 (1976) (where the state provided an opportunity for full

¹Mary Elaine Parmley's Petition is Case No. 99-CV-163-B; Homer Lee Parmley's Petition is Case No. 99-CV-164-B. For convenience, unless otherwise noted all references to document docket numbers refer to documents in Case No. 99-CV-163-B.

and fair litigation of a Fourth Amendment claim, a state prisoner could not be granted habeas corpus relief on the basis of Fourth Amendment claims). [See Dkt. 6].

To avoid dismissal for failure to exhaust state remedies, Petitioners have moved to amend their Petitions deleting their unexhausted claim that the search warrant was not supported by probable cause. [Dkt. 11].

For the reasons discussed below, the undersigned recommends that Petitioners' Motions to Amend be granted and Respondent's Motions to Dismiss be granted.

BACKGROUND

In the District Court of Delaware County, Oklahoma, Case No. CF-92-137, the Parmleys were convicted of Possession of Marijuana with Intent to Distribute. Following a non-jury trial they were found guilty and were each sentenced to four years imprisonment and assessed a \$500 fine. Their sentences were suspended.

On appeal to the Oklahoma Court of Criminal Appeals, they raised the following propositions of error, relevant to this proceeding:

(1) The warrant authorizing the search of Appellants' residence failed to particularly describe the place to be searched. Admission of evidence obtained pursuant to this defective warrant violated Appellants' state and federal constitutional freedom from unreasonable searches and seizures;

(2) The law enforcement raiding party flagrantly disregarded the limited authority of search and seizure granted by the warrant and conducted exploratory rummaging and grossly excessive seizures of personal property and private papers from Appellants' residence. The flagrant abuse of police authority in the execution of the warrant requires suppression of the evidence;

(3) The magistrate who issued the warrant abandoned the constitutionally required role of neutrality by engaging in secret off the record discussions with the affiant concerning the identity of the confidential informer. The absence of a neutral and detached magistrate renders the warrant void.

[Dkt. 7, Ex. A, p. 2; Ex. B]. The Oklahoma Court of Criminal Appeals affirmed the convictions. [Dkt. 7, Ex. A].

On petition for writ of habeas corpus, Petitioners claim their "fundamental rights to due process and equal protection of the law were violated because [their] convictions were based entirely on evidence seized in violation of [their] Fourth and Fourteenth Amendment rights against unreasonable searches and seizures." [Dkt. 1, p. 3]. In particular, the Petitioners claim: (1) the July 16, 1992, search warrant was not supported by probable cause;² (2) the search warrants were not issued by a neutral and detached magistrate; (3) the warrants fail to particularly describe the premises to be searched; (4) the warrants fail to particularly describe the things to be seized, or in the alternative authorize the seizure of property unrelated to the purpose of the search; (5) the officers who executed the warrants disregarded the restrictions in the warrant and conducted an illegal, reckless and oppressive general search; and (6) the Court of Criminal Appeals' Summary Opinion affirming their convictions is devoid of legal analysis, factual analysis, or reasoned argument and cannot therefore be said to have fairly and lawfully addressed the issues raised. [Dkt. 1, p. 4-5].

²Petitioner's have moved to amend their Petitions, removing this allegation.

ANALYSIS

Petitioners' Motions to Amend

The United States Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the state highest Court. *See Picard v. Conner*, 404 U.S. 270, 275-76, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971).

After carefully reviewing the record in this case, the undersigned concludes that Petitioners have not fairly presented their claim that the search warrant was not supported by probable cause to the Oklahoma Court of Criminal Appeals ("OCCA"), and have not exhausted an available state remedy, an application for post-conviction relief, as to that claim. A "mixed petition," one which contains both exhausted claims and unexhausted claims, is subject to dismissal without prejudice. *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) (holding that a federal district court must dismiss a habeas corpus petition containing exhausted and unexhausted grounds for relief). The undersigned finds that Petitioners should be permitted to amend their petitions to eliminate the unexhausted claim that the July 16, 1992, search warrant was not supported by probable cause.

Respondent's Motion to Dismiss

(1) Exhaustion

Respondent maintains that even if Petitioners are permitted to amend, their petitions contain unexhausted claims and should be dismissed for that reason.

Having reviewed the brief Petitioners filed with the OCCA on June 16, 1997, [Dkt. 7, Ex. B], the undersigned finds that although Petitioners presented several claims related to the issuance and execution of the search warrants, on appeal they did not "fairly present" the specific claim that the warrants failed to particularly describe the things to be seized or the claim that the search warrants authorized seizure of property unrelated to the search. Accordingly, the undersigned finds those claims to be unexhausted. In accordance with *Rose v. Lundy*, the petitions are therefore subject to dismissal.

A petitioner is generally given an opportunity to amend the petition to enable him to proceed with unexhausted claims. Alternatively, the petition is dismissed without prejudice to enable the petitioner to exhaust all claims before returning to federal court pursue claims which have not been subjected to a time bar. However, the undersigned finds that neither of these options is appropriate in the present case because Petitioners' claims are barred by *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 3052, 49 L.Ed.2d 1067 (1976).

(2) Application of *Stone v. Powell*

Petitioners state: "[t]he single overall claim in each of their respective Petitions is that the Parmley's [sic] were convicted and sentenced in violation of their respective

constitutional right against unreasonable searches and seizures." [Dkt. 12, [.2]. However, Fourth Amendment exclusionary rule claims are not cognizable in federal habeas corpus proceedings if the petitioner had an opportunity for full and fair litigation of the claim in state court. *Stone v. Powell*, 428 U.S. 465, 494 (1976); *see also Miranda v. Cooper*, 967 F.2d 392, 401 (10th Cir.1992) (reiterating that court should focus on procedural "opportunity" to raise claims, and holding petitioner's Fourth Amendment claim not cognizable because he failed to present it to state court despite adequate time to do so); *Gamble v. Oklahoma*, 583 F.2d 1161, 1164-65 (10th Cir.1978) (explaining that court should focus primarily on whether a state provided a procedural opportunity to litigate Fourth Amendment claims in determining whether the state provided "an opportunity for full and fair litigation" of such claims). The record of Petitioners' proceedings in state court indicates that they challenged the constitutionality of the search warrants and the seizure of property both through motions to suppress in the trial court, and on direct appeal. [Dkt. 7; Ex. B, p. 2, 10-17]. The Oklahoma state courts twice reviewed and twice rejected their claims on the merits. The undersigned concludes that Petitioners had a full and fair opportunity to litigate their Fourth Amendment claims in state court, and, pursuant to the bar imposed by *Stone*, this Court is precluded from granting federal habeas relief on those grounds.

In an effort to avoid the *Stone* bar, Petitioners argue that they were denied a full and fair opportunity to litigate their Fourth Amendment issues in state court because "the Oklahoma trial and appellate Courts did little more than provide lip service to the Fourth and Fourteenth Amendment guarantees." [Dkt. 7, p. 4]. They argue that the

OCCA's failure to provide full and fair opportunity to litigate their claims is demonstrated by the Court's use of a summary opinion format to affirm their convictions. Petitioners' efforts to couch their displeasure with the decision of Oklahoma Courts as a challenge to the fairness and integrity of the state judicial process is unavailing.

The Tenth Circuit has ruled that there is nothing inherently objectionable in the Oklahoma court's use of summary opinions in unpublished cases. *King v. Champion*, 55 F.3d 522, 526 (10th Cir. 1995). The United States Supreme Court has recognized that "courts of appeals should have wide latitude in their decisions of whether or how to write opinions." *Taylor v. McKeithen*, 407 U.S. 191, 194 n. 4, 92 S.Ct. 1980, 1982 n. 4, 32 L.Ed.2d 648 (1972) (per curiam); see also *Furman*, 720 F.2d at 264 ("There is no requirement in law that a federal appellate court's decision be accompanied by a written opinion."); 10th Cir. R. 36.1 ("It is unnecessary for the court to write opinions in every case.").

The undersigned finds that Petitioners' Fourth Amendment claims are barred by *Stone* from consideration as a basis for federal habeas relief because they had a full and fair opportunity to litigate these claims in the state courts.

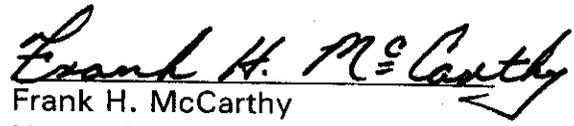
CONCLUSION

After carefully reviewing the record in this case, the undersigned RECOMMENDS that Petitioners' Motions to Amend [Dkt. 11 in Case No. 99-CV-163; and Dkt. 10 in Case No. 99-CV-164] be GRANTED; and that Respondent's Motions to Dismiss [Dkt.

6 in Case No. 99-CV-163, and Dkt. 4 in Case No. 99-CV-164] be GRANTED and that the Petitions be DISMISSED.

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 29th Day of March, 2000.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

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

No. 97-CV-457-K ✓

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

ENTERED ON DOCKET
DATE MAR 29 2000

ORDER

Before the Court is the motion of the defendant American Airlines, Inc. ("American") for summary judgment against plaintiff Ann Watson ("Watson"). Watson brings this action asserting the following claims: (1) discrimination because of age in violation of the Age Discrimination in Employment Act ("ADEA"); (2) discrimination because of race and sex in violation of Title VII of the Civil Rights Act of 1964. Watson brought her claims against three defendants but has dismissed the Sabre Group, Inc. and AMR Corporation.

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

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Watson was employed by American from February, 1976 until March, 1995. Watson was denied a customer service representative ("CSR") position between January and April of 1993, but concedes that she failed the requisite typing test. She also concedes that she received another position with the same job grade level, salary and benefits. Watson's position was transferred to Barbados during a downsizing in early 1993. Watson claims this was discrimination based upon her race and age, but admits that an older black female employee in plaintiff's department retained her position. At the time, Watson was told that she would be reassigned to an alternative position with no change in her salary and level. She accepted that reassignment.

Barbados is the location where original transaction documents involving corporate credit cards were kept. Since Barbados was the location where the raw data was housed, the functions which Watson performed prior to the downsizing (as Processing Clerk) were more efficiently performed at that location.

Watson complains about various unsatisfactory performance evaluations but admits that she never received higher ratings, even before she turned 40 years old. On July 26, 1994, Watson filed a charge of discrimination against American with the EEOC and the OHRC. In the fall of 1994, American offered a Voluntary Early Retirement Program ("VERP") to various employees, including Watson. On or about December 1, 1994, Watson was advised she had 60 days to consider the VERP. On January 31, 1995, Watson executed an Agreement and General Release which released all claims she had against American, including those within her EEOC charge. Watson contends that she was forced to sign the release, but admits in her deposition that she had used up all her sick leave prior to the offer of the VERP (Watson suffered carpal tunnel syndrome in 1993) and accepting the VERP allowed her to receive monthly income. She further admitted that she read the release

before she signed it, realized that it was a binding legal document and acted voluntarily of her own free will in signing the document. Watson filed an amended charge with the EEOC around May of 1996.

As plaintiff acknowledges, Title VII claims may be knowingly and voluntarily waived. Wright v. Southwestern Bell Telephone Co., 925 F.2d 1288 (10th Cir.1991). The record reflects that Watson knowingly and voluntarily waived her race and sex claims under Title VII when she signed the release. Merely alleging that she was given a choice of signing the release or receiving nothing is insufficient to render the signing involuntary. White v. General Motors Corp., 699 F.Supp. 1485 (D.Kan.1988) aff'd, 908 F.2d 669 (10th Cir.1990) (plaintiff could have declined to sign release under such circumstances and sought redress in court).

In any event, Watson ratified the release by continuing to accept the benefits of the VERP under the release. When a party accepts benefits to which he or she is entitled under a release without objection, the party ratifies the release and becomes bound by it. Deren v. Digital Equip. Corp., 61 F.3d 1, 2-3 (1st Cir.1995).

American first argues that Watson's ADEA claims are time-barred. The ADEA requires that a claimant file a charge of discrimination within 180 days after the alleged unlawful employment practice. This filing period may be extended to 300 days where the claimant has initially instituted proceedings with a state or local agency. See 29 U.S.C. §626(d)(2). Harris filed her EEOC charge on July 26, 1994. Consequently, any claim of age discrimination based on conduct occurring more than 300 days prior to that date, i.e., prior to September 30, 1993, is time-barred. All the conduct of which Watson complains occurred prior to September 30, 1993. She may not proceed under the ADEA.

Harris responds that no claims are barred because American's violation is a continuing one. The Court disagrees. The "continuing violation" doctrine is premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights have been violated. If an event or a series of events should have alerted a reasonable person to act to assert his or her rights at the time of violation, the victim cannot later rely on the doctrine. Martin v. Nannie & the Newborns, 3 F.3d 1410, 1415 n.6 (10th Cir.1993). Here, Watson was well aware of the defendant's actions of which she now complains within the statutory period. Her contention is that because of the failure to promote, the loss of compensation is "continuous in that it occurs again and again with every paycheck." This is an argument that the effect of discriminatory acts continues outside the statutory period. Such a contention is insufficient to invoke the continuing violation doctrine. See Mascheroni v. Bd. of Regents, 28 F.3d 1554 (10th Cir.1994).

Assuming arguendo that the plaintiff's claims are properly before the Court and that she has made out a prima facie case (a dubious assumption) plaintiff has presented no evidence raising an issue of fact that the reasons offered by American for failing to promote her were pretextual. Summary judgment is appropriate in all respects.

It is the Order of the Court that the motion of the defendant American Airlines, Inc. to dismiss or for summary judgment (#113) against plaintiff Ann Watson is hereby GRANTED.

SO ORDERED THIS 29 DAY OF MARCH, 2006.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 29 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GWENLYN D. DIKEMAN,
SSN: 446-42-9640,

PLAINTIFF,

vs.

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

DEFENDANT.

CASE No. 99-CV-252-M ✓

ENTERED ON DOCKET

DATE MAR 29 2000

ORDER

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

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

¹ Plaintiff's February 22, 1996 applications for Disability Insurance and Supplemental Security Income benefits were denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held June 26, 1997. By decision dated August 22, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on February 10, 1999. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born November 3, 1943 and was 53 years old at the time of the hearing. [R. 45, 57, 84]. She claims to have been unable to work since November 24, 1995 due to respiratory problems and a right "foot drop." [R. 43, 53, 58].

The ALJ determined that Plaintiff has severe impairments consisting of chronic obstructive pulmonary disease and right foot drop but that she retained the residual functional capacity (RFC) to perform sedentary work with restrictions on repetitive pushing or pulling of leg controls, stooping, crouching, bending, kneeling, climbing, crawling, balancing, reaching overhead; with limited exposure to temperature extremes, humidity, dust, fumes, gases, caustic chemicals; and with the ability to alternate sitting and standing every half hour. [R. 26]. He determined that Plaintiff was not able to perform her past relevant work (PRW) as a stocker/cashier but found that Plaintiff could perform a sedentary, semi-skilled cashier job. Based upon the testimony of a vocational expert (VE), the ALJ determined that sedentary semi-skilled

cashier jobs were available in the economy in significant numbers and found, therefore, that Plaintiff was not disabled as defined by the Social Security Act. [R. 26]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts only one error upon appeal. She contends the ALJ erred in finding Plaintiff had skills acquired from her past work which would transfer to a sedentary cashier occupation. Because Plaintiff is within the "closely approaching advanced age" category, the determination of her disability status turns upon the determination regarding the transferability of her skills. Under the grids,² if Plaintiff's skills are transferable, Rule 201.15 applies. If not, Rule 201.14 applies and dictates a conclusion that Plaintiff is disabled. *See Frey v. Bowen*, 816 F.2d 508, 517 (10th Cir. 1987)(citing *Podedworny v. Harris*, 745 F.2d 210 (3rd Cir. 1984)).

Under the Social Security regulations, an individual is considered to have transferable skills "when the skilled or semi-skilled work activities [the individual] did in past work can be used to meet the requirements of skilled or semi-skilled work activities of other jobs or kinds of work." 20 C.F.R. § 404.1568(d)(1). Transferability is most probable among jobs in which the same or lesser degree of skill is required; the same or similar tools or machines are used; and the same or similar raw materials, products, processes, or services are involved. *id.* § 404.1568(d)(2). "Transferability

² 20 C.F.R. § 404, Subpt. P, App. 2, Table No. 1: Medical-Vocational Guidelines.

refers to acquired work skills, not to aptitudes and attributes that are more properly characterized as qualities necessary and useful in nearly all jobs." *Frey*, 816 F.2d at 517-18.

Plaintiff worked for Homeland Stores, Inc. for 34 years. [R. 44, 94]. On the job description form Plaintiff filled out for the administration, she listed her jobs at Homeland as management, file maintenance (sic), stocker and checker. [R. 94]. Plaintiff reported that she performed her job as computer operator in file maintenance without any problems until she was transferred to the store in Pryor where she had to work nights as a stocker, lifting and stacking 50 lb. bags of dog food. [R. 95, 106]. At the hearing, Plaintiff testified that for 33 years, she had worked as a checker, working as a dog food stocker only in the six months after her transfer and just prior to "getting sick." [R. 44, 48].

At the hearing, the vocational expert (VE) identified Plaintiff's past work as cashier/checker, semi-skilled, SVP of 3 and light exertion. [R. 64]. She identified the stock clerk job as a semi-skilled, SVP of 4, generally performed at a heavy exertion level but performed by Plaintiff at her past work at a light level of exertion. [R. 64]. The pricer (file maintenance) position was also identified as a semi-skilled job, SVP of 3 and light exertion. [R. 94-95].

After that testimony, the following exchange took place between the ALJ and the VE:

Q Okay, did the claimant's relevant work generate any acquired skills that would be transferable to the sedentary level?

A The cashier/checker, Your Honor, there are some cashiering positions at the sedentary level. It's still a semiskilled level, an SVP of 3, and it's sedentary exertion. In Oklahoma we have 1,500 such positions and 120,000 nationally. The -

Q And that, that's sedentary?

A Yes, Your Honor.

Q Semiskilled, 3?

A Yes, Your Honor.

[R. 65-66]. The ALJ then gave the VE a hypothetical question incorporating light lifting ability into his assessment of Plaintiff's RFC. [R. 66-67]. The VE testified Plaintiff could return to her cashier/checking job and named other jobs Plaintiff could perform at the unskilled light exertional level. [R. 67]. The second hypothetical question presented by the ALJ restricted Plaintiff's physical exertions to sedentary work. [R.69]. The VE's response was that only the sedentary cashier position would be available with that added restriction. *Id.* In his decision denying benefits, the ALJ cited the sedentary cashier job as available in significant numbers in the economy which Plaintiff could perform.

Plaintiff asserts the ALJ failed to identify specific job skills that were transferable as required by Social Security Ruling 82-41 and *Frey*. Defendant concedes the VE did not specifically list the skills that he deemed transferable from cashier with light exertion, to cashier with sedentary exertion. Defendant asserts, however, that, since the cashier job is the same job as Plaintiff's past relevant work,

just at a lighter exertional level, the failure of the VE to identify the specific skills was harmless error.

The Social Security regulations define a skill as knowledge of a work activity which requires the exercise of significant judgment that goes beyond the carrying out of simple job duties and is acquired through performance of an occupation which is above the unskilled level (requires more than 30 days to learn). It is practical and familiar knowledge of the principles and processes of an art, science or trade, combined with the ability to apply them in practice in a proper and approved manner. Soc.Sec. R. 82-41, 1982 WL 31389 at *2. Semi-skilled work is work which needs some skills but does not require doing the more complex work duties. Semi-skilled jobs may require alertness and close attention to watching machine processes; or inspecting, testing or otherwise looking for irregularities; or tending or guarding equipment, property, materials, or persons against loss, damage or injury; or other types of activities which are similarly less complex than skilled work, but more complex than unskilled work. A job may be classified as semi-skilled where coordination and dexterity are necessary, as when hands or feet must be moved quickly to do repetitive tasks. 20 C.F.R. § 404.1568(b). "Skills refer to experience and demonstrated proficiency with work activities in particular tasks or jobs. In evaluating the skill level of PRW or potential occupations, work activities are the determining factors." Social Security Rule 82-41, 1982 WL 31389, *3.

The vocational expert testified that Plaintiff's prior work as checker/cashier had been semi-skilled at a light exertional level and that the skills Plaintiff acquired at that

job were transferable to the semi-skilled work of cashier at the sedentary level. Plaintiff does not contend that she did not acquire such skills or that she no longer possesses them. Nor does her comparison of the DOT descriptions of 211.462-010 and 211.462-014 serve to contradict the VE's testimony that the alternate work activity involved skills Plaintiff acquired in her prior work. Social Security Ruling 82-41 states: A VS (vocational specialist) is sometimes required to assist the adjudicator or ALJ in determining the skill level of past work." *Id.* *4. Accordingly, the ALJ's reliance on the vocational expert to clarify Plaintiff's ability to perform other work is precisely what the rulings contemplate. See also: *Jordan v. Heckler*, 835 F.2d 1314 (10th Cir. 1987)(a vocational expert may be called for the limited purpose of determining whether the claimant's skills acquired during past work would transfer to a category containing the exertional level the ALJ has concluded the claimant could perform). The vocational expert identified the cashier job as work that Plaintiff could perform using her acquired work skills. Thus, the requirements of Social Security Ruling 82-41 were met, and the ALJ did not err in finding Plaintiff not disabled.

The Court concludes that substantial evidence supports the ALJ's determination that Plaintiff possessed skills which were transferable to other work. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 28th day of MARCH, 2000.


FRANK H. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

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

JERRY ALEXANDER, CIPRIANO)
ALVARADO, LAVONNE ANDERSON,)
JOHN BENNETT, MARTY CHARLES,)
HOWARD CHILDERS, COY COOK,)
SCOTT COOK, MICHAEL COX,)
SHIRLEY DAVIS, EDWIN DEAN, LOIS)
DENTIS, SHERI DILLMAN, PRESTON)
DUGAN, JAMES EMERSON, JIMMY)
FORD, KENNETH GADDY, TERESA)
GLADD, RICHARD HIGGINS, JUDY)
HILKER, DANNY JACKSON, JAMES)
KEELING, DANNY KELLY, DIANE)
KELLY, DOROTHEA KIDNEY,)
WILLIAM KNIGHT, BARBARA LARUE,)
LARRY LEE, MICHAEL MARQUEZ,)
DALE MCDANIEL, JANIE MILLER,)
GILBERT NAIL, DARRIN PROCK,)
HOMER PURCELL, DONNA RAMBO,)
JAMES READY, LARRY SCARBROUGH,)
ALFRED SEIP, RAY SHIVERS, HAROLD)
SKAGGS, BOBBY SMITH, DAVID)
SMITH, TIMOTHY SNIDER, JOELLE)
STRUBLE, VICTOR TAYLOR,)
VICTORIA VAUGHN, STEVE WEGNER,)
DEAN WISE, CLARENCE WOODS,)
MICHAEL SILER, and CLEOTIS)
RAINES,)

Plaintiffs,)

v.)

SMITH & NEPHEW, P.L.C., and)
SMITH & NEPHEW RICHARDS, INC.,)

Defendants.)

ENTERED ON DOCKET
DATE MAR 29 2000

F I L E D

MAR 29 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-1004-K (E)

ORDER

Before the Court are Defendant Smith & Nephew Richards, Inc.'s ("Defendant's") motions for summary judgment and to exclude or limit the testimony of Jerry D. McKenzie, M.D., as to Plaintiff Judy Hilker ("Plaintiff").

I. History of Case

This is a products liability case concerning the Rogozinski Spinal Rod System manufactured by Defendant, presently on remand from *In re Orthopedic Bone Screw Products Liability Litigation*, multidistrict litigation number 1014, in the United States District Court for the Eastern District of Pennsylvania. Plaintiff is suing Defendant for injuries allegedly sustained due to the Rogozinski system implanted into her back in 1993. Plaintiff's theories for liability include manufacturers' products liability, negligence, negligence per se, failure to warn, breach of express and implied warranties, and fraud.

Plaintiff's back problems began in the 1980s, and she had abnormal findings in both cervical and lumbar spine by early 1990. Plaintiff injured her back in June 1991, when she slipped and fell. After being diagnosed with a herniated disc at the C5-6 level, Plaintiff underwent surgery on August 27, 1992. This first surgery involved an anterior C5 disc excision followed by an anterior C5-6 fusion using autogenous right iliac donor bone. Although Plaintiff's neck and arm pain decreased, she began to experience increasing pain in her back, radiating into her legs. Eventually, R. Clio Robertson, M.D., diagnosed Plaintiff with central herniation of L4-5 disc and extravasated lumbosacral disc with right S1 radiculopathy. Due to her increasing symptomatology, which was preventing her from

working, and her failure to respond to conservative treatment, Dr. Robertson recommended a decompression of the L4-5 and L5-S1 levels followed by stabilization using the Rogozinski Spinal Rod System bilaterally. Dr. Robertson discussed the risks of this surgery with Ms. Hilker. Plaintiff consulted with Dr. Don Hawkins, who concurred in Dr. Robertson's recommendation. Plaintiff agreed to a second surgery, which Dr. Robertson performed on January 18, 1993. In this surgery, Dr. Robertson performed a decompressive laminectomy of L4 and L5 with medial facetectomy and foraminotomy over the L4-5 and L5-S1 levels; removal of herniated L4-5 and L5-S1 discs with evacuation of interspaces; stabilization of the L4-5 and L5-S1 levels using the Rogozinski device bilaterally; and bilateral L4-5 and L5-S1 lateral mass and facet fusion utilizing autogenous left iliac donor bone. Dr. Robertson secured the Rogozinski device with screws through the pedicle into the vertebral bodies of L4, L5, and S1. In the 10 months following surgery, Plaintiff's problems with low back pain markedly improved, and x-rays indicated solid fusion from L4 to sacrum with no complicating appearance of the Rogozinski instrumentation. In early 1994, after gradually increasing her activities, returning to work, and not following her exercise program, Plaintiff began to develop pain in her low back and buttocks and tightness in her left calf. In April 1994, Dr. Robertson found that x-rays demonstrated what appeared to be solid fusion and did not see any complicating process about the fusion or Rogozinski instrumentation. The device remained in place until Plaintiff's death on May 7, 1995. Plaintiff argues that the Rogozinski system was not mechanically strong enough to support her spine during the fusion process,

did not promote fusion at the L5-S1 level or provide any medical benefit, and aggravated, if not caused, Plaintiff's medical problems, primarily continued back and leg pain.

II. Exclusion of Expert Testimony

Defendant seeks to exclude the testimony of Dr. Jerry D. McKenzie, Plaintiff's medical causation expert, for failure to satisfy Fed. R. Evid. 702. Defendant argues that Dr. McKenzie is not qualified to testify as to his expressed opinions, his opinions are not sufficiently reliable to satisfy Rule 702, and his opinions are irrelevant to the case.

A. Standard

Fed. R. Evid. 702 authorizes a "witness qualified as an expert by knowledge, skill, experience, training, or education" to testify as to "scientific, technical, or other specialized knowledge." Testimony is admissible under Fed. R. Evid. 702, if it "rests on a reliable foundation and is relevant." *See Kumho Tire Co. v. Carmichael*, — U.S. —, 119 S. Ct. 1167, 1171 (1999). In making its initial determination of reliability, the Court has broad latitude to consider whatever factors the Court finds useful, and the particular factors will depend on the unique circumstances of the expert testimony involved. *See id.* at 1176. Factors mentioned in *Daubert* and *Kumho* include the following: (1) whether the reasoning or methodology underlying the expert's opinion has been or could be tested; (2) whether the reasoning or methodology has been subject to peer review and publication; (3) the known or potential rate of error; and (4) the level of acceptance of the reasoning or methodology by the relevant professional community. *See id.* at 1176-77; *Daubert v. Merrill Dow Pharms., Inc.*,

509 U.S. 579, 592-95 (1993). These factors are not necessarily applied in every case and are not exclusive of other factors. *See Kumho*, 118 S. Ct. at 1175. An expert may rely on facts and data not in evidence to the extent reasonably relied upon by experts in his field. *See Fed. R. Evid. 703*. Rule 702 was intended to liberalize the introduction of relevant expert evidence and such testimony is subject to being tested by "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Daubert*, 509 U.S. at 596. The Court also must recognize that expert witnesses have the potential to "be both powerful and quite misleading." *Id.* at 595.

B. Dr. McKenzie's Qualifications

Dr. McKenzie does not qualify as an expert to testify as to the causation of Plaintiff's ailments. Dr. McKenzie's report indicates that he proposes to testify that (1) the Rogozinski device did not provide any medical advantage to Ms. Hilker and did not enhance fusion at the L5-S1 level; (2) she developed a localized chronic inflammatory reaction from the device that caused fibrous and bony overgrowth resulting in symptoms of lower extremity radiculitis; and (3) she developed pseudarthrosis manifested by a continuation of chronic low back pain.

The simple possession of a medical degree is insufficient to qualify a physician to testify as to the advantages of an spinal fixation device, or the medical causation of spine-related ailments. Plaintiff cites to *Wheeler v. John Deere Co.*, which states that "an expert witness is not strictly confined to his area of practice, but may testify concerning related

applications; a lack of specialization does not affect the admissibility of the opinion, but only its weight." 935 F.2d 1090, 1100 (10th Cir. 1991). This opinion and the other federal cases cited by Plaintiff, however, are pre-*Daubert*.¹ A blanket qualification for all physicians to testify as to anything medically-related would contravene the Court's gate-keeping responsibilities.²

Dr. McKenzie's qualifications even fail to satisfy the Fifth Circuit's quite liberal qualification test. That Circuit finds that, while a completely unqualified expert should not testify, *Daubert* focuses instead on relevancy and reliability. See *Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 507 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 1171 (2000). Therefore, "[a]s long as some reasonable indication of qualifications is adduced, the court may admit the evidence without abdicating its gate-keeping function." *Id.* As more fully set out below, Dr. McKenzie's qualifications fail to satisfy even this minimal test.

Dr. McKenzie's experience as an emergency room physician and in legal medicine for workers' compensation injuries does not qualify him to give the opinions to which he proposes to testify. Dr. McKenzie has been licensed as a doctor in Oklahoma since 1967,

¹In fact, the only post-*Daubert* Tenth Circuit opinion to cite *Wheeler* is *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1519 (10th Cir. 1996). *Compton*, however, was based on the erroneous holding that *Daubert* was inapplicable to opinions not based on a particular methodology or technique. See *id.*, *abrogated by Kumho*, 119 S. Ct. at 1170.

²Other courts have reached a similar conclusion regarding the testimony of medical doctors. See, e.g., *Whiting v. Boston Edison Co.*, 891 F. Supp. 12, 24 (D. Mass. 1995) ("Just as a lawyer is not by general education and experience qualified to give an expert opinion on every subject of the law, so too a scientist or medical doctor is not presumed to have expert knowledge about every conceivable scientific principle or disease.").

with over two decades of experience in emergency medicine. Dr. McKenzie is not board certified in any medical specialty and has no experience or training in orthopedics, spinal surgery, spinal fusion with instrumentation, neurology, or other areas remotely related to the subject of his opinions. Plaintiff makes no attempt to demonstrate Dr. McKenzie's qualifications in these specialized area but rather relies on his assertion that Dr. McKenzie's medical degree is qualification enough. Plaintiff simply has not demonstrated that Dr. McKenzie is "qualified as an expert by knowledge, skill, experience, training, or education" to testify as to the effects of the Rogozinski device or the causes of Ms. Hilker's ailments. *See Fed. R. Civ. Evid. 702.*

C. Reliable Foundation

Even if Dr. McKenzie possessed the appropriate qualifications, his proffer lacks a reliable foundation. Plaintiff must show that Dr. McKenzie's method is scientifically sound and his opinion is based on sufficiently reliable facts. *See Mitchell v. Gencorp Inc.*, 165 F.3d 778, 781 (10th Cir. 1999). At a minimum, Dr. McKenzie should describe the method he used in reaching, and the data supporting, his determination. The Court cannot rely on an expert's mere assurance that the methodology and data are reliable. *See id.* The Court does not focus on an expert's conclusions but on whether his principles and methodology are sound. *See Daubert*, 509 U.S. at 595. If any step renders Dr. McKenzie's opinion unreliable – either in the choice of methodology or its application – his opinion is inadmissible. *See Mitchell*, 165 F.3d at 782.

Dr. McKenzie's methodology for determining the medical causation of Plaintiff's ailments is wholly lacking in reliability.³ Dr. McKenzie notes that he merely reviewed Plaintiff's medical records.⁴ On this basis and his expertise as a licensed physician, Dr. McKenzie opines that the Rogozinski device caused the problems listed above. Dr. McKenzie, however, fails to explain why he eliminated, assuming he even considered, other possible causes for Plaintiff's injuries. Dr. McKenzie was unaware of Plaintiff's prior back injuries, her activity levels following surgery, and her return to employment. He has testified that Plaintiff's diabetes mellitus could cause symptoms mimicking bursitis, such as pain, numbness, and weakness. His report, however, makes no effort to rule this out or explain the effect of Plaintiff's severe diabetes on her condition. He testifies that Plaintiff may not have obtained solid fusion, notwithstanding the contrary indications from her x-rays and examining physician, based solely on his belief that one can never determine solid fusion with instrumentation in place. Finally, Dr. McKenzie makes no attempt to distinguish Plaintiff's pre-surgery pain complaints from the less severe problems reported following implantation. Dr. McKenzie's methodology, basing his opinion solely on Plaintiff's medical

³This discussion will focus on Dr. McKenzie's evaluation of whether Defendant's device *actually* caused Plaintiff's injuries, specific causation, rather than whether it is *capable* of causing such injuries, general causation. The parties do not appear to dispute the issue of general causation for the purposes of the motion to exclude.

⁴Dr. McKenzie's initial affidavit erroneously stated that he based his opinions on his examination of Judy Hilker. However, in his supplemental affidavit, he states that he never personally examined Ms. Hilker. The latter statement comports with the evidence indicating that Ms. Hilker died prior to Dr. McKenzie's involvement in this case.

records without indulging in even limited differential diagnosis, is entirely unreliable.⁵

The standard used to determine the sufficiency of causation evidence does not affect this analysis. Plaintiff's reliance on the lesser causation standard of *McKellips v. Saint Francis Hospital, Inc.*, in order to cure the defects in her expert's methodology, is misplaced. 741 P.2d 467 (Okla. 1987). In *McKellips*, the Oklahoma Supreme Court adopted the loss of chance of survival doctrine that lessens the causation burden in medical malpractice cases where the duty breached was one imposed to prevent the type of harm the patient ultimately sustained. *See id.* at 474. This doctrine, even if it were otherwise applicable, has *not* been extended to ordinary negligence actions brought against persons other than a medical practitioner or hospital. *See Hardy v. Southwestern Bell Tel. Co.*, 910 P.2d 1024, 1025-26 (Okla. 1996). Thus, even if a lesser causation standard would be sufficient to lessen the reliability standards imposed by *Daubert*, the doctrine is inapplicable to this case. Furthermore, requiring Dr. McKenzie to employ differential diagnosis does not require Plaintiff to prove causation beyond a reasonable doubt. Contrary to Plaintiff's analysis, *In*

⁵Other courts have found that some sort of differential diagnosis or attempted elimination of other causes is an important, if not necessary, factor in determining the reliability of a medical causation opinion. *See, e.g., Rutigliano v. Valley Bus. Forms*, 929 F. Supp. 779, 786 (D.N.J. 1996) (requiring differential diagnosis before an expert may give opinion testimony regarding specific causation), *aff'd*, 118 F.3d 1577 (3d Cir. 1997); *Wooley v. Smith & Nephew Richards, Inc.*, 67 F. Supp. 2d 703, 703 (S.D. Tex. 1999) (rejecting expert opinion as unreliable that, among other things, lacked any analysis indicating how other possible causes of the patient's pain were ruled out); *McCollin v. Synthes Inc.*, 50 F. Supp. 2d 1119, 1127 (D. Utah 1999) (rejecting expert's opinion that, among other things, failed to explain how other potential causes were ruled out); *Cali v. Danek Med., Inc.*, 24 F. Supp. 2d 941, 951 (W.D. Wis. 1998) (finding that expert's assertion that implanted device caused patient's symptoms based on his general expertise and without ruling out other possible causes lacked sufficient reliability and was unsupported speculation); *Tucker v. Nike, Inc.*, 919 F. Supp. 1192, 1196-97 (N.D. Ind. 1995) (finding that expert's failure to exclude other possible factors and to inquire as to patient's prior injuries rendered opinion unreliable).

re Paoli Railroad Yard PCB Litigation reemphasizes the need for a medical causation expert to engage in diagnostic techniques that rule out other causes and offer a good explanation as to why his conclusion remains reliable when he does not. 35 F.3d 717, 761 (3d Cir. 1994). Dr. McKenzie has failed to do so and does not meet the reliability requirements imposed by Rule 702.⁶

III. Summary Judgment

A. Standard

Summary judgment is appropriate if “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence that would require submission of the case to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). Where the nonmoving party will bear the burden of proof at trial, that party must go beyond the pleadings and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *See Mares*, 971 F.2d at 494. Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at

⁶Having found Dr. McKenzie unqualified and his methodology unreliable, the Court does not rule on the relevance of his proffered opinion.

trial, the content or substance of such evidence must be admissible. *See Thomas v. International Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995).

B. Plaintiff's Claims

Plaintiff's claims against Defendant are as follows: (1) manufacturers' products liability; (2) negligence, including negligence per se; (3) failure to warn; (4) breach of express and implied warranties; and (5) fraud.⁷ Defendant argues that, because Plaintiff has failed to prove causation, her entire case should be dismissed. Defendant also argues that Plaintiff's Food and Drug Administration ("FDA") regulatory theories are legally unsound and that Plaintiff cannot establish any defect in the Rogozinski device.

C. Manufacturers' Products Liability

Because Plaintiff has put forward no evidence of medical causation, Plaintiff's manufacturers' products liability claim must fail. The three elements of a manufacturers' products liability action are as follows: (1) the product caused Plaintiff's injury; (2) the defect existed in the product at the time it left Defendant's possession and control; and (3) the defect rendered the product unreasonably dangerous. *See Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1363 (Okla. 1974). To establish causation, Plaintiff must prove that her injury was caused, not necessarily by the negligence of Defendant, but by reason of a defect built in and existing at the time of her injury. *See id.* at 1364. Unreasonably dangerous means that

⁷This formulation differs somewhat from that found in Plaintiff's complaint. However, given the complex history of the case, the Court will rely on Plaintiff's representations in her summary judgment response as to the extent of her claims.

the device was dangerous to an extent beyond that which would be contemplated by the ordinary customer who purchases it, with the ordinary knowledge common to the community as to its characteristics. *See id.* at 1362-63.

Absent the now-excluded testimony of Dr. McKenzie, Plaintiff has no evidence of medical causation. The Oklahoma Supreme Court has frequently found expert testimony necessary to establish medical causation "[w]here injuries are of a character requiring skilled and professional men to determine the cause and extent thereof." *Williams v. Safeway Stores, Inc.*, 515 P.2d 223, 227 (Okla. 1973). Plaintiff has no expert qualified to render an opinion as to the cause of her injuries. As noted above, Dr. McKenzie's testimony cannot be admitted, because he lacks the necessary qualifications and his methodology is unreliable. Plaintiff also attempts to rely on the testimony of Harold Alexander, Ph.D., to satisfy this burden. However, Dr. Alexander's testimony is limited to orthopedic bioengineering by Pretrial Order No. 725.⁸ *In re Orthopedic Bone Screw Prods. Liab. Litig.*, No. MDL 1014, 1997 WL 39583 *6 (E.D. Pa. Jan. 23, 1997). This means Dr. Alexander may testify as to "how pedicle screws function in the human body and how the human body functionally, but not medically, responds to pedicle screws." *Id.* at *3. He is not, however, "particularly qualified to make . . . statements in the additional disciplines of law, medicine, orthopedics,

⁸Bioengineering includes the following: (1) biomechanics, the study of how a medical device will mechanically interact with surrounding tissue; (2) biomaterials, the study of the materials in a medical device and the body tissue's response to this device; (3) biomedical engineering, the study of how a device should be designed and constructed; and (4) design and analysis of device research, the study of the proper design and implementation of studies to determine potential risks and benefits associated with device designs and the extent to which those risks and benefits are realized in clinical practice. *See* 1997 WL 39583, at *1, 6.

FDA regulatory practice, conflicts of interest, market surveys, and clinical studies." *Id.* at *4. While Dr. Alexander's affidavit covers many of these disallowed areas, his orthopedic bioengineering testimony is insufficient to create an issue of causation.⁹

D. Negligence and Negligence Per Se

1. Negligence

Plaintiff's negligence claim similarly fails on her inability to show causation. The elements of a negligence claim in Oklahoma are as follows: (1) the existence of a duty owed by Defendant to Plaintiff to use ordinary care; (2) the breach of that duty; and (3) an injury proximately caused by the breach. *See Comer v. Preferred Risk Mut. Ins. Co.*, 991 P.2d 1006, 1010 (Okla. 1999). Therefore, in order for Plaintiff to recover on a negligence action, there must be a causal connection between Defendant's actions and the injury. *See Key v. Liquid Energy Corp.*, 906 F.2d 500, 505 (10th Cir. 1990). As noted above, Plaintiff has failed to put forth any evidence of causation, rendering judgment for Defendant appropriate as to this claim, as well. *See Hardy v. Southwestern Bell Tel. Co.*, 910 P.2d 1024, 1027 (Okla. 1996) ("While absolute certainty is not required, mere possibility of causation is insufficient.").

⁹Plaintiff argues that Dr. Alexander's testimony is sufficient to establish that the device provided no medical benefit to Plaintiff and generated metal particles and corrosion products that produced an inevitable inflammatory response in adjacent tissues. As noted above, no expert has examined Ms. Hilker's device, because it was never explanted. Therefore, "the physical evidence of component interface motion, surface abrasion, and corrosion exhibited by the explanted components" cannot possibly prove actual medical causation in Plaintiff's case. (Pl.'s Resp. Def.'s Mot. Summ. J. at 36.)

2. Negligence Per Se

Plaintiff's negligence per se claim fails, because this theory is inapplicable to labeling and marketing violations under the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 *et seq.*, and Plaintiff has put forward no evidence of causation. When a statute or regulation governs conduct, the Court may adopt it as the standard required of a reasonably prudent person if the Court believes it appropriate for civil liability. *See Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 622 (10th Cir. 1998). The violation of a statute is negligence per se if (1) the claimed injury is caused by the law's violation; (2) the injury is of the type intended to be prevented by the statute; and (3) the injured person is a member of the class the statute intends to protect. *See Lockhart v. Loosen*, 943 P.2d 1074, 1078 (Okla. 1997). Plaintiff's negligence per se claim appears to be based on Defendant's alleged violations of FDA regulations. The Court has rejected this theory in *Johnson v. Smith & Nephew Richards, Inc.*, No. 97-CV-363-K, 1999 WL 1117105 *2 (N.D. Okla. Sept. 30, 1999).

In this case, Plaintiff has failed to put forth evidence that Defendant's alleged violation of the FDA regulations caused her injury. On the contrary, Defendant has submitted Dr. Robertson's uncontroverted testimony that he knew that the Rogozinski device had not been approved by the FDA to be marketed for the use of bone screws in the vertebral pedicles and that he relied on his knowledge of the medical standard of care and the facts of Ms. Hilker's case in recommending the surgery.

Furthermore, the regulations alleged to have been violated are administrative and do not impose a standard of care, as could form the basis of a negligence per se claim. Plaintiff argues that Defendant unlawfully marketed the Rogozinski device for use with pedicular attachment. Under the Medical Device Amendments of 1976, 21 U.S.C. §§ 360c *et seq.*, devices are divided into three categories, Classes I, II, and III. The classes range from least to most dangerous. Class I devices are subject only to general controls. *See* 21 U.S.C. § 360c(a)(1)(A). Class II devices are subject to further special controls, and Class III devices require premarket approval ("PMA"). *See id.* § 360c(a)(1)(B)-(C). At the time of Plaintiff's surgery, the Rogozinski device with pedicular attachment fell under Class III. However, because it was substantially equivalent to devices marketed in interstate commerce prior to May 28, 1976, it could be introduced into the market without PMA. *See id.* §§ 360(k), 360c(f). This equivalency classification applied only to devices labeled and intended to be fixed to the spine by laminar hooks and sacral/iliac attachment. The FDA prohibited Defendant from labeling or promoting the device for pedicular attachment to the vertebral column. Moreover, the FDA required that all labeling prominently note that the screws were intended for sacral/iliac attachment only and include the following statement: "WARNING - THIS DEVICE IS NOT INTENDED FOR PEDICULAR APPLICATION." While the FDA regulates the manner in which Defendant markets the Rogozinski device, it does not regulate a physician's decision to use the device for another, "off-label" use. *See* Citizen Petition Regarding the Food and Drug Administration's Policy on Promotion of Unapproved

Uses of Approved Drugs and Devices; Request for Comments, 59 Fed. Reg. 59,820, 59,821 (1994). Furthermore, the parties acknowledge that the FDCA does not provide a private right of action. See 21 U.S.C. § 337(a). Nevertheless, Plaintiff seeks to enforce the FDCA by arguing that the FDA's labeling requirements constitute a minimum standard of care. As noted in *Johnson*, these requirements are merely administrative in nature and lack any independent substantive content. See 1999 WL 1117105, at *2. Under these circumstances, the Court finds that the alleged violations of FDA regulations do not create a cause of action for negligence per se in Oklahoma. Cf. *Talley v. Danek Med., Inc.*, 179 F.3d 154, 161 (4th Cir. 1999) (finding no negligence per se claim under Virginia law, because the regulations lack substantive content); *Baker v. Danek Med.*, 35 F. Supp. 2d 875, 878 (N.D. Fla. 1998) (finding no negligence per se claim under Florida law where FDCA does not provide private right of action and FDA status was immaterial to implanting surgeon); but cf. *Valente v. Sofamor*, 48 F. Supp. 2d 862, 876 (E.D. Wis. 1999) (disagreeing with *Cali v. Danek Med., Inc.*, 24 F. Supp. 2d 941, 954 (W.D. Wis. 1998), and finding Wisconsin law allows negligence per se claim based on violation of FDCA).

E. Failure to Warn

Plaintiff's failure to warn claim fails under the learned intermediary doctrine. In Oklahoma, the learned intermediary doctrine is an exception to the duty to warn, under which

the manufacturer can warn the physician rather than the ultimate consumer.¹⁰ *See Tansy v. Dacomed Corp.*, 890 P.2d 881, 886 (Okla. 1994). The reasoning behind this doctrine is instructive. As a physician, Dr. Robertson has the duty to inform himself of the qualities and characteristics of the Rogozinski system and to exercise independent judgment, taking into account his knowledge of the patient, as well as the product. *See Edwards v. Basel Pharms.*, 933 P.2d 298, 300 (Okla. 1997). The patient is expected to rely primarily on this judgment. *See id.* Therefore, if the Defendant properly informed Dr. Robertson, it is entitled to assume that he exercised his informed judgment. *See id.* at 300-01. In this case, Dr. Robertson has testified that he was fully informed as to the FDA status of the Rogozinski System, knew of its risks, did not rely on Defendant's promotional materials, and exercised his independent medical judgment based on the standards of care and Ms. Hilker's situation in recommending the surgery. Given these facts, Plaintiff can show no injury resulting from any failure to warn Dr. Robertson.

F. Breach of Express and Implied Warranties

Plaintiff's claim for breach of express warranty fails, because Plaintiff has submitted no evidence that Dr. Robertson relied on any of Defendant's representations. *See Speed Fasteners, Inc. v. Newsom*, 382 F.2d 395, 397 (10th Cir. 1967). Dr. Robertson states in his affidavit that Defendant did not make any warranty about, or promise of performance

¹⁰There are two exceptions to the learned intermediary doctrine in Oklahoma – mass immunizations and situations where the FDA has mandated that warning be given directly to the consumer – neither of which is applicable here. *See Edwards v. Basel Pharms.*, 933 P.2d 298, 301 (Okla. 1997).

concerning, the Rogozinski System and that he was knowledgeable of the device's regulatory status and risks. He also states that he has used different spinal fixation devices and based his decision to use the Rogozinski device on his experience with the system. Plaintiff's only response is that the Court can infer that Dr. Robertson relied on these representations despite his affidavit to the contrary.¹¹ Plaintiff puts forward no material facts in support of Dr. Robertson's reliance, warranting summary judgment to Defendant on this claim.

Plaintiff's warranty claims also lack any evidence of causation. In addition to breach of express warranty, Plaintiff alleges breach of implied warranty of fitness for intended use. In a products liability action, breach of implied warranty is no longer an appropriate remedy except as provided in the Uniform Commercial Code. *See Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1365 (Okla. 1974). In order to recover for breach of warranty, Plaintiff must show the following: (1) the existence of the warranty; (2) the warranty was broken; and (3) the breach was the proximate cause of the loss sustained. *See American Fertilizer Specialists, Inc. v. Wood*, 635 P.2d 592, 595 (Okla. 1981); *see also* U.C.C. § 2-314 cmt. 13. As noted above, Plaintiff has no evidence that the device caused her injuries.

¹¹Plaintiff actually states, "the inference can be drawn that Dr. *Hawkins* probably relied . . ." (Pl.'s Resp. Def.'s Mot. Summ. J. at 30 (emphasis added).) Although Dr. Hawkins seconded his recommendation, Dr. Robertson was Plaintiff's primary surgeon. Whether Plaintiff intends to state Dr. Hawkins or Dr. Robertson is irrelevant, given her lack of evidence of material facts supporting this assertion as to either physician.

G. Fraud

A fraud claim requires Plaintiff to prove (1) Defendant made a material representation; (2) that was false; (3) and made knowingly or recklessly, without regard for its truth; (4) with the intent that it be acted upon; and (5) Plaintiff was injured as a result. *See McCain v. Combined Communications Corp. of Okla., Inc.*, 975 P.2d 865, 867 (Okla. 1998). In order to succeed on this claim, Plaintiff must show that Defendant's submissions to the FDA caused Dr. Robertson to use the Rogozinski Spinal System and that the device caused her injury. As detailed above, Plaintiff has no evidence supporting either assertion.

IV. Conclusion

Because Dr. McKenzie is not qualified to render his proffered expert opinion and because his methodology is unreliable, his testimony is excluded. Absent this testimony, Plaintiff lacks any evidence that the Rogozinski Spinal Rod System caused her injuries. Plaintiff also has submitted no evidence to contradict Defendant's evidence that her surgeon, Dr. Robertson, was aware of the FDA status of the device, did not rely on any representations made by Defendant, was aware of its risks, and chose to implant the Rogozinski system in Ms. Hilker based on his independent medical knowledge. Under these circumstances, Plaintiff's claims for manufacturers' products liability, negligence, negligence per se, failure to warn, breach of express and implied warranties, and fraud must fail.

IT IS THEREFORE ORDERED that Defendant's Motion to Exclude, or in the Alternative, Limit the Testimony of Jerry D. McKenzie, M.D. as to Plaintiff Judy Hilker (# 13) is GRANTED and Defendant's Motion for Summary Judgment as to Plaintiff, Judy Hilker (# 12) is GRANTED.

ORDERED this 27 day of March, 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARK CEOLA, et al.,

Plaintiffs,

v.

SMITH & NEPHEW, P.L.C., and SMITH &
NEPHEW RICHARDS, INC., BURNETT
MEDICAL COMPANY, INC.; JOE BURNETT;
ST. FRANCIS HOSPITAL, INC.; CENTRAL
STATE ORTHOPEDIC SPECIALISTS OF
TULSA, INC.; Successor in Interest of CENTRAL
STATES ORTHOPAEDIC AND SPORTS
MEDICINE CENTER, INC.; and ORTHOPEDIC
SPECIALISTS OF TULSA, INC.,

Defendants.

ENTERED ON DOCKET

DATE MAR 29 2000

Case No. 95-CV-1071K(E) ✓

FILED

MAR 29 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

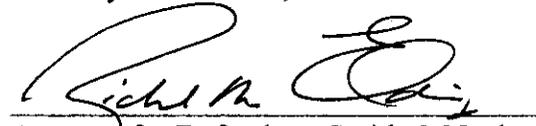
ORDER OF DISMISSAL AS TO WILLIAM WHITE

Defendant Smith & Nephew Richards, Inc. having suggested, upon the record, pursuant to Fed.R.Civ.P. 25(a)(1), the death of William P. White, plaintiff, during the pendency of this action, and Plaintiff's counsel having advised the Court that no person has been located to substitute for the deceased plaintiff, the Court finds that the claims of William White should be, and are, dismissed without prejudice to refiling.


THE HONORABLE TERRY C. KERN
U.S. District Court Judge

APPROVED AS TO FORM:


Attorney for Plaintiff, William P. White


Attorney for Defendant, Smith & Nephew Richards, Inc.

289

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

JOE LEWIS HOSKINS,

Petitioner,

vs.

STEVE HARGETT,

Respondent.

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Case No. 97-CV-231-K ✓

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DATE MAR 29 2000

F I L E D

MAR 29 2000 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

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

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

SO ORDERED THIS 27 day of March, 2000.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

JOE LEWIS HOSKINS,)
)
 Petitioner,)
)
 vs.)
)
 STEVE HARGETT,)
)
 Respondent.)

ENTERED ON DOCKET

DATE MAR 29 2000

Case No. 97-CV-231-K

FILED

MAR 29 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#1). Petitioner is a state inmate and appears *pro se*. Respondent has filed a response to the petition (#3) and has provided the transcript from Petitioner's trial. Petitioner has filed a reply to Respondent's response (#4). For the reasons discussed below, the Court concludes that this petition should be denied.

BACKGROUND

During the overnight hours of August 1-2, 1991, Petitioner beat Bobbie Lee Smith with a T-shaped metal pipe and a metal crutch. Smith died of the injuries sustained in the beating. Petitioner was charged with First Degree Murder in Tulsa County District Court, Case No. CF-91-3289. During his jury trial, held February 10, 11, 12 & 13, 1992, Petitioner testified that he acted in self-defense. The jury found Petitioner guilty of First Degree Murder and he was sentenced to life imprisonment without the possibility of parole.

Petitioner perfected a direct appeal in the Oklahoma Court of Criminal Appeals ("OCCA") where he raised the following claims:

- Proposition No. I: The trial court materially suppressed the Defendant's right to present a defense by rejecting evidence that the defendant knew the alleged victim had previously committed homicide.
- Proposition No. II: The jury was ineffectively instructed on the law applicable to the Defendant's defense of self-defense.
- Proposition No. III: The trial court reversibly erred by failing to instruct the jury on the correct theory of First Degree Manslaughter.
- Proposition No. IV: The trial court reversibly erred by refusing to instruct the jury on the Defendant's mitigation defense of voluntary intoxication.
- Proposition No. V: The trial court committed reversible error by refusing to instruct the jury on second degree murder.
- Proposition No. VI: Fundamental error occurred when the jury was instructed to determine the question of the Defendant's innocence.
- A. The Defendant's presumption of innocence was effectively denied.
 - B. The instruction shifted the burden of proof to the Defendant.
- Proposition No. VII: The prosecutor committed reversible error by encroaching on the presumption of innocence, the definition of the burden of proof, and the issue of credibility, thus violating fundamental rights guaranteed by the United States Constitution.
- A. Presumption of innocence.
 - B. Burden of proof.
 - C. Credibility of witnesses.
- Proposition No. VIII: The prosecutor prejudiced the proceedings by uttering remarks which were designed to result in a life without parole sentence.
- Proposition No. IX: The cumulative effect of the errors requires relief from this court.

(#3, Ex. A). On January 31, 1995, the OCCA affirmed Petitioner's conviction in an unpublished opinion. (#3, Ex. B).

Petitioner filed the instant federal petition for writ of habeas corpus (#1) on March 25, 1997. As his grounds of error, Petitioner asserts the first seven propositions of error as raised on direct appeal. (#1).

ANALYSIS

A. Exhaustion/Evidentiary Hearing

Respondent concedes, and this Court finds, that Petitioner presented each of the seven claims identified in his petition on direct appeal and that, therefore, Petitioner has satisfied the exhaustion requirement of 28 U.S.C. § 2254(b) as to those claims. The Court also finds that an evidentiary hearing is not warranted because Petitioner has not demonstrated that the claims before the Court rely on either a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, or a factual predicate that could not have been previously discovered through the exercise of due diligence and that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found Petitioner guilty of the underlying offense. 28 U.S.C. § 2254(e)(2).

B. Standard of Review

The Antiterrorism and Effective Death Penalty Act (“AEDPA”), enacted April 24, 1996, amended the standard of review in habeas corpus cases as follows:

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

adjudication of the claim –

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

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

28 U.S.C. § 2254(d). As stated above, Petitioner raised each of his instant claims on direct appeal. After considering Petitioner's arguments, the OCCA rejected each claim and affirmed Petitioner's conviction. Thus, the § 2254(d) standard of review governs this Court's review of Petitioner's claims.

C. Petitioner's claims identified in his petition

After careful review of the record in this case, including the trial transcript, the Court finds Petitioner has failed to demonstrate that the decision of the OCCA was contrary to clearly established federal law as set forth by the Supreme Court or that there was an unreasonable application of Supreme Court law to the facts of this case. The Court will address each claim in the order presented by Petitioner.

1. Trial court's refusal to admit Petitioner's testimony that victim had killed her boyfriend

As his first proposition of error, Petitioner argues that the trial court erred in sustaining the State's objection and admonishing the jury to disregard his testimony that he was afraid of the victim because she had previously killed her boyfriend. (See Trans. II at 518). As a result, Petitioner claims the trial court improperly infringed on his right to present a critical aspect of his self-defense claim. The OCCA considered this claim on direct appeal and concluded that there was no need to determine

whether the exclusion of the evidence was erroneous because “it is clear from the record that its exclusion could not have prejudiced [Petitioner].” See #3, Ex. B.

It is well established that the role of a federal habeas corpus court is not to correct errors of state law. Estelle v. McGuire, 502 U.S. 62 (1991). “Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.” Smith v. Phillips, 455 U.S. 209, 221 (1982) (citations omitted). Evidentiary rulings by a state court cannot serve as the basis for habeas corpus relief unless the ruling rendered the petitioner’s trial fundamentally unfair resulting in a violation of due process. Fox v. Ward, 200 F.3d 1286, 1296-97 (10th Cir. 2000) (stating that to justify habeas relief, trial court’s evidentiary error must be “so grossly prejudicial that it fatally infected the trial and denied the fundamental fairness that is the essence of due process”); Duvall v. Reynolds, 139 F.3d 768, 789 (10th Cir. 1997); Nichols v. Sullivan, 867 F.2d 1250, 1253 (10th Cir. 1989) (citing Brinlee v. Crisp, 608 F.2d 839, 850 (10th Cir. 1979)).

After reviewing the transcript from Petitioner’s entire trial, the Court finds that the trial court’s refusal to admit Petitioner’s statement regarding his belief that the deceased had murdered her boyfriend, even if improper, was not significant enough to influence the jury’s decision in light of the other evidence admitted concerning the deceased’s reputation as a violent person. (See Trans. II at 354, 435, 518). As a result, the Court finds that Petitioner has failed to demonstrate that his trial was rendered fundamentally unfair by the exclusion of the evidence. Pursuant to § 2254(d), habeas relief on this claim should be denied.

2. *Errors in jury instructions*

As his second, third, fourth, fifth and sixth allegations of error, Petitioner asserts that the trial court committed numerous errors in instructing the jury. Specifically, Petitioner argues that the self-defense instructions were inadequate, the trial court failed to instruct on the correct theory of First Degree Manslaughter, the trial court refused to instruct on Defendant's defense of voluntary intoxication, the trial court refused to instruct the jury on Second Degree Murder, and by giving a flight instruction the jury was asked to determine the question of Petitioner's innocence. Petitioner raised these claims on direct appeal where they were rejected by the OCCA (#3, Ex. B).

A habeas corpus petitioner "bears a 'great burden . . . when [he] seeks to collaterally attack a state court judgment based on an erroneous jury instruction.'" Lujan v. Tansy, 2 F.3d 1031, 1035 (10th Cir. 1993) (quoting Hunter v. New Mexico, 916 F.2d 595, 598 (10th Cir. 1990)). Federal habeas corpus relief is not available for alleged errors of state law, and, when an allegedly erroneous instruction is given, this Court examines only "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). Moreover, it is well established that "[h]abeas proceedings may not be used to set aside a state conviction on the basis of erroneous jury instructions unless the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial in the constitutional sense." Shafer v. Stratton, 906 F.2d 506, 508 (10th Cir. 1990) (quoting Brinlee v. Crisp, 608 F.2d 839, 854 (10th Cir. 1979)).

Furthermore, where a petitioner challenges the trial court's refusal or failure to give a specific instruction, this Court uses a highly deferential standard of review in evaluating the alleged error. As stated above, "errors in jury instructions in a state criminal trial are not reviewable in federal habeas

corpus proceedings, 'unless they are so fundamentally unfair as to deprive petitioner of a fair trial and to due process of law.'" Nguyen v. Reynolds, 131 F.3d 1340, 1357 (10th Cir. 1997) (quoting Long v. Smith, 663 F.2d 18, 23 (6th Cir.1981)); see also Maes v. Thomas, 46 F.3d 979, 984 (10th Cir.1995). Thus, the burden on a petitioner attacking a state court judgment based on a refusal to give a requested jury instruction is especially great because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Maes, 46 F.3d at 984 (quoting Henderson v. Kibbe, 431 U.S. 145, 155 (1977)).

a. Challenge to self-defense instructions

Petitioner alleges that the self-defense instructions were inadequate because the trial court failed to instruct the jury that there is no duty to retreat when assaulted while in your own home. Petitioner also alleges that the self-defense instructions omitted definitions of certain legal terms, specifically, "altercation," "imminent danger," and "mutual combat." Petitioner presented both of these claims to the OCCA on direct appeal. Noting that the defense did not object to the self-defense instructions at trial, the OCCA determined that Petitioner had waived all but plain error. (#3, Ex. B at 3). The OCCA found no plain error occurred and that, under Oklahoma law, the jury had been adequately instructed on the duty to retreat.¹ The OCCA also found that while the trial court may have erred in omitting the cited definitions from OUJI-CR 752, it was not plain error because the

¹Pursuant to Oklahoma Uniform Jury Instructions – Criminal ("OUJI-CR") No. 748, the jury at Petitioner's trial was instructed that:

A person who was not the aggressor or who did not provoke another with intent to cause an altercation has no duty to retreat, but may stand firm and use the right of self-defense.

(#3, Ex. B at 3).

terms “altercation,” “imminent danger,” and “mutual combat” were “sufficiently self-explanatory that we cannot say the error probably resulted in a miscarriage of justice or constituted a substantial violation of a constitutional or statutory right.” (#3, Ex. B at 4). As a result, the OCCA rejected Petitioner’s claims.

After reviewing the entire record, the Court finds Petitioner has not demonstrated that even if the self-defense instructions were erroneous his trial was rendered fundamentally unfair as a result of the errors. Therefore, habeas corpus relief should be denied under § 2254(d).

b. Failure to instruct on First Degree Manslaughter by Resisting Criminal Intent and on Second Degree Murder

As his third and fifth grounds of error, Petitioner claims that the trial court erred in failing to instruct on the lesser offenses of First Degree Manslaughter by Resisting Criminal Attempt, Okla. Stat. tit. 21, § 711(3) and Second Degree Murder. The Tenth Circuit Court of Appeals has held that the failure of a state court to instruct on a lesser included offense in a noncapital case never raises a federal constitutional question. Lujan v. Tansy, 2 F.3d 1031, 1036 (10th Cir. 1993). In addition, in denying Petitioner’s claims on direct appeal, the OCCA concluded that the evidence did not support the giving of either a First Degree Manslaughter by Resisting Criminal Intent or a Second Degree Murder instruction. (See #3, Ex. B at 5 and 6). Those findings are entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1) which Petitioner may rebut with clear and convincing evidence. Petitioner in this case has failed to make the necessary evidentiary showing. Therefore, habeas relief on these claims should be denied.

c. Failure to instruct on voluntary intoxication

As his fourth allegation of error, Petitioner argues that there was sufficient evidence, under Oklahoma law, to warrant the giving of a voluntary intoxication instruction and that the state court's refusal to give it deprived him of due process by preventing him from arguing his theory of the case to the jury. In order to be entitled to habeas relief, however, he must go further and show that failure to give the instruction, under the circumstances of his case, resulted in a "serious miscarriage of justice." Nickerson v. Lee, 971 F.2d 1125, 1138 (4th Cir.1992) (quotation omitted); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.1995). Having carefully reviewed the record, the Court concludes that Petitioner has failed to show a miscarriage of justice from the failure to give the requested instruction. Therefore, habeas corpus relief on this claim should be denied.

d. Challenge to flight instruction

As his last challenge to the jury instructions, Petitioner asserts that the flight instruction given to the jury deprived him of his right to a presumption of innocence and improperly shifted the burden of proof. In its opinion affirming Petitioner's conviction on direct appeal, the OCCA indicated that the jury had been instructed that:

If, after a consideration of all the evidence on this issue, you find beyond a reasonable doubt that the defendant was in flight, then this flight is a circumstance which you may consider with all the other evidence in the case in determining the question of the defendant's guilt or innocence.

(#3, Ex. B. at 7, citing OUJI-CR 806). The state appellate court rejected Petitioner's claim, finding that the same issue had been recently addressed in Mitchell v. State, 876 P.2d 682 (Okla. Crim. App. 1993), where the OCCA concluded that the challenged language "does not charge the jury with the

task of finding the defendant's innocence." (#3, Ex. B at 7).

As stated above, a habeas petitioner is not entitled to relief based on a challenge to a jury instruction unless "the instruction so infected the trial that the resulting conviction violates due process." Maes, 46 F.3d at 984 (quoting Henderson, 431 U.S. at 154) (citations omitted). Petitioner in the instant case clearly cannot meet this high standard. In Nguyen v. Reynolds, 131 F.3d 1340, 1357 (10th Cir. 1997), the Tenth Circuit Court of Appeals considered and rejected a similar challenge to a flight instruction taken directly from OUJI-CR 806. The Tenth Circuit held that in Nguyen, the petitioner had not been deprived of a fair trial or due process of law because the challenged instruction informed the jury it first had to determine whether Petitioner's departure after the crime was committed constituted "flight." Id. Only if it determined the departure constituted "flight" could it consider this as circumstantial evidence of guilt. The Tenth Circuit also stated that although the instruction could have been more artfully drafted, it did not allow the jury to conclude Petitioner was guilty simply because of his departure. Id. To the contrary, it specifically indicated that evidence of departure could be considered only if the jury drew a specific set of inferences from the departure. Id. (citing United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977) (outlining inferences that must be drawn in determining probative value of flight as circumstantial evidence of guilt)). The Court concludes that use of the challenged flight instruction in this case, as in Nguyen, did not so infect Petitioner's trial as to deprive him of a fair trial or due process of law. Petitioner is not entitled to habeas corpus relief on this claim.

3. Improper comments by the prosecutor

As his last ground of error asserted in his petition, Petitioner alleges that he was denied a fair

trial as a result of improper statements by the prosecutor during voir dire, the examination of witnesses and closing arguments. Specifically, Petitioner alleges the prosecutor improperly encroached on the presumption of innocence, the definition of the burden of proof, and the issue of witness credibility. In considering this claim on direct appeal, the OCCA found that five of the six allegedly improper comments by the prosecutor were not met with any contemporaneous objection by the defense. As a result, the OCCA reviewed those claims only for fundamental error. Finding no fundamental error, the OCCA rejected all five of the claims. As to the sixth claim, the OCCA noted that after sustaining defense counsel's objection to the prosecutor's remarks, the trial court admonished the jury to disregard the statement. Under Oklahoma law, admonishment cures any error which does not substantially affect the verdict. The OCCA found that in this case, the admonishment cured any error that may have occurred. In addition, the OCCA stated that "we have reviewed all the comments now objected to, both individually and as a whole, and do not find grounds for either reversal or modification." (#3, Ex. B at 9).

Habeas corpus relief is available for prosecutorial misconduct only when the prosecution's conduct is so egregious in the context of the entire trial that it renders the trial fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637, 642-648 (1974); Cummings v. Evans, 161 F.3d 610, 618 (10th Cir.1998), *cert. denied*, --- U.S. ----, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999). Inquiry into the fundamental fairness of a trial requires examination of the entire proceedings. Donnelly, 416 U.S. at 643. "To view the prosecutor's statements in context, we look first at the strength of the evidence against the defendant and decide whether the prosecutor's statements plausibly could have tipped the scales in favor of the prosecution." Fero v. Kerby, 39 F.3d 1462, 1474 (10th Cir. 1994) (quotations omitted); see also Smallwood v. Gibson, 191 F.3d 1257, 1275-76 (10th Cir. 1999).

After reviewing the entire trial transcript, this Court does not find the OCCA's rulings to be an unreasonable application of constitutional law. Even assuming that the specific instances of alleged misconduct were improper, this Court finds, based on careful review of the record of the entire proceedings, that none of the prosecutor's comments were of sufficient magnitude to influence the jury's decision. In light of the considerable evidence establishing Petitioner's guilt, there is no reasonable probability that the verdict in this case would have been different without the alleged misconduct. Therefore, the Court concludes that the proceedings against Petitioner were not rendered fundamentally unfair by prosecutorial misconduct. Petitioner is not entitled to habeas relief on this claim.

D. Claim asserted in Petitioner's reply to Respondent's response

In his reply to Respondent's response, Petitioner asserts for the first time in any court that "the trial judge was biased and became an active advocate for the prosecution, rendering the trial structurally unsound and violating Petitioner's Fourteenth Amendment rights to a fair trial and due process – requiring habeas relief." (#4 at 19). This claim, inappropriately asserted for the first time in Petitioner's reply, has not been presented to the state courts of Oklahoma. As a result, the claim is unexhausted. Nonetheless, pursuant to § 2254(b)(2), the Court finds this claim should be denied on the merits notwithstanding Petitioner's failure to exhaust the remedies available in the state courts of Oklahoma.

In support of his claim, Petitioner states that he "adopts the trial court errors as set forth in Ground One-Seven of his Petition as well as throughout the individual Propositions in this Reply, in support of the judicial bias and misconduct." (#4 at 19). Because the Court has rejected each of

Petitioner's seven grounds of error, the Court finds Petitioner's claim of judicial bias to be without merit. Furthermore, nothing in the trial record supports Petitioner's claim. Therefore, habeas corpus relief on this claim should be denied.

CONCLUSION

Petitioner has failed to demonstrate that he is in custody in violation of the Constitution or laws of the United States. Therefore, the petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for writ of habeas corpus (#1) is **denied**.

SO ORDERED THIS 27 day of March, 2000.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED
MAR 27 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CRUDE MARKETING &)
TRANSPORTATION, INC., an)
Oklahoma corporation,)
)
Plaintiff,)

vs.)

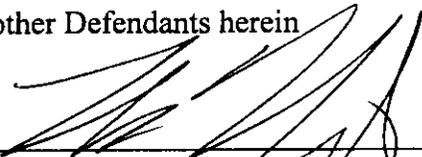
Case No. 99CV-1125E(M) ✓

WASTE CONVERSION CORP., a)
Delaware corporation; IMPERIAL)
PETROLEUM, INC., a Nevada)
corporation; and)
CARLETON B. FOSTER, an individual,)
)
Defendants.)

ENTERED ON DOCKET
DATE MAR 28 2000

DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff CRUDE MARKETING & TRANSPORTATION, INC., and
dismisses without prejudice its cause of action against the Defendant Imperial Petroleum, Inc.,
reserving all of its causes of action against the other Defendants herein



THOMAS L. VOGT, OBA #10995
JONES, GIVENS, GOTCHER & BOGAN, P.C.
15 East 5th Street, Suite 3800
Tulsa, OK 74103
(918) 581-8200

ATTORNEYS FOR PLAINTIFF

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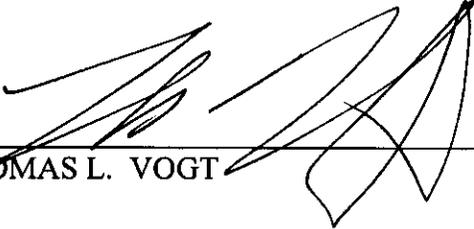
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CERTIFICATE OF MAILING

The undersigned hereby certifies that on this March 24, 2000, a true and correct copy of the above and foregoing document was mailed, with proper postage affixed thereon, to:

Rodney A. Edwards, Esq.
Robert A. Huffman, Jr., Esq.
Two Warren Place
6120 South Yale Ave., Suite 1470
Tulsa, OK 74136-4223

Carleton B. Foster
P.O. Box 624
Troy, AL 36081



THOMAS L. VOGT

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

FILED

MAR 28 2000 *glw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GRAIN DEALERS MUTUAL INSURANCE)
COMPANY)

Plaintiff,)

v.)

Case No. 00CV0164H (J) ✓

ASSOCIATED INTERNATIONAL MANAGEMENT)
CONSULTANTS, INC. d/b/a AIMC, INC.;)
STAFFPRO PLUS, L.L.C.; INTERSTATE TRAVEL)
FACILITIES, INC.; BEARD COMPANY; PUBLIC)
SERVICE COMPANY OF OKLAHOMA; TOBY)
TINDELL, an individual; CHRISTIE TINDELL, an)
individual; J. DENNIS GREEN, an individual;)
GREEN'S REMODELING, INC.; TAMI PRICE,)
individually and as administratrix of the Estate of)
CHARLES PRICE, deceased,)

Defendants.)

ENTERED ON DOCKET
DATE MAR 28 2000

DISMISSAL WITHOUT PREJUDICE

Pursuant to the provisions of Rule 41(a)(1)(i), Fed.R.Civ.P., Plaintiff, Grain Dealers Mutual Insurance Company, by and through its undersigned counsel, hereby dismisses without prejudice to any subsequent refileing its Complaint for Declaratory Relief only against Defendant Public Service Company of Oklahoma and not against any other Defendants named herein.

Respectfully submitted,

Scott D Cannon

Scott D. Cannon, OBA #10755
WAGNER, STUART & CANNON, P.L.L.C.
902 South Boulder Ave.
Tulsa, OK 74119-2034
(918) 582-4483

Attorney for Plaintiff
Grain Dealers Mutual Insurance Company

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

F I L E D

MAR 27 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

R. BRENT JOHNSON, and IDG, INC.,)
(a/k/a Interface Design Group, Inc.), an)
Oklahoma Corporation,)

Plaintiffs,)

vs.)

CIVIL ACTION NO. 00-CV-0125B(E)

GLOBAL MAINTTECH CORPORATION,)
a Minnesota Corporation and GLOBAL)
MAINTTECH, INC., a Minnesota)
Corporation,)

Defendants.)

ENTERED ON DOCKET

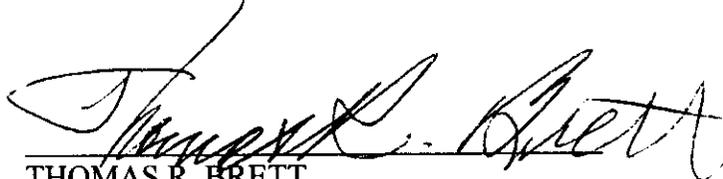
MAR 28 2000
DATE _____

ORDER OF DISMISSAL

COMES ON FOR CONSIDERATION this ^{to} 27 day of March, 2000, Plaintiffs' Motion
Requesting the Court to Dismiss the above referenced matter with prejudice, but retaining
jurisdiction over matters related to their Settlement Agreement and upon due consideration:

IT IS HEREBY ORDERED THAT Plaintiffs' Motion to Dismiss the above referenced matter
with prejudice is granted and said action is dismissed with prejudice with each party to pay its own
costs. The Court will continue to have jurisdiction solely over matters associated with disputes or
enforcement of the settlement/license/release agreement signed by the parties.

FURTHER THE COURT ORDERS NOT.


THOMAS R. BRETT
U. S. DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I do hereby certify that on the _____ day of March, 2000, I caused to be mailed a true and correct copy of the above and foregoing instrument to the following parties with proper postage fully prepaid thereon.

ROBERT J GLANCE
MERCHANT & GOULD
90 SOUTH 7TH ST SUITE 3100
MINNEAPOLIS MINNESOTA 55402-4131

T LANE WILSON
HALL ESTILL HARDWICK GABLE
GOLDEN & NELSON PC
320 SOUTH BOSTON SUITE 400
TULSA OK 74103-3708

R BRENT JOHNSON
C/O WEB TECHNOLOGIES INC
111 WEST 5TH ST., SUITE 300
TULSA OK 74103

885-58.006plp

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 27 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TINA MONTGOMERY)
SSN: 431-29-8068,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 98-CV-675-EA

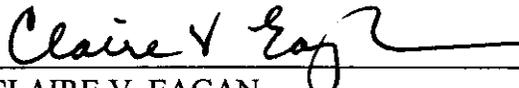
ENTERED ON DOCKET

DATE MAR 28 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 27th 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

TINA MONTGOMERY)
SSN: 431-29-8068,)

Plaintiff,)

v.)

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

Defendant.)

MAR 27 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-675-EA

ENTERED ON DOCKET

DATE MAR 28 2000

ORDER

Claimant, Tina Montgomery, 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 Administrative Law Judge (“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 which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 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 June 6, 1966, and was 30 years old at the time of the ALJ’s decision. She has a high school education and an associate’s degree in electronic engineering. Claimant has worked as an electronic assembler, an injection molding machine operator, a laundry attendant, a nurse’s aide, a desk clerk, a home restoration surface cleaner, a day care attendant, an accounts receivable clerk, an attendant in a children’s institution, and an insert machine operator. Claimant alleges an inability to work beginning July 17, 1994, when she suffered an on-the-job injury to her left hand. She claims to be impaired by neck injuries requiring surgery at the C5-6 level, bilateral carpal tunnel syndrome involving surgery and physical therapy, and depression.

Procedural History

On August 8, 1995, claimant applied for disability benefits under Title II (42 U.S.C. § 401 et seq.), and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant’s application for benefits was denied in its entirety initially and on reconsideration. A hearing before ALJ R. J. Payne was held November 7, 1996, in Tulsa, Oklahoma. By decision dated May 30, 1997, the ALJ found that claimant was not disabled at any time through the date of the decision. On July 6, 1998, the Appeals Council denied review of the ALJ’s findings. Thus, the decision of the ALJ represents the Commissioner’s final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Decision of the Administrative Law Judge

The ALJ made his decision at the fourth and fifth steps of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform light work activity limited by no lifting and carrying over 20 pounds occasionally and 10 pounds frequently; no repetitive pushing of arm controls with the left arm; only occasional stooping, crouching, bending, climbing of ramps or stairs; and no climbing ladders, ropes or scaffolds. Claimant was also limited by a mild to moderate limitation on the ability to grip with the non-dominant left hand and an inability to perform repetitive hand motion with the non-dominant left hand. The ALJ determined that claimant could perform her past relevant work as an accounts receivable clerk, a desk clerk, or a day care attendant. He also determined that there were other jobs existing in significant numbers in the national and regional economies that she could perform, based on her RFC, age, education, and work experience. The ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Review

Claimant asserts as error that the ALJ: (1) and subsequently the Appeals Council, appeared to make a medical conclusion regarding claimant's condition, substituting his/its opinion for that of the medical experts; (2) and subsequently the Appeals Council, improperly evaluated claimant's testimony regarding pain and fatigue as inconsistent with the medical evidence; and (3) failed to consider that some limited activity by the claimant does not preclude a finding of disability.

Substitution of Opinion

An ALJ cannot substitute his or her own "medical expertise" for that of a physician, especially when that physician is the regular treating doctor. See Kemp v. Bowen, 816 F.2d 1469,

1476 (10th Cir. 1987). The medical conclusion that claimant challenges is purportedly found in the ALJ's statements that "claimant's reported symptoms are not consistent with complaints made to her treating and examining medical sources and objective medical findings in the records," and "[s]traight leg raising were [sic] normal and the claimant never complained of numbness or pain in the lower extremities." (R. 21) Claimant argues that, since the ALJ acknowledged claimant's surgeries for bilateral carpal tunnel problems and he acknowledged the bony spurs found at the C5-C6 level of her spine, his comments about the lower extremities were not a proper basis for his credibility determination. "The ALJ here appeared to make the medical conclusion that since the Claimant was not suffering any lower extremity symptomatology, there was no consistency between her testimony and the medical evidence." (Cl. Br., Docket # 7, at 3.)

Claimant has taken the ALJ's comments out of context. The ALJ's full statement acknowledges the evidence regarding her upper extremities as well as her lower extremities:

The Administrative Law Judge finds that the claimant's reported symptoms are not consistent with complaints made to her treating and examining medical sources and objective medical findings in the record. For example, EMG studies failed to show any sensory defects except for the suggestion of minimal carpal tunnel syndrome in the right hand. X-rays of the claimant's spine was [sic] normal with the exception of minimal anterior spurring at C5 and C6. Straight leg raising were [sic] normal and the claimant never complained of numbness or pain in the lower extremities. Also, her grip strength on the right has remained intact. Moreover, Dr. Hensley concluded that the claimant had no impairment of the body with the exception of her left hand which had only a 5% reduction in functioning. Without a basis for the claimant's allegations limiting pain and other symptomatology, her allegations cannot be deemed credible.

(R. 21) As the Commissioner points out, the ALJ's comments were entirely proper, especially since claimant complained of back pain and limited ability to sit, stand, or walk. (See R. 57, 62-63, 70, 138) The medical evidence also indicates that claimant complained of pain in her lower back, and

she was evaluated for that pain. (See R. 175, 177-78, 180, 196, 201) The ALJ noted these findings in his decision. (R. 17-18) He did not substitute his opinion for that of the medical experts.

Pain/Credibility

Claimant argues that the ALJ improperly evaluated claimant's testimony as inconsistent with the medical evidence regarding pain and fatigue. She bases this argument on her testimony that she suffered pain in both hands, her left shoulder, her neck, back, and arm, and she had headaches. (Cl. Br., Docket # 7, at 4; see R. 48-49, 51, 54, 57-58) The law is clear, however, that subjective complaints alone are not sufficient to support a disability finding; medical signs and findings must show the existence of an impairment that could reasonably be expected to produce the pain or other symptoms alleged. 43 U.S.C. § 423(d)(5); 20 C.F.R. §§ 404.1529, 416.929.

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 must also explain why the specific evidence relevant to each factor led him to conclude that the claimant’s subjective complaints were not credible. Kepler, 68 F.3d at 391.

The ALJ fully considered claimant’s subjective complaints of disabling pain. (R. 20-23) He specifically referenced the parameters and the criteria set forth in Luna and Kepler, as well as 20 C.F.R. § 404.1529, 416.929, and Social Security Ruling 96-7p. (R. 20) The ALJ recounted claimant’s testimony regarding her pain, activities, and medications. He noted, in particular, that she said her pain on a “good” day was an 8 on a pain scale of 1-10, with 10 being the equivalent of one’s hand being irretrievably trapped in a fire. She rated her pain on a “bad” day at 10. (R. 20; see R. 59) She also testified that she could only sit for 20 minutes before having to lay down. (R. 62-63) The ALJ remarked that, nonetheless, claimant “remained seating during the entire 1 hour 7 minute hearing with no apparent distress and answered questions in a thoughtful manner.” (R. 21) An ALJ is allowed to consider whether a claimant’s allegations of pain contain exaggeration and hyperbole, and this consideration is important to his or her credibility determination. See Talley v. Sullivan, 908 F.2d 585, 587 (10th Cir. 1990).

The ALJ further supported his determination by reference to the medical evidence which indicates that her symptoms are not consistent with the complaints she made to her treating and examining physicians, or with their objective findings as to her condition. (R. 21) In particular, the ALJ referenced the report of Kent C. Hensley, M.D. (R. 22; see R. 174-78) Dr. Hensley reported, in connection with her request for worker’s compensation benefits, that claimant specifically denied

pain in her neck, and she did not mention any back pain when he initially evaluated her on December 8, 1993. (R. 174-75) However, by June 13, 1994, she attempted to attribute these symptoms to her on-the-job accident. (Id.) The ALJ also pointed out that three of claimant's treating physicians released claimant to work activities, although at a slightly reduced level due to the residuals of her left hand injury. (R. 22; see R. 152-53, 178-79, 208, 212)²

Claimant also argues that the ALJ failed to consider that some limited activity by the claimant does not preclude a finding of disability. See Thompson v. Sullivan, 987 F.2d 1482, 1491 (10th Cir. 1993). Nonetheless, claimant's daily activities are one of the factors that the rules and regulations direct the ALJ to consider. 20 C.F.R. §§ 404.1529(c), 416.929(c); SSR 96-7p. The ALJ mentioned claimant's daily activities as part of his pain and credibility evaluation, but he did not rely exclusively, or even primarily, on her testimony that she engaged in limited activities such as going to church, watching others bowl, and driving twice a week to transport her son. (R. 21; see R. 62, 67)

Claimant suggests that the ALJ misrepresented her testimony because he stated his observations of her demeanor at the hearing, and he noted that she "was able to travel (as a passenger) on a 300 mile road trip to visit her parents in Arkansas without any problems." (R. 21). Claimant suggests that this does not accurately reflect her testimony at the hearing, where the ALJ asked "Do -- did that give you any problems?" and she answered, "No, I took my medication like I was supposed to and slept a lot." (R. 68) Claimant fails to mention the rest of the inquiry. The

² In claimant's most recent visits with James F. Bischoff, M.D., he indicated that she needed to be off work while she recovered from surgery to her hand. (R. 151-52)

ALJ asked “Did you have to stop for any rest periods? Or were you able to go all the way through?” She replied: “Well, I wasn’t driving so it wasn’t a problem.” (Id.)

The ALJ did not misrepresent her testimony. Neither his reference to the road trip nor his reference to her hearing demeanor were improper as part of his pain and credibility analysis. 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. Although an ALJ may not rely solely on his personal observations to discredit claimant’s testimony, he may consider his personal observations in his overall evaluation of her credibility. Qualls v. Apfel, ___ F.3d ___, 2000 WL 296847 at * 3 (10th Cir. Mar. 22, 2000). The ALJ’s credibility determination in this instance was supported by substantial evidence and thus, it is entitled to great deference.

New or Additional Evidence

Finally, claimant’s arguments repeatedly suggest that the Appeals Council erred by failing to consider evidence submitted after the ALJ’s decision. That evidence consists of a two-page letter, dated May 5, 1997, from Eugene G. Feild, M.D., to the Worker’s Compensation Court.³ The letter reports the results of a cervical myelogram with contrast CAT scan. Dr. Feild stated: “We find only at 5-6 the significant nerve root pressure as well as cord deformity from spurring combined with disc herniation.” (R. 233) Dr. Feild stated that claimant was temporarily totally disabled and needed

³ Claimant’s letter to the Appeals Council does not reflect any attempt by claimant to notify the ALJ about the “new” evidence prior to May 30, 1997, the date he issued his decision. (R. 9-10)

additional medical treatment. He recommended and sought authorization for an anterior cervical discectomy and interbody fusion. He also stated that he had completed diagnostic testing, but he attached no supporting documentation. (R. 233-34)

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), 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); Wilkins v. Secretary, Dep’t of Health and Human Servs. 953 F.2d 93, 95-96 (4th Cir. 1991) (internal quote omitted); see also O’Dell, 44 F.3d at 858. It will then review the case if it finds that the ALJ’s action, findings, or conclusion is contrary to the weight of the evidence currently of record. 20 C.F.R. §§ 404.970(b), 416.1470(b).

The Appeals Council specifically stated that it considered the additional evidence, but concluded that it did not provide a basis for changing the ALJ’s decision. (R. 4) Although the Appeals Council did not discuss the Dr. Feild’s letter to the Worker’s Compensation Court, arguably it was not required to even consider the letter because the letter was not “material.” Additional evidence is considered “new” when “it is not duplicative or cumulative,” and it is considered “material” when “there is a reasonable possibility that [it] would have changed the outcome.” see Wilkins, 953 F2d at 96.

As the Commissioner points out, Dr. Feild’s letter is inconsistent with other substantial evidence of record. On December 8, 1994, Dr. Hensley found that her neck revealed “no spinous or paraspinous tenderness. She has cervical flexion of 60 degrees, extension of 75 degrees, lateral

bending of 45 degrees bilaterally and rotation of 80 degrees bilaterally. Range of motion was consistent on repetition. She complained of no discomfort on range of motion.” (R. 182.) On January 30, 1995, she saw Samuel H. Park, M.D., for a neurological consult. He reported that she had full range of motion in her left shoulder, although there was mild tenderness in the anterior aspect of her left shoulder joint. Her cervical range of motion was full. (R. 172) On February 6, 1995, Dr. Park reported that “needle electrode examination was performed in the muscles of [claimant’s] left upper extremity and the cervical area. No evidence of denervation was seen.” (R. 168) X-rays taken on June 13, 1995, showed that claimant’s cervical vertebral heights and disc spaces were well preserved. Small anterior spurs were demonstrated at the C5-C6 levels, but no acute bony abnormalities of the cervical spine were demonstrated. Thomas White, M.D. interpreted the x-rays and stated his impression as “[n]egative AP and lateral cervical spine except for small anterior spurs at C5 and C6 levels.” (R. 180) The ALJ noted these findings in his decision. (R. 18-19)

It is true that the opinions of Dr. Hensley and Dr. Park, and the x-ray interpretation by Dr. White, were provided approximately two years or more prior to the opinion of the ALJ. However, Dr. Feild’s opinion was brief, conclusory, and unsupported by any documentation demonstrating that claimant’s condition had lasted or could be expected to last for a continuous period of not less than 12 months. 42 U.S.C. § 423(d)(1)(A). Neither the Appeals Council nor the ALJ committed reversible error.

Conclusion

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

DATED this 27th 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 28 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ARTHUR J. ALLOWAY)
SSN: 444-52-0369,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner,)
Social Security Administration,)
)
Defendant.)

Case No. 98-CV-0783-EA ✓

ENTERED ON DOCKET
DATE MAR 28 2000

ORDER

Claimant, Arthur J. Alloway, 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 Administrative Law Judge (“ALJ”) and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner’s decision.

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 September 4, 1951, and was 45 years old at the time of the ALJ's decision. He has a high school education and two years of college. Claimant has worked as a sales representative, store manager, and waiter. Claimant alleges an inability to work beginning March 2, 1995, when he was in a motor vehicle accident. However, his primary complaints are abdominal pain and fatigue associated with hepatitis C and cirrhosis of the liver. He also claims to suffer from low back strain, left leg numbness, high blood pressure, diabetes, migraine headaches, anxiety, and depression. He is obese, denies drug abuse, and no longer drinks.

Procedural History

On November 6, 1995, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.) His application for benefits was denied in its entirety initially and on reconsideration. A hearing before ALJ R. J. Payne was held May 20, 1997, in Tulsa, Oklahoma. By decision dated June 27, 1997, the ALJ found that claimant was not disabled at any time through the date of the decision. On August 20, 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 fourth and fifth steps of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform a wide range of light work, subject to sitting no more than three hours at any one time and for a total of eight hours in a

day; standing or walking no more than two hours at any one time and for a total of five hours in a day; only occasionally bending squatting, or crawling; frequently climbing or reaching; and a mild restriction on exposure to marked changes in temperature and humidity and to dust, fumes, and gases. (R. 21) The ALJ determined that claimant could perform his past relevant work as a sales representative, but that, even if claimant could not return to such work, 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.

Review

Claimant asserts that the ALJ erred: (1) in his evaluation of the medical evidence of pain from the treating physicians; and (2) in his determination that the plaintiff's pain is not disabling. The nature of claimant's allegations, as well as the basis of the ALJ's decision, requires a full recitation of the medical record.

Claimant's Medical History

Jo Lieta W. Bright, D.C., reported to the Oklahoma Disability Determination Unit on January 23, 1996, that claimant's neck and upper back complaints following his motor vehicle accident on March 2, 1995, were resolved during the course of his treatment with her from May 18, 1995 through August 19, 1995. She stated that his complaints "seemed to be intermittent and exacerbated by such activities [sic] as mowing the lawn and fishing for too long a period. As I explained to Mr. Alloway several times, his recovery rate was likely to be slower due to complicating factors of diabetes and obesity." (R. 209). She opined that he should be capable of light duties in a work related environment [sic] with a gradual increase to moderate activity once his obesity is properly addressed." (Id.)

On July 27, 1995, Robert G. Bebout, D.O., evaluated claimant for chronic lower back pain with left radicular pain. His diagnosis was “[d]egenerative disease of the lumbar spine with some mild radicular symptoms, especially to the left lower extremity without any clear-cut surgical lesion.” (R. 180) The radiology report by David B. Waters, M.D., dated September 7, 1995, indicates “normal vertebral body alignment is maintained and the intervertebral disc spaces are intact. There are mild hypertrophic degenerative changes with small anterior osteophytes. There is no fracture, subluxation or destructive bone lesion. The facet joints are normal.” (R. 182)

Claimant presented to the emergency room at the Mayes County Medical Center on September 27, 28, and 29, 1995, complaining of “unbearable” right upper quadrant (RUQ) pain. (R. 183, 188, 191-92) Russell T. Shephard, M.D., noted that claimant had “tenderness to deep palpation in the right upper quadrant and epigastrium without rebound tenderness without organomegaly noted; difficult to assess secondary to obesity.” (R. 193) Doctors at the medical center ordered laboratory tests and began evaluations to determine whether claimant had hepatitis C. (R. 188, 194) They gave him prescriptions for Darvocet (R. 183, 188) and Percocet (191, 193) for pain. A laboratory report dated September 28, 1995, indicates a reactive result for the hepatitis C antibody. (R. 194)

On October 5, 1995, Jack Morgan, D.O., noted that claimant was tender to palpation in his right upper quadrant (“TTP-RUQ”). (R. 226) A laboratory report dated the same day indicates that “pt has confirmed case of hepatitis C.” (R. 227) Apparently, Dr. Morgan did not receive the report until several days later. Claimant returned to the Mayes County Medical Center on October 9, 1995, complaining of pain in the right upper quadrant, and his doctors switched his medication to Prilosec. (R. 198) Dr. Morgan referred claimant to Sheldon Berger, D.O., for a consultative examination on

October 10, 1995. Dr. Berger stated the results of his physical examination of claimant's abdomen as follows: "Markedly obese; soft and nontender to palpation; bowel sounds are present in all quadrants; no masses or organomegaly could be appreciated." (R. 200) However, Dr. Berger's impression was that claimant had "[a]bdominal pain, etiologies to include gastroesophageal reflux disease, peptic ulcer disease, gastritis including possible *Helicobacter pylori* induced." (R. 199) He also noted that claimant was being evaluated for hepatitis C, and claimant had diabetes mellitus and hypertension. (*Id.*) Dr. Berger performed an esophagogastroduodenoscopy on claimant. (R. 202)

On October 11, 1995, Dr. Morgan noted that claimant's abdomen was "soft, moderately obese," and indicated his impression, in part, as "Hepatitis 'C' - follow up." (R. 225) On October 16, 1995, Dr. Morgan called claimant to discuss the results of a test and other pain medication options, along with claimant's hepatitis profile. (R. 225) On October 30, 1995, claimant was again tender to palpitation in his right upper quadrant. (R. 222) The results of another laboratory report, dated November 1, 1995, were positive for the hepatitis C antibody. (R. 223) In mid-November, 1995, Dr. Berger examined claimant again and noted that his abdomen was "soft and nontender to palpation" (R. 221), but his diagnostic impression was "[a]bdominal pain, etiology undetermined" along with hepatitis C "reported by the patient" and claimant's diabetes and hypertension by history. (R. 219)

On November 27, 1995, Dr. Morgan definitively diagnosed claimant with hepatitis C. (R. 217, 206), but he reported, on that date, that claimant's abdomen was soft and nontender to palpation ("NTP"). (R. 217) Dr. Morgan saw claimant again in December 1995, noting claimant's hepatitis C. On December 11, 1995, he noted that claimant's abdomen was tender to palpation in the right

upper quadrant (R. 216); on December 29, 1995, it was not. (R. 215) Dr. Morgan prescribed Vicodin for claimant. (Id.)

On February 2, 1996, claimant had a liver biopsy. (R. 244) Dr. Berger reported the results. (R. 240-41). The results of the biopsy showed that claimant had “micronodular cirrhosis with moderate chronic inflammation and mild piecemeal necrosis.” (R. 240, 245) On the date of his follow-up with Dr. Berger, February 8, 1995, claimant’s abdomen was “soft and nontender. No masses or organomegaly are noted.” (R. 240) Dr. Berger had a “long discussion” with claimant, his father, and his brother about the biopsy results and his treatment plan. Claimant decided to proceed with interferon therapy, which would require subcutaneous injections three times a week for at least six months. Dr. Berger explained that side effects could include changes in mood, anxiety, depression, and flu-like symptoms, as well as other adverse side effects. (R. 240)

On February 18, 1996, claimant was in another motor vehicle accident. (R. 228) He was evaluated at Mayes County Hospital initially and then transported to Hillcrest Medical Center in Tulsa, Oklahoma for further evaluation. (R. 230) He had pain in his neck and lower back, but radiographic and laboratory data showed no evidence of acute fracture in claimant’s cervical or lumbar spine, although the data showed some evidence of degenerative changes in claimant’s cervical spine. (R. 230, 232, 236) Dennis E. Salazar, M.D., the emergency room physician, diagnosed claimant as “status post motor vehicle accident” and “cervical strain and lumbar strain post motor vehicle accident.” (R. 231) He prescribed Motrin, Flexeril, and Lortab, and discharged claimant. (R. 229, 231) Dr. Salazar noted that claimant’s abdomen was “soft and tender on the right upper quadrant region; however, there is no guarding and no rebound.” (R. 230) Doctors at the Mayes County Medical Center also noted “TTP RUQ” (R. 235)

On March 11, 1996, claimant reported to Dr. Berger that he was “doing relatively well, except for some nausea on the days he [gave] himself the injections, along with decreased appetite.” (R. 248) Dr. Berger reported that claimant’s abdomen, on the date of examination, was nontender. (Id.)

David Ring, D.O., saw claimant monthly from February 1996 through March 1997 (R. 255-58, 274-80, 284-87). After his initial examination of claimant, Dr. Ring reported right upper quadrant tenderness in claimant’s abdomen and assessed claimant as having hepatitis C, Type II, diabetes mellitus, and cirrhosis and pain secondary to hepatitis C and interferon therapy. (R. 258) He repeatedly reported that claimant had chronic hepatitis C, chronic pain secondary to it, and right upper quadrant pain in his abdomen. (R. 256, 257, 274-77, 279-80, 285, 287) He also prescribed medication for claimant’s migraine headaches. (R. 278-80) Dr. Ring also saw claimant for thyroid problems (R. 274), allergies and a flu shot (R. 276), prostatitis (R. 277, 278), vision problems (R. 284), and for a sore eye (R. 287). Dr. Ring referred claimant for a second opinion because claimant was upset that Dr. Berger said he was not having pain from his hepatitis. (R. 256)

On April 22, 1996, Dennis E. Karasek, M.D., a pain specialist, evaluated claimant. He noted that, since September 1995, claimant had complained of “severe and unrelenting right upper quadrant pain.” (R. 249) Claimant stated that his pain was present at all times and did not seem to have any alleviating or exacerbating factors. On a scale of 1-10, with 10 representing the most pain, claimant described his pain as 7 without medications, and 2-3 with medications. Claimant also described his intermittent left leg numbness that would subside if he took his weight off of his leg. Dr. Karasek noted that claimant had no significant history of back pain. He also noted that claimant

had occasional migraine headaches, along with other “concomitant illnesses.” At that time, claimant was taking Glipizide, Percocet, Vicodin, Demerol, Synthroid, Vasotec, Imferon, and Ambien. (Id.)

Dr. Karasek indicated that claimant had “pain in the right upper quadrant with deep palpation” when he examined claimant’s abdomen. (R. 250) Claimant had a full range of motion and no pain in his lower back. Dr. Karasek’s impression was hepatitis C and cirrhosis, obesity, right upper quadrant pain “probably related to cirrhosis,” left leg periodic numbness of unknown etiology, and adult onset diabetes mellitus. (Id.) Dr. Karasek thought that claimant needed “a short trial of round-the-clock narcotics,” in addition to medication for claimant’s sleep disturbance and depression, an activity and weight loss program, and follow-up treatment. (R. 251)

Harvey D. Tatum, M.D., saw claimant on April 29, 1996. Dr. Tatum noted Dr. Berger’s findings. He also reported claimant’s complaints of chronic fatigue and chronic right upper abdominal pains. (R. 263) He examined claimant and found claimant’s abdomen “soft and nontender.” (R. 264) His diagnostic impression was “[c]hronic hepatitis C with a history of alcohol abuse and possibly a component of chronic alcoholic liver disease with cirrhosis.” (Id.) On June 3, 1996, Dr. Tatum reported that claimant was being treated by the Tulsa Pain Clinic. He reported that claimant “is currently taking oral morphine and has stopped all the pain medications [sic].” (R. 260) Claimant stated that his sense of well-being was markedly improved and his pain was better controlled. On that day, claimant’s abdomen was soft and nontender. (Id.)

On December 12, 1996, claimant returned to see Dr. Karasek. (R. 272) Claimant reported continuation of his right upper quadrant pain. Dr. Karasek and Dr. Ring decided to discontinue Dilaudid and oxycodone, change all of claimant’s medications to long-acting (as opposed to short-acting) narcotics, have claimant read and sign a narcotic contract, have claimant follow-up every two

months, begin to wean claimant off of his medication after approximately six months (so that Dr. Karasek could “see what he is like completely off the medication for at least a two-month period”), and have claimant follow up with Dr. Tatum. (Id.)

Dr. Tatum saw claimant on December 17, 1996. Claimant stated that he had “generally been feeling fairly well but he had some occasional chronic fatigue.” (R. 273) Dr. Tatum stated that claimant “has some occasional fleeting pain in the right upper quadrant which has been chronic.” He further noted that claimant’s abdomen was soft, and there was “no palpable hepatosplenomegaly.” His diagnostic impression was “failure of Intron to resolve hepatitis C infection with no remarkable symptoms to suggest symptomatic progressive liver disease.” Nonetheless he advised claimant that “this is a disease which has potential significance in terms of chronic morbidity.” He recommended continued monitoring, avoidance of all potential hepatotoxins, and follow up with Dr. Ring. (Id.)

Dr. Karasek saw claimant again on February 5, 1997, complaining of side effects with his medication. (R. 283) Dr. Karasek changed his medication and stated that claimant “would be weaned in approximately four months from all narcotic medication.” (Id.)

Dr. Ring referred claimant to John R. Hood, M.D., for evaluation of abdominal pain, weight loss, recent diarrhea, and multiple other medical complaints. Dr. Hood saw claimant for a consultive examination on April 23, 1997. (R. 288-89) With regard to claimant’s abdomen, Dr. Hood reported: “Soft. I did not detect any masses. I could not detect a spleen tip but this would be difficult, given the patient’s abdominal girth. I did not detect liver edge. There was no pain to palpation of the right upper quadrant that I could detect at this time.” (R. 289) He opined that claimant had a history of cirrhosis of the liver “probably secondary to a combination of hepatitis C and alcohol.” (Id.) He

noted that claimant failed interferon therapy, and he wondered whether claimant's weight loss was indicative of "malignant degeneration of the liver." (Id.) He ordered a CT scan of claimant's abdomen and pelvis. The scan showed "mild hepatosplenomegaly without focal mass. Possible cyst, left kidney. . . . No adenopathy or ascites." (R. 290)²

Pain/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

² Records regarding claimant's annual eye examination due to his diabetes and evidence regarding his anxiety and depression are not considered herein because claimant has not placed at issue the ALJ's findings regarding his diabetes or mental impairments.

must explain why the specific evidence relevant to each factor led him to conclude that the claimant's subjective complaints were not credible. Kepler, 68 F.3d at 391.

The ALJ considered claimant's subjective complaints of disabling pain. He specifically referenced the parameters and the criteria set forth in Luna, as well as 20 C.F.R. §§ 404.1529, 416.929 and Social Security Ruling 96-7p. (R. 16-17) However, the ALJ found that claimant was not credible "because, but not limited to, the objective findings, or the lack thereof, by treating and examining physicians, the lack of medication for severe pain, the frequency of treatments by physicians and the lack of discomfort shown by claimant at the hearing." (R. 17) It is difficult to understand how the ALJ could have reached his conclusion based on this boilerplate language, especially since the medical evidence clearly indicates that claimant took prescription narcotics to control his pain.

The ALJ attempted to clarify his position by stating his perception that the record shows a lack of complaints by the claimant. He stated that claimant was not credible because of the "lack of any substantial and continuing complaints" by claimant regarding his back pain, his migraine headaches, the side effects of his medication, his liver pain, and his fatigue. (R. 17-18) These observations are directly contradicted by the record. The record shows that claimant continually complained (at least with regard to the problems associated with his hepatitis C), and he continually sought treatment. The strength of his medications also suggests that his pain was extraordinarily severe.

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. Here, however, the ALJ’s determination that claimant was not credible is not supported by substantial evidence.

Treating Physicians

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).

In his decision, the ALJ mentioned Dr. Bebout's July 27, 1995 findings, the September 28, 1995 laboratory report, Dr. Berger's November 13, 1995 consultative examination, a February 19, 1996 x-ray of claimant's lumbar spine, Dr. Berger's liver biopsy results, Dr. Tatum's June 3, 1996 examinations, Dr. Ring's July 3, 1996 diagnosis of migraine headaches, Dr. Tatum's December 17, 1996 observations, Dr. Hood's April 23, 1997 findings, and the findings of Barbara B. Hewett, Ph.D., who treated claimant from anxiety and depression. (R. 15-16) The ALJ then recited the boilerplate language (R. 16) sharply criticized in Barnes v. Apfel, Case No. 98-5156, 1999 WL 559846 (10th Cir. Aug. 2, 1999) (unpublished):

It is also indicated by what appears to be boilerplate language that the ALJ carefully reviewed all of the medical evidence except those exhibits omitted because they "relate to a time not covered by the claim, illegibility, duplicity, different physicians reporting the same diagnoses, physician duplication of hospitalization records, failure to state a diagnosis, statement of the claimant's complaints without a diagnosis, prescription of medication only, etc." Appellant's App. at 21. This kind of general disclaimer does not excuse an ALJ from careful consideration of all the relevant evidence and from linking findings to specific evidence. See Huston v. Bowen, 838 F.2d 1125, 1133 (10th Cir. 1988) Further, because the ALJ does not identify which exhibits fall within the parameters of this list, we cannot tell which exhibits he omitted. This failure may itself be grounds for reversal. See Baker v. Bowen, 886 F.2d 289, 291 (10th Cir. 1989) Indeed, actual reliance on the boilerplate could itself result in reversal, since certain of the ALJ's stated criteria for omitting consideration of medical exhibits--such as the failure of a physician to state a diagnosis--contradict an ALJ's duty to consider all relevant medical evidence, see id., 20 C.F.R. § 404.1527(d). This is especially true where, as here, the ALJ relies on a paucity or lack of complaints to treating sources on the record to reject claimant's allegations of disabling pain.

Id., at *1 n. 1.

As set forth above, the ALJ relied, in part, on a paucity or lack of complaints to treating sources on the record to reject claimant's allegations of disabling pain. The ALJ is not required to discuss every piece of evidence; however, "in addition to discussing the evidence supporting his

decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects.” Clifton v. Chater, 79 F.3d 1007, 1010 (10th Cir. 1996) (citations omitted). The ALJ left out much of the evidence indicating that claimant’s allegations could have reflected disabling pain. He failed to mention the findings of Drs. Morgan, Shephard, Karasek, or Salazar, and he failed to discuss the findings of Drs. Berger and Ring that do not support his conclusions.

As set forth above, numerous doctors examined claimant and wrote reports describing claimant’s condition and treatment, but many of these reports are inconsistent, and, except for Dr. Bright, none state what claimant can do despite his impairment, and any associated physical or mental restrictions. The ALJ called a medical advisor³ in an apparent attempt to rectify the inconclusive nature of the medical record, but the hearing transcript of the medical advisor’s testimony is often incoherent,⁴ and the portions that are coherent fail to support the conclusions of the medical advisor or the ALJ. The medical advisor admits that claimant’s doctors have consistently prescribed extremely strong pain medication for claimant. (R. 41, 80) He also acknowledges that claimant did not tolerate certain medications well and others were not effective. (R. 37, 40) Nonetheless, the medical advisor stated that claimant’s allegations of pain and the medications prescribed “seem[] to be out of proportion to the disease.” (R. 42, 44)

³ Although the ALJ referred to him as a medical expert, the regulations refer to a medical advisor. 20 C.F.R. § 404.1527(f).

⁴ The transcript in this matter is garbled and includes numerous gaps where the reporter merely noted as “INAUDIBLE.” The condition of the transcript makes it difficult to discern whether the medical advisor’s testimony is often incoherent because of the poor sound system, an inexperienced court reporter, or a speech characteristic.

The medical advisor concluded that claimant's pain is not severe enough to be disabling because no doctor definitively, conclusively stated that claimant's pain was due to his cirrhosis or hepatitis C condition and because the medical documentation does not show that claimant consistently had tenderness in his right upper quadrant when he was examined. (R. 82-83) The medical advisor filled out, but did not sign, an RFC form indicating that claimant could perform light work (R. 295-97), and the ALJ used that form to develop the hypothetical question he presented to the vocational expert (R. 85-86). The ALJ also adopted the restrictions presented in that form as his assessment of claimant's RFC. (R. 19)

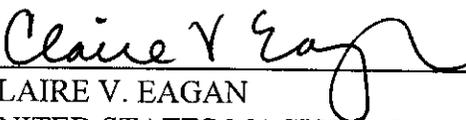
Yet, the basis for the medical advisor's conclusions are flawed. No doctor indicated that the narcotic medications prescribed for claimant were for anything other than pain associated with his hepatitis C or liver problems. The medical advisor glossed over the numerous reports which indicate that claimant's abdomen was tender to palpitation in the right upper quadrant; he focused instead on those which indicate that claimant's abdomen was not tender. The record shows that claimant's abdominal pain was noted more times than not, and even on a few occasions that no abdominal pain was noted, the doctor recorded abdominal pain as part of his diagnostic impression. (See R. 199-200, 219, 221.) The medical advisor effectively rejected the opinions of claimant's treating physicians without showing good cause or giving legitimate reasons for doing so. The ALJ erred by relying on the medical advisor's RFC assessment.

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, 838 F.2d at 1132. The decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

DATED this 28th day of March, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

MAR 28 2000

EARL E. THOMPSON, SR.,
Plaintiff,

Phil Lombardi, Clerk
U.S. DISTRICT COURT

vs.

Case No. 95-CV-1139-H (M)

HENRY T. HAYNES, FLUID
CONTROLS, INC., and MIGHTY
CLEAN CORPORATION,
Defendants.

ENTERED ON DOCKET

DATE **MAR 28 2000**

REPORT AND RECOMMENDATION

Defendants' Motion for Discovery Sanctions [Dkt. 181] is before the undersigned United States Magistrate Judge for report and recommendation.

Defendants' motion is based upon facts obtained after trial that, contrary to the repeated representations of Plaintiff and his attorney that all of Plaintiff's swivel sales had been disclosed, Plaintiff has sold swivels without disclosing the sales to Defendants. In particular, Defendants contend that: (1) Plaintiff has sold at least 578 swivels to Hydro Tek without ever disclosing Hydro Tek as a customer; (2) Plaintiff sold at least 120 swivels to Elite Mfg., which sales began in July 1998 but were not disclosed until October 1999 (some 9 months after trial); and (3) the type of swivel sold to Elite is different than the swivel disclosed to Defendants in discovery. Defendants seek "sanctions sufficient to substitute for further discovery and to punish and deter the extraordinary misconduct that has occurred in this case." [Dkt. 188, p.10].¹

¹ The Court rejects Plaintiff's argument that Defendants' motion for sanctions should be (continued...)

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Plaintiff does not dispute that he sold swivels to Hydro Tek or that those sales were not disclosed to Defendants. Instead Plaintiff claims Defendants' discovery requests were ambiguous and, in any event, Hydro Tek knew Plaintiff was separate from Defendants, thereby eliminating any unfair competition claim. The Court finds that Defendants' discovery requests were not ambiguous and Hydro Tek's alleged knowledge that Plaintiff was separate from Defendants does not excuse Plaintiff's failure to correctly answer and supplement his discovery responses in accordance with the Federal Rules of Civil Procedure.

Plaintiff does not dispute that he sold swivels to Elite Mfg. However, Plaintiff claims his disclosure of the sales in October 1999 satisfied his discovery obligations. Plaintiff does not explain why he failed to supplement his discovery responses in July 1998 when he began selling to Elite Mfg. Further, Plaintiff's response does not even address the allegation that the swivels sold to Elite Mfg. are different than the swivels disclosed to Defendants.²

Fed. R. Civ. P. 26(g) imposes a duty on Plaintiff to make reasonable inquiry to insure that discovery responses are complete and correct. Further, under Fed. R. Civ.

(...continued)

dismissed because Defendants failed to hold a good faith conference concerning the matter before filing their motion as required by N.D.LR 37.1 A. Defendants have repeatedly conferred with Plaintiff in an attempt to obtain full disclosure of Plaintiff's swivel sales. An additional conference would serve no purpose, where as here, the movant is not seeking to compel disclosure of information, but is seeking sanctions after having discovered that an opponent failed to provide accurate information in response to discovery.

² Plaintiff did offer an explanation of the difference in Plaintiff's Answers to Defendants' Motion To Reopen the Record to Admit Newly Discovered Evidence [Dkt. 167], filed May 13, 1999.

P. 26(e)(2), Plaintiff and his attorney had a duty to seasonably amend prior discovery responses when additional information was called for. By completely failing to disclose his sales to Hydro Tek and by delaying disclosure of his sales to Elite Mfg. until October 1999 when he first made such sales in July 1998, Plaintiff has violated both of these rules.

Having found that Plaintiff failed to meet his discovery obligations, the Court must next determine what sanction is appropriate. The Court has considered the factors set forth in *Ehrenhaus v. Reynolds*, 965 F.2d 916 (10th Cir. 1992)³ and has attempted to arrive at a recommended sanction that is both "just" and related to the particular 'claim' for which Plaintiff failed to provide discovery. *See 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).

The type of swivels Plaintiff is selling, to whom the swivels were sold, and how many he has sold is at the heart of Defendants' case. From the start of discovery Defendants have been trying to get answers to these basic questions. By failing to provide this information, Plaintiff has obstructed discovery and has prevented Defendants from presenting evidence about these sales at trial. To require Defendants to conduct discovery and to present evidence concerning these sales now, after trial,

³ According to the Tenth Circuit, factors which are to be considered in determining an appropriate sanction include: (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).

would cause a duplication of effort and waste of judicial resources. This problem simply would not exist if Plaintiff had provided the information requested before trial.

Viewed most favorably to Plaintiff, the problem has been caused by Plaintiff's complete lack of attention to his obligation to provide complete and accurate information. However, this is not Plaintiff's only instance of lack of attention. The prior discovery sanction order in this case [Dkt. 157] also addressed Plaintiff's lack of attention to his discovery obligations,⁴ and even Plaintiff's trial testimony about the number of swivels he manufactured has now been shown to be materially incorrect.⁵

In its earlier sanction order, and in hearings, the Court has previously stressed the need for Plaintiff to provide complete and accurate information and warned of severe consequences for failure to do so. At this stage, the only sufficient sanction is one which avoids prejudice to the Defendants, prevents Plaintiff from benefitting from his conduct, and minimizes the interference with the judicial process.

After trial on the merits, in its Partial Findings of Fact and Conclusions of Law the Court found that Plaintiff's sales of swivels violated the Lanham Act and the Oklahoma Deceptive Trade Practices Act. Defendants should not have to start over with discovery and proof concerning Plaintiff's sales to Hydro Tek and Elite Mfg.

⁴ Plaintiff's assertion that this discovery sanctions order was the result of the "luck of the draw" [Dkt. 184, p. 23] in having his case assigned to the undersigned is both wrong on the merits and professionally improper. N.D. LR 83.4 ("I will maintain the respect due to courts of justice and judicial officers").

⁵ Plaintiff testified at trial that he had manufactured 800 swivels to date. *Trial Transcript* Vol. VI at 1007. Information Plaintiff has produced since trial reflects that he had manufactured 671 at the time of trial. However, if Plaintiff's undisclosed pre-trial sales to Hydro Tek (243) and Elite Mfg. (90) are added to those he claims to have sold at the time of trial (646), Plaintiff would have had to have manufactured 979 swivels by the time of trial.

Likewise, at this stage of the case it would be unfair to allow Plaintiff to contest whether the sales to Hydro Tek and Elite Mfg. violate the Lanham Act and the Oklahoma Deceptive Trade Practices Act. Consequently, pursuant to Fed.R.Civ.P. 37(d), the undersigned makes the following recommendation for sanctions against Plaintiff for having violated his discovery obligations under Fed. R. Civ. P. 26(e)(2) and (g):

- That Plaintiff pay all reasonable expenses, including attorney fees, incurred by Defendants in investigating and presenting this matter to the Court;
- That Plaintiff be precluded from contesting in any way that his sales of swivels to Hydro Tek and Elite Mfg. violated the Lanham Act and the Oklahoma Deceptive Trade Practices Act;
- That Plaintiff pay Defendants a sum equal to the damages Defendants would receive upon a finding that Plaintiff's sales to Hydro Tek and Elite Mfg. were willful violations of the Lanham Act and the Oklahoma Deceptive Trade Practices Act⁶. However, in the event Defendants' eventual judgment against Plaintiff for willful violations of the Lanham Act and the Oklahoma Deceptive Trade Practices Act include damages for these sales, Defendants should only be permitted one recovery;

⁶ On sales of 578 swivels to Hydro Tek and sales of 120 swivels to Elite Mfg., and based on the findings in the Special Master's Report of a cost to Plaintiff of \$28 per swivel and a sales price of \$134.73 per swivel, Plaintiff's profit equals \$74,497.54. That amount trebled as a willful violation equals \$223,492.62.

- That the Court consider additional sanctions against Plaintiff for failing to disclose the type of swivel being sold to Elite Mfg. depending on the impact, if any, of this information on Defendants' patent claims.

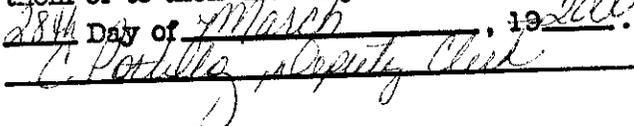
In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this Report and Recommendation must be filed with the Clerk of the District Court for the Northern District of Oklahoma within ten (10) days of being served with a copy of this report. Failure to file objections within 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 28th Day of March, 2000.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

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

28th Day of March, 192000.


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

F I L E D

MAR 28 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICKIE M. DAVENPORT,
SSN: 275-60-7695,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 99-CV-0463-EA ✓

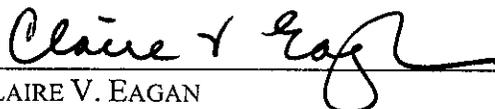
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DATE MAR 28 2000

ADMINISTRATIVE CLOSING ORDER

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

IT IS SO ORDERED this 28th day of March, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

FILED
MAR 28 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

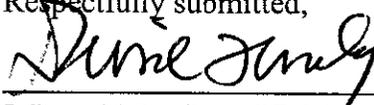
KATHLEEN DONICA,)
)
Plaintiff,)
)
vs.)
)
HEALTHSOUTH CORPORATION, a)
Delaware corporation,)
)
Defendant.)

Case No. 98-CV-0439H(M) ✓

ENTERED ON DOCKET
DATE MAR 28 2000

STIPULATION OF DISMISSAL OF OPT-IN PLAINTIFF VINCENT T. PALMER

Opt-In Plaintiff Vincent T. Palmer ("Palmer") and Defendant HealthSouth Corporation ("HealthSouth"), pursuant to Fed.R.Civ.P. 41(a)(1)(i), hereby stipulate to the dismissal without prejudice of Palmer's claims against HealthSouth in this matter, and Palmer by this dismissal, effectively withdraws his name from the class in this case.

Respectfully submitted,


J. Ronald Petrikin, OBA No. 7092
David H. Herrold, OBA No. 17053
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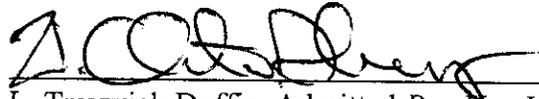
Attorneys for the Plaintiff,
KATHLEEN DONICA and those other present and former employees of HealthSouth Corporation who are similarly situated

SM

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ct

-AND-



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Attorneys for the Defendant,
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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 27 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICKIE M. DAVENPORT,

Plaintiff,

v.

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

Defendant.

Case No. 99-CV-463-EA

ENTERED ON DOCKET

DATE MAR 27 2000

O R D E R

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

DATED this 24th day of March 2000.

Claire V Eagan

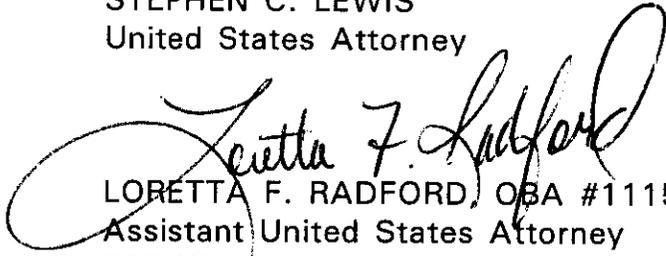
CLAIRE V. EAGAN

United States Magistrate Judge

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SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in cursive script that reads "Loretta F. Radford". The signature is written in black ink and is positioned over the typed name and title of the signatory.

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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:)
)
HUTTON, R.E., Inc.,)
)
Debtor.)
_____)
)
)
TERRY P. MALLOY,)
)
Appellant,)
)
)
vs.)
)
LAIRMORE PETROLEUM CORP.,)
)
Appellee.)

FILED
MAR 24 2000 SA
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-0282-B (E)

ENTERED ON DOCKET
DATE MAR 27 2000

REPORT AND RECOMMENDATION

The instant appeal from the United States Bankruptcy Court for the Northern District of Oklahoma has been referred to the undersigned United States Magistrate Judge for all proceedings consistent with her jurisdiction. The appeal has been fully briefed.

Appellant, Terry P. Malloy ("Mr. Malloy"), appeals from the order and judgment of the Bankruptcy Court awarding sanctions in the amount of \$10,000 against Mr. Malloy, Debtor's attorney, for bad faith filing of a bankruptcy petition in violation of Fed. R. Bankr. Proc. 9011. For the reasons discussed below, the undersigned recommends that the order and judgment of the Bankruptcy Court be **AFFIRMED**.

Jurisdiction and Standard of Review

The District Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158. A bankruptcy court's award of sanctions for bad faith filing of a bankruptcy petition is reviewed for abuse of discretion. Udall v. Federal Deposit Ins. Corp. (In re Nursery Land Development, Inc.), 91 F.3d 1414 (10th Cir. 1996); Findlay v. Banks (In re Cascade Energy & Metals Corp.), 87 F.3d 1146, 1149-50 (10th Cir. 1996). Abuse of discretion is shown if the bankruptcy court "based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 2461 (1990).

Procedural History

The procedural events material to the resolution of the issues on appeal are:

1. On November 24, 1995, R.E. Hutton, Inc. ("Debtor") filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code. (Bankruptcy Docket #1)¹
2. On December 29, 1995, Lairmore Petroleum Corporation ("Lairmore") filed a motion to dismiss the bankruptcy case, alleging that the petition had been filed in bad faith. (Bankruptcy Docket #11)
3. On August 15, 1997, the Bankruptcy Court entered its order granting Lairmore's motion to dismiss the bankruptcy petition on the ground that the petition had been filed in bad faith. (Bankruptcy Docket #140)
4. On August 25, 1997, Debtor filed a notice of intent to appeal the dismissal order. (Bankruptcy Docket #144)

¹ Citations to "Bankruptcy Docket" are to the docket sheet of the United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 95-03750-R, attached to the Record on Appeal.

5. On August 27, 1997, Lairmore filed in Bankruptcy Court a motion to assess sanctions against Debtor, Debtor's attorney Mr. Malloy, and Robert E. Hutton individually, for violation of, inter alia, Fed. R. Bankr. Proc. 9011 in filing the petition. (Bankruptcy Docket #146)

6. On September 25, 1997, the Bankruptcy Court entered an amended order dismissing the case (the "dismissal order"), to correct some minor errors in the earlier order. (Bankruptcy Docket #153)

7. On September 29, 1997, Debtor, Mr. Malloy, and Robert E. Hutton filed their objection to Lairmore's motion to assess sanctions. (Bankruptcy Docket #158)

8. On October 7, 1997, the Debtor amended its notice of intent to appeal. (Bankruptcy Docket #159)

9. On February 5, 1998, the Debtor's appeal of the dismissal order was docketed in this Court. (District Docket #1)² On the same day, the Bankruptcy Clerk filed an affidavit that there had been no designation of record filed by Debtor. (Bankruptcy Docket #169; District Docket #1)

10. On July 30, 1998, following an order to show cause, this Court (Judge Kern) dismissed Debtor's appeal for failure to prosecute, based on failure to file a designation of record or statement of issues on appeal. (District Docket #15)

11. On July 31, 1998, the Bankruptcy Court entered its order granting Lairmore's motion to assess sanctions under Fed. R. Bankr. Proc. 9011 (the "sanctions order"), and judgment was entered in favor of Lairmore against Mr. Malloy in the amount of \$10,000, against Debtor in the

² Citations to "District Docket" are to the docket sheet of the United States District Court for the Northern District of Oklahoma, Case No. 98-CV-0099-K, which was the Debtor's appeal of the dismissal order.

amount of \$5,000, and against Robert E. Hutton in the amount of \$7,000. (Bankruptcy Docket ##173, 174)

12. On August 12, 1998, Mr. Malloy filed a notice of appeal of the sanctions order and judgment.³ (Bankruptcy Docket #177)

13. On August 27, 1998, Mr. Malloy filed an amended notice of appeal of the sanctions order and judgment. (Bankruptcy Docket #182)

Review

Mr. Malloy raises three issues on appeal: the sanctions order is inconsistent with the pretrial order and prior findings of a predecessor bankruptcy judge; the Bankruptcy Court lacked jurisdiction to enter the sanctions order while the dismissal order was on appeal; and the sanctions order is against the weight of the evidence and contrary to law.

A. **The Bankruptcy Court Dismissal Based on Bad Faith Is a Final Decision Not Subject to Reconsideration**

Mr. Malloy directs much of his brief to the alleged flaws in the dismissal order, including an argument that it is inconsistent with previous (interlocutory) orders of a predecessor judge,⁴ and inconsistent with the pretrial order. Mr. Malloy attempts to bootstrap these arguments relating to the dismissal order into this appeal of the sanctions order because the Bankruptcy Court incorporated certain findings from the dismissal order into its sanction order. This attempt is unavailing; the

³ Debtor and Robert E. Hutton did not appeal the judgment awarding sanctions.

⁴ The predecessor judge ordered Lairmore to transfer certain properties to Debtor to be sold, and allowed Lairmore to operate other oil and gas properties, with net revenues applied to the debt owed to Lairmore. (Bankruptcy Docket #31) He thereafter ordered that Debtor should and manage all the properties as debtor-in-possession. (Bankruptcy Docket #79M, and #80 at 2-3) The prior judge's orders were rescinded by the Bankruptcy Court on March 17, 1997. (Bankruptcy Docket #107M, #116)

dismissal order is a final order, the appeal of which was dismissed by this Court on July 30, 1998. When that appeal was dismissed for failure to prosecute and Debtor did not appeal further, the dismissal order became final and binding. Thus, the issue of bad faith filing of the bankruptcy petition is foreclosed by the finality of the dismissal order. Mr. Malloy argues lack of finality based on incorporation of the bad faith findings into the sanctions order. Mere incorporation of prior, final findings into a later order (the sanctions order) does not affect the finality of those findings.

Mr. Malloy was counsel for Debtor in the appeal of the dismissal order. At the time of that appeal (the October 7, 1997 amended notice of appeal), Lairmore had already moved to assess sanctions against, inter alia, Mr. Malloy. Thus, Mr. Malloy was aware of the importance of the appeal of the bad faith finding in connection with the sanctions request. In fact, Mr. Malloy had already filed his objection to the sanctions motion. Instead of diligently pursuing the appeal of the bad faith finding, no designation of record was filed and the appeal was dismissed for failure to prosecute.

The issues for this appeal are whether Mr. Malloy, as Debtor's attorney, knew or reasonably should have known that the petition was filed in bad faith, and whether the award of sanctions is an abuse of discretion. See C, infra.

B. The Bankruptcy Court Retained Jurisdiction to Award Sanctions While the Dismissal Order Was On Appeal; In Any Event the Sanctions Order Was Entered After Dismissal of That Appeal

Mr. Malloy alleges that after Debtor filed its appeal of the dismissal order, the Bankruptcy Court was divested of jurisdiction and thus possessed no power to enter the sanctions order. This argument lacks merit for two reasons.

First, “[a]lthough filing notice of appeal generally divests the [bankruptcy] court of jurisdiction over the issues on appeal, see Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 379, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985), the [bankruptcy] court retains jurisdiction over ‘collateral matters not involved in the appeal,’ Garcia v. Burlington Northern R. Co., 818 F.2d 713, 721 (10th Cir. 1987).” Lancaster v. Independent School Dist. No. 5, 149 F.3d 1228, 1237 (10th Cir. 1998). Collateral matters include attorneys fees, costs, and sanctions. See Cooter & Gell, 496 U.S. at 395-96; Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988); White v. New Hampshire Dep’t of Employment Security, 455 U.S. 445, 451, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982).

In arguing that the Bankruptcy Court lacked jurisdiction because the sanctions issue was inextricably intertwined with the appealed finding of bad faith (and, thus, not “collateral”), Mr. Malloy relies on In re Wonder Corp. of America, 81 B.R. 221 (Bankr. D. Conn. 1988). The Wonder decision stands for the proposition that the bankruptcy court lacks jurisdiction over a sanctions motion when it raises the same issues as those pending on appeal. Mr. Malloy argues that his conduct in filing the action is the same subject matter as was on appeal to this Court in the appeal of the dismissal order. While there may be some visceral merit to this argument, it is both inapplicable and, in this case, academic.

Wonder is contrary to the more recent Tenth Circuit decision in Lancaster, which was decided in the context of a post-judgment award of attorneys’ fees as sanctions under Fed. R. Civ. P. 37. Plaintiffs there argued that the district court was deprived of jurisdiction to award attorneys fees as sanctions after a notice of appeal was filed. In concluding the argument lacked merit because

attorney fee awards are collateral matters over which the lower court retains jurisdiction, the court addressed sanctions as “collateral”:

While the cases typically discuss attorney’s fees awards in the context of statutory grants of attorney’s fees to the prevailing party, see e.g., Budinich, 486 U.S. at 197, 108 S. Ct. 1717, we see no basis to distinguish those cases from one like the present case in which fee awards are granted as sanctions. In either context, the award is collateral to the merits of the underlying action.

149 F.3d at 1237.

Here, the appeal of the dismissal order involved the bad faith filing of the petition, but not the conduct of counsel. Conduct of counsel was collateral to the merits of the bankruptcy petition and had not yet been determined by the dismissal order. The undersigned recommends a finding that the award of sanctions was collateral to the merits of the underlying action and that the Bankruptcy Court had jurisdiction to hear and grant the sanctions motion.

Second, even if the undersigned were to recommend following the Wonder analysis, in this case the Bankruptcy Court entered the sanctions order one day after the appeal was dismissed. While the Debtor had a ten-day stay to decide whether to pursue a further appeal of this Court’s dismissal of the appeal, see Fed. R. Bankr. Proc. 8017(a), and thirty days to file notice of appeal, see Fed. R. App. P. 4(a), no such appeal was taken to the court of appeals. (Technically, under the Wonder analysis, the Bankruptcy Court would have to wait an appropriate time to determine if a further appeal would be taken before entering the sanctions order. However, no further appeal was filed.) Thereafter, the Bankruptcy Court reacquired jurisdiction. Perhaps Mr. Malloy is arguing that the sanctions order was premature because a thirty-day appeal window had not expired; surely he is not suggesting that it is now necessary for this Court to vacate the sanctions order and remand to the Bankruptcy Court for re-entry of the sanctions order nunc pro tunc. Such a strategy is inefficient and

a waste of judicial resources. The undersigned recommends that the Court not engage in judicial ping-pong, but rather address the merits of the appeal of the sanctions order.

C. The Award of Sanctions Against Malloy Was Not An Abuse of Discretion

The standard of review for the Bankruptcy Court's sanctions order is abuse of discretion, which is shown if the order is based on an erroneous view of the law or a clearly erroneous assessment of the evidence. Cooter v. Geli, 496 U.S. at 405.

The Law

The sanctions order against Mr. Malloy was based on a violation of Fed. R. Bankr. Proc. 9011, which provided in part at the time of the sanctions motion⁵ as follows:

The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. . . . If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

Fed. R. Bankr. Proc. 9011(a) (emphasis added). Once a bankruptcy court determines that Rule 9011 has been violated, an appropriate sanction is mandatory. Id.; White v. General Motors Corp., 908 F.2d 675 (10th Cir. 1990). Cases under Fed. R. Civ. Proc. 11 are authoritative in Rule 9011 cases. See Masunaga v. Stoltenberg (In re Rex Montis Silver Co.), 87 F.3d 435, 437 (10th Cir. 1996).

⁵ Rule 9011 was amended effective December 1, 1997. The sanctioned conduct and dismissal order occurred prior to the effective date of the amended rule; thus, the pre-amendment version of Rule 9011 is applicable.

Under Tenth Circuit precedent, an attorney's actions must be objectively reasonable in order to avoid sanctions under Rule 9011. White, 908 F.2d at 680. An attorney's good faith belief in the merit of an argument is not sufficient; it must be in accord with what a reasonable, competent attorney would believe under the circumstances. Id.

The Bankruptcy Court cited the correct standard in its review of Mr. Malloy's conduct (Bankruptcy Docket #173, at 13), and assessed the circumstances surrounding the filing of the bankruptcy petition to determine objectively if Mr. Malloy knew or reasonably should have known that the petition was filed in bad faith. (Id. at 15-16) The Bankruptcy Court relied on precedent from this circuit to make this objective determination. See In re Nursery Land Development, Inc., 91 F.3d at 1415-16; In re Rex Montis Silver Co., 87 F.3d at 439-40. Thus, the Bankruptcy Court applied the correct legal standards. The undersigned recommends a finding that the Bankruptcy Court sanctions order is not based on an erroneous view of the law as to the decision to award sanctions. Further, Mr. Malloy does not argue that the Bankruptcy Court based the amount of sanctions on an erroneous view of the law. Thus, any abuse of discretion would have to be based on a clearly erroneous assessment of the evidence, or the application of the law to that evidence.

The Evidence and Application of the Law

The evidence relating to the filing of the bankruptcy petition and Mr. Malloy's knowledge of those facts and inquiry into the law can be summarized as follows:

Prior to May 1994, Robert E. Hutton ("Mr. Hutton") and Larry Lairmore ("Mr. Lairmore") jointly engaged in the oil and gas business through Lairmore Petroleum Corporation (previously identified herein as "Lairmore"). Lairmore received oil and gas revenues for the benefit of its clients. In approximately May 1994, Mr. Lairmore discovered that Mr. Hutton had intercepted checks

payable to Lairmore and deposited them in private accounts controlled by him. (Mr. Hutton was indicted and plead guilty to four counts of concealing property of bankruptcy estate.)

Lairmore sued the Debtor and Mr. and Mrs. Hutton (the "Huttons") in State Court to recover the converted funds. On the eve of trial in that lawsuit, the parties entered a settlement agreement which provided that the Huttons agreed to pay Lairmore \$200,000, and upon receipt of that payment Lairmore would assign certain oil and gas interests to the Huttons or their nominee.⁶ The Huttons failed to pay the \$200,000 to Lairmore. On August 4, 1995, upon motion by Lairmore, the State Court entered a judgment for Lairmore against the Huttons in the amount of \$200,000 plus interest. The judgment granted Lairmore a lien against the oil and gas interests⁷ and allowed Lairmore to sell those interests in a commercially reasonable manner. On October 11, 1995, the State Court entered an order allowing Lairmore to sell the oil and gas interests; the sale was scheduled for November 27, 1995.

On November 24, 1995, Mr. Malloy notified Lairmore that the Huttons had assigned to the Debtor all of their interests in the oil and gas interests.⁸ There was no valid consideration for the

⁶ Mr. Malloy represented the Huttons in State Court, as well as in connection with the settlement agreement. As counsel for the Huttons, he represented to Lairmore that he held checks in the amount of \$200,000. It was later discovered that the checks were drawn on accounts which had insufficient funds to cover them.

⁷ Pursuant to a 1992 agreement between Lairmore and the Huttons, Lairmore held record title to the oil and gas interests, and Lairmore and the Huttons each owned 50% beneficial interest in those oil and gas interests. (Docket #14, Ex. 2) (references to "Docket #" are to the docket sheet of this Court in this case). Pursuant to the judgment, Lairmore was granted a "lien" (even though it held record title) against the oil and gas interests, in the amount of \$200,000 plus interest and attorneys fees; the Huttons' right to obtain the oil and gas interests from Lairmore was contingent upon the Huttons' payment to Lairmore of the amounts owed. (*Id.*, Ex. 4)

⁸ The undersigned agrees with the Bankruptcy Court that the interests transferred to the Debtor by the Huttons is not clear. The Bankruptcy Court presumed the transfer was of interests in the oil and gas interests granted to the Huttons in the judgment, which were encumbered by Lairmore's "lien" (Bankruptcy Docket #173, at 3 n. 3), and which were contingent on a payment which had not been and could not be made before the scheduled sale or the filing of the bankruptcy petition.

assignment. On that same day, Debtor filed its Chapter 11 petition. Mr. Malloy, as counsel for the Debtor, and Mr. Hutton, as President of the Debtor, signed the petition. As a result of the bankruptcy filing, the sale of the oil and gas interests was automatically stayed. Lairmore moved to dismiss the petition for bad faith filing. That motion was granted in August 1997, after the case had been pending before a predecessor bankruptcy judge for almost two years. (Bankruptcy Docket #153, at 1-5)

Mr. Hutton testified before the Bankruptcy Court on behalf of the Debtor and himself.⁹ He stated that he and the Debtor relied on Mr. Malloy to determine if it was appropriate to file the bankruptcy petition (Docket #8, at 20); that he believed Debtor still had a right to ownership of the oil and gas interests (*id.* at 26, 29); that the only other asset of the Debtor was an interest in a well (*id.* at 28); that he and Mr. Malloy discussed the fact that many bankruptcies are filed on the “eve of foreclosure” (*id.* at 19); and that the Debtor’s goal in filing bankruptcy was to gain additional time to repay the State Court judgment (*id.* at 15-16).

Mr. Malloy testified¹⁰ that he had worked with Mr. Hutton on the Lairmore matter since 1994; that he represented the Huttons in the State Court action; that he represented Mr. Hutton in the criminal proceedings; that it was his contention that the State Court judgment transferred equitable ownership of the oil and gas interests to the Huttons, even though they had not paid the judgment; that he suggested the assignment from the Huttons to the Debtor on the eve of the State Court sale; that the consideration for the assignment was the Debtor’s assumption of the

⁹ The only portion of the sanctions hearing transcript which Mr. Malloy designated for appeal is the testimony of Mr. Hutton, and it is filed of record in this case at Docket #8.

¹⁰ The Court must rely on the recitation of the Bankruptcy Court as to Mr. Malloy’s testimony because he elected not to designate that portion of the transcript for the record on appeal.

indebtedness arising from the judgment;¹¹ that prior to filing the bankruptcy petition he reviewed an engineering report which valued the oil and gas interests in excess of the \$200,000 debt owed to Lairmore (see Docket #8, at 8-9); that he reviewed the income stream from the properties (see id. at 10), the Debtor's tax returns for the previous years (see id. at 11), and the settlement agreement between the Huttons and Lairmore; that he did not view the bankruptcy as a single-asset case and he believed the Debtor had a probability of successful reorganization; that he was familiar with Chapter 11 bad faith decisions, but he believed the petition was in good faith. (Bankruptcy Docket #173, at 8-9)

The Bankruptcy Court assessed this evidence and concluded that the actions of Mr. Malloy warranted imposition of sanctions. The Bankruptcy Court found that the filing of the bankruptcy petition was in bad faith, solely to frustrate the legitimate efforts of Lairmore to sell the oil and gas interests. With regard to Mr. Malloy, the Bankruptcy Court concluded:

A reasonable attorney should have known that the Debtor's Petition was an artifice designed to enable the Debtor to evade the State Court Order allowing the sale, without posting an appeal bond or paying any portion of the Judgment. By retaining its interest in the Oil and Gas Interests, the Debtor could speculate that the Oil and Gas Interests would increase in value, all to the detriment of Lairmore, the only significant creditor. A reasonable attorney would not have filed the Petition. Mr. Malloy knew or should have known that the Debtor's chapter 11 Petition was filed for an improper purpose and in bad faith; Mr. Malloy violated Rule 9011 in signing the Debtor's Petition.

(Bankruptcy Docket #173, at 16)

Mr. Malloy disputes the Bankruptcy Court's findings that the oil and gas interests were the Debtor's single asset, that the Debtor had little or no cash flow or other source of income to sustain

¹¹ The Bankruptcy Court found no consideration for the assignment based on the fact that the Debtor was already jointly and severally liable with the Huttons for this debt. (Bankruptcy Docket #173, at 9 n. 12)

a plan of reorganization, and that Debtor had attempted to use the bankruptcy process to retain a single asset and speculate that it would increase in value. These arguments relate to findings in the dismissal order (now final), relating to bad faith filing of the bankruptcy petition. In addition, Mr. Malloy's arguments relating to assets, cash flow, and reorganization are based on orders of the predecessor bankruptcy judge entered after the filing of the bankruptcy petition which directed transfer of certain oil and gas properties to Debtor and allowed Lairmore to operate other oil and gas properties with net revenues applied to reduce the debt owed to Lairmore. The test for objective reasonableness on the part of Mr. Malloy is the date he signed or filed the bankruptcy petition; hindsight is to be avoided. Adv. Comm. Notes to Rule 11; cf. Adamson v. Bowen, 855 F.2d 668, 673 (10th Cir. 1988).

At the time of filing the bankruptcy petition, Mr. Malloy knew that he represented to Lairmore in connection with the settlement agreement that he held checks totalling \$200,000 (which checks, it was discovered before bankruptcy, were drawn on accounts with insufficient funds), that the settlement was never funded, that the State Court judgment provided for the Huttons' interest in the oil and gas interests if the \$200,000 was paid to Lairmore, that the \$200,000 could not be paid to Lairmore before the scheduled State Court sale, and that the assignment to Debtor (suggested by him) and filing of the bankruptcy petition (on advice from him) were calculated to thwart the sale and to delay payment to Lairmore. Mr. Malloy's subjective belief that Debtor owned the oil and gas interests claimed in its schedules and that Debtor could be reorganized is not relevant. The issue is whether his belief was objectively reasonable; it was not. This case contains numerous indicia of the classic badges of bad faith bankruptcy filing: one asset (the oil and gas interests); one significant creditor (Lairmore); property acquired by assignment which was scheduled for sale and the assignor was unsuccessful in defending against the sale; Debtor had no ongoing business or employees and

lacked possibility of reorganization; and the chapter 11 filing stopped the sale. Nursery Land, 91 F.3d at 1416 (citing Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd.), 40 F.3d 1084, 1090 (10th Cir. 1994); Laguna Assocs. Ltd. Partnership v. Aetna Casualty & Sur. Co. (In re Laguna Assocs. Ltd. Partnership), 30 F.3d 734, 738 (6th Cir. 1994); Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (In re Little Creek Dev. Co.), 779 F.2d 1068, 1072-73 (5th Cir. 1986)).

The signature of Mr. Malloy on the bankruptcy petition constituted a certificate that it was warranted by existing law and not interposed to cause unnecessary delay. Fed. R. Bankr. P. 11. The petition was signed in violation of Rule 9011; thus, sanctions were mandatory. The undersigned recommends findings that the Bankruptcy Court did not base its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. The undersigned recommends a conclusion that the Bankruptcy Court's award of sanctions is not an abuse of discretion, and must be affirmed.

Conclusion

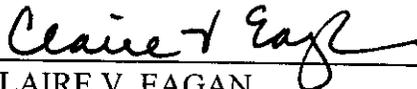
For the foregoing reasons, the undersigned recommends that the order and judgment of the Bankruptcy Court be **AFFIRMED**.

Objections

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must file them with the Clerk of the District Court within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1); see also Fed. R. Civ. P. 72(b). **The failure to**

file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Judge. See Thomas v. Arn, 474 U.S. 140 (1985); Haney v. Addison, 175 F.3d 1217 (10th Cir. 1999).

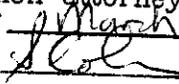
Submitted this 24th day of March, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 27 Day of March, 2000



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

FILED

MAR 24 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM SCOTT SOURS,)
)
Plaintiff,)
)
vs.)
)
COUNTY OF OTTAWA, et al.,)
)
Defendants.)

Case No. 97-CV-581-BU

ENTERED ON DOCKET

DATE MAR 27 2000

JUDGMENT

This matter came before the Court upon Defendants' motions for summary judgment and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendants, Ottawa County Board of County Commissioners, Jack Harkins, in his individual and official capacities, John Daniels, Sean Corbit, Ben Loring, in his individual and official capacities, William Culver, and Douglas S. Pewitt, and against Plaintiff, William Scott Sours.

DATED at Tulsa, Oklahoma, this _____ day of March, 2000.



MICHAEL DURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 24 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM SCOTT SOURS,
Plaintiff,
vs.
COUNTY OF OTTAWA, et al.,
Defendants.

Case No. 97-CV-581-BU

ENTERED ON DOCKET

DATE MAR 27 2000

ORDER

On December 28, 1999, Magistrate Judge Claire V. Eagan issued a Report and Recommendation. In the Report and Recommendation, Magistrate Judge Eagan recommended that the Motion for Summary Judgment filed by Defendants, Ben Loring, in his individual and official capacities, Douglas S. Pewitt and William Culver and the Motion for Summary Judgment filed by Defendants, Ottawa County Board of County Commissioners, Jack Harkins, in his individual and official capacities, John Daniels and Sean Corbit be granted.

This matter now comes before the Court upon Plaintiff, William Scott Sours' Objections to the Report and Recommendation, to which Defendants have responded. Pursuant to 28 U.S.C. § 636(b)(1), the Court has conducted a de novo review of the matters objected to by Plaintiff. Having done so, the Court finds that Plaintiff's objections are without merit. The Court agrees with the Report and Recommendation of Magistrate Judge Eagan and adopts the Report and

Recommendation in its entirety.

Accordingly, the Report and Recommendation of Magistrate Judge Claire V. Eagan (Docket Entry #68) is **AFFIRMED**. The Motion for Summary Judgment filed by Defendants, Ben Loring, in his individual and official capacities, Douglas S. Pewitt and William Culver (Docket Entry #62) and the Motion for Summary Judgment filed by Defendants, Ottawa County Board of County Commissioners, Jack Harkins, in his individual and official capacities, John Daniels and Sean Corbit (Docket Entry #63) are **GRANTED**. The Motion to Dismiss Defendant Harkins (Docket Entry #69) is **DENIED**. Judgment shall issue forthwith.

ENTERED this _____ day of March, 2000.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

After the filing of the Report and Recommendation, Plaintiff filed a Motion to Dismiss Defendant Harkins. In the motion, Plaintiff requests to dismiss the claims against Jack Harkins, in his individual capacity, dealing with malicious prosecution on the basis that those claims abated upon the death of Defendant. Because Magistrate Judge Eagan had addressed the merits of the claims against Defendant, Jack Harkins, in his individual capacity, prior to Plaintiff's motion and had recommended summary judgment in regard to those claims and the Court has now adopted that recommendation, the Court declines to grant Plaintiff's motion. The Court prefers to address the merits of the claims and therefore finds that Plaintiff's motion should be denied.

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

FILED

MAR 24 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TONY CONTU, individually, and JACKIE GRUBB, individually, and all other similarly situated present and past employees,

Plaintiffs,

vs.

TIERRA VISTA, INC., an Oklahoma corporation; Thomas Flood, an individual; Russell Warren, an individual; and TruGreen LandCare, L.L.C, a limited liability company,

Defendants.

Case No. 99-CV-0799H(M)

ENTERED ON DOCKET
MAR 24 2000
DATE _____

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1), Plaintiffs Tony Contu and Jackie Grubb and Defendants Tierra Vista, Inc., Thomas Flood, Russell Warren, and TruGreen LandCare, L.L.C. hereby dismiss this litigation with prejudice.

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

FILED

MAR 24 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GOLDMAN SACHS MORTGAGE)
CO. L.P.,)
)
Plaintiff,)
vs.)
)
DOUGLAS E. HINER,)
)
Defendant.)

Case No. 99-CV-0737H

ENTERED ON DOCKET
DATE MAR 24 2000

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Goldman Sachs Mortgage Company L.P., hereby dismisses with prejudice all of its claims against Douglas E. Hiner filed herein.

Respectfully submitted,

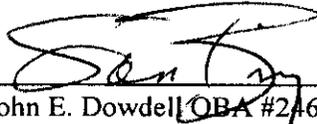

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CERTIFICATE OF SERVICE

This is to certify that service of this pleading has been made on March 24, 2000, to:

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

FILED
MAR 24 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JERRY ALEXANDER, CIPRIANO)
ALVARADO, LAVONNE ANDERSON,)
JOHN BENNETT, MARTY CHARLES,)
HOWARD CHILDERS, COY COOK,)
SCOTT COOK, MICHAEL COX,)
SHIRLEY DAVIS, EDWIN DEAN, LOIS)
DENTIS, SHERI DILLMAN, PRESTON)
DUGAN, JAMES EMERSON, JIMMY)
FORD, KENNETH GADDY, TERESA)
GLADD, RICHARD HIGGINS, JUDY)
HILKER, DANNY JACKSON, JAMES)
KEELING, DANNY KELLY, DIANE)
KELLY, DOROTHEA KIDNEY,)
WILLIAM KNIGHT, BARBARA LARUE,)
LARRY LEE, MICHAEL MARQUEZ,)
DALE MCDANIEL, JANIE MILLER,)
GILBERT NAIL, DARRIN PROCK,)
HOMER PURCELL, DONNA RAMBO,)
JAMES READY, LARRY SCARBROUGH,)
ALFRED SEIP, RAY SHIVERS, HAROLD)
SKAGGS, BOBBY SMITH, DAVID)
SMITH, TIMOTHY SNIDER, JOELLE)
STRUBLE, VICTOR TAYLOR,)
VICTORIA VAUGHN, STEVE WEGNER,)
DEAN WISE, CLARENCE WOODS,)
MICHAEL SILER, and CLEOTIS)
RAINES,)

Plaintiffs,

v.

SMITH & NEPHEW, P.L.C., and
SMITH & NEPHEW RICHARDS, INC.,

Defendants.

Phil Lombardi, Clerk

ENTERED ON DOCKET
MAR 24 2000
DATE _____

Case No. 96-CV-1004-K (E) ✓

ORDER

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Before the Court are Defendant Smith & Nephew Richards, Inc.'s ("Defendant's") motions for summary judgment and to exclude or limit the testimony of Jerry D. McKenzie, M.D., as to Plaintiff Kenneth D. Gaddy ("Plaintiff").

I. History of Case

This is a products liability case concerning the Rogozinski Spinal Rod System manufactured by Defendant, presently on remand from *In re Orthopedic Bone Screw Products Liability Litigation*, multidistrict litigation number 1014, in the United States District Court for the Eastern District of Pennsylvania. Plaintiff is suing Defendant for injuries allegedly sustained due to the Rogozinski system implanted into his back in 1993. Plaintiff's theories for liability include manufacturers' products liability, negligence, negligence per se, failure to warn, breach of express and implied warranties, and fraud.

Plaintiff injured his back in September 1989, while moving heavy objects at work. Eventually, James Rodgers, M.D., diagnosed Plaintiff with left leg sciatica and herniated discs at the L4-5, and possibly L5-S1, levels of his spine. After being treated with spinal epidural steroid injections, Plaintiff underwent his first surgery, a left L4-5 and left L5-S1 partial hemilaminectomy, medial facetectomy, and microdiscectomy, in November 1990. After an initial improvement followed by the continued deterioration of his condition, Mr. Gaddy was referred to Dr. Don. L. Hawkins. In May 1993, Dr. Hawkins found Mr. Gaddy to be suffering from severe degenerative changes in the disc, recurrent herniation at the L4-5 level, and scar tissue and stenosis, particularly in the neural foramen on the left side at L4-5

and L5-S1 bilateral. Finding that Mr. Gaddy likely would not improve without surgical intervention, Dr. Hawkins recommended a redo decompressive lumbar laminectomy of both lower levels, discectomy with internal fixation, and fusion with iliac bone grafts. He discussed the risks, benefits, and possible complications of this surgery with Mr. Gaddy. Plaintiff agreed to a second surgery, which Dr. Hawkins performed on June 28, 1993. In this surgery, Dr. Hawkins utilized components from the Rogozinski Spinal Rod System in segmental fixation at the L4-5 and L5-S1 levels utilizing screws in the vertebral pedicles. Using a bone graft from the left iliac crest, a bilateral mass fusion was performed at L4-5 and L5-S1. This procedure followed a decompressive laminectomy and discectomy at L4-5 and L5-S1 and foraminotomies, particularly of the left L5 nerve root. Dr. Hawkins also inserted an internal bone growth stimulator to further enhance the chances of fusion. Although x-rays and examinations showed excellent alignment of the system, a solidifying fusion mass, and no evidence of loosening of the system, in May 1994, Gaddy still complained of some pain in his back. Gaddy eventually chose to have the Rogozinski device removed, and Dr. Hawkins explanted it on June 20, 1994. During the explantation surgery, Dr. Hawkins noted solid fusion. Plaintiff argues that the Rogozinski system was not mechanically strong enough to support his spine during the fusion process, did not promote fusion or provide any medical benefit, and that it aggravated, if not caused, Plaintiff's medical problems, primarily continued back and leg pain and sexual dysfunction.

II. Exclusion of Expert Testimony

Defendant seeks to exclude the testimony of Dr. Jerry D. McKenzie, Plaintiff's medical causation expert, for failure to satisfy Fed. R. Evid. 702. Defendant argues that Dr. McKenzie is not qualified to testify as to his expressed opinions, his opinions are not sufficiently reliable to satisfy Rule 702, and his opinions are irrelevant to the case.

A. Standard

Fed. R. Evid. 702 authorizes a "witness qualified as an expert by knowledge, skill, experience, training, or education" to testify as to "scientific, technical, or other specialized knowledge." Testimony is admissible under Fed. R. Evid. 702, if it "rests on a reliable foundation and is relevant." *See Kumho Tire Co. v. Carmichael*, — U.S. —, 119 S. Ct. 1167, 1171 (1999). In making its initial determination of reliability, the Court has broad latitude to consider whatever factors the Court finds useful, and the particular factors will depend on the unique circumstances of the expert testimony involved. *See id.* at 1176. Factors mentioned in *Daubert* and *Kumho* include the following: (1) whether the reasoning or methodology underlying the expert's opinion has been or could be tested; (2) whether the reasoning or methodology has been subject to peer review and publication; (3) the known or potential rate of error; and (4) the level of acceptance of the reasoning or methodology by the relevant professional community. *See id.* at 1176-77; *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 592-95 (1993). These factors are not necessarily applied in every case and are not exclusive of other factors. *See Kumho*, 118 S. Ct. at 1175. An expert may rely on facts

and data not in evidence to the extent reasonably relied upon by experts in his field. *See* Fed. R. Evid. 703. Rule 702 was intended to liberalize the introduction of relevant expert evidence and such testimony is subject to being tested by "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Daubert*, 509 U.S. at 596. The Court also must recognize that expert witnesses have the potential to "be both powerful and quite misleading." *Id.* at 595.

B. Dr. McKenzie's Qualifications

Dr. McKenzie does not qualify as an expert to testify as to the causation of Plaintiff's ailments. Dr. McKenzie's report indicates that he proposes to testify that (1) the Rogozinski device did not provide any medical advantage to Mr. Gaddy; (2) he developed a severe chronic inflammatory reaction from the device that caused bony and fibrous overgrowth resulting in spinal and foraminal stenosis; (3) this reaction necessitated the explantation of the device; caused loss of sensation in the lower extremities, difficulty walking, and other limitations on daily life; resulted in bowel and bladder dysfunction and loss of sexual awareness; and caused Plaintiff chronic pain; and (4) an examination of the Rogozinski device explanted from Plaintiff indicates movement of the component parts.

The simple possession of a medical degree is insufficient to qualify a physician to testify as to the advantages of an spinal fixation device, the medical causation of spine-related ailments, or the mechanical functioning of an orthopedic implantation device. Plaintiff cites to *Wheeler v. John Deere Co.*, which states that "an expert witness is not

strictly confined to his area of practice, but may testify concerning related applications; a lack of specialization does not affect the admissibility of the opinion, but only its weight." 935 F.2d 1090, 1100 (10th Cir. 1991). This opinion and the other federal cases cited by Plaintiff, however, are pre-*Daubert*.¹ A blanket qualification for all physicians to testify as to anything medically-related would contravene the Court's gate-keeping responsibilities.²

Dr. McKenzie's qualifications even fail to satisfy the Fifth Circuit's quite liberal qualification test. That Circuit finds that, while a completely unqualified expert should not testify, *Daubert* focuses instead on relevancy and reliability. See *Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 507 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 1171 (2000). Therefore, "[a]s long as some reasonable indication of qualifications is adduced, the court may admit the evidence without abdicating its gate-keeping function." *Id.* As more fully set out below, Dr. McKenzie's qualifications fail to satisfy even this minimal test.

Dr. McKenzie's experience as an emergency room physician and in legal medicine for workers' compensation injuries does not qualify him to give the opinions to which he proposes to testify. Dr. McKenzie has been licensed as a doctor in Oklahoma since 1967,

¹In fact, the only post-*Daubert* Tenth Circuit opinion to cite *Wheeler* is *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1519 (10th Cir. 1996). *Compton*, however, was based on the erroneous holding that *Daubert* was inapplicable to opinions not based on a particular methodology or technique. See *id.*, *abrogated by Kumho*, 119 S. Ct. at 1170.

²Other courts have reached a similar conclusion regarding the testimony of medical doctors. See, e.g., *Whiting v. Boston Edison Co.*, 891 F. Supp. 12, 24 (D. Mass. 1995) ("Just as a lawyer is not by general education and experience qualified to give an expert opinion on every subject of the law, so too a scientist or medical doctor is not presumed to have expert knowledge about every conceivable scientific principle or disease.").

with over two decades of experience in emergency medicine. Dr. McKenzie is not board certified in any medical specialty and has no experience or training in orthopedics, spinal surgery, spinal fusion with instrumentation, neurology, or other areas remotely related to the subject of his opinions. Plaintiff makes no attempt to demonstrate Dr. McKenzie's qualifications in these specialized area but rather relies on his assertion that Dr. McKenzie's medical degree is qualification enough. Plaintiff simply has not demonstrated that Dr. McKenzie is "qualified as an expert by knowledge, skill, experience, training, or education" to testify as to the effects of the Rogozinski device or the causes of Mr. Gaddy's ailments.³ See Fed. R. Civ. Evid. 702.

C. Reliable Foundation

Even if Dr. McKenzie possessed the appropriate qualifications, his proffer lacks a reliable foundation. Plaintiff must show that Dr. McKenzie's method is scientifically sound and his opinion is based on sufficiently reliable facts. See *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 781 (10th Cir. 1999). At a minimum, Dr. McKenzie should describe the method he used in reaching, and the data supporting, his determination. The Court cannot rely on an expert's mere assurance that the methodology and data are reliable. See *id.* The Court does not focus on an expert's conclusions but on whether his principles and methodology are sound. See *Daubert*, 509 U.S. at 595. If any step renders Dr. McKenzie's opinion unreliable

³Dr. McKenzie's qualifications to render opinions regarding the mechanical behavior of the Rogozinski device while implanted are even more lacking. Dr. McKenzie has demonstrated absolutely no training, education, or experience in biomechanics or any related field.

- either in the choice of methodology or its application - his opinion is inadmissible. *See Mitchell*, 165 F.3d at 782.

Dr. McKenzie's methodology for determining the medical causation of Plaintiff's ailments is wholly lacking in reliability.⁴ Dr. McKenzie notes that he interviewed Mr. Gaddy, reviewed certain medical records and prior x-rays, inspected Mr. Gaddy's explanted device, and took x-rays and performed a physical examination of Mr. Gaddy. On this basis and his expertise as a licensed physician, Dr. McKenzie opines that the Rogozinski device caused the numerous problems listed above. Dr. McKenzie, however, fails to explain why he eliminated, assuming he even considered, other possible causes for Plaintiff's injuries. Dr. McKenzie does not explain, nor did he inquire as to, when Mr. Gaddy's incontinence or sexual difficulties began.⁵ Dr. McKenzie's opinion is devoid of any indice of reliable methodology or any indication of any methodology whatsoever, other than examining the patient and attributing all of his physical problems, whether preexistent or nonexistent, to the Rogozinski device.⁶

⁴This discussion will focus on Dr. McKenzie's evaluation of whether Defendant's device *actually* caused Plaintiff's injuries, specific causation, rather than whether it is *capable* of causing such injuries, general causation. The parties do not appear to dispute the issue of general causation for the purposes of the motion to exclude.

⁵Although his medical records and testimony indicate Mr. Gaddy has had incontinence problems in the past, he has testified that he does not have any bladder problems. He has further testified that, although his sexual problems worsened following the implantation surgery, they began after his first surgery.

⁶Other courts have found that some sort of differential diagnosis or attempted elimination of other causes is an important, if not necessary, factor in determining the reliability of a medical causation opinion. *See, e.g., Rutigliano v. Valley Bus. Forms*, 929 F. Supp. 779, 786 (D.N.J. 1996) (requiring differential diagnosis before an expert may give opinion testimony regarding specific causation), *aff'd*, 118 F.3d 1577

The standard used to determine the sufficiency of causation evidence does not affect this analysis. Plaintiff's reliance on the lesser causation standard of *McKellips v. Saint Francis Hospital, Inc.*, in order to cure the defects in his expert's methodology, is misplaced. 741 P.2d 467 (Okla. 1987). In *McKellips*, the Oklahoma Supreme Court adopted the loss of chance of survival doctrine that lessens the causation burden in medical malpractice cases where the duty breached was one imposed to prevent the type of harm the patient ultimately sustained. *See id.* at 474. This doctrine, even if it were otherwise applicable, has *not* been extended to ordinary negligence actions brought against persons other than a medical practitioner or hospital. *See Hardy v. Southwestern Bell Tel. Co.*, 910 P.2d 1024, 1025-26 (Okla. 1996). Thus, even if a lesser causation standard would be sufficient to lessen the reliability standards imposed by *Daubert*, the doctrine is inapplicable to this case. Furthermore, requiring Dr. McKenzie to employ differential diagnosis does not require Plaintiff to prove causation beyond a reasonable doubt. Contrary to Plaintiff's analysis, *In re Paoli Railroad Yard PCB Litigation* reemphasizes the need for a medical causation expert to engage in diagnostic techniques that rule out other causes and offer a good explanation as

(3d Cir. 1997); *Wooley v. Smith & Nephew Richards, Inc.*, 67 F. Supp. 2d 703, 703 (S.D. Tex. 1999) (rejecting expert opinion as unreliable that, among other things, lacked any analysis indicating how other possible causes of the patient's pain were ruled out); *McCullin v. Synthes Inc.*, 50 F. Supp. 2d 1119, 1127 (D. Utah 1999) (rejecting expert's opinion that, among other things, failed to explain how other potential causes were ruled out); *Cali v. Danek Med., Inc.*, 24 F. Supp. 2d 941, 951 (W.D. Wis. 1998) (finding that expert's assertion that implanted device caused patient's symptoms based on his general expertise and without ruling out other possible causes lacked sufficient reliability and was unsupported speculation); *Tucker v. Nike, Inc.*, 919 F. Supp. 1192, 1196-97 (N.D. Ind. 1995) (finding that expert's failure to exclude other possible factors and to inquire as to patient's prior injuries rendered opinion unreliable).

to why his conclusion remains reliable when he does not. 35 F.3d 717, 761 (3d Cir. 1994). Dr. McKenzie has failed to do so and does not meet the reliability requirements imposed by Rule 702.⁷

III. Summary Judgment

A. Standard

Summary judgment is appropriate if “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence that would require submission of the case to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). Where the nonmoving party will bear the burden of proof at trial, that party must go beyond the pleadings and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *See Mares*, 971 F.2d at 494. Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *See Thomas v. International Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995).

⁷Having found Dr. McKenzie unqualified and his methodology unreliable, the Court does not rule on the relevance of his proffered opinion.

B. Plaintiff's Claims

Plaintiff's claims against Defendant are as follows: (1) manufacturers' products liability; (2) negligence, including negligence per se; (3) failure to warn; (4) breach of express and implied warranties; and (5) fraud.⁸ Defendant argues that, because Plaintiff has failed to prove causation, his entire case should be dismissed. Defendant also argues that Plaintiff's Food and Drug Administration ("FDA") regulatory theories are legally unsound and that Plaintiff cannot establish any defect in the Rogozinski device.

C. Manufacturers' Products Liability

Because Plaintiff has put forward no evidence of medical causation, Plaintiff's manufacturers' products liability claim must fail. The three elements of a manufacturers' products liability action are as follows: (1) the product caused Plaintiff's injury; (2) the defect existed in the product at the time it left Defendant's possession and control; and (3) the defect rendered the product unreasonably dangerous. *See Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1363 (Okla. 1974). To establish causation, Plaintiff must prove that his injury was caused, not necessarily by the negligence of Defendant, but by reason of a defect built in and existing at the time of his injury. *See id.* at 1364. Unreasonably dangerous means that the device was dangerous to an extent beyond that which would be contemplated by the

⁸This formulation differs somewhat from that found in Plaintiff's complaint. However, given the complex history of the case, the Court will rely on Plaintiff's representations in his summary judgment response as to the extent of his claims.

ordinary customer who purchases it, with the ordinary knowledge common to the community as to its characteristics. *See id.* at 1362-63.

Absent the now-excluded testimony of Dr. McKenzie, Plaintiff has no evidence of medical causation. The Oklahoma Supreme Court has frequently found expert testimony necessary to establish medical causation "[w]here injuries are of a character requiring skilled and professional men to determine the cause and extent thereof." *Williams v. Safeway Stores, Inc.*, 515 P.2d 223, 227 (Okla. 1973). Plaintiff has no expert qualified to render an opinion as to the cause of his injuries. As noted above, Dr. McKenzie's testimony cannot be admitted, because he lacks the necessary qualifications and his methodology is unreliable. Plaintiff also attempts to rely on the testimony of Harold Alexander, Ph.D., to satisfy this burden. However, Dr. Alexander's testimony is limited to orthopedic bioengineering by Pretrial Order No. 725.⁹ *In re Orthopedic Bone Screw Prods. Liab. Litig.*, No. MDL 1014, 1997 WL 39583 *6 (E.D. Pa. Jan. 23, 1997). This means Dr. Alexander may testify as to "how pedicle screws function in the human body and how the human body functionally, but not medically, responds to pedicle screws." *Id.* at *3. He is not, however, "particularly qualified to make . . . statements in the additional disciplines of law, medicine, orthopedics, FDA regulatory practice, conflicts of interest, market surveys, and clinical studies." *Id.* at

⁹Bioengineering includes the following: (1) biomechanics, the study of how a medical device will mechanically interact with surrounding tissue; (2) biomaterials, the study of the materials in a medical device and the body tissue's response to this device; (3) biomedical engineering, the study of how a device should be designed and constructed; and (4) design and analysis of device research, the study of the proper design and implementation of studies to determine potential risks and benefits associated with device designs and the extent to which those risks and benefits are realized in clinical practice. *See* 1997 WL 39583, at *1, 6.

*4. While Dr. Alexander's affidavit covers many of these disallowed areas, his orthopedic bioengineering testimony is insufficient to create an issue of causation.¹⁰

D. Negligence and Negligence Per Se

1. Negligence

Plaintiff's negligence claim similarly fails on his inability to show causation. The elements of a negligence claim in Oklahoma are as follows: (1) the existence of a duty owed by Defendant to Plaintiff to use ordinary care; (2) the breach of that duty; and (3) an injury proximately caused by the breach. *See Comer v. Preferred Risk Mut. Ins. Co.*, 991 P.2d 1006, 1010 (Okla. 1999). Therefore, in order for Plaintiff to recover on a negligence action, there must be a causal connection between Defendant's actions and the injury. *See Key v. Liquid Energy Corp.*, 906 F.2d 500, 505 (10th Cir. 1990). As noted above, Plaintiff has failed to put forth any evidence of causation, rendering judgment for Defendant appropriate as to this claim, as well.

¹⁰Plaintiff argues that Dr. Alexander's testimony is sufficient to establish that the device provided no medical benefit to Plaintiff and generated metal particles and corrosion products that produced an inevitable inflammatory response in adjacent tissues. As noted above, Dr. Alexander may be qualified to testify as to how the body mechanically reacted to the Rogozinski System, but he cannot testify as to how the body *medically* reacted to the device or the medical benefits of the device's use. Plaintiff attempts to make an unsupported leap from the device's mechanical behavior to the lack of any "medical benefit" and Plaintiff's symptoms. Plaintiff must bridge this gap with reliable and relevant expert medical causation testimony. While absolute certainty is not required in Oklahoma, the "mere possibility of causation is insufficient." *Hardy v. Southwestern Bell Tel. Co.*, 910 P.2d 1024, 1027 (Okla. 1996).

2. Negligence Per Se

Plaintiff's negligence per se claim fails, because this theory is inapplicable to labeling and marketing violations under the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 *et seq.*, and Plaintiff has put forward no evidence of causation. When a statute or regulation governs conduct, the Court may adopt it as the standard required of a reasonably prudent person if the Court believes it appropriate for civil liability. *See Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 622 (10th Cir. 1998). The violation of a statute is negligence per se if (1) the claimed injury is caused by the law's violation; (2) the injury is of the type intended to be prevented by the statute; and (3) the injured person is a member of the class the statute intends to protect. *See Lockhart v. Loosen*, 943 P.2d 1074, 1078 (Okla. 1997). Plaintiff's negligence per se claim appears to be based on Defendant's alleged violations of FDA regulations. The Court has rejected this theory in *Johnson v. Smith & Nephew Richards, Inc.*, No. 97-CV-363-K, 1999 WL 1117105 *2 (N.D. Okla. Sept. 30, 1999).

In this case, Plaintiff has failed to put forth evidence that Defendant's alleged violation of the FDA regulations caused his injury. On the contrary, Defendant has submitted Dr. Hawkins' uncontroverted testimony that he knew that the Rogozinski device had not been approved by the FDA to be marketed for the insertion of bone screws in the vertebral pedicles and that he relied on his knowledge of the medical standard of care and the facts of Mr. Gaddy's case in recommending the surgery.

Furthermore, the regulations alleged to have been violated are administrative and do not impose a standard of care, as could form the basis of a negligence per se claim. Plaintiff argues that Defendant unlawfully marketed the Rogozinski device for use with pedicular attachment. Under the Medical Device Amendments of 1976, 21 U.S.C. §§ 360c *et seq.*, devices are divided into three categories, Classes I, II, and III. The classes range from least to most dangerous. Class I devices are subject only to general controls. *See* 21 U.S.C. § 360c(a)(1)(A). Class II devices are subject to further special controls, and Class III devices require premarket approval ("PMA"). *See id.* § 360c(a)(1)(B)-(C). At the time of Plaintiff's surgery, the Rogozinski device with pedicular attachment fell under Class III. However, because it was substantially equivalent to devices marketed in interstate commerce prior to May 28, 1976, it could be introduced into the market without PMA. *See id.* §§ 360(k), 360c(f). This equivalency classification applied only to devices labeled and intended to be fixed to the spine by laminar hooks and sacral/ilic attachment. The FDA prohibited Defendant from labeling or promoting the device for pedicular attachment to the vertebral column. Moreover, the FDA required that all labeling prominently note that the screws were intended for sacral/ilic attachment only and include the following statement: "WARNING - THIS DEVICE IS NOT INTENDED FOR PEDICULAR APPLICATION." While the FDA regulates the manner in which Defendant markets the Rogozinski device, it does not regulate a physician's decision to use the device for another, "off-label" use. *See* Citizen Petition Regarding the Food and Drug Administration's Policy on Promotion of Unapproved

Uses of Approved Drugs and Devices; Request for Comments, 59 Fed. Reg. 59,820, 59,821 (1994). Furthermore, the parties acknowledge that the FDCA does not provide a private right of action. *See* 21 U.S.C. § 337(a). Nevertheless, Plaintiff seeks to enforce the FDCA by arguing that the FDA's labeling requirements constitute a minimum standard of care. As noted in *Johnson*, these requirements are merely administrative in nature and lack any independent substantive content. *See* 1999 WL 1117105, at *2. Under these circumstances, the Court finds that the alleged violations of FDA regulations do not create a cause of action for negligence per se in Oklahoma. *Cf. Talley v. Danek Med., Inc.*, 179 F.3d 154, 161 (4th Cir. 1999) (finding no negligence per se claim under Virginia law, because the regulations lack substantive content); *Baker v. Danek Med.*, 35 F. Supp. 2d 875, 878 (N.D. Fla. 1998) (finding no negligence per se claim under Florida law where FDCA does not provide private right of action and FDA status was immaterial to implanting surgeon); *but cf. Valente v. Sofamor*, 48 F. Supp. 2d 862, 876 (E.D. Wis. 1999) (disagreeing with *Cali v. Danek Med., Inc.*, 24 F. Supp. 2d 941, 954 (W.D. Wis. 1998), and finding Wisconsin law allows negligence per se claim based on violation of FDCA).

E. Failure to Warn

Plaintiff's failure to warn claim fails under the learned intermediary doctrine. In Oklahoma, the learned intermediary doctrine is an exception to the duty to warn, under which

the manufacturer can warn the physician rather than the ultimate consumer.¹¹ *See Tansy v. Dacomed Corp.*, 890 P.2d 881, 886 (Okla. 1994). The reasoning behind this doctrine is instructive. As a physician, Dr. Hawkins has the duty to inform himself of the qualities and characteristics of the Rogozinski system and to exercise independent judgment, taking into account his knowledge of the patient, as well as the product. *See Edwards v. Basel Pharms.*, 933 P.2d 298, 300 (Okla. 1997). The patient is expected to rely primarily on this judgment. *See id.* Therefore, if the Defendant properly informed Dr. Hawkins, it is entitled to assume that he exercised his informed judgment. *See id.* at 300-01. In this case, Dr. Hawkins has testified that he was fully informed as to the FDA status of the Rogozinski System, knew of its risks, did not rely on Defendant's promotional materials, and exercised his independent medical judgment based on the standards of care and Mr. Gaddy's situation in recommending the surgery. Given these facts, Plaintiff can show no injury resulting from any failure to warn Dr. Hawkins.

F. Breach of Express and Implied Warranties

Plaintiff's claim for breach of express warranty fails, because Plaintiff has submitted no evidence that Dr. Hawkins relied on any of Defendant's representations. *See Speed Fasteners, Inc. v. Newsom*, 382 F.2d 395, 397 (10th Cir. 1967). Dr. Hawkins states in his affidavit that Defendant did not make any warranty about, or promise of performance

¹¹There are two exceptions to the learned intermediary doctrine in Oklahoma – mass immunizations and situations where the FDA has mandated that warning be given directly to the consumer – neither of which is applicable here. *See Edwards v. Basel Pharms.*, 933 P.2d 298, 301 (Okla. 1997).

concerning, the Rogozinski System and that he was knowledgeable of the device's regulatory status and risks. He also states that he has used different spinal fixation devices and based his decision to use the Rogozinski device on his experience with the system. Plaintiff's only response is that the Court can infer that Dr. Hawkins relied on these representations despite his affidavit to the contrary. Plaintiff puts forward no material facts in support of Dr. Hawkins' reliance, warranting summary judgment to Defendant on this claim.

Plaintiff's warranty claims also lack any evidence of causation. In addition to breach of express warranty, Plaintiff alleges breach of implied warranty of fitness for intended use. In a products liability action, breach of implied warranty is no longer an appropriate remedy except as provided in the Uniform Commercial Code. *See Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1365 (Okla. 1974). In order to recover for breach of warranty, Plaintiff must show the following: (1) the existence of the warranty; (2) that the warranty was broken; and (3) that the breach was the proximate cause of the loss sustained. *See American Fertilizer Specialists, Inc. v. Wood*, 635 P.2d 592, 595 (Okla. 1981); *see also* U.C.C. § 2-314 cmt. 13. As noted above, Plaintiff has no evidence that the device caused his injuries.

G. Fraud

A fraud claim requires Plaintiff to prove (1) Defendant made a material representation; (2) that was false; (3) and made knowingly or recklessly, without regard for its truth; (4) with the intent that it be acted upon; and (5) Plaintiff was injured as a result. *See McCain v. Combined Communications Corp. of Okla., Inc.*, 975 P.2d 865, 867 (Okla. 1998).

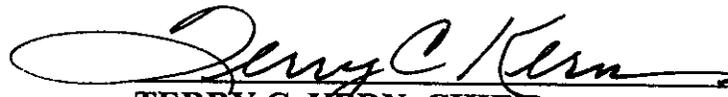
In order to succeed on this claim, Plaintiff must show that Defendant's submissions to the FDA caused Dr. Hawkins to use the Rogozinski Spinal System and that the device caused his injury. As detailed above, Plaintiff has no evidence supporting either assertion.

IV. Conclusion

Because Dr. McKenzie is not qualified to render his proffered expert opinion and because his methodology is unreliable, his testimony is excluded. Absent this testimony, Plaintiff lacks any evidence that the Rogozinski Spinal Rod System caused his injuries. Plaintiff also has submitted no evidence to contradict Defendant's evidence that his surgeon, Dr. Hawkins, was aware of the FDA status of the device, did not rely on any representations made by Defendant, was aware of its risks, and chose to implant the Rogozinski system in Mr. Gaddy based on his independent medical knowledge. Under these circumstances, Plaintiff's claims for manufacturers' products liability, negligence, negligence per se, failure to warn, breach of express and implied warranties, and fraud must fail.

IT IS THEREFORE ORDERED that Defendant's Motion to Exclude, or in the Alternative, Limit the Testimony of Jerry D. McKenzie, M.D. as to Plaintiff Kenneth D. Gaddy (# 32) is GRANTED and Defendant's Motion for Summary Judgment as to Plaintiff, Kenneth Gaddy (# 14) is GRANTED.

ORDERED this 24 day of March, 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KCS MEDALLION RESOURCES, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 TIW CORPORATION, a Texas corporation,)
 and GSM, INC., a Texas corporation,)
)
 Defendants.)

ENTERED ON DOCKET

DATE MAR 24 2000

Case No. 99 CV 1456 K (B) D

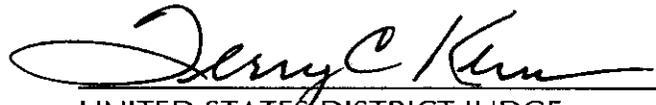
MAR 24 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER DISMISSING GSM, INC. WITHOUT PREJUDICE

The Court, being fully advised, hereby grants Plaintiff's application to dismiss its claims against GSM, Inc., without prejudice. This Order shall not affect the claims of Plaintiff's against the remaining Defendant, TIW Corporation.

IT IS SO ORDERED, this 23 day of March, 2000.


UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

LORENZO A. RAMOS,

Defendant.

ENTERED ON DOCKET

DATE MAR 24 2000

No. 99CV1052K(J)

FILED

MAR 24 2000

DEFAULT JUDGMENT

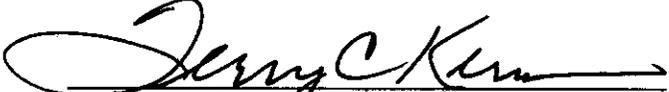
Phil Lombardi, Clerk
U.S. DISTRICT COURT

This matter comes on for consideration this 24 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, Lorenzo A. Ramos, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Lorenzo A. Ramos, was served with Summons and Complaint on February 15, 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, Lorenzo A. Ramos, for the principal amount of \$3,742.36, plus accrued

interest of \$318.58, 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

CLARENCE STANLEY,)
SSN: 463-64-1752)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner)
of Social Security Administration,)
)
Defendant.)

FILED

MAR 23 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-CV-779-J¹

ENTERED ON DOCKET
DATE MAR 24 2000

ORDER^{2/}

Plaintiff, Clarence Stanley, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{3/} Plaintiff asserts that the Commissioner erred (1) because the ALJ did not properly evaluate Plaintiff's literacy, (2) because Plaintiff is disabled due to Plaintiff's pain, (3) because the hypothetical

^{1/} This action was filed by Plaintiff on August 25, 1997. By Order dated July 6, 1998, Plaintiff was directed to file a return of service or show good cause why the action should not be dismissed. Plaintiff did not file any responsive pleadings to the Order, and the action was dismissed by the District Court on July 22, 1998. Plaintiff filed a Motion to set aside the Dismissal on August 3, 1998. Plaintiff's Motion was granted, and a briefing schedule was entered by the Court. Plaintiff's Opening Brief was due May 18, 1999, but no brief was received by the Court prior to that date. On June 1, 1999, the Court entered an Order directing Plaintiff to show cause for Plaintiff's failure to comply with the Court's scheduling order. Plaintiff filed a response to the Order to Show Cause on June 15, 1999, explaining that the date was not properly calendered. The Court, by Order dated June 16, 1999, granted Plaintiff additional time to file Plaintiff's brief, and gave Plaintiff until June 28, 1999. On June 28, 1999, Plaintiff filed for an extension of time to file his opening brief. Plaintiff's motion was granted, and Plaintiff was given until July 8, 1999 to file his brief. Plaintiff filed a brief on July 16, 1999.

^{2/} This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

^{3/} Administrative Law Judge Larry C. Marcy (hereafter "ALJ") concluded that Plaintiff was not disabled by decision dated May 1, 1996. [R. at 8]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on June 19, 1997. [R. at 4].

question posed to the vocational expert did not accurately include all of Plaintiff's impairments, and (4) because the ALJ did not properly evaluate Plaintiff's mental impairment. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was born January 30, 1943, and was 52 years old at the time of his hearing before the ALJ. [R. at 30].

At the hearing before the ALJ, Plaintiff testified that he completed the eighth grade^{4/} and could read and write "a bit" and do some arithmetic with a calculator. [R. at 30].

In 1989, while Plaintiff was at work, a large approximately 1,000 pound frame fell on Plaintiff. Plaintiff went to the emergency room and was treated for knee problems, collapsed lungs, and back problems related to the accident. According to Plaintiff, he still experiences pain related to the injuries he received in that incident.

Plaintiff testified that he took high blood pressure medication, Tylenol, Alleve, and ibuprofen. [R. at 32]. Plaintiff testified that his pain had increased since his injury, and that he took ibuprofen approximately three to four times each day. [R. at 35]. Plaintiff also testified that he currently saw a doctor at the free clinic. [R. at 34].

^{4/} A note by a doctor who examined Plaintiff indicated that Plaintiff completed the tenth grade in 1959. [R. at 131]. Plaintiff would have been fourteen in 1959. Another doctor noted that Plaintiff "related a ninth grade education." [R. at 182]. A form which appears to have been completed by Plaintiff indicates that Plaintiff completed the ninth grade. [R. at 214]. Some of Plaintiff's doctors indicated Plaintiff had a ninth grade education. [R. at 142, 178].

Plaintiff has smoked for approximately 20 years. [R. at 38]. Plaintiff drinks as much as eight to ten beers each day. [R. at 161]. Plaintiff stated that during the day he watches television, sometimes makes himself a sandwich, and walks approximately 50 yards.

Plaintiff additionally testified that he was sometimes depressed and forgetful. [R. at 48].

A RFC completed on April 15, 1995, indicated Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand or walk for six hours in an eight hour day, and sit for six hours in an eight hour day. [R. at 74].

The social security interviewer indicated that Plaintiff asked his wife to read everything with him. [R. at 115].

Plaintiff's file contains numerous workers' compensation impairment ratings. Plaintiff was rated as having a 91.5% impairment to the whole man^{5/} by Lawrence A. Reed on January 6, 1990. [R. at 135].

Plaintiff was examined by John Halfort, D.O., on August 10, 1990, for injuries related to his September 23, 1989 injury when the frame fell on him. The doctor noted that Plaintiff had surgery to repair his knee and had a collapsed lung during the incident. [R. at 138]. Plaintiff indicated that he was also short of breath. [R. at 138]. A September MRI was interpreted as revealing a bulging disc, but not requiring surgery. Plaintiff's neck and shoulders and thoracic spine were reported as indicating

^{5/} This document is missing page 12.

a full range-of-motion. Plaintiff had a slight limp in his gait, and the range-of-motion in Plaintiff's right knee was limited. The doctor indicated Plaintiff was temporarily totally disabled from the date of the accident through November 20, 1989, which was the date that Plaintiff began working. [R. at 139].

Plaintiff was examined on October 31, 1990. The doctor indicated Plaintiff reported respiratory problems, difficulty sleeping and getting out of bed, and pain in his back. [R. at 142].

Kenneth Trinidad, D.O., wrote a letter discussing Plaintiff's complaints of shortness of breath on April 30, 1993. [R. at 151]. Dr. Trinidad reported that Plaintiff had an impairment and estimated Plaintiff's respiratory impairment at 25% to the whole person - 10% from smoking, and 15% from Plaintiff's work environment. [R. at 154].

Plaintiff was estimated as having a permanent partial impairment to the whole person of 75.5% by Jim Martin, M.D., on August 12, 1993. [R. at 157].

Plaintiff indicated that he had difficulty breathing in an examination conducted by Roy Fielding, M.D., on August 31, 1993. [R. at 160]. Dr. Fielding noted that Plaintiff last mowed his one-half acre lawn three months prior to the examination and, according to Plaintiff, was able to push the mower for only ten minutes before he needed to rest. Plaintiff additionally informed Dr. Fielding that he had not worked since he was fired and "he cannot find work that pays him enough as he will not work for \$5.00 an hour." [R. at 161]. Dr. Fielding also noted that Plaintiff drank eight to

ten beers each day. [R. at 162]. According to Dr. Fielding, Plaintiff's FVC tests were normal. [R. at 164].

On October 7, 1993, William Gillock, M.D., summarized Plaintiff's injury history. Plaintiff injured his lower back at work on March 26, 1984, receiving a 5% impairment to the whole person. Plaintiff again injured his lower back on January 11, 1985. Plaintiff burnt his forearm on August 10, 1987, receiving a disability rating of 1%. A frame was dropped on Plaintiff on September 23, 1989, and Plaintiff received a permanent disability rating of 39.5%. Plaintiff was rated on September 10, 1991, as having an additional 19% impairment due to his hearing loss. Dr. Gillock reported that Plaintiff's lungs had a normal respiratory rate. In Dr. Gillock's opinion, Plaintiff had a total impairment to the whole person of 60.9%.

On July 7, 1994, Plaintiff was reported as having a hearing impairment. John A. Karr, D.C., also concluded that Plaintiff was permanently and totally disabled.

C.B. Pettigrew, D.O., on October 18, 1994, noted that, in his opinion, Plaintiff was not permanently disabled. [R. at 182].

Plaintiff was examined by Casey Truett, M.D. Dr. Truett addressed Plaintiff's impairments in a letter written December 10, 1994. [R. at 189]. Dr. Truett noted that Plaintiff's pulmonary tests indicated a lack of effort on the part of Plaintiff. In addition, Dr. Truett wrote that Plaintiff's audiogram indicated that Plaintiff would be unable to hear conversation in a quiet room, but that his conversations with Plaintiff indicated otherwise.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

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

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

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

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

42 U.S.C. § 423(d)(2)(A).^{6/}

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by

^{6/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

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

"The finding of the Secretary^{7/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

^{7/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

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

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff had the RFC to perform a wide range of light work. The ALJ found that Plaintiff could not perform his past relevant work, but that Plaintiff could work as a parking lot attendant, a marker/packer, and an assembler. [R. at 16].

IV. REVIEW

LITERACY

Plaintiff claims that he can read and write only "a little," and is illiterate. Plaintiff asserts that the ALJ did not have sufficient information to determine that Plaintiff was literate, and that no information supported the ALJ's conclusion that Plaintiff had a drivers' license.

The ALJ noted that Plaintiff testified that he could only read and write a little and that his wife filled out his application and read it to him. The ALJ noted that Plaintiff "completed shop orders, alleged he needed no assistance in prosecuting his claim, and apparently had a driver's license. Thus the undersigned finds that claimant is literate. . . ." Defendant additionally notes that a seventh grade through eleventh grade education is generally considered a "limited education" in evaluating an

individual's education status. Defendant asserts that although Plaintiff apparently borrowed his wife's glasses and had his wife read the social security papers with him this indicated that Defendant needed corrective lenses rather than assistance with reading. Defendant asserts that the record adequately supports the ALJ's conclusion that Plaintiff is literate. The Court disagrees.

Initially, Defendant asserts that Plaintiff's education^{8/} provides evidence that Plaintiff is literate. The record is not at all clear as to whether Plaintiff completed the eighth grade or the tenth grade. *See, infra*, n.4. Regardless, social security regulation 20 C.F.R. § 404.1564(b) provides that "if there is no other evidence to contradict it, we will use your numerical grade level to determine your educational abilities." In this case, direct evidence contradicts the Defendant's assumption that Plaintiff is literate. Plaintiff testified that he could read and write only "a little," that he had memorized the shop orders at his job, and that he relied upon his wife's assistance in completing the application papers. Due to the testimony of Plaintiff, Defendant cannot rely on the grade level attained by Plaintiff to presume that Plaintiff is literate.

Defendant notes that Plaintiff claims he relied upon his wife to read to him, and borrowed his wife's glasses. Defendant suggests that these actions mean that Plaintiff requires corrective lenses, but is not illiterate. First, none of the actions Defendant refer to support a conclusion that Plaintiff is literate. Second, the examiner

^{8/} Defendant asserts that Plaintiff has a "limited education." A limited education is considered, pursuant to the regulations, to be a seventh grade through eleventh grade education. The record is not entirely clear on the level of high school completed by Plaintiff. However, Plaintiff completed either the eighth grade or tenth grade. Nothing suggests Plaintiff completed the eleventh grade.

which Defendant refers to wrote that Plaintiff "borrowed his wife's glasses to see where to sign his name and asked her to read everything with him." [R. at 115]. Requesting that an individual read "with you" does not constitute evidence that the requester can read. Defendant additionally notes that Plaintiff "presumably" had a drivers license. Again, the record is not clear on this point.

Plaintiff testified that he was able to read and write only a little, and that he had memorized the shop orders for his prior job. Nothing in the record supports a conclusion that Plaintiff is literate. See, e.g., Eggleston v. Bowen, 851 F.2d 1244 (10th Cir. 1988). Under the Grids, a person is presumed disabled if the person is limited to performing light work, is closely approaching advanced age, and is illiterate. On remand the ALJ should determine Plaintiff's educational classification, and the degree of Plaintiff's literacy.

PAIN

Plaintiff claims that he proved that he experienced disabling pain and that the ALJ therefore erred in concluding that Plaintiff was not disabled. Plaintiff states that the medical record supports his claim that he has impairments which can produce disabling pain, and that Plaintiff's complaints are consistent throughout the record. Plaintiff additionally asserts that the ALJ focused on the negative comments in Dr. Truett's report while ignoring other comments, that the ALJ wrongly discredited Plaintiff for using only non-prescription pain medicine, and that Plaintiff failed to consider Plaintiff's pre-injury work history.

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Id. at 164. In assessing the credibility of a claimant's complaints of pain, the following factors may be considered.

[T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are 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, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders

combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.").

The mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment."). Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

The ALJ proceeded to the third step of Luna, concluding that Plaintiff did have impairments which could produce disabling pain. The ALJ evaluated the various opinions of Plaintiff's examining physicians. The ALJ noted that one of the examining doctors observed that Plaintiff's breathing and hearing tests were inconsistent with Plaintiff's true abilities. Based on this observation, the ALJ questioned, to some degree, Plaintiff's credibility. This is not error, but is the type of analysis which the ALJ must make in determining what weight should be given to Plaintiff's complaints of pain. In addition, the ALJ noted that Plaintiff's attempts at pain relief consisted primarily of non-prescription pain medication, that Plaintiff spent money on items other than pain medication (alcohol and cigarettes) claiming that he could not afford such medication, that Plaintiff's medical record contained some gaps, and that Plaintiff was evaluated primarily for workers' compensation claims and did not actively seek

additional treatment. The Court concludes that the ALJ adequately evaluated Plaintiff's complaints of pain.

HYPOTHETICAL QUESTION TO VOCATIONAL EXPERT

Plaintiff additionally asserts that the hypothetical question to the vocational expert did not include Plaintiff's problems with his right leg, Plaintiff's pain, and Plaintiff's bilateral hand numbness. As noted above, the Court has concluded that the ALJ did not adequately evaluate Plaintiff's literacy. On remand, any findings regarding Plaintiff's literacy should be presented to the vocational expert.

V. CONCLUSION

The Court concludes that this action should be reversed and remanded to the Commissioner for an evaluation of Plaintiff's literacy. Absent a conclusion that Plaintiff is presumptively disabled under the Grids, any findings with regard to Plaintiff's literacy should be presented to the vocational expert.

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

Dated this 23 day of March 2000.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 23 2000 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERRY L. NICHOLS,)
SSN: 455-06-6888,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 98-CV-0731-EA

ENTERED ON DOCKET

DATE MAR 23 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 23rd day of March, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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 October 4, 1955, and was 41 years old at the time of the administrative hearing in this matter. She has a high school education. Her past relevant work includes being an insurance clerk, reservation agent, video clerk, store manager, catalog researcher, rental manager, rental clerk, and telephone sales person. Claimant alleges an inability to work beginning June 22, 1995, due to depression, anxiety attacks, three back surgeries, carpal tunnel surgery on both hands, and tendinitis in her left elbow and shoulders.

Procedural History

On August 17, 1995, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.). Claimant’s application for benefits was denied in its entirety initially and on reconsideration. A hearing before ALJ Richard J. Kallsnick was held January 27, 1997, in Tulsa, Oklahoma. By decision dated March 24, 1997, the ALJ found that claimant was not disabled at any time through the date of the decision. On August 4, 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 severe impairments consisting of status post multiple lumbar surgeries, with fusion, status post bilateral carpal tunnel release, anxiety disorder, and depression, but that she does not have any impairment or combination of impairments listed in, or medically equal to one listed

in the Listing of Impairments (20 C.F.R. Pt. 404, Subpart P, App. 1). He determined that claimant had the residual functional capacity (RFC) to perform the physical exertional and nonexertional requirements of light work except for work that requires more than occasional stooping, that would require repetitive use of her hands (for activities such as typing) for more than two hours each day, that would not allow a five-minute break every 30 minutes during that two hour period, and that involves more than simple work activity with more than limited contact with the public. The ALJ found 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. He concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Review

Claimant asserts as error that the ALJ: (1) failed to properly analyze claimant's subjective complaints of pain; (2) failed to consider the full impact of claimant's mental impairments upon her ability to perform work-related activities; (3) failed to find that she meets or equals several listings; and (4) failed to consider claimant's mental impairments in combination with the effects of her pain.²

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:

² Claimant actually listed only three errors in her amended brief, but her second allegation contains two separate errors.

(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’s analysis of claimant’s subjective complaints of disabling pain is lacking. He specifically referenced the parameters and the criteria set forth in 20 C.F.R. § 404.1529 and Social Security Ruling 96-7p (R. 20), but he failed to explain why specific evidence led to the conclusion that claimant’s subjective complaints were not fully credible. Kepler, 68 F.3d at 391. Instead, the ALJ merely recited the claimant’s testimony, stated that he evaluated and compared her testimony with prior statements and other evidence, and concluded that her pain is limiting but not severe enough to preclude all types of work. (R. 20-21) Then he recited the evidence pertaining to her *mental* impairments and mentioned that she went on vacation during the period she alleged she was disabled. (R. 21-22) He acknowledged her complaints, her pain, her limitations, and the fact that she takes medication, but he summarily concluded that none of these would not preclude light work

with the limitations he imposed. As in Kepler, the link between the evidence and credibility determination is missing. Id. The Commissioner attempted to link the evidence to the claimant's credibility in its brief filed in this Court (Docket # 15), but the ALJ failed to do so in his decision. The ALJ's credibility determination was not supported by substantial evidence. He failed to properly analyze claimant's subjective complaints of pain.

Mental Impairments

The Tenth Circuit requires an ALJ to follow the procedure in 20 C.F.R. § 404.1520a when he or she evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey 92 F.3d 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, but his evaluation of her mental impairment is not supported by substantial evidence. He relies, in part, on the findings of a psychiatric consultative examination performed by a doctor whose specialty is family practice. (R. 20, 254-56, 264) There is no indication in the record that David B. Dean, M.D., has any training or experience in psychiatry or psychology. (R. 264) Further, his diagnosis does not necessarily lend support to the ALJ's decision that claimant can perform light work as long as her contact with the public is limited. (See

R. 20) Dr. Dean diagnosed claimant with “[p]ost traumatic stress disorder, severe, with anxiety and depression, and auditory hallucinations of a persecutory variety.” (R. 256)

The ALJ also recited the findings of G.J. Ann Taylor, Ph.D., and Kash K. Biddle, D.O., but neither of these reports provide the necessary support for the ALJ’s opinion. Dr. Taylor diagnosed claimant with post traumatic stress disorder, major depression, recurrent, and possible adult attention deficit disorder. (R. 235) Dr. Biddle treated claimant for a variety of minor physical problems from October 1994 to September 1995, but he prescribed Prozac, Xanax, and other medications for her anxiety. (R. 241-52) He also noted occasions when she could not work due to her anxiety and stayed in bed all day (R. 242), and when she had increased anger, withdrawal, depression, and crying (R. 243).

The ALJ mentioned, but effectively disregarded, the most extensive and telling notes of claimant’s mental health treatment in the record. Therapists at the Associated Centers for Therapy, Inc., (“ACT”) treated claimant during the period from January 30, 1996 through December 23, 1996, when she was referred to another mental health clinic following a change in policy. (R. 22, 287-338) These notes indicate that claimant was very troubled. ACT therapists diagnosed claimant as having post traumatic stress disorder, dissociative identity disorder, and borderline personality disorder. Her Global Assessment of Functioning (GAF) was 52 (current) and 65 (for the preceding year) in February 1995.³ (R. 292)

³ A score of 51-60 indicates moderate symptoms or moderate difficulty in social, occupational, or school functioning, and a score of 61-70 indicates mild symptoms or some difficulty in social, occupational, or school functioning, but generally functioning pretty well, with some meaningful interpersonal relationships. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders § 245.2 (4th ed.1994).

Claimant's brief adequately summarizes extensive references to the mental and emotional problems recorded in the ACT notes. (See Cl. Br., Docket # 13, at 3-5.) The notes indicate that she was sexually molested as a child from the time she was four years of age until she was sixteen, and she had "flashbacks" of those incidents. She had panic attacks with agoraphobia.⁴ Her flashbacks and fears sometimes caused her to hide in a closet or trunk. She believed she had two personalities. She had homicidal and suicidal thoughts, and she attempted suicide once. Feelings of hatred, anger, guilt, worthlessness, isolation, and paranoia filled her mind. She abused her spouse, property, and herself. The notes also reveal a fear of men, few social contacts, avoidance of people, sleep disturbance, and memory loss, among other things. (See R. 287-338) At the administrative hearing, claimant tearfully testified to the same thoughts, feelings, behaviors, and problems reflected in the ACT notes. (See 37-66) The ALJ's cursory treatment of her alleged mental impairments does not reflect full consideration their impact upon her ability to perform work-related activities.

Listings §§ 12.06, 12.03, 12.08

The ALJ's failure to properly evaluate claimant's mental impairments began at step three of the sequential evaluation process. At step three, 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). Equivalence is determined "on medical evidence only." *Id.*

⁴ Agoraphobia is defined as "intense, irrational fear of open spaces, characterized by marked fear of being alone or of being in public places where escape would be difficult or help might be unavailable. Called also *panic disorder with agoraphobia*. . . ." Dorland's Illustrated Dictionary 38 (28th ed. 1994).

§ 404.1526(b). 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). Yet, 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).

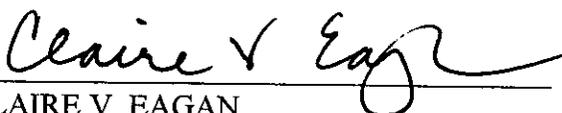
Claimant argues that the ALJ failed to find that she meets or equals several listings: § 12.06 (Anxiety Related Disorders), § 12.03 (Schizophrenic, Paranoid, and Other Psychotic Disorders), and § 12.08 (Personality Disorders). Given the evidence provided by ACT and other doctors, the ALJ was obliged to address whether claimant’s impairments met the Listings. As in Clifton, the ALJ in this matter “did not discuss the evidence or his reasons for determining that [claimant] was not disabled at step three, or even identify the relevant Listing or Listing; he merely stated a summary conclusion that [claimant’s] impairments did not meet or equal any Listed Impairment. Such a bare conclusion is beyond meaningful judicial review.” Id. Because the Court finds reversible error at step three in addition to the ALJ’s errors in evaluating claimant’s pain, credibility, and mental impairments, the Court finds it unnecessary to address claimant’s final argument: that the ALJ failed to consider claimant’s mental impairments in combination with the effects of her pain.

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, 838 F.2d at 1132. The decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

DATED this 23rd day of March, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

GLORIA A. BROOKS, individually and on)
behalf of other similarly situated individuals,)

Plaintiff,)

v.)

WILLIAM HENDERSON, Postmaster General)
of the United States Postal Service, and the)
AMERICAN POSTAL WORKERS UNION,)
LOCAL NO. 1348,)

Defendants.)

ENTERED ON DOCKET

DATE MAR 23 2000

Case No. 99-CV-592-H

U.S. DISTRICT COURT

MAR 23 2000

FEDERAL CLERK
U.S. DISTRICT COURT

ORDER

This matter comes before the Court pursuant to Plaintiff's motion to dismiss without prejudice (Docket # 14), filed March 2, 2000. Plaintiff's motion is hereby granted.

IT IS SO ORDERED.

This 22ND day of March, 2000.



Sven Erik Holmes
United States District Judge

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

FILED

MAR 22 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GARY DEAN CHILDERS,)
)
Petitioner,)
)
vs.)
)
RON CHAMPION,)
)
Respondent.)

Case No. 99-CV-231-E (E)

ENTERED ON DOCKET

DATE MAR 22 2000

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.

SO ORDERED THIS 22^d 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 22 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GARY DEAN CHILDERS,)

Petitioner,)

vs.)

RON CHAMPION,)

Respondent.)

Case No. 99-CV-231-E (E) /

ENTERED ON DOCKET
MAR 22 2000
DATE _____

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #18) entered on February 24, 2000, in this 28 U.S.C. § 2254 habeas corpus action. The Magistrate Judge recommends that Respondent's motion to dismiss (#9) be granted and the petition for writ of habeas corpus (#s 1, 4, and 5) be dismissed as barred by the statute of limitations imposed by 28 U.S.C. § 2244(d). The Magistrate Judge further recommends that Petitioner's remaining motions (#s 6, 10, 11, 12, and 14) be denied as moot. On March 6, 2000, Petitioner, appearing in this matter *pro se*, filed his timely objection to the Report (#19).

In accordance with Rule 8(b) of the Rules Governing Section 2254 Cases and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which the Petitioner has objected, and concludes that, for the reasons discussed below, the Report should be adopted and affirmed.

BACKGROUND

As stated by the Magistrate Judge in her Report, Petitioner sustained a physical injury on March 15, 1995, while incarcerated at Dick Conner Correctional Center, Hominy, Oklahoma. As a result of that injury, Petitioner has been unable to work thereby limiting his ability to earn "early release" credits. Petitioner believes he is entitled to an award of those credits he has been unable to earn. Petitioner also seeks restoration of 100 previously earned credits which were revoked as a result of a disciplinary proceeding.

In her Report, the Magistrate Judge concludes that the factual predicate for petitioner's claims, that the state unconstitutionally lengthened the term of his sentence and removed or withheld early release credits he had previously accumulated, arose at the latest on October 30, 1996, the date Petitioner claims his early release credits were removed.¹ As a result, under 28 U.S.C. § 2244(d)(1)(D), Petitioner had one (1) year from October 30, 1996, or until October 30, 1997, to file a federal petition for writ of habeas corpus. Recognizing that the limitations period is tolled while a petitioner seeks post-conviction or other collateral relief in the state courts, see 28 U.S.C. § 2244(d)(2), the Magistrate Judge extended Petitioner's deadline by 411 days, or until December 15, 1998, based on the amount of time Petitioner's state mandamus action remained pending.² Petitioner did not file the instant petition until March 29, 1999, clearly beyond the December 15,

¹As noted by the Magistrate Judge (see #18 at 5), Petitioner's Consolidated Record Card indicates credits were actually removed from Petitioner's record in October, 1995, not October, 1996, as urged by Petitioner. (See #19, attachment).

²Petitioner filed his "petition for writ of habeas corpus or writ of mandamus" in Osage County District Court on February 28, 1997 (#9, Ex. A) where it remained pending until February 2, 1998 when the state district court denied Petitioner's request for extraordinary relief (#9, Ex. B). Petitioner filed a petition in error in the Supreme Court of Oklahoma (#9, Ex. C). The petition in error was transferred to the jurisdiction of the Oklahoma Court of Criminal Appeals where mandamus relief was denied on April 15, 1998 (#9, Ex. D). Thus, as stated by the Magistrate Judge, the action was pending in the state courts for 411 days.

1998 deadline. As a result, the Magistrate Judge concluded the instant action is untimely and should be dismissed.

Petitioner objects to the Report, alleging that the Magistrate Judge overlooked the time he spent exhausting administrative remedies and seeking relief under the Governmental Tort Claims Act, Okla. Stat. tit. 51, §§ 151, et seq. Petitioner also states that he has not intentionally delayed this action and that Respondent is responsible for any delay as a result of “slow response (sic) to administrative remedies.” (#19).

DISCUSSION

After reviewing the record, the Report, and Petitioner's objections to the Report, the Court agrees with the Magistrate Judge's conclusions and finds that the instant petition was not timely filed. The Court finds no basis for further extension of the filing deadline based on Petitioner's claim that the Magistrate Judge “overlooked” the time spent exhausting administrative remedies. Even if the § 2244(d) limitations period were tolled while Petitioner exhausted administrative remedies, the only additional time for which Petitioner could possibly be credited is the eight (8) days from December 2, 1996 (date of grievance submitted to Warden Champion, #19 attachment) to December 10, 1996, the date Petitioner states the grievance was denied. (#19 at 2). However, an additional eight (8) days will not save this petition. According to the record before the Court, any further effort by Petitioner to exhaust administrative remedies occurred prior to October 30, 1996, the date generously recognized by the Magistrate Judge as the date the § 2244(d) limitations clock began to run. See #19, attachments.

The Court also rejects Petitioner's argument concerning time spent pursuing tort claims at the state Risk Management Division as required by Okla. Stat. tit. 51, §§ 151, et seq. Petitioner's pursuit of tort claims and compensatory damages is not relevant to the habeas corpus relief sought

in the instant petition. Petitioner was not required to file his governmental tort claim with the Risk Management Division prior to seeking federal habeas corpus relief. Furthermore, the record before the Court indicates administrative review of Petitioner's tort claims was completed in March, 1996, prior to the October 30, 1996 commencement of the limitations period. (See #19, attachments). As a result, the Court concludes that Petitioner's actions under the Governmental Tort Claims Act, Okla. Stat. tit. 51, §§ 151, et seq., do not serve to further extend the limitations period in this case.

The Court also concludes Petitioner has failed to demonstrate both that he pursued his habeas claims diligently and the existence of extraordinary circumstances justifying equitable tolling. See Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618-19 (3d Cir.1998) (equitable tolling applies only where prisoner has diligently pursued claims but has in some "extraordinary way" been prevented from asserting rights). Therefore, the Court agrees with the Magistrate Judge's conclusion that Petitioner is not entitled to equitable tolling in this case. The Report should be adopted and affirmed and the petition for writ of habeas corpus should be dismissed with prejudice as barred by the statute of limitations.

CONCLUSION

The Court has reviewed de novo those portions of the Report to which the Petitioner has objected, see Rule 8(b), Rules Governing Section 2254 Cases, and 28 U.S.C. § 636(b)(1)(C), and concludes that the Report and Recommendation of the United States Magistrate Judge should be adopted and affirmed. Respondent's motion to dismiss should be granted and Petitioner's petition for writ of habeas corpus should be dismissed with prejudice. Petitioner's additional motions have been rendered moot and should be denied on that basis.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the United States Magistrate Judge (#18) is **adopted and affirmed.**
2. Respondent's motion to dismiss time barred petition (#9) is **granted.**
3. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#s 1, 4, and 5) is **dismissed with prejudice.**
4. Petitioner's motions to set for hearing (#6), for writ of habeas corpus *ad testificandum* (#10), for appointment of counsel (#11), "motion *in limine*" (#12), and motion for jury trial (#14) are **denied as moot.**

SO ORDERED THIS 22^d 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 22 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THRIFTY RENT-A-CAR SYSTEM,)
INC., an Oklahoma corporation,)

Plaintiff,)

vs.)

TRANSPORTATION ONE LLC.)
a Michigan Limited Liability Company,)
Fred P. Smith, Jr., an individual, and)
Mikhail G. Kheyson, an individual)

Defendants.)

Case No. 99 CV 0707E(E) ✓

ENTERED ON DOCKET
DATE MAR 22 2000

AMENDED DEFAULT JUDGMENT

The Court, being fully advised, hereby amends the default judgment, which was filed on March 17, 2000 and entered on the docket on March 17, 2000. Based on the papers filed by Plaintiff, Thrift Rent-A-Car System, Inc., the amount of the judgment should be \$166,141.19, rather than \$180,303.00, which amount was contained in the Court's Default Judgment. The Court, therefore, amends its judgment as follows:

Judgment is granted in favor of Thrift Rent-A-Car System, Inc. and against Defendant, Transportation One LLC in the amount of \$166,141.19. As part of this judgment, Thrifty is entitled to recover its costs and attorney fees, as well as post-judgment interest.

IT IS SO ORDERED.


JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

15

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

FILED

MAR 22 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FRED WASHINGTON,)

Plaintiff,)

vs.)

STANLEY GLANZ and M. ENGLAND,)

Defendants.)

Case No. 99-CV-132-B (J) ✓

ENTERED ON DOCKET

DATE MAR 22 2000

ORDER

Defendants filed a motion to dismiss or in the alternative, motion for summary judgment on June 15, 1999 (Docket #11). Plaintiff's response to that motion was due on or before July 15, 1999. See #7. By Order dated July 29, 1999 (#14), after Plaintiff failed to file a response, the Court provided Plaintiff a second opportunity to respond, setting a new response deadline of August 8, 1999. To date, the Court has not received a response to the motion to dismiss from Plaintiff.

Plaintiff has also failed to keep the Court apprised of his current address. As the Court's docket sheet reflects, the Court Clerk has made diligent efforts, without success, to obtain a current address for Plaintiff.

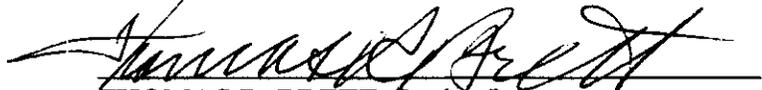
The Court finds this case should be dismissed as a result of Plaintiff's failure to prosecute, to follow the Court's orders and to provide a current address. See, e.g., Fed. R. Civ. P. 41(b). Defendants' motion to dismiss or in the alternative for summary judgment is moot.

15

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This action is **dismissed** as a result of Plaintiff's failure to prosecute, to follow the Court's orders and to provide a current address. See, e.g., Fed. R. Civ. P. 41(b).
2. Defendants' motion to dismiss or in the alternative for summary judgment (#11) is **moot**.
3. This Order constitutes a final order in this case.

SO ORDERED THIS 21ST day of March, 2000.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

F I L E D

MAR 22 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HARTFORD CASUALTY)
INSURANCE COMPANY, INC.,)
)
Plaintiff,)
)
vs.)
)
KIMBERLY S. KING,)
)
Defendant.)

Case No. 00-C-66-B(J)

ENTERED ON DOCKET
DATE MAR 22 2000

ORDER

Before the Court are the Motion to Dismiss Plaintiff's Complaint for Declaratory Judgment filed by Defendant Kimberly S. King ("King") (Docket No. 7) and the Motion to Certify Questions of Law to the Oklahoma Supreme Court filed by Plaintiff Hartford Casualty Insurance Company, Inc. ("Hartford") (Docket No. 8).

King seeks the dismissal of this declaratory judgment action in the interest of judicial economy as the same issues and parties, as well as additional issues and parties, are involved in King's prior filed state court action. Hartford, in response to King's motion to dismiss, moves to certify three questions to the Oklahoma Supreme Court, arguing the Court should retain jurisdiction and certify these questions as King improperly joined the tortfeasor in the state court action thereby destroying diversity and Hartford's ability to remove the action to this Court.

On December 27, 1999, King and her husband, Richard Lawrence King, filed claims of negligence and loss of consortium against Dora Ellen Bishop ("Bishop"), an allegedly underinsured motorist at fault in an automobile accident in which King was injured on January 4, 1998, and a claim of bad faith against Hartford, King's underinsured motorist carrier, in the

District Court of Tulsa County, State of Oklahoma, No. CJ-99-6139. Pursuant to King's application for underinsured ("UMI") benefits, Hartford evaluated King's claim at \$29,500 predicated on the medical information available at the time. King demanded that Hartford pay its evaluation, then pay additional sums as she incurred future medical expenses. Hartford, however, refused to tender the \$29,500 without receiving a release of all claims from King. The parties then agreed Hartford would issue a check to King in the amount of \$25,000 in substitution for Bishop's liability limits and would thereby be "subrogated to any funds payable by the tortfeasor's carrier up to this \$25,000 substitution." Hartford further acknowledged "that this \$25,000.00 substituted payment does not reduce any available benefits of uninsured [underinsured] motorist coverage to King."

Hartford argues its declaratory judgment action should go forward, despite the companion state court action, as it was denied its right of removal due to the improper joinder of Bishop and this declaratory judgment action is an appropriate vehicle to certify questions concerning an underinsured motorist carrier's obligations to pay a claim in light of *Burch v. Allstate Insurance Company*, 977 P.2d 1057 (Okla. 1998). The Court finds neither ground persuasive. If Hartford determined it could succeed in its removal of the state court action based on fraudulent joinder of Bishop, it should have done so pursuant to 28 U.S.C. §1441. Further, if Hartford wishes to seek certification to the Oklahoma Supreme Court, nothing prevents it from requesting that relief of the state court pursuant to 20 O.S. §952(b)(3).

Having weighed the factors set forth in *St. Paul Fire and Marine Insurance Co. v. Runyon*, 53 F.3d 1167 (10th Cir. 1995), the Court declines to exercise federal declaratory judgment jurisdiction over this matter. The factors include

[1] whether a declaratory action would settle the controversy; [2] whether it would

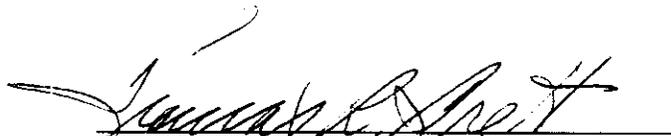
serve a useful purpose in clarifying the legal relations at issue; [3] whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race to res judicata"; [4] whether use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and [5] whether there is an alternative remedy which is better or more effective.

Id. at 1169. The Court finds all these factors advise dismissal of the declaratory judgment action.

Particularly, since the state court action will resolve the entire controversy while the declaratory judgment action would not, the Court considers the declaratory judgment action a redundant and inefficient use of judicial resource.

Accordingly, the Court grants ^{defendant's} ~~plaintiff's~~ motion to dismiss (Docket No. 7) and denies defendant's motion to certify question (Docket No. 8).

IT IS SO ORDERED, this 22nd day of March, 2000.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE MAR 22 2000

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOUISE JOHNSON,)
)
Plaintiff,)
)
v.)
)
PROGRESSIVE NORTHERN)
INSURANCE COMPANY,)
)
Defendant.)

00-CV-121-H(J)

MAR 22 2000
FBI

ORDER

This matter comes before the Court on Defendant's Notice of Removal. Because the Court finds that it lacks subject matter jurisdiction over this case, it remands the case to state court.

Plaintiff originally brought this action in the District Court of Muskogee County. Plaintiffs' Petition alleges tort and breach of contract causes of action under state law, and claims damages in excess of \$10,000.¹ Defendant filed Notice of Removal on February 9, 2000, claiming diversity jurisdiction.

It is well-settled that federal courts are courts of limited jurisdiction. If at any time before final judgment it appears the court lacks subject matter jurisdiction, this Court must remand the matter to state court. See 28 U.S.C. § 1447(c). Initially, the Court notes that with respect to

¹In Oklahoma, the general rules of pleading require that:

[e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000) shall, without demanding any specific amount of money, set forth only that amount sought as damages is in excess of Ten Thousand Dollars (\$10,000), except in actions sounding in contract.

Okla. Stat. tit. 12, § 2008(2).

diversity jurisdiction, “[d]efendant’s right to remove and plaintiff’s right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand.” Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed \$75,000. 28 U.S.C. § 1332(a). The Tenth Circuit has clarified the analysis which a district court should undertake in determining whether an amount in controversy is greater than \$75,000. The Tenth Circuit stated:

[t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. The burden is on the party requesting removal to set forth, in the notice of removal itself, the “underlying facts supporting [the] assertion that the amount in controversy exceeds [\$75,000].” Moreover, there is a presumption against removal jurisdiction.

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995) (citations omitted) (emphasis in original); see also, e.g., Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351, 353 (N.D. Okla. 1995)(applying Laughlin and remanding case); Homolka v. Hartford Ins.. Group, Individually and d/b/a Hartford Underwriters Ins.. Co., 953 F. Supp. 350, 351 (N.D. Okla. 1995)(same); Barber v. Albertson’s, Inc., 935 F. Supp. 1188, 1191-93 (N.D. Okla. 1996) (same); Hughes v. E-Z Serve Petroleum Marketing Co., 932 F. Supp. 266, 268 (N.D. Okla. 1996) (same); Martin v. Missouri Pacific R.R. Co. d/b/a Union Pacific R.R. Co., 932 F. Supp. 264, 266 (N.D. Okla. 1996) (same); Maxon v. Texaco Ref. & Marketing Inc., 905 F. Supp. 976, 978 (N.D. Okla. 1995) (same); Herber v. Wal-Mart Stores, 886 F. Supp. 19, 20 (D. Wyo. 1995) (same).

Further, “both the requisite amount in controversy and the existence of diversity must be

affirmatively established on the face of either the petition or the removal notice.” Laughlin, 50 F.3d at 873. Bare conclusory statements that the requirements are met are not sufficient. See Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia (Anpac) v. Dow Quimica de Colombia S.A., 988 F.2d 559, 565 (5th Cir. 1993) (finding defendant’s conclusory statement that “the matter in controversy exceeds [\$75,000] exclusive of interest and costs” did not establish that removal jurisdiction was proper); Gaus v. Miles, Inc., 980 F.2d 564 (9th Cir. 1992) (mere recitation that the amount in controversy exceeds \$75,000 is not sufficient to establish removal jurisdiction).

Where the face of the complaint does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the removal documents, not only the defendant’s good faith belief that the amount in controversy exceeds \$75,000, but also facts underlying defendant’s assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than \$75,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction at the time of removal and not by supplemental submission. See Laughlin, 50 F.3d at 873; Herber, 886 F. Supp. at 20 (holding that the jurisdictional allegation is determined as of the time of the filing of the Notice of Removal). The Tenth Circuit has clearly stated what is required to satisfy that burden. As set out in Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. at 353, if the face of the petition does not affirmatively establish that the amount in controversy exceeds \$75,000.00, then the rationale of Laughlin contemplates that the removing party will undertake to perform an economic analysis of the alleged damages with underlying facts.

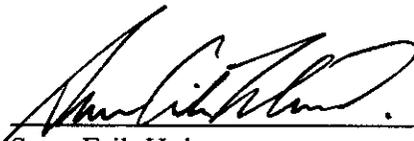
Plaintiff’s Petition does not indicate that the amount in controversy here exceeds \$75,000.

Additionally, in its notice of removal, Defendant failed to set forth any specific facts that demonstrate the federal amount in controversy has been met. As support for its position, Defendant states only that "counsel believes and therefore asserts that the combined damages sought by Plaintiff in this matter [are] in excess of Seventy-Five Thousand Dollars." This is clearly insufficient to support diversity jurisdiction removal.

Based on the above, the Court finds that Defendant's conclusory assertions contained in its Notice of Removal do not satisfy the standards set forth by the Tenth Circuit in Laughlin, and concludes that removal is improper on the basis of diversity jurisdiction. The case is hereby remanded to Muskogee County.²

IT IS SO ORDERED.

This 22nd day of March, 2000.


Sven Erik Holmes
United States District Judge

²Additionally, the Court notes that Defendant improperly removed this case to the wrong federal district court. 28 U.S.C. § 1441(a) states that a civil action may be removed "to the district court of the United States for the district and division embracing the place where such action is pending." This clear language requires a removing defendant to remove the case to the appropriate district. Muskogee County lies within the Eastern District of Oklahoma, not the Northern District. Accordingly, Defendant has removed to the wrong court. There is a split of authority regarding the question of whether improper removal to the wrong district is jurisdictional and therefore subject to sua sponte remand. Compare Franchino v. Valenti, 347 F. Supp. 1020 (E.D.N.Y. 1972) (remanding case brought in wrong district); Scarmardo v. Mooring, 89 F. Supp. 936 (S.D. Tex. 1950) (same) with Peterson v. BMI Refractories, 124 F.3d 1386, 1394 (11th Cir. 1997) ("failure to comply with the geographic requirements of § 1441(a) is a procedural defect that does not deprive a district court of subject matter jurisdiction in a removed case"). Based upon the Court's finding that the case must be remanded under Laughlin, it need not decide this issue.

FD

FILED

MAR 22 2000 *SK*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 MIKE D. PATTON,)
)
 Defendant.)

Case No. 00CV0118H(M) /

ENTERED ON DOCKET

DATE MAR 22 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 22nd day of March, 2000.

UNITED STATES OF AMERICA

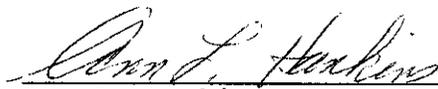
Stephen C. Lewis
United States Attorney



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 22nd day of March, 2000, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Mike D. Patton, 539 S. Hickory St., Nowata, OK 74048-3819.



Ann L. Hankins
Financial Litigation Agent

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

FILED

MAR 21 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDA FAYE STEADMAN,)
Plaintiff,)
vs.)
KENNETH S. APFEL,)
Commissioner of Social Security,)
Defendant.)

No. 99 CV 955-J

ENTERED ON DOCKET

DATE MAR 21 2000

ORDER

Now on this 21 day of MARCH, 2000, the above-matter comes on before me pursuant to the Defendant's Motion to Remand for purposes of locating the claimant's file and preparing an administrative record pursuant to sentence six of 42 U.S.C. § 405(g). The Court after considering said matter does hereby grant defendant's motion to remand to allow the Commissioner an additional 90 days from the date of this Order to locate the file and submit a complete administrative record to Plaintiff and this Court.

The Court further orders that, if the administrative record is not submitted within 90 days, the defendant will notify both the Court and the Plaintiff of the status of the search and of what additional proceedings are being taken to reconstruct the file. The Court retains jurisdiction over this matter pursuant to sentence six of 42 U.S.C. § 405(g).


UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 21 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TOMMY D. BILBY,

Plaintiff,

v.

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

Defendant.

Case No. 99-CV-1015-J

ENTERED ON DOCKET

DATE MAR 21 2000

ORDER

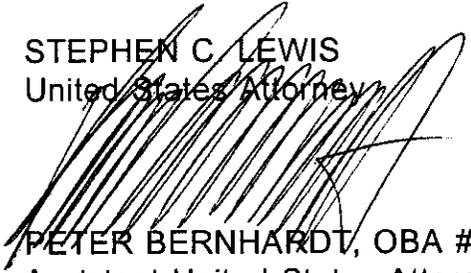
Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded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

DATED this 21 day of March, 2000.


SAM A. JOYNER
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3880
(918) 581-7463

FILED

MAR 20 2000

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

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

ZACKARY S. KEETER,)
)
Plaintiff,)
)
vs.)
)
PARAMEDICS PLUS, L.L.C.,)
)
Defendant.)

Case No. 99-CV-1067-BU(JY)

ENTERED ON DOCKET

DATE MAR 21 2000

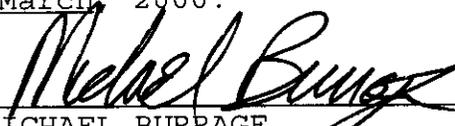
ORDER

On March 16, 2000, Plaintiff, Zackary S. Keeter, filed a pleading entitled Stipulation of Dismissal. Because the pleading was not signed by Defendant, Paramedics Plus, L.L.C., as required by Rule 41(a)(1)(ii), Fed. R. Civ. P., the Court concludes that the pleading was improperly filed as a stipulation of dismissal. However, because Defendant has not yet filed an answer or a motion for summary judgment in this case, the Court construes Plaintiff's pleading as a Notice of Dismissal pursuant to Rule 41(a)(1)(i).

Construing Plaintiff's pleading entitled Stipulation of Dismissal as a Notice of Dismissal pursuant to Rule 41(a)(1)(i), the Court **DIRECTS** the Court Clerk to dismiss this action in his records with prejudice without any requirement of Defendant's signature on the pleading.

In light of the dismissal with prejudice, the Court **DECLARES MOOT** Defendant's motions to dismiss (Docket Entries #4 and #6).

ENTERED this 20th day of March, 2000.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 21 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDSEY K. SPRINGER,)
)
 Plaintiff,)
)
 vs.)
)
 VICKI BALOUGH, et al.,)
)
 Defendants.)

Case No. 99-CV-977-BU(E) ✓

ENTERED ON DOCKET
DATE MAR 21 2000

ORDER

This matter comes before the Court upon the motions to dismiss filed by Defendants, Lance Ward, Gary McIntosh, John Y. Brown, III, Joe Kerwin, Jacque Alexander/Jeanette Heinbockel, Ken Hechler, Ron Thornburgh, Meryl Atterberry, Victoria Buckley/Donetta Davidson, Scott Moore, Dwayne D. Yoshina, David Rancourt, James Hendrix, Gene Raynor/Linda Lamone, Ann McGeehan, Dick Filling, Sandra Stout, Janet Armstrong, Vicki Balough, Ronald D. Michaelson, Bob Taft/Kenneth Blackwell, Colleen Sealock, Linda W. Beazley, Alvin A. Jaeger, John Mott-Smith, Joseph Britt, Julie Flynn, Joyce Hazeltine, Diana Ohman, James Milne/Deborah L. Markowitz, Christopher Thomas, Sue Anne Gilroy, Kevin Kennedy, Gary Bartlett, William Gardner, Brook Thompson, John Cloonan, Thomas H. Ferguson, Dean Heller, Olene S. Walker, Stephanie Gonzales and Ward Martin III/Frances Hurst (Docket Entries #10, #20, #28, #32, #37, #45, #52, #56, #57, #62, #70, #72, #75, #76, #83, #86, #90, #93, #99, #103, #108, #110, #111, #116, #121, #125, #139, #142, #146, #151, #158, #161, #165, #168, #170, #175-1, #180, #215, #216, #239, #241,

199

#246, and #279)¹ and the motion for summary judgment filed by Defendant, Thomas R. Wilkey (Docket Entry #12). Plaintiff, Lindsey K. Springer, has responded to the motions and upon due consideration of the parties' submissions, the Court makes its determination.

Plaintiff brings this action pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief against state officials who are responsible for elections in the fifty states. In his Complaint, Plaintiff alleges that on or about November 18, 1998, he requested each of the Defendants to place his name upon the ballot to be presented to "Appointed Electors" for election of the office of President. Plaintiff alleges that each of the Defendants refused his request for ballot access, even though he sufficiently demonstrated compliance with the constitutional qualifications for the office of President, namely, a natural born citizen, a resident of the United States of America for at least 14 years and the age of thirty-five. Plaintiff claims that Defendants have dictated that Plaintiff must satisfy additional qualifications in order to be eligible for consideration by the "Appointed Electors" for the office of President. Plaintiff alleges that by requiring additional qualifications for ballot access, Defendants have

¹ In addition to his motion to dismiss, Defendant, Dwayne Yoshina, filed a motion for joinder in the other Defendants' motions to dismiss. The Court finds that the motion should be granted. The Court also finds that the notices of joinder in the brief filed by Gary McIntosh which were filed by Defendants, William Gardner and Stephanie Gonzales, and which the Court construes as motions for joinder should be granted.

violated his constitutional rights under the 9th, 10th, 14th Amendments.

Plaintiff bases his Complaint upon six causes of action. In the first cause of action, Plaintiff claims that Defendants, by expanding the qualifications for the office of President and by infringing upon Plaintiff's right to be considered for the office of President, have denied Plaintiff his rights under the 9th, 10th and 14th Amendments. In his second cause of action, Plaintiff claims that Defendants, by refusing to place Plaintiff's name on the ballot, have denied Plaintiff "equal access" under the 9th, 10th and 14th Amendments. In his third cause of action, Plaintiff contends that Defendants, by refusing to allow Plaintiff to be considered by the Appointed Electors, have granted preferential treatment to political parties and unfairly burdened Plaintiff. In his fourth cause of action, Plaintiff alleges that Defendants have caused the constitutional election of the office of President to be unattainable and therefore have violated Article II, section 1, cl. 3 and the 12th Amendment. In his fifth cause of action, Plaintiff claims that Defendants, by their conduct, have "produce[d] the affect of a Monopoly" as to the Elector appointment process. In his sixth cause of action, Plaintiff contends that Defendants have violated Plaintiff's rights under the 9th, 10th and 14th Amendments by refusing to accept his presidential qualifications.

In their motions, Defendants request dismissal or summary judgment of Plaintiff's action on various grounds. One of the grounds raised in support of dismissal by the majority of non-

resident Defendants is that the Court lacks personal jurisdiction over them. Another ground raised in support of dismissal or summary judgment by all Defendants is that Plaintiff's Complaint fails to state a claim against them upon which relief may be granted. Upon review, the Court finds that Plaintiff has failed to satisfy his burden of establishing personal jurisdiction over the non-resident Defendants who have challenged the Court's exercise of personal jurisdiction over them. The Court also finds that Plaintiff's Complaint fails to state a claim against Defendants upon which relief may be granted. Because these issues are dispositive of Plaintiff's action, the Court shall not address any of the other grounds raised by Defendants in their motions.

Personal Jurisdiction

The Due Process Clause permits the exercise of personal jurisdiction over a non-resident defendant "so long as there exist minimum contacts between the defendant and the forum State." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) (quotation omitted); OMI Holdings, Inc. v. Royal Insurance Co. of Canada, 149 F.3d 1086, 1090 (10th Cir. 1998). The minimum contacts standard may be met in two ways. First, a court may, consistent with due process, assert specific jurisdiction over a non-resident defendant "if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (quotations and citations omitted). When a plaintiff's cause

of action does not arise directly from a defendant's forum-related activities, the district court may nonetheless maintain general personal jurisdiction over the defendant based on the defendant's business contacts within the forum state. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 (1984); OMI Holdings, 149 F.3d at 1091. However, because general jurisdiction is not related to events giving rise to the lawsuit, the district court is to impose a more stringent minimum contacts test, requiring the plaintiff to demonstrate the defendant's continuous and systematic general business contacts. Helicopteros, 466 U.S. at 416; OMI Holdings, 149 F.3d at 1091.

Even if the defendant's actions created sufficient minimum contacts, the district court must still consider whether the exercise of personal jurisdiction over the defendant would offend traditional notions of "fair play and substantial justice." Burger King Corp., 471 U.S. at 476 (quotation omitted). This inquiry requires a determination of whether the district court's exercise of personal jurisdiction over the defendant is reasonable in light of the circumstances surrounding the case. Id. at 477-78.

The plaintiff bears the burden of establishing personal jurisdiction over the defendant. Behagen v. Amateur Basketball Ass'n of the United States, 744 F.2d 731, 733 (10th Cir. 1984), cert denied, 471 U.S. 1010 (1985). When the district court rules on a Fed. R. Civ. P. 12(b)(2) motion, without an evidentiary hearing, the plaintiff need only make a prima facie showing of personal jurisdiction. Kuenzle v. HTM Sport-Und Freizeitgerate AG, 102 F.3d

453, 456 (10th Cir. 1996). The plaintiff may make this prima facie showing by demonstrating, via affidavit or other written materials, facts if true would support personal jurisdiction over the defendant. OMI Holdings, 149 F.3d at 1091.

The Court concludes that Plaintiff has failed to satisfy his burden of establishing personal jurisdiction over the non-resident Defendants who have challenged the Court's exercise of personal jurisdiction. Plaintiff has not shown that Defendants purposefully directed their activities to the forum state. Assuming arguendo that Defendants responded to Plaintiff's initial letter asking for placement upon each of the state's ballots,² the Court finds such activity is insufficient to establish specific personal jurisdiction over the non-resident Defendants. See, Caldwell v. Palmetto State Savings Bank, 811 F.2d 916, 918 (5th Cir. 1987).

The Court also finds that Plaintiff has failed to show continuous and systematic contacts to support the Court's exercise of general personal jurisdiction. The Court concludes that Defendants' purported actions in responding to Plaintiff's letter cannot be regarded as a contact of a "continuous and systematic" nature for the exercise of general personal jurisdiction.

In his response, Plaintiff contends that the non-resident Defendants have waived their defense of lack of personal

² In his Complaint, Plaintiff does not allege that each of the Defendants responded to Plaintiff in writing. Plaintiff alleges that Defendants "either by silence and or written communication, chose to deny plaintiff the satisfaction of being eligible for consideration by the Appointed Electors...." See, Paragraph 128 of Complaint.

jurisdiction on the basis that they have entered an appearance in this action. The Court, however, rejects this contention. Defendants challenged the Court's exercise of personal jurisdiction in pre-answer motions as required by Fed. R. Civ. P. 12(h). Moreover, Defendants' counsels' filing of initial appearances or motions for admission pro hac vice are not the defensive moves in which a waiver of personal jurisdiction can occur. United States v. 51 Pieces of Real Property, 17 F.3d 1306, 1314 (10th Cir. 1994).

Plaintiff also contends that the Court may exercise personal jurisdiction over the Defendants on the basis that Plaintiff's Complaint is federal in nature. The Court finds this contention to be without merit. In the absence of a federal statute providing for nationwide personal jurisdiction, as in this case, Plaintiff must still establish minimum contacts even though the cause of action is federal. Janmark, Inc. v. Reidy, 132 F.3d 1200, 1201-02 (7th Cir. 1997).

Because Plaintiff has failed to establish his prima facie case of personal jurisdiction over the non-resident Defendants who have challenged the Court's exercise of personal jurisdiction, the Court finds that dismissal of Plaintiff's Complaint against these Defendants is appropriate.

Failure to State a Claim

In his Complaint, Plaintiff claims that Defendants are required to place his name on the ballot for consideration of the office of President because he satisfies the constitutional qualifications for the office of President. Plaintiff maintains

that Defendants cannot place any restrictions on his access to the ballot, if the constitutional qualifications have been met.

It is well-established, however, that states can require candidates to satisfy reasonable requirements in order to appear on the ballot. The Supreme Court has recognized that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." Storer v. Brown, 415 U.S. 724, 730 (1974). While the Constitution protects the right of the people to organize political parties for the purpose of promoting their views, it also permits the states to "enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997). Among the potential cause of disorder such regulations may address is the potential for the ballot to become "cluttered with candidates from minor parties who did not command significant voter support." Munro v. Socialist Workers Party, 479 U.S. 189, 196 (1986). As the Supreme Court has reasoned, "it seems to us that limiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable." Burdick v. Takushi, 504 U.S. 428, 440, n. 10 (1992).

The Supreme Court has specifically applied this line of reasoning to presidential election ballots. Indeed, the seminal case defining the standard by which a court should review state

ballot access laws concerned the 1980 presidential campaign of John Anderson. Anderson v. Celebrezze, 460 U.S. 780, 782 (1983). Although the Court invalidated the specific procedures at issue, it held that most ballot access requirements would satisfy constitutional standards. The Supreme Court therein stated that "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." Id. at 788.

In the Complaint, Plaintiff has not set forth any allegations to show that he has complied with the conditions and/or restrictions enumerated by the states to obtain access to the ballot. In addition, Plaintiff has not pled any facts which would call into question whether the states' restrictions would fail to satisfy the reasonable balancing test announced in Anderson. Id. at 789. Plaintiff has simply alleged that he wrote to Defendants demanding that his name be placed on the ballot. However, "it is now clear that States may condition access to the general election ballot by minor-party or independent candidates upon a showing of a modicum of support among the potential voters for the office." Munro, 479 U.S. at 193. Indeed, according to the Supreme Court, a state "has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." Anderson, 460 U.S. at 788 n. 9. In this case, Plaintiff made no effort to demonstrate that support. Moreover, he has alleged no

reason why compliance with the states' election laws would be difficult or unreasonable.

In his Complaint, Plaintiff has alleged that Defendants are precluded from adding to the qualifications the Constitution establishes for serving as President. However, the Court finds that Plaintiff has confused a qualification for serving as President with a requirement for appearing on a ballot for selection of President. While the Supreme Court has ruled that states may not engraft new or additional qualifications for holding office onto those Constitutionally established, it made clear that this principle does not apply to ballot access standards. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 798 (1995). Requirements that are procedural in nature, such as reasonable ballot access requirements, do not violate a constitutional provision describing the qualification for holding office. Id. at 834.

In his Complaint, Plaintiff alleges that he should be placed upon the ballot voted by the electors rather than by the people. He maintains that because the Constitution states that the electors must vote by "ballot," the states must print ballots containing the list of all candidates from which the electors may choose. The Twelfth Amendment, however, merely requires that the ballots show the persons for whom the electors actually cast votes. It does not require that the ballot list all the candidates to be considered. The Court finds that Plaintiff's assertions in regard to this issue are without merit.

In his Complaint and Response, Plaintiff raises other assertions in regard to the electoral college process. The Court finds those assertions to be without merit.

Upon review, the Court finds that Plaintiff has failed to state a claim against Defendants for which relief may be granted. Accordingly, the Court finds that dismissal of Plaintiff's Complaint is appropriate.

Other Motions

Plaintiff has filed a request for the Court Clerk to enter default and a motion for the Court to enter default judgment against Defendants, Jane Hull, Thomas Cook, Pete Cenarrusa, Carol Olson, Joseph Mansky, Eric Clark and Bruce Meadows. None of these non-resident Defendants have answered or filed a responsive pleading to Plaintiff's Complaint.³⁴ The Court, however, finds that the request and motion should be denied and that Plaintiff's action against these Defendants should be dismissed. Similar to the other non-resident Defendants, Plaintiff has not demonstrated that the Court may exercise specific or general personal jurisdiction over

³ Plaintiff's request and motion also sought the entry of default and default judgment against Defendants, Thomas H. Ferguson, Wade Martin, III, Dean Heller, Stephanie Gonzales and Olene S. Walker. These Defendants, however, filed motions to dismiss after Plaintiff's filing of the request and motion. The Court has addressed those motions on the merits. The Court therefore does not address Plaintiff's request and motion as to these Defendants.

⁴ The Court notes that counsel for Defendant, Thomas Cook, filed a motion for admission pro hac vice, which the Court granted on February 3, 2000. However, to date, Defendant, Thomas Cook, has not filed an answer or a responsive pleading to Plaintiff's Complaint.

these non-resident Defendants. Although personal jurisdiction is a personal defense of a non-resident defendant and can be waived by that defendant, the Court may sua sponte consider defects in personal jurisdiction and dismiss an action for lack of personal jurisdiction when a default judgment is sought to be entered. Williams v. Life Savings and Loan, 802 F.2d 1200, 1202 (10th Cir. 1986). By considering the defects sua sponte, the Court is not raising the personal defense of the non-resident defendant, but is exercising its responsibility to determine that it has the power to enter default judgment. Id. Because Plaintiff has failed to establish personal jurisdiction in regard to these non-resident Defendants, the Court finds that the action against them should be dismissed for lack of personal jurisdiction.

Plaintiff has filed a motion for reconsideration of the motions for admission pro hac vice filed by non-resident counsel for Defendants, Victoria Buckley/Donetta Davidson, Dwayne D. Yoshina, Ron Thornburgh, John Y. Brown, III, Julie Flynn, Gene Raynor/Linda Lamone, Meryl Atterberry, Joe Kerwin, Thomas R. Wilkey, Gary Bartlett, and Gary McIntosh and a motion for sanctions against Barbara Stoner and Tracy Folsom Milner, counsel for Defendant, Lance Ward. The Court finds that these motions are without merit and should be denied.

In their pro hac vice motions, non-resident counsel properly identified Barbara Stoner and Tracy Folsom Milner as their resident counsel in accordance with N.D. LR 83.3(K). At the time non-resident counsel filed their motions, Barbara Stoner and Tracy

Folsom Milner had already entered an appearance in the case. The Court finds that it was not necessary for these attorneys to enter an appearance as resident counsel for each of the Defendants in order to comply with N.D. LR 83.3(K). However, to the extent that N.D. LR 83.3(K) could be construed to require Barbara Stoner and Tracy Folsom Milner to enter an appearance as resident counsel for each of the Defendants, the Court waives the requirement pursuant to N.D. LR 1.1(E).

In regard to Plaintiff's alternative request for sanctions against Barbara Stoner and Tracy Folsom Milner for failure to enter an appearance as resident counsel, the Court finds that such request should be denied for the reasons above-stated.

As to Plaintiff's request for sanctions against Barbara Stoner and Tracy Folsom Milner for presenting a defense of improper service of process on behalf of Defendant, Stephanie Gonzales, the Court finds that such sanctions should be denied. Plaintiff has not cited any authority for the imposition of sanctions. To the extent, Plaintiff is seeking sanctions pursuant to Rule 11, Fed.R.Civ.P., the Court finds that Plaintiff has failed to comply with the requirements of Rule 11(c)(1)(A), Fed.R.Civ.P.⁵

In addition, Defendant, Janet Armstrong, has filed a motion for sanctions or injunctive relief on the basis that Plaintiff's action is frivolous, vexatious and wholly without merit. The Court finds that the motion should be denied. Defendant has not complied

⁵ The Court further notes that Defendant, Stephanie Gonzales did not challenge service of process in her motion to dismiss.

with Rule 11(c)(1)(A), Fed. R. Civ. P., in regard to sanctions. In regard to the injunctive relief, Defendant has failed to cite any authority to support such relief.

Based upon the foregoing, the Court **ORDERS** as follows:

1. The motion for joinder in other Defendants' motions to dismiss filed by Defendant, Dwayne D. Yoshina (Docket Entry #70-2) and the motions for joinder in Defendant, Gary McIntosh's motion to dismiss filed by Defendants, William Gardner and Stephanie Gonzales (Docket Entries #175-2, #246-2) are **GRANTED**;

2. The motions to dismiss filed by Defendants, Lance Ward, Gary McIntosh, John Y. Brown, III, Joe Kerwin, Jacque Alexander/Jeanette Heinbockel, Ken Hechler, Ron Thornburgh, Meryl Atterberry, Victoria Buckley/Donetta Davidson, Scott Moore, Dwayne D. Yoshina, David Rancourt, James Hendrix, Gene Raynor/Linda Lamone, Ann McGeehan, Dick Filling, Sandra Stout, Janet Armstrong, Vicki Balough, Ronald D. Michaelson, Bob Taft/Kenneth Blackwell, Colleen Sealock, Linda W. Beazley, Alvin A. Jaeger, John Mott-Smith, Joseph Britt, Julie Flynn, Joyce Hazeltine, Diana Ohman, James Milne, Christopher Thomas, Sue Anne Gilroy, Kevin Kennedy, Gary Bartlett, William Gardner, Brook Thompson, John Cloonan, Thomas H. Ferguson, Dean Heller, Olene S. Walker, Stephanie Gonzales and Ward Martin III/Frances Hurst (Docket Entries #10, #20, #28, #32, #37, #45, #52, #56, #57, #62, #70-1, #72, #75, #76, #83, #86, #90, #93, #99, #103, #108, #110, #111, #116, #121, #125, #139, #142, #146, #151, #158, #161, #165, #168, #170, #175-1, #180, #215, #216, #239, #241, #246, and #279) are **GRANTED**;

3. Plaintiff's motion for extension of time to respond to motion for summary judgment of Defendant, Thomas R. Wilkey (Docket Entry #256-1) is **DENIED**;

4. The motion for summary judgment filed by Defendant, Thomas Wilkey (Docket Entry #12) is **GRANTED**;

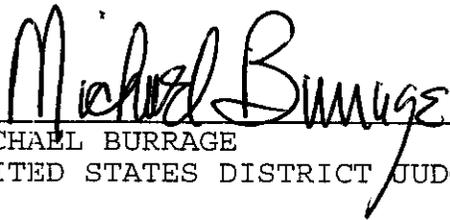
5. Plaintiff's Request for Clerk to Enter Default Judgment Order (Docket Entry #192) and Motion for Default Judgment (Docket Entry #193) are **DENIED**. Plaintiff's action against Defendants, Jane Hull, Thomas Cook, Pete Cenarrusa, Carol Olson, Joseph Mansky, Eric Clark and Bruce Meadows is **DISMISSED** for lack of personal jurisdiction;

6. The Motion for Sanctions or Injunctive Relief filed by Defendant, Janet L. Armstrong (Docket Entry #95) is **DENIED**;

7. The Motion for Reconsideration and Motion for Sanctions filed by Plaintiff, Lindsey Springer (Docket Entries #115-1, #115-2) are **DENIED**; and

8. In light of the Court's dismissal of Plaintiff's action, the Court **DECLARES MOOT** Defendant, Lance Ward's Motion for the Court Not to Require Service of Defendants' Pleadings as Between Defendants (Docket Entry #5) and Defendant, Lance Ward's Motion for Protective Order filed on March 17, 2000.

ENTERED this 20th day of March, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 21 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDSEY K. SPRINGER,)
)
Plaintiff,)
)
vs.)
)
VICKI BALOUGH, et al.,)
)
Defendants.)

Case No. 99-CV-977-BU(E)

ENTERED ON DOCKET
DATE **MAR 21 2000**

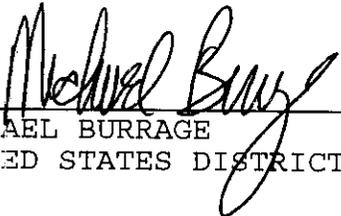
JUDGMENT

This matter came before the Court upon the motion for summary judgment of Defendant, Thomas R. Wilkey, and the issues having been duly considered and a decision having been duly rendered and the motions to dismiss filed by Defendants, Lance Ward, Gary McIntosh, John Y. Brown, III, Joe Kerwin, Jacque Alexander/Jeanette Heinbockel, Ken Hechler, Ron Thornburgh, Meryl Atterberry, Victoria Buckley/Donetta Davidson, Scott Moore, Dwayne D. Yoshina, David Rancourt, James Hendrix, Gene Raynor/Linda Lamone, Ann McGeehan, Dick Filling, Sandra Stout, Janet Armstrong, Vicki Balough, Ronald D. Michaelson, Bob Taft/Kenneth Blackwell, Colleen Sealock, Linda W. Beazley, Alvin A. Jaeger, John Mott-Smith, Joseph Britt, Julie Flynn, Joyce Hazeltine, Diana Ohman, James Milne/Deborah L. Markowitz, Christopher Thomas, Sue Anne Gilroy, Kevin Kennedy, Gary Bartlett, William Gardner, Brook Thompson, John Cloonan, Thomas H. Ferguson, Dean Heller, Olene S. Walker, Stephanie Gonzales and Ward Martin III/Frances Hurst, having been previously granted and Plaintiff's action against Defendants, Jane Hull, Thomas Cook, Pete Cenarrusa, Carol Olson, Joseph Mansky, Eric Clark and Bruce Meadows

having been previously dismissed for lack of personal jurisdiction,

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendant, Thomas R. Wilkey, and against Plaintiff, Lindsey K. Springer.

DATED at Tulsa, Oklahoma, this 20th day of March, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 21 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 NORMAN D. EDWARDS,)
)
 Defendant.)

No. 99CV0910E(J)

ENTERED ON DOCKET
MAR 21 2000
DATE _____

DEFAULT JUDGMENT

This matter comes on for consideration this 15th 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, Norman D. Edwards, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Norman D. Edwards, was served with Summons and Complaint on January 12, 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, Norman D. Edwards, for the principal amounts of \$2,280.00 and \$2,938.95,

7

plus accrued interest of \$1,541.21 and \$1,935.48, plus administrative charges in the amounts of \$45.65 and \$52.80, plus interest thereafter at the rates of 9.13% and 8% per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 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 21 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

In Re:)

GARY L. KING and)
THELMA F. KING,)

Debtors.)

DPW EMPLOYEES CREDIT UNION)

Appellant,)

vs.)

GARY L. KING, and)
THELMA F. KING,)

Appellees.)

Bankruptcy Case No.:
98-00162-R
Chapter 13

ENTERED ON DOCKET

DATE MAR 21 2000

Case No. 99-CV-672-K(J)

REPORT AND RECOMMENDATION

This bankruptcy appeal concerns a proof of claim filed by Appellant, DPW Employees Credit Union ("Credit Union") in the Debtors' Chapter 13 proceeding. Credit Union extended advances of funds through a line of credit provided to Debtor Thelma King. Credit Union contends that the line of credit advances were collateralized by two automobiles on which Credit Union held a security interest by virtue of "future advances" clauses in the security agreements executed by Mrs. King on the two automobiles. Credit Union also contends that it extended loans for travel purposes to Mrs. King who occasionally traveled as a requirement of her employment, and that those "travel loans" were also collateralized by the two automobiles. Debtors filed an objection to Credit Union's proof of claim, contending that Credit Union's line

of credit advances and the "travel loans" made to Mrs. King were not secured by the two automobiles because they were the subject of completely separate loans made by Credit Union to Mrs. King. The Bankruptcy Court entered its Order on April 14, 1999, granting Debtors' objection to Credit Union's claim and Credit Union appeals from that Order.

By minute order dated August 13, 1996, this case was referred to the United States Magistrate Judge for all further proceedings. The United States Magistrate Judge recommends that the decision of the Bankruptcy Court be **AFFIRMED** as to its findings that (1) the travel loan amounts are secured only by the reimbursement money and (2) the debtor's objection to Credit Union's proof of claim was procedurally tantamount to an adversary proceeding. The United States Magistrate Judge recommends that the decision of the Bankruptcy Court be **REVERSED AND REMANDED** on the following findings:

- (1) the line of credit advances were not secured by the two automobiles because the future advances clauses of the parties' security agreements did not apply to those advances;
- (2) Credit Union's April 10th proof of claim was not adequately documented, and therefore was not *prima facie* evidence of the validity and amount of Credit Union's secured claim, pursuant to Fed. R. Bankr. P. 3001; and
- (3) because Credit Union did not object to confirmation of the Debtor's amended plan, that plan "provided for" Credit Union's line of credit claim by deeming that claim to be unsecured.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Some detail is necessary to understand the borrowing relationship between Mrs. King and Credit Union before reviewing the procedural background of the bankruptcy proceeding. Credit Union is chartered by the State of Oklahoma and its primary member group consists of employees of the State's Department of Human Services ("DHS"). Mrs. King is a DHS employee. On November 9, 1990, Mrs. King executed a "Loanliner" Advance Request Voucher and Security Agreement, in the amount of \$3,521.00 for the painting and payment of taxes on a 1986 Chevrolet Celebrity. Credit Union Exhibit 1. The Security Agreement contained the following provision,

WHAT THE SECURITY INTEREST COVERS - The security interest secures the advance and any extensions, renewals or refinancings of the advance. It also secures any other advances you have now or receive in the future under the LOANLINER[®] Credit Agreement and any other amounts you owe the credit union for any reason now or in the future. If the property description is marked with two stars (**), the property will secure only the advance and not other amounts you owe.

On May 16, 1991, Mrs. King executed another LOANLINER agreement in the amount of \$8,429.97, covering the previous indebtedness on the 1986 Chevrolet Celebrity and adding the purchase of a 1988 Chevrolet Celebrity. Credit Union Exhibit 2. That LOANLINER agreement also contained the same security interest clause as set forth above.

Mrs. King further testified that she had a "line of credit" with Credit Union which she used to purchase "furniture, various things," and on which she always had

an outstanding balance. Transcript of September 23, 1998 hearing on Debtors' Objection to Claim (hereinafter referred to as "Transcript"), p. 35, lines 8-19.

Additionally, Mrs. King traveled occasionally as part of her duties with DHS. She obtained travel money advances from Credit Union, which she repaid with money later reimbursed to her by her employer. Transcript, p. 36, line 1-7. A Travel Loan note, dated October 14, 1997, provided that this loan was secured by the reimbursement money. See Credit Union Exhibit 6.

Debtors filed their Chapter 13 case and a proposed Chapter 13 plan on January 16, 1998. The Bankruptcy Court issued a Notice of Commencement of the case on January 26, 1998, which, among other relevant dates, set a claims bar date of May 21, 1998. On February 2, 1998, Credit Union filed a proof of claim asserting a claim of \$1,463.82, secured by the travel reimbursement money then owed to Mrs. King by her employer. On February 11, 1998, Credit Union filed a first amended proof of claim, asserting that its claim for \$1,738.82 for travel loan advances was secured by travel reimbursement money and by liens Credit Union still held on the two automobiles by virtue of the future advances clauses in the two security agreements. Credit Union Exhibit 7. On the same day, Credit Union also filed an Objection to confirmation of the Debtors' plan, because it did not provide for Credit Union's secured claim in the amount of \$1,738.82.

The Bankruptcy Court held a hearing on the confirmation of the Debtors' plan on March 4, 1998. That plan was not confirmed and the Court required Debtors to file an amended Chapter 13 plan within ten days. On March 5, 1998, the Bankruptcy

Court entered an Order continuing the confirmation hearing and setting a deadline of April 8, 1998 for filing of objections to the amended plan, and a hearing date of April 15, 1998 on the amended plan. Debtors filed their amended plan on March 16, 1998. That amended plan classified Credit Union's travel loan as a secured claim in the amount of \$1,463.82, and secured only by the travel reimbursement money. The amended plan did not address Credit Union's then-filed claim that the travel loan was additionally secured by the two automobiles, and did not address the line of credit advances made to Debtors. See Credit Union Exhibit 10.

Credit Union filed an "amended"^{1/} proof of claim on April 10, 1998, asserting a claim in the amount of \$4,405.36, which was secured by the two automobiles (the "April 10th proof of claim"). Credit Union Exhibit 8. Credit Union's counsel later explained that the \$4,405.36 amount represented the combined amounts of the travel loans and the line of credit advances, both of which were secured by the two automobiles. Credit Union did not file an objection to Debtors' amended plan.

On April 15, 1998, the Bankruptcy Court held a confirmation hearing on the amended plan. Credit Union did not attend that hearing. The Bankruptcy Court

^{1/} That proof of claim stated that Credit Union was amending its prior claim filed on January 28, 1998, although no proof of claim had been filed on that date. At the hearing, the Bankruptcy Court clarified with Credit Union's counsel that the \$4,405.36 proof of claim duplicated in part the second proof of claim for travel loan amounts advanced in the amount of \$1,738.82. By subtracting the travel loan amount of \$1,738.82 from the April 10th proof of claim amount of \$4,405.36, the undersigned finds that Credit Union's claim for the line of credit advances should have been in the amount of \$2,666.54 ($\$4,405.36 - \$1,738.82 = \$2,666.54$). The Bankruptcy Court's finding that the entire \$4,405.368 amount in the April 10th proof of claim was unsecured failed to take into account the confirmed amended plan's provision of \$1,463.82 for the travel loan amounts designated as secured debt. See Objection Order, p. 13.

confirmed Debtors' amended plan, entering the order of confirmation of the plan on April 20, 1998.

Debtors filed an Objection to Credit Union's April 10th proof of claim on April 28, 1998, to which Credit Union responded on May 28, 1998. On September 23, 1998, the Bankruptcy Court held a hearing on Debtors' objection to Credit Union's claim, at which the Bankruptcy Judge took testimony from Mrs. King and from Credit Union employee, Sheryl Rogers. The Bankruptcy Court issued its Order on April 14, 1999, granting Debtors' Objection to Credit Union's claim (hereinafter cited as "Objection Order"). Credit Union timely appealed from that Order.

II. STANDARD OF REVIEW

The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. Conclusions of law are reviewed *de novo*. Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988). "When reviewing factual findings, an appellate court is not to weigh the evidence or reverse the finding because it would have decided the case differently. A trial court's findings may not be reversed if its perception of the evidence is logical or reasonable in light of the record." In re Branding Iron Motel, Inc., 798 F.2d 396 (10th Cir. 1986) (citations omitted).

III. ANALYSIS

On appeal, Credit Union raises the following allegations of error: A) whether the Bankruptcy Court erred in its determination that the future advances clauses in the parties' security agreements did not cover the travel loans or the line of credit advances; B) whether the Bankruptcy Court erred in finding that Credit Union failed

to attach all necessary documents to its April 10th proof of claim; C) whether the Bankruptcy Court erred in finding that the confirmed plan "provided for" the line of credit advances of funds, thereby finding that Credit Union's allegedly secured claim could be extinguished by the confirmed plan's "silence" on those line of credit advances; and D) whether the Bankruptcy Court erred in permitting Credit Union's secured claim to be addressed by an objection to its April 10th proof of claim instead of an adversary proceeding. These allegations of error are considered below.

A. THE FUTURE ADVANCES CLAUSES

"When the security agreement clearly indicates that the debtor's obligation includes future advances, the collateral pledged will stand as security for future advances." Security National Bank and Trust v. Dentsply Professional Plan, 617 P.2d 1340, 1345 (Okla. 1980). To determine if new liabilities incurred by a debtor are subject to the futures advances clause in a previously-executed security agreement, the Oklahoma Supreme Court specified that the new debts be "of the same class as the primary obligation" and in "contemplation of the parties at the time the agreement was executed." Id. at 1345-46.

In Dentsply, the evidence demonstrated that overdrafts on the debtor's business bank account, which were covered by the creditor, were used to pay expenses related to the debtor's dental practice. The Oklahoma Supreme Court found the overdrafts were extensions of credit which were of a similar purpose to the original loan's provision of operating funds for the dental practice. The Oklahoma Supreme Court

concluded that the debtor's overdrafts were covered by the future advances clause in the parties' security agreement, and the collateral pledged in the original agreement continued to stand as security for the overdraft amounts. Id. at 1346-47.

Where a future advances clause is broadly drafted, the Dentsply test may limit the application of the future advances clause to some of the transactions between the parties which result in new liabilities or debts. The focus of the Dentsply test is (1) whether new debts arising out of subsequent transactions between the parties are of the same type, or are used for similar purposes, as the object of the original indebtedness and thus (2) whether it is reasonable to find that the new debts are within the contemplation, or coverage of the security agreement's future advances clause. Evidence of the type or purpose of the original indebtedness may be compared with the type and purpose for the new debts to determine if the new debts are related to the original indebtedness. In applying the Dentsply test, however, parol evidence of the parties' understanding of the security agreement's coverage cannot be used to change the terms of the future advances clause in the parties' security agreement.

1. The travel loans

Applying the test in Dentsply, the Bankruptcy Court found that the travel loan amounts were not of the same class as the automobile loans. The Bankruptcy Court characterized the automobile loans as made for consumer or personal purposes and the travel loans as made for business purposes.

Upon review of the record, the undersigned finds no error in the Bankruptcy Court's determination that the travel loans were for a different purpose than the automobile loans, and thus of a separate class. Under Dentsply, the future advances clauses in the security agreements did not cover the travel loan amounts.

2. The line of credit

At the hearing on Debtors' objection to the April 10th proof of claim, Debtor Thelma King testified that in signing the security agreements, she understood that if she refinanced those loans, liens against the two automobiles would continue to secure the refinanced loan. Mrs. King testified she did not contemplate that the line of credit was secured by the two automobiles and that she always understood the line of credit was called "unsecured" based upon advertisements she read. Transcript, p. 36, lines 8-20. At the hearing, Mrs. King identified a Member's Statement of Account which indicated that the loan amounts on the two automobiles had been repaid. Transcript, p. 34, lines 8-23.

Referencing Dentsply, the Bankruptcy Court found that Credit Union failed to present evidence to establish the line of credit indebtedness was contemplated by the Debtors at the time the two security agreements were signed. The Bankruptcy Court relied upon Mrs. King's "unrebutted" testimony that she did not contemplate that the two automobiles would secure the line of credit, which she understood to be an unsecured loan. The Bankruptcy Court also noted that the Member's Statement of

Account failed to identify any collateral for the line of credit, viewing that as support for Mrs. King's testimony.

Credit Union contends that Mrs. King's testimony constituted parol evidence of the parties' intentions in making the security agreements, and thus was inadmissible to explain the parties' contemplation in making the security agreements. The undersigned agrees.

Oklahoma law specifically provides that "[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Okla. Stat. tit. 15, § 154. Under Oklahoma law, the interpretation of an unambiguous^{2/} contract is a question of law for the courts, with the intent of the parties to be determined from the terms of the contract itself. Public Service Co. v. Burlington Northern R. Co., 53 F.3d 1090, 1097 (10th Cir. 1995); Mercury Investment Company v. F.W. Woolworth Co., 706 P.2d 523, 529 (Okla. 1985); Provident Life & Accident Insurance v. Ridenour, 838 P.2d 530, 531 (Okla. Ct. App. 1992). The intention of the parties to a contract must be deduced from the four corners of the instrument. McEvoy v. First Nat. Bank and Trust Co., 624 P.2d 559 (Okla. Ct. App. 1980). It is well-established in Oklahoma that the execution of a written contract supercedes all oral negotiations or stipulations concerning its terms and subject matter in the absence of accident, fraud or mistake of fact in its procurement, and any representations made are inadmissible to contradict, change or

^{2/} No issue has been raised by the parties that the security agreements, or the future advances clauses within those agreements are ambiguous.

add to the terms of the written contract. See In Re Continental Resources Corp., 799 F.2d 622, 626 (10th Cir. 1986) (no error in court's refusal to consider parol evidence of intent when language of note is clear and unequivocal).

Debtors argue that Mrs. King's testimony was admissible, and point out that the Bank and the debtor in Dentsply provided testimony regarding the future advances clause at issue in that case. However, the testimony in Dentsply addressed the purposes of the original loan. Dentsply, 618 P.2d at 1346. It was not used to vary the terms of the agreement. Here, Mrs. King's testimony effectively changed the scope of coverage of the future advances clauses themselves. Mrs. King's testimony that she did not intend the security agreements to cover the line of credit advances contradicts the scope of coverage language in the security agreements' future advances clauses which explicitly provided they also secured "**any other advances you have now or receive in the future under the LOANLINER[®] Credit Agreement and any other amounts you owe the credit union for any reason now or in the future.**" (emphasis added).^{3/} Mrs. King's testimony that her understanding of the future advances clauses' operation was different from that provided in the security agreements she signed is clearly an example of parol evidence used to change the terms of those agreements.

^{3/} Mrs. King's testimony also contradicts the provision in the futures advances clauses that provided that "[i]f the property description is marked with two stars (**), the property will secure only the advance and not other amounts you owe." On the description of collateral in the security agreements, the two automobiles are not marked with the two stars. See Credit Union Exhibits 1 and 2.

In setting forth the test for the extension of a future advances clause to future liabilities in Dentsply, the Oklahoma Supreme Court relied on the decision in Kimbell Foods, Inc. v. Republic Nat. Bank, 557 F.2d 491 (5th Cir. 1977). In Kimbell Foods, the Fifth Circuit criticized the district court's admission of the debtor's testimony of the parties' subjective intent in executing the security agreements. The Fifth Circuit stated that such testimony was a "classic violation of the parol evidence rule and clearly inadmissible." The Fifth Circuit further stated that the parties' intention could only be deduced from the language of the contract. Id. at 495-96.

Applying Dentsply and Kimbell, the undersigned finds that the Bankruptcy Court's admission of Mrs. King's testimony of her subjective intent and understanding of the scope of the collateral covered by the future advances clauses in the security agreements is a clear violation of Oklahoma's parol evidence rule.^{4/}

The Bankruptcy Court further erred in finding that a Member's Statement of Account supported Mrs. King's testimony that the line of credit advances were unsecured because the Statement indicated "NO COLLATERAL IN COMPUTER" with respect to the Line of Credit. See Objection Order, pp. 7, 12. The notation of "NO

^{4/} No allegations of accident, fraud or mistake of fact have been made regarding Debtors' signing of the security agreements. Debtors' counsel suggests that the future advances clause was "hidden" on the back side of the agreements. However, Mrs. King testified that she read the security agreements, including the back pages where the future advances clauses were located. Transcript, p. 37, lines 9-20. Even if Mrs. King had not read the security agreements, her testimony of her understanding, contradicting the scope of the future advances provisions would still not be admissible. Oklahoma law is clear that a party who signs a contract without reading it is still bound by its terms, unless that party can show that its signature was induced by duress or misrepresentation. Elsken v. Network Multi-Family Sec. Corp., 49 F.3d 1470, 1474 (10th Cir. 1995). Mrs. King has made no such allegation regarding her signatures on the security agreements.

COLLATERAL IN COMPUTER" on the Member's Statements of Account does not appear in relation to the line of credit advances.^{5/}

Review of all of the Member's Statements of Account for the periods from 1991 to 1998, reflecting all Credit Union's business transactions with Debtors, shows that Credit Union generally did not identify the collateral for each loan it made with Debtors. For example, the Travel Loan category, listed on Member's Statements of Account from January 1, 1994 to March 31, 1998, does not list any collateral even though Credit Union had a secured interest in the reimbursement money from Mrs. King's employer. Nothing on the Member's Statements of Account labels the two automobiles specifically as "collateral."^{6/}

Viewing these Member's Statements of Account in their entirety, the undersigned finds no evidence to support the Bankruptcy Court's characterization that those Statements identified the two automobiles as collateral only for the car loans and not the line of credit advances.

The Bankruptcy Court found that the subsequent advances on the line of credit were not secured by the automobiles because the loan for the automobiles was paid off on January 13, 1995. See Objection Order, p. 11. However, under Oklahoma

^{5/} The notation of "NO COLLATERAL IN COMPUTER" only appears in relation to a "new loan" numerically identified in the Member's Statements of Account as "(24)" or "L024." That notation does not appear in relation to any other loan made by Credit Union to Debtors, including the line of credit. The line of credit advances are designated on the Member's Statements of Account by the separate numerical identifiers of "(6)" "(6)," "(026)" or "L026." See Credit Union Exhibit 5.

^{6/} On Member's Statements of Account from January 1, 1994 to September 30, 1994, the two automobiles are identified in the loan identification line as "open end" or numerically as loan "01." On Statements from January 1, 1991 to December 31, 1993, the category of loan is identified as "used car" loan with the numerical identifier of "(21)" or "L021."

law, the secured interest through the future advances clause can remain in the collateral, even though the loan on the collateral is paid off. In First Nat. Bank & Trust v. Security Nat. Bank, 676 P.2d 837 (Okla. 1984), the Oklahoma Supreme Court found that payment of the original indebtedness did not terminate the application of the security interest to later extensions of credit by virtue of the future advances clause which remained valid and covered a renewal note and additional loans made by the debtor in favor of the creditor. Id. at 840-41. The Oklahoma Supreme Court noted that no termination statement was filed or requested by the debtor after payment of the original indebtedness. Id. at 841.

The future advances clause causes the collateral pledged in the original security agreement to stand as security for future advances made to the debtor. The future advances clause survives despite payment of the underlying debt, if the debtor continued to owe outstanding balances to the creditor. See In re Tulsa Indus. Facilities, Inc., 186 B.R. 517 (Bankr. N.D. Okla. 1995). One commentator makes the same point.

When the security agreement covers future advances, the payment of the original debt covered by the security agreement does not terminate the security interest of the creditor when future advances have also been made and remain unpaid. *A fortiori*, the security interest remains in force when the debtor has been continuously in debt as to either the original debt or as to future advances.⁷¹

At the hearing, Credit Union's loan counselor, Sheryl Rogers, testified that no termination statement of the lien against the automobiles had been filed, and it was

⁷¹ 8A Anderson on the Uniform Commercial Code § 9-204:112, at 940 (3rd Ed. 1996).

Credit Union's policy that liens against collateral were not released when other loans were outstanding. Transcript, p. 45, lines 4-10. The Bankruptcy Court obtained the parties' stipulation that Credit Union had not released its security interest in the two automobiles. Transcript, p. 46, lines 4-7. Moreover, Mrs. King testified that, at the time she paid off the indebtedness on the automobiles, she still owed money to Credit Union on the line of credit. Transcript, p. 35, lines 3-12, 20-24. Mrs. King also testified that she didn't think there was ever a time when she didn't owe any indebtedness to Credit Union. Transcript, p. 40, lines 20-25.

Because the Bankruptcy Court relied on Mrs. King's testimony regarding her contemplation of the scope of the future advances clauses in the security agreements, it did not address the purpose of the line of credit advances. However, Mrs. King's testimony stated that she used the line of credit advances to purchase "furniture, various things." Transcript, p. 35, lines 13-17. Her testimony clearly indicated that the line of credit was used for personal or consumer purposes. The Bankruptcy Court found the loan for the two automobiles was made for consumer or personal purposes. Because the line of credit advances were made for the same purposes as the loan for the two automobiles, under Dentsply the line of credit advances are considered to be within the same class as the primary obligation, the two automobiles.

As evidenced by the future advances clauses in the security agreements, the parties contemplated that the two automobiles would continue to secure any advances of funds made to Debtors by Credit Union. The line of credit advances are of the same class as the primary obligation of the two automobiles. Accordingly, under the

Dentsply test, the future advances clauses in the security agreements covered the line of credit advances of funds made to Debtors by Credit Union, and those line of credit advances were secured by the two automobiles.

B. PROOF OF CLAIM DOCUMENTATION

Fed. R. Bankr. P. 3001(c) requires that when a claim is based on a writing, an original or a copy of the writing shall be attached to the proof of claim. A proof of claim filed in accordance with this requirement constitutes *prima facie* evidence of the validity and amount of the claim. Fed. R. Bankr. P. 3001(f).

The Bankruptcy Court found that Credit Union had not attached documents evidencing the making of the line of credit "loan" to its April 10, 1998 proof of claim. Pursuant to Rule 3001, the Bankruptcy Court held the April 10th proof of claim was not entitled to consideration as *prima facie* evidence of the validity and amount of the line of credit advances owed by Debtors. In finding that Credit Union had not properly documented its proof of claim for the line of credit advances, the Bankruptcy Court assumed the line of credit was a separate loan transaction between Mrs. King and Credit Union, to which the security agreements might or might not apply. The Bankruptcy Court speculated that the loan documents evidencing the line of credit "may provide that the Line of Credit is an unsecured loan notwithstanding the terms of any security agreement that the Debtors executed in favor of the Credit Union." Objection Order, p. 12. It may be there are no additional loan documents evidencing the line of credit. That the advances were made and the amount of the debt is admitted by Mrs. King. See Transcript, p. 35, lines, 3-25; p. 39, lines 2-25.

Section 9-204(3) of the Uniform Commercial Code (12A Okla. Stat. tit. 12A, § 9-204(3)) specifically authorizes future advances.^{8/} No contention was made, and the Bankruptcy Court did not find, that the language in the security agreements stating that it "also secures any other advances you have now or receive in the future under the LOANLINER® Credit Agreement and any other amounts you owe the credit union for any reason now or in the future," was not a future advances clause.

In finding that Credit Union had not effectively documented its proof of claim for the line of credit advances, the Bankruptcy Court ignored the legal effect of the future advances clauses in the security agreements. Credit Union properly attached the security agreements which contained the future advances clauses to its April 10th proof of claim. Credit Union was entitled to rely upon the documents it attached to the April 10th proof of claim, since the future advances clauses in the two security interest agreements caused the two automobiles to continue to stand as security for the advances on the line of credit made to Mrs. King. The payment of the car loans did not terminate the effectiveness of the future advances clauses to maintain the automobiles as collateral, because, as Mrs. King admitted and Ms. Rogers testified, Mrs. King always had amounts outstanding to Credit Union, even at the time she paid off the amounts owed on the two automobiles. The two vehicles thus continued to serve as collateral on the outstanding amounts owed by Debtors on the line of credit.

^{8/} One commentator has described the purpose of § 9-204(3) as "designed to allow the secured creditor to claim future advances as part of the secured obligation in its initial security agreement rather than having to take new agreements each time a new loan is made or the secured obligation otherwise increases." 1A Bender, Secured Transactions under the Uniform Commercial Code §7.04[3][b], at 7-31 (1999).

The Bankruptcy Court erred in finding that Credit Union had not adequately documented that the line of credit advances were secured under the future advances clauses of the security agreements on the two automobiles, pursuant to Fed. R. Bankr. P. 3001. The Bankruptcy Court then erred in finding that Credit Union's April 10th proof of claim would not be accepted as *prima facie* evidence of the validity and amount of Credit Union's secured claim.

C. NOTICE TO CREDIT UNION REGARDING AMENDED PLAN'S EFFECT ON ITS LINE OF CREDIT SECURED CLAIM

Having found that Credit Union's April 10th proof of claim was adequately documented, and thus was *prima facie* evidence of its claim that the line of credit advances were secured by the two automobiles, the undersigned now considers what effect the confirmation of Debtors' amended plan had upon Credit Union's secured claim. A chronology of relevant dates is helpful to place the parties' actions in context.

- January 16, 1998 - Debtors file Chapter 13 case and a proposed Chapter 13 plan.
- February 2, 1998 - Credit Union files proof of claim in amount of \$1,463.82 for travel loan amounts, secured by reimbursement money.
- February 11, 1998 - Credit Union files first amended proof of claim, in amount of \$1,738.82 for travel loan amounts, secured by reimbursement money and the two automobiles.
- February 11, 1998 - Credit Union files objection to confirmation of Debtors' plan, because that plan did not include the \$1,738.82 secured claim for travel loan amounts.
- March 4, 1998 - Bankruptcy Court holds confirmation hearing on Debtors' plan, which is not confirmed. Debtors ordered to file an amended plan.

- March 16, 1998 - Debtors file amended plan, which provides for Credit Union's secured claim on travel loan amounts in the amount of \$1,463.82.
- April 10, 1998 - Credit Union files amended proof of claim for \$4,405.36, which includes \$1,738.82 for the travel loan amounts, secured by the reimbursement money and the two automobiles, and \$2,666.54 for the line of credit advances, secured by the two automobiles.
- April 15, 1998 - Confirmation hearing on Debtors' amended plan, which was confirmed without objection. Credit Union did not file an objection or attend the confirmation hearing.
- April 20, 1998 - Bankruptcy Court enters order confirming plan.
- April 28, 1998 - Debtors file objection to Credit Union's April 10th proof of claim.
- May 8, 1998 - Hearing on Debtors' objection scheduled, but hearing is continued.
- May 21, 1998 - Deadline for filing proofs of claim in Debtors' case.
- September 23, 1998 - Hearing held on Debtors' objection to April 10th proof of claim.

Debtors' amended plan listed three secured creditors, including Credit Union for the travel loan advances in the amount of \$1,463.82. After listing the three secured creditors, Debtors' amended plan then stated,

NOTE: Secured creditors shall retain their liens to the extent of the value stated above. The allowed secured claim of each secured creditor shall be the amount of the value stated above with any balance of the claim as filed being allowed as an unsecured claim, with the lien of the creditor being avoided on the unsecured portion pursuant to 11 U.S.C. §506(d).

As to unsecured claims, the amended plan then provided that "[a]ll claims not specifically provided for above and those relegated to unsecured status above shall be

paid a general unsecured claim, without priority, on a prorated basis" with an approximated percentage payback to holders of unsecured claims of 32 per cent. See Credit Union Exhibit 10.

Because Credit Union did not object to confirmation of the amended plan, the Bankruptcy Court held that Credit Union's unsecured claim on the line of credit advances was "provided for" in Debtors' amended plan for payment of general unsecured claims. In the context of Chapter 13 proceedings, "provided for by the plan" is commonly understood to mean that a plan "makes provision for" "deals with" or even "refers to" a claim. Rake v. Wade, 508 U.S. 464, 474 (1993).^{9/} Here, the amended plan was filed before Credit Union's April 10th proof of claim and thus did not expressly make provision for, deal with, or even refer to the line of credit advances secured claim. Because the amended plan contained no reference to the line of credit advances secured claim, that the claim was not "provided for" in the amended plan.

On appeal, Credit Union contends that because the amended plan did not "provide for" Credit Union's secured claim on the line of credit advances, the confirmation of the plan cannot thereby extinguish that secured claim. Debtors respond that the confirmed plan was *res judicata*, and its provisions for the unsecured line of credit advances are binding on Credit Union.

Section 1327 of the Bankruptcy Code states that the provisions of a confirmed plan bind the debtor and each creditor, regardless of whether the claim of such creditor

^{9/} The undersigned recognizes that the Supreme Court was construing "provided for" in terms of 11 U.S.C. § 1328(a), rather than § 1327 at issue here. The undersigned however finds the Supreme Court's construction of "provided for" in Rake instructive of that phrase's application here.

is provided for by the plan, or the creditor has objected to, accepted or rejected the plan. The confirmation of the plan vests all property of the bankruptcy estate in the debtor, free and clear of any claim or interest of a creditor provided for by the plan.

The binding effect of the confirmation order establishes the rights of the debtor and creditor as those that are provided in the plan. It is therefore incumbent upon creditors with notice of the Chapter 13 case to review the plan and object to the plan if they believe it to be improper; they may ignore the confirmation hearing at their peril.

8 Collier on Bankruptcy ¶ 1327.02[1][a] (15th ed. 1999).

Bankruptcy proceedings are subject to requirements of due process. Bank of Marin v. England, 385 U.S. 99, 102 (1966). Due process generally requires

notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). However, opinions among the Circuit Courts of Appeal and the Bankruptcy Courts appear divided as to the specificity of the notice to be provided to the creditor by the debtor regarding the treatment of the creditor's secured claim in the plan. The Seventh Circuit Court of Appeals, for example, has held that confirmation of the debtor's plan precludes a creditor from later collaterally attacking the extinguishment of its lien in the plan, whether or not the creditor had notice of the plan's treatment of his claim. See In Re Pence, 905 F.2d 1107 (7th Cir. 1990). In contrast, the Fifth Circuit Court of Appeals has held that confirmation of the debtor's plan does not extinguish the creditor's secured claim, unless the debtor has provided notice to the creditor by

specifically objecting to the secured claim prior to the confirmation of the debtor's plan. See In Re Simmons, 765 F.2d 547 (5th Cir. 1985).

The Bankruptcy Court's decision inherently suggested that Credit Union was placed on notice of the jeopardy of its secured claim on the line of credit advances when the amended plan provided only for part of the travel loan amounts, secured only by the reimbursement money, with the remainder of Credit Union's claim being allowed as an unsecured claim. The inference taken from the Bankruptcy Court's decision was that, having been placed on such notice by its receipt of the amended plan, Credit Union had an affirmative obligation to object to the confirmation of the amended plan if Credit Union believed that the plan inadequately provided for all of its claims against Debtors.

However, a decision from the Tenth Circuit Court of Appeals suggests that the finality of a debtor's plan must be balanced with the necessity of ensuring that the creditor with a lien affected by the plan's provisions has adequate notice of the plan's effect upon his secured claim. In Re Barton Industries, 104 F.3d 1241, 1245 (10th Cir. 1997). In Barton, the debtor's plan provided that all allowed claims not specifically mentioned in the plan would be treated as a class of claims entitled to only a *pro rata* share of funds from a creditor trust, if and when such trust funds became available. The plan and disclosure statement sent to the two creditors did not specifically^{10/} refer to the insurance premium refunds, the creditors' secured interests

^{10/} In Barton, an agreement between the debtor and the primary creditor which conveyed "contract rights and general intangibles" to the primary creditor and construed as covering the disputed insurance
(continued...)

in the insurance premium refunds, or the plan's effect on those refunds and secured interests in the refunds. Barton, 104 F.3d at 1245-46.

While recognizing that it was a "close case," the Tenth Circuit found the plan in Barton was vague and did not provide adequate notice to the two secured creditors regarding the plan's effect upon their interests because the plan did not specifically refer to the property affected or the creditors' interest in that property. Id. at 1245-46. Because the two creditors had not received adequate notice of the effect of the debtor's plan upon their interests, the Tenth Circuit held that their claims were not affected by the plan, and the plan's confirmation was not *res judicata* as to those creditors. The Tenth Circuit stated that "a creditor's claim is not subject to a confirmed bankruptcy plan when the creditor is denied due process because of inadequate notice." Id. at 1246.

Credit Union filed its April 10th proof of claim on the line of credit advances after Debtors filed their amended plan. Debtors' amended plan did not anticipate Credit Union's later-filed secured claim on the line of credit advances, and thus did not address that claim or specify the plan's effect on it. However, Credit Union had timely filed its April 10th proof of claim for its secured claim on the line of credit advances, which was entitled to consideration as *prima facie* proof of the validity and amount of that claim. On April 15, 1998, the date of the confirmation hearing on the amended

^{10/} (...continued)

premium refunds was incorporated into the debtor's plan. The two secured creditors did not receive a copy of that agreement with the plan. The Tenth Circuit found the "obscure reference" in the plan to the debtor's agreement did not provide the two creditors with "sufficient notice about the treatment of their particular class of claim or adequate information to make a reasonable judgment about the plan." Id. at 1246.

plan, Credit Union's April 10th proof of claim on the line of credit advances was deemed to be an allowed secured claim, pursuant to 11 U.S.C. §502(a)^{11/} and §506.^{12/}

Credit Union thus had an allowed secured claim on the line of credit advances, which was not specifically addressed by the amended plan. Debtors' amended plan provided that specified creditors retained their liens in the amount stated, with any balance of their secured claim being allowed as an unsecured claim, and their lien avoided on the unsecured portion of their claim. The amended plans only identified unsecured claims as "[a]ll claims not specifically provided for above and those relegated to unsecured status above" in stating that creditors holding those claims would be paid "a general unsecured claim, without priority, on a prorated basis." The provision in the amended plan notifying "specified creditors" that the balance of their secured claim would be found unsecured and their lien avoided did not provide adequate notice to Credit Union that its claim on the line of credit advances would be deemed unsecured and its security interest in the two automobiles extinguished. The treatment specified for unsecured claims in the amended plan also would not have

^{11/} 11 U.S.C. §502(a) provides that "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, . . . objects." 11 U.S.C. §501(a) permits a creditor to file a proof of claim. Credit Union had an allowed secured claim on the line of credit advances at the date of the confirmation hearing because Debtors did not object to the April 10th proof of claim until after the confirmation hearing.

^{12/} 11 U.S.C. §506(a) provides that "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest, . . . is a secured claim to the extent of the value of such interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim." 11 U.S.C. §506(d) provides that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void" unless it is disallowed on certain statutory grounds or because the creditor failed to file a proof of claim.

placed Credit Union on notice, since Credit Union knew it had an allowed secured claim.

In Barton, the Tenth Circuit held that "[i]n order to satisfy due process, [the two creditors] had to receive notice that specified the treatment of their class of claim and allowed them to make an informed judgment about [the plan]." 104 F.3d at 1245. Debtors' amended plan was similar to the plan in Barton in that both failed to specifically address the creditor's allowed secured claim on property which was not identified as affected by the plan. The amended plan's classification of "specified" secured creditors and the "not specifically provided for" unsecured creditors was similarly deficient in providing notice to Credit Union of that plan's adverse effect on its allowed secured claim as was the Barton plan's notice to the two creditors there that their claims were included as "unspecified creditors."

Where the plan does specifically state the treatment to be accorded the secured claim, the Tenth Circuit has held that the creditor has received notice adequate for purposes of due process. Turney v. Federal Deposit Ins. Corp., 18 F.3d 865 (10th Cir. 1994). See also In Re Andersen, 215 B.R. 792, 795 (B.A.P. 10th Cir. 1998) ("The question is whether the demands of due process have been honored. Due process requires only that there be notice and a meaningful opportunity to be heard – no more, and no less. Here . . . the plan specifically stated the treatment to be accorded the [secured interest].").

In finding that Credit Union's failure to object to the amended plan caused its April 10th claim to be "provided for" in the amended plan, the Bankruptcy Court relied

on In re Holmes, 225 B.R. 789 (Bankr. D. Colo. 1998). The Bankruptcy Court characterized that decision as holding that a bankruptcy court can (1) disallow the claim of a secured creditor who failed to present supporting evidence for the full amount of the claim at the confirmation hearing, and (2) confirm a Chapter 13 plan which states a lesser amount of claim for the creditor.

The Bankruptcy Court's reliance on Holmes is misplaced. In Holmes, the debtors filed their amended plan with a motion to confirm. The motion to confirm provided a notice to creditors that the amounts specified in the plan to be paid to each secured creditor would be accepted by the court when confirming the plan, unless the creditor filed a written objection to the plan. The creditor in Holmes filed an objection to confirmation because the plan failed to fully provide for the full amount of its claim. At the Holmes confirmation hearing, the bankruptcy court required the creditor to put on evidence substantiating its claim, and found part of that claim to be unsecured when the creditor failed to present that evidence. Holmes, 225 B.R. at 794.

Holmes can be distinguished from the present case in that the Holmes debtors specifically advised the creditors in the motion to confirm that the confirmation hearing could reduce their allowed secured claims, and that the creditors had to file objections to the confirmation. The creditor filed an objection in response to the notice provided in the motion to confirm, and had the opportunity to present its arguments before the preclusive effect of the plan's confirmation took place.

Here, Debtors' amended plan could not have informed Credit Union that its claimed security interest was to be extinguished because that plan was filed before

Credit Union filed its April 10th proof of claim which asserted the security interest. Debtors had no knowledge of the claimed security interest when the amended plan was filed. Credit Union's proof of claim, however, was filed well within the deadline of May 21, 1998 for filing proofs of claim. Prior to the confirmation hearing, Debtors did not file an objection to Credit Union's proof of claim. The amended plan did not inform Credit Union that its allowed secured claim on the line of credit advances would be adversely affected by the confirmation of the amended plan if Credit Union did not object to confirmation of the amended plan.

Creditors have a responsibility to take an active role in protecting their claims. In Re Ruti-Sweetwater, Inc., 836 F.2d 1263, 1265-67 (10th Cir. 1988). That duty arises, however, when the creditor receives adequate notice of how a plan proposes to treat a creditor's claim.

A fundamental right guaranteed by the Constitution is the opportunity to be heard when a property interest is at stake. Specifically, the reorganization process depends upon all creditors and interested parties being properly notified of all vital steps in the proceeding so they may have the opportunity to protect their interests.

Reliable Elec. Co., Inc. v. Olson Const. Co., 726 F.2d 620 (10th Cir. 1984).

A failure to address Credit Union's secured claim on the line of credit advances does not provide notice that justifies reducing that claim to an unsecured status. The "silence" of Debtors' amended plan as to the line of credit advances cannot be construed as providing adequate notice regarding the treatment of that claim. Debtors' amended plan did not include any provision regarding the line of credit advances from which Credit Union could be said to have notice that its secured claim would be held

to be "provided for" in the amended plan as an unsecured claim and its lien on the two automobiles extinguished. Thus, the necessity that Credit Union be given adequate notice, comporting with due process, requires reversal of the Bankruptcy Court's finding that Credit Union's failure to object to confirmation caused its secured claim on the line of credit advances to become unsecured and thereby "provided for" by the plan.

The undersigned recognizes the "difficulty in striking a workable balance between the interest in the protection of secured creditors and the interest in finality for Chapter 13 debtors." Matter of Howard, 972 F.2d 639, 642 (5th Cir. 1992). The undersigned is sympathetic to the concern in bankruptcy proceedings that a creditor not be allowed to simply "stick its head in the sand and pretend it would not lose any rights by not participating in the proceedings." In Re Pence, 905 F.2d 1107, 1109 (7th Cir. 1990). However, due process requires that a debtor's provision of adequate notice, specifying the treatment in its plan of the claims held by its creditors, must be made before concerns of creditor diligence can be addressed.

[W]e do expect creditors to take some responsibility in the bankruptcy process or lose their rights. . . . However, notwithstanding the recognized responsibilities of the creditor, the debtor also must meet certain burdens. A debtor should inform the *secured* creditor of an intent to reclassify its claim into partially secured and partially unsecured status. Placing such a responsibility with the debtor is both logical and not unduly burdensome.

In Re Linkous, 990 F.2d 160 163 (4th Cir. 1993)(emphasis original).

The undersigned finds that the Bankruptcy Court erred in its determination that the amended plan "provided for" the line of credit claim held by Credit Union in

deeming that claim to be an unsecured claim. Following the Tenth Circuit's decision in Barton, the undersigned finds the Debtors' amended plan failed to provide adequate notice to Credit Union regarding the treatment of its allowed secured claim on the line of credit advances, and the confirmation of the amended plan was not *res judicata* as to that claim.

D. DEBTORS' OBJECTION TO CREDIT UNION'S SECURED CLAIM

Credit Union objects to the Bankruptcy Court's use of Debtors' Objection to Credit Union's April 10th proof of claim as the procedural vehicle to determine the validity of its lien on the two automobiles. Credit Union contends that the Bankruptcy Court should have required Debtors to bring an adversary proceeding to determine the validity of that lien.

The Tenth Circuit has indicated that a secured creditor's claim can be addressed not only by an adversary proceeding or formal objection, but can be altered by the plan itself, provided that the creditor participated in the proceedings and received adequate notice. Barton, 104 F.3d at 1245 n.1. The relevant question here is whether Credit Union received adequate notice that its secured claim on the line of credit advances would be extinguished by the confirmation of the amended plan. Certainly, an adversary proceeding or an objection to the April 10th proof of claim would constitute adequate notice to Credit Union of the potential jeopardy to its secured claim, if those contested matters were sufficiently filed before the confirmation hearing to enable Credit Union to act to protect its secured claim. Alternatively, however, notice given in or with the amended plan, indicating that the line of credit advances would be

treated as unsecured, would provide Credit Union with adequate opportunity to determine whether it needed to object to confirmation of Debtors' amended plan. Under the guidance provided thus far by the Tenth Circuit in Barton, the significant factor is whether the creditor received notice, comporting with due process, of the debtor's intentions toward the creditor's secured claim, rather than the form of procedural vehicle used to attack the validity of the secured claim.

RECOMMENDATION

In summary, the undersigned Magistrate Judge finds that the Bankruptcy Court correctly applied the Dentsply test to determine that the travel loan amounts were not covered by the future advances clauses of the parties' security agreements. However, the undersigned finds that the Bankruptcy Court erred in relying on inadmissible parol evidence to change the scope of coverage of the future advances clauses, resulting in error in finding that the line of credit advances were not secured by the two automobiles. The undersigned finds that Credit Union's claim for the line of credit advances in the amount of \$2,666.54 was secured by the two automobiles. The undersigned finds that the Bankruptcy Court erred in finding that Credit Union's April 10th proof of claim was not adequately documented, and therefore was not *prima facie* evidence of the validity and amount of Credit Union's secured claim, pursuant to Fed. R. Bankr. P. 3001. Finally, the undersigned finds that Debtor's amended plan failed to provide adequate notice to Credit Union regarding the treatment of its secured claim on the line of credit advances, and the Bankruptcy Court erred in determining

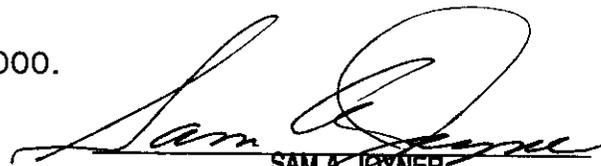
that the amended plan "provided for" Credit Union's line of credit claim by deeming that claim to be unsecured.

The undersigned Magistrate Judge recommends that the District Court **REVERSE AND REMAND** in part and **AFFIRM** in part the decision of the Bankruptcy Court, for further proceedings consistent with this Report and Recommendation, pursuant to Fed. R. Bankr. P. 8013.

OBJECTIONS

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

Dated this 21 day of March 2000.


SAM A. JOYNER
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

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

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21 Day of March, 2000, ~~10~~

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

**DARA JONES, a minor; DALE JONES,
a minor; DANA JONES, a minor;
DESEREE JONES, a minor; and
LAYTHATCHER JONES, a minor,
by and through MURIEL BURCH as
Parent and Next Best Friend of the
Minor Children,**

Plaintiffs,

v.

**La PETITE ACADEMY, INC.; STATE
OF OKLAHOMA COMMISSION FOR
HUMAN SERVICES; and STATE OF
OKLAHOMA DEPARTMENT OF
HUMAN SERVICES,**

Defendants.

FILED

MAR 21 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-898-K (M)

ENTERED ON DOCKET
MAR 21 2000
DATE

ORDER

Before the Court is Plaintiffs' motion for attorney fees and costs not covered by 28 U.S.C. § 1920, as prevailing parties under 42 U.S.C. § 1988.

History of Case

Plaintiffs filed suit on September 30, 1997, alleging racial discrimination in violation of 42 U.S.C. § 1981, intentional infliction of emotional distress, invasion of privacy, negligent hiring and supervision, and breach of fiduciary duty against La Petite Academy, Inc. ("La Petite") and alleging intentional racial discrimination under 42 U.S.C. § 2000d and failure to enact sufficient minimum licensing standards against the State of Oklahoma

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Commission for Human Services ("CHS") and the State of Oklahoma Department of Human Services ("DHS"). Plaintiffs' complaint stemmed from the intentional, racially-motivated mistreatment of Dara, Dale, Dana, Deseree, and Laythatcher Jones while attending La Petite. Plaintiffs' amended complaint, filed September 2, 1998, alleged an additional count against the CHS and DHS of racial discrimination by a recipient of federal funds in violation of 42 U.S.C. § 2000d-1. From La Petite, Plaintiffs sought compensatory and punitive damages, attorney fees, and a letter of apology. From the CHS and DHS, Plaintiffs sought compensatory damages and injunctive relief, including the adoption of new minimum standards for child care and the adoption of an educational program geared toward eliminating racial discrimination at licensed childcare facilities. By Order, filed December 18, 1998, the Court granted summary judgment to the CHS and DHS, based on Plaintiffs' lack of standing to pursue injunctive relief and failure to state a prima facie case of discrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* The case then went to a jury trial on January 28, 1999. Following the Plaintiffs' case in chief, the Court granted judgment as a matter of law to La Petite on the negligent hiring claim but overruled La Petite's other motions for judgment. The jury returned with a verdict on February 3, 1999, finding for the La Petite as to the intentional infliction of emotional distress and invasion of privacy claims, but finding for Plaintiffs on their racial discrimination and negligent supervision claims. For these injuries, the jury awarded Plaintiffs \$8,500 in compensatory damages. After finding that La Petite acted maliciously

or wantonly with regard to Plaintiffs' rights, the jury awarded \$150,000 in punitive damages. Plaintiffs subsequently filed this motion for attorney fees and certain costs under 42 U.S.C. § 1988, seeking \$ 215,396.50 in fees and \$9,315.65 in costs.

Applicable Law

42 U.S.C. § 1988 provides for the award of attorney fees to the prevailing party under section 1981. A plaintiff may be considered the prevailing party if she succeeds on any significant issue in the litigation that achieves some of the benefit sought in bringing the suit. *See Jane L. v. Bangerter*, 61 F.3d 1505, 1509 (10th Cir. 1995). Once the Court finds that the plaintiff has prevailed, the district court must determine, in its discretion, what fee is reasonable. *See Carter v. Sedgwick County*, 36 F.3d 952, 956 (10th Cir. 1994).

To determine this reasonable amount, the Court must arrive at a "lodestar" figure by multiplying the hours plaintiff's counsel reasonably spent on the litigation by a reasonable hourly rate. *See Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1249 (10th Cir. 1998). Counsel for plaintiff must submit "meticulous, contemporaneous time records that reveal, for each lawyer . . . , all hours for which compensation is requested and how those hours were allotted to specific tasks." *Id.* at 1250. If these records are sloppy or imprecise or contain large blocks of unaccounted time, the Court may reduce the figure. *See id.* The Court must ensure that the attorneys exercised billing judgment, winnowing the hours down to those reasonably expended, as they would do for a private client. *See id.* If the Court finds that certain hours were unnecessary, irrelevant, or duplicative, the Court may reduce the number

of hours accordingly. *See Carter*, 36 F.3d at 956. Important to this determination is the Court's experience and knowledge of the local area. *See Case*, 157 F.3d at 1250; *Smith v. Freeman*, 921 F.2d 1120, 1122 (10th Cir. 1990).

Once the Court reaches a reasonable lodestar figure, the Court may adjust the fee award up or down. No fee may be awarded for claims based on different facts and legal theories than the successful civil rights claim. *See Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989). Where the plaintiff is unsuccessful on *related* claims, the Court qualitatively considers the relationship between the fee award and results obtained. *See Jane L.*, 61 F.3d at 1511. The Court should assess these losses in light of the time necessarily devoted to the litigation as a whole and the plaintiff's overall success. *See id.* The Court must keep in mind, however, that "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). Just as the Court may reduce the lodestar figure, an enhancement may be warranted for exceptional success. *See id.*

Attorney Fees

There is no dispute that Plaintiffs are a prevailing party under 42 U.S.C. § 1988. The jury found that La Petite had racially discriminated against Plaintiff under 42 U.S.C. § 1981, and Defendant makes no attempt to argue Plaintiffs' status.

The hours requested by Plaintiffs' attorneys in this matter are reasonable. The Court

does not treat a plaintiffs' initial attorney fees request as an opening bid and will not punish the attorney who has already exercised appropriate billing judgment prior to submitting his request. The Court has extensively reviewed the almost 40 pages of contemporaneous billings and finds them to be sufficiently detailed.¹ Randolph L. Jones, Jr., the lead attorney on this cases has averred by affidavit that every month he deleted entries for conferences involving more than one attorney and adjusted time amounts to an appropriate level. The Court can confirm that the billing records do not contain duplicative billings, for multiple conference attendees or otherwise. Furthermore, Plaintiffs' attorneys have deleted all additional hours related to the two dismissed parties, the CHS and DHS. The billing records retain the listings for these services but with no charge assessed. Finally, the Court has reviewed the hours allotted for certain tasks and finds them reasonable, as well. Plaintiffs' attorneys spent a total of 1,742.6 post-winnowing hours, only 1,615.9 of which are included in the request. This amount does not include the 112.7 hours incurred during the last three days of trial, a traditionally hour-intensive period.² This figure also excludes the additional time incurred in preparing, submitting, and briefing Plaintiffs' request for fees.

¹La Petite's assertion that Plaintiffs' attorneys indulged in "block-billing" is ludicrous. The submitted records break down, to the tenth of the hour, the time spent by each attorney, each day, with detailed descriptions of the tasks completed.

²La Petite argues that the presence of three attorneys at trial was unnecessary and excessive. If the Court deletes the services of Jacalyn W. Peter, the attorney who appeared to have the least responsibilities at trial, the Court would award Plaintiffs more than their initial request. This is because Plaintiffs included only one of the four trial days in their initial request. The addition of these three days and subtraction of Ms. Peter's hours for all four days would result in a net gain for Plaintiffs.

The Court further finds that the rates charged by Plaintiffs' attorneys and staff to be a reasonable reflection of the prevailing market rates in this area, considering the attorneys' expertise and the subject-matter of the litigation. Mr. Jones is a shareholder in a major Oklahoma law firm, with almost 25 years of legal experience and several years in his firm's pro bono program for abused, neglected, and delinquent children. Plaintiffs, in fact, were referred to Mr. Jones and his firm based on his reputation and work in this program. Furthermore, the billings reflect Mr. Jones' fixed discount rate in 1997 for clients who receive a standard discount. Although private client's rates went up during the eighteen month course of this litigation, Mr. Jones billings have remained at their original, discounted level. The Court, based on these factors and its own experience and local knowledge, finds that \$190 per hour is a reasonable rate for Mr. Jones.

The rates for the other attorneys participating in this case are similarly reasonable. They, too, reflect their fixed discount rates, with an additional \$15 per hour discount to reflect the number of attorneys involved. Both of the other two attorneys most heavily involved in this litigation are also quite qualified. Deirdre O. Dexter is a director and shareholder of the firm with over 14 years experience in litigation and has represented children in its pro bono program for over four years. She has also served as an adjunct settlement judge during that time, handling around eight employment discrimination cases per year, many of which involve civil rights discrimination. Jacalyn W. Peter worked as an associate on this case, has more than three years litigation experience, and, like the others,

has represented children in the pro bono program. These attorneys billed \$150 and \$115 hours, respectively, an amount the Court finds reasonable. The Court has further reviewed the rates for other attorneys and legal assistants who performed work for Plaintiffs and similarly finds their rates appropriate.

La Petite's attempt to limit Plaintiffs' attorneys to \$103 per hour is misplaced. La Petite bases this figure on the median hourly charge among respondents to an Oklahoma Bar Association survey in 1992. This data does not purport to reflect the rates in the Tulsa area, which the Court notes from experience tend to be higher than in the rural parts of the state. Furthermore, this data is several years old and does not break the figures down by area of practice. The lack of "fit" between the information relied on by La Petite and the circumstances of this case, as well as the contradictory indications from Plaintiffs' affidavit and the Court's knowledge, renders La Petite's figure unhelpful.

The Court does not deem any reduction for partial success appropriate. Plaintiffs have already deducted those costs associated with their unsuccessful claims against the CHS and DHS. The remaining unsuccessful claims "were intertwined with the successful claims through a common core of facts or related legal theories." *Robinson v. City of Edmond*, 160 F.3d 1275, 1283 (10th Cir. 1998). Plaintiffs claims against La Petite were founded on a common core of facts surrounding the racially-motivated mistreatment of these children. Plaintiffs pursued a single goal through these alternative legal theories – compensatory and punitive damages and a judgment that such acts will not be tolerated. In this instance, it

would be inappropriate for the Court to punish Plaintiffs for pursuing alternative legal grounds for a desired outcome, when Plaintiffs obtained the results they sought.

The purpose behind section 1988 is to ensure a compensation "adequate to attract competent counsel." *See Robinson*, 160 F.3d at 1281 (quoting S. Rep. No. 94-1011, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913 (internal quotation marks omitted)). The Tenth Circuit has stated that "[i]t goes without saying that if a court's compensation is not adequate to match what the market will bear for a lawyer's services, then competent lawyers will go elsewhere to offer their services. Such a result would do irreparable damage to our system of private enforcement of federal civil rights." *Id.* In this case, the Court finds that Plaintiffs' fee request, if anything, under-represents the market rate for the attorneys involved. The representation afforded in this case reflects section 1988's success, and the Court will not dampen the progress that has been made with an arbitrary reduction for the mere purpose of making a cut. The Court, therefore, awards the \$215,396.50 requested.

Additional Costs

A section 1988 award should include reasonable expenses incurred in the representation, if such expenses are usually billed in addition to the attorney's hourly rate. *See Case*, 157 F.3d at 1257. Plaintiffs request \$9,315.65 in untaxed costs, which breaks down as follows: (1) photocopies, copies, and telecopies, \$6,922.52; (2) telephone, 212.88; (3) postage and Federal Express, 171.10; (4) transcript, 510.00; (5) courier and deliveries, 82.75; (6) Westlaw, 1,110.37; (7) meals, 78.68; (8) mileage, toll, and parking, 75.55; (9)

witness fees, 120.00; and (10) PACER access, 31.80. Mr. Jones avers that these are the types of costs that his firm normally charges its fee-paying clients. This figure does not include an additional \$1,784.68 in costs associated only with the CHS and DHS, representing \$676.35 in photocopies and binding; 1,056.64 in Westlaw fees; 31.85 in staff overtimes; and 19.84 in meals. Although a fairly minor matter, the Court finds the 15 cents per photocopy charged by Plaintiffs' attorneys to be somewhat excessive and reduces the award to reflect a 10 cent per photocopy charge. Aside from this amount, the Court finds the remaining costs to be reasonable and awards Plaintiffs \$8,381.65 in costs.

IT IS THEREFORE ORDERED that the Motion for Attorneys' Fees and Certain Costs of Plaintiffs (# 60) is GRANTED and the Court awards Plaintiffs \$223,778.15 in attorney fees and additional costs.

ORDERED this 20 day of March, 2000.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 20 2000 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LEONARD RENAL ROBERTS,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION,)
)
 Respondent.)

Case No. 97-CV-305-BU ✓

ENTERED ON DOCKET

DATE ~~MAR 20 2000~~

MAR 21 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 judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 20th day of March, 2000.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 20 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LEONARD RENAL ROBERTS,)
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 Petitioner,)
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Case No. 97-CV-305-BU

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ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, a prisoner in the custody of the Oklahoma Department of Corrections and appearing *pro se*, challenges his conviction entered in Tulsa County District Court, Case No. CRF-92-1020. Respondent has filed a Rule 5 response (#14), along with a copy of the trial transcript (#15). Petitioner has filed a reply (#20). Petitioner has also filed a "motion for entry of declaratory judgment" (#28) along with a brief in support (#29). For the reasons discussed below, the Court finds that this petition should be denied. Today's decision renders Petitioner's "motion for declaratory ruling" moot.

BACKGROUND

On March 3, 1992, Petitioner and another man, Curtis Jamerson, entered the Wal-Mart store located in Prattville, Oklahoma. The store's loss prevention officer, Dale Bland, observed Petitioner disconnect a VCR from a display television and hand the VCR to Jamerson. Jamerson placed the VCR inside a "paste-board" Skittles box in a shopping cart where there were also four (4) cartons of cigarettes and packages of underarm deodorant. Bland also observed the two men leave the store together pushing the shopping cart without paying for the items in the cart. Bland watched as the

men loaded the Skittles box into a car driven by Doris Salim, a woman later identified as Petitioner's wife. Bland and another store employee followed the car as it left the store's parking lot. Shortly thereafter, a Sand Springs police officer, Scott Brady, stopped the vehicle and arrested the three occupants upon recovery of the VCR, the cigarettes and the deodorant.

On March 5, 1992, Petitioner was charged, along with two co-defendants, Jamerson and Salim, with Larceny of Merchandise from a Retailer, After Former Conviction of Two or More Felonies, in Tulsa County District Court, Case No. CRF-92-1020. Petitioner was tried by a jury on June 16-17, 1992. The Hon. Clifford E. Hopper presided at trial. At the conclusion of the first stage of trial, the jury returned a verdict of guilty as charged. After the second stage of trial, the jury found Petitioner had committed the crime after two or more prior felony convictions and recommended punishment be set at seventy-five (75) years imprisonment. On June 23, 1992, the trial court formally sentenced Petitioner in accordance with the jury's verdict. Petitioner was represented at trial and sentencing by attorney Edward Glass.

Petitioner, represented by attorney Lendell S. Blosser, an Assistant Appellate Indigent Defender, perfected a direct appeal where he raised the following four (4) propositions of error:

- I. Appellant was prejudiced by the introduction of other crimes evidence.
- II. The Court's first stage instructions inferred that Mr. Roberts was a repeat offender.
- III. Prosecutorial misconduct denied appellant a fair trial.
- IV. The evidence was insufficient to sustain Mr. Roberts' conviction.

(#14, Ex. B.) On August 25, 1995, in an unpublished summary opinion, the Oklahoma Court of Criminal Appeals ("OCCA") affirmed Petitioner's conviction, but modified his sentence to fifty (50) years imprisonment after finding that evidence of another crime was improperly introduced in the first stage of Petitioner's trial and that the prosecutor had made prejudicial statements concerning

the pardon and parole system during the second stage. (#14, Ex. A.)

Petitioner, represented by his appellate counsel, filed a petition for rehearing, arguing that the OCCA should rehear Petitioner's appeal based on that court's issuance of Flores v. State, 896 P.2d 556 (Okla. Crim. Appl 1995). See #1, Petition for Rehearing, attached to petition. The Flores decision, issued prior to the OCCA's opinion affirming Petitioner's conviction but after Petitioner had filed his Brief in Chief, held that an instruction stating that the defendant is "presumed not guilty" rather than "presumed innocent" was unconstitutional and deprived the defendant of a fair trial. During Petitioner's trial, the jury was instructed, as in Flores, that the defendant was "presumed not guilty." However, the OCCA declined to rehear Petitioner's case, stating that the state procedural rule governing rehearing does not provide for rehearing on an issue which was not raised on original appeal. (#1, Order Denying Rehearing, attached to the petition).

Petitioner filed an application for post-conviction relief in the state district court alleging that (1) trial and appellate counsel were ineffective; (2) he was forced to stand trial in jail clothing; (3) the court used the modified "presumed not guilty" instruction as dealt with in the Flores case; (4) the State relied on invalid prior convictions to enhance petitioner's conviction; (5) Petitioner's habeas corpus rights were violated by the trial court; and (6) no rational trier of fact could have found proof beyond a reasonable doubt based upon the trial evidence. On June 24, 1996, the trial court denied post-conviction relief, finding "Petitioner's issues of error could have been raised during trial or on appeal. They were not raised, and petitioner has failed to state a sufficient reason for his failure to so raise them; therefore they are now barred by waiver." (#14, attachment to Ex. D). In addition, the trial court found Petitioner's challenge to the sufficiency of the evidence was barred by the doctrine of *res judicata*. (#14, attachment to Ex. D).

Petitioner perfected a post-conviction appeal in the OCCA raising the same six (6)

propositions of error he had raised in the trial court. On February 19, 1997, the OCCA affirmed the trial court's denial of post-conviction relief, finding that Petitioner had waived his claim of ineffective assistance of trial counsel by failing to raise it on direct appeal; that Petitioner did not receive ineffective assistance of appellate counsel; that Petitioner's challenge to the sufficiency of the evidence was rejected on direct appeal and was, therefore, barred by the doctrine of *res judicata*; and that the remaining issues could have been raised on direct appeal and were, therefore, waived. (#14, Ex. C).

Petitioner filed the instant petition on April 2, 1997, asserting the following eight (8) grounds of error:

- (1) Petitioner was deprived of his right to effective assistance of counsel at trial and on direct appeal which deprived him of his 5th, 6th and 14th Amendment rights.
- (2) Petitioner's right to due process and a fair trial was violated by trial court's use of an erroneous instruction regarding the presumption of innocence and the burden of proof ("the Flores issue").
- (3) There was insufficient evidence to prove the essential elements of Larceny of Merchandise from a Retailer and that the petitioner knowingly or willingly participated in a crime.
- (4) The trial court allowed the State's attorney to introduce into evidence prior convictions that the State's attorney and court knew to be invalid convictions to enhance the petitioner's sentence.
- (5) The trial court suspended the petitioner's right to petition the court pursuant to writ of habeas corpus in violation of the Oklahoma State Constitution's Article 2 Section 10 -- Compt.St.1921 § 429-431. Therefore the court was without jurisdiction to try petitioner in CRF-92-1020 and petitioner is entitled to immediate release.
- (6) The court's first stage instructions inferred that petitioner was a repeat offender.
- (7) Petitioner was prejudiced by the introduction of other crimes evidence.
- (8) Prosecutorial misconduct denied petitioner a fair trial.

(#1).

ANALYSIS

A. Exhaustion and Evidentiary Hearing

As a preliminary matter, the Court must determine whether Petitioner has satisfied the exhaustion requirement of 28 U.S.C. § 2254(b). Respondent concedes and the Court finds Petitioner has presented each of his claims to the OCCA on direct and/or post-conviction appeal and meets the exhaustion requirement of § 2254(b). See Rose v. Lundy, 455 U.S. 509, 510 (1982).

The Court also finds that an evidentiary hearing is not warranted as Petitioner has not met his burden of proving entitlement to an evidentiary hearing. See Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998). In denying Petitioner's application for post-conviction relief, the state trial court stated that "the matter under consideration does not present any genuine issue of material fact requiring a formal hearing with the presentation of witnesses and the taking of testimony . . . The matter will therefore be decided on the basis of the pleadings and the court records." (#14, attachment to Ex. D). The OCCA affirmed the trial court's opinion. Thus, the state courts denied an evidentiary hearing on Petitioner's claims and he shall not be deemed to have "failed to develop the factual basis of a claim in state court." Id. Therefore, his request is governed by pre-AEDPA standards rather than by 28 U.S.C. § 2254(e)(2). Id. Under pre-AEDPA standards, in order to be entitled to an evidentiary hearing, Petitioner must make allegations which, if proven true and "not contravened by the existing factual record, would entitle him to habeas relief." Id. In this case, Petitioner has not made allegations which, if proven true, "would entitle him to habeas relief." Therefore, the Court finds that an evidentiary hearing is not necessary.

B. Standard of review under the AEDPA

Pursuant to 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death

Penalty Act ("AEDPA"), this Court cannot grant habeas corpus relief on Petitioner's claims adjudicated by the OCCA unless the adjudication of the claims

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

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

28 U.S.C. § 2254(d). Petitioner raised his claims numbered 3, 6, 7, and 8 on direct appeal. The state appellate court considered the merits of each of those claims. Although the OCCA modified Petitioner's sentence, the court affirmed Petitioner's conviction. (#14, Ex. A.) In addition, the OCCA considered and rejected Petitioner's ineffective assistance of appellate counsel claim, part of Petitioner's first claim, on post-conviction appeal. (#14, Ex. C). Therefore, unless the Court of Criminal Appeals's adjudications of the claims related to Petitioner's conviction were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," this Court must deny the requested habeas relief as to those claims. 28 U.S.C. § 2254(d).

C. Claims adjudicated by the OCCA on the merits

1. Challenge to sufficiency of the evidence (claim 3)

As his third proposition of error, Petitioner argues that the evidence was insufficient to sustain his conviction for Larceny of Merchandise from a Retailer. Petitioner presented this claim to the OCCA on direct appeal. Without specifically discussing this allegation of error, the OCCA affirmed Petitioner's conviction "[a]fter thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibit of the parties" (#14, Ex. A

at 2). In the instant action, Petitioner has failed to demonstrate that the OCCA's rejection of this claim on direct appeal warrants issuance of the writ under 28 U.S.C. § 2254(d). The Court finds, after careful review of the record, that habeas corpus relief cannot be granted on this claim.

Sufficiency of the evidence claims are evaluated based on the following standard established by the Supreme Court:

. . . the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.

Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (citations omitted). In evaluating the evidence presented at trial, this Court does not weigh conflicting evidence or consider witness credibility. Wingfield v. Massie, 122 F.3d 1329, 1332 (10th Cir. 1997); Messer v. Roberts, 74 F.3d 1009, 1013 (10th Cir. 1996). Instead, the Court must view the evidence in the "light most favorable to the prosecution," Jackson, 443 U.S. at 319, and "accept the jury's resolution of the evidence as long as it is within the bounds of reason." Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir. 1993).

In the instant case, the jury heard testimony and viewed evidence supporting the conclusion that Petitioner removed a VCR from Wal-Mart without paying for the VCR. Specifically, the jury heard the store's loss prevention officer, Bland, testify that he saw Petitioner disconnect the co-axial cable connecting the VCR to a display television and give the VCR to his companion, Jamerson,

who placed the VCR in a paste-board box (#15 at 66, 68). Bland also testified that pre-boxed VCRs of the same model removed from the store by Petitioner and Jamerson were available for purchase. (#15 at 67-68). Bland further testified there was no evidence that the merchandise removed from the store had been purchased (#15 at 72), that the total value of the merchandise exceeded \$220, and that the VCR alone was worth \$165-169. (#15 at 71). The Court concludes that this evidence, when viewed in a light most favorable to the State, was sufficient to allow the jury as a rational trier of fact to have found the essential elements of Larceny of Merchandise from a Retailer beyond a reasonable doubt. Petitioner has failed to demonstrate that the OCCA's resolution of this claim was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. As a result, the Court finds habeas corpus relief should be denied on this claim.

2. *Evidentiary ruling by trial court (claim 7)*

As his seventh proposition of error identified in the instant action, Petitioner alleges that he was prejudiced by the introduction of "other crimes" evidence during the first stage of his bifurcated trial. Specifically, Petitioner complains that over defense counsel's objection, witness Bland was allowed to testify that it was common for people to attempt to get a cash refund from Wal-Mart for items, such as cigarettes, which had not been purchased at Wal-Mart. The cigarettes found in Petitioner's possession had been identified as coming from a Homeland store. Thus, Petitioner argues the jury was allowed to hear evidence that Petitioner was involved in a scheme to obtain money by false pretenses.

Petitioner presented this claim to the OCCA on direct appeal. See #14, Ex. B, Petitioner's claim I. The state appellate court determined that the evidence concerning the cigarettes was "plainly not part of the res gestae of the larceny of the VCR" and that admission of the testimony

was, therefore, error. However, citing Chapman v. California, 386 U.S. 18 (1976), the OCCA also concluded "beyond a reasonable doubt the testimony regarding the cigarettes did not contribute to the jury's finding of guilt" because other evidence of Petitioner's guilt was overwhelming. As a result, the OCCA determined that the error did not require reversal of the conviction. Nonetheless, after finding that the error may have impacted the jury's sentencing decision, the OCCA reduced Petitioner's sentence from 75 years to 50 years imprisonment.

A federal habeas court is responsible only to ensure that a petitioner "was afforded the protections of due process, not to exercise supervisory powers over . . . state courts." Scrivner v. Tansy, 68 F.3d 1234, 1239-40 (10th Cir. 1995) (citing Nichols v. Sullivan, 867 F.2d 1250, 1253 (10th Cir. 1989)). To prevail on his argument concerning admission of other crimes evidence, Petitioner must show that the witness's remarks were "so prejudicial in the context of the proceedings as a whole that he was deprived of the fundamental fairness essential to the concept of due process." Id. at 1240; see also Hopkinson v. Shillinger, 866 F.2d 1185, 1197 (10th Cir.1989) ("[W]e will not disturb a state court's admission of evidence of prior crimes, wrongs or acts unless the probative value of such evidence is so greatly outweighed by the prejudice flowing from its admission that the admission denies defendant due process of law."). In this case, even if the references to other crimes was error as determined by the OCCA, any error, in light of the evidence of Petitioner's guilt, was harmless under the standard applicable in federal habeas corpus cases announced in Kotteakos v. United States, 328 U.S. 750, 776 (1946). That standard requires the Court to determine whether the error substantially and injuriously influenced the jury's verdict. See Tuttle v. Utah, 57 F.3d 879, 883 (10th Cir.1995). In light of the entire record and looking at the totality of the evidence presented, this Court finds that the error complained of here was harmless. Id. at 884. Pursuant to § 2254(d), habeas corpus relief on this claim should be denied.

3. *Prosecutorial misconduct (claim 8)*

As his eighth proposition of error, Petitioner claims that he was denied a fair trial by prosecutorial misconduct. Petitioner presented this same claim to the OCCA on direct appeal. See #14, Ex. B, proposition III. Specifically, Petitioner complains that during closing argument, the prosecutor, after introducing evidence of Petitioner's eleven (11) prior felony convictions during the sentencing phase of Petitioner's trial, made an improper comment on the possibility of parole by urging the jury to compare the actual sentences received by Petitioner to the length of time served. (#15 at 152-53). On direct appeal, Petitioner requested that the OCCA reduce his sentence as a result of this error. (#14, Ex. B at 11). In considering this claim, the OCCA concluded that the prosecutor's "unmistakable reference to the pardon and parole system resulted in prejudice to the defendant and warrants modification of sentence . . . This error in conjunction with the introduction of inadmissible other crimes evidence requires modification of sentence from seventy-five to fifty years imprisonment." (#14, Ex. A at 3 (citation omitted)).

In his reply to Respondent's response, Petitioner argues that under Okla. Stat. tit. 22, § 929, the OCCA erred in modifying his sentence rather than remanding the case for resentencing after finding error and that the OCCA's error violated federal law as provided in United States v. Tucker, 404 U.S. 443 (1972) and Townsend v. Burke, 334 U.S. 736 (1948). (#20 at 2-3). First, Petitioner's reliance on Okla. Stat. tit. 22, § 929 is misplaced. Under that statute, "[u]pon any appeal of a conviction by the defendant in a noncapital criminal case, the appellate court, if it finds prejudicial error in the sentencing proceeding only, *may* set aside the sentence rendered and remand the case to the trial court in the jurisdiction in which the defendant was originally sentenced for resentencing." Okla. Stat. tit. 22, § 929(A) (emphasis added). A remand for resentencing is not mandatory as alleged by Petitioner. In addition, the OCCA's decision to modify Petitioner's

sentence was not based on a finding that the original sentence was premised on false information. Thus, Petitioner's reliance on Tucker and Townsend is also misplaced. Therefore, the Court rejects Petitioner's argument that the OCCA's modification of his sentence "resulted in a decision that was contrary to clearly established Federal law, as determined by the Supreme Court of the United States." In addition, because the OCCA granted relief to Petitioner on this claim, this Court finds no further consideration is warranted. Therefore, the Court concludes that habeas corpus relief on this claim should be denied.

4. *Challenge to jury instructions (claim 6)*

As his sixth proposition of error, Petitioner alleges that the trial court's first stage instructions inferred that Petitioner was a repeat offender. Petitioner presented this claim to the OCCA on direct appeal where the claim was summarily rejected. (#14, Exs. A and B). Petitioner's argument is premised on the fact that during the first stage of trial, the trial court instructed the jury that "[y]ou are instructed that the sole question for the consideration of the jury at this stage of the trial is whether the defendant is guilty or not guilty. The matter of punishment is not to be considered by you at this stage of the proceedings." See #14, Ex. B at 8. According to Petitioner, this instruction was prejudicial because it informs a juror familiar with bifurcated trials that the defendant was a prior felon.

In the instant action, Petitioner has failed to assert a basis for finding that the OCCA's rejection of this claim on direct appeal warrants issuance of the writ under 28 U.S.C. § 2254(d). Furthermore, in a habeas proceeding attacking a state court judgment based on an erroneous jury instruction, a petitioner has a great burden. Lujan v. Tansy, 2 F.3d 1031, 1035 (10th Cir.1993). A state conviction may only be set aside on the basis of erroneous jury instructions when the errors had

the effect of rendering the trial so fundamentally unfair that a fair trial was denied. Shafer v. Stratton, 906 F.2d 506, 508 (10th Cir.1990). It is not sufficient to show that "the instruction is undesirable, erroneous, or even universally condemned." Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (quoting Cupp v. Naughten, 414 U.S. 141, 146 (1973)). Rather, Petitioner must establish the instruction "so infected the entire trial that [the] resulting conviction violates due process." Id. (quoting Naughten, 414 U.S. at 147). The degree of prejudice from the challenged instruction must be evaluated in the context of the events at the trial. United States v. Frady, 456 U.S. 152, 169 (1982). Having carefully reviewed the record, the court is not convinced that the instruction referencing a second stage punishment proceeding constituted a violation of due process. Any error in this case is harmless because there was clearly sufficient independent evidence to convict. Therefore, after reviewing the record, the Court finds habeas relief is not warranted under § 2254(d).

5. *Ineffective assistance of appellate counsel (part of claim 1)*

As part of his first proposition of error, Petitioner complains that he was denied effective assistance of appellate counsel because appellate counsel "refused to raise obvious constitutional violations which would constitute fundamental errors requiring reversal of the conviction and sentence." (#1 at 4). Petitioner presented this claim to the OCCA on post-conviction appeal, where the OCCA considered and rejected the claim on the merits, stating that "[f]ailure to raise each and every issue is not determinative of ineffective assistance of counsel and counsel is not required to advance every cause of argument regardless of merit." (#14, Ex. C at 3 (citation omitted)).

To prevail on a claim of ineffective assistance of appellate counsel, Petitioner must show that his appellate counsel's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); Hickman v. Spears, 160 F.3d 1269, 1273 (10th

Cir. 1998). There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Strickland, 466 U.S. at 688. In making this determination, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. To establish the prejudice prong of the Strickland test, Petitioner must show that the allegedly deficient performance prejudiced the defense; namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. The Court will address each of Petitioner's claimed instances of ineffective assistance of appellate counsel.

a. Failure to raise ineffective assistance of trial counsel

Petitioner argues he received ineffective assistance of appellate counsel because appellate counsel failed to raise ineffective assistance of trial counsel on direct appeal. After reviewing the record in this case, the Court finds Petitioner is unable to satisfy either prong of Strickland. Petitioner maintains that he received ineffective assistance of trial counsel because his attorney failed to present his defense, failed to call requested witnesses, and failed to object to "harpoons" injected by the prosecutor. (#1 at 4). However, Petitioner has failed to overcome the strong presumption that his attorney's decisions made at trial "might be considered sound trial strategy." Strickland, 466 U.S. at 689. Here, counsel's decision to refrain from calling the requested defense witness clearly resembles trial strategy and Petitioner has not overcome his burden to establish otherwise. Moreover, even assuming that Petitioner established deficient performance, the Court finds he has shown no prejudice under Strickland, i.e., no reasonable probability that, had counsel not committed the errors he now claims were committed, the outcome of the case would have been different. Bearing in mind that, in evaluating prejudice, the Court must look at the "totality of the evidence," Cooks v. Ward, 165 F.3d 1283, 1293 (10th Cir. 1998), the Court finds no reasonable

probability that the jury would have reached a different verdict. The record in this case is "replete with evidence of Petitioner's guilt." Id. While his counsel may have more vigorously attempted to undermine the State's theory of the case, there was no reasonable probability of success, given the strength of evidence presented by the State. The Court finds appellate counsel did not provide ineffective assistance of counsel in failing to raise a claim of ineffective assistance of trial counsel on direct appeal.

b. Failure to raise Flores issue

Petitioner claims that appellate counsel's failure to challenge an allegedly improper jury instruction on the presumption of innocence constitutes ineffective assistance. In Flores v. State, 896 P.2d 558, 562 (Okla. Crim. App. 1995), the Oklahoma Court of Criminal Appeals held that Judge Hopper's deviation from the uniform jury instructions regarding the presumption of innocence and the state's burden of proof when the jury was deciding the guilt or innocence of a defendant was reversible error. In the instant case, Petitioner's trial attorney did not object to the jury instructions proposed by the trial court (#15 at 123). Petitioner was represented by different counsel on appeal, however, who argued four grounds but did not raise an issue relating to the modified jury instruction. The Court of Criminal Appeals decided Flores on January 24, 1995, after Petitioner's trial in June, 1992, after Petitioner filed his notice of appeal, and more than nine (9) months after Petitioner's appellate counsel filed his brief-in-chief on April 20, 1994. The Oklahoma Court of Criminal Appeals entered its order affirming Petitioner's conviction on August 25, 1995, or seven (7) months after issuing the Flores decision.

As noted above, the state courts, including the same Court of Criminal Appeals which decided the Flores case, determined that appellate counsel's failure to challenge the jury instruction on direct appeal did not constitute ineffective assistance of counsel. The state courts correctly noted that counsel need not pursue every meritorious claim in order to render reasonably effective counsel. See Murray v. Carrier, 477 U.S. 478 (1986). Furthermore, the Tenth Circuit Court of Appeals has held that appellate counsel's failure to challenge the instruction at issue in Flores prior to issuance of the Flores opinion did not constitute ineffective assistance of appellate counsel. Sherrill v. Hargett, 184 F.3d 1172, 1175-76 (10th Cir. 1999). The Tenth Circuit has also stated that "counsel is not ineffective for failing to anticipate arguments or appellate issues which are based on decisions issued after the appeal was submitted." Burton v. Martin, No. 98-7034, 1998 WL 694531 (10th Cir. Oct. 6, 1998) (rejecting claim of ineffective assistance of appellate counsel for failing to raise Flores issue prior to issuance of Flores opinion and citing Lilly v. Gilmore, 988 F.2d 783, 786 (7th Cir. 1993)). Therefore, this Court concludes that the state courts' rejection of Petitioner's claim was based on a reasonable application of federal law. Accordingly, Petitioner is not entitled to habeas relief on this ground.

c. Failure to raise issue of validity of prior convictions used to enhance

During the sentencing phase of Petitioner's trial, the State introduced evidence of Petitioner's eleven (11) prior felony convictions. The evidence consisted of certified copies of Judgments and Sentences (#15 at 138-143; copies of the Judgments and Sentences attached to transcript). In support of his claim in the instant case, Petitioner states that he had filed a state petition for writ of habeas corpus in which he outlined the bases for the invalidity of his prior convictions. Petitioner further alleges that "instead of ruling on the duly verified and properly served writ of habeas corpus, the Judge suspended right to writ of habeas corpus and used the invalid prior convictions anyway."

(#1 at 7.b). In addition, Petitioner testified during the sentencing phase of his trial that one of his prior convictions was entered when he was a juvenile and that at least one other of his prior convictions was the result of a guilty plea entered unknowingly and involuntarily. (#15 at 147). However, he offered no evidence to support his claims at trial and no evidence in the instant habeas proceedings to support his claim of ineffective assistance of appellate counsel. Accordingly, because Petitioner failed to meet his burden of showing the invalidity or inapplicability of the prior convictions, see Mansfield v. Champion, 992 F.2d 1098, 1105, 1106 (10th Cir.1993) (holding constitutional the Oklahoma procedure providing that a certified copy of judgment and sentence constitutes prima facie evidence of prior conviction and shifting the burden to defendant to produce evidence showing the invalidity of the conviction), he has failed to satisfy the deficient performance prong of the Strickland standard. As a result, Petitioner has failed to demonstrate that appellate counsel provided ineffective assistance in failing to raise this claim on direct appeal.

d. Failure to raise jurisdictional challenge based on suspension of writ

Petitioner sought state habeas corpus relief during the pendency of his trial proceedings. See #1, Order Denying Petition for Writ of Habeas Corpus, attached as Ex. D to petition. The OCCA denied habeas corpus relief, stating that the claims Petitioner sought to raise were appropriate issues to raise on direct appeal and further stating that Petitioner had failed to raise his habeas claims in the proper state district court before presenting them to the OCCA. Petitioner's claim that the state trial court judge "chose to suspend the petitioner's right to writ of habeas corpus" (#1 at 7.c) is patently without merit and appellate counsel did not provide ineffective assistance in failing to raise the claim on direct appeal.

After reviewing each of Petitioner's allegations of ineffective assistance of appellate counsel, the Court finds that Petitioner has failed to show either that counsel provided deficient performance

or that the results of his appeal would have been different but for the allegedly deficient performance by his counsel. As a result, Petitioner has failed to satisfy two-pronged Strickland standard. Therefore, pursuant to § 2254(d), the Court concludes habeas corpus relief on Petitioner's claim of ineffective assistance of appellate counsel must be denied.

D. Procedural bar

Respondent asserts that Petitioner's claims numbered 2, 4, 5, and that part of claim 1 asserting ineffective assistance of trial counsel are procedurally barred and should be denied on that basis. In his reply to Respondent's response, Petitioner states that he "did not raise these claims as separate (sic) grounds for relief in the state court proceedings as the respondent argues neither did the petitioner intend for the claims to be construed as such in the federal habeas proceeding. Rather, as alleged in the state courts the claims set forth in grounds II, IV, V and part of ground I of the federal habeas petition are underlying 'acts or omissions' in support of the petitioner's claim of ineffective assistance of appellate counsel." (#20 at 1).

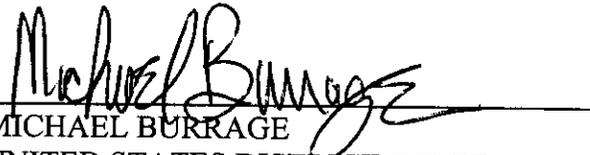
To the extent Petitioner asserts the designated claims only as instances of ineffective assistance of appellate counsel, the claims have been addressed and rejected in part C(5), above. Because Petitioner has indicated he did not intend to raise the claims as separate claims, the Court will not address Respondent's contention that the claims are procedurally barred.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. The petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus (#1) is **denied**. Petitioner's "motion for entry of declaratory judgment" (#28) is **moot**.

SO ORDERED THIS 20th day of March, 2000.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE