

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

F I L E D

APR 10 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
THE SUM OF TWENTY-THREE)
THOUSAND ONE HUNDRED THIRTY)
DOLLARS (\$23,130.00))
IN UNITED STATES CURRENCY;)
et al.)
)
Defendants.)

CIVIL ACTION NO. 96-CV-1085-C

ENTERED ON DOCKET

DATE APR 10 2000

**ORDER GRANTING GOVERNMENT'S
MOTION TO DISMISS WITHOUT PREJUDICE**

THIS MATTER comes on for consideration of the Government's motion to dismiss the above styled cause of action without prejudice. Upon consideration of the matter, the Court finds that the Government's motion should be and it is hereby granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above styled cause of action is dismissed without prejudice.

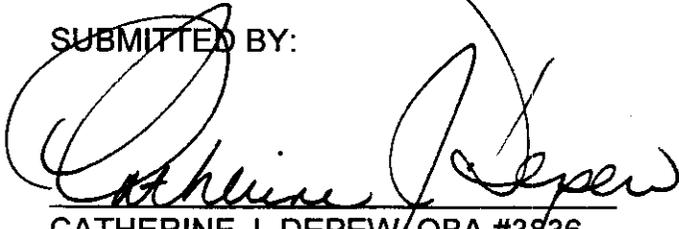
ENTERED this 10th day of April, 2000.



H. DALE COOK
Senior Judge of the United States District Court
for the Northern District of Oklahoma

30

SUBMITTED BY:

A handwritten signature in black ink, appearing to read "Catherine DePew". The signature is written in a cursive style with large, flowing loops.

CATHERINE J. DEPEW, OBA #3836
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, OK 74103
(918) 581-7463

F I L E D
APR 10 2000

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

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RAILROAD SIGNAL, INC.,
Plaintiff(s),
vs.
BORDER PACIFIC RAILROAD,
Defendant(s).

Case No. 99-C-294-B ✓

ENTERED ON DOCKET
DATE APR 10 2000

ORDER DISMISSING ACTION
BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

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

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

IT IS SO ORDERED this 10th day of April, 2000.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

F I L E D

APR 10 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JOHN F. FAIR,)
)
 Plaintiff,)
)
 vs.)
)
 WEBCO INDUSTRIES, INC., an)
 Oklahoma Corporation, BRIAN)
 CLEMONT, JASON BURGESS,)
 RICK WRIGHT, KIRK BACON,)
 CHARLIE BATTENFIELD, JESSIE)
 JOHNSON, CHARLIE ANDREWS)
 and KEVIN LASSITER,)
)
 Defendants.)

CASE NO. 99-CV-0574E (M)

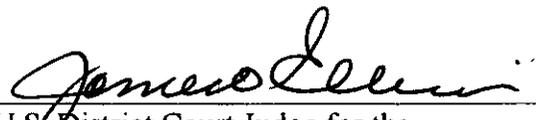
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DATE APR 10 2000

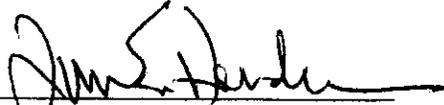
ORDER OF DISMISSAL

Now on this 29th day of March, 2000, on the Plaintiff's Oral Motion to dismiss his Title VII claims against all individual defendants in this action, and for good cause shown, this Court FINDS, ORDERS, ADJUDICATES and DECREES that Plaintiff's First Cause of Action, for violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), is hereby dismissed without prejudice as to the following individual Defendants: Brian Clements, Jason Burgess, Rick Wright, Kirk Bacon, Charlie Battenfield, Jessie Johnson, Charlie Andrews and Kevin Lasater.

Dated this 6th day of April, 2000.


 U.S. District Court Judge for the
 Northern District of Oklahoma

Approved as to Form:



Tim E. Hendren, Esq.
324 South Main, Suite 607
Tulsa, OK 74103
(918) 583-0800 - telephone
(918) 582-7550 - facsimile

William H. Hinkle, Esq.
4815 South Harvard, Suite 385
Tulsa, OK 74135
(918) 747-1400 - telephone
(918) 747-1483 - facsimile
ATTORNEYS FOR PLAINTIFF JOHN F. FAIR

Approved as to form:

STRECKER & ASSOCIATES, P.C.



David E. Strecker, OBA #8687

James E. Erwin, OBA #17615

1600 Bank of America Center

15 W. Sixth Street

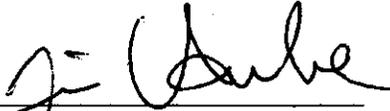
Tulsa, Oklahoma 74119

Phone: (918) 582-1716

Fax: (918) 582-1780

ATTORNEYS FOR DEFENDANTS WEBCO
INDUSTRIES, INC., CHARLIE ANDREWS,
AND KEVIN LASATER

Approved as to Form:

A handwritten signature in black ink, appearing to read "Jim Huber", written over a horizontal line.

Jim Huber (OBA #15173)

1924 South Utica, Suite 810

Tulsa, OK 74104-6103

(918) 747-3491 - telephone

(918) 743-6103 - facsimile

ATTORNEY FOR DEFENDANTS

BRIAN CLEMENTS, JASON BURGESS,

RICK WRIGHT and KIRK BACON

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR - 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ASSURANCE COMPANY OF)
AMERICA, a New York Corporation.)

Plaintiff,)

v.)

Case No. 99CV0260B (J)

UNITED STATES EXTERIORS, INC.,)

an Oklahoma corporation, TERRY L.)

DAVIS, THOMAS M. WALPOLE,)

ROBERT WALLER, NEENA INN, INC.,)

d/b/a SUPER 8 MOTEL AT I-44, an)

Oklahoma corporation,)

Defendants.)

ENTERED ON DOCKET
DATE APR 07 2000

JUDGMENT

On the 7th day of April, 2000, the above-captioned matter came before this Court on the motion of Plaintiff, Assurance Company of America, for default declaratory judgment against Defendants, United States Exteriors, Inc., Terry L. Davis, Thomas M. Walpole, Robert Waller, and Neena Inn, Inc., d/b/a/ Super 8 Motel at I-44. The Plaintiff appeared through its attorney of record, Rhodes, Hieronymus, Jones, Tucker and Gable by John H. Tucker. The Defendants appeared not and are in default.

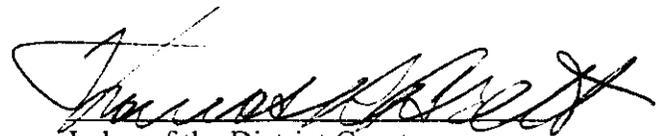
The Court, having reviewed the pleadings, having heard the evidence and arguments of counsel, and being fully advised finds as follows:

1. That Defendants have been properly served with the Complaint, Summons, Motion for Default Judgment, Order Setting Default Judgment for Hearing, and Notice of Default Judgment;
2. Pursuant to Plaintiff's Application for Entry of Default by the Clerk, the Clerk entered default in this case on January 19, 2000;

3. That such service upon Defendants is hereby adjudged proper and in all respects sufficient to give this Court jurisdiction over this matter and Defendants;
4. That, although Defendants had proper notice of the this suit and the Complaint filed therein, Defendants have neither answered nor otherwise responded to Plaintiff's allegations;
5. That, although Defendants had proper notice of the hearing on Plaintiff's Motion for Default Judgment, Defendants neither responded to such Notice nor appeared at the scheduled hearing;
6. That Defendants are in default and thereby admit all allegations contained in Plaintiff's Complaint and Amended Complaint;
7. That the allegations of the Complaint and Amended Complaint are therefore deemed true against Defendants;
8. That CGL Policy No. SCP 30296660 provides no coverage for defense or indemnity to any of the Defendants concerning Neena Inn Inc.'s \$350,000.00 Tulsa County District Court judgment, Case No. CJ-98-2195, against United States Exteriors, Inc.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff, Assurance Company of America, is entitled to a declaratory judgment against Defendants, United States Exteriors, Inc., Terry L. Davis, Thomas M. Walpole, Robert Waller, and Neena Inn, Inc., d/b/a Super 8 Motel at I-44, that Assurance Company of America CGL Policy No. SCP 30296660 does not provide any coverage for defense or indemnity concerning Neena Inn Inc.'s \$350,000.00 Tulsa County District Court judgment, Case No. CJ-98-2195, against United States Exteriors, Inc.

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


Judge of the District Court

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

FILED

APR - 6 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CRAIG NEON, INC., an Oklahoma
corporation, and REZA TORABY-
PAYHAN, also know as RAY TORABY,

Plaintiffs,

vs.

No. 99-C-63-B(E) ✓

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

Defendants.

ENTERED ON DOCKET

DATE APR 07 2000

ORDER

Before the Court is the motion for judgment as a matter of law filed by defendants Trent McKenzie ("McKenzie"), New Rapid of Kansas, L.L.C. and New Rapid of Oklahoma, L.L.C. (collectively referred to as "New Rapid") (Docket No. 180). At the conclusion of the trial in this case, the Court entered judgment pursuant to the jury's verdict in favor of Plaintiff Craig Neon, Inc. ("Craig Neon") and against defendants McKenzie and New Rapid on Plaintiff's claim for deceit, and in favor of defendants and against Plaintiff Craig Neon on Plaintiff's claim under the Oklahoma Uniform Trade Secrets Act ("UTSA"), 78 O.S. §§85-92.¹ Defendants argue to set aside the judgment in favor of Craig Neon on its fraud claim pursuant to Fed.R.Civ.P. 50(b) because the UTSA precludes plaintiff's common law fraud claim and plaintiff did not meet its

¹ At the end of Plaintiffs' case-in-chief, the Court granted Defendants' motion pursuant to Fed.R.Civ.P. 50(a) against Plaintiff Reza Toraby-Payhan, also known as Ray Toraby. Accordingly, all claims brought by Plaintiff Reza Toraby-Payhan, individually, were dismissed on the merits.

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proving fraud by clear and convincing evidence.

Section 92 of the Oklahoma UTSA provides:

- A. Except as provided for in subsection B of this section, the Uniform Trade Secrets Act displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.
- B. The Uniform Trade Secrets Act does not affect:
 - 1. contractual remedies, whether or not based upon misappropriation of a trade secret; or
 - 2. other civil remedies that are not based upon misappropriation of a trade secret; or
 - 3. criminal remedies, whether or not based upon misappropriation of a trade secret.

78 O.S. §92. Pursuant to §92, Craig Neon's fraud claim would be precluded if it conflicts with the UTSA; *i.e.*, if it is "based upon misappropriation of a trade secret."

Oklahoma courts have not addressed which common law torts have been displaced by Oklahoma's adoption of the UTSA. Nor, as noted by the court in *Powell Products, Inc. v. Marks*, 948 F.Supp. 1469 (D.Colo. 1996), have courts in other UTSA jurisdictions uniformly interpreted the preemption issue:

Several courts have stated that where a plaintiff alleges in his complaint that information was misappropriated and that such information constituted trade secrets, all claims that are factually related to that misappropriation are preempted. See, e.g., *Hutchison v. KFC Corp.*, 809 F.Supp. 68, 71 (D.Nev.1992). Other courts reason that a plaintiff should be permitted to proceed upon all causes of action "to the extent that the causes of action have 'more' to their factual allegations than the mere use or misappropriation of trade secrets." See *Micro Display Sys., Inc. v. Axtel, Inc.*, 699 F.Supp. 202, 204-05 (D.Minn.1988). Finally, some courts have held that common law tort claims are preempted only "to the extent directed at trade secret misappropriation," implying that certain common law claims do not depend upon the information misused being in the nature of a trade secret. *Web Communications Group, Inc. v. Gateway 2000, Inc.*, 889 F.Supp. 316, 321 (N.D.Ill.1995).

Id. at 1474.

The Court concurs with the *Powell* court's analysis and conclusion:

I disagree with those courts that have applied a blanket preemption to all claims that arise from a set of circumstances that happen to involve information that the plaintiff claims is in the nature of a trade secret. "The preemption provisions can be somewhat worrisome if they are applied mechanistically or overly conceptually. Our common law is richly flexible in redressing wrongs for improper conduct which in full or in part involves the use of information derived from the plaintiff." Roger M. Milgrim, *Milgrim on Trade Secrets*, § 1.01[4], at 1-68.14 (1996). It is neither necessary nor prudent to preclude all common law claims that are connected with the misappropriation of what a plaintiff claims are trade secrets.

Often, a plaintiff will be able to state claims that do not depend upon the information in question qualifying as trade secrets. For example, here, plaintiff claims that defendants interfered with its business relationships. Although plaintiff contends that its manufacturing process and machine are protectable trade secrets, its claims for interference do not depend upon that determination. Defendants could be liable for interference with business relations even if they did not misappropriate any trade secrets from plaintiff. Accordingly, those claims would not conflict with the UTSA and are not preempted.

In addition, a plaintiff may also bring claims that, although involving a trade secret misappropriation issue, include additional elements not necessary for a misappropriation claim under the UTSA. For example, here, plaintiff alleges that defendants conspired to misappropriate its trade secrets, which requires an agreement, which is not an element of a misappropriation claim under the UTSA. This claim too does not conflict with the UTSA and will not be preempted.

Preemption is only appropriate where "other claims are no more than a restatement of the same operative facts which would plainly and exclusively spell out only trade secret misappropriation." *Milgrim, supra*.

Id.

The pertinent inquiry, therefore, is centered in a comparison of the elements of the UTSA and fraud claims brought by Craig Neon. To establish a claim under the UTSA, Craig Neon had to prove by a preponderance of the evidence (1) the existence of a trade secret; (2) misappropriation of this secret by defendants; and (3) use of the secret to the detriment of the plaintiffs. *Micro Consulting, Inc. v. Zubeldia*, 813 F.Supp. 1514, 1534 (W.D.Okla. 1990), *aff'd* 959 F.2d 245 (10th Cir. 1992). A "trade secret" is defined in the Oklahoma UTSA as follows:
information, including a formula, pattern, compilation, program, device, method,

technique or process, that:

- a. derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- b. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

78 O.S. §86(4). Thus, "[p]roving the existence of a trade secret requires proof of (1) information not generally known in the industry (2) which gives rise to a competitive advantage to the owner of such information and (3) which is maintained as a secret. *Micro Consulting*, 813 F.Supp at 1534. To establish its fraud claim, Craig Neon had to establish by clear and convincing evidence the following :

1. That defendants made a material representation;
2. That it was false;
3. That defendants made it when defendants knew it was false, or made it as a positive assertion recklessly, without any knowledge of its truth;
4. That defendants made it with the intention that it should be acted upon by plaintiff;
5. That plaintiff acted in reliance upon it; and
6. That plaintiff thereby suffered injury.

Oklahoma Uniform Jury Instruction 18.1. Clearly, the elements of each claim are distinct and the fraud claim does not require proof of the existence or misappropriation of a trade secret.

Defendants, however, argue the fraud claim is "based entirely upon its allegation that the Defendants agreed to keep confidential certain plans and a model created by Craig Neon" and therefore, "arises from the very same facts as its claim for misappropriation of a trade secret."

Defendants' Motion for Judgment as a Matter of Law, pp. 3-4. The Court concludes §92 cannot be read so broadly as to preclude all alternative tort theories of recovery simply because the claims arise from the same dispute. Indeed, applying the broadest interpretation of UTSA

preemption, the *Hutchison* court did not preclude a fraud claim arising from the same dispute. *Hutchison v. KFC Corp.*, 809 F.Supp. 68 (D. Nev. 1992)(allowing a fraud claim to be pleaded with more particularity although dismissing claims for unjust enrichment, unfair competition and breach of confidential relationship); *see also Herbster v. Global Intermediary, Inc.*, 1991 WL 2056569 (D.Kan. 1991) (denying motion to dismiss plaintiff's claims for fraud and breach of the duty of good faith finding Kansas Uniform Trade Secrets Act did not preclude these claim) and *Ace Novelty Co., Inc. v. Vijuk Equipment, Inc.*, 1990 WL 129510 at *3-4 (N.D.Ill. 1990)(interpreting the Illinois Trade Secrets Act which states the "act is intended to displace . . . other laws of this State providing civil remedies for misappropriation of a trade secret" to exclude common law claim of conversion of Ace's design of an improved type of soft ticket to be used in pull tab games and the particular specifications for the equipment needed to manufacture them, "to the extent that Illinois law did provide common law protection for the conversion of intangible property such as trade secrets," but does not exclude common law claims of fraud, bad faith and breach of contract). The jury was properly instructed as to the elements of each claim and apparently concluded the model and plans for New Rapid's signage did not meet the requirements of a trade secret. Such would not preclude alternative findings that McKenzie and New Rapid falsely represented they would not use the model and/or plans if they did not award the contract to Craig Neon and that Craig Neon relied on that representation in allowing them to take possession of the model and/or plans.

Finally, defendants argue there was no basis for the jury's verdict in favor of Craig Neon on its fraud claim and therefore the Court should set aside that judgment. The Court concludes the evidence presented at trial was sufficient to submit the fraud claim to the jury for its

determination.

Accordingly, defendants' motion for judgment as a matter of law (Docket No. 180) is denied.

IT IS SO ORDERED, this 6th day of April, 2000.

A handwritten signature in cursive script, reading "Thomas R. Brett". The signature is written in black ink and is positioned above the printed name and title.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

APR 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LISA WILLIAMS,)
)
Plaintiff,)
)
vs.)
)
BURLINGTON NORTHERN SANTA FE)
RAILWAY COMPANY, and EVERETT)
REYNOLDS TRUCKING COMPANY,)
)
Defendants. (

No. 99CV 0371H (J)

STIPULATION FOR DISMISSAL WITH PREJUDICE

Come now the Plaintiff and defendants and hereby stipulate to the dismissal of the above styled cause with prejudice to future filing.

CHESTER H. LAUCK, III
H. CHRIS CHRISTY
JONES & GRANGER
for the Plaintiff

Chester H. Lauck III

A. CAMP BONDS, JR.
BONDS, MATTHEWS,
BONDS & HAYES
for Defendant Burlington
Northern and Santa Fe
Railway Company

A. Camp Bonds

JAMES K. SECREST, II
SECREST, HILL & FOLLUO
for Defendant Everett
Reynolds Trucking Co.

James K. Secrest

clj

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

FILED
APR 7 2000

DAWNA O'DONOHUE, a resident of the State)
of Missouri,)

Plaintiff,)

v.)

WORLDCOM NETWORK SERVICES, INC.,)
a Delaware corporation,)
MCI WORLDCOM NETWORK SERVICES,)
INC., f/k/a MCI COMMUNICATIONS)
CORPORATION, a Delaware corporation, MCI)
WORLDCOM, INC., a Georgia corporation,)
MCI TELECOMMUNICATIONS)
CORPORATION, a Delaware corporation.)

Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 00-CV-0032-H(M) ✓

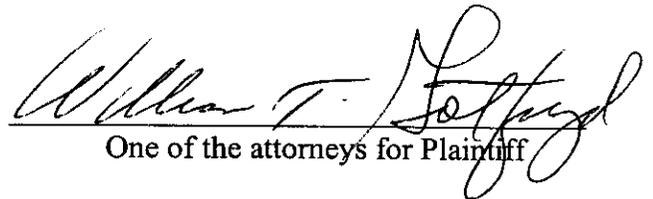
Hon. Sven Erik Holmes

ENTERED ON DOCKET

DATE APR 7 2000

**PLAINTIFF'S NOTICE OF VOLUNTARY
DISMISSAL WITHOUT PREJUDICE PURSUANT
TO FEDERAL RULE OF CIVIL PROCEDURE 41(a)(1)**

Plaintiff, Dawna O'Donohue, by and through her attorneys hereby gives here Notice of Voluntary Dismissal of this action without prejudice pursuant to Rule 41(a)(1) F.R.Civ.P., where none of the defendants has filed an Answer or a Motion for Summary Judgment.


One of the attorneys for Plaintiff

Arthur T. Susman
Charles R. Watkins
Susman & Watkins
Two First National Plaza, Suite 600
Chicago, Illinois 60603
(312) 346-3466

CIT
mail
copy held

Kenneth E. Crump, Jr.
Crump, Tolson & Page, L.L.P.
1516 South Boston Avenue
Suite 318
Tulsa, Oklahoma 74119-4019
(918) 583-2393

William T. Gotfryd
Of Counsel
Susman & Watkins
Two First National Plaza
Suite 600
Chicago, Illinois 60603
(312) 346-3466

Dated: April 6, 2000

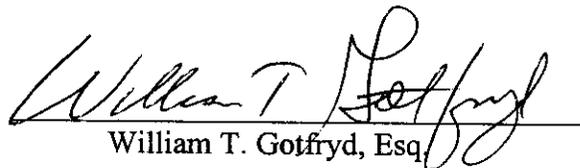
CERTIFICATE OF SERVICE

The undersigned certifies that he is one of the attorneys of record for plaintiff caused a copy of the attached Plaintiff's Notice of Voluntary Dismissal Without Prejudice Pursuant to Federal Rule of Civil Procedure 41(a)(1) to be served upon:

David Handzo, Esq.
Jenner & Block
601- 13th Street, NW
Suite 1200
Washington, DC 20005

J. Kevin Hayes, Esq.
Hall, Estill, Hardwick, Gable,
Golden & Nelson
320 S. Boston Ave. Suite 400
Tulsa, OK 74103

by mailing the same via First Class Mail thereto this 6th day of April 2000 before the hour of 5:00 p.m.


William T. Gotfryd, Esq.

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

ALEXANDRIA FEDEROV,
Administratrix of the Estate of
MICHELE C. FEDEROV, deceased,

Plaintiff,

v.

ARDEN WHITE and DARVIN
WHITE, d/b/a ARDEN WHITE
TRUCKING; ARDEN WHITE
TRUCKING, INC.; and WILSHIRE
INSURANCE COMPANY,

Defendants.

ENTERED ON DOCKET
DATE APR 07 2000

Case No. 99-CV-326-K(J)

F I L E D

APR 07 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised by Settlement Judge Gerald Hilsher on March 31, 2000, that the parties 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 5 day of APRIL, 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

RICKY L. PREWITT,
SSN: 441-70-4295

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

FILED

APR 07 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99-CV-317-J

ENTERED ON DOCKET

DATE APR 07 2000

ORDER^{1/}

Plaintiff, Ricky L. Prewitt, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because (1) the ALJ failed to give appropriate weight to the opinion of the treating physician, (2) the ALJ did not adequately discuss his conclusions with regard to Plaintiff's mental status and the Psychiatric Review Technique Form ("PRT"). For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was born September 28, 1962, and was 35 years old at the time of the hearing before the ALJ. [R. at 75]. Plaintiff completed high school and two years of

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

^{2/} Administrative Law Judge Stephen C. Calvarese (hereafter "ALJ") concluded that Plaintiff was not disabled by Order dated on January 29, 1998. [R. at 9]. Plaintiff appealed to the Appeals Council. The Appeals Council declined Plaintiff's request for review on March 2, 1999. [R. at 5].

college. [R. at 31]. Plaintiff, at the time of the hearing before the ALJ, lived with his brother, and was financially supported by his brother.

Plaintiff was hospitalized at Griffin Memorial Hospital from June 12, 1996 until July 15, 1996. [R. at 43]. Plaintiff apparently had an altercation with his father and caused extensive property damage to his father's trailer. The admission notes indicated that Plaintiff's father obtained a protective order against Plaintiff.

The admission notes indicate that Plaintiff believed that the F.B.I. was following him, and that Plaintiff lacked insight into his condition. [R. at 40].

Plaintiff was placed on medications, and the treatment notes report few side effects, and indicate that Plaintiff's paranoid ideation was markedly decreased with medication. [R. at 63].

Plaintiff testified that in 1991 he was working three different jobs and was extremely stressed. According to Plaintiff, he was hospitalized in 1991 after causing considerable damage to his mother's home. [R. at 80]. Plaintiff stated that he was informed by one of his doctors that he should not work due to the stress which work placed on him. In 1996, Plaintiff was again hospitalized after causing damage to his father's house. [R. at 83]. Plaintiff testified that he did not damage his father's house. [R. at 83]. Plaintiff's brother testified that Plaintiff is in denial and that Plaintiff did damage his father's house. [R. at 97].

On the disability report, Plaintiff wrote that he is a paranoid schizophrenic. [R. at 139]. Plaintiff noted that in 1991 he caused over \$6,000 in damage to his

mother's home. [R. at 139]. Plaintiff's home burned down, and Plaintiff's mother suggested that the cause of the fire was arson. [R. at 190].

The record indicates that Plaintiff believes that the F.B.I. followed him, that the police watch him, that he was bugged, and that his father stole an \$11,000 check from him. In addition, Plaintiff apparently harassed a disc jockey and had a restraining order entered against him by his father. [R. at 176].

Plaintiff was examined by Ronald Passmore, M.D., on November 22, 1996. Dr. Passmore indicated that Plaintiff had difficulty when he was not on his medications. Dr. Passmore noted that Plaintiff currently lived with his brother, watched a lot of television, and had minimal stressors in his life. [R. at 203]. Dr. Passmore indicated that Plaintiff had a paranoid disorder which was apparently being adequately treated. [R. at 204].

Two Psychiatric Review Technique Forms were completed by two separate doctors. One, which was completed on December 9, 1996, indicated that Plaintiff's impairment was not severe, and that Plaintiff was currently in remission on his medications. [R. at 207]. A second PRT Form, completed February 11, 1997, indicated Plaintiff's impairment was not severe and was in remission. [R. at 216]. Each form noted that Plaintiff had "slight" restrictions of daily living, "slight" difficulties in maintaining social functioning, "never" had deficiencies of concentration or pace, and "never" had episodes of deterioration in work or work-like settings. [R. at 214].

A "Mental Status Form" completed by one of Plaintiff's physicians noted that Plaintiff has difficulty reacting to peers, was able to handle very simple instructions, that his judgment was very limited, and that he had difficulty forming relationships. [R. at 225]. Plaintiff's doctor noted that Plaintiff was unable to handle the pressure of work or relate to co-workers, and that Plaintiff could not function well independently. [R. at 225].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

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

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

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

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

42 U.S.C. § 423(d)(2)(A).^{3/}

^{3/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings,

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

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

"The finding of the Secretary^{4/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to

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).

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

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

Plaintiff was last insured for the purpose of social security disability insurance on December 31, 1996. [R. at 75]. The ALJ observed that Plaintiff's treatment notes indicated that Plaintiff had a bright affect, was oriented times four, denied hallucinations or paranoia, and was friendly and comfortable. The ALJ concluded that Plaintiff did have a severe schizophreniform disorder. The ALJ found that the disorder resulted in only slight restrictions of activities of daily living, "moderate" difficulties in maintaining social functioning, "seldom" deficiencies of concentration, persistence, or pace, and perhaps one episode of deterioration. The ALJ found that when Plaintiff followed his prescribed treatment he retained the ability to perform work-related activities. The ALJ concluded that although Plaintiff could not perform his past

relevant work, Plaintiff could perform other jobs in the national economy and therefore was not disabled.

IV. REVIEW

WEIGHT GIVEN TO TREATING PHYSICIAN REPORT

Plaintiff asserts that the ALJ incorrectly rejected the opinion of one of Plaintiff's treating physicians while adopting the opinion of a consulting examiner who saw Plaintiff for one brief visit. Plaintiff describes the treating physician's report as noting Plaintiff had a GAF between 41 and 50,^{5/} that Plaintiff had a flat affect, that Plaintiff exhibited violence, that Plaintiff had paranoid ideation, and that Plaintiff should avoid any severe stressors, including work. Plaintiff states that the ALJ discounted the treating physician opinion and chose to rely on a consulting examiner who did not review any of Plaintiff's medical records.

The ALJ did, briefly, discuss the treating physician opinion. The ALJ noted that the treating records at Parkside in July 1996, indicated Plaintiff had a bright affect, was oriented times four, and was stable. The ALJ concluded that the Plaintiff's condition stabilized with treatment and medication, and that Plaintiff was therefore able to work.

As noted by Plaintiff, a treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the

^{5/} Plaintiff notes that this indicates a serious impairment.

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

- (1) the length of the treatment relationship and the frequency of examination;
- (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed;
- (3) the degree to which the physician's opinion is supported by relevant evidence;
- (4) consistency between the opinion and the record as a whole;
- (5) whether or not the physician is a specialist in the area upon which an opinion is rendered; and
- (6) other factors brought to the ALJ's attention which tend to support or contradict the opinion.

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

The ALJ only briefly discussed the opinion of the treating physician. In addition, as noted above, the treating physician wrote that Plaintiff could not handle the stress involved with work. When Plaintiff was examined by the social security examiner, Dr. Passmore, Plaintiff was not, at the time of the examination, working. Dr. Passmore noted that Plaintiff's stressors were minimal. Nothing in the record supports the ALJ's conclusion that Plaintiff would be able to work. The ALJ relied on treatment notes

during a time period when Plaintiff was not working and his stresses were minimal. The social security examiner does not address whether or if Plaintiff would be able to work, or what stresses Plaintiff would encounter if he did work. The only opinion addressing whether or not Plaintiff could work is that of the treating physician.

The opinion of the treating physician is dated March 1997, and Plaintiff's date last insured is December 31, 1996. Although this fact is noted, the ALJ gives no reason why Plaintiff's status would have drastically changed between December 31, 1996 and March 1997.

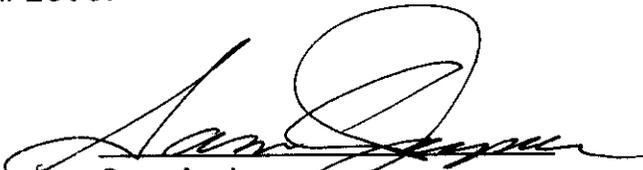
On remand, the ALJ should review the findings and conclusions of Plaintiff's treating physicians. If the ALJ concludes that an opinion of a treating physician should be rejected or disregarded, the ALJ should provide the specific reasons for disregarding or rejecting it.

PRT FORM

Plaintiff additionally asserts that the ALJ's findings on the Psychiatric Review Technique Form ("PRT Form") are conclusory and not supported by the evidence. The ALJ did attach the PRT Form to his decision. The ALJ does not discuss or explain his findings with regard to the PRT Form. On remand, the ALJ should provide the reasons for the conclusions reached on the PRT Form.

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

Dated this 7th day of April 2000.



Sam A. Joyner
United States Magistrate Judge

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

FILED

FLOYD L. WALKER and VIRGINIA)
G. WALKER,)
)
Plaintiffs,)
)
vs.)
)
THE UNITED STATES OF AMERICA,)
)
Defendant.)

APR 6 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-672-BU ✓

ENTERED ON DOCKET
DATE APR 07 2000

JUDGMENT

This action came before the Court upon the parties' cross-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 Defendant, The United States of America, and against Plaintiffs, Floyd L. Walker and Virginia G. Walker.

Dated at Tulsa, Oklahoma, this 6th day of April, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

FLOYD L. WALKER; VIRGINIA G.)
WALKER,)
))
Plaintiffs,)
))
vs.)
))
UNITED STATES OF AMERICA,)
))
Defendant.)

APR 6 2000 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-672-BU

ENTERED ON DOCKET

DATE APR 07 2000

ORDER

In light of the mandate of the Tenth Circuit Court of Appeals, the Court **ORDERS** as follows:

1. The July 24, 1998 Order granting Plaintiffs' Motion for Summary Judgment and denying Defendant's Cross-Motion for Summary Judgment is **VACATED**. The July 24, 1998 Judgment and September 10, 1998 Amended Judgment are also **VACATED**. The Court Clerk's taxation of costs in favor of Plaintiffs on September 17, 1998 is also **VACATED**.

2. Defendant's Cross-Motion for Summary Judgment (Docket Entry # 14) is **GRANTED** and Plaintiffs' Motion for Summary Judgment (Docket Entry #12) is **DENIED**.

3. Judgment in favor of Defendant shall issue forthwith.

ENTERED this ____ day of April, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

JOHN E. ACKENHAUSEN,)
)
Plaintiff,)
)
vs.)
)
CITY OF TULSA,)
)
Defendant.)

APR 6 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99 CV -0186 BU (E)

ENTERED ON DOCKET
DATE **APR 07 2000**

**ORDER DISMISSING CASE IN ITS ENTIRETY
WITH PREJUDICE**

NOW, on this 6 day of April, 2000, upon Plaintiff's Motion to Dismiss WITH prejudice, the Court finds that the same should be and hereby is granted.

IT IS THEREFORE ORDERED that the above case be dismissed with prejudice to refiling.



JUDGE OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 06 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JERRY D. HILL
SSN: 440-68-5312,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0954-EA

ENTERED ON DOCKET
APR 6 2000
DATE _____

ORDER

Claimant, Jerry D. Hill, 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 January 6, 1960, and was 37 years old at the time of the ALJ’s decision. He has a high school education by obtaining a General Equivalency Diploma. Claimant’s past relevant work includes work as a delivery driver and cook for a pizza delivery chain, and as a night custodian for a public school system. Claimant alleges an inability to work beginning December 31, 1993, due to problems with his back, an ulcer and mild reflux, hepatitis C, and attention deficit disorder. He also claims to suffer from post-traumatic stress disorder, anti-social personality disorder, and depression, and he has complained, from time to time, of headaches, left knee problems, and right shoulder problems.

As the ALJ detailed in his opinion, claimant had back surgery in 1987 and again in 1994. In 1987, the surgery was a left L5-S1 modified hemilaminectomy for microsurgical removal of a herniated intervertebral disc. In 1994, the surgery was a left L5 modified hemilaminotomy, foraminotomy, lysis of adhesions, and removal of disc herniation with microscope. He has also been evaluated for gastrointestinal complaints and assessed with bronchitis secondary to his smoking. He takes medication for depression and for his back pain. He also has a history of alcohol and drug abuse. He continues to smoke a pack and a half of cigarettes per day and marijuana two or three times per week.

Procedural History

On October 9, 1990, 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, and claimant did not pursue them further. Claimant filed applications for both Title II and Title XVI benefits again on August 28, 1995. Again, his applications for benefits were denied in their entirety initially and on reconsideration. However, this time claimant requested a hearing. A hearing before ALJ Stephen C. Calvarese was held February 13, 1997, in Tulsa, Oklahoma. By decision dated April 18, 1997, the ALJ found that claimant was not disabled at any time through the date of the decision. On October 30, 1998, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 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 wide range of medium work, including his past relevant work as a custodian. The ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision. As part of this determination, the ALJ found that claimant would not be disabled if he stopped using drugs and alcohol. Therefore, in accordance with the Contract with America Advancement Act of 1996, Pub. L. 104-121, 110 Stat. 847, 852-53, enacted March 29, 1996, see 42 U.S.C. §§ 423(d)(2), 1382c(a)(3), the ALJ concluded that claimant was not eligible for disability benefits.

Review

Claimant asserts as error that: (1) substantial evidence does not support the ALJ's conclusion that drug and alcohol abuse are a contributing factor material to claimant's disability; (2) the ALJ failed to do a proper pain analysis; (3) the ALJ failed to cite specific, legitimate reasons for

rejecting the opinion of the treating physician; (4) the ALJ failed to fully develop the record; (5) the ALJ failed to consider the total combined effects of all of claimant's impairments, including the physical and mental impairments; (6) the ALJ's hypothetical to the vocational expert (VE) failed to include all of claimant's impairments; and (7) the ALJ erroneously applied the doctrine of *res judicata* to claimant's prior application.

James v. Chater

As a preliminary matter, the Commissioner argues that claimant failed to raise issues numbered one, six, and seven before the Appeals Council, and that claimant raised issues numbered two through five, but only generally in a form letter. (See R. 483-84). A review of the form letter indicates that claimant failed to raise the issues numbered one (regarding the ALJ's analysis of claimant's drug and alcohol abuse) and six (whether the ALJ's hypothetical question to the VE was proper). Accordingly, these two issues would be deemed waived for purposes of subsequent judicial review under James v. Chater, 96 F.3d 1341, 1343 (10th Cir. 1996). However, the Court recognizes that the Tenth Circuit considers the James opinion to be "on questionable footing" and the Supreme Court has granted *certiorari* to consider the administrative waiver doctrine. Jones v. Apfel, No. 99-7039, 2000 WL 3875 at *1, n. 1 (10th Cir. Jan. 4, 2000) (unpublished) (citing to Sims v. Apfel, 68 U.S.L.W. 3345 (U.S. Nov. 29, 1999) (No. 98-9537)). Therefore, the Court will address the merits of the issues.

Drug and Alcohol Abuse

Under recent amendments to the Social Security Act, an individual is not considered disabled "if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination the individual is disabled." 42 U.S.C. §§ 423(d)(2)(C),

1382c(a)(3)(J) (1997). The implementing regulations provide that if the Commissioner finds that the claimant is disabled and has medical evidence of the claimant's drug or alcoholism, the Commissioner "must determine whether . . . drug addiction or alcoholism is a contributing factor material to the determination of disability." 20 C.F.R. §§ 404.1535(a), 416.935(a).

To make this determination, the ALJ must determine which, if any, of the claimant's physical and mental limitations would remain if the claimant refrained from drug or alcohol use and whether any of those remaining limitations would be disabling. If claimant's remaining impairments would not be disabling without the drug addiction or alcoholism, then the drug addiction or alcoholism is a contributing factor material to the finding of disability and benefits will be denied. See id., §§ 404.1535(b)(2)(1), 416.935(b)(2)(1). If claimant would still be considered disabled due to the remaining limitations, claimant is disabled and entitled to benefits. See id., §§ 404.1535(b)(2)(ii), 416.935(b)(2)(ii). See also Sherman v. Apfel, No. 97-7085, 1998 WL 163355 (10th Cir. Apr. 8, 1998) (unpublished decision). The claimant bears the burden of proof to establish that drug or alcohol addiction is not a contributing factor material to his disability. Brown v. Apfel, 192 F.3d 492 (5th Cir. 1999).

As a precursor to the ALJ's discussion of claimant's drug addiction and alcoholism, the ALJ found at step two of the sequential evaluation process that claimant had a severe impairment as a result of his 1994 back surgery. (R. 20) The ALJ then proceeded to the third step. At step three of the sequential evaluation process, a claimant's impairment is compared to the Listing of Impairments (20 C.F.R. Pt. 404, Subpt. P, App. 1). If claimant has an impairment, or a combination of impairments, which meets or equals an impairment in the Listing of Impairments, claimant is presumed disabled without considering his age, education, and work experience. 20 C.F.R. §§

(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 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 pain producing impairment in this instance was claimant’s back. The ALJ fully considered claimant’s subjective complaints of disabling pain. He specifically referenced the parameters and the criteria set forth in Social Security Ruling 96-7p. (R. 21) He also analyzed almost all of the relevant factors to determine the weight to be given claimant’s subjective allegations of pain, and, as required by Kepler, he made express findings as to the credibility of claimant’s subjective complaints of disabling pain, with an explanation of why specific evidence led to the conclusion that claimant’s subjective complaints were not fully credible. (R. 21-28) 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); SSR 82-59.

The issue, then, is whether claimant’s credibility determination is supported by substantial evidence. Since the majority of the ALJ’s credibility analysis is devoted to his rejection of the treating physician’s opinions, the issue of whether his analysis is proper turns on whether his rejection of the treating physicians’ opinions was proper, as discussed below. Further, even if the ALJ’s pain and credibility analysis is deemed proper, the question remains whether there is substantial evidence to support the ALJ’s determination that claimant could perform medium work.

Treating Physician

Claimant argues that the ALJ improperly rejected the opinions of two treating physicians, John R. Pittman, M.D., and Robert W. Gibson, M.D. On October 13, 1995, Dr. Pittman opined:

Until [claimant] has had proper conditioning I feel that any type of work that he does will end up just causing him further disability. It is possible, however, that for short periods of time he could sit and would be able to handle objects less than five pounds each in a sitting position for limited periods of time.

His memory seems adequate, although until his ADHD is well controlled this will not be something that he can continue very long, making it unlikely that he would be very successful in any activity requiring concentration or persistence for any length of time.

(R. 420). On February 20, 1996, Dr. Gibson stated:

This man is totally disabled at the present time. He is not physically or mentally capable of performing any type of work due to the constant and severe pain that he has in his lumbar back. He cannot perform a sedentary type job due to his mental situation, and he cannot do anything that requires movement of the lumbar back because all movements precipitate pain.

Without any hesitation at the present time, I believe this man is temporarily and totally disabled and will be for the oncoming months.

(R. 436)

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), 416.927(a)(2). The Commissioner will give controlling weight to that type of opinion if it is well-supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. *Id.* §§ 404.1527(d)(2), 416.927(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), 416.927(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 ALJ rejected the opinions of Dr. Gibson and Dr. Pittman primarily because of a "significant gap in treatment extending throughout all of 1996." (R. 23) The records before the ALJ

indicated that Dr. Gibson's treatment of claimant terminated in July 1995. (R. 23-24; see R. 436-41) The ALJ remarked that Dr. Pittman only saw claimant between June and August 1995. (R. 23-24; see R. 419-25)³

The ALJ further discounted Dr. Pittman's opinion because claimant did not follow-up on a recommendation by Dr. Pittman to obtain a "good workup" of his back. Dr. Pittman stated that claimant "had no insurance and I felt he needed a good workup which he could not afford. I referred him down to the Health Science Center here in Oklahoma City for neurosurgical consultation." (R. 419) From this ambiguous statement, the ALJ infers that the consultation at the Health Science Center was "within the claimant's financial means" (R. 24), but claimant argues that it was treatment at the Health Science Center which he could not afford. (See Cl. Br., Docket # 11, at 10.)

Regardless of the ambiguity, claimant is not precluded from recovering disability benefits because of failure to pursue medical treatment if he cannot afford medical treatment. See Thompson v. Sullivan, 987 F.2d 1482, 1489-90 (10th Cir. 1993); Teter v. Heckler, 775 F.2d 1104, 1107 (10th Cir. 1985). Moreover, the ALJ should consider the following factors before he relies on the claimant's failure to pursue treatment or take medication as support for his determination of noncredibility: "(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

³ The ALJ also points out that Eric S. Glichouse, D.O., treated claimant in November and December 1995 (R. 432-34), but Dr. Glichouse did not issue an opinion as to claimant's disability, and claimant does not argue that the ALJ erred in rejecting Dr. Glichouse's opinion.

404.1511(a), 404.1520(d), 416.911(a), 416.920(d). Equivalence is determined “on medical evidence only.” Id. §§ 404.1526(b), 416.926(b). 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 his back condition meets Listing § 1.05C, which provides:

C. Other vertebrogenic² disorders (e.g., herniated nucleus pulposus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last 12 months. With both 1 and 2:

1. Pain, muscle spasm, and significant limitation of motion in the spine; and
2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.05C (footnote added).

The ALJ did not analyze claimant’s severe impairment by reference to Listing § 1.05C. Instead, he explained his step three finding primarily by analyzing claimant’s subjective complaints of pain and by rejecting the opinions of three treating physicians. His analysis led to a conclusion that claimant had the RFC to perform medium work. He then focused on claimant’s drug and alcohol abuse and determined that claimant’s mental or emotional impairments were not disabling by themselves. Then he discussed additional factors to complete his pain and credibility analysis before continuing to step four of the sequential evaluation process. (R. 21-28) In this manner, the ALJ commingled his step three analysis with both his RFC analysis and his analysis of whether claimant’s drug and alcohol abuse were a contributing factor material to a finding of disability. This

² “[A]rising in a vertebra or in the vertebral column.” Dorland’s Illustrated Medical Dictionary 1819 (28th ed. 1994).

commingling may have led the ALJ to focus on claimant's undisputed drug and alcohol abuse instead of focusing on whether claimant's remaining impairments would be disabling if claimant refrained from alcohol abuse.

The ALJ's analysis of whether his remaining physical and mental are disabling by themselves is incomplete. The ALJ legitimately determined that claimant's depression is not disabling because, as admitted by claimant, it is largely controlled by use of medication. (R. 27; see R. 427) However, the ALJ had no basis for his "feeling" that claimant's anti-social personality disorder is less severe when the effects of his drug and alcohol abuse are factored out. (R. 27) The ALJ does not mention claimant's post-traumatic stress disorder or attention deficit disorder at all. Substantial evidence does not support the ALJ's conclusion that drug and alcohol abuse are a contributing factor material to claimant's disability.

The ALJ reached his determination that claimant could perform medium work *before* he discussed the effects of claimant's drug and alcohol abuse; the ALJ does not discuss claimant's back problems as a *remaining* limitation after the effects of drug and alcohol abuse are factored out. Whether claimant's back problems were disabling requires a determination of whether the ALJ's pain and credibility analysis was proper; whether the ALJ properly rejected the opinions of claimant's treating physicians; and whether the ALJ failed to fully develop the record.

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:

the refusal was without justifiable excuse.” Thompson, 987 F.2d at 1489 (citations omitted). The ALJ considered none of these factors.⁴

The ALJ’s rejection of Dr. Gibson’s opinion is also suspect because evidence submitted to the Appeals Council by claimant after the ALJ’s opinion indicates that Dr. Gibson’s treatment of claimant continued throughout 1996 and early 1997 (R. 449-56). 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.

The additional evidence from Dr. Gibson is new because “it is not duplicative or cumulative,” see Wilkins, 953 F.2d at 96, and it is material because “there is a reasonable possibility that [it] would have changed the outcome.” Id. It relates to the period before the ALJ’s decision. The Appeals Council stated that it considered the new evidence, but concluded that it did not provide a basis for changing the ALJ’s decision. (R. 7) This kind of conclusory statement provides no basis

⁴ The ALJ also noted that Dr. Pittman treated claimant for ADHD, with improved results, but any limitations suggested by Dr. Pittman from claimant’s ADHD were “prematurely identified.” (R. 24, see R. 419) However, as claimant argues, the ALJ did not discuss claimant’s ADHD as part of his drug and alcohol abuse analysis. Instead, the ALJ summarily concluded that claimant’s ADHD was not substantiated to be of such intensity, frequency, and duration as to preclude medium work activity. (R. 28)

upon which the Court can evaluate whether the Appeals Council properly rejected the new evidence, and thus, whether the opinion of claimant's treating physician was legitimately rejected by the ALJ.

More significant, the ALJ rejects the opinions of two treating physicians without pointing to any evidence which shows that claimant can perform medium work. Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. 20 C.F.R. §§ 404.1567, 416.967. The ALJ discredits claimant by quoting P. K. Davis, M.D. When claimant was admitted to a medical center in June 1995, complaining of severe abdominal pain (R. 394-97), Dr. Davis stated: "In the past this patient has used his condition to manipulate medical personnel in order to obtain narcotics." (R. 25, see R. 394) Dr. Gibson expressed similar sentiments once in 1992 (prior to the alleged onset date) when claimant requested medication for headaches. Dr. Gibson stated: "Makes me kind of smell a rat." (R. 455) The fact that claimant exhibits drug-seeking behavior, however, does not mean that he has the ability to lift up to 50 pounds and frequently lift or carry objects weighing up to 25 pounds.

The ALJ also discussed the medical documentation submitted by Alzira F. Vaidya, M.D., a psychiatrist who, together with a licensed professional counselor at a community mental health center, treated claimant from August 1991 to January 1993 (R. 321-65). Although her treatment notes date from prior to the onset of claimant's alleged disability, Dr. Vaidya performed a consultative psychiatric examination on November 12, 1995, at the request of the Commissioner. (R. 426-38) Dr. Vaidya concluded that claimant's "ability to do a full-time job is moderately impaired because of his long history of substance abuse, antisocial personality, difficulty getting along with people and also because of chronic back pain with depression, difficulty in sitting, standing or walking for any length of time." (R. 428) The ALJ did not expressly reject Dr. Vaidya's

findings, but nonetheless concluded that claimant retained the RFC to perform medium work. In addition to the lifting and standing requirements, the ALJ defined medium work to include “standing/walking approximately six hours of an eight hour day, sitting approximately six hours of an eight hour day, and no more than occasional stooping.” (R. 25)

The ALJ does not discuss any medical record which supports this RFC. His hypothetical question to the vocational expert indicates that his RFC finding is based on an RFC assessment completed for the Commissioner by a non-examining medical consultant when claimant applied for benefits in 1995 (R. 82-83; 143-49). Such evidence does not constitute “substantial evidence” sufficient to support a disability determination. Regardless of whether the ALJ had valid reasons to find claimant not credible and to reject the opinions of claimant’s treating physicians, his own opinion lacks any discussion of valid medical evidence showing that claimant is capable of performing medium work. As the Tenth Circuit has admonished, “[t]he absence of evidence is not evidence.” Thompson, 987 F.2d at 1491.

Duty to Develop the Record

Given the ALJ’s rejection of the medical evidence due to the claimant’s lack of credibility and the perceived gap in treatment during 1996, the ALJ had an obligation to obtain some evidence supporting his position that claimant was capable of performing medium work. When a claimant’s medical sources do not give sufficient medical evidence about an impairment to determine whether the claimant is disabled, a consultative examination may be ordered. 20 C.F.R. §§ 404.1517, 416.917. A consultative examination may also be purchased when the evidence as a whole, both medical and nonmedical is not sufficient to support a decision. Other situations give rise to the need for a consultative examination, including, but not limited to, situations in which a conflict,

inconsistency, ambiguity, or insufficiency in the evidence must be resolved. 20 C.F.R. §§ 404.1519a, 416.919a. The ALJ has broad latitude in ordering a consultative examination. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 778 (10th Cir. 1990). “[T]he ALJ should order a consultative exam when evidence in the record establishes the reasonable possibility of the existence of a disability and the result of the consultative exam could reasonably be expected to be of material assistance in resolving the issue of disability.” Hawkins v. Chater, 113 F.3d 1162, 1169 (10th Cir. 1997).

The ALJ’s rejection of the treating physician’s opinion leaves an inconclusive medical record with regard to claimant’s alleged back problems. Since there is reasonable possibility that claimant’s back problems may be disabling, and the result of a consultative examinations could reasonably be expected to be of material assistance, the ALJ should have ordered a consultative physical examination or otherwise obtained evidence to support his conclusion that claimant could perform medium work. The ALJ has a basic duty of inquiry to fully and fairly develop the record as to material issues. Baca v. Department of Health & Human Servs., 5 F.3d 476, 479-80 (10th Cir. 1993). The ALJ’s failure to fully develop the record is reversible error.

Combined Effect of Impairments

Claimant argues that the ALJ failed to consider the combined effect of all of claimant’s impairments, including the physical and mental impairments. To determine whether the claimant’s impairments are sufficiently severe to serve as a basis for eligibility for disability benefits, the Commissioner must “consider the combined effect of all of the individual’s impairments without regard to whether any such impairment, if considered separately, would be of such severity.” 42 U.S.C. § 423(d)(2)(B); see 20 C.F.R. §§ 404.1523, 416.923. If the claimant’s combined impairments

are medically severe, the Commissioner must consider “the combined impact of the impairments throughout the disability determination process.” Id.

Claimant focuses his arguments on the ALJ’s discussion of his depression and the ALJ’s failure to discuss his headaches, left knee, and right shoulder. (Cl. Br., Docket # 11, at 10.) The ALJ specifically discussed claimant’s depression in combination with all of his other impairments and determined that it was not disabling because medical evidence indicated (and claimant admitted) that his depression was controlled by medication. (R. 25, 27) Claimant specifically challenges the ALJ recitation of claimant’s testimony that claimant was not receiving psychiatric treatment for his depression. That argument is misplaced. First, the documents upon which claimant relies for the severity of his depression predate the alleged onset date. Further, that argument goes to the weight the ALJ afforded claimant’s allegations that his depression was disabling. It does not go to the issue of whether the ALJ considered claimant’s depression in combination with his other alleged impairments.

Claimant also argues that the ALJ failed to discuss problems he has had with his headaches, his left knee, and his right shoulder. The claimant has the burden of providing medical evidence proving his disability. 20 C.F.R. §§ 404.1512(a)-(c), 404.1513, 416.912(a)-(c), 416.913. The references in the record to instances when claimant has complained of problems with his left knee and right shoulder are very few and, with one exception, take place before the alleged onset date. (See R. 200, 265, 266, 313, 353, 440) The one time claimant’s right shoulder and left knee are mentioned after the alleged onset date involved Dr. Gibson’s assessment that claimant reported having trouble at a work hardening program due to his left knee and right shoulder. (R. 440). This

hardly gives rise to any obligation on the ALJ's part to discuss or consider these two ailments in combination with other, more serious, impairments.

After claimant's alleged onset date, doctors sporadically noted his headache complaints in connection with his other impairments and prescribed medication for those headaches. (R. 384, 390, 427, 473) However, no doctor indicated that claimant's headaches were disabling. Nor did any doctor investigate or verify his headache complaints to determine their frequency or severity. Prior to the alleged onset date, Dr. Gibson indicated that he "smelled a rat" when claimant complained of headaches and asked for Darvocet to treat his headaches. Dr. Gibson suggested that claimant see a specialist regarding his headaches, but claimant stated that he could not afford it. (R. 455)

Significantly, claimant did not allege that his headaches, left knee or right shoulder problems were disabling impairments when he made any statements related to his applications for disability (R. 90, 157, 194, 213, 227) or when asked directly by the ALJ at the administrative hearing (R. 52). The ALJ did not err by failing to consider claimant's depression, headaches, left knee problems and right shoulder problems in combination. He may have erred, however, by failing to fully develop the record as to claimant's headaches. This issue is not dispositive since the Court reverses and remands based on other errors by the ALJ. Nonetheless, on remand the Commissioner may wish to develop the record further as to claimant's headaches, given some indication in the record that claimant was treated for headaches after the alleged onset date.

Vocational Expert

Similarly, the Commissioner may need to revise any questions posed to the vocational expert on remand so as to include all of claimant's impairments. "[T]estimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute

substantial evidence to support the [Commissioner's] decision.” Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Shepherd v. Apfel, 184 F.3d 1196, 1203 (10th Cir. 1999); Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995). In this case, there was insufficient evidence to support the inclusion of claimant’s alleged problems with headaches, his left knee, and his right shoulder. The ALJ did not err by failing to include them in his hypothetical to the vocational expert, but, if substantial evidence on remand supports their inclusion, the ALJ should reformulate his questions accordingly.

Res Judicata

Finally, claimant argues that the ALJ erroneously applied the doctrine of *res judicata* by deciding not to reopen claimant’s prior application. Social Security Administration regulations govern the reopening of prior determinations. The relevant portions clearly indicate that reopening is discretionary. See 20 C.F.R. §§ 406.987, 406.988, 416.1487, 416.1488. The ALJ found no basis for reopening the claimant’s 1990 applications. (R. 19) Therefore, he considered the relevant period to be from December 31, 1993 (the day claimant alleges he became disabled) through June 30, 1995 (the date the claimant was last insured) for purposes of eligibility under Title II of the Social Security Act, and through April 18, 1997 (the date of his decision) for purposes of eligibility under Title XVI.

The ALJ’s finding is not reviewable by this Court absent a valid Constitutional claim. Califano v. Sanders, 430 U.S. 99, 107-08 (1977); Nelson v. Sec’y of Health & Human Servs., 927 F.2d 1109, 1111 (10th Cir. 1990). Claimant acknowledges the dictates of Nelson, but argues that those dictates need to be revisited and revised. (Cl. Br., Docket # 11, at 11.) He claims that the ALJ

made his decision arbitrarily and without any explanation, thus thwarting due process and equal treatment under the law. The Court notes that claimant offered no explanation as to why he failed to pursue his prior applications further. More important, it is not the proper role of this Court to overrule Tenth Circuit and Supreme Court precedent, but to follow it.

Conclusion

It is the proper role of this Court to determine if the ALJ's decision was supported by substantial evidence. The Court recognizes that claimant does not elicit much sympathy even though claimant's childhood was far from ideal. He has a criminal record and a long history of drug abuse, alcoholism, and violence despite help from numerous medical professionals, his wife, and his family. However, a lack of sympathy for claimant does not relieve the ALJ of his duty to fully develop the record or the Court of its duty to determine whether the ALJ's conclusions are supported by substantial evidence.

This was a difficult case, and it appears that the ALJ thoroughly reviewed the record. Nonetheless, his decision was not supported by substantial evidence and, although he applied many of the correct legal standards, he failed to fully develop the record and properly evaluate whether all of claimant's alleged impairments would be disabling if claimant stopped abusing drugs and alcohol. 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 6th day of April, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

APR 06 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JERRY D. HILL
SSN: 440-68-5312,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0954-EA

ENTERED ON DOCKET

DATE APR 6 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 6th day of April, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PRISCILLA E. BROWN, o/b/o)
ALEXIS V. FOMBY,)
SSN: 446-86-7877)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner)
of Social Security Administration,)
)
Defendant.)

FILED

APR 06 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99-CV-304-J

ENTERED ON DOCKET
APR 6 2000
DATE

ORDER^{1/}

Plaintiff, Priscilla E. Brown, o/b/o Alexis V. Fomby, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because (1) the ALJ's conclusion that Alexis Fomby (hereafter "Plaintiff") did not meet the Listings is not supported by the record, and (2) the ALJ's credibility analysis is insufficient. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was born on November 13, 1984, and was 12 years old at the time of the hearing before the ALJ. [R. at 32].

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

^{2/} Administrative Law Judge R.J. Payne (hereafter "ALJ") concluded that Plaintiff was not disabled by decision dated September 26, 1997. [R. at 32]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on February 17, 1999. [R. at 3].

Plaintiff's mother testified^{3/} that Plaintiff had diabetes and suffered from excessive fatigue and hunger, vision problems, and memory problems. [R. at 37]. According to Plaintiff's mother, Plaintiff can walk approximately one mile without difficulty, but is fatigued if she walks three miles. [R. at 40]. Plaintiff plays basketball and participates in Girl Scouts. [R. at 57].

Plaintiff was diagnosed with diabetes in August of 1995. [R. at 141]. Plaintiff was admitted to a hospital on August 29, 1995, for initial assessment of and to gain control of her diabetes.

In December 1995, Plaintiff's height was 143 cm and her weight was 83 and one-half pounds. [R. at 151]. A social security examiner who conducted Plaintiff's mental examination noted that Plaintiff was of average height and weight. [R. at 163].

A December 19, 1995 letter by Plaintiff's treating physician noted Plaintiff's height was 144.9 cm (50th percentile) and weight was 41.01 kg (75th percentile). A June 10, 1996 letter indicated Plaintiff's height was 148.5 cm (50th percentile) and her weight 43.09 kg (50th percentile). [R. at 200]. A November 14, 1996 letter reported Plaintiff's height as 152 cm (50th percentile) and weight as 45.93 kg (50th to 75th percentile). [R. at 196].

Plaintiff was examined with regard to her diabetes on February 11, 1997. Plaintiff's diabetes was reported to be under good control. Plaintiff's height was

^{3/} The Court notes that Plaintiff's mother wrote several detailed and articulate letters to the Social Security Administration which explain the numerous expenses associated with Plaintiff's diabetes and the difficulty the family has in meeting those expenses. Although the Court may be empathetic to Plaintiff's situation, the social security disability system is not a panacea and is limited, statutorily, to the relief which it can provide.

153.8 cm, which was described as the 50th percentile. Plaintiff's weight listed as the 75th percentile. [R. at 167]. Plaintiff was described as paying good attention to her diabetes, and her diabetes was under "good control." [R. at 167].

Plaintiff was examined by Varsha Sikka, M.D. on April 21, 1997. [R. at 171]. Plaintiff's weight at birth was noted at eight pounds, twelve ounces. Plaintiff reported problems with remembering and with blurred vision. Dr. Sikka listed Plaintiff's height as 61 inches, which was described as the 76th percentile. Plaintiff's weight was listed as 109 pounds, which was described as the 75th percentile. The doctor additionally wrote, "the patient does meet growth factor and also genito-urinary system, 106.00 and also 109.00 documentation C."^{4/} [R. at 173].

A May 12, 1997, letter by Plaintiff's treating physician noted Plaintiff's height as 155.8 cm (50th percentile) and her weight as 50.58 kg (75th percentile). [R. at 192].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The current statute governing social security disability decisions with respect to children provides:

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

^{4/} Although Dr. Sikka discussed several "Listings," Plaintiff appeals the decision of the ALJ only with regard to Listing 100.02.

42 U.S.C. § 1382c(a)(3)(C)(i).

The regulations which implement the Act provide:

An impairment(s) causes marked and severe functional limitations if it meets or medically equals in severity the set of criteria for an impairment listed in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter, or if it is functionally equal in severity to a listed impairment.

- (1) Therefore, if you have an impairment(s) that is listed in appendix 1, or is medically equal in severity to a listed impairment, and that meets the duration requirement, we will find you disabled.
- (2) If your impairment(s) does not meet the duration requirement, or does not meet, medically equal, or functionally equal in severity a listed impairment, we will find that you are not disabled.

20 C.F.R. § 416.924. Consequently, based on the applicable statutes and regulations, a child is disabled only if the child establishes that he or she meets one of the Listings in 20 C.F.R. Pt. 404, Subpt. P, App. 1. See Gertrude Brown for Khilarney Wallace v. Callahan, 120 F.3d 1133, 1135 (10th Cir. 1997).

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

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

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

"The finding of the Secretary^{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.

^{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."

III. THE ALJ'S DECISION

The ALJ noted the applicable law in determining whether a child qualifies for social security disability. The ALJ concluded that Plaintiff did not meet a Listing impairment and did not meet an impairment which was functionally equivalent in severity to a listing impairment. The ALJ found that Plaintiff was not disabled.

IV. REVIEW

LISTING ANALYSIS

Plaintiff initially asserts that the record clearly indicates that she meets Listing 109.08C, and the ALJ failed by improperly reviewing the applicable evidence.

Listing 109.08C provides that the claimant be diagnosed with juvenile diabetes mellitus requiring insulin and exhibit:

Growth retardation as described under the criteria in 100.02A or B.

The referenced section, 100.02A and B, provide:

100.02 *Growth Impairment*, considered to be related to an additional specific medically determinable impairment, and one of the following:

- A. Fall of greater than 15 percentiles in height which is sustained, or
- B. Fall to, or persistence of, height below the third percentile.

Section 100.00 notes that the determination of a growth impairments "should be based upon the comparison of current height with at least three previous determinations, including length at birth, if available."

Plaintiff asserts that the record supports a greater than 15 percentile fall in height which is sustained and references the records from Dr. Sikka.

Plaintiff's treating physician's notes and records consistently record that Plaintiff's height and weight is in the 50th percentile. A December 19, 1995 letter by Plaintiff's treating physician noted Plaintiff's height was 144.9 cm (50th percentile). A June 10, 1996 letter indicated Plaintiff's height was 148.5 cm (50th percentile). [R. at 200]. A November 14, 1996 letter reported Plaintiff's height as 152 cm (50th percentile). [R. at 196]. On February 11, 1997, Plaintiff's height was 153.8 cm, which was described as the 50th percentile.

Dr. Sikka examined but apparently did not treat Plaintiff. Dr. Sikka reported on April 21, 1997, that Plaintiff's height was 61 inches, and described it as the 76th percentile. The doctor additionally wrote, "the patient does meet growth factor and also genito-urinary system, 106.00 and also 109.00 documentation C." [R. at 173]. No additional explanation is provided in Dr. Sikka's report, and Dr. Sikka provides no comparisons.

A few weeks after Dr. Sikka's examination, on May 12, 1997, Plaintiff's treating physician noted Plaintiff's height as 155.8 cm (50th percentile) and her weight as 50.58 kg (75th percentile). [R. at 192]. In fact, two months before (February 11, 1997) Dr. Sikka's examination, and less than one month after (May 12, 1997) Dr. Sikka's April 1997 examination, Plaintiff's treating physician listed Plaintiff's height as falling within the 50th percentile. This would reflect that Plaintiff's height did not fall the required amount. In addition, Dr. Sikka's report does not provide an explanation

for the conclusion that Plaintiff meets Listing 100.^{6/} Obviously, nothing in the record indicates that the alleged "fall" in height was sustained, which is required under the regulation. Both before and after the examination by Dr. Sikka, Plaintiff's height is described as being in the "50th percentile." In short, the record simply does not support Plaintiff's assertion that she meets Listing 100.02.

Plaintiff additionally suggests that the ALJ's evaluation of Dr. Sikka's analysis is insufficient. The Court disagrees. The ALJ reviewed and discussed Dr. Sikka's opinion, and discounted it because it lacked support in the record; it provided no explanation for its conclusion; Plaintiff's treating physicians noted no problems with Plaintiff's growth and indicated Plaintiff was "average." The Court concludes that the ALJ's discussion of Dr. Sikka's opinion was adequate.

CREDIBILITY ANALYSIS

Plaintiff additionally asserts that the ALJ's credibility findings are conclusory and lack analysis. Plaintiff asserts the ALJ should have made specific findings with regard to the testimony of Plaintiff's mother, and that the failure to make such findings is contrary to law.

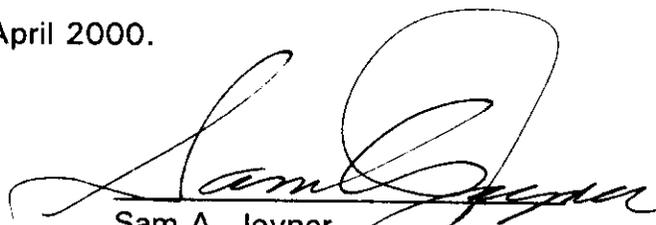
Even if the Court assumed Plaintiff's argument to be true, Plaintiff makes no argument as to why the lack of a finding with regard to the credibility of Plaintiff's mother would require reversal of the decision of the Commissioner. The failure to

^{6/} Further, Plaintiff compares her doctor's description of her height as falling in the "50th percentile" with Dr. Sikka's characterization of her height as being in the "76th percentile" as indicating a "fall" in height. This could be interpreted, however, as indicating that Plaintiff actually grew taller in comparison to the "norms."

make a finding as to an individual's credibility, by itself, does not require the Court to reverse the findings of the ALJ. Assuming Plaintiff's mother's testimony as completely true, acceptance of that testimony does not require a reversal of the ALJ's decision that Plaintiff is not disabled.

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

Dated this 6 day of April 2000.



Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PRISCILLA E. BROWN, o/b/o
ALEXIS V. FOMBY,
SSN: 446-86-7877

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

FILED

APR 06 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99-CV-304-J ✓

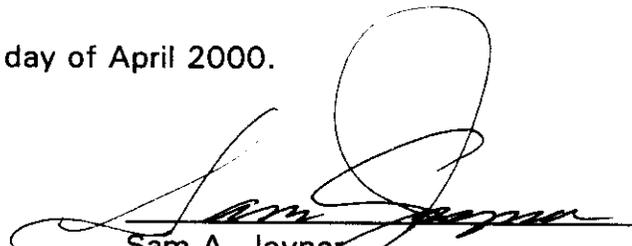
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DATE APR 6 2000

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 6th day of April 2000.


Sam A. Joyner
United States Magistrate Judge

*YAK
4-4-00*

FILED

APR - 5 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

PALM COMMODITIES)
INTERNATIONAL, INC.,)

Plaintiff,)

vs.)

ASEC MANUFACTURING, a)
Delaware General Partnership,)

Defendant.)

Case No. 98-CV-738-B (M)

ENTERED ON DOCKET
DATE APR 06 2000

**CONSENT ORDER OF DISMISSAL WITH
PREJUDICE AND OF RETENTION OF JURISDICTION
FOR ENFORCEMENT OF SETTLEMENT AGREEMENT**

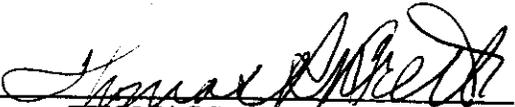
The parties, through their undersigned attorneys, having consented to the dismissal with prejudice of this action without costs or attorneys' fees; the parties having entered into an Agreement of Settlement on March 14, 2000 and Releases pursuant to said Agreement having been fully executed; and the parties having consented to this Court's retention of jurisdiction over this action for the purpose of enforcement of the Agreement of Settlement of March 14, 2000, issues ancillary to said agreement, and of the Releases executed pursuant to said Agreement;

IT IS on this 5th day of APRIL, 2000,

ORDERED that this action be dismissed in its entirety with prejudice without costs or attorneys' fees to any party as against any other party, and it is further

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ORDERED that the Court shall retain jurisdiction over this action for the purpose of enforcement of the Agreement of Settlement of March 14, 2000, and of issues ancillary to said agreement, and of the Releases executed pursuant to said agreement.


THOMAS R. BRETT
United States District Judge

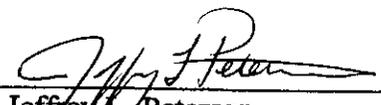
The undersigned attorneys for the parties consent to the form and entry of the within order.

ATTORNEYS FOR PLAINTIFF

Palm International, Inc
1289 Bridgestone Pkwy.
La Vergne, TN 37086

ATTORNEYS FOR DEFENDANT

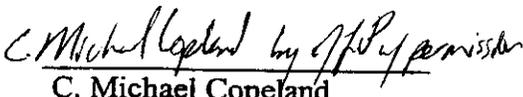
Rhodes, Hieronymus, Jones,
Tucker & Gable, P.L.L.C.
Oneok Plaza
100 West Fifth Street, Suite 400
P.O. Box 21100
Tulsa, Oklahoma 74121

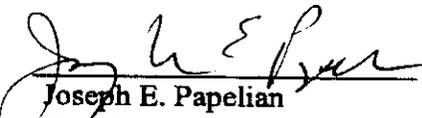
By: 
Jeffrey L. Peterson
General Counsel
Dated:

By: 
Mary Quinn-Cooper
Dated:

JONES, GIVENS, GOTCHER & BOGAN,
P.C.
15 East 5th Street Suite 3800
Tulsa, OK 74103

DELPHI AUTOMOTIVE SYSTEMS
5725 Delphi Drive
Troy, MI 48098-2815

By: 
C. Michael Copeland
Dated:

By: 
Joseph E. Papelian
Dated: 2, March 2000

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

FILED

APR - 4 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CLARENCE EDWARD REED,)
)
Petitioner,)
)
vs.)
)
A. M. FLOWERS,)
)
Respondent.)

No. 00-CV-127-C (M)

ENTERED ON DOCKET
DATE APR 05 2000

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Petitioner and against Respondent only as to Petitioner's conviction and sentence for violation of 18 U.S.C. § 924(c) entered in Case No. 89-CR-31-C.

SO ORDERED THIS 7th day of April, 2000.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

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

FILED
APR - 4 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CLARENCE EDWARD REED,)
)
Petitioner,)
)
vs.)
)
A. M. FLOWERS,)
)
Respondent.)

No. 00-CV-127-C (M) ✓

ENTERED ON DOCKET
DATE APR 05 2000

ORDER

On March 20, 2000, the United States of America, on behalf of Respondent, filed a response to Petitioner's 28 U.S.C. § 2241 petition for writ of habeas corpus. In response to the only issue pending in this matter, the government concedes that pursuant to Bailey v. United States, 516 U.S. 137 (1995), Petitioner is actually innocent of his conviction under 18 U.S.C. § 924(c). Therefore, the Court finds that the petition for writ of habeas corpus should be granted only as to Petitioner's conviction for use of a firearm during a drug trafficking offense in Case No. 89-CR-31-C and the § 924(c) conviction and sentence should be vacated. An Amended Presentence Report shall be prepared in Case No. 89-CR-31-C. Once the Amended Presentence Report is completed, this matter shall be set for resentencing.

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Cl/Prot. FP

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The 28 U.S.C. § 2241 petition for writ of habeas corpus is **granted** only as to Petitioner's conviction for use of a firearm during a drug trafficking offense in Case No. 89-CR-31-C.
2. Petitioner's conviction and sentence for violation of 18 U.S.C. § 924(c) entered in Case No. 89-CR-31-C are **vacated**.
3. An Amended Presentence Report shall be prepared in Case No. 89-CR-31-C.
4. Once the Amended Presentence Report is completed, this matter shall be set for resentencing in Case No. 89-CR-31-C.

SO ORDERED THIS 4 day of April, 2000.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

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

FILED

APR - 4 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LEWIS TURCK,)
)
Plaintiff,)
)
vs.)
)
BAKER PETROLITE, A BAKER)
HUGHES COMPANY,)
)
Defendant.)

Case No. 99-CV-0168C(M)

ENTERED ON DOCKET
DATE APR 05 2000

JOURNAL ENTRY OF JUDGMENT

On March 6, 2000, the above captioned case came on for jury trial. Plaintiff, Lewis Turck, appeared by and through his attorneys of record: Patterson Bond and Leslie V. Williams of Armstrong and Lowe, Tulsa, Oklahoma. Defendant Baker Petrolite, a Baker Hughes Company, appeared by and through its attorneys of record, Elaine R. Turner and William D. Fisher of Hall, Estill, Hardwick, Gable, Golden & Nelson. The Jury was empaneled and sworn. The Jury heard the evidence admitted, the instructions of the Court, and the argument of counsel. Defendant moved for judgment as a matter of law following Plaintiff's case and renewed said motion at the end of the evidence. The motion was denied by the Court.

The Jury returned its verdict in favor of Plaintiff finding that Plaintiff had proven by a preponderance of the evidence that Defendant violated Title 85 § 5 (A)(2) of the Oklahoma Statutes by terminating Plaintiff in retaliation for his attempt to consult with his workers' compensation attorney during his pending workers' compensation claim and that such act was a significant motivating factor in Defendant's termination of Plaintiff. The Jury awarded Plaintiff One Hundred Eleven Thousand One Hundred Thirty-Eight Dollars and No Cents (\$111,138.00) in past lost wages

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and benefits, One Hundred Eight Thousand Ten Dollars and No Cents (\$108,010.00) in future lost wages and benefits, and Six Thousand Dollars and No Cents (\$6,000.00) for mental anguish and emotional distress for a total of Two Hundred Twenty Five Thousand One Hundred Forty Eight Dollars and No Cents (\$225,148.00).

THEREUPON, based upon the Jury Verdict, and after reviewing the evidence, other matters of record, and hearing statements of counsel, the Court FINDS that a final judgment should be entered in favor of Plaintiff, Lewis Turck, and against Defendant, Baker Petrolite, a Baker Hughes Company, in the principal amount of Two Hundred Twenty Five Thousand One Hundred Forty Eight Dollars and No Cents (\$225,148.00), plus prejudgment interest of Twelve Thousand Eighty Three Dollars and Four Cents (12,083.04), for a total judgment of Two Hundred Thirty Seven Thousand Two Hundred Thirty One Dollars and Four Cents (\$237,231.04). Further, that postjudgment interest shall accrue at 6.197% or Thirty Eight Dollars and Thirty Three Cents (\$38.33) per day, until paid in full.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Plaintiff, Lewis Turck, and against Defendant, Baker Petrolite, a Baker Hughes Company, in the total amount of Two Hundred Thirty Seven Thousand Two Hundred Thirty One Dollars and Four Cents (\$237,231.04), plus postjudgment interest in the amount of Thirty Eight Dollars and Thirty Three Cents (\$38.33) per day, until paid in full.

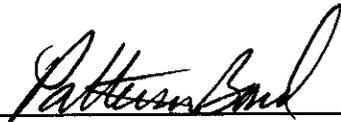
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is no just reason for delay in entry of this final judgment and it is expressly directed such judgment be entered.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the issue of costs and expenses of litigation will be taken under advisement upon timely application by Plaintiff and will be addressed by a separate judgment and order.

DATED THIS 3^d day of April, 2000.



H. Dale Cook
Judge of the U.S. District Court



Patterson Bond, OBA #942
Leslie V. Williams, OBA #9665
ARMSTRONG & LOWE, P.A.
1401 South Cheyenne
Tulsa, Oklahoma 74119
(918) 582-2500
(918) 583-1755 (facsimile)

ATTORNEYS FOR PLAINTIFF



Elaine R. Turner, OBA #13082
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
Bank One Center, Suite 2900
100 N. Broadway
Oklahoma City, Oklahoma 73102
(405) 553-2828
(405) 553-2855 (facsimile)

and

William D. Fisher, OBA #17621
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
320 South Boston, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0400
(918) 594-0505 (facsimile)

ATTORNEYS FOR DEFENDANT

thereafter at the current legal rate until paid, plus the costs of this action.

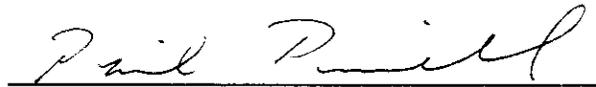
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of \$2,553.20, plus administrative costs in the amount of \$11.69, plus accrued interest in the amount of \$2,517.80, plus interest thereafter at the rate of 8% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate of 6.197 until paid, plus the costs of this action.


UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney


PHIL PINNELL
Assistant United States Attorney


HARRON J. EDWARDS

PEP/llf

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

PAMELA JONES, as Personal)
Representative of the Estate of Zachary)
W. Nobile, deceased,)
)
Plaintiff,)

ENTERED ON DOCKET
DATE APR 05.2000

vs.)

No. 98-CV-479-K ✓

CITY OF BROKEN ARROW, JOHN)
WALLS, and E.A. FERGUSON,)
)
)
Defendants.)

FILED

APR 04 2000 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action came on for jury trial, the Honorable Terry C. Kern, Chief District Judge, presiding, and the issues having been duly heard and a verdict having been duly rendered,

IT IS THEREFORE ORDERED that the Plaintiff Pamela Jones recover of the Defendants jointly and severally the sum of \$133,413.00 in actual damages. Plaintiff shall also recover of defendant John Walls individually the sum of \$4,564.33 in punitive damages and of the defendant E.A. Ferguson individually the sum of \$5,000.00 in punitive damages with interest thereon at the rate provided by law.

ORDERED this 4 day of APRIL, 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

APR 04 2000 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DANNY K. MAXWELL,)
SSN:)

Plaintiff,)

v.)

CASE NO. 99-CV-640-M ✓

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

Defendant.)

ENTERED ON DOCKET

DATE APR 05 2000

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 4th day of APRIL, 2000.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

APR 04 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DANNY K. MAXWELL,

Plaintiff,

v.

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

Defendant.

Case No. 99-CV-640-M

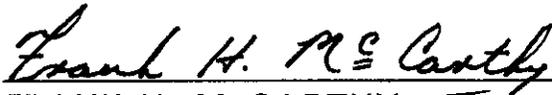
ENTERED ON DOCKET

DATE APR 04 2000

O R D E R

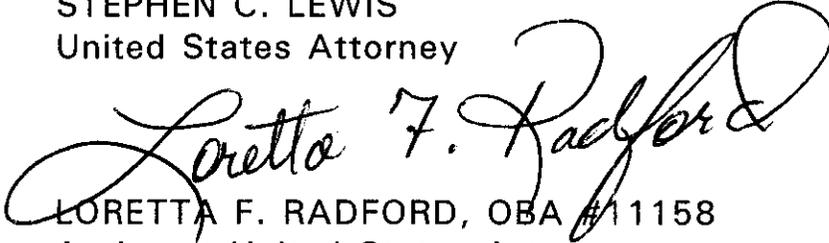
Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded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

DATED this 4th day of APRIL 2000.


FRANK H. McCARTHY
United States Magistrate Judge

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 above the typed name.

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

FILED

APR 3 2000 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
MILTON G. STOUT,)
)
Defendant.)

Case No. 00CV133BU(J)

ENTERED ON DOCKET

DATE APR 04 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 with prejudice.

Dated this 3rd day of April, 2000.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

Phil Pinnell

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 3rd day of April, 2000, a
true and correct copy of the foregoing was mailed, postage prepaid
thereon, to: Milton G. Stout, RR 3 Box 102-A, Cleveland, OK
74020-9521.

Desra L. Overstreet

Desra L. Overstreet
Financial Litigation Agent

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

FILED

APR 03 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES RUSHING for,
DANIELL R. RUSHING

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

Case No. 99-CV-613-K (J)

ENTERED ON DOCKET

APR 04 2000

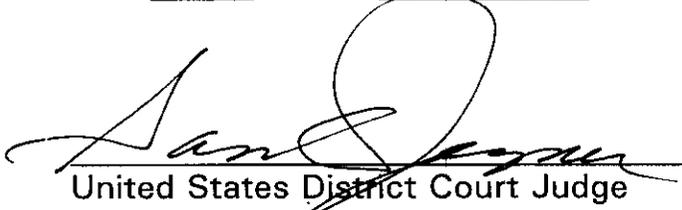
DATE

RULE 58 FINAL JUDGMENT

This action has come before the Court for consideration upon an unopposed Motion for Remand for Further Administrative Action. An Order remanding the case to the Commissioner has been entered.

The Court enters this Final Judgment under Fed. R. Civ. P. 58 remanding this case to the Commissioner for further administrative action.

THUS DONE AND SIGNED on this 3 day of APRIL 2000.


United States District Court Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 03 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES RUSHING for,
DANIEL R. RUSHING,

Plaintiff(s),

vs.

KENNETH S. APFEL, Commissioner, Social
Security Administration,

Defendant(s).

Case No. 99-CV-613-J

ENTERED ON DOCKET
DATE APR 04 2000

ORDER

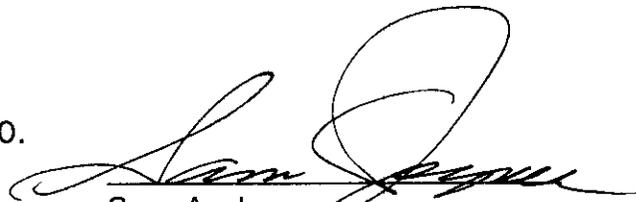
IT IS ORDERED, ADJUDGED, AND DECREED that this case is hereby remanded to the Defendant for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). Melkonyan v. Sullivan, 501 U.S. 89 (1991).

Defendant requests that upon remand the ALJ:

attempt to obtain the specific results from the April 1995 WISC III in the specific areas of "attention," "ability to sustain effort and attention," and "freedom from distractibility." If those results are not available, Plaintiff should be sent for additional testing in those areas.

IT IS SO ORDERED.

Dated this 3rd day of April 2000.



Sam A. Joyner
United States Magistrate Judge

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

FILED

APR 03 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Plaintiff,)

v.)

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

Defendant.)

CASE NO. 99-CV-252-M

ENTERED ON DOCKET

DATE APR 04 2000

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 3rd day of APRIL, 2000.

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

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

FILED

JAY THOMPSON,

Plaintiff

vs.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant

APR 03 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 99-CV-477-J

ENTERED ON DOCKET

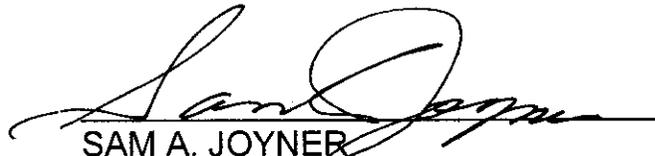
DATE APR 03 2000

RULE 58 FINAL JUDGMENT

This action has come before the Court for consideration upon an Agreed Motion to Remand for Further Administrative Proceedings. An Order remanding the case to the Commissioner has been entered.

The Court enters this Final Judgment under Fed. R. Civ. P. 58 remanding this case to the Commissioner for further administrative action.

THUS DONE AND SIGNED on this 3 day of ^{APRIL} ~~MAY~~, 2000.


SAM A. JOYNER
United States Magistrate Judge

16

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILE

JAY THOMPSON,

Plaintiff(s),

vs.

KENNETH S. APFEL, Commissioner, Social
Security Administration,

Defendant(s).

APR 03 2000

Phil Lombardi, C
U.S. DISTRICT CC

Case No. 99-CV-477-J

ENTERED ON DOCKET

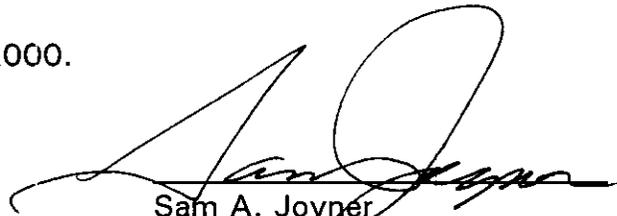
DATE APR 03 2000

ORDER

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

IT IS SO ORDERED.

Dated this 3rd day of April 2000.



Sam A. Joyner
United States Magistrate Judge

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

FILED

APR 03 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HAROLD BROSETTE,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

Case No. 99-CV-607-J

ENTERED ON DOCKET

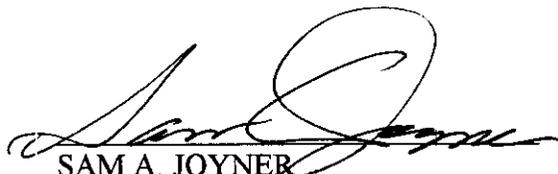
DATE APR 03 2000

RULE 58 FINAL JUDGMENT

This action has come before the Court for consideration upon an Agreed Motion to Remand for Further Administrative Proceedings. An Order remanding the case to the Commissioner has been entered.

The Court enters this Final Judgment under Fed. R. Civ. P. 58 remanding this case to the Commissioner for further administrative action.

THUS DONE AND SIGNED on this 3 day of APRIL 2000.


SAM A. JOYNER
United States Magistrate Judge

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

HAROLD BROSETTE,)
)
Plaintiff(s),)
)
vs.)
)
KENNETH S. APFEL, Commissioner, Social)
Security Administration,)
)
Defendant(s).)

APR 03 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-607-J

ENTERED ON DOCKET

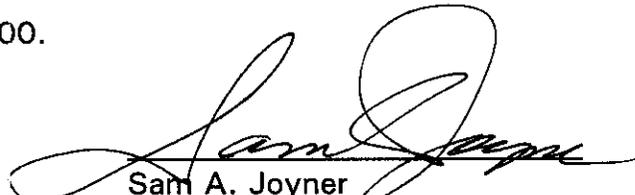
DATE APR 03 2000

ORDER

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

IT IS SO ORDERED.

Dated this 3rd day of April 2000.


Sam A. Joyner
United States Magistrate Judge

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
MELVIN L. GANN,)
)
Defendant.)

Case No. 91-CR-009-E
96-C-982-E

ORDER

ENTERED ON DOCKET
APR 03 2000
DATE _____

Now before the Court is the Motion for Notification of Judgment in the Above Captioned Case and Permission to File Late Notice of Appeal (Docket # 294) of Defendant, Melvin Gann.

In 1991, Gann was tried by a jury, convicted of conspiracy to distribute one thousand kilograms or more of marijuana and sentenced to 188 months imprisonment. He appealed his conviction and sentence, but the judgment of the Trial Court was affirmed in December 1992. United States v. Gann, 982 F.2d 1422 (10th Cir. 1992). Gann brought, in 1996, through counsel, a motion pursuant to 28 U.S.C. §2255, asserting various errors and defects in his trial and sentencing.

This Court denied Gann's motion pursuant to 28 U.S.C. §2255 on June 17, 1998. He did not file a notice of appeal regarding his §2255 motion, but, on September 21, 1999, filed this motion for notification of judgment. In support of his motion, he attaches a letter he wrote to his attorney dated November 2, 1998, wherein he states, "on or about the first week

of October, I requested my daughter personally check with the court to find out the status of my §2255 motion. And, to my surprise and dismay, I was informed the court has ruled on my motion June 17, 1998." On November 4, 1998, his counsel responded, stating that she would obtain a copy of the ruling, would send him a copy once she received it, and would visit him once she had reviewed the order. On August 30, 1999, Gann again wrote to counsel, stating, "[t]o date, I have not receive any further correspondence from you or the Court. Therefore, I am still awaiting notification of the status of my Section 2255 motion." This motion followed shortly thereafter.

Legal Analysis

Gann seeks to have the time for appeal reopened pursuant to Fed.R.App.P. 4(a)(6), which provides:

The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

The government argues that the Court lacks jurisdiction to reopen the time to file notice of appeal because Gann failed to file a motion requesting a reopening within the time

prescribed in the rule. The government asserts that the notice provided by Gann's daughter, or, at the very latest, the verification of the denial by Gann's attorney in her letter of November 4, 1998, would constitute "actual notice" of the denial and cause the statutory seven days referred to in Fed.R.App.P. 4(a)(6)(A) to begin to run.

The government's assertion that the information from Gann's daughter or the letter from Gann's attorney constitutes notice of the entry of the order is made without citation to any authority. Moreover this Court is persuaded by the reasoning of the court in Benevides v. Bureau of Prisons, 79 F.3d 25 (D.C. Cir. 1996), wherein the court held that the seven day window for filing motions under Rule 4(a)(6) is "opened only if and when a party receives notice of the entry of the judgment he seeks to appeal" from the clerk or any other party.

The evidence before this Court is that neither Gann nor his attorney has received notice of the order denying the §2255 motion or its accompanying judgment from the clerk or from any other party. Although Gann's attorney apparently requested a copy of the order on November 4, 1998, there is no notation on the docket sheet that a copy was mailed. Additionally, there is evidence that his attorney did not contact him as she said she would when she reviewed the order and judgment.

The court therefore concludes that Gann is entitled to notice of the order and judgment of June 17, 1998, and his seven days does not begin to run until he receives a copy of the order and judgment from the court clerk. However, in light of Gann's request that the time for appeal be reopened, and in the interest of time, the court further concludes since Gann

has not yet received the notice to which he is entitled, and no party would be prejudiced, that the time to file an appeal should be reopened for a period of fourteen days from the date of this order.

The court clerk is directed to mail to Gann a copy of the order and the judgment from June 17, 1998. Gann's Motion for Notification of Judgment in the Above Captioned Case and Permission to File Late Notice of Appeal (Docket # 294) is granted. Gann has 14 days from the date of this order within which to file an appeal.

IT IS SO ORDERED 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

F I L E D

MAR 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LUCIA ROCCO,)
)
Plaintiff,)
)
vs.)
)
BAYLINER MARINE, A CORPORATION,)
CHRIS HAYES, ROBIN MOUNT and)
TOD WIESENBACH, individuals,)
)
Defendants.)

No. 99-CV-740-E ✓

ENTERED ON DOCKET

DATE APR 03 2000

ORDER

Now before the Court are the Motions to Dismiss filed by Defendants' Bayliner Marine, and Robin Mount (Docket # 15) and Tod Wiesenbach (Docket #16).

At the Case Management Conference held on January 19, 2000, the Court entered an Order (Docket #14) that Plaintiff's counsel would be allowed to withdraw from the case and that the Plaintiff should have new counsel file an appearance or the Plaintiff should enter a *pro se* appearance by February 22, 2000. The Order also stated that Plaintiff's failure to comply with said Order may result in sanctions against the Plaintiff.

Plaintiff has failed to comply with the Court's Order of January 19, 2000 and the Defendants have moved the court to dismiss the Plaintiff's Complaint with prejudice as a sanction for such failure to comply. The Court finds that Defendants' motions should be granted and the Plaintiff's Complaint is hereby dismissed with prejudice.

ORDERED this 31st day of March, 2000.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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.)

FILED

MAR 21 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98 CV 0602C (M) ✓

ENTERED ON DOCKET
DATE APR 03 2000

ORDER OF DISMISSAL WITH PREJUDICE

On the 3rd day of March, 2000, the Court considered the parties' Stipulation for Dismissal with Prejudice in the above-styled and numbered cause, and is of the opinion that this action should be dismissed with prejudice. It is therefore,

ORDERED that the Plaintiffs' action against Defendants Dennis Biggerstaff and Sysco Food Services of Oklahoma, Inc., is DISMISSED WITH PREJUDICE, with all costs of court to be taxed against the party incurring them.

DATED this ___ day of _____, 2000.


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

RHONDA LYNN STARK, MARIO
JOHNSON, NATHAN SMITH AND
RICHARD LAWRENCE,

Plaintiffs,

vs.

THE CITY OF SAPULPA, OKLAHOMA,

Defendant.

Case No. 99-CV-0756-BU(E)

ENTERED ON DOCKET

DATE APR 03 2000

STIPULATION OF DISMISSAL WITH PREJUDICE

All the parties to this action hereby stipulate that any and all causes of action and claims against the Defendant, City of Sapulpa, are hereby dismissed with prejudice.

BAKER & HENDREN, P.A.

By:

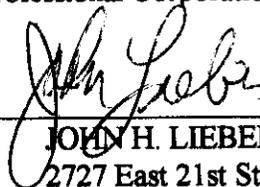


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By:



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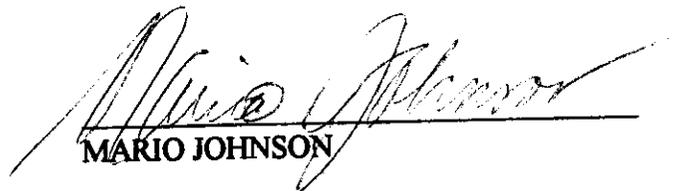
ATTORNEYS FOR DEFENDANT

SIGNATURE PAGE FOR STIPULATION OF DISMISSAL WITH PREJUDICE

Rhonda Lynn Stark

RHONDA LYNN STARK

SIGNATURE PAGE FOR STIPULATION OF DISMISSAL WITH PREJUDICE


MARIO JOHNSON

SIGNATURE PAGE FOR STIPULATION OF DISMISSAL WITH PREJUDICE



RICHARD LAWRENCE

SIGNATURE PAGE FOR STIPULATION OF DISMISSAL WITH PREJUDICE


NATHAN SMITH