IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re:	:	CHAPTER 7
EVELYN HATFIELD-SMITH,	:	
Debtor.	:	Case No. 98-30182KJC
EVELYN HATFIELD-SMITH,	:	
Plaintiff	:	
v.	:	
MICHAEL HERSHOCK, PRESIDENT, PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,	:	
Defendant	:	ADVERSARY NO. 00-863

M E M O R A N D U M[1]

BY: KEVIN J. CAREY, UNITED STATES BANKRUPTCY JUDGE.

INTRODUCTION

On November 15, 2000, the Debtor, Evelyn Hatfield-Smith (the "Debtor"), filed the "Debtor's Complaint to Determine Dischargeability Of A Student Loan Under 11 U.S.C. § 523(a)(8)" (the "Complaint"). The Debtor argued in her Complaint that two Stafford student loans, originally totaling $2,200 in principal, were dischargeable under § 523(a)(8) of the United

[1] This Memorandum constitutes the findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1334 and §157(a). This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(1)and 157(b)(2)(I).

States Bankruptcy Code (the "Bankruptcy Code" or "Code"). The Defendant and creditor Pennsylvania Higher Education Assistance Agency ("PHEAA") filed an "Answer to Complaint" (the "Answer") on December 21, 2000, opposing the relief sought. A trial was held and concluded on November 27, 2001.[2] Both parties filed post-trial briefs and proposed findings of fact and conclusions of law. On May 7, 2002, PHEAA filed a "Combined Motion for Expedited Hearing and Motion to Reopen the Record and for Leave to Issue a Subpoena to Obtain Additional Evidence Unavailable at the Time of Trial" (the "Motion to Reopen") and a subsequent brief on this issue on June 20, 2002, in which PHEAA argued that this Court should reopen the trial record to permit admission of a worker's compensation interim hearing decision by the Pennsylvania Department of Labor and Industry, Worker's Compensation Division (the "Worker's Compensation Interim Decision") regarding the Debtor's claim for worker's compensation benefits and to issue a subpoena to obtain a certified copy of such updated decision. The Debtor filed a response (the "Response") in which she argued that the Worker's Compensation Decision was cumulative and inadmissible into evidence as hearsay. Upon review of all the pleadings, briefs and evidence presented to this Court, I conclude that (1) the record of the Debtor's case should not be reopened to admit the Worker's Compensation Interim Decision; and (2) the Debtor has demonstrated her eligibility for a discharge of these student loans under § 523(a)(8) of the Bankruptcy Code.

[2] At trial, I reserved ruling on an evidentiary objection by PHEAA to the admission of a February 28, 2000 letter ("P-4") authored by Jon S. Fisher, D.O., concerning the Debtor's physical condition and work constraints. As discussed below, P-4 will be admitted as an adoptive admission under Fed. R. Evid. 801(d)(2)(B).

FACTS

The parties, by virtue of their Joint Pretrial Statement, have agreed upon the following facts, which are repeated verbatim:

1. On or about August 12, 1998, the Debtor/Plaintiff filed a voluntary petition for protection from creditors under Chapter 7 of the United States Bankruptcy Code.

2. As part of this petition, the Debtor/Plaintiff listed, among her creditors holding unsecured claims, the sum of $2,100 as student loan debt.

3. On or about November 15, 2000, the Debtor/Plaintiff instituted an adversary proceeding in the above-captioned bankruptcy case upon the filing of a complaint seeking a determination under 11 U.S.C. §523(a)(8) of the United States Bankruptcy Code as to the dischargeability of the aforesaid student loan debtor.

4. On or about December 15, 2000, PHEAA filed an Answer in response to Debtor/Plaintiff's Complaint.

5. Debtor/Plaintiff and PHEAA have engaged in the discovery process including, without limitation, a deposition of the Debtor/Plaintiff conducted on April 13, 2001.

6. Debtor/Plaintiff obtained two (2) Stafford Loans, on or about August 3, 1989 in the original amount of $1,800 and on August 30, 1989 in the original amount of $400.

7. Debtor/Plaintiff's student loans were originated by Suntrust Bank, were serviced by PHEAA's Student Loan Servicing Center ("SLSC"), and were guaranteed by Education Credit Management Corporation ("ECMC").

8. On or about July 2, 1990, Debtor/Plaintiff's student loans matured and entered repayment.

9. Debtor/Plaintiff applied for and received deferments and forbearances in suspension of the repayment of her student loans.

10. The designated Forbearance/Deferment periods occurred as follows:

- Unemployment Deferment - 9/1/90 through 8/26/92
- Temporary Hardship - 7/20/93 through 8/20/94
- Temporary Hardship - 9/21/94 through 12/21/94
- Administrative - 9/22/95 through 10/18/95
- Temporary Hardship - 10/19/95 through 8/30/96

11. The Debtor/Plaintiff is a 58 year-old unmarried female with no dependents.

12. The Debtor/Plaintiff ceased attending Bartram High School in Philadelphia, Pennsylvania during the tenth grade. She did not attain a high school diploma nor has she since obtained a general equivalency diploma.

13. Debtor/Plaintiff is a licensed cosmetologist in Pennsylvania, License Number CO137602L. Debtor/Plaintiff completed cosmetology training at the Wilfred Academy in Philadelphia, Pennsylvania in or around 1972.

14. Debtor/Plaintiff earned a certificate in information processing after completing a six-month program at Advanced Career Training in Upper Darby, Pennsylvania in 1989.

15. From 1962 through 1965, Debtor/Plaintiff was employed at Moritz Embroidery performing factory work and started at minimum wage.

16. From 1965 through 1968, Debtor/Plaintiff was employed at American Safety performing factory work and started at minimum wage.

17. From 1968 through 1970, Debtor/Plaintiff was employed at University Dental

performing factory work.

18. From 1970 through 1972, Debtor/Plaintiff was employed at Penn Fruit as a cashier at minimum wage.

19. From 1972 through 1976, Debtor/Plaintiff was employed at Rose Hairdresser as a cashier and part-time stylist at $30 per day plus tips.

20. From 1976 through 1986, Debtor/Plaintiff was employed at National Publishing performing factory work.

21. From 1987 through 1988, Debtor/Plaintiff was employed at Rickel Home Center as a cashier and earned between $4 and $5 per hour.

22. From 1988 through 1989, Debtor/Plaintiff was employed at Price Appeal as a part-time cashier at approximately $5 per hour.

23. From 1989 through 1990, Debtor/Plaintiff was employed at Ava Electronics performing factory work starting at approximately $5.50 per hour and increased to $6.00 per hour.

24. From March 1990 through July 1990, Debtor/Plaintiff was employed at Aetna Life & Casualty as a file clerk and earned $6 per hour.

25. From July 1990 through October 1990, Debtor/Plaintiff was employed at Unique Industries performing factory work starting at $5 per hour and increased to $5.50.

26. From October 1990 through February 1991, Debtor/Plaintiff was employed at System Parking, Inc. as a cashier at approximately $5 per hour.

27. From September 1991 through August 1995, Debtor/Plaintiff was employed at Troemner, Inc. performing factory work starting at approximately $4.50 and increasing to $6.00.

28. From October 1995 through October 1996, Debtor/Plaintiff was employed at Dollarland as a cashier at approximately $5 per hour.

29. In July 1997, Debtor/Plaintiff began working at Ampco Express as a cashier.

30. Debtor/Plaintiff is currently employed at Ampco Express averaging 16 hours per week and earning $7.40 per hour.

31. Debtor/Plaintiffs total net income is $834 per month, which includes $193 every two weeks in workman's compensation benefits, which were awarded due to a back injury sustained in 1998, while employed in her current position at Ampco Express. Further, she receives a yearly grant of $287 from a Low-Income Home Energy Assistance Program ("LIHEAP"), which is paid directly to Philadelphia Gas Works to defray her gas utility expense.

32. In 1997, Debtor/Plaintiff reported an adjusted gross income of $6,935.

33. In 1998, Debtor/Plaintiff reported an adjusted gross income of $11,179.

34. Debtor/Plaintiff currently owns a 1977 Lincoln Mercury Marquis.

35. The Pennsylvania Higher Education Assistance Agency ("PHEAA") is an Agency, organized and existing under the laws of the Commonwealth of Pennsylvania.

36. The Student Loan Servicing Center ("SLSC") is a division of PHEAA.

The evidence adduced at trial revealed the following: The Debtor is a 58 year-old woman who lives alone. (Tr. at p. 9)[3]. The Debtor did not complete the 10th grade in school. Id. As of November 27, 2001, the balance on the two Stafford Loans was $2,451.30 with

[3] References are to the November 27, 2001 trial transcript. The Debtor testified that she was then 58 years old and would be age 59 in January (of 2002). This makes her 60 years of age at the time of this decision.

interest accruing at a rate of $11 per month. (Tr. at pp. 59-60). The Debtor has been employed in a variety of capacities and places since 1962, including a cashier, factory worker, file clerk and part-time stylist. The Debtor has held a cosmetology license since 1972, but has not worked in the field of cosmetology for over 25 years. (Tr. at pp. 33-34). While the Debtor borrowed the money at issue to earn a certificate in information processing after completing courses at Advanced Career Training in 1989, she has been unable to find a job in the field of computers. (Tr. at pp. 19-20). The Debtor testified that she can type only ten words per minute and had not heard of such computer programs as Windows 95 or 98, Microsoft Word or Microsoft Excel. (Tr. at pp. 22-23).

At the time of trial, the Debtor was employed sixteen hours per week as a cashier at Ampco Express Parking, earning $7.40 per hour, which is the highest wage that she has earned at a job. (Tr. at pp. 13-14, 18, 23). The Debtor was unable to work any more hours because she became partially disabled in October 1999 after sustaining a back injury while working for Ampco. The Debtor's back injury encompasses two bulging discs, one of which presses against a nerve. (Tr. at pp. 48-49). The back injury has negatively affected the Debtor's ability to work at any job that requires extended periods of sitting or standing. The Debtor is unable to work more than four hours a day because of her inability to sit or stand for extended periods of time. (Tr. at p. 18). Despite her previous work experience in cosmetology, the Debtor testified that she could not work as a stylist because such a job would require excessive standing or bending. (Tr. at p. 19). From January through October 2001, the Debtor's gross income from wages was $5,882.57, with net wages of $4,837.74, or a monthly average of approximately $588 and $484, respectively. (Exhibits P-1, P-2). At the time of trial, the Debtor received $193.02 in worker's

compensation every two weeks, with an average of approximately $418 per month. These figures translate into a monthly income of approximately $902[4]. The Debtor's only other outside support is a yearly grant of $287 under the Low-Income Home Energy Assistance Program ("LIHEAP"), which is paid directly to Philadelphia Gas Works. (Tr. at p. 11).

The Debtor has fixed monthly expenses of at least $904.[5] The calculation of the Debtor's budget does not include incidentals for such items as pain medication, which, the Debtor testified, she often foregoes because of an inability to pay the costs of the prescription. (Tr. at pp. 23-24). The Debtor cannot afford health insurance at her current job, the Debtor does not have a retirement plan beyond social security, and the Debtor's home has a second mortgage provided by the Pennsylvania Housing Finance Agency that prevented foreclosure on the Debtor's home due to her inability to make payments on the home's first mortgage. (Tr. at pp. 10, 23-24). Nor does the Debtor's monthly budget account for various repairs that need to be undertaken. At the time of trial, the Debtor drove a 1977 Mercury in need of mechanical repair, possessed a broken washing machine, and lived in a home with plumbing and electrical problems. (Tr. at pp. 12-13, 25).

About two months after trial, the Pennsylvania Department of Labor and Industry, Worker's Compensation Division issued the Worker's Compensation Interim Decision that is the

---

[4] This monthly net income figure is $68 higher than that agreed to by the parties in their Joint Pretrial Statement; however, P-2, a copy of the Debtor's pay stub for the period ending October 31, 2001 and P-3, reflecting the periodic worker's compensation payment, were offered by the Debtor at trial and admitted without objection.

[5] Monthly expenses include: $335 (two mortgages of $310 and $25) (Tr. at p. 10), $60 (water and electricity) (Tr. at p. 11), $50-$150 (for gas, after LIHEAP assistance)(Tr. at p. 10), $50 (gas and oil for the Debtor's car) (Tr. at p. 26), $69 (car insurance) (Tr. at pp. 25-26), $40 (Laundromat) (Tr. at p. 13), $200 (food) (Tr. at p. 26), $25 (telephone) (Tr. at p. 10) $35 (cable television) (Tr. at pp. 12-27), and $40 (clothing)(Tr. at p. 26).

focus of PHEAA's Motion to Reopen the record of the Debtor's case. At the time of PHEAA's Motion to Reopen and the hearing thereon on June 24, 2002, the Worker's Compensation Interim Decision was on appeal. (H'rg Tr. at pp. 10-12). The Debtor opposes the reopening of the record to admit the Worker's Compensation Interim Decision, in part, because the Debtor claims that the January 2002 decision is based upon evidence of the Debtor's physical condition in the year 2000, which was ascertainable by PHEAA by the November 2001 trial.

DISCUSSION

A. The Motion to Reopen the Record of the Debtor's Case to Include the Worker's Compensation Interim Decision.

Whether the record should be reopened to allow a party to submit additional evidence is within the sound discretion of the trial court. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331, 91 S. Ct. 795, 803 (1971); Rochez Bros., Inc., 527 F.2d 891, 894 n.6 (3d Cir. 1975). The trial court's discretion is especially broad when a final judgment has not been entered by the trial judge in a case. "Where a trial judge enters an order reopening the record and providing for the taking of further testimony before the case has been determined . . . by a judge in a bench trial, the trial judge's discretionary determination is one which, of course, is entitled to the greatest deference on appeal." Pinto v. Philadelphia Fresh Food Terminal Corp., No. Civ.A. 89-3233, 1989 WL 234516, at *5 (E.D.Pa. Aug. 25, 1989).

There exists no express authority under the Federal Rules of Civil Procedure to reopen a record, but reopening the record of a case "appears to be a cannibalization of those qualities found in Rules 59 and 60, Federal Rules of Civil Procedure, New Trials and Relief from Judgment or Order respectively, geared by the philosophy of Rule 1, that is, the 'just speedy and

inexpensive determination of every action.'" Caracci v. Brother Int'l Sewing Mach. Corp. of La., 222 F. Supp. 769, 771 (E.D.La. 1963), aff'd, 341 F.2d 377 (5th Cir. 1965); see 12 James Wm. Moore et al., 12 Moore's Fed. Practice § 59.13 [3][c](3d ed. 2002).

Guidance has been provided to the trial court for when a motion to reopen a record should be allowed. "[A] motion to reopen does not require that the evidence be newly discovered or that it could not have been discovered during the pendency of the trial by a party acting with due diligence." Moore at § 59.13[3][c]. Instead, "[i]n deciding whether to reopen a case, the district court should be concerned with several factors: What burden, if any, will be placed on the parties and their witnesses; what undue prejudice may result by not taking new testimony; and what consideration should be given to judicial economy." Rochez Bros., 527 F.2d at 894 n.6. A trial court should likewise consider the interest of substantial justice in determining whether to reopen a record. Id. at 894-895.

A motion to reopen may serve the purpose of updating a trial court concerning significant post-trial developments. Orfa Corp. of Am. v. Coppello (In re Orfa Corp. of Am.), 115 B.R. 799, 807 (Bankr. E.D.Pa. 1990). It may be granted when the evidence is necessary for a court to come to an accurate disposition of a case and avoid guesswork. See Labrum & Doak v. Brown (In re Labrum & Doak, LLP), 226 B.R. 161, 166-167 (Bankr. E.D.Pa. 1998). A motion to reopen may be granted when new evidence is found that would probably change the outcome of a case. See Slone v. Integra Bank/Pittsburgh (In re Int'l Bldg. Components), 161 B.R. 764, 768 (Bankr. W.D.Pa. 1993).

In Joy Technologies, Inc. v. Flakt, Inc., 901 F. Supp. 180, 183 (D. Del. 1995), the district court held that undue prejudice would result to the opposing party if the trial court reopened the

record in the case based on allegedly newly discovered evidence when the party moving to reopen the record had a "full and fair opportunity" to investigate the issue (and presumably attempt to enter its findings into evidence), where the new evidence is cumulative and not probative and where reopening the record would "frustrate the . . . prompt and efficient handling of [the] litigation." Id. See Agri-Concrete Products, Inc. v. Fabcor, Inc. (In re Agri-Concrete Products, Inc.), 1996 WL 31857, at *3 (Bankr. M.D.Pa. Jan. 16, 1996) (court declining to reopen record where "reopening [the] case would only be to re-litigate the matter one more time without the presentation of new theories or newly discovered evidence . . .").

Because the trial was held during November 2001, PHEAA had a full and fair opportunity to present all evidence concerning the Debtor's physical condition up to the point of trial and thus through the year 2000. Even if the Worker's Compensation Interim Decision concludes that the Debtor may work more hours in a week, this is only one factor for determining whether the Debtor is entitled to an undue hardship discharge under § 523(a)(8). The court may also consider other factors such as age, employment prospects and other financial expenses. See Queen v. PHEAA, 210 B.R. 677, 681 (E.D.Pa. 1997); moreover, even if the Worker's Compensation Interim Decision reflects a view that the Debtor has the ability to work more hours, that does not mean that she actually will be able to obtain such employment. Moreover, this Court need not determine the Debtor's present and future financial condition to a mathematical certainty to decide that she is entitled to an undue hardship discharge under § 523(a)(8) of the Bankruptcy Code. See Cline v. Ill. Student Loan Assistance Ass'n (In re Cline), 248 B.R. 347, 351 (8th Cir. BAP 2000) (refusing to go over the debtor's expenses dollar for dollar to find every possible way to boost a surplus given that the overall total remains firmly

minimal). For all of these reasons, no legal prejudice is suffered by PHEAA by denial of its Motion to Reopen.

I also conclude that an undue burden will be placed on the Debtor by reopening the record. The Debtor is receiving free legal assistance from the Consumer Bankruptcy Assistance Project. Even if admissible, the Worker's Compensation Interim Decision is on appeal and the Debtor has requested the opportunity to present further evidence and argument in opposition to it, if admitted.[6] Thus, the possibility exists that yet more litigation will ensue. (See e.g., Hrg. Tr. June 24, 2002 at p. 23)[7] (Tr. at p. 23).

The proposed addition to the record would be of little probative value, cumulative in some respects, and add further expense and delay to resolution of this approximately $2,500 dispute. Thus, I will not reopen the record to include the Worker's Compensation Interim Decision.

B. Admissibility of Letter by Dr. Fisher under Fed. R. Evid. 801(d)(2)(B).

I next address whether the letter by Dr. Fisher (P-4) is admissible as evidence in the Debtor's case. PHEAA filed a motion for summary judgment, attached to which was what was identified at trial as P-4.[8] The letter evidenced Dr. Fisher's conclusion that the Debtor could maintain a work schedule of four hours per day for five days per week and outlined the nature of

---

[6] The Court has not reviewed this decision and is relying upon the parties' broad descriptions of it, which do not appear to differ.

[7] Reference is to the transcript of the June 24, 2002 hearing to consider PHEAA's Motion to Reopen.

[8] PHEAA's Summary Judgment motion (and the Debtor's cross motion for summary judgment) were denied by Order of September 12, 2001.

the Debtor's back injury and various precautions that should be undertaken. At the trial, PHEAA objected to the Debtor's proposed admission into evidence of the letter by Dr. Fisher as an exhibit on the grounds that the letter was hearsay and lacked foundation. (Tr. at p. 51).[9] In response, the Debtor argues that this letter is an adoptive admission by PHEAA under Fed. R. Evid. 801(d)(2)(B), because PHEAA used the letter as an exhibit in its Motion for Summary Judgment. (Tr. at pp. 51-52). Specifically, the letter was offered by PHEAA in its Appendix, as part of Exhibit 13 in support of the following averment: "Plaintiff/Debtor currently has a back injury for which her doctor limited her to working no more than four hours per day five days a week...." ¶36 of PHEAA's Summary Judgment Motion. I conclude that PHEAA's use of P-4 in connection with its Summary Judgment Motion demonstrates an adoption by PHEAA of the letter. Analogous cases lend support to this conclusion. In In re Japanese Elec. Products Antitrust Litig., 723 F.2d 238, 301 (3d Cir. 1983), rev'd on other grounds, sub nom., Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986), the court held that statements were admissible by the plaintiffs under Rule 801(d)(2)(B) when the defendants had cross-referenced the statements in their answer to the plaintiffs' interrogatory under Federal Rule of Civil Procedure 33(c). The Court noted that, in the absence of an explicit statement by the responding party under oath disclaiming knowledge of the answer to the interrogatory, "the interrogating party is entitled to assume that a cross-reference to documents adopts the contents of the documents as answers to the interrogatory, and the answering party is estopped from claiming otherwise." Id. Even more analogous to the present

[9] Although, when challenged that PHEAA itself had first offered the letter in support of its own summary judgment motion, PHEAA acknowledged that this undercut its foundation objection. (Tr. at p. 51).

case is F.T.C. v. Hughes, 710 F. Supp. 1520 (N.D. Tex. 1989), appeal dismissed, 891 F.2d 589 (5th Cir. 1990). There, the court held that the defendant could not strike a financial statement as an exhibit to the plaintiff's motion for summary judgment because, among other factors, the defendant attached the financial statement to his own summary judgment affidavit. Id. at 1523. Instead, the Court held that the financial statement was admissible as an adoptive admission under Fed. R. Evid. 801(d)(2)(B). Id.

Similarly, PHEAA appended the letter by Dr. Fisher to its papers in support of its motion for summary judgment. The letter by Dr. Fisher was used by PHEAA in support of its factual allegation that the Debtor has a back injury in which her ability to work, according to Dr. Fisher, is limited to not more than four hours per day during a five day week. The letter itself outlines the facts relied upon by Dr. Fisher in support of his conclusion that the Debtor would not be physically overtaxed performing this part-time employment, including the nature of the Debtor's injury and certain precautions that should be undertaken by the Debtor to enable her to work this limited schedule. P-4 will be admitted.

C. Whether the Debtor's Student Loans Are Dischargeable Under 11 U.S.C. § 523(a)(8).

The next issue is whether the Debtor's student loans are dischargeable under § 523(a)(8) of the Bankruptcy Code, because forcing the Debtor to repay her two Stafford Loans would be an undue hardship on her.[10] The burden of demonstrating undue hardship rests with the Debtor. In re Greco, 251 B.R. 670, 675-676 (Bankr. E.D. Pa. 2000).

[10] 11 U.S.C. § 523(a)(8) states, in pertinent part: "A discharge under section 727 [(Chapter 7)] . . . of this title does not discharge an individual debtor from any debt for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents[.]"

For the Debtor to sustain her burden that her student loans qualify for a discharge under § 523(a)(8), she must meet the Third Circuit's three-part test under PHEAA v. Faish (In re Faish), 72 F.3d 298 (3d Cir. 1995), which is an adaptation of the Second Circuit's test outlined in Brunner v. N.Y. State Higher Educ. Services. Corp., 831 F.2d 395 (2d Cir. 1987). Under this test, the Debtor must demonstrate:

> (1) that the [D]ebtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans;
>
> (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period for student loans; and
>
> (3) that the [D]ebtor has made good faith efforts to repay the loans.

Faish, 72 F.3d at 304-05. The Debtor must prove all three elements by a preponderance of the evidence. Id. at 306. See also Grogan v. Garner, 498 U.S. 279, 291, 111 S.Ct. 654, 661, 112 L.Ed.2d 755, 767 (1991).

1. Whether the Debtor Cannot Maintain a Minimal Standard of Living.

Under Brunner's first prong, the Debtor must demonstrate that she cannot maintain a minimal standard of living if forced to repay the loans. Faish, 72 F.3d at 304. PHEAA argues that the Debtor can maintain a minimal standard of living and still repay her loans for two reasons: First, PHEAA directs this Court's attention to the capability of the Debtor to earn income that is above the poverty level for an individual who has no dependents. It bases this assertion on the Debtor's income from her last year of full-time employment before she sustained her back injury, in which she earned $11,179. Second, there exist flexible payment

options for the Debtor. One payment option allows the Debtor to make 24 payments of $16.75, 23 payments of $110.71 and a final payment of $110.69. (Tr. at p. 61); (Def.'s Post Trial Br. at 17). The Debtor could also enroll in an Income Contingent Repayment Plan in which her monthly payments could be as low as $5.00. (Def.'s Post Trial Br. at 17); see 34 C.F.R. §§ 685.209(a)(6) (2002). PHEAA also argues that the Debtor's ability to repay would be enhanced if she cancels her $35 per month cable television subscription, which PHEAA claims is "an extravagance to the detriment of her creditors." Id.

The Debtor cannot maintain a minimal standard of living and repay her student loans. "[W]hile income below the poverty line should generally be sufficient condition to satisfy the first Brunner prong, it should not be a necessary condition to satisfy that prong of the three-part test." Mayer v. PHEAA (In re Mayer), 198 B.R. 116, 125 (Bankr. E.D.Pa. 1996) (citations omitted), aff'd , Queen v. PHEAA, 210 B.R. 677 (E.D.Pa. 1997), aff'd, Mayer v. PHEAA (In re Mayer), 156 F.3d 1225 (3d Cir. 1998); see Hoyle v. PHEAA, 199 B.R. 518, 523 (Bankr. E.D.Pa. 1996)(rejecting notion that "minimal standard of living" is equivalent to poverty level) (citing Ammirati v. Nellie Mae, Inc. (In re Ammirati), 187 B.R. 902, 906 (D.S.C. 1995)). In Mayer, one of the debtors earned a salary of $17,000 (far above the then-current poverty level of $10,360), yet still obtained a determination of undue hardship under § 523(a)(8). See 198 B.R. at 127-128; 210 B.R. at 677. As the court in Hoyle explained:

> Where a family earns a modest income and the family budget, which shows no unnecessary or frivolous expenditures, is still unbalanced, a hardship still exists from which a debtor may be discharged from his student loan obligations.

Hoyle, 199 B.R. at 523 quoting Correll v. Union Nat'l Bank of Pittsburgh (In re Correll), 105

B.R. 302, 306 (W.D.Pa. 1989). Thus, whether the Debtor's income is above the poverty level is not outcome-determinative for this prong; instead the court should look at the Debtor's total financial circumstances, including her monthly budget and expenses. Queen, 210 B.R. at 681.

PHEAA argues that the Debtor's expenditure of $35 per month on cable is a luxury, and therefore, an unnecessary expense that precludes PHEAA from receiving repayment of her student loans. In Buzoiu, the debtor was spending $55 on "entertainment," $150 on clothing and $130 on her child's private school education each month. Buzoiu v. PHEAA, No. 01-0036, slip op. at 4 (Bankr. E.D.Pa. Oct. 3, 2001), aff'd, No. 01-5597 (E.D.Pa. Jan. 29, 2002), aff'd, No. 02-1583 (3d Cir. Nov. 13, 2002). Yet, the Buzoiu court concluded that "[t]here appears, in short, to be no 'fat' on the Debtor's household budget." Id.; slip op. at 7. In Queen, the court found that the debtor did not possess a spendthrift philosophy when she claimed she spent $175 per month on clothes and $1000 per month on day care. Queen, 210 B.R. at 681. Given the Debtor's lack of any entertainment expenses, and on this record, I cannot not declare her cable television expense a "luxury."

The evidence demonstrates that the Debtor barely meets her basic living expenses much of the time and fails to meet her basic living expenses at least some of the time. For the first ten months of 2001, the Debtor earned an average monthly net income of $484 in addition to $193 in worker's compensation every two weeks. She does not spend money eating out, except for occasional fast food, nor does she subscribe to magazines. There is no "fat" on the Debtor's budget. Even if the Debtor cancelled her cable television, the Debtor has other basic needs to address. The Debtor testified that she cannot afford pain medication for her back, runs low on food, drives an older vehicle in need of repair, forgoes clothing purchases, lives in a home with a

broken washer, bad electrical wiring and plumbing problems, and receives heating assistance for her home from LIHEAP.

Neither am I persuaded that the existence of possible repayment options presented by PHEAA would permit repayment of the loans. PHEAA argues that the Debtor has not mitigated her circumstances by consolidating her debt or pursuing an income sensitive repayment plan, such as the Income Contingent Repayment Plan. (Defs.' Post-Trial Br. at 16) PHEAA asserts that the Debtor can "maintain a minimal standard of living by . . . availing herself of the administrative relief afforded through student loan debt consolidation or income sensitive repayment plans." Id. at 17.

Availability of the repayment options is insufficient to aid the Debtor. First, the Debtor must make payments greater than the $11 per month accrual of interest if to retire any of her principal balance. (Tr. at p. 60). One option provided by PHEAA would require the Debtor to make monthly payments of $16.75. She cannot afford even the small payment of $16.75, especially considering that she occasionally cannot afford food and medication. This option becomes even less attractive when the $16.75 payments later balloon to $110 per month. Likewise, other plans that call for repayment options of approximately $60 per month are not feasible given the Debtor's extremely tight budget and pressing needs. There is no "surplus." Thus, the Debtor has sustained her burden of proof under Brunner's first prong.

2. Whether Additional Circumstances Exist Indicating that the Debtor's State of Affairs Will Continue for a Significant Portion of the Repayment Period for the Debtor's Student Loans.

Under the second prong of the "undue hardship" test under Brunner the Debtor must show that additional circumstances exist indicating that her current state of affairs is likely to

persist for a significant portion of the repayment period for the student loan. Faish, 72 F.3d at 304-305; Brightful v. PHEAA (In re Brightful), 267 F.3d 324, 328 (3d Cir. 2001). The Brightful court said:

> [I]t is not enough for [the Debtor] to demonstrate that she is currently in financial straits; rather, she must prove a total incapacity. . . in the future to pay [her] debts for reasons not within [her] control. In other words, 'dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment.

Brightful, 267 F.3d at 328 (citations omitted). The court in Brunner referred to the circumstances under this second prong as "exceptional circumstances" and suggested that such factors as age, disability, illness, and lack of skills may constitute "exceptional circumstances" and fulfill the requirement of the second prong. Brunner, 831 F.2d 396. Another relevant factor is the number of years that "a significant portion of the repayment period"encompasses. Mayer, 198 B.R. at 126-127.

PHEAA argues that the Debtor fails to meet this second prong, particularly since the Debtor presents no evidence of any future impairment of her ability to work that proves a certainty of hopelessness in the repayment of her student loan debt. PHEAA claims that her medical condition does not render her incapable of working and that the Debtor has marketable job skills. (Def.'s Post-Trial Br. at pp. 17-21). PHEAA suggests that the Debtor did not meet her burden of proof under this prong because she failed to present expert testimony on her medical condition. (Def.'s Post-Trial Br. at p. 20); (Tr. at pp. 18, 24).

The court in Brightful said it is permissible for the trial court to "draw reasonable conclusions regarding [a debtor's] mental and emotional state" without the benefit of expert

testimony. Brightful, 267 F.3d at 330. In Brightful, the Third Circuit reversed the bankruptcy court's conclusion that the Debtor satisfied the second Brunner prong, not because of the lack of expert testimony, but because it found that the bankruptcy court's determination that the Debtor's condition would prevent her from being gainfully employed was not sufficiently supported. Id. at 329-330.

The Debtor has suffered a downward trend in her earnings from a high gross in 1992 of approximately $17,000 (Exhibits D-6, D-10) to a low annualized net at the time of trial of $10,824. During this time, the Debtor has lost this higher-paying job, has aged and has suffered a back injury. The evidence presented at trial demonstrates that the Debtor, partially disabled by a back injury sustained in 1999, was still receiving partial worker's compensation at the time of trial. Over two years later, the Debtor was still obtaining treatment from her doctors. (Tr. at p. 26). The Debtor testified that, because of her back pain, she cannot sit or stand longer than the four hours a day she works and that sometimes she has to leave work early. (Tr. at p. 18). She also described the pain as "getting worse" and that she is "constantly having pain and pressure in the sciatic area." (Tr. at pp. 18-19).

PHEAA argues that the Debtor has marketable job skills due to her certificate in information processing and her cosmetology license. I disagree. The Debtor lacks skills to improve her earning potential. The Debtor did not complete the 10th grade in school. As far as her computer skills are concerned, the Debtor has earned only a certificate from her information processing course from twelve years ago. The Debtor has never obtained a job in the field of computers, nor does she know of anyone who has been successful in obtaining a job because of this course. (Tr. at p. 22). Any computer skills that she may have acquired in 1990 are likely

obsolete, evidenced by the fact that the Debtor has no working knowledge of the commonplace computer programs used today, such as Microsoft Word. Furthermore, she can only type ten words per minute. It is unlikely that the Debtor will be able to pursue a higher-paying job in information processing using her obsolete skills. See Buzoiu, No. 01-0036, slip op. at 7-8 (failure of debtor who earned certificate in computers to find job in a field that used her skills and obsolescence of skills learned nine years prior to the court's decision warranted finding "exceptional circumstances"). As far as the Debtor's skills in cosmetology are concerned, the Debtor obtained her cosmetology license thirty years ago and has not worked in that field since 1976. Also, the Debtor's back injury precludes her from standing for long periods of time. It is unlikely that the Debtor will be able to find a higher paying job in either cosmetology or computer information processing due to her outdated skills and the difficulty she has in standing and bending.

The Debtor is now 60 years old. Her age cannot favor her in finding long-term, higher-paying employment. The Debtor does not have a retirement plan beyond the social security that she will receive. The Income Contingent Repayment Plan put forward by PHEAA at trial, which could extend for as long as 25 years into the future (and thus retire the debt when the Debtor reaches her mid-80s), is unrealistic. Other courts have refused to "saddl[e] an aging debtor with an additional financial obligation." See Young v. PHEAA (In re Young), 225 B.R. 312, 317 (Bankr. E.D.Pa. 1998) (case involved a 50 year old debtor); c.f. N.J. Higher Educ. Assistance Auth. v. Zierden-Landmesser (In re Zierden-Landmesser), 249 B.R. 65, 70 (Bankr. M.D.Pa. 2000) (court found debtor had not met second prong of Brunner when the debtor, in her early forties, could expect to remain in the labor market for more than 25 years). Based upon this

record, I conclude that the Debtor's circumstances are exceptional and likely to continue over a significant portion of any repayment period. Thus, the second prong of the "undue hardship" test is satisfied.

3. Whether the Debtor Has Demonstrated a Good Faith Effort to Repay Her Student Loans

The third prong of the undue hardship test requires a showing that the Debtor has made good faith efforts to repay her loans. Faish, 72 F.3d at 304-305. "'[U]ndue hardship encompasses a notion that the debtor may not willfully or negligently cause h[er] own default, but rather h[er] condition must result from factors beyond h[er] reasonable control.'" Id. at 305 (quoting In re Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993)). PHEAA suggests that a review of good faith includes (1) consideration of whether the Debtor has made payments on her student loan in the past, (2) whether the Debtor has maximized her financial resources to prevent default, and (3) whether the Debtor has minimized her financial difficulties through positive actions. (Def.'s Post-Trial Br. at 22) See Queen, 210 B.R. at 682. PHEAA also argues that the Court must look at whether the Debtor mitigated her circumstances by accepting various repayment options offered by the U.S. Department of Education, such as an Income Contingent Repayment Plan. (Def.'s Post-Trial Br. at 23). Even assuming that these factors are all relevant to the Court's analysis of good faith, the Brunner test, as adopted by Faish, requires an inquiry of the totality of the Debtor's circumstances in determining good faith, a determination not necessarily limited only to these factors.

PHEAA suggests that a debtor's refusal to accept such repayment options as the Income Contingent Repayment Plan may be sufficient to deny a discharge to a debtor because of a lack

of a good faith effort to repay her loans under such cases as Swinney v. Academic Fin. Services (In re Swinney), 266 B.R. 800 (Bankr. N.D. Ohio 2001) and Douglass v. Great Lakes Higher Educ. Servicing Corp. (In re Douglass), 237 B.R. 652 (Bankr. N.D. Ohio 1999). Swinney and Douglass found a lack of good faith when the Debtor failed to accept the U.S. Department of Education's repayment options, had not demonstrated exceptional circumstances that precluded the debtor in that case from accepting the proffered repayment options by the U.S. Department of Education, and had engaged in other conduct that demonstrated a lack of good faith. See Swinney, 266 B.R. at 807; Douglass, 237 B.R. at 657. Swinney held that a lack of good faith existed when the court found that the debtor had failed to establish the exceptional circumstance of a mental disability that precluded her from accepting the repayment plan and that the debtor had already reaffirmed an auto loan while in bankruptcy. Swinney, 266 B.R. at 807. Douglass found good faith lacking when there existed no exceptional circumstances and when the debtor filed bankruptcy before the first payment was due on her loan. Douglass, 237 B.R. at 657. The Debtor contends that if a debtor had to apply for every possible loan deferment program prior to obtaining an undue hardship discharge, then no debtor would be able to obtain discharge of her student loan debt, since there would always be some type of plan available. (Pl.'s Post-Trial Br. at 7).

One way to analyze the Debtor's good faith is to ask whether the Debtor has "maximized financial resources in order to prevent a default and has allowed sufficient time before declaring bankruptcy to obtain the job sought when the education in issue was being obtained." Queen, 210 B.R. at 682; see Derby v. Student Loan Services (In re Derby), 199 B.R. 328, 330 (Bankr. W.D.Pa. 1996).

The Debtor has maximized her financial resources. The Debtor has never earned more than $7.40 per hour at a job. She has demonstrated that because of her age, lack of skills and a disability, it is unlikely that she will find a higher-paying job. Furthermore, no evidence in this record demonstrates that the Debtor has lived extravagantly while failing to repay her loans. Her bankruptcy petition shows few assets and little accumulation of wealth. Her most valuable asset, her home, has a value of $30,000, which is secured by a claim of $24,266.30. (Ex. D-1). All of her listed assets on Schedule C have values that fall within the § 522(d) exemptions. Her budget has no surplus. She could decrease expenses only if she was to forego purchasing food or cleaning her laundry.

The ability of the Debtor to make past payments on the student loans at issue is a relevant factor for determining the Debtor's good faith. Williams v. Illinois Student Assistance Comm'n (In re Williams), No. 99-10899DWS, 99-0378, 1999 WL 1134772 at *2 (Bankr. E.D.Pa. Dec. 6, 1999). As Williams discussed, there may exist circumstances beyond a debtor's control that preclude a debtor from making any payments on her loans. Id. at *3. Thus, the Williams court found good faith when the debtor had been incarcerated, was employed at a minimum-wage job and had made no payments towards her loan in that case. Id.

The Debtor presented evidence — uncontested by PHEAA — that payments have been made toward the two student loans at issue. The Debtor testified that she made payments of "a couple hundred dollars" to the loans and the Defense's own exhibit, which was used as evidence by the Debtor, shows that the principal balance for her two student loans was reduced by $430. (Ex. D-15); (Tr. at pp. 71-72). In light of the Debtor's exceptional circumstances, few assets, lean budget and past repayments, I conclude that the Debtor has maximized her financial

resources.

It is also important to consider the length of time between the first payment due on the loans at issue and the date the Debtor filed her bankruptcy petition. See Brunner, 831 F.2d at 397; Queen, 210 B.R. at 682; Mayer, 198 B.R. at 128 (citing Hoyle, 199 B.R. at 524-525). In Brunner, the Debtor filed for bankruptcy ten months after receiving a master's degree and filed for a discharge of her student loan debt within one month of the first payment due date. Brunner, 831 F.2d at 397. The court found a lack of good faith in Douglass when the debtor did not wait until her first loan payment was due to file bankruptcy. Douglass, 237 B.R. at 657. Here, the Debtor's loans matured in 1990; she filed her bankruptcy petition in 1998. During this eight-year period, the Debtor received six deferments. (Ex. D-3). The Debtor has waited an adequate period of time before filing for bankruptcy. In light of the foregoing, the Debtor has demonstrated a good faith effort to repay her student loans and has satisfied the third prong of the Brunner test as adopted by the Third Circuit in Faish. These loans are dischargeable under 11 U.S.C. § 523(a)(8). An appropriate Order follows.

BY THE COURT:

_____
KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

Dated: April 14, 2003

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re:	:	CHAPTER 7
EVELYN HATFIELD-SMITH,	:	
Debtor.	:	Case No. 98-30182KJC
EVELYN HATFIELD-SMITH,	:	
Plaintiff	:	
v.	:	
MICHAEL HERSHOCK, PRESIDENT, PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,	:	
Defendant	:	ADVERSARY NO. 00-863

ORDER

AND NOW, this 14th day of April, 2003, after trial of this adversary proceeding and for the reasons given in the accompanying Memorandum, it is hereby

ORDERED AND DECREED that:

1. Defendant's Combined Motion for Expedited Hearing and Motion to Reopen the Record and for Leave to Issue a Subpoena to Obtain Additional Evidence Unavailable at the Time of Trial, is **DENIED**.

2. Exhibit P-4 is **ADMITTED** into evidence.

3. Judgment is entered in favor of the Plaintiff and against the Defendant.

4. The two Stafford Loans owed by Debtor, one obtained on or about August 3, 1989, in the original principal amount of $1,800 and one obtained on August 30, 1989 in the original principal amount of $400, are **DECLARED DISCHARGEABLE**.

BY THE COURT:

KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

Copies to:

Evelyn Gloria Hatfield-Smith
2546 S. Bonnafon Street
Philadelphia, PA 19142

Henry J. Sommer, Esquire
Consumer Bankruptcy Assistance Project
1424 Chestnut Street
Philadelphia, PA 19102

Byron F. Walker, Esquire
PHEAA Legal Services Division
1200 North Seventh Street
Harrisburg, PA 17102-1444

Thomas M. Hayward, Esquire
(Trustee)
Bala Point Suite 130
111 Presidential Boulevard
Bala Cynwyd, PA 19004

Frederic J. Baker, Sr., Esquire
Senior Assistant United States Trustee
Curtis Center, Suite 950 West
601 Walnut Street
Philadelphia, PA 19106

Joseph Simmons, Clerk, U. S. Bankruptcy Court
Pamela Blalock, Courtroom Deputy Clerk