

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

In Re: DAVID V. HORSLEY,
Debtor.

Chapter 13
Case No. 04-00820

DECISION AND ORDER

At Harrisonburg in said District this 12th day of May, 2008

On February 7, 2008, the Debtor in the above-captioned case filed an application for discharge under 11 U.S.C. § 1328(b) and (c). A hearing on the matter was held March 12, 2008, at which time the court received evidence and heard oral testimony of the Debtor and arguments of Debtor's counsel in support of a discharge. No creditors appeared or otherwise opposed the motion. The chapter 13 Trustee participated in the hearing. For the reasons stated below, the requested hardship discharge is denied.

BACKGROUND

The Debtor filed a petition seeking relief under chapter 13 of the United States Bankruptcy Code on March 1, 2004, for which a plan was confirmed on May 19, 2004. A second amended plan filed by the Debtor on September 6, 2007, was never confirmed by the court. As of the date of this hearing, the Debtor's unsecured creditors had received a total of \$5,495.00 through the

confirmed plan payments. (See Debtor's Ex. C.)

Prior to filing for bankruptcy protection, the Debtor was employed for a total of thirty years at two separate foundries in Lynchburg, Virginia and Radford, Virginia. (Hr'g Tr. 5-6, Mar. 12, 2008.) The Debtor's work at the foundries consisted of heavy labor (Hr'g Tr. 5), which led to an injury rendering the Debtor unable to raise his arms over his head. (Hr'g Tr. 6.) The Debtor had surgery on his shoulders but ultimately had to quit work at the foundry soon after the surgery due to his inability to perform his job function as a result of the injury. (Hr'g Tr. 13.) The Debtor submitted no medical evidence as to the extent and severity of his injury.

After leaving his job at the foundry, the Debtor worked at an ice plant loading pallets in Radford, Virginia for 5 years. (Hr'g Tr. 6.) Sometime during 2006, the Debtor became unable to perform his job at the ice plant due to his shoulder injury and left his position there. (Hr'g Tr. 7.)

As listed in his amended Schedule I filed February 29, 2008, the Debtor's current monthly income is \$1,244.00, consisting of \$374 in retirement fund payments and \$870 in Social Security retirement payments. The Debtor's amended Schedule J, also filed February 29, 2008, lists his current monthly expenditures at \$1,479, which includes monthly mortgage payments on his residence of \$511.

DISCUSSION

Under 11 U.S.C. § 1328(b), chapter 13 debtors can obtain a discharge after confirmation even though complete payments under the plan have not been made so long as three essential criteria are satisfied. The debtors must show that (1) the failure to complete plan payments is due to circumstances for which the debtors cannot justly be held accountable; (2) the value of property distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and (3) modification of the plan is not practicable. 11 U.S.C. § 1328(b)(1)-(3) (2006).

To satisfy the first prong of § 1328(b), a majority of courts require that debtors prove that they have suffered from catastrophic circumstances which directly impact their ability to make plan payments. See e.g., In re Cummins, 266 B.R. 852 (Bankr. N.D. Iowa 2001)(denying discharge where two separate injuries did not leave the debtor incapable of employment); In re White, 126 B.R. 542 (Bankr. N.D. Ill. 1991)(denying discharge where disability neither permanent nor totally disabling); In re Bond, 36 B.R. 49 (Bankr. E.D.N.C 1984)(granting discharge where debtor died). Other courts only require the existence of some unforeseeable economic circumstance that the debtor has made every effort to overcome. See e.g., Bandilli v. Boyajian (In re Bandilli), 231 B.R. 836 (B.A.P. 1st Cir. 1999); In re Edwards, 207 B.R. 728 (Bankr. N.D. Fla. 1997). Although there is no clear precedent within the Fourth Circuit on which standard to apply to a

hardship discharge determination, see In re Harrison, 1999 Bankr. LEXIS 1830, at *4 (Bankr. E.D. Va. July 30, 1999), this court finds that the Debtor has failed to meet either standard.

Although the Debtor has experienced health difficulties which seem to have affected his employment status, the Debtor has failed to provide sufficient evidence to support that his health problems amount to a “catastrophic circumstance.” The Debtor’s circumstance does not appear “catastrophic” primarily because he has not established that his health difficulties preclude him from holding any gainful employment.

Furthermore, the Debtor has failed to reach the “less than catastrophic circumstance” standard. See In re Edwards, 207 B.R. at 731 (“Where a debtor is unable to complete payments under a Chapter 13 plan due to economic circumstances that did not exist nor were foreseeable at the time of confirmation of the plan, where those circumstances are beyond the debtor’s control, and where the debtor has made every effort to overcome those circumstances but is unable to complete his plan payments, then I think the requirement of § 1328(b)(1) has been met.”) The Debtor’s situation does constitute an unforeseeable economic circumstance, but the Debtor has failed to establish that he has made every effort to overcome his situation by failing to present evidence that would preclude the possibility of finding suitable alternative employment.

Based on the pleadings before the court, the facts of this case, and

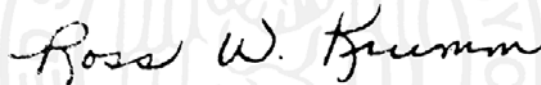
the evidence adduced at the hearing, the court holds that a hardship discharge is not warranted. By failing to show that he cannot be held accountable for his failure to complete plan payments under either standard, the Debtor fails to meet the first prong of § 1328(b) and therefore does not qualify for a hardship discharge.

Based on the foregoing analysis, it is

ORDERED:

That the Application for Discharge of Debtor Under Section 1328(b) is DENIED.

Copies of this order are directed to be sent to Mark A. Black, Esquire, Counsel for the Debtor, and to Rebecca Connelly, Esquire, chapter 13 Trustee.



Ross W. Krumm

Ross W. Krumm
U. S. Bankruptcy Judge

