IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

JOHN E. VEST, JR.,	)	CASE NO. 5:11CV00047
	)	
Plaintiff,	)	
v.	)	REPORT AND RECOMMENDATION
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	
	)	By: B. Waugh Crigler
Defendant.	)	U. S. Magistrate Judge

This challenge to a final decision of the Commissioner which denied plaintiff's October 27, 2008 applications for a period of disability, disability insurance benefits, and supplemental security income ("SSI") under the Social Security Act ("Act"), as amended, 42 U.S.C. § 416, 423 and 1381 et seq., is before this court under authority of 28 U.S.C. § 636(b)(1)(B) to render to the presiding District Judge a report setting forth appropriate findings, conclusions and recommendations for the disposition of the case. The questions presented are whether the Commissioner's final decision is supported by substantial evidence, or whether there is good cause to remand for further proceedings. 42 U.S.C. § 405(g). For the reasons that follow, the undersigned will RECOMMENDED that an Order enter GRANTING the plaintiff's motion for summary judgment and REMANDING this case to the Commissioner for further proceedings.

In a decision issued on August 27, 2010, an Administrative Law Judge ("Law Judge") found that plaintiff meets the insured status requirements through September 30, 2012. (R. 14.) The Law Judge further found that, despite the fact that plaintiff had worked since December 25, 2006, his original alleged disability onset date, the record did not support a decision based solely on this work activity. (*Id.*) The Law Judge determined that plaintiff suffered the following severe

impairments: degenerative disc disease of the lumbar spine status-post laminectomies, obesity[1], affective disorders with insomnia, and generalized anxiety disorder. (R. 15.) He concluded that plaintiff did not suffer an impairment or combination of impairments that met or medically equaled a listed impairment. (R. 16.) The Law Judge found that plaintiff had the residual functional capacity ("RFC") to perform at least sedentary work (lifting or carrying ten pounds occasionally and less than ten pounds frequently, standing or walking about two hours in an eight-hour workday, and sitting about six hours in an eight-hour workday), but that he was limited to only occasional balancing, stooping, kneeling, crouching, crawling and climbing on ramps and stairs, must avoid climbing on ladders, ropes and scaffolds, and must avoid even moderate exposure to workplace hazards (such as moving machine parts and unprotected heights). (R. 22.) The Law Judge determined that he was limited to simple, routine unskilled work in a low stress environment working more with things rather than people. (*Id.*) The Law Judge believed that plaintiff's RFC precluded him from performing his past relevant work as a laborer, landscape laborer, dishwasher/food preparation worker, lumber handler, and cleaner. (R. 30.) Nevertheless, the Law Judge found there were other jobs available in significant numbers in the national economy that he could perform. (R. 31.) The Law Judge ultimately determined that plaintiff was not disabled under the Act. (R. 32.)

Plaintiff appealed the Law Judge's August 27, 2010 decision to the Appeals Council. (R. 1-3.) The Appeals Council found no basis in the record or in the reasons advanced on appeal to review the decision, denied review, and adopted the Law Judge's decision as the final decision of the Commissioner. (R. 1.) This action ensued.

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[1] At his July 1, 2010 hearing, plaintiff testified that he was 6'1½" tall and weighed 313 pounds. (R. 56.)

The Commissioner is charged with evaluating the medical evidence and assessing symptoms, signs and medical findings to determine the functional capacity of the plaintiff. *Hays v. Sullivan*, 907 F.2d 1453 (4th Cir. 1990); *Shively v. Heckler*, 739 F.2d 987 (4th Cir. 1984). The regulations grant some latitude to the Commissioner in resolving conflicts or inconsistencies in the evidence which the court is to review for clear error or lack of substantial evidentiary support. *Craig v. Chater*, 76 F.3d 585 (4th Cir. 1996). However, if the Commissioner's resolution of the conflicts in the evidence is supported by substantial evidence, the court is to affirm the Commissioner's final decision. *Laws v. Celebrezze*, 368 F.2d 640 (4th Cir. 1966).

In a brief filed in support of his motion for summary judgment, plaintiff argues that the Law Judge erred by failing to address whether his obesity and back disorder, in combination, medically equaled Listing 1.04A[2]. (Pl's Brief, p. 11.[3]) The undersigned agrees.

A claimant is found disabled at step three of the sequential evaluation when his impairments meet or medically equal any of the listed impairments described in 20 C.F.R. Part 404, Subpart P, Appendix 1. To establish medical equivalency, a claimant must present evidence that his impairment, unlisted impairment, or combination of impairments, is equal in severity and

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[2] The Regulations describe Listing 1.04A as follows:

> *Disorders of the spine* (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture), resulting in compromise of a nerve root (including the cauda equina) or the spinal cord. With:
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> A. Evidence of nerve root compression characterized by neuroanatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine)[.]

[3] Plaintiff did not assign page numbers to the brief filed in support of his motion for summary judgment. For ease of reference, the undersigned has assigned page numbers to the document.

duration to all of the criteria of a listed impairment. *Sullivan v. Zebley*, 493 U.S. 521, 531 (1990); *see also* 20 C.F .R.§§404.1526, 416.926. Medical equivalency can be determined in three instances: First, where the claimant has an impairment that is described in the Listing, but (1) does not exhibit all of the findings specified in the listing, or (2) when the claimant exhibits all of the findings, but does not meet the severity level outlined for each and every finding, equivalency can be established if the claimant has other findings related to the impairment that are at least of equal medical significance to the required criteria. 20 C.F.R.§§404.1526(b)(1), 416.926(b)(1). Second, where the claimant's impairment is not described in the Listing, equivalency can be established by showing that the findings related to the claimant's impairment are at least of equal medical significance to those of a similar listed impairment. 20 C.F.R.§§404.1526(b)(2), 416.926(b)(2). Finally, if the claimant has a combination of impairments, no one of which meets a listing, equivalency can be proven by comparing the medical findings to the most closely analogous listings. 20 C.F.R.§§404.1526(b)(3), 416.926(b)(3). If the findings are of at least equal medical significance to the criteria set forth in any one of the listings, then the combination of impairments will be considered equivalent to the most similar listing. 20 C.F.R.§§404.1526(b)(3), 416.926(b)(3).

The Third Circuit's decision in *Diaz v. Commissioner of Social Security*, 577 F.3d 500 (3rd Cir. 2009), is instructive here. In *Diaz*, the Law Judge acknowledged that the plaintiff's obesity was a severe impairment, but he failed to consider its impact in combination with her other impairments, as required at step three in the sequential evaluation. *Id.* at 504. The Court held "absent analysis of the cumulative impact of Diaz's obesity and other impairments on her functional capabilities, we are at a loss in our reviewing function." *Id.*

As in *Diaz*, the Law Judge here determined that plaintiff's obesity was a severe impairment[4]. (R. 15.) The Law Judge also found that his degenerative disc disease of the lumbar spine was a severe impairment. (*Id.*) At step three, the Law Judge then addressed the cumulative impact of these conditions. The Law Judge specifically found that plaintiff's "back disorder with obesity does not meet Listing 1.04A because it is not associated with evidence of nerve root compression characterized by neuroanatomic distribution of pain, limitation of motion of the spine, and motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss." (R. 18.) However, the Law Judge failed to further address whether the combined effects of plaintiff's obesity and degenerative disc disease medically equaled Listing 1.04A. This was error. Thus, there is good cause to remand the case for further proceedings which address that failure.

Accordingly, it is RECOMMENDED that an Order enter GRANTING the plaintiff's motion for summary judgment and REMANDING this case to the Commissioner for further proceedings under Sentence Four of 42 U.S.C.§405(g) in a manner consistent herewith.

The Clerk is directed to immediately transmit the record in this case to the presiding United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note objections, if any they may have, to this Report and Recommendation within fourteen (14) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not

[4] A severe impairment is one which, either separately or in combination with another impairment, significantly limits the claimant's physical or mental ability to perform basic work activities. 20 C.F.R.§404.1520(c), 416.920(c). Basic work activities are the abilities and aptitudes necessary to do most jobs, including: physical functions such as sitting and standing; capacities for seeing, hearing and speaking; understanding, carrying out, and remembering simple instructions; use of judgment; responding appropriately to supervisors, co-workers and usual work situations; and dealing with changes in a routine work setting. 20 C.F.R.§404.1521(b)(1)-(6), 416.921(b)(1)-(6).

specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C.§636(b)(l)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection. The Clerk is directed to transmit a certified copy of this Report and Recommendation to all counsel of record.

ENTERED: _____
U.S. Magistrate Judge

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Date