

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

LESLIE ESTELLE HELMICK,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 5:13cv62
)	
MICHAEL J. ASTRUE, Commissioner,)	
Social Security Administration,)	By: Joel C. Hoppe
)	United States Magistrate Judge
Defendant.)	

REPORT AND RECOMMENDATION

Plaintiff Leslie Estelle Helmick (“Helmick”) brought this action for review of the Commissioner of Social Security’s (“Commissioner”) decision denying her claim for disability insurance benefits (“DIB”) under the Social Security Act (“Act”), 42 U.S.C. §§ 401–433. On appeal, Helmick argues that the Commissioner erred by allowing her to appear at the administrative hearing by phone, improperly assessed her credibility, and incorrectly determined that her symptoms did not meet a listed impairment for personality disorder. The Court has jurisdiction pursuant to 42 U.S.C. § 405(g), and this case is before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). After carefully reviewing the record and the briefs of the parties, I find that the decision of the Administrative Law Judge (“ALJ”) is supported by substantial evidence, and I recommend that the Commissioner’s decision be affirmed.

I. Procedural History

Helmick was born on June 3, 1978 (Administrative Record, hereinafter “R.” 130), and at the time of the ALJ’s decision was considered a “younger person” under 20 C.F.R. § 404.1563(c). Helmick is a high school graduate (R. 35) and has prior work history as a cook,

draw warp operator, and server (R. 168). On December 8, 2009, Helmick filed an application for DIB. (R. 130–31.) She alleged a disability onset date of August 11, 2007, due to back pain, bipolar disorder, attention deficit hyperactivity disorder (“ADHD”), stomach pain, and migraines. (R. 130, 167.)

The Commissioner rejected Helmick’s application both initially and upon reconsideration. (R. 13.) On June 30, 2011, the ALJ held an administrative hearing at which Helmick appeared by telephone (Helmick was incarcerated at the time and could not attend in person) and was represented by counsel. (R. 30–54.) In an opinion dated September 23, 2011, the ALJ found that Helmick had low back difficulty, abdominal complaints, depressive disorder, anxiety disorder, and history of substance abuse, which qualify as severe impairments pursuant to 20 C.F.R. § 416.1520(c). (R. 15.) None of these impairments met or equaled the severity of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. 15–17.) The ALJ found that Helmick had the residual functional capacity (“RFC”) to perform light work¹ and had moderate limitations in her ability to handle detailed instructions, maintain concentration for extended periods, interact with supervisors, and respond appropriately to change in the work setting. (R. 17.) Relying on the testimony of a vocational expert (“VE”), the ALJ determined that Helmick could perform her past relevant work as a fast food cook and waitress or server as well as other jobs that exist in significant numbers in the national economy, including night cleaner, food prep worker, and laundry aide. (R. 22–23.) Accordingly, the ALJ determined that Helmick was not disabled under the Act. (R. 23–24.) The Appeals Council denied Helmick’s request for review (R. 1–3), and this appeal followed.

¹ Light work involves lifting items weighing up to 20 pounds at a time with frequent lifting or carrying of items weighing up to 10 pounds. If an individual can do light work, he or she also can do sedentary work. *See* 20 C.F.R. § 404.1567(b) (2013).

II. Standard of Review

The Social Security Act authorizes this Court to review the Commissioner's final determination that a person is not entitled to disability benefits. *See* 42 U.S.C. § 405(g); *see also Hines v. Barnhart*, 453 F.3d 559, 561 (4th Cir. 2006). The Court's role, however, is limited—it may not “reweigh conflicting evidence, make credibility determinations, or substitute [its] judgment” for that of agency officials. *Hancock v. Astrue*, 667 F.3d 470, 472 (4th Cir. 2012). Instead, the Court asks only whether substantial evidence supports the ALJ's factual findings and whether the ALJ applied the correct legal standards. *Meyer v. Astrue*, 662 F.3d 700, 704 (4th Cir. 2011).

“Substantial evidence” 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). It is “more than a mere scintilla” of evidence,” *id.*, but not necessarily “a large or considerable amount of evidence,” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Substantial evidence review takes into account the entire record, and not just the evidence cited by the ALJ. *See Gordon v. Schweiker*, 725 F.2d 231, 236 (4th Cir. 1984); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–89 (1951). Ultimately, this Court must affirm the ALJ's factual findings if ““conflicting evidence allows reasonable minds to differ as to whether a claimant is disabled.”” *Johnson v. Barnhart*, 434 F.3d 650, 653 (4th Cir. 2005) (per curiam) (quoting *Craig v. Chater*, 76 F.3d 585, 589 (4th Cir. 1996) (internal quotation marks omitted)). However, “[a] factual finding by the ALJ is not binding if it was reached by means of an improper standard or misapplication of the law.” *Coffman v. Bowen*, 829 F.2d 514, 517 (4th Cir. 1987).

A person is “disabled” if he or she is unable engage in “any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505(a) (governing claims for DIB). Social Security ALJs follow a five-step process to determine whether an applicant is disabled. The ALJ asks, in sequence, whether the applicant: (1) is working; (2) has a severe impairment; (3) has an impairment that meets or equals an impairment listed in the Act’s regulations; (4) can return to his or her past relevant work based on his or her residual functional capacity; and if not (5) whether he or she can perform other work. *See* 20 C.F.R. §§ 404.1520(a)(4); *see also Heckler v. Campbell*, 461 U.S. 458, 460–462 (1983). The applicant bears the burden of proof at steps one through four. *Hancock*, 667 F.3d at 472. At step five, the burden shifts to the agency to prove that the applicant is not disabled. *See id.*

III. Discussion

Helmick argues that the ALJ erred by not finding that she suffered from a personality disorder that met the listing in 20 C.F.R. Part 404, Subpart P, Appendix 1 § 12.08. Additionally, Helmick argues that the ALJ erred by allowing her to appear at the administrative hearing by phone, primarily because the phone connection from the jail turned out to be poor. In a related argument, Helmick asserts that the ALJ improperly assessed her credibility, in part, because he could not gauge her demeanor over the phone.

A. Appearance by Telephone

On April 26, 2011, Helmick’s attorney submitted a written request for a hearing before an ALJ. (R. 85.) In the request, Helmick’s attorney noted that his client was incarcerated. (*Id.*) The ALJ sent a Notice of Hearing informing Helmick of the date of her hearing and the procedure for

requesting a delay in the hearing if she was unable to attend it as scheduled. (R. 99–103.) The Notice indicates that the ALJ expected Helmick to appear in person. (*See* R. 99–100.) In a subsequent notice, the ALJ reinforced his expectation that Helmick would be present at the hearing. (R. 125.) In the Acknowledgement of Receipt (Notice of Hearing), Helmick’s counsel indicated that his client could not be present at the hearing. (R. 122.) He explained that “Helmick is incarcerated and will have to be present by telephone or videoconference.”² (*Id.*) At the administrative hearing on June 30, 2011, Helmick appeared, without objection, by telephone. (*See* R. 32–34.)

The regulation in place at the time of Helmick’s hearing required the Commissioner to notify a party of a hearing and the manner in which it will be conducted, i.e., in person or by videoconference. 20 C.F.R. § 404.936(a), (c). The regulation did not expressly allow for appearance by telephone, and some courts have found error where an ALJ allowed a witness to appear by telephone, but did not notify the claimant of this arrangement and did not give the claimant an opportunity to object prior to the hearing. *See Decker v. Comm’r Soc. Sec.*, No. 2:12cv454, 2013 U.S. Dist. LEXIS 128955, at *6-7, 11 (S.D. Ohio Sept. 10, 2013) (plaintiff did not have notice that VE would testify by phone); *Edwards v. Astrue*, No. 3:10cv1017, 2011 U.S. Dist. LEXIS 88293, at *20, 25 (D. Conn. Aug. 10, 2011) (plaintiff had no notice that medical expert would testify by phone and objected to such testimony at the hearing).³ Helmick’s case is distinguishable on its facts from these cases.

² The record does not indicate whether video teleconferencing was available at the facility where Helmick was incarcerated. At oral argument, Helmick’s counsel stated his belief that the facility did not have video teleconferencing.

³ At the time of the hearing, relevant regulations provided that a party could appear in person or by video teleconferencing. 20 C.F.R. § 404.950(a) (2011). That regulation has since been amended to allow a party to appear by telephone. 20 C.F.R. § 404.950(a) (2013). The Commissioner promulgated this amendment in response to *Edwards* and other similar cases. *See*

The ALJ scheduled a hearing and notified Helmick of its time and date. The notice indicated that the ALJ expected Helmick to be present. She appeared by telephone at her attorney's request. Allowing Helmick to appear by phone was not for the administrative convenience of the Commissioner; rather, it was an accommodation sought by Helmick because she was incarcerated and thus unable to be present. Given that Helmick requested to appear by telephone or videoconference, had notice that her appearance would be by telephone, and did not at anytime during the administrative process withdraw her request or otherwise object, I cannot find that the Commissioner erred by allowing her to appear by telephone.

Moreover, even if I did find error, it would be harmless. *See Decker*, 2013 U.S. Dist. LEXIS 128955, at *11 (applying harmless error analysis); *Edwards v. Astrue*, No. 3:10cv1017, 2011 U.S. Dist. LEXIS 88293, at *25 (same). Harmless error analysis applies to decisions of administrative agencies. *See Ngarurih v. Ashcroft*, 371 F.3d 182, 190 n.8 (4th Cir. 2004) (“While the general rule is that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained, reversal is not required when the alleged error clearly had no bearing on the procedure used or the substance of the decision reached.”); *Camp v. Massanari*, 22 Fed. Appx. 311 (4th Cir. 2001) (unpublished) (applying harmless error in a social security case).

As evidence of prejudice, Helmick argues that the ALJ rushed the administrative hearing after he became concerned that the telephone connection was deteriorating. Certainly, the poor connection was less than ideal. But the two witnesses, Helmick and the VE, completed their

78 F.R. 29624 (May 21, 2013); *see also Johnson v. Colvin*, No. 13-CV-6319-CJS, 2014 U.S. Dist. LEXIS 49372, at *8-9 (W.D.N.Y. April 9, 2014). In their briefs, Helmick and the Commissioner debate the wisdom of allowing a party to appear by phone. This debate is settled now by the new regulation. Nonetheless the amended regulation does not contain any language indicating that it applies retroactively. *Decker*, 2013 U.S. Dist. LEXIS 128955, at *11. Thus, it has no bearing on Helmick's case.

testimony. (*See* R. 45, 51.) Before the ALJ closed the hearing, he ensured that Helmick had an opportunity to submit any evidence she deemed necessary at the hearing. (*See* R. 52.) Although the ALJ did not allow a closing argument from counsel, he left the record open to allow Helmick to submit anything in writing. (R. 52–53.) The record reveals that Helmick did not submit additional evidence after the administrative hearing. Instead, counsel for Helmick submitted a letter to the ALJ, which was received into the record, and the letter contained additional argument, but no additional evidence. (R. 824–26.) At oral argument before this Court, counsel for Helmick confirmed that all of the evidence he sought to admit at the administrative hearing had been admitted, but that he had wanted to make additional argument before the ALJ.

Although the operation of the telephone at the administrative hearing was imperfect, the ALJ ensured that Helmick had an opportunity to testify, cross examine the VE, and submit evidence. Accordingly, I do not find that the ALJ erred in the manner in which he conducted the hearing.

B. Personality Disorder Listing (§ 12.08)

1. Record Relevant to Personality Disorder

On February 15, 2005, Helmick was admitted to the emergency room at Augusta Medical Center (“AMC”) and reported symptoms of insomnia, anxiety, brief suicidal ideation, feelings of irritability, and racing thoughts. (R. 327.) Helmick stated that these symptoms had persisted for six weeks after she stopped taking hormone treatment following a complete hysterectomy. (*Id.*) Helmick reported significant stress because she had lost her job, her car had been stolen and wrecked, and she was living with her parents. (*Id.*) Other than an admission to Crossroads in 1997 for an overdose on her mother’s phenobarbital, she denied prior psychiatric treatment or history of suicide attempts. (*Id.*) Dr. Timothy Kane, M.D. diagnosed bipolar disorder and

adjustment disorder with mixed emotional disturbance. (R. 328.) She was discharged the following day in stable condition, and she agreed to seek follow-up treatment. (R. 325.)

On September 14, 2005, Helmick was examined by her primary care physician, Dr. Siman. (R. 376.) Dr. Siman noted that Dr. McMillan had ordered an ultrasound based on Helmick's complaints of lower left quarter pain (*see* R. 356), but the ultrasound showed no signs of endometriosis. (R. 376.) Helmick reported that she felt anxious and had stopped taking Seroquel because it made her too sleepy. (*Id.*) Dr. Siman noted that Helmick had Bipolar Disorder, suggested that she try Zyprexa, and refilled a prescription for Klonopin. (*Id.*) Dr. Siman also noted, "letter – unable to work at this point," but did not provide a reason for this note. (*Id.*)

On October 17, 2005, Dr. Siman noted that Helmick's bipolar disorder was doing "ok" and "better on Zyprexa." (R. 375.) She prescribed Klonopin and methadone. (*Id.*) On December 5, 2005, Helmick reported that Zyprexa was no longer helping in that she felt anxious and was unable to sleep. (R. 374.) Dr. Siman noted diagnoses of anxiety and bipolar disorders and prescribed Seroquel and methadone. (*Id.*) Helmick requested Xanax, which Dr. Siman also prescribed. (*Id.*) On January 4, 2006, Helmick reported that she was not sleeping well, but that her anxiety was "ok" while using Xanax. (R. 373.) Dr. Siman increased the amount of Seroquel. (*Id.*) On February 2, Helmick stated that Seroquel made her too groggy, so she stopped taking it. (R. 372.) She reported sleeping well, but she had trouble finding a job because she was using methadone. (*Id.*) Dr. Siman prescribed Celexa. (*Id.*) On February 27, Helmick again stated that Xanax helped her anxiety and that Celexa helped, presumably her insomnia. (R. 371.) Dr. Siman noted that Helmick had decreased her usage of methadone to six doses a day, and she felt better. (*Id.*) Dr. Siman noted diagnoses of anxiety and bipolar disorders. (*Id.*) On March 24, Helmick

reported that she stopped taking Celexa because it made her sleepy and that she was seeing a psychologist named Ruth Click.⁴ (R. 370.) Four days later, Helmick asked for a letter from Dr. Siman because social services wanted her to attend classes to prepare for full-time employment. (R. 369.) On May 1, Helmick stated that she was nervous about everything, including driving, Xanax was not helping, she could not sleep, and she was taking four methadone doses a day. (R. 368.) Dr. Siman discontinued Xanax and prescribed Seroquel, Klonopin, and Effexor. (*Id.*) Dr. Siman again noted that Helmick was seeing psychologist Click. (*Id.*) On June 1, Helmick reported that she thought she could work full-time and requested that Dr. Siman write a confirming note. (R. 367.) Dr. Siman noted that Helmick's depression was stable. (*Id.*) On June 23, Helmick reported that Klonopin was not helping, asked for Xanax, and opined that she needed to switch medications periodically. (R. 366.) Dr. Siman prescribed Xanax to treat her anxiety disorder. (*Id.*) On July 28, Helmick reported that she had switched jobs because her previous place of employment was too far away. (R. 365.) Helmick also stated that her boyfriend had stolen her Xanax, so she needed a refill, which Dr. Siman wrote. (*Id.*) On August 25, Helmick reported that she thought Xanax was not strong enough and Klonopin did not help. (R. 364.) Dr. Siman prescribed lithium. (*Id.*)

Dr. Siman saw Helmick on August 8 and September 13, 2007, and she diagnosed anxiety and prescribed Xanax and Klonopin as well as methadone. (R. 666–67.) On December 11, 2007, Helmick reported that she felt depressed and very nervous and had trouble “remembering things at work.” (R. 665.) Helmick stated that she had used all of her Xanax, which Dr. Simon noted had been refilled two weeks before at 90 pills. (*Id.*) Dr. Siman diagnosed anxiety and possible depression and prescribed Xanax, lithium, and Valium. (*Id.*) She also wrote a note that stated,

⁴ The record contains no notes from Click.

“Please excuse Leslie Helmick from work from 12-12-07 indefinitely. I will see her in 2 wks.”
(R. 422.)

Between January and September 2008, Dr. Siman saw Helmick five times for anxiety-related complaints. (R. 657–63.) At various times, she prescribed lithium, Xanax, and Risperdal, which she reported afforded some positive results, and she recommended counseling. (*Id.*) On September 11, 2008, Helmick reported difficulty concentrating and suggested she had attention deficit disorder (“ADD”). (R. 657.) Dr. Siman noted a possible ADD diagnosis and wondered “if this could be her underlying problem not anxiety.” (*Id.*) She prescribed Adderall and expressed a hope that Helmick could decrease her use of Xanax. (*Id.*)

On January 7, 2009, Dr. Siman wrote a letter stating, “Due to some ongoing medical problems it is my opinion that Leslie Helmick be restricted to part-time work at this time.” (R. 409.) None of her treatment notes correspond in time to the date of her letter. The closest dates of an office visit occurred in November 2008 and March 2009.

On April 19, 2009, Dr. Siman wrote a letter apparently after Helmick had shoplifted an item from a store. (R. 403.) Dr. Siman noted that Helmick attributed the theft to her consumption of extra Xanax that Helmick said impaired her judgment. (*Id.*) Dr. Siman indicated that she would send Helmick to a psychiatrist and discontinue prescribing Xanax for her. (*Id.*)

Through July 2009 Dr. Siman saw Helmick 10 times, variably diagnosed ADD, anxiety, and bipolar disorder, and prescribed Adderall, Xanax, lithium, Ativan, Klonopin, and Zyprexa. (R. 646–56.) At one appointment, Dr. Siman noted that Helmick had used a month’s amount of Xanax in 11 days. (R. 652.)

On July 7, 2009, Dr. Siman referred Helmick for psychological testing, seeking “any insight into her diagnosis and any medication guidance.” (R. 399.) Dr. Siman indicated that

Helmick had been her patient for 10 years and she had chronic low back pain and anxiety. (*Id.*) Dr. Siman professed, “I am not sure if she could be bipolar,” and noted that medication has not helped. (*Id.*) Dr. Siman reported that Helmick appeared to have attention deficit disorder, for which she took Adderall, and she took Klonopin for anxiety. (*Id.*) Dr. Siman noted that Helmick had been doing well for six months.

Julie H. Roebuck, a Nurse Practitioner at Augusta Psychological Associates, LLC, evaluated Helmick on July 14, 2009. (R. 386–89.) Helmick stated that she felt overwhelmed, had difficulty coping, and had problems sleeping. (R. 386.) Helmick reported that she had never participated in therapy or counseling although she had been admitted to Crossroads as a teenager for a drug overdose. (*Id.*) She reported using six methadone doses a day. (*Id.*) She denied any history of abuse or neglect. (R. 387.)

On mental evaluation, Nurse Roebuck noted that Helmick was well groomed, fully oriented, and cooperative. (R. 388.) Her mood was anxious, speech excessive, and thought processes intact and tangential. (*Id.*) Nurse Roebuck found that Helmick’s memory was impaired, her cognitive functions were intact, and her judgment and insight were minimally impaired. (*Id.*) As to signs of depression, she noted low energy, anhedonia, poor concentration, and sleep disturbance. (*Id.*) As to symptoms of anxiety, she noted mood swings. (*Id.*) Nurse Roebuck diagnosed Axis I impressions of anxiety disorder, not otherwise specified, depressive disorder, not otherwise specified, substance dependence to opiates from pain medication, and bipolar disorder. (R. 389.) She recommended individual therapy and a restart of Helmick’s medications. (*Id.*)

On July 21, 2009, Nurse Roebuck reported a similar mental evaluation, except that Helmick’s thought process was disorganized and tangential, her memory was normal, her

concentration was both normal and impaired, and her insight was impaired. (R. 385.) Nurse Roebuck noted that Helmick was taking Adderall and Klonopin, commented that her mood had stabilized, and recommended additional individual counseling. (*Id.*) Helmick cancelled her appointment in August 2009 (R. 384), and the record contains no notes of further counseling.

On July 22, 2009, Dr. Siman completed a medical evaluation form for the Virginia Department of Social Services. (R. 393–94.) Dr. Siman reported a primary diagnosis of lumbar spine disorder and secondary diagnosis of bipolar disorder. (R. 394.) She opined that Helmick could not work for at least 90 days and that she should apply for disability benefits. (R. 393.) Dr. Siman completed the same form in December 2009, and opined that Helmick could work 15 hours a week. (R. 443–44.)

In July and August 2009, Dr. Siman noted that Nurse Roebuck had prescribed Tegretol. (R. 644–46.) During medical visits from September to November 2009, Dr. Siman continued variously to diagnose anxiety and bipolar disorders and ADD, and she prescribed Adderall, Klonopin, Xanax, and Risperdal. (R. 638–43.) On December 9, 2009, Dr. Siman noted diagnoses of anxiety and depression and opined, “I think she has borderline personality disorder.” (R. 637.) Dr. Siman encouraged Helmick to seek treatment at AMC, and she agreed to do so. (*Id.*) Treatment notes from January to March 2010, reflect continued diagnosis of anxiety and continued treatment with Xanax. (R. 627–35.)

On August 28, 2009, Helmick was admitted to the AMC emergency department after an apparently accidental overdose of methadone and Ativan. (R. 574–82.) She was admitted to AMC on January 7, 2010, again for an overdose. (R. 589–90.) A drug screen was positive for benzodiazepines and opiates. (R. 590.)

On February 4, 2010, Becky Snead, a Licensed Professional Counselor and Certified Substance Abuse Counselor at the Valley Community Services Board (“Valley CSB”), completed an Intake Assessment of Helmick on referral from a state court and the Virginia Alcohol Safety Action Program. (R. 784–86.) Helmick reported that her primary care physician prescribed Xanax for panic attacks, which she has daily if not taking medication. (R. 784.) Her primary care physician, according to Helmick, also diagnosed bipolar disorder and ADHD that she treated with Adderall, but Helmick stated that was not experiencing symptoms of either condition. (*Id.*) Despite a conviction in 2004 for driving under the influence, Helmick claimed she last drank alcohol in 2000. (*Id.*) She stated that her current husband mentally and physically abused her. (*Id.*)

On mental status exam, Snead noted that Helmick was appropriately groomed and dressed, was friendly and cooperative, and had a neutral mood and a constricted affect. (R. 765.) Her thought processes were mostly linear and goal-directed, and she was of average intelligence. (*Id.*) According to Snead, Helmick had limited insight, poor judgment, and moderate motivation for treatment. (*Id.*)

As to clinical findings, Snead noted that Helmick had some memory impairment, although the inconsistencies in her statements may have been intentional, poor coping skills, poor relationship history, and tendency to blame others for her problems. (R. 786.) The medications Helmick was taking were related to ADHD and panic disorder, but she showed no signs of bipolar disorder. (*Id.*) Snead gave an Axis I diagnosis of alcohol dependence, panic disorder without agoraphobia, attention deficit disorder not otherwise specified, and bipolar disorder by history and Axis II diagnosis of personality disorder, not otherwise specified, with cluster B and C traits. (*Id.*) From February to August 2010, Helmick attended a few counseling

sessions and skipped many more. (R. 821.) Leigh Anderson, a Licensed Clinical Social Worker, repeatedly expressed concerns that Helmick's prescribed medications were leading to substance abuse, which Helmick denied. (R. 801, 803, 806, 809.) When Helmick's primary care physician reduced the medications, Anderson noted improvement in Helmick's appearance. (R. 809.)

State agency consulting psychologist Dr. Gemma M. Nachbahr, Ph.D., determined that Helmick had affective disorders (§ 12.04) based on depressive disorder, not otherwise specified; anxiety-related disorders (§ 12.06) based on anxiety disorder, not otherwise specified; and substance addiction disorders (§ 12.09). (R. 704, 707, 709, 712.) Assessing Paragraph "B" criteria, Dr. Nachbahr found that Helmick had mild restrictions on activities of daily living and moderate difficulties in maintaining social functioning and concentration, persistence, and pace. (R. 714.) Dr. Nachbahr noted that no evidence established Paragraph "C" criteria. (R. 715.) As to Helmick's mental RFC, Dr. Nachbahr noted moderate limitations in her ability to do the following: understand, remember, and carry out detailed instructions; maintain attention and concentration for extended periods; complete work without interruptions from psychologically based symptoms and perform at a consistent pace; accept instructions and respond appropriately to criticism from supervisors; maintain socially appropriate behavior and adhere to basic standards of neatness and cleanliness; and respond appropriately to changes in the work setting. (R. 717–19.) However, if Helmick abstained from using "substances," she would be capable of performing routine tasks. (R. 720.)

Cathy Riley, a Registered Nurse at the Middle River Regional Jail, examined Helmick in November 29, 2010. (R. 793.) Helmick reported having mood swings, panic attacks, low energy and motivation, and sporadic sleep. (*Id.*) Nurse Riley diagnosed panic attacks with agoraphobia, bipolar disorder by history, polysubstance abuse, and borderline personality traits. (*Id.*) On

December 21, 2010, Helmick reported that medication had helped her mood swings, and in January 2011, she reported feeling “a lot better.” (R. 794–95.)

In a Function Report dated March 23, 2010, Helmick indicated that she cooked, cleaned, washed clothes, shopped for all necessities of the household, and took care of one dog and three cats. (R. 199.) She reported no problems with personal care other than difficulty bending down to her feet. (*Id.*) As for hobbies, Helmick watched television, knitted, read books, played word puzzles, and decorated her house. (R. 202.) She also went to the park with her children and played Bingo with her mother at the Eagles Club. (*Id.*)

At the administrative hearing, Helmick testified that she had bipolar disorder and ADHD and suffered anxiety attacks that sometimes occurred daily. (R. 37–38.) She reported having “post-traumatic syndrome” that she attributed to abuse suffered in childhood and from her three husbands. (R. 41–42.) This ailment, according to Helmick, caused “anxiety, manic depress[ion], the concentration problems, the ADHD, insomnia – everything.” (R. 45.) Helmick described the effects of her bipolar disorder as a “roller coaster,” either she was “way too hyper” or “just dormant.” (R. 44.)

In a written opinion, the ALJ found that Helmick has severe mental impairments of depressive disorder, anxiety disorder, and history of substance abuse. (R. 15.) The ALJ did not find that Helmick has a severe personality disorder.

The ALJ then considered whether Helmick’s mental impairments met or equaled the listings for affective disorders (§ 12.04), anxiety-related disorders (§ 12.06), and substance addiction disorders (§ 12.09).⁵ In analyzing the Paragraph “B” criteria for affective disorder and

⁵ Helmick did not assign error to any of these findings.

anxiety disorder,⁶ the ALJ found that Helmick had mild restrictions in activities of daily living, but he did not attribute those restrictions to any mental health impairment. (R. 16.) Crediting the report of Diana Helmick, the claimant's mother, the ALJ noted that Helmick took care of her cat, made the bed, washed dishes, drove a car, and was capable of going out alone. (*Id.*)⁷ Additionally, Helmick reported that she shopped for household necessities and clothes, went to the park with her children, and played Bingo with her mother at the Eagles Club. (R. 21; *see* R. 199–200.)

The ALJ determined that Helmick had moderate limitations in social functioning. (R. 16.) He noted that she shopped for groceries and visited the doctor regularly, got along “okay” with authority figures, did not spend time with others, and lost employment because of problems getting along with others. (*Id.*) He also noted her history of legal problems, abuse, and failed relationships. (*Id.*)

The ALJ found that Helmick had moderate difficulty in concentration, persistence, or pace. (R. 16.) The ALJ noted that Helmick enjoyed activities, such as reading and watching television, that require a certain amount of concentration. (R. 16.) She could count change, but not manage a bank account. (*Id.*) Additionally, Helmick stated that she had a short attention span and did not finish tasks she had started. (R. 16–17.)

He found no evidence of episodes of prolonged decompensation. (R. 17.) The ALJ further noted Dr. Nachbahr's finding that if Helmick abstained from using “substances,” she would be capable of performing routine tasks. (R. 21.)

⁶ The Paragraph “B” criteria is the same for Personality Disorder. *Compare* 20 C.F.R. Pt. 404, Subpart P, App. 1, §§ 12.04, 12.06, *with* § 12.08.

⁷ The Court notes that Diana Helmick overall described that her daughter does very little. (R. 174–82.)

2. *Analysis*

Helmick argues that the ALJ erred in finding that she did not meet the criteria for a personality disorder listed in § 12.08. This regulation provides:

A personality disorder exists when personality traits are inflexible and maladaptive and cause either significant impairment in social or occupational functioning or subjective distress. Characteristic features are typical of the individual's long-term functioning and are not limited to discrete episodes of illness.

The required level of severity for these disorders is met when the requirements in both A and B are satisfied.

A. Deeply ingrained, maladaptive patterns of behavior associated with one of the following:

1. Seclusiveness or autistic thinking; or
2. Pathologically inappropriate suspiciousness or hostility; or
3. Oddities of thought, perception, speech and behavior; or
4. Persistent disturbances of mood or affect; or
5. Pathological dependence, passivity, or aggressivity; or
6. Intense and unstable interpersonal relationships and impulsive and damaging behavior;

AND

B. Resulting in at least two of the following:

1. Marked restriction of activities of daily living; or
2. Marked difficulties in maintaining social functioning; or
3. Marked difficulties in maintaining concentration, persistence, or pace;

or

4. Repeated episodes of decompensation, each of extended duration.

20 C.F.R. Pt. 404, Subpart P, App. 1, § 12.08.

The ALJ did not find that Helmick had a personality disorder; rather, he found that she had severe impairments of affective, anxiety, and substance addiction disorders. From his review of the medical evidence in the record, including records from Dr. Siman, the Valley CSB, the Middle River Regional Jail, and AMC, the consulting opinion of Dr. Nachbahr, and Helmick's report of daily activities, the ALJ determined that Helmick had mild or moderate functional

impairments and, thus, did not meet the Paragraph “B” criteria under the listings for Affective or Anxiety Disorders. The Paragraph “B” criteria for these listings are the same as for the Personality Disorder listing. Substantial evidence exists in the record to support the ALJ’s finding that Helmick’s limitations did not satisfy the Paragraph “B” criteria, whether for the affective and anxiety disorders or for the personality disorder proposed by Helmick. *See, e.g. Horn v. Commissioner*, No. CBB-12-3539, 2013 WL 3868138, at *2 (D. Md. July 24, 2013) (finding that claimant “could not have met” the personality disorder listing, where the ALJ found that the claimant fell short of the Paragraph “B” criteria in considering the listings for affective disorder or anxiety-related disorder).

Although she did not object to the ALJ’s Paragraph “B” findings under the Affective and Anxiety Disorder listings, Helmick argues that the ALJ should have found that she met the Paragraph “B” criteria for the Personality Disorder listing based on marked difficulties in social functioning, marked difficulties in concentration, persistence, or pace, and repeated episodes of decompensation.⁸ (Pl. Br. 10.) In support of this argument, Helmick points to “her inability to maintain employment for longer than a two-month period, the chaos of her domestic life, her escape from a petty larceny conviction by virtue of a physician’s letter, her conviction of grand

⁸ Helmick also argues that she met the Paragraph “A” criteria for affective disorder. Because the ALJ’s decision regarding the Paragraph “B” criteria is sufficient to resolve her argument that she met the listing, a comprehensive discussion of the Paragraph “A” criteria is not necessary. It is worth noting, however, that the evidence for personality disorder is minimal. Dr. Siman—who previously diagnosed Helmick with anxiety disorder, depression, bipolar disorder, and ADD—mused in December 2009, “I think [Helmick] has borderline personality disorder” and referred her for an assessment at AMC. On February 4, 2010, a licensed professional counselor at Valley CSB diagnosed Helmick with alcohol dependence, panic disorder without agoraphobia, ADHD not otherwise specified, partner relational problem, bipolar disorder by history, and personality disorder NOS, cluster B and C traits. The counselor made clinical findings based upon her interview and observations of Helmick, but she did not conduct psychological testing. Likewise, a nurse at Middle River Regional Jail diagnosed Helmick with personality disorder based on Helmick’s subjective statements. This diagnosis also was not based on psychological testing, and follow-up treatment notes provide no additional basis for the diagnosis.

larceny and sentence of probation, and her eventual incarceration due to a violation of the terms of her probation.” (*Id.*) This argument fails because, even assuming Helmick could show that she has marked difficulty in social functioning, the ALJ’s conclusions that Helmick had only moderate limitations in concentration, persistence, and pace and had suffered no episodes of decompensation of extended duration were supported by substantial evidence.

Helmick’s inability to maintain employment, “chaotic” home life, and checkered legal history do not undermine the ALJ’s evaluation of her concentration, persistence, and pace. Most of these facts are more relevant to her social functioning, and bear only indirectly on her concentration, persistence, and pace. The ALJ based his finding that Helmick had only moderate difficulties maintaining concentration, persistence, and pace based on specific and more directly relevant evidence, including Helmick’s own statements that she enjoyed reading and watching television, “activities that . . . require a certain amount of concentration.” (R. 16.)

Helmick also relies on evidence from the Valley CSB and the Middle River Regional Jail. (Pl. Br. 8-9.) During her only meeting with Helmick, a Licensed Professional Counselor at the Valley CSB completed an intake assessment. She noted that Helmick had limited insight, poor judgment, and moderate motivation for treatment. The counselor also noted that Helmick had mostly linear and goal-directed thought processes. Like Helmick’s counseling sessions at the Valley CSB, the jail medical records showed a short duration of treatment and findings based largely on Helmick’s subjective report. Aside from Helmick’s report of low energy and lack of motivation, none of the notes have any bearing on her concentration, persistence, or pace. The claimant, however, bears the burden of proving the existence of the functional limitations under the Paragraph “B” criteria. *Fore*, 2013 WL 880271, at *3 (citing *English v. Shalala*, 10 F.3d 1080, 1082 (4th Cir. 1992)). The scant evidence from the Valley CSB and the jail does not

undermine the ALJ's finding that Helmick had moderate limitations in concentration, persistence, and pace. Accordingly, I find that substantial evidence supports this determination.

Likewise, the ALJ properly concluded that Helmick did not suffer from repeated episodes of decompensation, each of extended duration. "Episodes of decompensation are exacerbations or temporary increases in symptoms or signs accompanied by a loss of adaptive functioning, as manifested by difficulties in performing activities of daily living, maintaining social relationships, or maintaining concentration, persistence, or pace." 20 C.F. R Part 404, Subpart P, Appendix 1, § 12.00(C)(4). Episodes of decompensation are of "extended duration" when they last at least two weeks, and repeated when they occur three times within one year. *Id.* Although the ALJ may find that shorter, more frequent episodes of decompensation are equal in severity to the listing, "such a finding is squarely within the ALJ's judgment." *Fore v. Astrue*, No. 7:11-cv-511, 2013 WL 880271, at *5 (W.D. Va. Feb. 13, 2013). "Episodes of decompensation may be demonstrated by an exacerbation in symptoms or signs that would ordinarily require increased treatment or a less stressful situation," or may be inferred from medical record showing "significant alteration in medication[,] documentation of the need for a more structured psychological support system[,] or other relevant information in the record about the existence, severity, and duration of the episode." 20 C.F. R Part 404, Subpart P, Appendix 1, § 12.00(C)(4). Incidents of psychiatric hospitalization or placement in a halfway house qualify as episodes of decompensation, but institutionalization is not required. *Larson v. Astrue*, 615 F.3d 744, 750 (7th Cir. 2010).

Here, I find that substantial evidence supports the ALJ's determination that Helmick did not suffer from any episodes of decompensation of extended duration. Dr. Nachbahr, who completed the psychiatric review technique, opined that Helmick had no episodes of

decompensation, and no contrary medical opinion exists in the record. (R. 63, 714.) Moreover, Helmick has not specifically identified even one episode of decompensation of extended duration. To the extent Helmick relies on her criminal history in establishing episodes of decompensation, she has presented “no evidence that [her] criminal conduct was reflective of an episode of mental decompensation” of any significant duration, much less extended duration. *Lindamood v. Colvin*, No. EDCV 12-01684 AN, 2013 WL 4012892, at *3 (C.D. Cal. Aug. 6, 2013); *see also Barber v. Astrue*, 431 Fed. Appx. 709, 712 n. 3 (10th Cir. 2011) (rejecting claimant’s argument that criminal conduct constituted an episode of decompensation of extended duration, where “nothing in the record indicated any . . . decompensation event lasted two weeks” and there was no “evidence in the record concerning the medical impact of these events.”). Likewise, Helmick has not shown that she was fired from any of her jobs due to an episode of decompensation.

Based on this evidence, the ALJ found that Helmick did not meet or equal the Paragraph “B” criteria for affective disorder or anxiety disorder, and that finding is supported by substantial evidence. Because the Paragraph “B” criteria are the same for personality disorder as they are for affective disorder and anxiety disorder, the ALJ’s finding applies with equal force to the listing for personality disorder. *See French v. Colvin*, No. 7:12-cv-297-FL, 2014 WL 1331042, at *7 (E.D.N.C. Feb. 24, 2014), *report and recommendation adopted*, 2014 WL 1331031 (Mar. 31, 2014); *Horn*, 2013 WL 3868138, at *2. Thus, Helmick’s argument is without merit.

C. Credibility Determination

Helmick argues that the ALJ improperly assessed her credibility. It is not this Court’s role to determine whether Helmick was a credible witness. *See Craig*, 76 F. 3d at 589; *see also Shively v. Heckler*, 739 F. 3d 987, 989 (4th Cir. 1984) (“Because he had the opportunity to

observe the demeanor and to determine the credibility of the claimant, the ALJ's observations concerning these questions are to be given great weight."). Rather, the Court must be satisfied that the ALJ applied the proper legal standard in assessing Helmick's credibility and that substantial evidence supports his finding that her testimony describing her symptoms was not credible. *See Craig*, 76 F. 3d at 589.

ALJs follow a two-step process for evaluating claimant's statements about her symptoms. *See* 20 C.F.R § 404.1529; Soc. Sec. Ruling 96-7p, 1996 WL 374186 (Jul. 2, 1996). First, the ALJ must "consider whether there is an underlying medically determinable physical or mental impairment(s) . . . that could reasonably be expected to produce" those symptoms. Soc. Sec. Ruling 96-7p, 1996 WL 374186, at *2. If there is, the ALJ then "must evaluate the intensity, persistence, and limiting effects of the individual's symptoms to determine the extent to which [they] limit [her] ability to do basic work activities." *Id.* Whenever the individual's symptoms are "not substantiated by objective medical evidence," the ALJ "must make a finding on the credibility of the individual's statements" in light of the entire record. *Id.* The ALJ must give specific reasons for the weight given to the applicant's statements, *id.*, and those reasons must be supported by substantial evidence in the record, *see Craig*, 76 F. 3d at 589.

The ALJ found that Helmick had medical impairments that could cause the symptoms she claimed, but that her statements about the intensity, persistence, and limiting affects of those symptoms were not credible. (R. 18.) In support of this assessment, the ALJ noted Helmick's drug-seeking, multiple admissions to the emergency room, and inconsistencies in the record. (R. 18.)

The Administrative Record contains dozens of records from AMC for the period of 2006 to 2010 where Helmick complained of pain, usually originating from her abdomen, and sought

pain medications. (*See* R. 597–99.) Over the years, the doctors at AMC compiled a medical history for Helmick that noted polysubstance abuse, in part from methadone and benzodiazepines prescribed by Dr. Siman, drug-seeking behavior from emergency room visits with complaints of chronic abdominal pain, chronic narcotic withdrawal, depression, ADHD, chronic unspecified abdominal pain with multiple negative workups, chronic back pain with unremarkable MRI, and abdominal hysterectomy. (R. 597–98.) Specifically concerning Helmick’s complaints of abdominal pain, objective testing, such as x-rays, typically revealed the presence of gas, but no abnormalities. (*See* R. 599.) A more detailed look at additional records from AMC confirms the ALJ’s analysis.

On December 21, 2006, the rescue squad responded to Helmick’s home after she reported that she had fallen on the stairs. (R. 321.) Helmick was admitted to the emergency room at AMC with complaints of pain in her neck, low back, and left hip. (*Id.*) Physical exam showed no bruising or deformities, which was confirmed by x-rays, and upon palpation Helmick reported tenderness in the area of her lumbar spine, but no tenderness in the area of her thoracic spine or left hip. (R. 321, 361.) Although Helmick cried intermittently and frequently asked for pain medication, she also got out of bed, walked to the bathroom, smoked cigarettes, and got food from the vending machines. (R. 321–22.) Helmick was given Tylenol, which she consumed; however, she later told the medical staff that she was allergic to it and requested Dilaudid. (R. 322.) After the treating physician, Dr. Michael Bost, M.D., advised Helmick that her x-rays showed no acute symptoms, Helmick jumped off the examining table, put on her jeans, and told him that she had “boatloads” of narcotic pain medications that were helping her. (*Id.*) She then told him the pain came from her endometriosis rather than the fall. (*Id.*) Dr. Bost refused to prescribe pain medications and discharged her to the care of Dr. Siman. (*Id.*)

On September 27, 2007, Helmick went to the AMC emergency department with complaints of pain and claimed she had fallen and reinjured a fractured right tibia. (R. 539–40.) Dr. Brian R. Baker, M.D., offered Helmick a tablet of Percocet for pain pending x-ray results. (R. 539.) Helmick responded, “can’t you just give me Dilaudid and Phenergan.” (*Id.*) X-rays revealed that the bone was healing, and Helmick had not suffered a new injury. (R. 540.) Dr. Baker did not prescribe additional pain medications for Helmick. (*Id.*)

On August 18, 2008, Helmick presented to the AMC emergency department with complaints of abdominal pain. (R. 456–57.) Dr. J. Scott Just, M.D., found no physical signs to explain Helmick’s claims of pain, which he attributed to narcotics withdrawal. (R. 457.) Helmick denied using drugs and claimed that she had stopped taking Methadone several weeks ago. (R. 456–57.) Her urine screen was positive for amphetamine, benzodiazepines, and marijuana. (R. 457.) She later admitted that she had consumed her friend’s Adderall. (R. 453.)

These records provide ample support for the ALJ’s determination that Helmick overstated the severity of her physical impairments. Moreover, the record contains little evidence to substantiate Helmick’s complaints as to the severity of her mental impairments beyond the limitations and restrictions that the ALJ assigned in her RFC.

Helmick also argues that Dr. Siman’s treatment notes and reports corroborate her testimony and contradict the ALJ’s finding that she was not credible. The ALJ accorded no weight to Dr. Siman’s opinion that Helmick was unable to work or was limited to part-time work because he found it was not supported by the record, and he noted in particular the absence of laboratory or clinical abnormalities to support her opinion. (R. 22.) Helmick does not assign error to this finding, which is supported by substantial evidence and consistent with the Commissioner’s regulations. *See* 20 C.F.R. § 404.1527(c).

Throughout the years of treating Helmick, Dr. Siman documented Helmick's subjective complaints, but noted few objective findings and no physical or psychological testing in support of her diagnoses of Helmick's impairments. In an attempt to explain the dearth of written notes from Dr. Siman's treatment records, counsel asserts that Dr. Siman treated Helmick for many years and knew her well; thus, she did not need to record all of her findings and diagnoses for treatment purposes. (Pl. Br. 11.) Even accepting this assertion as true, the ALJ must base his determinations on the record, not information possibly known to the treating physician, but not recorded. Had Helmick thought that Dr. Siman possessed additional medical evidence not contained in her treatment notes, she could have requested that Dr. Siman be subpoenaed to testify at the administrative hearing, *see* 20 C.F.R. § 404.950(d); (*see* R. 102), or requested to otherwise supplemented the record.

Furthermore, Dr. Siman provided no rationale for her opinion that Helmick was unable to work full-time or part-time. An ALJ may give "significantly less weight" to a treating physician's "conclusory opinion based on the applicant's subjective reports." *Craig v. Chater*, 76 F.3d 585, 590 (4th Cir. 1996). Given the lack of objective evidence to support Dr. Siman's conclusions about Helmick's impairments and their affect on Helmick's functioning, I cannot find that the ALJ erred by discounting her opinion as to Helmick's ability to work.

Additionally, Helmick's testimony at the administrative hearing does not inspire much confidence. Helmick did not know the date of onset of disability. (R. 35–36.) She testified that she had never held a job for more than two months (R. 43), but in a Disability Report that Helmick had completed as part of her disability application, she indicated that she had worked for one year as a draw warp operator, nearly four years as a cook, and most recently nine months as a server. (R. 168.)

Despite Helmick's inaccurate testimony and the medical treatment notes that suggest she overstated her symptoms and engaged in drug seeking behavior, her counsel faults the ALJ for allowing her to appear by telephone in so far as this manner of testifying adversely affected the ALJ's assessment of her demeanor. As discussed in Section III.A, the ALJ allowed Helmick to appear by telephone at the request of her attorney because she was incarcerated. Given the ALJ's discussion of Helmick's credibility and the evidence in the record, I cannot find that his decision to discount Helmick's credibility was error.

IV. Conclusion

The Court's role is to determine whether substantial evidence supports the Commissioner's decision and whether the correct legal standard was applied. In this case, the Commissioner did not err in allowing Helmick to appear by telephone at her counsel's request. Furthermore, substantial evidence supports the Commissioner's determination that Helmick did not meet a listing for Personality Disorder and that she was not entirely credible. Accordingly, I recommend that the Commissioner's decision be affirmed.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

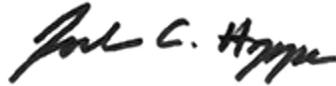
Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14 day period, the Clerk

is directed to transmit the record in this matter to the Honorable Michael F. Urbanski, United States District Judge.

The Clerk is directed to send certified copies of this Report and Recommendation to all counsel of record.

ENTER: May 9, 2014

A handwritten signature in black ink that reads "Joel C. Hoppe". The signature is written in a cursive, slightly slanted style.

Joel C. Hoppe
United States Magistrate Judge