

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

<b>JAMES G. DONATHAN JR.,</b>	)	
Plaintiff	)	
	)	
v.	)	Civil Action No. 1:05cv00077
	)	<b><u>REPORT AND</u></b>
	)	<b><u>RECOMMENDATION</u></b>
<b>JO ANNE B. BARNHART,</b>	)	
<b>Commissioner of Social Security,</b>	)	By: PAMELA MEADE SARGENT
Defendant	)	United States Magistrate Judge

*I. Background and Standard of Review*

Plaintiff, James G. Donathan Jr., filed this action challenging the final decision of the Commissioner of Social Security, (“Commissioner”), denying plaintiff’s claims for disability insurance benefits, (“DIB”), and supplemental security income, (“SSI”), under the Social Security Act, as amended, (“Act”), 42 U.S.C.A. §§ 423, 1381 *et seq.* (West 2003 & Supp. 2006). Jurisdiction of this court is pursuant to 42 U.S.C. § 405(g) and § 1383(c)(3). This case is before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). As directed by the order of referral, the undersigned now submits the following report and recommended disposition.

The court’s review in this case is limited to determining if the factual findings of the Commissioner are supported by substantial evidence and were reached through application of the correct legal standards. *See Coffman v. Bowen*, 829 F.2d 514, 517 (4<sup>th</sup> Cir. 1987). Substantial evidence has been defined as “evidence which a reasoning mind would accept as sufficient to support a particular conclusion. It consists of more than a mere scintilla of evidence, but may be somewhat less than a preponderance.”

*Laws v. Celebrezze*, 368 F.2d 640, 642 (4<sup>th</sup> Cir. 1966). ““If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is “substantial evidence.””” *Hays v. Sullivan*, 907 F.2d 1453, 1456 (4<sup>th</sup> Cir. 1990) (quoting *Laws*, 368 F.2d at 642).

The record shows that Donathan filed his applications for DIB and SSI on or about May 19, 2003, alleging disability as of October 4, 2002, based on undergoing two back surgeries and back, leg and foot pain. (Record, (“R.”), at 52-54, 60, 91, 282-91.) The claims were denied initially and upon reconsideration. (R. at 27-29, 34, 36-38, 293, 295-97.) Donathan then requested a hearing before an administrative law judge, (“ALJ”). (R. at 39.) The ALJ held a hearing on April 19, 2005, at which Donathan was represented by counsel. (R. at 298-343.)

By decision dated June 6, 2005, the ALJ denied Donathan’s claims. (R. at 15-24.) The ALJ found that Donathan met the disability insured status requirements of the Act through the date of his decision. (R. at 23.) The ALJ found that Donathan had not engaged in substantial gainful activity since October 4, 2002. (R. at 23.) The ALJ also found that the medical evidence established that Donathan suffered from severe impairments, namely degenerative disc disease of the lumbar spine, status post spinal surgery, blindness in the right eye due to amblyopia and asthma, but he found that Donathan did not have an impairment or combination of impairments listed at or medically equal to one listed at 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. at 23.) The ALJ found that Donathan’s allegations were not totally credible. (R. at 24.) The ALJ found that Donathan retained the residual functional capacity to perform light work.<sup>1</sup> (R. at 24.) The ALJ further found that Donathan should not climb ladders,

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<sup>1</sup>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 also

ropes and scaffolds, but could occasionally climb ramps and stairs, balance, stoop, kneel, crouch and crawl. (R. at 24.) The ALJ found that Donathan could perform his past relevant work as a convenience store manager. (R. at 24.) In addition, based on Donathan's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ concluded that Donathan could perform jobs existing in significant numbers in the national economy. (R. at 24.) Thus, the ALJ found that Donathan was not disabled under the Act and was not eligible for benefits. (R. at 24.) *See* 20 C.F.R. §§ 404.1520(f), (g), 416.920(f), (g) (2005).

After the ALJ issued his decision, Donathan pursued his administrative appeals, (R. at 10), but the Appeals Council denied his request for review. (R. at 7-9.) Donathan then filed this action seeking review of the ALJ's unfavorable decision, which now stands as the Commissioner's final decision. *See* 20 C.F.R. §§ 404.981, 416.1481 (2005). The case is before this court on Donathan's motion for summary judgment filed January 19, 2006, and the Commissioner's motion for summary judgment filed February 9, 2006.

## *II. Facts*

Donathan was born in 1954, (R. at 52), which classifies him as a "person closely approaching advanced age" under 20 C.F.R. §§ 404.1563(d), 416.963(d) (2005). He has a ninth-grade education and past relevant work experience as a stocker, a greeter, a convenience store manager and a cashier. (R. at 61, 66, 74.)

Donathan testified that he had settled a workers' compensation case<sup>2</sup> against

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can do sedentary work. *See* 20 C.F.R. §§ 404.1567(b), 416.967(b) (2005).

<sup>2</sup>The compromised settlement order indicates that both parties of the agreement agreed that Donathan had been released to light-duty work and that Donathan wished to find

Wal-Mart. (R. at 302.) Donathan testified that he did not take pain medication. (R. at 312.) He stated that he took Advil on occasion. (R. at 312.) He stated that he could stand for one hour without interruption, sit for up to five hours without interruption and walk up to 40 feet without interruption. (R. at 312-13.) Donathan stated that he experienced up to 15 asthma attacks per month. (R. at 328.)

Donathan reported that his activities included cooking, sweeping, mopping, washing clothes, making the beds and grocery shopping. (R. at 317-18.) He reported that he enjoyed hunting and fishing and testified that he last went deer hunting from the back of a pickup truck in November 2004, and that he last went fishing in July or August of 2004. (R. at 318-19.) Donathan also reported that he went bowling weekly. (R. at 82, 84.)

Gina Baldwin, a vocational expert, also testified at Donathan's hearing. (R. at 330-41.) Baldwin was asked to consider an individual of Donathan's age, education and work experience, who was limited as indicated by Dr. Frank M. Johnson, M.D., a state agency physician, on July 16, 2003, and who had a visual limitation due to no vision in the right eye. (R. at 268-75, 333-34.) Baldwin stated that Donathan's past work as a convenience store manager, as it is normally performed, would not be precluded. (R. at 334.) She also stated that a significant number of jobs existed in the economy that such an individual could perform, including jobs as a light cashier and a kiosk cashier, both of which would allow a sit/stand option. (R. at 335.) Baldwin was asked to consider an individual who, as of October 2002, was limited to light work, but who could sit, stand and/or walk for at least four hours. (R. at 335.) Baldwin stated that such an individual could not perform the managerial job, but he could

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employment on his own. (R. at 55-58.)

perform the job as a cashier. (R. at 335.) Baldwin stated that there were jobs available that such an individual could perform that allowed a sit/stand option, including those of a cashier, a gate attendant and an unarmed security guard. (R. at 335-36.) Baldwin stated that there were no jobs available that an individual could perform if the individual was limited as indicated by Dr. Raymond V. Harron, D.O. (R. at 174, 340-41.)

In rendering his decision, the ALJ reviewed records from Dr. Robert L. Bowman, M.D.; Columbia Montgomery Regional Hospital; Dr. James M. Leipzig, M.D.; Dr. Cyrus E. Bakhit, M.D.; Dr. Raymond V. Harron, D.O.; Dr. Neil P. Dubner, M.D.; Dr. Robert F. Devereaux, M.D.; Eugenie Hamilton, Ph.D., a state agency psychologist; Dr. Frank M. Johnson, M.D., a state agency physician; Free Clinic of the New River Valley; and Dr. David T. MacMillan, M.D.

On April 2, 1997, Donathan injured his back at work. (R. at 112.) On April 11, 1997, an x-ray of Donathan's lumbar spine was normal, and he was diagnosed with acute strain. (R. at 112.) In May 1997, an MRI of Donathan's lumbar spine showed an L-5 disc bulge, and no evidence of a disc herniation was noted. (R. at 114.) In September 1997, an MRI of Donathan's lumbar spine showed disc extrusion at the L5-S1 level and minimal associated spinal stenosis. (R. at 113, 128.) On October 9, 1997, Dr. Raymond V. Harron, D.O., performed a left L5-S1 laminectomy and discectomy for a large herniated disc compressing on the nerve root. (R. at 115-25.) Donathan was discharged on October 11, 1997, in markedly improved condition. (R. at 124-25.)

In June 1998, Donathan complained of low back and left leg pain. (R. at 129.)

A March 1998 MRI of Donathan's lumbar spine revealed evidence of recurrent herniated disc at the L5-S1 level. (R. at 142-43.) On June 15, 1998, Dr. Harron performed a left L5-S1 laminectomy, foraminectomy, discectomy and adhesiolysis, which revealed that there was a small amount of recurrent disc herniation placing pressure on the left S1 nerve root, but no massive disc herniation. (R. at 131-32.)

On September 9, 1998, Dr. Harron indicated that Donathan could return to light-duty work with an eight-to-10 pound lifting restriction and no bending at the waist. (R. at 200-01.) In November 1998, Dr. Harron reported that Donathan continued to complain of significant left lower extremity pain, but that he was going to work every day and doing fairly well with his work. (R. at 198.) An MRI of Donathan's lumbar spine was suspect for a very small recurrent disc herniation or focal protrusion of the disc, ventrolaterally on the left at the L5-S1 level. (R. at 135.) In December 1998, Dr. Harron recommended a third surgical intervention. (R. at 194.) On April 26, 1999, Dr. Harron approved part-time work as a people greeter at Wal-Mart. (R. at 192.) Dr. Harron limited this work to four hours per day with restrictions of no bending, lifting, stooping or pushing or pulling weights greater than 10 pounds. (R. at 190, 192.) He also recommended a sit/stand option. (R. at 192.) A functional capacity evaluation performed in June 1999 showed that Donathan had the residual functional capacity to perform sedentary<sup>3</sup> to light work. (R. at 187.) On February 7, 2000, Dr. Harron recommended an anterior lumbar interbody fusion at the L5-S1 level. (R. at 182.)

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<sup>3</sup>“Sedentary work involves lifting up to 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.” 20 C.F.R. §§ 404.1567(a), 416.967(a) (2005).

On March 7, 2001, Donathan reported that he had reinjured his back while installing PVC pipe in his home. (R. at 178.) Dr. Harron believed that Donathan could have a recurrent disc herniation and ordered an MRI. (R. at 178.) An MRI of Donathan's lumbar spine showed surgical changes at the L5-S1 level with mild residual disc protrusion and mild epidural fibrosis. (R. at 172.) It also showed that there were no visible changes since November 11, 1998. (R. at 172.) On June 13, 2001, Dr. Harron advised Donathan to stop smoking before undergoing any additional surgery because continued smoking would result in a failed fusion. (R. at 176.) Dr. Harron did not see Donathan again until August 28, 2002, at which time he reported that Donathan had been approved for a lumbar fusion in January 2002, but that he had been unable to schedule the surgery. (R. at 175.) Donathan was still working with the same restrictions. (R. at 175.)

On June 1, 2004, approximately two years after Donathan's last office visit, Dr. Harron wrote a letter to Donathan's attorney indicating that he had restricted Donathan on April 26, 1999, to working four hours a day with a sit/stand option and no pushing, pulling or lifting weights greater than 10 pounds. (R. at 174.) Dr. Harron concluded that these restrictions remained in place from April 26, 1999, through the date of Donathan's last visit with him, August 28, 2002. (R. at 174-75.)

On January 25, 1999, Dr. James M. Leipzig, M.D., performed an independent medical examination for complaints of back and left leg pain. (R. at 146-47.) Examination revealed that Donathan was "a generally healthy-appearing individual in no acute distress." (R. at 146.) Sensory function was decreased on the left at the S1 level; however, all other levels were normal. (R. at 146.) Straight leg-raising tests and bowstring sign were negative on the right and positive on the left. (R. at 146.) Dr.

Leipzig reviewed Donathan's November 1998 MRI results and disagreed with Dr. Harron's recommendation for a third surgery. (R. at 147.) On February 12, 1999, Dr. Leipzig saw Donathan for follow-up care to review the results of the electromyogram, ("EMG"), and CT myelogram. (R. at 145.) The EMG demonstrated no evidence of active radiculopathy. (R. at 145.) The CT myelogram demonstrated changes at the L4-L5 level and mild bulging of the disc at the L5-S1 level with some displacement of the S1 nerve root, but no significant neurological compression or recess stenosis. (R. at 145.) Dr. Leipzig reported that he would not recommend additional decompression surgery because there was no significant neurological compression. (R. at 145.) His impressions included back and left leg pain, left S1 radicular symptoms with dysesthesia, status post L5-S1 discectomy and tobacco use. (R. at 145.)

On April 20, 2000, Dr. Leipzig saw Donathan for follow-up care for his complaints of back and leg pain. (R. at 144.) Straight leg-raising tests were positive on the left and negative on the right. (R. at 144.) Sensory and motor testing at the L2-S1 level revealed normal motor functioning with mild diminished sensation at the S1 level on the left. (R. at 144.) Diagnosed impressions included discogenic low back pain at the L5-S1 level, chronic left radicular symptom and possible arachnoiditis. (R. at 144.) Dr. Leipzig noted that Donathan continued to smoke at least one pack of cigarettes per day and explained to him that it was "essential" for him to stop smoking before any elective surgery. (R. at 144.)

On February 22, 2000, Dr. Neil P. Dubner, M.D., evaluated Donathan. (R. at 247.) Donathan reported that he began feeling anxious and depressed after he injured his back. (R. at 247.) Dr. Dubner prescribed Paxil and Doxepin. (R. at 247.) On March 7, 2000, Donathan reported a positive response to the combination of medications,

reporting that his sleep and appetite had improved, his pain was less severe, his mood was better and he was more active. (R. at 246.) On March 7, 2001,<sup>4</sup> Donathan reported that his activities included laying pipe. (R. at 231.) He also reported that he had hurt his back while getting up from a chair, but was less worried and was sleeping better. (R. at 231.) In April 2001, Donathan reported that he was not working because he had to look after his wife. (R. at 230.) Donathan reported that he was feeling “pretty good,” although he continued to have some pain. (R. at 230.) On May 7, 2001, Dr. Dubner noted that Donathan’s condition was stable on his current medications. (R. at 229.) On September 5, 2002, Donathan reported that he felt okay emotionally, although his back continued to hurt. (R. at 220.) Dr. Dubner reported that Donathan’s depression was stable. (R. at 220.) Dr. Dubner indicated that Donathan had a Global Assessment of Functioning, (“GAF”), score of 50.<sup>5</sup> (R. at 220.)

On June 5, 2001, Dr. Cyrus E. Bakhit, M.D., evaluated Donathan at the request of Dr. Harron. (R. at 158-69.) A neurological examination revealed that there was no evidence of gait difficulties, neuropathy, weakness or paralysis. (R. at 162.) Examination for motor strength of the lower extremities was within normal limits, and there was no evidence of wasting or sensory deficit. (R. at 167.) Straight leg-raising tests were negative on the right and positive on the left, although reflexes were within normal limits. (R. at 168.) A CT scan of Donathan’s lumbar spine showed some mild

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<sup>4</sup>On March 7, 2001, the same date as his appointment with Dr. Dubner, Donathan reported to Dr. Harron that he had injured his back while installing PVC pipe in his home. (R. at 178.)

<sup>5</sup>The GAF scale ranges from zero to 100 and “[c]onsider[s] psychological, social, and occupational functioning on a hypothetical continuum of mental health-illness.” DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION, (“DSM-IV”), 32 (American Psychiatric Association 1994). A GAF of 41-50 indicates that the individual has “[s]erious symptoms ... OR any serious impairment in social, occupational, or school functioning ....” DSM-IV at 32.

bulging at the L3-L4 level, no focal disc protrusion or spinal stenosis and possible left-sided disc protrusion at the L5-S1 level. (R. at 170.)

On June 23, 2003, Dr. Robert F. Devereaux, M.D., examined Donathan for his complaints of back pain. (R. at 248-51.) Examination of the lumbosacral spine revealed no evidence of muscle spasm. (R. at 250.) Straight leg-raising tests were positive on the left and negative on the right. (R. at 250.) There was no weakness in the lower extremities. (R. at 250.) Donathan was able to squat to the floor and stand up. (R. at 250.) X-rays of Donathan's lumbar spine showed some disc space narrowing, which could be related to degenerative disc disease. (R. at 252.) Dr. Devereaux's diagnostic impression was chronic mechanical low back pain. (R. at 250.) Dr. Devereaux opined that it would be difficult for Donathan to perform jobs that required repeated bending, heavy lifting or prolonged sitting, but that it would pose no difficulty for him to perform jobs requiring walking and light carrying. (R. at 250-51.) He also indicated that Donathan would require a job that allowed him to change positions frequently. (R. at 251.)

On July 16, 2003, Dr. Frank M. Johnson, M.D., a state agency physician, indicated that Donathan had the residual functional capacity to perform light work, diminished by a limited ability to push and/or pull with the lower extremities. (R. at 268-75.) He indicated that Donathan could occasionally climb ramps and stairs, balance, stoop, kneel, crouch and crawl and never climb ladders, ropes or scaffolds. (R. at 270.) No manipulative, visual, communicative or environmental limitations were noted. (R. at 271-72.) This assessment was affirmed by Dr. Michael J. Hartman, M.D., another state agency physician, on February 11, 2004. (R. at 275.)

On July 16, 2003, Eugenie Hamilton, Ph.D., a state agency psychologist, completed a Psychiatric Review Technique form, (“PRTF”), indicating that Donathan suffered from a nonsevere affective disorder. (R. at 253-67.) Hamilton indicated that Donathan had no limitations on his activities of daily living or in maintaining social functioning. (R. at 263.) She indicated that Donathan had “mild” restrictions in maintaining concentration, persistence or pace and “never” had episodes of deterioration or decompensation in work or work-like settings. (R. at 263.) Hamilton reported that Donathan’s allegations were minimally credible. (R. at 265.) This assessment was affirmed by Hugh Tenison, Ph.D., another state agency psychologist, on February 11, 2004. (R. at 253.)

The record contains progress notes from the Free Clinic of The New River Valley which show that Donathan was seen there on December 2, 2003, January 20, 2004, and April 20, 2004. (R. at 276-78.) An April 2004 chest x-ray showed chronic obstructive pulmonary disease. (R. at 279.) These records show that Donathan was advised to quit smoking and that his asthma was in remission. (R. at 276-77.)

### *III. Analysis*

The Commissioner uses a five-step process in evaluating DIB and SSI claims. *See* 20 C.F.R. §§ 404.1520, 416.920 (2005); *see also Heckler v. Campbell*, 461 U.S. 458, 460-62 (1983); *Hall v. Harris*, 658 F.2d 260, 264-65 (4<sup>th</sup> Cir. 1981). This process requires the Commissioner to consider, in order, whether a claimant 1) is working; 2) has a severe impairment; 3) has an impairment that meets or equals the requirements of a listed impairment; 4) can return to his past relevant work; and 5) if not, whether he can perform other work. *See* 20 C.F.R. §§ 404.1520, 416.920 (2005).

If the Commissioner finds conclusively that a claimant is or is not disabled at any point in this process, review does not proceed to the next step. *See* 20 C.F.R. §§ 404.1520(a), 416.920(a) (2005).

Under this analysis, a claimant has the initial burden of showing that he is unable to return to his past relevant work because of his impairments. Once the claimant establishes a prima facie case of disability, the burden shifts to the Commissioner. To satisfy this burden, the Commissioner must then establish that the claimant has the residual functional capacity, considering the claimant's age, education, work experience and impairments, to perform alternative jobs that exist in the national economy. *See* 42 U.S.C.A. §§ 423(d)(2)(A), 1382c(a)(3)(A)-(B) (West 2003 & Supp. 2006); *McLain v. Schweiker*, 715 F.2d 866, 868-69 (4<sup>th</sup> Cir. 1983); *Hall*, 658 F.2d at 264-65; *Wilson v. Califano*, 617 F.2d 1050, 1053 (4<sup>th</sup> Cir. 1980).

By decision dated June 6, 2005, the ALJ denied Donathan's claims. (R. at 15-24.) The ALJ found that the medical evidence established that Donathan suffered from severe impairments, namely degenerative disc disease of the lumbar spine, status post spinal surgery, blindness in the right eye due to amblyopia and asthma, but he found that Donathan did not have an impairment or combination of impairments listed at or medically equal to one listed at 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. at 23.) The ALJ found that Donathan retained the residual functional capacity to perform light work. (R. at 24.) The ALJ further found that Donathan should not climb ladders, ropes and scaffolds, but could occasionally climb ramps and stairs, balance, stoop, kneel, crouch and crawl. (R. at 24.) The ALJ found that Donathan could perform his past relevant work as a convenience store manager. (R. at 24.) In addition, based on Donathan's age, education, work history and residual functional capacity and the

testimony of a vocational expert, the ALJ concluded that Donathan could perform jobs existing in significant numbers in the national economy. (R. at 24.) Thus, the ALJ found that Donathan was not disabled under the Act and was not eligible for benefits. (R. at 24.) *See* 20 C.F.R. §§ 404.1520(f), (g), 416.920(f), (g) (2005).

As stated above, the court's function in the case is limited to determining whether substantial evidence exists in the record to support the ALJ's findings. The court must not weigh the evidence, as this court lacks authority to substitute its judgment for that of the Commissioner, provided her decision is supported by substantial evidence. *See Hays*, 907 F.2d at 1456. In determining whether substantial evidence supports the Commissioner's decision, the court also must consider whether the ALJ analyzed all of the relevant evidence and whether the ALJ sufficiently explained his findings and his rationale in crediting evidence. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4<sup>th</sup> Cir. 1997).

Thus, it is the ALJ's responsibility to weigh the evidence, including the medical evidence, in order to resolve any conflicts which might appear therein. *See Hays*, 907 F.2d at 1456; *Taylor v. Weinberger*, 528 F.2d 1153, 1156 (4<sup>th</sup> Cir. 1975). Furthermore, while an ALJ may not reject medical evidence for no reason or for the wrong reason, *see King v. Califano*, 615 F.2d 1018, 1020 (4<sup>th</sup> Cir. 1980), an ALJ may, under the regulations, assign no or little weight to a medical opinion, even one from a treating source, based on the factors set forth at 20 C.F.R. §§ 404.1527(d), 416.927(d), if he sufficiently explains his rationale and if the record supports his findings.

Donathan argues that the ALJ erred by finding that he had the residual

functional capacity to perform his past relevant work. (Brief In Support Of Motion For Summary Judgment, (“Plaintiff’s Brief”), at 7-9.) He also argues that the ALJ erred by giving the opinions of the state agency physicians greater weight than the opinion of Dr. Harron. (Plaintiff’s Brief at 9.) Donathan further argues that the ALJ erroneously based his decision, at least in part, on his inability to afford medical treatment. (Plaintiff’s Brief at 10.)

The ALJ found that Donathan had the residual functional capacity to perform light work that did not require him to climb ladders, ropes and scaffolds and that required only occasional climbing of ramps and stairs, balancing, stooping, kneeling, crouching and crawling. (R. at 24.) Based on my review of the record, I find that substantial evidence does not exist to support this finding. In June 2003, Dr. Devereaux diagnosed chronic mechanical low back pain. (R. at 250.) He opined that Donathan could perform jobs that required walking and light carrying and that allowed him to change positions frequently. (R. at 250-51.) In July 2003, the state agency physician found that Donathan had the residual functional capacity to perform light work diminished by a limited ability to push and/or pull with the lower extremities. (R. at 268-75.) While Dr. Harron restricted Donathan to working four hours a day with a sit/stand option at a job which did not require pushing, pulling or lifting items weighing more than 10 pounds, it appears that these restrictions remained in place from April 26, 1999, through the date of Donathan’s last visit with him, August 28, 2002. (R. at 174-75.) The ALJ rejected Dr. Harron’s assessment, indicating that it was inconsistent with the record as a whole. (R. at 21.) The medical evidence shows that both Dr. Harron and Dr. Devereaux reported that Donathan would have to change positions frequently or required a sit/stand option. (R. at 174-

75, 250-51.) However, the ALJ failed to include this limitation in determining Donathan's residual functional capacity.

Donathan argues that the ALJ erred in finding that he could perform his past relevant work as a convenience store manager because he was required to lift in excess of 100 pounds. (Plaintiff's Brief at 9.) The vocational expert testified that Donathan's past relevant work as a convenience store manager was very heavy<sup>6</sup> in exertional level as he actually performed it. (R. at 332.) However, the vocational expert testified that the job of a convenience store manager is light in exertional level according to the Dictionary of Occupational Titles. (R. at 332.) However, the vocational expert testified to jobs that existed in the light exertional level that allowed a sit/stand option. (R. at 335-36.) The vocational expert did not identify the position of convenience store manager as a job that allowed a sit/stand option. Therefore, I cannot find that substantial evidence exists to support the ALJ's finding that Donathan could perform his past work as a convenience store manager or that other jobs existed in significant numbers in the economy that he could perform.

### **PROPOSED FINDINGS OF FACT**

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. Substantial evidence does not exist to support the ALJ's

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<sup>6</sup>Very heavy work involves lifting items weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing 50 pounds or more. If someone can perform very heavy work, he also can perform heavy, medium, light and sedentary work. *See* 20 C.F.R. §§ 404.1567(e), 416.967(e) (2005).

finding with regard to Donathan's residual functional capacity;

2. Substantial evidence does not exist to support the ALJ's finding that Donathan had the residual functional capacity to perform his past relevant work as a convenience store manager as it is generally performed; and
3. Substantial evidence does not exist to support the ALJ's finding that Donathan was not disabled under the Act.

### **RECOMMENDED DISPOSITION**

The undersigned recommends that the court deny Donathan's and the Commissioner's motions for summary judgment, vacate the Commissioner's decision denying benefits and remand this case to the Commissioner for further development.

### **Notice to Parties**

Notice is hereby given to the parties of the provisions of 28 U.S.C.A. § 636(b)(1)(c) (West 1993 & Supp. 2006):

Within ten 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 10 days could waive appellate review. At the conclusion of the 10-day period, the Clerk is directed to transmit the record in this matter to the Honorable James P. Jones, Chief United States District Judge.

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

DATED: This 12<sup>th</sup> day of June 2006.

*/s/ Pamela Meade Sargent*  
UNITED STATES MAGISTRATE JUDGE