

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

<b>TARA L. BROWN,</b>	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:06cv00112
	)	<b><u>REPORT AND</u></b>
	)	<b><u>RECOMMENDATION</u></b>
<b>MICHAEL J. ASTRUE,</b>	)	
<b>Commissioner of Social Security,</b>	)	By: PAMELA MEADE SARGENT
Defendant.	)	UNITED STATES MAGISTRATE JUDGE

*I. Background and Standard of Review*

Plaintiff, Tara L. Brown, filed this action challenging the final decision of the Commissioner of Social Security, (“Commissioner”), denying plaintiff’s claim for supplemental security income, (“SSI”), under the Social Security Act, as amended, (“Act”), 42 U.S.C.A. § 1381 *et seq.* (West 2003 & Supp. 2007). This court has jurisdiction 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 (4th 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 (4th 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 (4th Cir. 1990) (quoting *Laws*, 368 F.2d at 642).

The record shows that Brown protectively filed her application for SSI on November 5, 2003, alleging disability beginning December 20, 1997, due to rheumatoid arthritis, possible lupus, depression, “nerves,” acid reflux disease, osteoporosis and fibromyalgia. (Record, (“R.”), at 94-97, 101, 132.) The claim was denied initially and on reconsideration. (R. at 73-75, 78, 79-81.) Brown then requested a hearing before an Administrative Law Judge, (“ALJ”). (R. at 82.) The ALJ held a hearing on November 17, 2005, at which Brown was represented by counsel. (R. at 24-70.)

By decision dated May 26, 2006, the ALJ denied Brown’s claim. (R. at 14-22.) The ALJ found that Brown had not engaged in any substantial gainful activity at any time relevant to his decision. (R. at 16.) The ALJ found that the medical evidence established that Brown had severe impairments, namely depression and fibromyalgia, but he found that Brown’s impairments did not meet or medically equal the requirements of any impairment listed at 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. at 16-17.) The ALJ also found that Brown retained the residual functional capacity to perform a limited range of sedentary work.<sup>1</sup> (R. at 19-20.) Based on Brown’s age,

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<sup>1</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

education, past work experience and residual functional capacity and the testimony of a vocational expert, the ALJ found that a significant number of jobs existed that Brown could perform, including jobs as an order clerk, an office worker, a receptionist and an information clerk.<sup>2</sup> (R. at 22.) Therefore, the ALJ found that Brown was not under a disability as defined in the Act at any time through the date of his decision, and that she was not eligible for benefits. (R. at 22.) *See* 20 C.F.R. § 416.920(g) (2007).

After the ALJ issued his decision, Brown pursued her administrative appeals, (R. at 11), but the Appeals Council denied her request for review. (R. at 5-8.) Brown 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. § 416.1481 (2007). The case is before this court on the Commissioner's Motion for Summary Judgment filed July 30, 2007.

## *II. Facts*

Brown was born in 1980, (R. at 95), which classifies her as a "younger person" under 20 C.F.R. § 416.963(c) (2007). Brown has a high school education and past work experience as a factory worker and a telemarketer. (R. at 42, 102, 107.)

James Williams, a vocational expert, also was present and testified at Brown's hearing. (R. at 58-67.) Williams was asked to consider a hypothetical individual of

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other sedentary criteria are met. *See* 20 C.F.R. § 416.967(a) (2007).

<sup>2</sup>The ALJ also found that Brown could perform her past work as a telemarketer, but noted that he wanted to explore alternative occupations. (R. at 21.)

Brown's age, education and work experience who had the residual functional capacity to perform sedentary work with occasional climbing of ramps and stairs, balancing, stooping, kneeling, crouching and crawling and who should never climb ladders, ropes or scaffolds. (R. at 62.) Williams stated that Brown's past work as a telemarketer was sedentary and that it matched the hypothetical question. (R. at 62.) Williams also stated that a significant number of jobs existed that such an individual could perform, including jobs as an order clerk, food and beverage, an office worker, a receptionist and an information clerk. (R. at 63.)

Williams was asked to assume the same individual who had no significant limitations in her ability to remember locations and work-like procedures, to understand, remember and carry out very short and simple instructions, to understand and carry out detailed instructions, to maintain attention and concentration for extended periods, to sustain an ordinary routine without special supervision, to work in coordination or proximity to others without being distracted by them, to make simple work-related decisions, to interact appropriately with the general public, to ask simple questions or request assistance, to accept instructions and respond appropriately to criticism from supervisors, to get along with co-workers or peers without distracting them or exhibiting behavioral extremes, to maintain socially appropriate behavior, to adhere to basic standards of neatness and cleanliness, to respond appropriately to changes in the work setting, to be aware of normal hazards and to take appropriate precautions, to travel in unfamiliar places and to use public transportation and to set realistic goals or make plans independently of others. (R. at 63-64.)

He also was asked to assume that the individual had moderate limitations in her

ability to perform activities within a schedule, to maintain regular attendance and be punctual within customary tolerances, to complete a normal work day and work week without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods. (R. at 64.) Williams stated that the individual could perform the jobs previously identified. (R. at 64-65.)

In rendering his decision, the ALJ reviewed records from University of Virginia Medical Center; Washington Square Clinic; Tazewell County Health Department; Dr. Jamal I. Sahyouni, M.D.; Dr. T. Nagaraja, M.D.; Dr. Richard M. Surrusco, M.D., a state agency physician; Dr. Frank M. Johnson, M.D., a state agency physician; Melinda Wyatt, M.S., a licensed psychologist; Howard Leizer, Ph.D., a state agency psychologist; R. J. Milan Jr., Ph.D., a state agency psychologist; and Dr. Sharat K. Narayanan, M.D. Brown's attorney also submitted medical reports from Stone Mountain Health Services to the Appeals Council.<sup>3</sup>

The record shows that Brown was treated by Dr. Jamal I. Sahyouni, M.D., in September 1997 for complaints of arthritic pain. (R. at 186-87.) Dr. Sahyouni diagnosed polyarthralgia. (R. at 186.) Lab results showed that Brown was negative for rheumatoid arthritis. (R. at 197.) Brown was not seen by Dr. Sahyouni again until December 9, 2003, when she complained of joint pain. (R. at 177.) Brown also complained of depression and reported depressive symptoms since the age of 15. (R. at 177.) Brown reported that she was interested in seeing a psychiatrist because she

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<sup>3</sup>Since the Appeals Council considered this evidence in reaching its decision not to grant review, (R. at 5-8), this court also should consider this evidence in determining whether substantial evidence supports the ALJ's findings. *See Wilkins v. Sec'y of Dep't of Health & Human Servs.*, 953 F.2d 93, 96 (4<sup>th</sup> Cir. 1991).

was interested in seeking social security benefits. (R. at 177.) Dr. Sahyouni also indicated that Brown may be disabled from arthritis. (R. at 177.) Dr. Sahyouni diagnosed polyarthralgia, most likely fibromyalgia and depression. (R. at 177.) He prescribed Lexapro and Vioxx. (R. at 177.) On December 30, 2003, Brown reported that the Lexapro was helping. (R. at 176.) Dr. Sahyouni diagnosed fibromyalgia and recommended that Brown ambulate and walk. (R. at 176.) On January 13, 2004, Brown reported that her medications were helping, but she continued to report a lot of pain. (R. at 175.) She was diagnosed with fibromyalgia. (R. at 175.) On January 28, 2004, Brown again reported that Lexapro helped her. (R. at 174.)

On September 16, 1998, Dr. T. Nagaraja, M.D., diagnosed Brown with severe cervical dysplasia and multiple condyloma acuminata. (R. at 184.)

On November 25, 2002, Brown was seen at the Washington Square Clinic for various complaints such as vaginal bleeding and acid reflux. (R. at 164-65.) She denied being depressed. (R. at 165.) She was diagnosed with chronic gastrointestinal complaints. (R. at 164.) On February 20, 2002, Brown was diagnosed with probable scabies, possible pelvic inflammatory disease, epigastric pain and generalized aches and pain. (R. at 166-67.)

On May 11, 2004, Howard Leizer, Ph.D., a state agency psychologist, completed a mental assessment indicating that Brown had moderate limitations in her ability to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances and to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods. (R.

at 214-16.) This assessment was affirmed by R. J. Milan Jr., Ph.D., another state agency psychologist, on October 15, 2004. (R. at 216.)

Leizer also completed a Psychiatric Review Technique form, (“PRTF”), indicating that Brown suffered from an affective disorder. (R. at 218-34.) Leizer indicated that Brown had mild limitations in her activities of daily living and in maintaining social functioning. (R. at 228.) He indicated that Brown had moderate limitations in maintaining concentration, persistence or pace and that she had not experienced any episodes of decompensation. (R. at 228.) Leizer noted that Brown had some limitations in the areas of attending and/or completing work periods, but that she was not precluded from performing simple, unskilled work. (R. at 230.) This assessment was affirmed by state agency psychologist Milan on October 15, 2004. (R. at 218.)

On May 12, 2004, Dr. Richard M. Surrusco, M.D., a state agency physician, indicated that Brown had the residual functional capacity to occasionally lift and/or carry items weighing up to 20 pounds and frequently lift and/or carry items weighing up to 10 pounds. (R. at 200-07.) Dr. Surrusco reported that Brown could stand and/or walk at least two hours in an eight-hour workday and that she could sit about six hours in an eight-hour workday. (R. at 201.) He indicated that Brown could occasionally climb, balance, stoop, kneel, crouch and crawl. (R. at 203.) No manipulative, visual, communicative or environmental limitations were noted. (R. at 203-05.) This assessment was affirmed by Dr. Frank M. Johnson, M.D., another state agency physician, on July 19, 2004. (R. at 207.)

On September 16, 2004, Melinda Wyatt, M.S., a licensed psychologist,

evaluated Brown. (R. at 208-13.) Brown reported that she left her job as a telemarketer due to “family problems.” (R. at 208.) Wyatt reported that Brown’s mood appeared anxious and her affect was flat. (R. at 211.) Brown’s immediate memory was within normal limits. (R. at 212.) Her recent memory was moderately deficient. (R. at 212.) Wyatt reported that Brown’s ability to concentrate was impaired. (R. at 212.) Wyatt diagnosed major depressive disorder and fibromyalgia. (R. at 212.) Wyatt indicated that Brown had a then-current Global Assessment of Functioning, (“GAF”), score of 55.<sup>4</sup> (R. at 212.) Wyatt reported that with appropriate treatment, Brown’s prognosis appeared fair. (R. at 212.)

Wyatt reported that Brown’s then-current concerns with impaired concentration, anxiety and depression would likely affect her ability to remain on task and to recall instructions. (R. at 213.) She reported that with supervision, appropriate performance of repetitive tasks appeared likely. (R. at 213.) Wyatt reported that it was likely that Brown would experience difficulty effectively managing the usual stressors encountered in gainful employment. (R. at 213.) She reported that Brown would have difficulty interacting appropriately with the public and co-workers and that it was unlikely that she would complete a normal workweek without interruptions resulting from depressive and anxious symptoms. (R. at 213.)

On December 17, 2004, Dr. Sharat K. Narayanan, M.D., saw Brown for her

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<sup>4</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 51-60 indicates that the individual has “[m]oderate symptoms ... OR moderate difficulty in social, occupational, or school functioning ....” DSM-IV at 32.

complaints of fibromyalgia and depression. (R. at 235-48.) Dr. Narayanan diagnosed fatigue by history, depression and fibromyalgia. (R. at 236.) He provided Brown with samples of Lexapro. (R. at 226.)

On February 24, 2006, Brown was seen by Mary Ann Collins, F.N.P., for complaints of chronic pain and depression. (R. at 255-62.) Brown reported that she had not seen a doctor since December 17, 2004. (R. at 255.) Brown reported that she had been treated with Lexapro and that she did well with it. (R. at 255.) Collins diagnosed tachycardia, tobacco abuse, depression, fibromyalgia, hyperthyroidism, weight gain, abnormal pap smear and anxiety. (R. at 256.)

### *III. Analysis*

The Commissioner uses a five-step process in evaluating SSI claims. *See* 20 C.F.R. § 416.920 (2007); *see also Heckler v. Campbell*, 461 U.S. 458, 460-62 (1983); *Hall v. Harris*, 658 F.2d 260, 264-65 (4th Cir. 1981). The 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 her past relevant work; and 5) if not, whether she can perform other work. *See* 20 C.F.R. § 416.920 (2007). If the Commissioner finds conclusively that a claimant is or is not disabled at any point in the process, review does not proceed to the next step. *See* 20 C.F.R. § 416.920(a) (2007).

Under the analysis, a claimant has the initial burden of showing that she is unable to return to her past relevant work because of her 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. § 1382c(a)(3)(A)-(B) (West 2003 & Supp. 2007); *McLain v. Schweiker*, 715 F.2d 866, 868-69 (4th 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 May 26, 2006, the ALJ denied Brown's claim. (R. at 14-22.) The ALJ found that the medical evidence established that Brown had severe impairments, namely depression and fibromyalgia, but he found that Brown's impairments did not meet or medically equal the requirements of any impairment listed at 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. at 16-17.) The ALJ also found that Brown retained the residual functional capacity to perform a limited range of sedentary work. (R. at 19-20.) Based on Brown's age, education, past work experience and residual functional capacity and the testimony of a vocational expert, the ALJ found that a significant number of jobs existed that Brown could perform, including jobs as an order clerk, an office worker, a receptionist and an information clerk. (R. at 22.) Therefore, the ALJ found that Brown was not under a disability as defined in the Act at any time through the date of his decision, and that she was not eligible for benefits. (R. at 22.) *See* 20 C.F.R. § 416.920(g) (2007).

Brown argues that the ALJ erred by failing to find that she did not meet the listing for depression found at 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.04.<sup>5</sup>

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<sup>5</sup>Listing § 12.04 is the listing for affective disorders characterized by a disturbance of mood, accompanied by a full or partial manic or depressive syndrome. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.04.

(Brief In Support Of Plaintiff's Motion For Summary Judgment,<sup>6</sup> ("Plaintiff's Brief"), at 7-10.) Brown does not contest the ALJ's finding with regard to her physical residual functional capacity.

As stated above, the court's function in this 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 his 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 (4th 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 (4th 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 (4th 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. § 416.927(d), if he sufficiently explains his rationale and if the record supports his findings.

Brown argues that the ALJ erred by failing to find that her condition met the

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<sup>6</sup>Brown did not file a motion for summary judgment.

listing for § 12.04. (Plaintiff's Brief at 7-10.) Based on my review of the record, I reject this argument. The qualifying criteria for the listed impairment for depression is found at 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.04. In this case, the ALJ found that Brown met the "A" criteria for § 12.04, but that she did not meet the "B" criteria. (R. at 18.) To meet the requirements of subsection B, a claimant must show that she suffers from at least four of the listed symptoms of depressive syndrome, which result in at least two of the following:

1. Marked restriction of activities of daily living;
2. Marked difficulties in maintaining social functioning;
3. Marked difficulties in maintaining concentration, persistence, or pace;  
or
4. Repeated episodes of decompensation, each of extended duration.

*See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, §§ 12.04(A)(1), 12.04(B) (2007). A claimant also may meet the requirements of this section if she has a medically documented history of a chronic affective disorder of at least two years' duration that has caused more than minimal limitation of ability to do basic work activities. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.04(C) (2007).

The ALJ noted that the record did not contain any objective evidence to support the diagnosis of depressive or anxiety disorder, and that Brown had never sought ongoing treatment by a mental health professional. (R. at 20.) Brown did not attempt to receive psychiatric treatment until Dr. Sahyouni suggested it in December 2003. (R. at 177.) At her hearing, Brown testified that she had not seen a psychiatrist. (R. at 40.) In December 2004, Dr. Narayanan scheduled Brown for an appointment with a licensed clinical social worker for evaluation and management of depression, but there

is no indication that Brown ever kept the appointment. (R. at 236.) Brown testified at her hearing, almost a year later, that she attempted to get an appointment, but that the social worker had not been able to schedule her in. (R. at 32.)

In addition, the medical evidence shows that in November 2002, Brown denied symptoms of depression. (R. at 165.) On December 9, 2003, Brown complained of depression and reported depressive symptoms since the age of 15. (R. at 177.) Brown reported that she was interested in seeing a psychiatrist because she was interested in seeking social security benefits. (R. at 177.) She was prescribed Lexapro. (R. at 177.) On December 30, 2003, Brown reported that the Lexapro was helping with her symptoms of depression. (R. at 176.) She continued to report that the Lexapro was helping her through January 2004. (R. at 174-75.) “If a symptom can be reasonably controlled by medication or treatment, it is not disabling.” *Gross v. Heckler*, 785 F.2d 1163, 1166 (4<sup>th</sup> Cir. 1986). There is no indication in the record that Brown suffered from more than mild limitations in her activities of daily living and in maintaining social functioning and moderate limitations in her ability to maintain concentration, persistence or pace (R. at 228.) Based on this, I find that substantial evidence exists to support the ALJ’s finding that Brown’s impairment did not meet or equal § 12.04.

For all of the reasons stated above, I find that substantial evidence supports the ALJ’s finding with regard to Brown’s mental impairment, and I recommend that the court grant the Commissioner’s motion for summary judgment and affirm the Commissioner’s decision denying benefits.

## **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 exists to support the ALJ's finding that Brown's condition did not meet or equal § 12.04; and
2. Substantial evidence exists to support the ALJ's finding that Brown was not disabled under the Act.

## **RECOMMENDED DISPOSITION**

The undersigned recommends that the court grant the Commissioner's motion for summary judgment and affirm the Commissioner's decision denying benefits.

### **Notice to Parties**

Notice is hereby given to the parties of the provisions of 28 U.S.C.A. § 636(b)(1)(c) (West 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 13<sup>th</sup> day of February 2008.

/s/ Pamela Meade Sargent  
UNITED STATES MAGISTRATE JUDGE