

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

LARRY D. FLANNER)	
Plaintiff)	
)	
v.)	Civil Action No. 1:06cv00061
)	<u>REPORT AND</u>
)	<u>RECOMMENDATION</u>
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,¹)	By: PAMELA MEADE SARGENT
Defendant)	United States Magistrate Judge

I. Background and Standard of Review

Plaintiff, Larry D. Flanner, filed this action challenging the final decision of the Commissioner of Social Security, (“Commissioner”), denying plaintiff’s claim for disability insurance benefits, (“DIB”), under the Social Security Act, as amended, (“Act”), 42 U.S.C.A. § 423 (West 2003 & Supp. 2006). Jurisdiction of this court is pursuant to 42 U.S.C. § 405(g). 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

¹Michael J. Astrue became Commissioner of Social Security on February 12, 2007, and is, therefore, substituted for Jo Anne B. Barnhart as the defendant in this case pursuant to Federal Rule of Civil Procedure 25(d)(1).

(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 Flanner filed his application for DIB on March 30, 2004, alleging disability as of March 30, 2003, based on thyroid problems, high blood pressure, arthritis in the back and legs, headaches, neck problems, joint aches, pains from gallbladder surgery that occurred in 1992, hemorrhoid problems, numbness in the arms at night, varicose veins, and shortness of breath. (Record, (“R.”), at 61-63, 67, 93.) The claim was denied initially and upon reconsideration. (R. at 28-30, 36, 37-39.) Flanner then requested a hearing before an administrative law judge, (“ALJ”). (R. at 40.) The ALJ held a hearing on December 21, 2005, at which Flanner was represented by counsel. (R. at 274-318.)

By decision dated February 3, 2006, the ALJ denied Flanner’s claim. (R. at 19-25.) The ALJ found that Flanner met the disability insured status requirements of the Act for DIB purposes through at least March 31, 2008. (R. at 24.) The ALJ found that Flanner had not engaged in substantial gainful activity since the alleged onset of disability. (R. at 24.) The ALJ also found that the medical evidence established that Flanner suffered from a severe impairment, namely degenerative disc disease/degenerative joint disease, but he found that Flanner 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 24.) The ALJ found that Flanner's allegations regarding his limitations were not totally credible. (R. at 24.) The ALJ found that Flanner had the residual functional capacity to perform light work² that did not require climbing ladders, ropes or scaffolds. (R. at 24.) Thus, the ALJ concluded that Flanner could not perform his past relevant work. (R. at 24.) Based on Flanner's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ found that jobs existed in significant numbers in the national economy that Flanner could perform, including those of a solderer, a drill press operator and an electronic assembly worker. (R. at 24-25.) Thus, the ALJ concluded that Flanner was not disabled under the Act and was not eligible for DIB benefits. (R. at 25.) *See* 20 C.F.R. § 404.1520(g) (2006).

After the ALJ issued his decision, Flanner pursued his administrative appeals, (R. at 14), but the Appeals Council denied his request for review. (R. at 8-10.) Flanner 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 (2006). The case is before this court on the Commissioner's motion for summary judgment filed October 18, 2006.³

II. Facts

Flanner was born in 1954, (R. at 61), which classifies him as a "person closely approaching advanced age" under 20 C.F.R. § 404.1563(d). Flanner has had up to one

²Light 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 someone can perform light work, he also can perform sedentary work. *See* 20 C.F.R. § 404.1567(b) (2006).

³Flanner did not file a motion for summary judgment.

year of college classes and has completed special job training as a welder. (R. 71.) Flanner has past relevant work as a welder and a carpenter. (R. at 78-84.)

Flanner testified that he had seen a counselor at Stone Mountain Health Services and that he had been taking Lexapro for approximately six to eight months prior to the hearing. (R. at 286-87.) He stated that he had never been hospitalized in a psychiatric facility. (R. at 288.) In fact, Flanner testified that he first saw a psychologist at his attorney's request. (R. at 288.) He stated that his treating physician had suggested that he might have depression. (R. at 288.) Flanner testified that he did not like being around groups of people, which caused anxiety and feelings of being overwhelmed. (R. at 305.) He stated that when people visited his home, he had to take a walk to "get away." (R. at 306.) Flanner testified that he did not socialize much and that there were days that he did not leave his home. (R. at 306.)

Olen Dodd, a vocational expert, also was present and testified at Flanner's hearing. (R. at 307-16.) Dodd testified that Flanner's work as a welder was medium⁴ and skilled. (R. at 308-09.) Dodd was asked to consider a hypothetical individual of Flanner's age, education and work history who could perform medium work, who could not climb ladders, ropes or scaffolds and who had to avoid exposure to hazardous machinery and heights. (R. at 310.) Dodd testified that such an individual could not perform Flanner's past work as a welder. (R. at 310.) Dodd was next asked to consider the same hypothetical individual, but who could perform light work. (R. at 311.) Dodd testified that such an individual could perform the jobs of a solderer,

⁴Medium work involves lifting items weighing up to 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If an individual can do medium work, he also can do sedentary and light work. *See* 20 C.F.R. § 404.1567(c) (2006).

a drill press operator and an electronic assembly worker. (R. at 311.) Dodd next testified that the same hypothetical individual, who also had to work in a relatively clean environment with a controlled temperature, would be able to perform the jobs of an assembly worker and a drill press operator. (R. at 313.) Dodd testified that the same hypothetical individual who experienced mild to moderate pain would be able to perform the jobs enumerated. (R. at 313.) Dodd testified that an individual with the limitations set forth in psychologist Lanthorn's assessment would not be able to work. (R. at 313-14.) Dodd testified that an individual who was limited as set forth in Dr. Maggard's assessment could perform the job of the assembly worker. (R. at 314.) Dodd testified that an individual with borderline intellectual functioning would not be able to perform Flanner's past relevant work. (R. at 314-16.)

In rendering his decision, the ALJ reviewed records from Willis Chiropractic Offices; Dr. Joseph C. Claustro, M.D.; Dr. Gary Craft, M.D.; Dr. Ramon A. Motos, M.D.; Dr. Donald R. Williams, M.D., a state agency physician; Dr. Richard M. Surrusco, M.D., a state agency physician; B. Wayne Lanthorn, Ph.D., a licensed clinical psychologist; Dr. Brian L. Maggard, M.D.; Dr. Sharat K. Narayanan, M.D.; Stone Mountain Health Services; and Tazewell Community Hospital.

On June 29, 2004, Dr. Gary Craft, M.D., completed a physical assessment for the Virginia Department of Rehabilitative Services. (R. at 118-23.) In addition to the various physical findings, Dr. Craft noted that Flanner's gross mental status was intact, that he was oriented and related well and was free of any overt psychiatric behavior. (R. at 120.) Dr. Craft further noted that he could not detect any deterioration of personal habits, constriction of interest or any restriction in physical

activities related to a mental condition. (R. at 120.)

On December 8, 2004, Flanner saw B. Wayne Lanthorn, Ph.D., for a psychological evaluation, at the request of his counsel. (R. at 202-10.) Lanthorn noted that Flanner was fully oriented and denied any hallucinations. (R. at 204.) No delusional thinking was evidenced, and Flanner displayed no signs of ongoing psychotic processes. (R. at 204.) Flanner reported attending approximately six counseling sessions before terminating these sessions two months prior to Lanthorn's evaluation. (R. at 205.) Flanner reported that he had been prescribed Lexapro, which had "helped some." (R. at 205.) Lanthorn administered the Wechsler Adult Intelligence Scale-Third Edition, ("WAIS-III"), on which Flanner obtained a verbal IQ score of 76, a performance IQ score of 80 and a full-scale IQ score of 76, placing him in the borderline range of intellectual functioning. (R. at 206.)

Lanthorn also administered the Personality Assessment Inventory, ("PAI"), which suggested that Flanner may have tried to portray himself in a more negative or pathological manner in some areas. (R. at 206-07.) Nonetheless, Lanthorn concluded that the results were valid. (R. at 207.) The PAI indicated significant thinking and concentration problems, a marked degree of somatic concerns, likely social isolation, confusion, distractibility, difficulty concentrating and significant depression. (R. at 207-08.)

Lanthorn also administered the Pain Patient Profile, ("P/3"), the results of which also were deemed valid. (R. at 208.) Flanner scored in the upper and most severe range on the Somatization Scale, the Depression Scale and the Anxiety Scale. (R. at

208.) Lanthorn diagnosed Flanner with a mood disorder with major depressive-like episode, an anxiety disorder with generalized anxiety, a pain disorder associated with both psychological factors and a general medical condition, chronic, borderline intellectual functioning and a then-current Global Assessment of Functioning, (“GAF”), score of 50.⁵ (R. at 209.) Flanner’s prognosis was judged to be guarded, but Lanthorn found him competent to manage his own funds. (R. at 210.) He further concluded that Flanner had significant cognitive difficulties in the areas of concentration, memory loss and initiating and persisting at tasks, and that he had poor self-esteem and a lack of self-confidence. (R. at 210.) Flanner was encouraged to continue counseling where a psychiatric evaluation should be done to determine if his medications were having the full efficacy they should. (R. at 210.)

Lanthorn also completed a mental assessment finding that Flanner had a fair ability to understand, remember and carry out simple job instructions and to maintain personal appearance. (R. at 211.) Lanthorn found that Flanner had a poor ability to follow work rules, to relate to co-workers, to use judgment, to function independently, to maintain attention and concentration, to understand, remember and carry out detailed job instructions and to behave in an emotionally stable manner. (R. at 211.) He found that Flanner had no ability to deal with the public, to interact with supervisors, to deal with work stresses, to understand, remember and carry out complex job instructions, to relate predictably in social situations and to demonstrate

⁵The 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 serious symptoms or serious impairments in social, occupational or school functioning. *See* DSM-IV at 32.

reliability. (R. at 211.)

Flanner saw Dr. Brian L. Maggard, M.D., on January 4, 2005, with various complaints, including depression. (R. at 215-17.) He reported that he was taking Lexapro, which controlled his symptoms fairly well. (R. at 215.) Dr. Maggard diagnosed Flanner with depression, among other things, and advised him to continue his medication regimen. (R. at 215, 217.) Dr. Maggard again diagnosed Flanner with depression on October 5, 2005. (R. at 254.)

Flanner saw Dr. Sharat K. Narayanan, M.D., on May 25, 2005. (R. at 233-37.) Dr. Narayanan noted that Flanner was referred to him by Dr. Maggard, and that Flanner's multiple medical problems included depression. (R. at 233.) A physical examination revealed that Flanner was alert and oriented. (R. at 233.) Dr. Narayanan diagnosed depression, among other things. (R. at 234.) No prescriptions were written, as Flanner advised Dr. Narayanan that he had adequate medications. (R. at 234.)

III. Analysis

The Commissioner uses a five-step process in evaluating DIB claims. *See* 20 C.F.R. § 404.1520 (2006); *see also Heckler v. Campbell*, 461 U.S. 458, 460-62 (1983); *Hall v. Harris*, 658 F.2d 260, 264-65 (4th 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 (2006). 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) (2006).

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) (West 2003 & Supp. 2006); *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 (4th Cir. 1980).

By decision dated February 3, 2006, the ALJ denied Flanner's claim. (R. at 19-25.) The ALJ found that Flanner met the disability insured status requirements of the Act for DIB purposes through at least March 31, 2008. (R. at 24.) The ALJ also found that the medical evidence established that Flanner suffered from a severe impairment, namely degenerative disc disease/degenerative joint disease, but he found that Flanner 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 24.) The ALJ found that Flanner had the residual functional capacity to perform light work that did not require climbing ladders, ropes or scaffolds. (R. at 24.) Thus, the ALJ concluded that Flanner could not perform his past relevant work. (R. at 24.) Based on Flanner's age, education, work history and residual functional capacity and the testimony of a

vocational expert, the ALJ found that jobs existed in significant numbers in the national economy that Flanner could perform, including those of a solderer, a drill press operator and an electronic assembly worker. (R. at 24-25.) Thus, the ALJ concluded that Flanner was not disabled under the Act and was not eligible for DIB benefits. (R. at 25.) *See* 20 C.F.R. § 404.1520(g) (2006).

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 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. § 404.1527(d), if he sufficiently explains his rationale and if the record supports his findings.

Flanner argues that the ALJ erred in finding that he had no severe mental impairment and by not having a medical expert present to testify concerning his mental impairments. (Brief In Support Of Plaintiff's Motion For Summary Judgment, ("Plaintiff's Brief"), at 9-13.) In particular, Flanner argues that the ALJ had an obligation to have a psychological expert present to testify or send the claimant out for a consultative exam if he found the uncontradicted opinion of an examining source unreliable. (Plaintiff's Brief at 13.) Flanner argues that the ALJ rejected Lanthorn's opinion without giving proper explanation as to why he did so. (Plaintiff's Brief at 12-13.)

The ALJ cannot substitute his own opinion for that of a medical expert. "In the absence of any psychiatric or psychological evidence to support his position, the ALJ simply does not possess the competency to substitute his views on the severity of plaintiff's psychiatric problems for that of a trained professional." *Grimmet v. Heckler*, 607 F. Supp. 502, 503 (S.D. W. Va. 1985) (citing *McLain*, 715 F.2d at 869; *Oppenheim v. Finch*, 495 F.2d 396, 397 (4th Cir. 1974)).

Here, Lanthorn is the only mental health source contained in the record. Nonetheless, the ALJ stated as follows at the hearing:

I'm not going to give any credibility to Dr.Lanthorn. ... He's not a treating source and simply stated, Dr. Lanthorn has the same diagnosis in every case that he you folks send him every individual that you send him to, he has the same thing. Everybody's got borderline intellectual functioning, everybody's severely depressed, you know.

(R. at 316.) The ALJ had stated previously during the hearing that:

... Dr. Lanthorn, I do not find him to be at all a reputable source. He always finds everyone to have mental retardation, borderline intellectual functioning, there is nothing in this record at all that would even hint at Mr. Flanner having below an average IQ level. Mr. Lanthorn comes up with exactly the same in every test that he does and I'm not going to place any significant value on [Lanthorn's report]. I don't, sitting here and talking with Mr. Flanner, I don't believe that there's any issue of borderline intellectual functioning, there is nothing in this record that would indicate any question at all with regard to his intellectual capabilities, so, I'm just not going to place any value on it because I don't think it's accurate."

(R. at 282.)

Because Lanthorn is the only mental health source contained in the record, by rejecting his opinion, the ALJ improperly substituted his opinion for that of a mental health professional because the rejection of this evidence simply left no other psychological evidence in the record. While there is some other evidence in the record relating to Flanner's mental health, it is all from medical doctors, not mental health sources and, in any event, most of this evidence supports Lanthorn's diagnoses. Specifically, although Dr. Craft reported that Flanner's mental status was intact, that he was oriented, that he related well and that he was free of any overt psychiatric behavior, (R. at 120), Dr. Maggard diagnosed Flanner with depression on January 4, 2005, (R. at 215), Dr. Narayanan diagnosed him with depression on March 25, 2005, and again on October 5, 2005, (R. at 234, 254), and Lexapro, an antidepressant, had been prescribed at the suggestion of Flanner's therapist. (R. at 205.)

For all of these reasons, I find that substantial evidence does not exist to support the ALJ's rejection of Lanthorn's assessment, that substantial evidence does not exist to support the ALJ's finding that Flanner did not suffer from a severe mental impairment and that the ALJ improperly substituted his own opinion for that of a mental health professional.

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 finding that Flanner did not have a severe mental impairment; and
2. Substantial evidence does not exist to support the ALJ's finding that Flanner was not disabled under the Act.

RECOMMENDED DISPOSITION

The undersigned recommends that the court deny the Commissioner's motion for summary judgment, vacate the decision of the Commissioner denying benefits and remand the case to the ALJ for further development of the record with regard to Flanner's mental impairments and any accompanying impact on his work-related abilities, to include either securing the testimony of a psychological expert or obtaining a consultative psychological evaluation.

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 7th day of May 2007.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE