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

WILLIAM B. TURNER,	)	
Plaintiff	)	
	)	
v.	)	Civil Action No. 1:06cv00087
	)	**SUPPLEMENTAL REPORT AND**
	)	**RECOMMENDATION**
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	By: PAMELA MEADE SARGENT
Defendant	)	United States Magistrate Judge

I. Background and Standard of Review

Plaintiff, William B. Turner, 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). 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 supplemental 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 Turner protectively filed his application for SSI on or about February 18, 2003,[1] alleging disability as of September 4, 2002, based on three herniated discs, hip, back, leg and joint pain, nervous tension, headaches and depression . (Record, ("R."), at 79-82, 102, 111.) By decision dated August 3, 2005, the ALJ denied Turner's claim. (R. at 20-32.) The ALJ found that the medical evidence established that Turner suffered from severe impairments, namely degenerative disc disease, left sacroiliitis and pain disorder with depression, but she found that Turner 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 31.) The ALJ found that Turner retained the residual functional capacity to perform light work,[1] which allowed a sit/stand option, required only occasional climbing, balancing, stooping, kneeling, crouching and crawling, required no exposure to

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[1]The record shows that Turner filed an application for disability insurance benefits, ("DIB"), on September 22, 1993. (R. at 161.) By decision dated August 10, 1995, the ALJ denied this claim. (R. at 161.) The record also shows that Turner filed previous applications for SSI and DIB on April 7, 1997. (R. at 161.) By order dated November 19, 2003, this court affirmed the ALJ's January 5, 2001, decision denying benefits. (R. at 68-69, 158-59.) The record further shows that Turner filed an application for SSI on July 27, 2002. (R. at 38.) The claim was denied initially and on reconsideration. (R. at 38.) By decision dated September 3, 2002, the ALJ denied Turner's claim. (R. at 38-44.)

[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 perform light work, he also can perform sedentary work. *See* 20 C.F.R. § 416.967(b) (2007).

extreme temperature changes and no unusual exposure to dust, fumes, chemicals and poor ventilation. (R. at 31.) The ALJ also found that Turner had a mild reduction in his ability to concentrate due to depression. (R. at 31.) Thus, the ALJ found that Turner was unable to perform his past relevant work. (R. at 31.) Based on Turner's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ found that Turner could perform jobs existing in significant numbers in the national economy. (R. at 31-32.) Thus, the ALJ found that Turner was not disabled under the Act and was not eligible for benefits. (R. at 32.) *See* 20 C.F.R. § 416.920(g) (2007).

After the ALJ issued her decision, Turner pursued his administrative appeals. (R. at 13, 206.) The decision of the ALJ became the final decision of the Commissioner when the Appeals Council declined review on July 11, 2006. (R. at 7-10.) *See* 20 C.F.R. § 416.1481 (2007). This case is before the court on Turner's motion for summary judgment filed January 5, 2007, and the Commissioner's motion for summary judgment filed February 5, 2007. The undersigned entered a report and recommendation on July 23, 2007, recommending that Turner's motion for summary judgment be denied and that the Commissioner's motion for summary judgment be granted. Turner filed timely objections to the report and recommendation. The case was recommitted to the undersigned for a supplemental report and recommendation.

II. Facts & 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). 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. § 416.920 (2007). 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. § 416.920(a) (2007).

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. §1382c(a)(3)(A)-(B) (West 2003 & Supp. 2007); *McLain v. Schweiker*, 715 F.2d 866, 868-69 (4th Cir. 1983); *Hall v. Harris*, 658 F.2d at 264-65; *Wilson v. Califano*, 617 F.2d 1050, 1053 (4th Cir. 1980).

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exposure to dust, fumes, chemicals and poor ventilation. (R. at 31.) The ALJ also found that Turner had a mild reduction in his ability to concentrate due to depression. (R. at 31.) Thus, the ALJ found that Turner was unable to perform his past relevant work. (R. at 31.) Based on Turner's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ found that Turner could perform jobs existing in significant numbers in the national economy. (R. at 31-32.) Thus, the ALJ found that Turner was not disabled under the Act and was not eligible for benefits. (R. at 32.) *See* 20 C.F.R. § 416.920(g) (2007).

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 her findings and her 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 she sufficiently

explains her rationale and if the record supports her findings.

This case was recommitted to the undersigned for preparation of a supplemental report and recommendation to address the contention that the ALJ erred in selectively considering medical reports retrieved from an earlier disability claim by Turner. (Plaintiff's Brief In Support Of Motion For Summary Judgment, ("Plaintiff's Brief"), at 11-12; Plaintiff's Objections To The Magistrate Judge's Report And Recommendation, ("Plaintiff's Objections"), at 5-6.) In particular, Turner points out that in rejecting his claim of disability based on a mental impairment, the ALJ retrieved and relied on a report by Bede A. R. Pantaze, Ph.D., a psychologist, dated October 29, 2001. (Plaintiff's Brief at 11; Plaintiff's Objections at 5.) Turner also argues that the ALJ did not consider a report by William Brezinski, Ph.D., another psychologist, which was introduced in that prior proceeding and was apparently favorable to his position. Turner argues that this report may have provided further support for the assessment provided by Tonya McFadden, M.A., a licensed psychologist. (Plaintiff's Brief at 11; Plaintiff's Objections at 5.)

The only reference in the record before the court to the Brezinski report[1] is in the ALJ's decision from a prior case dated September 3, 2002. (R. at 38-44.) In that decision, the ALJ briefly described Brezinski's report stating that he gave "more weight ... to the Pantaze report." (R. at 40.) The ALJ stated that Brezinski assessed Turner as having absolutely no ability whatsoever to function independently or to demonstrate reliability. (R. at 40.) The ALJ further noted that Turner was able to drive himself to the hearing and to testify without any problem. (R. at 40.) The ALJ

[1]The court cannot determine when Brezinski evaluated Turner.

also found that although Brezinski's assessment described an individual with such serious limitations he would need to be institutionalized, Turner lived alone and was judged by the examiner as being able to handle his own finances. (R. at 40.) The ALJ noted that these conclusions were inconsistent with and not supported by the medical evidence of record. (R. at 40.)

Turner's contention that the ALJ erred in selectively considering medical reports retrieved from an earlier disability claim is without merit. Based on the medical reports before the ALJ at the time of her decision, substantial evidence supported the conclusion that Turner was capable of performing light work with restrictions. Medical evidence considered in a subsequent application for a different time period has no bearing on this court's review of a pending claim. Reviewing courts are restricted to the administrative record in performing their limited function of determining whether the Commissioner's decision is supported by substantial evidence. *See Huckabee v. Richardson*, 468 F.2d 1380, 1381 (4th Cir. 1972) (citation omitted); *see also* 42 U.S.C. § 405(g). If substantial evidence in the record supports the ALJ's decision, then this court will uphold that decision. *See Laws*, 368 F.2d at 642. It is this court's opinion that the record in this case was sufficient for the ALJ to properly make these determinations; thus, the ALJ had no duty to further develop the record.

In May 2003, Dr. Hunter reported that he found no limitations in Turner's capacity for understanding, memory, sustained concentration and persistence, social interaction or adaptation. (R. at 131.) In September 2004, McFadden assessed

Turner's Global Assessment of Functioning, ("GAF"),[2] score at 65, indicating some mild symptoms or some difficulty in social or occupational functioning. (R. at 201.) *See* DSM-IV at 32. In addition, Turner reported to McFadden that Wellbutrin was "somewhat helpful." (R. at 200.) "If a symptom can be reasonably controlled by medication or treatment, it is not disabling." *Gross v. Heckler*, 785 F.2d 1163, 1166 (4th Cir. 1986).

The ALJ noted that she was rejecting McFadden's mental assessment, which indicated that Turner had "marked" limitations in his ability to perform activities within a schedule, maintain regular attendance and to be punctual. (R. at 26.) The ALJ noted that McFadden made these findings despite having reported in her narrative report that Turner would have only "minimal disruptions" in these areas. (R. at 26, 201.) The ALJ further noted that she was rejecting McFadden's assessment because it was inconsistent with her own narrative and her finding that Turner had a GAF score of 65, as well as the medical evidence of record. (R. at 26.) Thus, I find that the ALJ properly rejected McFadden's assessment.

I note that while the ALJ recited Pantaze's report and its findings in her summary of the evidence contained in the record, it does not appear that she relied on this evidence in rejecting McFadden's opinions. Furthermore, despite being represented by counsel, this record contains no evidence that Turner ever requested that the ALJ or the Appeals Council review Brezinski's report submitted in the prior decision. There is no explanation why, to date, counsel has not submitted this report

[2]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).

for consideration by the ALJ, Appeals Council or this court. I further note that it appears that the ALJ left the record open to allow counsel to submit other evidence subsequent to the hearing. (R. at 20.)

For these reasons, I find that substantial evidence exists to support the ALJ's finding that Turner was not disabled.

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 with regard to Turner's mental impairment;

2. Substantial evidence exists to support the ALJ's finding with regard to Turner's residual functional capacity; and

3. Substantial evidence exists to support the ALJ's finding that Turner was not disabled under the Act.

RECOMMENDED DISPOSITION

The undersigned recommends that the court deny Turner's motion for summary judgment, 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. § 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 Supplemental Report and Recommendation to all counsel of record at this time.

DATED: This 8th day of August 2007.

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