

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

CHARLES THOMPSON,)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:08cv00012
)	<u>REPORT AND</u>
)	<u>RECOMMENDATION</u>
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	By: PAMELA MEADE SARGENT
Defendant.)	UNITED STATES MAGISTRATE JUDGE

I. Background and Standard of Review

The plaintiff, Charles Thompson, 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. 2008). 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 (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 Thompson protectively filed his application for DIB on October 25, 2006, alleging disability as of June 30, 2006, due to right ankle weakness resulting from ankle surgery, as well as back and neck problems. (Record, (“R.”), at 12, 91-93, 133, 163 .) The claim was denied initially and upon reconsideration. (R. at 50-52, 57, 58-60.) Thompson then requested a hearing before an administrative law judge, (“ALJ”). (R. at 62.) The ALJ held a hearing on December 19, 2007, at which Thompson was represented by counsel. (R. at 24-47.)

By decision dated February 1, 2008, the ALJ denied Thompson’s claim. (R. at 12-23.) The ALJ found that Thompson met the nondisability insured status requirements of the Act for DIB purposes through December 31, 2010. (R. at 14.) The ALJ also found that Thompson had not engaged in substantial gainful activity since June 30, 2006. (R. at 14.) The ALJ found that the medical evidence established that Thompson suffered from severe impairments, namely obesity, degenerative disc disease of the lumbar and cervical spine, osteoarthritic changes in the right ankle joint and status post excision of synovitis of the right ankle, but she found that Thompson 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 14-19.) The ALJ

also found that Thompson had the residual functional capacity to perform light work¹ that allowed for a sit/stand option, which required only occasional balancing, stooping, kneeling, crouching, crawling and climbing of ramps and stairs, which did not require concentrated exposure to extremely cold temperatures and which did not require work around hazardous machinery, unprotected heights, ladders, ropes or scaffolds. (R. at 20.) Therefore, the ALJ found that Thompson was unable to perform any of his past relevant work. (R. at 22.) Based on Thompson's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ found that a significant number of jobs existed in the national economy that Thompson could perform, including jobs as a cashier, a packer and an assembler. (R. at 22-23.) Thus, the ALJ found that Thompson was not under a disability as defined under the Act at any time through the date of her decision and was not eligible for benefits. (R. at 23.) *See* 20 C.F.R. § 404.1520(g) (2008).

After the ALJ issued her decision, Thompson pursued his administrative appeals, (R. at 7), but the Appeals Council denied his request for review. (R. at 2-4.) Thompson 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 (2008). This case is before the court on the Commissioner's motion for summary judgment filed December 5, 2008.²

¹Light 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) (2008).

²Thompson has not filed a motion for summary judgment.

II. Facts & Analysis

Thompson was born in 1957, which classifies him as a “person closely approaching advanced age” under 20 C.F.R. § 404.1563(d). (R. at 27, 91.) He has a high school education and past relevant work experience in the coal mining industry as a long wall miner, a roof bolter and utility worker and a skip operator. (R. at 27, 134, 139.) Thompson testified that he had undergone five surgeries on his ankle, the last of which was in October 2006, and one hip surgery. (R. at 28, 37-38.) He stated that he suffered a neck injury and a lower back injury while working as a coal miner. (R. at 28.) He testified that the neck injury affected the functioning of his hands. (R. at 35.) Thompson testified that his physicians had instructed him to elevate his right foot to relieve the pain, which he had to do “quite often.” (R. at 32, 38.) He stated that, on a bad day, he spent most of his time on the couch with his foot elevated. (R. at 38.) Thompson further testified that he had arthritis in his neck, hands and fingers that limited his activities. (R. at 29.) He stated that his pain resulted in elevated blood pressure and anxiety and that he was taking Lexapro and Ambien. (R. at 29, 39.) Thompson stated that he had seen a counselor every two weeks since October 2006. (R. at 30.) However, he stated that he had not been hospitalized for depression or anxiety, and he had no difficulty getting along with others. (R. at 33-34.)

Thompson testified that he had difficulty walking, but did not use a cane or walker. (R. at 30.) He stated that, although he could stand and sit for up to 30 minutes each, both were difficult for him due to poor circulation. (R. at 30-31.) He opined that he could not repetitively lift items weighing more than 10 pounds, and he described difficulty gripping objects. (R. at 36-37.) Thompson stated that his fingers were very stiff in the mornings. (R. at 33.) He testified that he had received injectable arthritis

medication, which helped relieve his pain for a while. (R. at 33.) Thompson stated that, on a good day, he could walk around “pretty good,” watched television, went outside, visited his mother-in-law who lived next door and went to church. (R. at 32.) He testified that he sometimes went to stores with his wife, but could not stay inside for very long. (R. at 32.) Thompson stated that his son mowed his yard and that he played his guitar when his hands allowed. (R. at 34.)

John Newman, a vocational expert, also was present and testified at Thompson’s hearing. (R. at 40-45.) Newman classified Thompson’s past work in the coal mines as heavy³ and semi-skilled or skilled, depending on the type of machinery operated. (R. at 41.) Newman was asked to consider a hypothetical individual of Thompson’s age at the time of alleged onset, education and work history, who could perform light work with occasional climbing, balancing, kneeling, crawling, stooping and crouching, and which did not require work around hazardous machinery at unprotected heights, climbing ladders, ropes or scaffolds, which did not require working on vibrating surfaces, did not expose the worker to extreme cold environments, but did allow for a sit/stand option. (R. at 41-42.) Newman testified that such an individual could not perform any of Thompson’s past relevant work, but that he could perform the jobs of a cashier, an assembler and a packer, all at the sedentary⁴ level of exertion. (R. at 42-43.) Newman opined that an individual with

³Heavy work involves lifting items weighing up to 100 pounds at a time with frequent lifting or carrying of items weighing up to 50 pounds at a time. If someone can perform heavy work, he also can perform medium, light and sedentary work. *See* 20 C.F.R. § 404.1567(d) (2008).

⁴Sedentary work involves lifting items weighing up to 10 pounds at a time and occasionally lifting or carrying items such as docket files, ledgers and small tools. *See* 20 C.F.R. § 404.1567(a) (2008).

the limitations testified to by Thompson could not perform any jobs. (R. at 43-44.) Likewise, Newman testified that an individual with the limitations set forth in Mead's assessment of ability to do work-related mental activities could not perform any jobs. (R. at 44-45.)

In rendering his decision, the ALJ reviewed medical records from Johnston Memorial Hospital; Dr. Wallace L. Huff Jr., M.D.; Clinch Valley Medical Center; Wake Forest University Baptist Medical Center; Dr. Philip B. Robertson, M.D., a psychiatrist; Dr. Robert O. McGuffin, M.D., a state agency physician; Marsha Mead, Ph.D., a licensed professional counselor; Howard Leizer, Ph.D., a state agency psychologist; Dr. Joseph Duckwall, M.D., a state agency physician; Richard J. Milan Jr., Ph.D., a state agency psychologist; and Merit Medical Group.

The Commissioner uses a five-step process in evaluating DIB claims. *See* 20 C.F.R. § 404.1520 (2008); *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. 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) (2008).

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. 2008); *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).

Thompson argues that the ALJ erred by failing to give appropriate weight to the opinions of his treating physicians. (Brief In Support Of Plaintiff's Motion For Summary Judgment, ("Plaintiff's Brief"), at 10-17, 19-20.) Thompson also argues that the ALJ erred by failing to evaluate his impairments in combination. (Plaintiff's Brief at 11-17, 20.) Thompson next argues that the ALJ erred by failing to find that his impairments met or equaled the listed impairment either for depression, found at 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.04, or for anxiety, found at 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.06. (Plaintiff's Brief at 11-13.) Thompson argues that the ALJ erred by failing to find that his right ankle impairment and his degenerative disc disease of the spine met medical listings. (Plaintiff's Brief at 13-15.) Thompson further argues that the ALJ erred by failing to follow Social Security Ruling 85-15. (Plaintiff's Brief at 20.) Finally, Thompson argues that the ALJ erred in her credibility and pain analyses. (Plaintiff's Brief at 20.)

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

Thompson argues that the ALJ erred by failing to give appropriate weight to the opinions of his treating physicians. (Plaintiff's Brief at 10-17, 19-20.) I disagree. The ALJ must consider objective medical facts and the opinions and diagnoses of both treating and examining medical professionals, which constitute a major part of the proof of disability cases. *See McLain*, 715 F.2d at 869. The ALJ must generally give more weight to the opinion of a treating physician because the physician is often most able to provide "a detailed, longitudinal picture" of a claimant's alleged disability. *See* 20 C.F.R. § 404.1527(d)(2) (2008). However, "circuit precedent does not require that a treating physician's testimony 'be given controlling weight.'" *Craig v. Chater*,

76 F.3d 585, 590 (4th Cir. 1996) (quoting *Hunter v. Sullivan*, 993 F.2d 31, 35 (4th Cir. 1991)). In fact, “if a physician’s opinion is not supported by the clinical evidence or if it is inconsistent with other substantial evidence, it should be accorded significantly less weight.” *Craig*, 76 F.3d at 590.

The ALJ stated that she was giving little weight to the opinions of Marsha Mead, Ph.D., a licensed professional counselor, that Thompson was moderately limited in his ability to respond appropriately to changes in a routine work setting and markedly limited in his ability to respond appropriately to work pressures in a usual work setting because of anxiety about making mistakes and decreased concentration due to pain. (R. at 16-17.) Instead, the ALJ found the opinions of state agency psychologists Howard S. Leizer, Ph.D., and Richard J. Milan Jr., Ph.D., consistent with the evidence of record as a whole. (R. at 17.) For the following reasons, I find that substantial evidence supports this weighing of the evidence.

In January 2007, the Beck Depression Inventory-Second Revision, (“BDI-II”), administered by Mead, revealed that Thompson had moderate depression, and the Beck Anxiety Inventory, (“BAI”), revealed only mild anxiety. (R. at 366-68.) The state agency psychologists concluded that Thompson suffered from a nonsevere affective disorder and a nonsevere anxiety-related disorder, resulting in mild restrictions on his activities of daily living, mild difficulties in maintaining social functioning and in maintaining concentration, persistence or pace and no episodes of decompensation of extended duration. (R. at 299-311, 331.) These findings are supported by the progress notes of Dr. Philip B. Robertson, M.D., a psychiatrist, as well as Mead’s progress notes and Thompson’s statements regarding his activities and

his improvement with medication. Specifically, Dr. Robertson, Thompson's treating psychiatrist, noted on February 1, 2007, that Thompson was cooperative, but depressed and anxious with agitated motor activity. (R. at 285.) He had intact thought processes, was fully oriented and had intact cognitive functioning. (R. at 285.) Dr. Robertson diagnosed increased depression, sleep difficulty and pain, and he prescribed Lexapro and Ambien. (R. at 285.) By March 1, 2007, Thompson informed Dr. Robertson that Lexapro had helped his depression, and Ambien had helped him sleep. (R. at 283.) When Thompson saw Dr. Robertson on June 4, 2007, he reported that his depression was "under control." (R. at 312.) He was cooperative and calm with a euthymic mood, and his thought processes were intact, he was fully oriented, and he had intact cognitive functioning. (R. at 312.) Dr. Robertson found that Thompson was stable on his medications. (R. at 312.)

Also, Thompson informed Mead on February 12, 2007, that he was "doing better" and was "resting better." (R. at 363.) Again, in April 2007, Thompson informed Mead that his depression had decreased since taking medication. (R. at 294.) He also reported getting along well with others, attending church services, playing guitar and attending his children's sporting events. (R. at 295.) He further reported a satisfactory energy level, performing light housework, watching television and taking his children to "ball practice." (R. at 295.) Thompson noted that he had missed some of these activities prior to beginning the Lexapro. (R. at 295.) In July 2007, Mead noted that Thompson's depression and anxiety did not appear to have increased despite the repossession of his vehicle and a decrease in income. (R. at 388.) In September 2007, Thompson opined that he might socialize again after his financial situation improved. (R. at 386.) The results of another BDI-II, administered

in October 2007, revealed only minimal depression, and a BAI revealed only mild anxiety. (R. at 383-85.) Mead noted that Thompson appeared to cope fairly well with interactions with others. (R. at 382.)

Moreover, Mead's progress notes consistently reflect that Thompson was calm, had an appropriate affect, depressed and anxious mood, no hallucinations or delusions, intact memory, judgment, insight and impulse control and no suicidal or homicidal ideations. (R. at 354-65, 369-70, 376, 382, 386-88.) Additionally, the court notes that Thompson did not allege any mental impairments in either his Disability Report or his Disability Report-Appeal in connection with his application for benefits. He also admitted that he has never been hospitalized for the treatment of any mental condition.

For all of the above-stated reasons, I find that substantial evidence supports the ALJ's decision to accord greater weight to the opinions of the state agency psychologists.

Thompson also argues that the ALJ erred by failing to find that his mental impairments met the medical listings for depression and anxiety, found at § 12.04 and § 12.06, respectively. For the following reasons, I disagree. To meet the requirements of § 12.04, a claimant must show that he 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) (2008). A claimant also may meet the requirements of this section if he 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) (2008). As the Commissioner argues in his brief, there is no evidence contained in the record that Thompson suffers from marked restrictions in any relevant areas, nor has he suffered from repeated episodes of decompensation of extended duration. In fact, both state agency psychologists concluded that Thompson suffered from only mild restrictions in the performance of activities of daily living, in maintaining social functioning and in maintaining concentration, persistence or pace. (R. at 309, 331.) They also found that he had experienced no repeated episodes of decompensation of extended duration. (R. at 309, 331.) The record further shows that Thompson's symptoms were controlled with counseling and medication. (R. at 283, 294, 312-13, 355, 363, 388.) "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). For the reasoning outlined above, the court finds that substantial evidence supports such a finding, and that Thompson cannot meet the "B criteria" of § 12.04.

That being the case, the court must consider whether Thompson can meet the "C criteria" of § 12.04. I find that he cannot for two reasons. First, the evidence does not show that Thompson has suffered from a chronic affective disorder of at least two years' duration. While there is mention in the record that Thompson suffered from some depression in 2004 following his first ankle surgery, this depressive episode was

short-lived. Thompson did not again begin to experience depressive symptoms until 2006 after having to cease working. Moreover, Thompson informed Mead in December 2006 that he suffered from depression, but not all the time. (R. at 371.) Thus, he cannot show that he suffered from a chronic affective disorder of at least two years' duration. That being the case, it is unnecessary to address whether Thompson's affective disorder causes more than minimal limitations on his ability to perform work-related activities.

I also reject Thompson's argument that the ALJ erred by failing to find that his mental impairment met or equaled the listing for anxiety-related disorders, found at § 12.06. To meet § 12.06, a claimant must show by medically documented findings that he suffers from at least one of the following:

1. Generalized persistent anxiety accompanied by three of the following: motor tension, autonomic hyperactivity, apprehensive expectation or vigilance and scanning;
2. A persistent irrational fear of a specific object, activity or situation which results in a compelling desire to avoid the dreaded object, activity or situation;
3. Recurrent severe panic attacks manifested by a sudden unpredictable onset of intense apprehension, fear, terror and sense of impending doom occurring on the average of at least once a week;
4. Recurrent obsessions or compulsions which are a source of marked distress; or
5. Recurrent and intrusive recollections of a traumatic experience, which are a source of marked distress.

See 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.06(A) (2008). A claimant also must show that his condition results in at least two of the following: marked restriction of

activities of daily living; marked difficulties in maintaining social functioning; marked deficiencies of concentration, persistence or pace; or repeated episodes of decompensation, each of extended duration. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.06(B) (2008). If a claimant cannot show that his condition resulted in two of the previous symptoms, he still may qualify for benefits under this section if he can show that his symptoms have resulted in a complete inability to function independently outside the area of his home. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.06(C) (2008). Again, the state agency psychologists, whose opinions are supported by substantial evidence, found that Thompson did not suffer from such limitations. Moreover, there is no evidence contained in the record that Thompson's symptoms have prevented him from functioning independently outside the area of his home. In particular, Thompson has stated that he grocery shops weekly, that he attends church services multiple times each week and that he attends his children's sporting events and takes them to ball practice. (R. at 32, 295, 386.) Therefore, I find that substantial evidence supports the ALJ's finding that Thompson's condition did not meet or equal the requirements of § 12.06.

Thompson next argues that the ALJ erred by failing to follow Social Security Ruling 85-15, which states, in relevant part, as follows:

Because response to the demands of work is highly individualized, the skill level of a position is not necessarily related to the difficulty an individual will have in meeting the demands of the job. A claimant's condition may make performance of an unskilled job as difficult as an objectively more demanding job.

S.S.R. 85-15, WEST'S SOCIAL SECURITY REPORTING SERVICE, Rulings 1983-1991 (West 1992). Thompson argues that this Ruling obligates the ALJ to include any impairment-related limitations created by an individual's response to demands of

work in the residual functional capacity finding. The court notes that this Ruling makes clear that it “is not intended to set out any presumptive limitations for disorders, but to emphasize the importance of thoroughness in evaluation on an individualized basis.” S.S.R. 85-15. Thompson appears to be arguing that the ALJ erred by failing to include in his residual functional capacity any restrictions on his ability to deal with stress in the workplace. However, as discussed above, Mead is the only medical source contained in the record who placed restrictions on Thompson’s ability to do so. For all the reasons explained above, substantial evidence supports the ALJ’s decision to accord little weight to Mead’s opinions. The other evidence contained in the record, which is supported by substantial evidence, is that from the state agency psychologists, who found that Thompson suffered from a nonsevere affective disorder and a nonsevere anxiety-related disorder, resulting in mild restrictions on activities of daily living and mild difficulties in maintaining social functioning and in maintaining concentration, persistence or pace. (R. at 299-311, 331.) The ALJ thoroughly evaluated the evidence before arriving at this decision. Thus, I find Thompson’s argument that the ALJ erred by failing to follow S.S.R. 85-15 to be without merit.

Thompson next argues that the ALJ erred in her pain analysis and her credibility analysis. Again, I disagree. It appears that Thompson is arguing that the ALJ erred by basing her credibility determination upon a finding that he could perform light housework and could get around his house in a manner that was not significantly limited at times. I disagree because the ALJ did not rely solely on these findings in making her credibility determination. Instead, this was only one factor that the ALJ considered to support her credibility finding. In addition to this factor, the

ALJ also considered several other factors, which will be discussed in more detail below.

It is the province of the ALJ to assess the credibility of a witness or claimant. *See Hays*, 907 F.2d at 1456; *Taylor*, 528 F.2d at 1156. Furthermore, “[b]ecause [s]he had the opportunity to observe the demeanor and to determine the credibility of the claimant, the ALJ’s observations concerning these questions are to be given great weight.” *Shively v. Heckler*, 739 F.2d 987, 989 (4th Cir. 1984). Ordinarily, this court will not disturb the ALJ’s credibility findings unless “it appears that her credibility determinations are based on improper or irrational criteria.” *Breeden v. Weinberger*, 493 F.2d 1002, 1010 (4th Cir. 1974). The undersigned finds that the ALJ’s credibility determination was not based on “improper or irrational criteria.” That being the case, great weight should be accorded to the ALJ’s credibility findings.

The Fourth Circuit has adopted a two-step process for determining whether a claimant is disabled by pain. First, there must be objective medical evidence of the existence of a medical impairment which could reasonably be expected to produce the actual amount and degree of pain alleged by the claimant. *See Craig v. Chater*, 76 F.3d 585, 594 (4th Cir. 1996). Second, the intensity and persistence of the claimant’s pain must be evaluated, as well as the extent to which the pain affects the claimant’s ability to work. *See Craig*, 76 F.3d at 595. Once the first step is met, the ALJ cannot dismiss the claimant’s subjective complaints simply because objective evidence of the pain itself is lacking. *See Craig*, 76 F.3d at 595. This does not mean, however, that the ALJ may not use objective medical evidence in evaluating the intensity and persistence of pain. In *Craig*, the court stated:

Although a claimant's allegations about [his] pain may not be discredited solely because they are not substantiated by objective evidence of the pain itself or its severity, they need not be accepted to the extent they are inconsistent with the available evidence, including objective evidence of the underlying impairment, and the extent to which that impairment can reasonably be expected to cause the pain the claimant alleges [he] suffers. ...

Craig, 76 F.3d at 595. “[P]ain itself can be disabling, and it is incumbent upon the ALJ to evaluate the effect of pain on a claimant’s ability to function.” *Walker v. Bowen*, 889 F.2d 47, 49 (4th Cir. 1989). Evidence of a claimant’s activities as affected by the pain is relevant to the severity of the impairment. *See Craig*, 76 F.3d at 595. Furthermore, an ALJ’s assessment of a claimant’s credibility regarding the severity of pain is entitled to great weight when it is supported by the record. *See Shively*, 739 F.2d at 989-90. “[S]ubjective evidence of pain cannot take precedence over objective medical evidence or the lack thereof.” *Parris v. Heckler*, 733 F.2d 324, 327 (4th Cir. 1984). As in the case of other factual questions, credibility determinations as to a claimant’s testimony regarding his pain are for the ALJ to make. *See Shively*, 739 F.2d at 989-90. To hold that an ALJ may not consider the relationship between the objective evidence and the claimant’s subjective testimony as to pain would unreasonably restrict the ALJ’s ability to meaningfully assess a claimant’s testimony.

Here, the ALJ found that Thompson’s medically determinable impairments could reasonably be expected to produce the alleged symptoms, but she further found that Thompson’s statements regarding the intensity, persistence and limiting effects of those symptoms were not entirely credible. (R. at 21.) In particular, the ALJ correctly noted that Thompson could walk with no evidence of neurological deficits and that, despite suffering from degenerative disc disease of the spine, this was minimal and the canal stenosis in his cervical spine was mild. (R. at 21, 348-53.) The

ALJ also correctly noted that, although Thompson underwent surgeries on his right ankle for an infection, x-rays taken in January 2007 showed no misalignment of the ankle, and examination showed that the surgical wound had healed. (R. at 21, 279-80.) Additionally, the ALJ emphasized that Thompson told his primary care provider in April 2007 that his orthopedic specialist had released him from care. (R. at 21-22, 337.) She further noted Thompson's testimony that steroid injections relieved his pain for a while, and that medications also had improved his sleep. (R. at 22.) Moreover, the ALJ noted that Thompson's anxiety and depression had improved with outpatient treatment, and he had undergone no inpatient mental health treatment. (R. at 22.) Finally, the ALJ correctly noted that Thompson participated in a variety of routine household and other activities, such as playing the guitar, watching television, reading, attending church, driving, shopping, doing laundry and visiting with others. (R. at 22.)

The undersigned finds that the ALJ thoroughly considered Thompson's allegations of pain and their effect on his ability to work. However, for all of the reasons recited by the ALJ in her decision, the objective evidence does not support Thompson's allegations regarding the extent of his pain and its effect on his ability to perform work. That being the case, the undersigned finds that the ALJ's pain analysis is supported by substantial evidence.

Thompson next argues that the ALJ erred by failing to find that his right ankle impairment and his degenerative disc disease of the spine met or equaled a listed impairment. While Thompson does not specify to which medical listings he is referring, the court finds that the only applicable listing for the ankle impairment would be 20 C.F.R. Part 404, Subpart P, Appendix 1, § 1.02(A) and/or § 1.03. Section 102(A) relates to major dysfunction of a joint(s) (due to any cause), and §

1.03 relates to reconstructive surgery or surgical arthrodesis of a major weight-bearing joint. Both of these listings require a showing that an individual is unable to ambulate effectively. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, §§ 1.02(A), 1.03 (2008). Inability to ambulate effectively means an extreme limitation of the ability to walk, for example, an impairment that interferes very seriously with the individual's ability to independently initiate, sustain or complete activities. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.00B(2)(b) (2008). Ineffective ambulation is defined generally as having insufficient lower extremity functioning to permit independent ambulation without the use of a hand-held assistive device that limits the functioning of both upper extremities. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.00B(2)(b) (2008). To ambulate effectively, individuals must be capable of sustaining a reasonable walking pace over a sufficient distance to be able to carry out activities of daily living. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.00B(2)(b) (2008). They must have the ability to travel without companion assistance to and from a place of employment or school. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.00B(2)(b) (2008). Here, there simply is not evidence in the record that Thompson cannot ambulate effectively. He testified that he could walk around "pretty good," that he visited his mother-in-law who lived next door, attended church services regularly and accompanied his children to their sporting events and "ball practice." (R. at 32, 295.) Thompson did not state that he needed assistance to do any of these things. He stated that he grocery shopped weekly. (R. at 32.) Moreover, no treating or examining physician ever prescribed any assistive device for Thompson, nor did they place any limitations on his ability to walk. Likewise, the state agency physicians concluded that Thompson could perform light work with an occasional ability to climb, balance, stoop, kneel, crouch and crawl. (R. at 289-90.) Thus, the undersigned finds that there is no evidence contained in the record showing that Thompson could not ambulate effectively. That being said, the undersigned finds that substantial evidence supports the ALJ's finding that

Thompson's ankle impairment did not meet or equal § 1.02(A) or § 1.03.

Again, with regard to Thompson's argument that the ALJ erred by failing to find that his degenerative disc disease met or equaled a medical listing, Thompson failed to specify to which medical listing he was referring. The relevant medical listing for disorders of the spine is found at 20 C.F.R. Part 404, Subpart P, Appendix 1, § 1.04. The medical record is clear that Thompson does not suffer from any of the symptoms included in subsection (B) or (C). Thus, the court will analyze Thompson's degenerative disc disease under § 1.04(A). To meet § 1.04(A), a claimant must suffer from either a herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis or vertebral fracture, resulting in compromise of a nerve root or the spinal cord with evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.04(A) (2008).

MRIs and x-rays of Thompson's cervical and lumbar spines, taken in May 2007, showed no evidence of nerve root compression. (R. at 348-53.) Specifically, these MRIs and x-rays showed only mild degenerative disc disease of the lumbar spine and mild canal stenosis in the cervical spine. (R. at 348-53.) Moreover, there is no evidence of limitation of motion of the spine, motor loss accompanied by sensory or reflex loss and no positive straight-leg raising test. For all of these reasons, the undersigned finds that substantial evidence supports the ALJ's finding that Thompson's degenerative disc disease did not meet or equal a listed impairment.

Thompson next argues that the ALJ erred by failing to accept the opinions of

his treating physicians with regard to his physical limitations. For the following reasons, I find that substantial evidence supports the ALJ's weighing of the evidence. In her decision, the ALJ stated that the opinions of state agency physicians Drs. Robert McGuffin, M.D., and F. Joseph Duckwall, M.D., that Thompson could perform light work were consistent with the objective and other evidence of record. (R. at 20.) Therefore, she accorded significant weight to those opinions. (R. at 20.) I find that substantial evidence supports such a weighing of the evidence. I first note that the ALJ did not reject any opinions of any treating physicians. In fact, the findings of the treating and examining physicians are consistent with those of the state agency physicians. The record shows that Thompson suffers from a history of recurring tumors of the right ankle and multiple surgeries to correct this condition. He also suffered from a right ankle infection in 2006, which required multiple surgeries to control. Although Thompson experienced some difficulty with wound healing following these surgeries, by November 2006, his wounds were mostly healed, and x-rays taken in January 2007 showed no fracture or joint misalignment and no new bone lesion. (R. at 279, 281.) Although Thompson continued to experience pain, in March 2007, he informed Mead that he accepted that he would never be pain-free. (R. at 360.) He was prescribed pain medications, and he received several Depo Medrol injections. By January 2007, Thompson's orthopedist, Dr. William G. Ward, M.D., noted that Thompson's ankle wound had "healed up." (R. at 280.) Importantly, none of Thompson's treating or examining physicians placed any physical limitations on Thompson once he recovered from the ankle surgeries in 2006. Moreover, no assistive devices were prescribed for him thereafter. Additionally, Thompson's activities of daily living further support the ALJ's acceptance of the state agency physicians' opinions. For instance, in a questionnaire dated November 2006, Thompson reported that he shopped weekly for approximately one to two hours, (R. at 119), and that he attended church services two to three times

weekly. (R. at 120.) Although he stated that a brace had been prescribed for him in October 2006, the medical reports do not support this contention. (R. at 122, 250-51.) In fact, when he was discharged from Dr. Ward's care in October 2006, Thompson was advised to bear weight as tolerated. (R. at 251.) In June 2007, Thompson again stated that he shopped weekly for approximately one hour. (R. at 154.) He also again stated that he attended church services twice weekly. (R. at 155.) Similarly, in April 2007, Thompson informed Mead that he attended church services, played guitar and attended his children's sporting events. (R. at 295.) He further reported performing light housework and taking his children to "ball practice." (R. at 295.) In September 2007, Thompson informed Mead that, despite his dislike of being around people, he continued to attend church services and go grocery shopping. (R. at 386.)

The state agency physicians concluded that Thompson could perform light work with an occasional ability to climb, balance, stoop, kneel, crouch and crawl. (R. at 287-93.) They imposed no manipulative, visual, communicative or environmental limitations. (R. at 289-90.) As discussed above, however, nothing contained in the notes of the treating or examining physicians contradicts these findings. In fact, their notes support such a finding. For all of these reasons, I find that the ALJ's weighing of the evidence is supported by substantial evidence.

Finally, Thompson argues that the ALJ erred by failing to consider all of his impairments in combination. Again, I disagree. The ALJ specifically stated in her decision that "[t]he claimant does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments. ..." (R. at 18.) The ALJ proceeded to then thoroughly evaluate each of Thompson's impairments, including his right ankle impairment and his back impairment. (R. at 18-19.) The ALJ then even stated that she considered the effect that obesity might have

on these impairments and/or combinations of impairments. (R. at 19.) Even after considering all of these in combination, the ALJ found that Thompson's impairments did not meet or equal a medical listing. (R. at 19.) For all of these reasons, I find that the ALJ did, in fact, consider all of Thompson's impairments in combination.

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 Thompson's mental residual functional capacity;
2. Substantial evidence exists to support the ALJ's finding with regard to Thompson's physical residual functional capacity; and
3. Substantial evidence exists to support the ALJ's finding that Thompson 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 final decision of the Commissioner 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 12th day of March 2009.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE