

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

LEWIS L. BOWERS,)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:08cv00043
)	<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

Plaintiff, Lewis L. Bowers, 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. 2009). 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 Bowers protectively filed his application for SSI on October 27, 2006, alleging disability as of October 1, 2005, based on a “pinched nerve,” numbness in his right knee and “nerves.” (Record, (“R.”), at 98-105, 114, 118.) The claim was denied initially and upon reconsideration. (R. at 60-62, 67, 68-72.) Bowers then requested a hearing before an administrative law judge, (“ALJ”). (R. at 73.) The ALJ held a hearing on January 30, 2008, at which Bowers was represented by counsel. (R. at 17-57.)

By decision dated May 14, 2008, the ALJ denied Bowers’s claim. (R. at 8-16.) The ALJ found that Bowers had not engaged in any substantial gainful activity since October 27, 2006. (R. at 10.) The ALJ found that the medical evidence established that Bowers had severe impairments, namely lumbar degenerative disc disease, degenerative joint disease of his hands and mild hypertension, but she found that Bowers’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 10-11.) The ALJ also found that Bowers had the residual functional capacity to perform a limited range of light¹ work. (R. at 13.) The ALJ found that, due to poor reading and writing

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 an individual can do light work, he also can do sedentary work. *See* 20 C.F.R. § 416.967(b) (2009).

skills, Bowers was limited to performing tasks that required recognition of only simple symbols and words; that, due to back pain, he could not climb or work at heights, he could occasionally crouch, crawl, kneel, stoop, balance and bend and would require the option to change posture in place for brief stretch breaks; that, due to degenerative joint disease of his hands, Bowers could not work continuously at tasks requiring fine manipulation for more than 75 percent of an eight-hour workday; and that, due to nervousness, he could not work with large groups of people or the public. (R. at 13.) The ALJ found that Bowers could not perform any of his past relevant work. (R. at 15.) Based on Bowers's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ found that other jobs existed that Bowers could perform, including light jobs as an unarmed security guard, a counter clerk and a marker and sedentary² jobs as a surveillance monitor and a quote clerk. (R. at 15-16.) Thus, the ALJ found that Bowers was not under a disability as defined under the Act, and was not eligible for benefits. (R. at 16.) *See* 20 C.F.R. § 416.920(g) (2009).

After the ALJ issued her decision, Bowers pursued his administrative appeals, but the Appeals Council denied his request for review. (R. at 1-3, 4.) Bowers 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 (2009). The case is before this court on the Commissioner's motion for summary judgment filed August

²Sedentary work involves lifting items weighing up to 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. *See* 20 C.F.R. § 416.967(a) (2009).

14, 2009.³

II. Facts

Bowers was born in 1967, (R. at 98, 143), which classifies him as a "younger person" under 20 C.F.R. § 416.963(c). He completed the tenth grade and stated that he attended special education classes.⁴ (R. at 24-25, 123.) He has past relevant work as a carpet installer. (R. at 28, 119, 189.) Bowers testified at his hearing that he had pneumatic fever at the age of six, which subsequently caused him a lot of joint problems. (R. at 25.) He testified that it had been more than 15 years since he last consumed alcohol. (R. at 41-42.)

Vocational expert, Bonnie Martindale, testified at Bowers's hearing. (R. at 49-56.) Martindale classified Bowers's past work as a carpet installer as heavy,⁵ skilled work. (R. at 49.) She classified his past work as a carpet helper as heavy, semiskilled work. (R. at 49.)

Martindale was asked to consider an individual of Bowers's age, education and vocational profile and who had the residual functional capacity to perform light work that required the ability to recognize only simple words and symbols, that did not

³Bowers did not file a motion for summary judgment.

⁴At his hearing, Bowers testified that he attended special education classes. (R. at 25.) However, on his Disability Report, he indicated that he did not attend special education classes. (R. at 123.)

⁵Heavy work involves lifting objects weighing up to 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds. If someone can do heavy work, he also can do medium, light and sedentary work. *See* 20 C.F.R. § 416.967(d) (2009).

require more than simple, noncomplex tasks, that did not require climbing, crouching or working around heights or more than occasional crawling and stooping, who would be allowed to sit and stand in place for brief stretch breaks throughout the day and who would not be required to work with his hands to perform continuous fine manipulation. (R. at 49-50.) Martindale testified that there would be jobs available at the light exertional level that existed in significant numbers, including jobs as an unarmed security guard, a counter clerk and a marker. (R. at 50-51.) When asked if these jobs would be affected if the individual was unable to bend to pick an object up from knee level or below and who was unable to stoop, Martindale stated that the counter clerk and marker jobs would be eliminated, but that the individual could perform the job as a security guard. (R. at 51.) Martindale also stated that there were jobs available at the sedentary level that such an individual could perform with the limitations as set out in the first hypothetical, including jobs as a surveillance monitor, a ticket checker and a quote clerk. (R. at 52-53.) When asked about the same individual with marked limitations in his ability to be around crowds of people or more than a couple of co-workers and to deal with work stressors or routine changes, Martindale stated that the individual could perform the jobs as a guard, a marker and a counter clerk. (R. at 53-54.)

In rendering his decision, the ALJ reviewed records from Twin County Regional Hospital; Linda Radford-Goad, C.F.N.P., a certified family nurse practitioner; Dr. Ralph Capaldo, M.D.; Tuck Chiropractic Clinic; Dr. William Humphries, M.D.; Dr. Michael Hartman, M.D., a state agency physician; University of Virginia; Lisa Foster, P.A.C., a physician assistant; Dr. Robert McGuffin, M.D., a state agency physician; and Elizabeth Hubbard, F.N.P., a family nurse practitioner.

On September 24, 1998, Bowers was seen at the emergency room at Twin County Regional Hospital. (R. at 192-208.) He was diagnosed with reflux esophagitis and acute duodenitis. (R. at 192.) On September 18, 2000, Bowers presented to the emergency room for complaints of chest pain following a fall. (R. at 209-19.) X-rays of Bowers's chest were normal. (R. at 218-19.) Bowers was diagnosed with a chest contusion. (R. at 212.) On February 2, 2001, Bowers was seen at the emergency room for complaints of right groin pain and increased urinary frequency. (R. at 241-53.) He was diagnosed with acute epididymitis. (R. at 250.) On March 27, 2002, Bowers was seen at the emergency room for complaints of low back pain. (R. at 254-67.) He was diagnosed with lumbar strain. (R. at 260.) On April 29, 2001, Bowers was seen at the emergency room and was diagnosed with probable hernia. (R. at 230-40.)

On February 17, 1999, Linda Radford-Goad, C.F.N.P., a certified family nurse practitioner, saw Bowers following his esophagogastroduodenoscopy. (R. at 281.) Bowers voiced no complaints other than heartburn and dyspepsia. (R. at 281.) Bowers was diagnosed with gastroesophageal reflux disease, ("GERD"), and treated helicobacter pylori gastritis. (R. at 281.) On August 31, 1999, Bowers reported that he was doing much better, but stated that he still had some nausea after eating. (R. at 280.) Bowers had good range of motion and strength in all extremities. (R. at 280.) He had adequate gait and coordination. (R. at 280.) In August 2000, Bowers complained of nausea, heartburn, dyspepsia and gas. (R. at 278.) He reported that he had been out of his Reglan. (R. at 278.) He stated that he had not consumed alcohol within the previous six to seven years, but that he drank heavily when he was younger. (R. at 278.) In September 2000, Bowers reported that he was doing better. (R. at 277.) In April 2001, Bowers reported that his symptoms had improved. (R. at 276.) His only complaint was right groin pain. (R. at 276.) Dr. Ralph Capaldo, M.D., examined

Bowers and found no evidence of hernia formation. (R. at 276.) He recommended that Bowers avoid heavy lifting and excess bending. (R. at 276.)

In January 2002, Bowers complained of nerves, anxiety and insomnia. (R. at 275.) In March 2002, Bowers complained of low back pain. (R. at 274.) He reported that his medication helped with his depressive symptoms, as well as his reflux symptoms. (R. at 274.) Radford-Goad diagnosed GERD, anxiety, depression and insomnia, helped with Effexor, and lumbar spine strain. (R. at 274.) In September 2002, Bowers complained of right lower groin pain. (R. at 273.) He had some tenderness over the epididymis. (R. at 273.) Bowers was treated for epididymitis and he was told not to perform heavy lifting. (R. at 273.) In November 2002, Bowers continued to complain of right groin pain. (R. at 272.) He was diagnosed with possible recurrence of epididymitis. (R. at 272.) In February 2003, Bowers complained of right hip pain that radiated to his right groin and numbness in his right thigh. (R. at 271.) X-rays of Bowers's hip and pelvis were normal. (R. at 284.) Radford-Goad diagnosed questionable right groin tendinitis, right hip pain, probable osteoarthritis and GERD. (R. at 271.) On July 8, 2003, Bowers complained of low back pain that radiated down his right leg. (R. at 270.) Straight leg raising tests were negative, and reflexes were intact. (R. at 270.) On July 22, 2003, Bowers reported relief of his symptoms since taking medication. (R. at 268.) A CT scan showed some bulging discs. (R. at 268.) He was diagnosed with back pain with bulging discs, chronic scrotal pain, GERD and anxiety/depression. (R. at 268.)

On September 25, 2006, Bowers was treated at Tuck Chiropractic Clinic for his complaints of low back pain. (R. at 293-99.) Bowers had a normal gait and normal heel and toe walking, and his lumbar spine images were negative for fracture or gross

pathology. (R. at 296-97.) He was diagnosed with spinal disc herniation and degenerative disc disease of the cervical spine. (R. at 297.)

On January 8, 2007,⁶ Dr. William Humphries, M.D., examined Bowers at the request of Disability Determination Services. (R. at 301-04.) Dr. Humphries noted that Bowers was alert, pleasant, in no distress, answered questions appropriately, was cooperative and related well. (R. at 302.) Dr. Humphries reported that Bowers's neck range of motion was slightly reduced. (R. at 302.) He had a moderately reduced range of motion of his back. (R. at 302.) Bowers had no scoliosis, muscle spasm or tenderness. (R. at 302.) Straight leg raising tests were negative to about 80 degrees sitting bilaterally, secondary to knee and joint stiffness. (R. at 302.) Dr. Humphries reported that Bowers had full range of motion in both shoulders, elbows and wrists and a slightly reduced range of motion in some of his fingers of both hands with some mild to moderate synovial thickening. (R. at 302.) He had full range of motion in both hips, knees and ankles with some minimal synovial thickening. (R. at 302.) Bowers had normal strength in all four extremities. (R. at 303.) His grip strength was normal, and fine manipulation was performed adequately bilaterally. (R. at 303.) Dr. Humphries reported that Bowers's memory was intact and that his thought and idea content were within normal limits. (R. at 303.) Dr. Humphries diagnosed mild hypertension, chronic lumbar strain, possible early degenerative joint disease of the right knee, mild to moderate degenerative joint disease of both hands and mild degenerative joint disease of the feet. (R. at 303.) Dr. Humphries found that Bowers was limited to sitting, standing and walking six hours in an eight-hour workday and that he could occasionally lift and carry items weighing up to 50 pounds and

⁶Bowers failed to appear for a cardiovascular-respiratory consultative examination on December 18, 2006. (R. at 300.)

frequently lift and carry items weighing up to 25 pounds. (R. at 304.) He placed no restrictions on Bowers's ability to climb, to stoop, to kneel, to crouch or to crawl or to work around heights, hazards or fumes. (R. at 304.)

On January 25, 2007, Dr. Michael Hartman, M.D., a state agency physician, indicated that Bowers had the residual functional capacity to perform medium⁷ work. (R. at 305-11.) No postural, manipulative, visual, communicative or environmental limitations were noted. (R. at 307-08.)

On February 17, 2007, Bowers presented to the University of Virginia for an MRI of his lumbar spine. (R. at 315-16.) The MRI showed mild degenerative changes throughout his lumbar spine, primarily at the L4-5 level, as well as some mild neural foraminal narrowing, right greater than left at the L5-S1 level. (R. at 312, 316.) On February 21, 2007, Lisa Foster, P.A.C., a physician assistant, reported that Bowers's spine had no tenderness or muscle spasm. (R. at 312.) Foster recommended physical therapy. (R. at 312-13.)

On March 20, 2007, Dr. Robert McGuffin, M.D., a state agency physician, indicated that Bowers had the residual functional capacity to perform medium work. (R. at 317-23.) No postural, manipulative, visual, communicative or environmental limitations were noted. (R. at 319-20.)

Bowers saw Elizabeth Hubbard, F.N.P., a family nurse practitioner, at the Tri-

⁷Medium work involves lifting items weighing up to 50 pounds at a time with frequent lifting or carrying of items 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. § 416.967(c) (2009).

Area Health Clinic on three occasions between November 2006 and April 2007. (R. at 324-33.) Hubbard assessed Bowers with chronic lumbar pain/strain. (R. at 324-33.) Bowers had bilateral negative straight leg raising tests, and no pain was elicited on palpation of his lumbar area. (R. at 327.) Labwork was negative for rheumatoid arthritis. (R. at 330.) In April 2007, Hubbard noted that Bowers was helped by Elavil, she instructed him to use Motrin and referred him for physical therapy. (R. at 324.)

III. Analysis

The Commissioner uses a five-step process in evaluating SSI claims. *See* 20 C.F.R. § 416.920 (2009); *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. 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) (2009).

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.

2009); *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 May 14, 2008, the ALJ denied Bowers's claim. (R. at 8-16.) The ALJ found that the medical evidence established that Bowers had severe impairments, namely lumbar degenerative disc disease, degenerative joint disease of his hands and mild hypertension, but she found that Bowers'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 10-11.) The ALJ also found that Bowers had the residual functional capacity to perform a limited range of light work. (R. at 13.) The ALJ found that, due to poor reading and writing skills, Bowers was limited to performing tasks that required recognition of only simple symbols and words; that, due to back pain, he could not climb or work at heights, he could occasionally crouch, crawl, kneel, stoop, balance and bend and would require the option to change posture in place for brief stretch breaks; that, due to degenerative joint disease of his hands, Bowers could not work continuously at tasks requiring fine manipulation for more than 75 percent of an eight-hour workday; and that, due to nervousness, he could not work with large groups of people or the public. (R. at 13.) The ALJ found that Bowers could not perform any of his past relevant work. (R. at 15.) Based on Bowers's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ found that other jobs existed that Bowers could perform, including light jobs as an unarmed security guard, a counter clerk and a marker and sedentary jobs as a surveillance monitor and a quote clerk. (R. at 15-16.) Thus, the ALJ found that Bowers was not under a disability as defined under the Act, and was not eligible for benefits. (R. at 16.) *See* 20 C.F.R. § 416.920(g).

Bowers argues that the ALJ erred by failing to adequately evaluate his case. (Brief In Support Of Plaintiff's Motion For Summary Judgment, ("Plaintiff's Brief"), at 2-6.) Bowers argues that the ALJ erred by relying on the opinions of the state agency physicians. (Plaintiff's Brief at 2-3.) Bowers also argues that the ALJ erred by relying on the erroneous opinions of the vocational expert. (Plaintiff's Brief at 3-5.) Finally, Bowers argues that the ALJ erred by finding that he was not credible. (Plaintiff's Brief at 5-6.)

The ALJ in this case found that Bowers had the residual functional capacity to perform a limited range of light work. (R. at 13.) Based on my review of the record, I find that substantial evidence exists to support this finding. In March 2002, Bowers voiced his first complaint of low back pain, which was diagnosed as lumbar spine strain. (R. at 274.) In February 2003, Bowers complained of right hip pain. (R. at 271.) X-rays of his hip and pelvis were normal. (R. at 284.) In July 2003, Bowers had negative straight leg raising tests, and his reflexes were intact. (R. at 270.) A CT scan showed some bulging discs. (R. at 268.) Bowers reported that he received relief of his symptoms with medication. (R. at 268.) In September 2006, Bowers had a normal gait and heel and toe walking, and his lumbar spine images were negative for fracture or gross pathology. (R. at 296-97.) In January 2007, Dr. Humphries diagnosed mild hypertension, chronic lumbar strain, possible early degenerative joint disease of the right knee, mild to moderate degenerative joint disease of both hands and mild degenerative joint disease of the feet. (R. at 303.) Dr. Humphries opined that Bowers had the residual functional capacity to perform medium work. (R. at 304.) Dr. Humphries is the only examining source who offered an opinion concerning the effects of Bowers's alleged impairments on his ability to work. In addition, both state agency physicians indicated that Bowers had the residual functional capacity to

perform medium work. (R. at 305-11, 317-23.) In February 2007, an MRI of Bowers's lumbar spine showed mild degenerative changes. (R. at 312, 316.) Upon examination, Bowers had no tenderness or muscle spasm. (R. at 312.) In April 2007, Bowers reported that his medication helped his back pain, and conservative treatment was recommended. (R. at 324.) "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 also found that Bowers did not suffer from a severe mental impairment. Based on my review of the record, I find that substantial evidence exists to support this finding. Bowers complained of "nerves," anxiety and insomnia in January 2002. (R. at 275.) In March 2002, Bowers reported that his medication helped his depressive symptoms, as well as his reflux symptoms. (R. at 274.) There is no indication in the record that Bowers received treatment for mental impairments. Furthermore, he stated that medication helped his nervous symptoms. *See Gross*, 785 F.2d 1166.

The ALJ noted that she had considered Bowers's allegations and gave him a more restrictive residual functional capacity than supported by the objective evidence and Bowers's treatment history. (R. at 14-15.) The ALJ eliminated jobs that required climbing, working at heights, more than occasional crouching, crawling, kneeling, stooping and bending and limited him to jobs that permitted him the option to change posture in place for brief stretch breaks. (R. at 13.) The ALJ also eliminated jobs that required fine manipulation for more than 75 percent of an eight-hour workday. (R. at 13.) To accommodate Bowers's alleged mental limitations, the ALJ also excluded any jobs that required extensive contact with large groups of people or the public. (R.

at 13.) The hypothetical question to the vocational expert included these limitations, which are supported by the record. Testimony of a vocational expert constitutes substantial evidence for purposes of judicial review where his or her opinion is based upon a consideration of all the evidence of record and is in response to a proper hypothetical question which fairly sets out all of a claimant's impairments. *See Walker v. Bowen*, 889 F.2d 47, 50 (4th Cir. 1989). Thus, the ALJ was entitled to rely upon the vocational expert's testimony concerning the number of jobs that existed that Bowers could perform.

PROPOSED FINDINGS OF FACT

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

1. Substantial evidence exists to support the ALJ's weighing of the evidence and findings with regard to Bowers's residual functional capacity;
2. Substantial evidence exists to support the ALJ's finding that a significant number of jobs exist in the national economy that Bowers could perform; and
3. Substantial evidence exists to support the ALJ's finding that Bowers 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 2009):

Within fourteen 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 14 days could waive appellate review. At the conclusion of the 14-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 17th day of February 2010.

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