

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

KRISTY L. RIFE,)	
Plaintiff)	
)	
v.)	Civil Action No. 1:10cv00018
)	<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, Kristy L. Rife, filed this action challenging the final decision of the Commissioner of Social Security, (“Commissioner”), determining that she was not eligible for disability insurance benefits, (“DIB”), and supplemental security income, (“SSI”), under the Social Security Act, as amended, (“Act”), 42 U.S.C.A. §§ 423, 1381 *et seq.* (West 2003 & Supp. 2010). 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 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 Rife protectively filed her applications for DIB and SSI on August 8, 2007, alleging disability as of April 30, 2002, due to migraine headaches, neck and back problems, depression and fibromyalgia.¹ (Record, (“R.”), at 151-55, 156-58, 173, 178.) The claims were denied initially and on reconsideration. (R. at 95-97, 100-02, 107-08, 109-11, 113-17, 119-20.) Rife then requested a hearing before an administrative law judge, (“ALJ”). (R. at 121.) The hearing was held on November 20, 2008, at which Rife was represented by counsel. (R. at 24-44.)

By decision dated December 23, 2008, the ALJ denied Rife’s claims. (R. at 13-23.) The ALJ found that Rife met the nondisability insured status requirements of the Act for DIB purposes through March 31, 2007.² (R. at 15.) The ALJ also found that Rife had not engaged in substantial gainful activity since April 30, 2002, the alleged onset date. (R. at 16.) The ALJ determined that the medical evidence established that Rife suffered from severe impairments, including migraine

¹ Rife filed previous applications for DIB and SSI on June 22, 2004, in which Rife alleged the same onset date currently alleged -- April 30, 2002. (R. at 13.) By decision dated May 25, 2005, the ALJ denied these claims. (R. at 13.) This court thereafter affirmed this decision on July 31, 2007. (R. at 45-68.)

² In order for Rife to be entitled to DIB benefits, she must demonstrate disability on or prior to March 31, 2007.

headaches, obesity, depression, anxiety, degenerative disc disease and fibromyalgia, but she found that Rife 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 16-17.) The ALJ found that Rife had the residual functional capacity to perform simple, routine, repetitive, unskilled light³ work that required no more than occasional climbing of ramps and stairs, balancing, stooping, kneeling, crouching and crawling, that did not require work around hazards/hazardous machinery, climbing ladders, ropes or scaffolds, work on vibrating surfaces, at unprotected heights or around loud background noise and that did not require more than occasional interaction with the general public. (R. at 17.) The ALJ found that Rife was unable to perform her past relevant work. (R. at 22.) Based on Rife's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ found that Rife could perform other jobs existing in significant numbers in the national economy, including jobs as a food preparation worker, a packer and an assembler. (R. at 22.) Therefore, the ALJ found that Rife was not under a disability as defined under the Act and was not eligible for benefits. (R. at 23.) *See* 20 C.F.R. §§ 404.1520(g), 416.920(g) (2010).

After the ALJ issued her decision, Rife pursued her administrative appeals, (R. at 8-9), but the Appeals Council denied her request for review. (R. at 1-5.) Rife 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, 416.1481 (2010). The case is before this court on Rife's motion for summary judgment filed

³ Light work involves lifting and carrying items weighing up to 20 pounds at a time with frequent lifting and carrying of items weighing up to 10 pounds. If an individual can do light work, she also can do sedentary work. *See* 20 C.F.R. §§ 404.1567(b), 416.967(b) (2010).

October 22, 2010, and the Commissioner's motion for summary judgment filed December 21, 2010.

II. Facts⁴ and Analysis

Rife was born in 1975, (R. at 28, 151, 156), which classifies her as a “younger person” under 20 C.F.R. §§ 404.1563(c), 416.963(c). Rife graduated from high school. (R. at 182.) Rife has past work experience as a cashier, which a vocational expert classified as light and unskilled work. (R. at 38, 179.)

In rendering her decision, the ALJ reviewed records from The Counseling Center; Life Recovery; Dr. J.P. Sutherland Jr., D.O.; Dr. Richard Surrusco, M.D., a state agency physician; Louis Perrott, Ph.D., a state agency psychologist; Dr. Syed Ahmad, M.D., a rheumatologist; Dr. Robert McGuffin, M.D., a state agency physician; Joseph Leizer, Ph.D., a state agency psychologist; Ronald Brill, Ph.D., a licensed clinical psychologist; Ridgeview Pavilion; John Ludgate, Ph.D.; and Dr. Maria Abeleda, M.D., a psychiatrist. Rife's attorney submitted additional medical records from Recovering Life, P.C. to the Appeals Council.⁵

⁴ Because Rife filed prior applications for DIB and SSI on June 22, 2004, which were denied by decision dated May 25, 2005, and whose denial was affirmed by this court on July 31, 2007, this prior decision is *res judicata*. That being the case, the question before the court is whether Rife was disabled at any time between May 26, 2005, the date following the ALJ's prior denial, and December 23, 2008, the date of the current ALJ's denial. The court notes, however, that Rife must show disability for DIB purposes between May 26, 2005, and March 31, 2007, the date last insured. Any facts included in this Report and Recommendation not directly related to this time period are included for clarity of the record.

⁵ Since the Appeals Council considered these records in deciding not to grant review, (R. at 1-5), this court also must consider this evidence in determining whether substantial evidence

The Commissioner uses a five-step process in evaluating SSI claims. *See* 20 C.F.R. §§ 404.1520, 416.920 (2010); *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 her past relevant work; and 5) if not, whether she can perform other work. *See* 20 C.F.R. §§ 404.1520, 416.920. 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), 416.920(a) (2010).

Under this analysis, a claimant has the initial burden of showing that she is unable to return to her past relevant work because of her impairments. Once the claimant establishes a prima facie case of disability, the burden shifts to the Commissioner. To satisfy this burden, the Commissioner must then establish that the claimant has the residual functional capacity, considering the claimant's age, education, work experience and impairments, to perform alternative jobs that exist in the national economy. *See* 42 U.S.C.A. §§ 423(d)(2)(A), 1382c(a)(3)(A)-(B) (West 2003 & Supp. 2010); *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).

Rife argues that the ALJ erred in her weighing of the medical evidence regarding both her physical impairments, as well as her mental impairments.

supports the ALJ's findings. *See Wilkins v. Sec'y of Health & Human Servs.*, 953 F.2d 93, 96 (4th Cir. 1991).

(Brief In Support Of Plaintiff's Motion For Summary Judgment, ("Plaintiff's Brief"), at 14-20.) Rife further argues that the ALJ erred by finding that she does not suffer from a disabling mental impairment. (Plaintiff's Brief at 20-26.) Finally, Rife argues that the ALJ erred by failing to identify jobs existing in significant numbers in the national economy consistent with her mental and physical limitations she found Rife to have. (Plaintiff's Brief at 26-28.)

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. This 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), 416.927(d), if she sufficiently explains her rationale and if the record supports her findings.

Rife argues that the ALJ erred by rejecting the opinion of her treating physician, Dr. Sutherland, and in her resulting physical residual functional capacity finding. For the following reasons, I disagree. The ALJ found that Rife had the physical residual functional capacity to perform light work that required no more than occasional climbing of ramps and stairs, balancing, stooping, kneeling, crouching and crawling, that did not require work around hazards/hazardous machinery, climbing ladders, ropes or scaffolds, work on vibrating surfaces, at unprotected heights or around loud background noise. (R. at 17.) In an Assessment Of Ability To Do Work-Related Activities (Physical), dated April 23, 2008, Dr. Sutherland found that Rife could occasionally lift and carry items weighing up to 20 pounds and frequently lift and carry items weighing up to five pounds. (R. at 373-75.) He further found that Rife could stand/walk for a total of up to one hour in an eight-hour workday, but for up to only 10 minutes without interruption. (R. at 373.) Dr. Sutherland found that Rife could sit for a total of two hours in an eight-hour workday, but for up to only 20 minutes without interruption. (R. at 374.) Dr. Sutherland opined that Rife could occasionally balance, but never climb, stoop, kneel, crouch or crawl. (R. at 374.) He found that Rife was limited in her abilities to reach, to handle objects and to push/pull. (R. at 374.) Dr. Sutherland further found that Rife was restricted from working around heights, moving machinery, temperature extremes, chemicals, fumes, humidity and vibration. (R. at 375.) Dr. Sutherland concluded that Rife would miss more than two workdays per month and that she would be “unable to do any type of gainful employment based on physical findings.” (R. at 375.)

I first note that the ALJ stated that she was rejecting this physical assessment because it was a “checklist of physical residual functional capacity” not

accompanied by medical examinations or report of clinical findings supporting the opinion. I note at the outset that this is not true, as Dr. Sutherland took great care to specify explicit findings that he believed supported his assessment.

In particular, Dr. Sutherland stated his restrictions on Rife's work-related activity were due to x-rays showing cervical and lumbar deteriorating disc disease. (R. at 373.) Dr. Sutherland also noted severe decreased ranges of motion in cervical and lumbar spine. (R. at 373-74.)

I further find that Dr. Sutherland's treatment notes support his opinion. Rife received treatment from Dr. Sutherland from January 2005 through October 2008. (R. at 295-316, 341-47, 383-86, 423-24.) Dr. Sutherland noted on multiple occasions that Rife had decreased range of motion of the lumbar spine and in both knees, as well as positive straight leg raise testing at 35 degrees bilaterally, multiple joint pains of the neck, elbows, shoulders, knees and back, decreased range of motion of the cervical spine, neuralgia radiating from both sciatic notches into the lateral margin of the foot, severe paravertebral muscle spasms of the lumbar spine, crepitus of the tibial plateau, right knee crepitus, tender cervical paraspinal muscles and multiple trigger points associated with fibromyalgia. (R. at 297, 299, 301, 303, 305, 307-16, 342, 344, 346, 384, 386, 424.) Over this period, Dr. Sutherland diagnosed migraine headaches, dysfunctional low back syndrome, chronic fatigue syndrome, bilateral sciatica, synovitis/bursitis of both knees, degenerative lumbar disc disease, fibromyalgia, chronic pain syndrome, degenerative arthritis of the cervical spine, cervical disc syndrome with cervical tendonitis, cervical and lumbar myositis and scoliosis. (R. at 295-316, 341-47, 383-86, 423-24.) Nonetheless, for the following reasons, I find that the other

substantial evidence of record does not support the April 23, 2008, assessment of Dr. Sutherland.

Dr. Sutherland's findings and opinions are contradicted by those of Dr. Syed M. Ahmad, M.D., a rheumatologist, who performed an examination of Rife on November 13, 2007. Dr. Ahmad found tender points secondary to fibromyalgia, as well as painful sites of entheses. (R. at 339-40.) However, Rife was neurologically grossly intact, peripheral joint examination showed no active synovitis, and range of motion was adequate, but tender. (R. at 340.) Rife's muscles were sore, but without weakness, and cervical and lumbar spine range of motion were normal, but tender. (R. at 340.) Dr. Ahmad diagnosed chronic fibromyalgia and fibrositis syndrome; rule out other inflammatory arthropathies, connective tissue disorders and endocrinopathies; recurrent paresthesias of the legs and feet, probably part of chronic pain syndrome; chronic fatigue with associated sleep disturbance; migraine headaches; and overweight status. (R. at 340.) He recommended only conservative treatment, including heat, rubs, analgesic creams, exercises and weight loss. (R. at 340.) He also advised proper posture and self-rehabilitation, he referred Rife for physical therapy, and he prescribed medications. (R. at 340.) When Rife saw Dr. Ahmad the following month, she reported no new neurological symptoms of significance, and he noted no new clinical features suggestive of an evolving connective tissue disorder. (R. at 338.) ANA and RA factor testing also was negative. (R. at 338.) Rife remained neurologically grossly intact, with tender points and painful entheses sites. (R. at 338.) Range of motion of various joints, as well as of the cervical and lumbar spine, was adequate, though painful. (R. at 338.) Straight leg raise testing was negative and, despite muscle soreness, Rife exhibited no weakness. (R. at 338.) There also was no evidence of active synovitis. (R. at

338.) Dr. Ahmad noted that an inflammatory arthropathy or connective tissue disorder was doubtful. (R. at 338.) The same conservative measures were recommended, and Rife was advised to continue physical therapy. (R. at 338.)

Dr. Sutherland's assessment is further contradicted by an x-ray of Rife's thoracic spine taken on January 10, 2008, which showed only slight scoliosis to the left at 10 degrees with no evidence of spondylolisthesis or acute bony abnormality. (R. at 347.) There was some narrowing of the disc space between T-10 and T-11 to the right paravertebral body, but there was no evidence of rheumatoid arthritis or osteophytes. (R. at 347.) Further contradicting Dr. Sutherland's assessment are the Physical Residual Functional Capacity Assessments completed by state agency physicians, Dr. Richard Surrusco, M.D., on October 11, 2007, and Dr. Robert McGuffin, M.D., on March 24, 2008. (R. at 317-23, 349-55.) Both state agency physicians concluded that Rife could perform light work with occasional climbing, balancing, stooping, kneeling, crouching and crawling. (R. at 318-19, 350-51.) Neither imposed any manipulative, visual, communicative or environmental limitations. (R. at 319-20, 351-52.)

In rendering her decision, the ALJ gave little weight to Dr. Sutherland's assessment, instead giving significant weight to the state agency physicians' opinions because they were consistent with the objective medical evidence. Based on the above-stated reasons, I find that substantial evidence supports the ALJ's weighing of the physical evidence and resulting physical residual functional capacity finding.

Rife next argues that the ALJ erred by failing to find that she suffered from a disabling mental impairment. The ALJ found that Rife suffered from severe depression and anxiety, but she concluded that Rife could perform simple, routine, repetitive, unskilled work that required no more than occasional interaction with the general public. Rife argues that the ALJ erred in weighing the medical evidence by giving little weight to the opinion of John Ludgate, Ph.D., Rife's psychological counselor, as well as the opinion of Dr. Maria Abeleda, M.D., Rife's treating psychiatrist. Again, the ALJ stated that she was doing so because the functional limitations contained in the "checklist forms" prepared by Ludgate and Dr. Abeleda were not supported by the objective treatment records. The ALJ also gave little weight to the findings of Ronald Brill, Ph.D., a licensed clinical psychologist, who performed a consultative psychological evaluation of Rife.

On April 29, 2008, Ludgate completed an Assessment Of Ability To Do Work-Related Activities (Mental), finding that Rife had a seriously limited ability to follow work rules, to use judgment, to interact with supervisors, to function independently, to understand, remember and carry out simple and detailed job instructions, to maintain personal appearance, to relate predictably in social situations and to demonstrate reliability. (R. at 395-97.) Ludgate found that Rife had no useful ability to relate to co-workers, to deal with the public, to deal with work stresses, to maintain attention and concentration, to understand, remember and carry out complex job instructions and to behave in an emotionally stable manner. (R. at 395-96.)

On November 10, 2008, Dr. Abeleda completed the same type of assessment, finding that Rife had a seriously limited ability to follow work rules, to

relate to co-workers, to use judgment, to interact with supervisors, to maintain personal appearance and to behave in an emotionally stable manner. (R. at 420-22.) Dr. Abeleda further found that Rife had no useful ability to deal with the public, to deal with work stresses, to function independently, to maintain attention and concentration, to understand, remember and carry out simple, detailed and complex job instructions, to relate predictably in social situations and to demonstrate reliability. (R. at 420-21.)

Psychologist Brill conducted a psychological evaluation of Rife on May 1, 2008. (R. at 376-79.) Although Brill noted that Rife appeared to have a “rather limited” intellectual functioning, as well as impaired or below average attention, concentration and memory, quite impoverished judgment, insight and fund of knowledge, a depressed mood and a flat affect, he noted that Rife appeared to be taking a significant amount of psychotropic medication, having sedating effects on her, and that he could not distinguish between her being overly sedated from the possibility that she was simply very depressed and/or that she had rather low intelligence. (R. at 378-79.) He, nonetheless, diagnosed a pain disorder associated with both psychological factors and general medical condition; major depressive disorder, single episode, severe, without psychotic features, chronic; and he assessed her then-current Global Assessment of Functioning, (“GAF”),⁶ score at

⁶ 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).

40,⁷ with the highest in the previous year being 40. (R. at 378.) Brill also completed an Assessment Of Ability To Do Work-Related Activities (Mental), finding that Rife had a seriously limited ability to follow work rules, to interact with supervisors, to understand, remember and carry out simple job instructions, to maintain personal appearance, to behave in an emotionally stable manner, to relate predictably in social situations and to demonstrate reliability. (R. at 380-82.) In all other areas of making occupational, performance and personal-social adjustments, Rife was deemed to have no useful ability. (R. at 380-81.) Brill stated that Rife's then-present cognitive and emotional functioning seemed very poor, that her concentration and memory were poor and that her mood was depressed with a flat affect. (R. at 380-81.)

I first find that substantial evidence supports the ALJ's rejection of Brill's opinion because Brill explicitly stated that he could not determine whether Rife's cognitive and emotional limitations were due to her being overly sedated or whether she was very depressed and/or that she had rather low intelligence. Brill essentially questioned his own findings. That being the case, I find that substantial evidence supports the ALJ's rejection thereof. However, I cannot find that substantial evidence supports the ALJ's granting little weight to the opinions of Ludgate and Dr. Abeleda, treating mental health sources. Specifically, I find that their opinions are supported by the bulk of the treatment notes contained in the record, including counseling records, psychiatric treatment records and records from Ridgeview Pavilion.

⁷ A GAF score of 31 to 40 indicates "[s]ome impairment in reality testing or communication . . . OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood. . . ." DSM-IV at 32.

Dr. Sutherland diagnosed Rife with stress anxiety disorder as early as January 2005, at which time he gave her samples of Zoloft and Wellbutrin and advised her to contact Cumberland Mental Health Services. (R. at 316.) Thereafter, Rife began receiving psychiatric treatment from Dr. Hal Gillespie, M.D., and Dr. Marilou Inocalla, M.D., both psychiatrists. In August 2005, Rife was diagnosed with severe, recurrent major depressive disorder, and she was prescribed Wellbutrin and Effexor, and she was referred for counseling. (R. at 294.) Rife received counseling from The Counseling Center and Recovering Life from May 2006 through January 2009. Over this time, Rife reported stress and anxiety over various family issues, including her divorce, custody issues, caring for her children as a single parent and finances. Rife's mood and affect fluctuated some, but remained mostly depressed and anxious. She also consistently reported sleep difficulty, impaired memory and concentration and passive suicidal thoughts. On May 9, 2006, Jodi Helbert, a licensed clinical social worker, diagnosed Rife with dysthymic disorder, late onset, and her then-current GAF score was assessed at 59.⁸ (R. at 273.) Later that month, Rife's judgment was deemed severely impaired. (R. at 269.) On July 20, 2006, Rife reported a marked increase in depressive symptoms after learning that her ex-husband wished to pursue visitation with their children. (R. at 262.) On July 25, 2006, Dr. Gillespie diagnosed recurrent, moderate major depressive disorder and added Klonopin to Rife's medication regimen. (R. at 291.) In October and November 2006, Rife's judgment again was deemed severely impaired. (R. at 250-52.) On November 14, 2006, Rife reported that Klonopin had helped "a little," but she reported increased anxiety and

⁸ A GAF score of 51 to 60 indicates "[m]oderate symptoms . . . OR moderate difficulty in social, occupational, or school functioning. . . ." DSM-IV at 32.

fleeting suicidal thoughts. (R. at 290.) Her concentration was poor, and attention span was limited. (R. at 290.)

Rife saw Ludgate from January 2007 through September 2008. Over this time, Rife continued having difficulty with depression and anxiety despite regular counseling and medication adjustments. In January 2007, her GAF score was assessed at 60, and Ludgate diagnosed recurrent, moderate depressive disorder. (R. at 289.) Rife's concentration remained impaired. (R. at 286.) Despite reporting that medications had helped "some," Rife had a low mood with flat affect, scattered concentration and fair focus and attention span on March 13, 2007. (R. at 284.) By the end of that month, Rife reported increased anxiety. (R. at 283.) Concentration remained impaired, and Rife's fund of knowledge was poor. (R. at 283.) On April 24, 2007, Rife again reported "slight improvement" with medication, despite reporting increased anxiety. (R. at 282.) Concentration again was impaired. (R. at 282.) In June 2007, Rife reported increased irritability and "bad" anxiety. (R. at 281.) Concentration was impaired. (R. at 281.) On August 1, and again on August 29, 2007, Rife stated that medications helped "a little." (R. at 413-14.) Ludgate assessed Rife's then-current GAF score at 60, and he deemed her prognosis good. (R. at 415.) By September 26, 2007, Rife was feeling "pretty depressed." (R. at 412.) Her concentration remained impaired through October 2007. (R. at 411-12.) When Rife saw Dr. Abeleda on November 16, 2007, her mood was sad and depressed with a constricted affect, but mental status examination was unremarkable. (R. at 410.) Dr. Abeleda diagnosed recurrent, moderate major depressive disorder and assessed Rife's then-current GAF score at 60. (R. at 410.) By the end of November, Rife was doing a little better, reporting somewhat less severe anxiety and nervousness. (R. at 407.) However, Rife's mood

remained depressed with an anxious affect, and her concentration was impaired. (R. at 407.)

On January 28, 2008, Rife noted experiencing angry outbursts “quite a bit,” memory difficulty, being scattered and easily distracted, having short concentration and not being able to stay on task. (R. at 406.) She reported thoughts of being better off dead. (R. at 406.) Dr. Abeleda increased Rife’s Cymbalta dosage and prescribed trazodone and Topamax. (R. at 406.) On March 11, 2008, Ludgate opined that Rife had a depressed mood with an anxious affect and impaired concentration. (R. at 405.) Later that month, Rife reported being withdrawn with no social interaction. (R. at 404.) She had scattered concentration with fair insight and judgment. (R. at 404.) Lamictal was prescribed, and her Topomax dosage was increased. (R. at 404.) On April 16, 2008, she reported continued depression and anxiety. (R. at 403.) Her mood was depressed with an anxious affect, and her concentration was impaired. (R. at 403.) On May 28, 2008, Rife reported doing no better and that Lamictal had not helped. (R. at 402.) She continued to have a depressed mood with an anxious affect and impaired concentration. (R. at 402.)

When Rife saw Dr. Abeleda in June 2008, she was “very flat” and “expresse[d] no emotion.” (R. at 401.) Her hygiene was good, “but not the usual.” (R. at 401.) Her mood was depressed, anxious and labile with a flat affect. (R. at 401.) She noted angry outbursts and crying spells. (R. at 401.) Dr. Abeleda noted memory and concentration impairment, as well as easy distraction. (R. at 401.) She increased Rife’s dosage of Lamictal, recommending psychiatric admission if this did not help improve her mood. (R. at 401.) On July 1, 2008, Rife looked “extremely depressed” with little facial expression, and her prognosis was deemed

poor. (R. at 400.) She was depressed and anxious with poor eye contact, poor concentration and poor fund of knowledge. (R. at 400.) Ludgate diagnosed recurrent, severe major depressive disorder. (R. at 400.) On July 14, 2008, Rife reported no improvement, and Dr. Abeleda noted that Rife had been “deteriorating steadily.” (R. at 399.) Rife noted no desire to live, but denied suicidal ideation. (R. at 399.) Dr Abeleda stated that Rife “sits and stares” and made no conversation, “except to answer.” (R. at 399.)

Rife was admitted to Ridgeview Pavilion on July 15, 2008, with psychomotor retardation, delayed speech, poor eye contact and a flat and depressed mood. (R. at 390.) She did not smile, her responses were guarded, and short-term memory was impaired. (R. at 390, 393.) Dr. Adrian C. Buckner, M.D., diagnosed Rife with depression, not otherwise specified, and placed her then-current GAF score at 30.⁹ (R. at 393.) Her prognosis was deemed fair with treatment. (R. at 393.) She was placed on suicidal precautions. (R. at 388.) Over the course of her treatment, her medications were adjusted, and Lyrica and Ativan were begun. (R. at 388.) On July 17, 2008, Rife reported feeling better, but “a little drugged.” (R. at 388.) She was discharged home on July 18, 2008, with no suicidal ideations, a brighter affect and improved insight and judgment. (R. at 388.) Her diagnosis at discharge was bipolar disorder, and her then-current GAF score was 55. (R. at 387.)

On August 11, 2008, Rife reported having discontinued Lyrica because it made her feel sick. (R. at 419.) Her mood remained depressed with a constricted

⁹ A GAF score of 21 to 30 indicates that the individual’s “[b]ehavior is considerably influenced by delusions or hallucinations OR serious impairment in communication or judgment . . . OR inability to function in almost all areas. . . .” DSM-IV at 32.

affect. (R. at 419.) She had continued difficulty concentrating, and psychomotor activity was mildly retarded. (R. at 419.) Rife was diagnosed with recurrent, severe major depressive disorder. (R. at 419.) On August 13, 2008, Rife's mood remained depressed with an anxious affect, impaired concentration and slowed psychomotor activity. (R. at 418.) On September 8, 2008, she noted being "very depressed" with a fluctuating mood. (R. at 417.) She had a depressed, anxious and labile mood with a constricted, blunt and restricted affect. (R. at 417.) Dr. Abeleda further noted scattered concentration, easy distraction and fair insight and judgment. (R. at 417.) Dr. Abeleda adjusted Rife's medications and initiated Ambien and Vyvanse. (R. at 417.) On September 16, 2008, Rife noted a lot of stress, "pretty bad" depression most of the time and being "very anxious." (R. at 416.) Concentration remained impaired. (R. at 416.)

From October 17, 2008, through January 29, 2009, Rife continued to exhibit a depressed mood and flat affect. (R. at 425-27, 430.) Medications again were adjusted, but Rife continued to report that they helped "a little" at best. (R. at 426-28.) Her short-term prognosis was deemed poor. (R. at 426.)

The ALJ accepted the findings of Louis Perrott, Ph.D., and Joseph I. Leizer, Ph.D., state agency psychologists, in finding that Rife retained the ability to perform simple, unskilled work. Perrott completed a Psychiatric Review Technique form, ("PRTF"), on October 12, 2007, finding that Rife suffered from a nonsevere affective disorder. (R. at 324-37.) It was noted that this was both a then-current assessment of Rife's impairments, as well as an assessment as of the date last insured. (R. at 324.) He opined that Rife had no restrictions in activities of daily living, had mild difficulties in maintaining social functioning and in maintaining

concentration, persistence or pace and had experienced no repeated episodes of decompensation of extended duration. (R. at 334.) Perrott found Rife's mental allegations to be "mostly credible." (R. at 337.) He further opined that her mental condition was not considered "to be of severe and disabling proportion" and that "[s]ome significant component of whatever limitations there may be on [Rife's] overall levels of adaptive functioning seem to result more directly from her pain and physical condition, rather than solely from her mental condition. . . ." (R. at 337.)

On March 27, 2008, Leizer completed a Mental Residual Functional Capacity Assessment for both Rife's then-current condition, as well as her condition at the time of her date last insured, finding that Rife was moderately limited in her abilities to understand, remember and carry out detailed instructions, to maintain attention and concentration for extended periods, to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances, to work in coordination with or proximity to others without being distracted by them, to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods, to interact appropriately with the general public, to accept instructions and respond appropriately to criticism from supervisors, to get along with co-workers or peers without distracting them or exhibiting behavioral extremes, to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness and to set realistic goals or make plans independently of others. (R. at 356-58.) In all other areas of functioning, Rife was deemed not significantly limited. (R. at

356-57.) Leizer opined that Rife could perform simple, unskilled, nonstressful work and that her disability allegations were not fully credible. (R. at 358.)

The same day, Leizer also completed a PRTF, finding that Rife suffered from an affective disorder and an anxiety-related disorder, but that a residual functional capacity assessment was necessary. (R. at 359-72.) Leizer further opined that Rife was only mildly restricted in her activities of daily living, experienced moderate difficulties in maintaining social functioning and in maintaining concentration, persistence or pace, but had experienced no repeated episodes of decompensation of extended duration. (R. at 369.) Leizer noted that Rife's mental allegations appeared to be mostly credible, but that she did not suffer from a severe and disabling mental condition. (R. at 372.) Instead, he opined that her limitations mostly appeared to result more directly from her pain and physical condition. (R. at 372.)

Based on the above, I find that substantial evidence does not support the ALJ's weighing of the evidence regarding Rife's mental impairments. Even if it did, however, I also find that the ALJ erred by posing an incomplete hypothetical to the vocational expert in determining that other jobs existed in significant numbers in the national economy that Rife could perform. First, it is clear from the records from Rife's treating counselors and psychiatrists, as well as from Ridgeview Pavilion, that Rife suffers from more severe restrictions than those set forth in the state agency psychologists' assessments. I further note that neither of the state agency psychologists had the benefit of reviewing the treatment notes from the time when Rife's mental condition "steadily deteriorated" resulting in inpatient psychiatric hospitalization.

In any event, even if substantial evidence did support the ALJ's reliance on the state agency psychologists' opinions, I find that the ALJ erred by posing an incomplete hypothetical to the vocational expert. "In order for a vocational expert's opinion to be relevant or helpful, it must be based upon a consideration of all . . . evidence in the record, . . . and it must be in response to proper hypothetical questions which fairly set out all of claimant's impairments." *Walker v. Bowen*, 889 F.2d 47, 50 (4th Cir. 1989) (citations omitted). The Commissioner may not rely upon the answer to a hypothetical question if the hypothesis fails to fit the facts. *See Swaim v. Califano*, 599 F.2d 1309 (4th Cir. 1979). The ALJ apparently accepted the findings of the state agency psychologists. The record shows that state agency psychologist Leizer opined that Rife could perform simple, unskilled, nonstressful work. (R. at 358.) However, in her hypothetical question to the vocational expert, the ALJ simply asked whether an individual who could perform simple, routine, repetitive, unskilled light work which did not require more than occasional interaction with the general public could work. This hypothetical omitted the "nonstressful" finding by the state agency psychologist. Moreover, psychologist Leizer opined that Rife had several moderate limitations, set out above, for which the ALJ did not account in her hypothetical to the vocational expert.

It is for all of these reasons that I find that the ALJ erred in her weighing of the evidence related to Rife's mental impairments and, even assuming that the ALJ properly weighed this evidence in accepting the state agency psychologists' opinions, her hypothetical to the vocational expert was incomplete and, therefore, the vocational expert's response thereto cannot constitute substantial evidence for the ALJ's nondisability finding. I recommend that the court deny Rife's and the

Commissioner's motions for summary judgment, vacate the decision of the Commissioner denying benefits and remand the case to the Commissioner for further development consistent with this decision.

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 in the record to support the ALJ's physical residual functional capacity finding;
2. Substantial evidence does not exist in the record to support the ALJ's mental residual functional capacity finding;
3. Substantial evidence does not exist in the record to support the ALJ's finding that Rife could perform other jobs existing in significant numbers in the national economy; and
4. Substantial evidence does not exist in the record to support the ALJ's finding that Rife was not disabled under the Act and was not entitled to DIB or SSI benefits.

RECOMMENDED DISPOSITION

The undersigned recommends that the court deny Rife's and the Commissioner's motions for summary judgment, vacate the Commissioner's decision denying benefits and remand Rife's claims to the Commissioner for further consideration.

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 & Supp. 2010):

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, 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: February 23, 2011.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE