

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

ROBERT F. CLEVINGER,)
Plaintiff)

v.)

Civil Action No. 1:10cv00053

MICHAEL J. ASTRUE,)
Commissioner of Social Security,)
Defendant)

REPORT AND RECOMMENDATION

BY: PAMELA MEADE SARGENT
United States Magistrate Judge

I. Background and Standard of Review

Plaintiff, Robert F. Clevinger, filed this action challenging the final decision of the Commissioner of Social Security, (“Commissioner”), determining that he 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. 2011). 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 Clevinger protectively filed his applications for DIB and SSI on March 1, 2006, alleging disability as of August 18, 2005, due to back problems and diabetes. (Record, (“R.”), at 64-72, 73, 77.)¹ The claims were denied initially and on reconsideration. (R. at 24-26, 33-34, 35-36.) Clevinger then requested a hearing before an administrative law judge, (“ALJ”). (R. at 37.) The hearing was held on November 17, 2006, at which Clevinger was represented by counsel. (R. at 223-47.) An additional hearing was held on October 2, 2008. (R. at 315-51.)

By decision dated June 28, 2007, the ALJ denied Clevinger’s claims. (R. at 11-19.) After the ALJ issued his decision, Clevinger pursued his administrative appeals, (R. at 7), but the Appeals Council denied his request for review. (R. at 4-6.) Clevinger then filed an action seeking review of the ALJ’s unfavorable decision in this court. On request of the Commissioner, this court remanded Clevinger’s claims for further consideration on June 19, 2008. (R. at 298.)

By decision dated March 24, 2009, the ALJ again denied Clevinger’s claims.

¹ Clevinger’s DIB application is not included in the record.

(R. at 281-97.) The ALJ found that Clevinger met the nondisability insured status requirements of the Act for DIB purposes through December 31, 2010. (R. at 284.) The ALJ also found that Clevinger had not engaged in substantial gainful activity since August 18, 2005, the alleged onset date. (R. at 284.) The ALJ determined that the medical evidence established that Clevinger had severe impairments, namely obesity, diabetes mellitus and degenerative disc disease of the lumbosacral spine, but she found that Clevinger'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 284-91.) The ALJ also found that Clevinger had the residual functional capacity to perform sedentary work² that allowed him to avoid extreme temperatures and excess humidity, pollutants and irritants, unprotected heights, hazardous machinery, climbing ladders, ropes or scaffolds or working on vibrating surfaces. (R. at 291-94.) Therefore, the ALJ found that Clevinger was unable to perform any of his past relevant work. (R. at 295.) Based on Clevinger's age, education, work experience and residual functional capacity and the testimony of a vocational expert, the ALJ also found that there were other jobs, such as work as a cashier, an assembler and a hand packer, that Clevinger could perform. (R. at 295-96.) Thus, the ALJ found that Clevinger was not under a disability as defined under the Act and was not eligible for benefits. (R. at 296-97.) *See* 20 C.F.R. §§ 404.1520(g), 416.920(g) (2011).

² Sedentary 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. §§ 404.1567(a), 416.967(a) (2011).

After the ALJ issued her decision, Clevinger pursued his administrative appeals, but the Appeals Council denied his request for review. (R. at 248-50, 275-76.) Clevinger 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 (2011). The case is before this court on Clevinger's motion for summary judgment filed March 24, 2011, and the Commissioner's motion for summary judgment filed April 26, 2011.

II. Facts

Clevinger was born in 1971, (R. at 64, 73), which classifies him as a "younger person" under 20 C.F.R. §§ 404.1563(c), 416.963(c). Clevinger completed the ninth grade. (R. at 82.) He has past relevant work experience in the construction of metal buildings. (R. at 78.)

Donald Anderson, a vocational expert, also was present and testified at Clevinger's supplemental hearing. (R. at 341-49.) Anderson classified Clevinger's past relevant work as a metal building construction worker as medium³ and skilled and his work as a construction worker as very heavy⁴ and unskilled. (R. at 341-42.) Anderson was asked to consider a hypothetical individual of Clevinger's age,

³ Medium 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 light and sedentary work. *See* 20 C.F.R. §§ 404.1567(c), 416.967(c) (2011).

⁴ Very heavy work involves lifting objects weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing 50 pounds or more. If someone can do very heavy work, he also can do heavy, medium, light and sedentary work. *See* 20 C.F.R. §§ 404.1567(e), 416.967(e) (2011).

education and work history who had the residual functional capacity to perform sedentary work that did not require working around hazardous machinery and unprotected heights, climbing ladders, ropes and scaffolds, working on vibrating surfaces or exposure to extreme temperature changes. (R. at 344-45.) Anderson testified that such an individual could not perform any of Clevinger's past relevant work, but could perform jobs existing in significant numbers in the national economy, including jobs as a cashier, an assembler and a hand packager. (R. at 345.) Anderson testified that the same individual, but who could handle objects only occasionally, could not perform Clevinger's past relevant work, but could perform the job of a cashier. (R. at 346.) Anderson next was asked to consider a hypothetical individual with the limitations set forth in the assessment completed by Dr. Chang. (R. at 347.) He testified that such an individual could not perform any of Clevinger's past relevant work, nor could he perform any other work. (R. at 347-48.)

In rendering her decision, the ALJ reviewed records from Buchanan General Hospital; Dr. J. G. Patel, M.D.; Clinch Valley Physicians, Inc.; Janet Susan Looney, F.N.P. with Buchanan Health Center; Dr. Thomas Phillips, M.D., a state agency physician; Dr. Michael Hartman, M.D., a state agency physician; Thompson Family Health Center; Family Drug; Dr. Y. Park, M.D.; Dr. Rebekah C. Austin, M.D., with Blue Ridge Neuroscience Center, P.C.; Dr. William M. Platt, M.D., with Appalachian Rehabilitation; and Dr. Ravi K. Titha, M.D. Clevinger's counsel submitted additional medical records from Ronald W. Brill, Ph.D., a licensed clinical psychologist, and Crystal Burke, a licensed clinical social worker with

Thompson Family Health Center, to the Appeals Council.⁵

Clevinger was seen at Buchanan General Hospital on August 21, 2005, for complaints of pain in his lower back. (R. at 135.) Clevinger also complained of a chronic problem with hemorrhoids. (R. at 136.) Clevinger was admitted overnight for anal pain and constipation on September 1, 2005. (R. at 140-41.) Clevinger stated that he suffered from back pain, but no depression, anxiety, nervousness, stress or insomnia. (R. at 143.)

On February 22, 2006, Clevingers saw Ladonna Osborne, F.N.P., with Clinch Valley Physicians. Inc., for back and right leg pain. (R. at 154.) Osborne prescribed Motrin and returned Clevinger to his primary physician for pain management. (R. at 154.)

X-rays and MRIs of Clevinger's thoracic and lumbar spine were taken at Buchanan General Hospital on March 9, 2006. (R. at 166-69.) Mild disc protrusions were seen at all levels of Clevinger's thoracic spine, with no spinal or foraminal stenosis. (R. at 166.) A small central disc protusion was noted at the L4-5 level with mild mass effect on the thecal sac and no significant spinal or foraminal stenosis. (R. at 167.) Mild degenerative disc disease was noted at several levels of both the thoracic and lumbar spine. (R. at 168-69.)

⁵ Since the Appeals Council considered this evidence in deciding not to grant review, (R. at 1-4), this court also must consider this evidence in determining whether substantial evidence supports the ALJ's findings. *See Wilkins v. Sec'y of Health & Human Servs.*, 953 F.2d 93, 96 (4th Cir. 1991).

Clevinger was seen by Dr. Y. Park, M.D., on April 20, 2006, for an evaluation of excessive protein in his urine. (R. at 201-02.) Dr. Park noted that Clevinger suffered from diabetes mellitus, hypertension, high cholesterol, a rather severe back problem and gastroesophageal reflux disease. (R. at 201, 202.) Clevinger complained of intermittent numbness in his feet beginning 10 years earlier. (R. at 201.) Dr. Park noted that Clevinger appeared to sit uncomfortably and kept moving around. (R. at 202.) Dr. Park prescribed Lipitor and recommended a kidney ultrasound and 24-hour urine workup. (R. at 202.)

On May 2, 2006, Dr. Thomas Phillips, M.D., a state agency physician, completed a Physical Residual Functional Capacity Assessment of Clevinger. (R. at 170-76.) Dr. Phillips stated that Clevinger was capable of occasionally lifting and carrying items weighing up to 20 pounds and frequently lifting and carrying items weighing up to 10 pounds. (R. at 171.) He stated that Clevinger could stand and/or walk about six hours in an eight-hour workday and sit for about six hours in an eight-hour workday. (R. at 171.) Dr. Phillips stated that Clevinger could occasionally stoop and crouch. (R. at 172.) He also stated that Clevinger should avoid concentrated exposure to extreme cold and vibration. (R. at 173.)

Clevinger was seen by Dr. Rebekah C. Austin, M.D., with Blue Ridge Neuroscience Center, P.C., for an initial consultation on May 31, 2006. (R. at 207-09.) Clevinger complained of bilateral lower extremity numbness and pain and lower lumbar pain. (R. at 207.) Clevinger reported that he had an onset of severe low back pain upon lifting a heavy object at work in August 2005, followed by a gradual onset of bilateral leg pain. (R. at 207.) Clevinger stated that he suffered

from burning pain in his low back which radiated down his thighs into his calves with numbness in his feet. (R. at 207.) He stated that his leg symptoms were worse on the right than on the left and were worse upon lifting or bending at the waist. (R. at 207.)

Dr. Austin noted that Clevinger was alert and cooperative and did not appear in any acute distress. (R. at 208.) She noted that Clevinger walked flexed at the waist. (R. at 208) Examination of his spine revealed lower back tenderness with pain bilaterally upon straight leg raises. (R. at 208.) Dr. Austin stated that an MRI taken at Buchanan General Hospital on March 9, 2006, showed degenerative disc disease throughout the lumbar spine with a small central disc protrusion at the L4-5 level. (R. at 209.) Dr. Austin stated that surgical intervention was not appropriate at that time and recommended continued conservative treatment. (R. at 209.)

Dr. Austin prescribed a back brace and physical therapy. (R. at 209.) She also referred Clevinger for a pain clinic evaluation for an epidural steroid injection with Dr. William Platt, M.D. (R. at 209.) Dr. Austin stated the Clevinger could not return to work and recommended that he find a lighter work. (R. at 209.)

Clevinger saw Dr. Platt on June 14, 2006, for an evaluation for an epidural steroid injection to ease his low back pain. (R. at 205-06.) Dr. Platt noted that the range of motion in Clevinger's upper and lower extremities was near full limits with no atrophy or subluxation and with normal tone. (R. at 206.) Clevinger could fully flex his spine to touch his toes, but refused to extend because of pain. (R. at 206.) Straight leg raises were negative, and his gait and station appeared normal.

(R. at 206.) Dr. Platt performed an epidural steroid injection on June 27, 2006. (R. at 204.) Clevinger did not keep a follow-up appointment for July 26, 2006. (R. at 206.)

On June 17, 2006, Dr. Michael Hartman, M.D., a state agency physician, completed a Physical Residual Functional Capacity Assessment of Clevinger. (R. at 177-83.) Dr. Hartman stated that Clevinger was capable of occasionally lifting and carrying items weighing up to 20 pounds and frequently lifting and carrying items weighing up to 10 pounds. (R. at 178.) He stated that Clevinger could stand and/or walk about six hours in an eight-hour workday and sit for about six hours in an eight-hour workday. (R. at 178.) Dr. Hartman stated that Clevinger could occasionally stoop and crouch. (R. at 179.) He also stated that Clevinger should avoid concentrated exposure to extreme cold and vibration. (R. at 180.)

Clevinger saw Crystal Burke, a licensed clinical social worker with the Thompson Family Health Center on April 11, 2006. (R. at 186.) Burke stated that Clevinger suffered from situational depression and anxiety due to significant stressors. (R. at 186.) Clevinger stated that he was unsure if he wanted to return to counseling. (R. at 186.) Clevinger returned with his wife on July 6, 2006. (R. at 185.) His wife stated that she was very concerned because Clevinger was getting very irritable and agitated with her and their children. (R. at 185.) She stated that he was not bathing and shaving and was becoming withdrawn. (R. at 185.) Clevinger reported feeling very depressed and anxious. (R. at 185.) Burke stated that Clevinger's mood appeared depressed. (R. at 185.) Burke encouraged Clevinger to seek antidepressant therapy from his primary care physician. (R. at 185.) Clevinger

did not keep his August 1, 2006, appointment with Burke. (R. at 184.)

Clevinger returned to see Dr. Park on July 13, 2006. (R. at 196.) Dr. Park noted that Clevinger appeared very distressed. (R. at 196.) Dr. Park noted that the amount of protein in Clevinger's urine had decreased significantly. (R. at 196.) He noted that Clevinger's high cholesterol had improved but remained high. (R. at 196.)

Clevinger returned to see Dr. Platt on August 23, 2006. (R. at 203.) Clevinger reported that the previous epidural steroid injection had not helped that much. (R. at 203.) Dr. Platt recommended that further epidural injections would probably only be helpful in "crisis situations," when Clevinger's pain was much worse. (R at 203.)

Dr. Ravi K. Titha, M.D., performed a consultative examination of Clevinger at the Commissioner's request on February 28, 2007. (R. at 210-14.) Clevinger complained of chronic low back pain radiating into both legs. (R. at 210.) Clevinger reported that he hurt his back lifting heavy weight at work. (R. at 211.) Clevinger stated that he had anxiety and difficulty dealing with people, large crowds and close spaces. (R. at 211.) Physical examination showed that Clevinger had back flexion of 60 degrees, extension of 10 degrees and right and left lateral flexion of 10 degrees. (R. at 213.) Clevinger's spine was tender in the lower lumbar and upper sacral areas, with no muscle spasm. (R. at 213.) Straight leg raises were positive bilaterally at 50 to 60 degrees. (R. at 213.)

Neurological examination showed that Clevinger's power and sensation were normal in his upper and lower extremities. (R. at 213.) Clevinger also complained of pain in his shoulders and demonstrated some difficulty in forward elevation and abduction. (R. at 213.) Dr. Titha noted that Clevinger's appearance, behavior, speech, thought processes, content, mood, affect, concentration, attention, judgment, insight, attitude, degree of comprehension, persistence and pace were normal. (R. at 213.)

Dr. Titha also completed an assessment of Clevinger's physical abilities to perform work-related activities. (R. at 215-20.) According to Dr. Titha, Clevinger was capable of frequently lifting and carrying items weighing up to 20 pounds and occasionally lifting and carrying items weighing up to 100 pounds. (R. at 215.) Dr. Titha stated that Clevinger could sit for up to four hours in an eight-hour workday and up to three hours at a time, stand for up to three hours in an eight-hour workday and up to one hour at a time and walk for up to three hours in an eight-hour workday and up to two hours at a time. (R. at 216.) Dr. Titha stated that Clevinger had no limitation in his ability to reach, handle, finger, feel, push, pull or operate foot controls. (R. at 216.) Dr. Titha found that Clevinger could occasionally climb ladders and scaffolds, stoop, kneel, crouch and crawl. (R. at 218.) Dr. Titha further found that Clevinger could occasionally work around moving mechanical parts and could work around moderate noise levels. (R. at 218-19.) Dr. Titha also stated that Clevinger's limitations had lasted or would last for at least 12 consecutive months. (R. at 220.)

Clevinger returned to see Burke on April 29, 2008. (R. at 273.) Clevinger

reported having mood swings and being agitated. (R. at 273.) He stated that he felt depressed, agitated and anxious mostly at home. (R. at 273.) He stated that he was withdrawn from his family and was interested in few or no activities. (R. at 273.) Burke stated that Clevinger's mood appeared irritable and mildly elated. (R. at 273.) She stated that Clevinger exhibited symptoms of bipolar disorder and possibly impulse disorder with poor impulse control. (R. at 273.)

On June 3, 2008, Clevinger reported that his moods were up and down. (R. at 272.) He also stated that he felt very anxious and moody. (R. at 272.) He complained of not sleeping well. (R. at 272.) Burke noted that Clevinger appeared very anxious and somewhat irritable, but with elated mood. (R. at 272.) She stated that he had some significant mood disturbance. (R. at 272.) On December 23, 2008, he again reported mood swings and not sleeping well. (R. at 271.) Burke stated that he appeared rather anxious. (R. at 271.) On January 27, 2009, Clevinger reported feeling about the same. (R. at 270.) He reported poor impulse control, mood swings and insomnia. (R. at 270.) Burke noted that Clevinger's mood appeared irritable and that his speech was pressured at times. (R. at 270.)

On April 28, 2009, Burke completed an Assessment Of Ability To Do Work-Related Activities (Mental) on Clevinger. (R. at 262-64.) Burke stated that Clevinger suffered from severe symptoms of mood disorder with very poor impulse control and coping strategies which resulted in no useful ability to function in most work-related mental activities. (R. at 262-64.) Burke did state that Clevinger had a seriously limited ability to follow work rules, to understand remember and carry out detailed, but not complex, job instructions, to maintain personal appearance, to

relate predictably in social situations and to demonstrate reliability. (R. at 262-63.) She stated that Clevinger had a limited, but satisfactory, ability to understand, remember and carry out simple job instructions. (R. at 263.) Burke stated that Clevinger suffered from serious mental illness that affected all activities of daily living. (R. at 264.) She also stated that he could not manage benefits in his own interests and that his mental impairment would cause him to be absent from work more than two days a month. (R. at 264.)

On May 13, 2009, Ronald W. Brill, Ph.D., a licensed clinical psychologist, performed a consultative psychological evaluation of Clevinger at the request of his counsel and completed an assessment of his work-related activities. (R. at 255-61.) Brill noted that Clevinger was casually dressed with minimally adequate hygiene. (R. at 255.) Clevinger complained of poor short- and long-term memory. (R. at 256.) However, Brill stated that the instances Clevinger conveyed did not seem abnormal for most individuals. (R. at 256.) Brill noted that Clevinger's attention, concentration and memory were somewhat impaired, but not extremely so. (R. at 256.)

Brill stated that Clevinger's higher cognitive functioning was very limited, and his thinking was quite concrete. (R. at 256.) Brill noted that Clevinger's presentation was one of high tension, agitation and a combination of depression and anxiety. (R. at 256.) Brill stated that Clevinger appeared confused at times and unable to think clearly to respond to questioning. (R. at 256.) On a symptom checklist, Clevinger endorsed numerous items indicating anxiety, tension, worry and depression. (R. at 256.) Clevinger noted that he had suicidal thoughts that

would come and go. (R. at 256-57.) Clevinger reported suffering from panic attacks, but was unable to describe his feelings during these events. (R. at 257.)

Brill diagnosed Clevinger as suffering from severe, chronic bipolar disorder with psychotic features and the need to rule out a personality disorder. (R. at 257.) Brill placed Clevingers then-current Global Assessment of Functioning, (“GAF”),⁶ score at 50.⁷ (R. at 258.) Brill stated that Clevinger was quite poorly functioning, socially inadequate and immature. (R. at 258.) Brill stated that Clevinger was frustrated, depressed and anxious and, perhaps, psychotic. (R. at 258.) He stated that Clevinger was clearly in need of supportive counseling and psychotropic medication. (R. at 258.) Brill doubted whether Clevinger could manage his own funds without help from his wife. (R. at 258.)

According to Brill’s assessment, Clevinger’s ability to follow work rules, to relate to co-workers and to understand, remember and carry out simple job instructions was seriously limited. (R. at 259-61.) Brill stated that Clevinger had no useful ability to function in any other work-related mental activity. (R. at 259-61.) Brill stated that Clevinger was emotionally unpredictable, irritable and impulsive. (R. at 259.) Brill also stated that Clevinger was easily frustrated and rather paranoid in social situations or crowds. (R. at 260.) According to Brill, Clevinger’s

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).

⁷ A GAF score of 41-50 indicates “[s]erious symptoms ... OR any serious impairment in social, occupational, or school functioning ...” DSM-IV at 32.

“[i]ntellectual capability seems limited or below average or emotional problems limit his attention, organization, and short[-]term memory.” (R. at 260.) Brill also stated that he would anticipate that Clevinger’s impairment would cause him to be absent from work more than two days a month and that he believed that Clevinger’s problems and limitations existed before June 28, 2007. (R. at 261.)

III. Analysis

The Commissioner uses a five-step process in evaluating SSI and DIB claims. *See* 20 C.F.R. §§ 404.1520, 416.920 (2011); *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, 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. §§ 404.1250(a), 416.920(a) (2011).

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), 1382c(a)(3)(A)-(B)

(West 2003 & Supp. 2011); *see also 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 March 24, 2009, the ALJ denied Clevinger's claims. (R. at 281-97.) The ALJ found that Clevinger met the nondisability insured status requirements of the Act for DIB purposes through December 31, 2010. (R. at 284.) The ALJ also found that Clevinger had not engaged in substantial gainful activity since August 18, 2005, the alleged onset date. (R. at 284.) The ALJ determined that the medical evidence established that Clevinger had severe impairments, namely obesity, diabetes mellitus and degenerative disc disease of the lumbosacral spine, but she found that Clevinger'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 284-91.) The ALJ also found that Clevinger had the residual functional capacity to perform sedentary work that allowed him to avoid extreme temperatures and excess humidity, pollutants and irritants, unprotected heights, hazardous machinery, climbing ladders, ropes or scaffolds or working on vibrating surfaces. (R. at 291-94.) Therefore, the ALJ found that Clevinger was unable to perform any of his past relevant work. (R. at 295.) Based on Clevinger's age, education, work experience and residual functional capacity and the testimony of a vocational expert, the ALJ also found that there were other jobs, such as work as a cashier, an assembler and a hand packer, that Clevinger could perform. (R. at 295-96.) Thus, the ALJ found that Clevinger was not under a disability as defined under the Act and was not eligible for benefits. (R. at 296-97.) *See* 20 C.F.R. §§ 404.1520(g) 416.920(g).

Clevinger argues that the ALJ's decision is not supported by substantial evidence. In particular, Clevinger argues that the ALJ erred by failing to find that he suffered from a severe mental impairment. (Brief In Support Of Plaintiff's Motion For Summary Judgment, ("Plaintiff's Brief"), at 9-11.) Clevinger also argues that the ALJ did not sufficiently explain her weighing of the medical evidence and the rejection of his treating physicians' opinions. (Plaintiff's Brief at 7-9.) Clevinger further argues that the ALJ's finding that other jobs existed which Clevinger could perform is not supported by substantial evidence. (Plaintiff's Brief at 9-12.)

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

Clevinger argues that the ALJ erred by failing to find that he suffered from a severe mental impairment. (Plaintiff's Brief at 9-11.) The Social Security regulations define a "nonsevere" impairment as an impairment or combination of impairments that does not significantly limit a claimant's ability to do basic work activities. *See* 20 C.F.R. §§ 404.1521(a), 416.921(a) (2011). Basic work activities include walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, handling, seeing, hearing, speaking, understanding, carrying out and remembering simple job instructions, use of judgment, responding appropriately to supervision, co-workers and usual work situations and dealing with changes in a routine work setting. *See* 20 C.F.R. §§ 404.1521(b), 416.921(b) (2011). The Fourth Circuit held in *Evans v. Heckler*, that "[a]n impairment can be considered as 'not severe' only if it is a *slight abnormality* which has such a *minimal effect* on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience." 734 F.2d 1012, 1014 (4th Cir. 1984) (quoting *Brady v. Heckler*, 724 F.2d 914, 920 (11th Cir. 1984)) (citations omitted).

The uncontradicted medical evidence in this case shows that Clevinger has been treated for depression and anxiety since at least early 2006. The uncontradicted medical evidence in this case also shows that these psychological problems have imposed limitations on Clevinger's mental work-related abilities. The ALJ, however, ignored this medical evidence. Instead, the ALJ references only

a January 22, 2008, Disability Determination Services finding that Clevinger's depression was nonsevere, which she states is found in the record at Exhibit B-6F. (R. at 287.) My review of the record shows that the exhibit found at B-6F is a Physical Residual Functional Capacity Assessment completed by Dr. Phillips on May 2, 2006, which does not address Clevinger's mental work-related abilities. (R. at 170-76.) That being the case, I find that substantial evidence does not support the ALJ's decision that Clevinger did not suffer from a severe mental impairment. Based on my finding on this issue, it is not necessary to address Clevinger's other arguments.

PROPOSED FINDINGS OF FACT

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

1. Substantial evidence does not exist to support the Commissioner's finding that Clevinger did not suffer from a severe mental impairment; and
2. Substantial evidence does not exist to support the Commissioner's finding that Clevinger was not disabled under the Act and was not entitled to DIB or SSI benefits.

RECOMMENDED DISPOSITION

The undersigned recommends that the court deny Clevinger's motion for summary judgment, deny the Commissioner's motion for summary judgment, vacate the final decision of the Commissioner denying benefits and remand these claims 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. 2011):

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: November 7, 2011.

s/ Pamela Meade Sargent

UNITED STATES MAGISTRATE JUDGE