

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

<b>DOUGLAS ALAN HESS,</b>	)	
Plaintiff	)	
	)	
v.	)	Civil Action No. 1:11cv00029
	)	<b><u>REPORT AND</u></b>
	)	<b><u>RECOMMENDATION</u></b>
<b>MICHAEL J. ASTRUE,</b>	)	
<b>Commissioner of Social Security,</b>	)	By: PAMELA MEADE SARGENT
Defendant	)	United States Magistrate Judge

Plaintiff, Douglas Alan Hess, 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”), under the Social Security Act, as amended, (“Act”), 42 U.S.C.A. § 423. (West 2011). Jurisdiction of this court is pursuant to 42 U.S.C. § 405(g). This case is before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). As directed by the order of referral, the undersigned now submits the following report and recommended disposition.

The court’s review in this case is limited to determining if the factual findings of the Commissioner are supported by substantial evidence and were reached through application of the correct legal standards. *See Coffman v. Bowen*, 829 F.2d 514, 517 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> Cir. 1990) (quoting *Laws*, 368 F.2d at 642).

The record shows that Hess protectively filed an application for DIB on August 31, 2007, alleging disability as of September 24, 2006, due to problems with his back and right leg, nerves and depression. (Record, (“R.”), at 113-14, 125, 142.) The claim was denied initially and on reconsideration. (R. at 55-57, 62-63, 66-67.) Hess then requested a hearing before an administrative law judge, (“ALJ”). (R. at 69-70.) The hearing was held on January 11, 2010, at which Hess was represented by counsel. (R. at 32-52.)

By decision dated April 29, 2010, the ALJ denied Hess’s claim. (R. at 12-27.) The ALJ found that Hess meets the nondisability insured status requirements of the Act for DIB purposes through December 31, 2012. (R. at 14.) The ALJ also found that Hess had not engaged in substantial gainful activity since September 24, 2006, the alleged onset date. (R. at 14.) The ALJ found that the medical evidence established that Hess suffered from severe impairments of degenerative disc disease, chronic lumbar and cervical strain, degenerative joint disease, obesity, depression/anxiety disorder, obsessive/compulsive disorder and pain disorder, but he found that Hess did not have an impairment or combination of impairments listed at or medically equal to one listed at 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. at 14-17.) The ALJ also found that Hess had the residual

functional capacity to perform sedentary work<sup>1</sup> that did not require him to follow any complex job instructions or make any complex work-related decisions. (R. at 17-27.) Based on this, the ALJ found that Hess was able to perform his past work as security guard. (R. at 27.) Thus, the ALJ found that Hess was not under a disability as defined under the Act and was not eligible for benefits. (R. at 27.) *See* 20 C.F.R. § 404.1520(f) (2011).

After the ALJ issued his decision, Hess pursued his administrative appeals, (R. at 110), but the Appeals Council denied his request for review. (R. at 1-3.) Hess 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 (2011). The case is before this court on Hess's motion for summary judgment filed September 13, 2011, and the Commissioner's motion for summary judgment filed October 13, 2011.

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

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<sup>1</sup> Sedentary work involves lifting items weighing up to 10 pounds with occasional lifting or carrying or articles like docket files, ledgers and small tools. *See* 20 C.F.R. § 404.1567(a) (2011). "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." 20 C.F.R. § 404.1567(a)(2011).

listed impairment; 4) can return to his past relevant work; and 5) if not, whether he can perform other work. *See* 20 C.F.R. § 404.1520. If the Commissioner finds conclusively that a claimant is or is not disabled at any point in this process, review does not proceed to the next step. *See* 20 C.F.R. § 404.1520(a) (2011).

Based on my review of the record, I find that substantial evidence does not exist to support the ALJ's finding that Hess could perform his past work as a security guard. As stated above, the ALJ found that Hess had the residual functional capacity to perform sedentary work that did not require him to follow complex job instructions or make complex work-related decisions. (R. at 17-27.) In reaching this conclusion, the ALJ stated that he was giving great weight to the opinions of the medical consultative examiner, Dr. William Humphries, M.D. (R. at 26.) According to Dr. Humphries, Hess was capable of working only eight hours a day, with up to six hours of sitting and two hours of walking and standing. (R. at 385, 388.) The state agency physicians also stated that Hess could work eight hours a day. (R. at 301, 365.)

In determining whether a claimant can return to his past work, the Commissioner will consider whether the claimant can return to his past work as he actually performed it or as it is generally performed in the national economy. *See* 20 C.F.R. § 404.1560(b)(2) (2011). In this case, the ALJ found that Hess could return to his work as a security guard as he actually performed it. (R. at 27.) That finding, however, is not supported by the evidence. On his Work History Report, Hess reported that he worked 12-hours a day, seven days a week as a security guard. (R. at 156.) At his hearing, Hess also testified that he worked 12-hour

shifts. (R. at 39.) Thus, the uncontradicted evidence shows that Hess's past work as a security guard, as it was actually performed, required him to work 12-hour shifts.

### **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 in the record to support the Commissioner's finding that Hess could perform his past relevant work as a security guard; and
2. Substantial evidence does not exist in the record to support the Commissioner's finding that Hess was not disabled under the Act and was not entitled to DIB benefits.

### **RECOMMENDED DISPOSITION**

The undersigned recommends that the court deny Hess's and the Commissioner's motions for summary judgment, vacate the Commissioner's decision denying benefits and remand this case to the Commissioner for further development.

#### **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: April 2, 2012.

s/ *Pamela Meade Sargent*  
UNITED STATES MAGISTRATE JUDGE