

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

MILDRED J. PORTER,)
Plaintiff)

v.)

CAROLYN W. COLVIN,¹)
Acting Commissioner of)
Social Security,)
Defendant)

Civil Action No. 1:13cv00015

REPORT AND RECOMMENDATION

BY: PAMELA MEADE SARGENT
United States Magistrate Judge

I. Background and Standard of Review

Plaintiff, Mildred J. Porter, 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”), 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.

¹ Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Federal Rules of Civil Procedure Rule 25(d), Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit.

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 Porter protectively filed an application for DIB on January 14, 2009, alleging disability as of December 22, 2008, due to depression, anxiety, hypertension, chest pain, shortness of breath, numbness in her arms and feet, memory problems and vision problems. (Record, ("R."), at 175-76, 207, 211, 236.) The claim was denied initially and on reconsideration. (R. at 96-98, 104, 106-08, 110-12.) Porter then requested a hearing before an administrative law judge, ("ALJ"), (R. at 113.) The hearing was held on January 10, 2012, at which, Porter was represented by counsel. (R. at 32-76.)

By decision dated February 17, 2012, the ALJ denied Porter's claim. (R. at 17-27.) The ALJ found that Jones met the nondisability insured status requirements of the Act for DIB purposes through December 31, 2008. (R. at 19.) The ALJ also found that Porter had not engaged in substantial gainful activity since December 22, 2008, the alleged onset date. (R. at 19.) The ALJ found that the medical

evidence established that, through the date last insured, Porter suffered from severe impairments, namely migraines, controlled with medications, chronic obstructive pulmonary disease, (“COPD”), hypertension, insomnia, anxiety and depression, but he found that Porter 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 19-20.) The ALJ also found that, through the date last insured, Porter had the residual functional capacity to perform a limited range of simple, routine, repetitive light work² that did not require more than occasional climbing, balancing, stooping, kneeling, crouching and crawling, that did not require her to work around pulmonary irritants, that did not require more than minimal public interaction and that did not require work tasks not directly interdependent with that of co-workers. (R. at 21.) The ALJ found that, through her date last insured, Porter was unable to perform her past relevant work. (R. at 26.) Based on Porter’s age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ found that jobs existed in significant numbers in the national economy that she could perform, including jobs as a photocopy machine operator, a laundry folder and an assembler. (R. at 26-27.) Thus, the ALJ found that Porter 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(g) (2013).

After the ALJ issued his decision, Porter pursued her administrative appeals, (R. at 173), but the Appeals Council denied her request for review. (R. at 1-5.) Porter then filed this action seeking review of the ALJ’s unfavorable decision,

² Light 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, she also can do sedentary work. *See* 20 C.F.R. § 404.1567(b) (2013).

which now stands as the Commissioner's final decision. *See* 20 C.F.R. § 404.981 (2013). The case is before this court on Porter's motion for summary judgment filed August 20, 2013, and the Commissioner's motion for summary judgment filed September 23, 2013.

II. Facts

Porter was born in 1958, (R. at 175), which, at the time of the ALJ's decision, classified her as a "person closely approaching advanced age" under 20 C.F.R. § 404.1563(d). Porter completed the seventh-grade³ and has past relevant work experience as an owner-operator of a trucking company and as a farm worker. (R. at 212, 264-66.)

Vocational expert, James Williams, was present and testified at Porter's January 10, 2012, hearing. (R. at 72-74.) Williams classified Porter's work as a trucking business owner/dispatcher as light and skilled and her work as a farmer as heavy⁴ and unskilled. (R. at 72.) Williams was asked to consider a hypothetical individual who had depression and anxiety, and who would be limited as set out in the assessment of Patricia Buston, L.C.S.W., a licensed clinical social worker. (R. at 72-73, 416-17.) Williams stated that there would be no jobs available that such

³ On her Disability Report, Porter indicated that she had a ninth-grade education and that she attended special education classes; however, school records contained in the record do not indicate that she was enrolled in special education classes. (R. at 216, 264-66.) In addition, Porter stated at her hearing that she had a tenth-grade education. (R. at 48.)

⁴ Heavy work is defined as work that involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds. If an individual can do heavy work, she also can do sedentary, light and medium work. *See* 20 C.F.R. § 404.1567(d) (2013).

an individual could perform. (R. at 73.) Williams was asked to assume an individual of Porter's age, education and work history who was capable of performing simple, routine, repetitive, light work that did not require more than occasional crouching, stooping, kneeling and climbing, who would need to avoid pulmonary irritants and who could have no more than minimal public interaction or that involved tasks that were directly interdependent with that of co-workers. (R. at 73-74.) Williams stated that such an individual could perform the jobs of a photocopy machine operator, a laundry folder and an assembler, all of which existed in significant numbers. (R. at 74.)

The ALJ and Porter's attorney also discussed the issue of Porter's date last insured. (R. at 35-37.) Porter's attorney notified the ALJ that Porter was in the process of filing a tax return for 2008 showing approximately \$23,000.00 of income for that year. (R. at 36.) Porter testified that she intended to file the tax return later that day. (R. at 37.) Porter's attorney told the ALJ that he would file a request for the Social Security Administration, ("SSA"), to recalculate Porter's date last insured based on the information regarding her 2008 income, and the ALJ stated that he would look for the additional information. (R. at 40-41.)

The record contains a request from Porter's counsel dated January 12, 2012, requesting that the SSA amend Porter's earnings record and adjust her date last insured based on the attached 2008 tax return filed January 11, 2012. (R. at 270-71.) The ALJ's opinion notes that Porter made this request, with supporting evidence in the form of her tax return, two days after the hearing. (R. at 17.) Nonetheless, the ALJ's opinion states that, as of the date of his decision, February

17, 2012, Porter's SSA earnings record did not reflect any earnings for 2008. (R. at 17.) Therefore, the ALJ found that Porter was insured only through December 31, 2008. (R. at 17.) Porter argues that this date does not take into consideration her 2008 and 2010 earnings, which would change her date last insured from December 31, 2008, to June 30, 2010. (Plaintiff's Brief In Support Of Motion For Summary Judgment, ("Plaintiff's Brief"), at 8-9.) In addition, Porter's earnings record from 1974 through 2010 has been filed as an attachment to her brief. (Plaintiff's Brief, Att. No. 1.)

In rendering his decision, the ALJ reviewed medical records from Joseph Leizer, Ph.D., a state agency psychologist; Dr. Thomas Phillips, M.D., a state agency physician; Julie Jennings, Ph.D., a state agency psychologist; Dr. Joseph Duckwall, M.D., a state agency physician; Coeburn Hospital Clinic, Inc.; Rebecca Varney, F.N.P., a family nurse practitioner; Dr. Brian Easton, M.D.; C-Health of Honaker; Stone Mountain Health Services; Patricia E. Buston, L.C.S.W., a licensed clinical social worker; and Abingdon Radiology Services. Porter's attorney also submitted medical evidence from Teresa E. Jarrell, M.A., a licensed psychologist, and Community Medical Care to the Appeals Council.⁵

On April 5, 2007, Porter sought treatment at the Coeburn Hospital Clinic, Inc., for a migraine headache and depression. (R. at 272-75.) She was working as a dispatcher at her trucking company. (R. at 272.) Dr. Guchara S. Kanwal, M.D.,

⁵ Since the Appeals Council considered and incorporated this additional evidence into the record in reaching its decision, (R. at 1-5), this court also must take this evidence into account when determining whether substantial evidence supports the ALJ's findings. *See Wilkins v. Sec'y of Dep't of Health & Human Servs.*, 953 F.2d 93, 96 (4th Cir. 1991).

noted on examination that Porter's blood pressure was 150/90; that she smoked one pack of cigarettes a day; and that she complained of agitation, depression, insomnia and anxiety. (R. at 272-74.) Dr. Kanwal observed no physical abnormalities. (R. at 272-74.) He diagnosed migraine headache, anxiety and depression. (R. at 275.)

On January 8, 2008, Porter was seen at C-Health of Lebanon for complaints of cough and depression. (R. at 280-82.) Porter reported that her symptoms of depression had been present for the previous five months. (R. at 280.) She reported that recent stressors included marital problems. (R. at 280.) Porter reported that she worked full-time. (R. at 280.) Her blood pressure reading was 197/102. (R. at 281.) Rebecca Varney, F.N.P., a family nurse practitioner, who was supervised by Dr. Brian Easton, M.D., diagnosed acute bronchitis, cough, tobacco abuse and moderate, recurrent major depression. (R. at 281.) On January 29, 2008, Porter complained of cough, nasal congestion and anxiety. (R. at 286-88.) She reported marital problems as a recent stressor. (R. at 286.) She reported working full-time. (R. at 286.) Her blood pressure reading was 164/88. (R. at 287.) She was diagnosed with cough, acute sinusitis and recurrent, moderate major depression. (R. at 287.) On January 7, 2009, Porter complained of anxiety and depression. (R. at 277-79.) She reported marital problems. (R. at 277.) Porter reported that she worked full-time. (R. at 277.) Her blood pressure reading was 188/91. (R. at 278.) She was diagnosed with insomnia, secondary to hot flashes, elevated blood pressure without a diagnosis of hypertension and adjustment disorder with mixed anxiety and depressed mood. (R. at 278.) On January 14, 2009, Porter was seen for follow-up for anxiety and depression. (R. at 283-85.) She continued to report that she worked

full-time. (R. at 283.) Her blood pressure reading was 172/99. (R. at 284.) Varney diagnosed hypertensive heart disease, benign, without heart failure, age-related memory loss, adjustment disorder with mixed anxiety and depressed mood and insomnia, secondary to hot flashes. (R. at 284.) On February 18, 2009, Porter complained of depression and sinusitis. (R. at 289-91.) She reported recent stressors of marital and financial problems. (R. at 289.) She reported that she worked full-time. (R. at 289.) Porter's blood pressure reading was 159/92. (R. at 290.) Varney diagnosed hypertensive heart disease, benign, without heart failure, acute sinusitis, adjustment disorder with mixed anxiety and depressed mood and sleep disturbance. (R. at 290.)

On March 24, 2009, Joseph Leizer, Ph.D., a state agency psychologist, noted that, as of the date last insured, the record did not document a limiting physical or mental impairment. (R. at 80.)

On March 24, 2009, Dr. Thomas Phillips, M.D, a state agency physician, noted that, as of the date last insured, Porter did not have a limiting mental or physical impairment. (R. at 82.) He noted that an examination in January 2009 showed that Porter had no chest pain, shortness of breath or heart failure due to hypertension. (R. at 82.) Dr. Phillips noted that Porter's blood pressure was stable, and her mental status was normal. (R. at 82.)

On April 19, 2010, Julie Jennings, Ph.D., a state agency psychologist, completed a Psychiatric Review Technique form, ("PRTF"), indicating that Porter had moderate restrictions on activities of daily living, in maintaining social

functioning and in maintaining concentration, persistence or pace. (R. at 87-88.) She noted that Porter had not experienced repeated episodes of decompensation of extended duration. (R. at 88.) Jennings reported that there were no objective findings to support the severity of the alleged limitations prior to Porter's date last insured. (R. at 89.)

Jennings also completed a mental assessment indicating that Porter was moderately limited in her ability to understand, remember and carry out detailed instructions, to maintain attention and concentration for extended periods, to sustain an ordinary routine without special supervision, to work in coordination with or in 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 and to set realistic goals or make plans independently of others. (R. at 90-92.) Jennings noted that, as of the date last insured, Porter was restricted to simple, unskilled, nonstressful work. (R. at 92.)

On April 19, 2010, Dr. Joseph Duckwall, M.D., a state agency physician, opined that Porter had the residual functional capacity to perform light work. (R. at 89-90.) He found that Porter could occasionally climb ramps and stairs, never climb ladders, ropes or scaffolds and frequently balance, stoop, kneel, crouch and crawl. (R. at 89-90.) No manipulative, visual or communicative limitations were

noted. (R. at 90.) Dr. Duckwall opined that Porter should avoid concentrated exposure to fumes, odors, dusts, gases and poor ventilation and avoid all exposure to hazards. (R. at 90.)

The record shows that Porter was treated at Stone Mountain Health Services from September 2009 through December 2011 for various problems, including sinusitis, acute bronchitis, headaches, fatigue, depression, anxiety and insomnia. (R. at 305-24, 326-74, 388-415.) On September 30, 2009, Porter sought treatment for depression, hypertension and insomnia attributed to menopause. (R. at 314-16.) Porter's blood pressure reading was 148/80. (R. at 316.) She was diagnosed with hypertension, uncontrolled due to noncompliance, depression and insomnia. (R. at 314.) On November 6, 2009, Porter was diagnosed with an upper respiratory infection. (R. at 311-13.) A chest x-ray was normal. (R. at 377.) It was noted that Porter's hypertension was controlled and that her depression and insomnia were improving. (R. at 368.) On November 19, 2009, Evelyn Hamilton, L.C.S.W., a licensed clinical social worker, saw Porter for symptoms of anxiety, depression and other symptoms related to menopause. (R. at 415.) Porter reported that her biggest stressor was a drop in income. (R. at 415.) She stated that she could not return to work due to her symptoms of anxiety and depression. (R. at 415.) She was diagnosed with adjustment disorder with mixed anxiety and depressed mood. (R. at 415.) On December 7, 2009, Porter reported continued anxiety. (R. at 414.) She stated that she once operated a trucking company, but the economy "ended that." (R. at 414.) On December 14, 2009, Hamilton reported that Porter was more relaxed with an improved mood and affect. (R. at 413.) Her blood pressure reading was 122/82. (R. at 367.)

On February 1, 2010, Porter reported that things had improved. (R. at 411.) Hamilton noted that Porter's mood and affect were improved. (R. at 411.) Porter had a positive attitude. (R. at 411.) On March 15, 2010, Porter expressed concerns about a custody dispute that her married son was involved in with his soon-to-be ex-wife. (R. at 409.) On April 28, 2010, Porter reported that she was doing well. (R. at 407.) On May 12, 2010, Porter reported that she was doing better. (R. at 406.) She stated that she wanted to find something to do to earn some money. (R. at 406.) Porter was looking forward to visiting her granddaughter, who lived in South Carolina. (R. at 406.) On June 29, 2010, Porter reported that she traveled to South Carolina almost every other weekend to visit her granddaughter. (R. at 402.) She reported doing well, stating that her anxiety symptoms had decreased, and her sleep disturbance had improved. (R. at 402.) The record shows that Porter continued to express concerns about her son's custody dispute, difficulty relating to her husband and family issues relating to her mother. (R. at 388-415.) Porter reported on a number of occasions that things had improved and that she was doing okay. (R. at 392-93, 395, 402, 406-07, 411, 413.) On December 13, 2011, Patricia Buston, L.C.S.W., a licensed clinical social worker, noted that Porter was stressed, tearful, twisting her hands and moving in her chair. (R. at 389.) She had an anxious affect and depressed mood. (R. at 389.) Buston noted that Porter's judgment was fair to good. (R. at 389.) On December 20, 2011, Buston diagnosed depressive disorder and anxiety disorder, not otherwise specified. (R. at 388.)

On January 5, 2012, Buston completed a mental assessment indicating that Porter had a seriously limited, but not precluded, ability to deal with the public, to use judgment, to function independently, to maintain personal appearance and to

demonstrate reliability. (R. at 416-17.) She noted that Porter had no useful ability to follow work rules, to relate to co-workers, to deal with work stresses, to maintain attention/concentration, to understand, remember and carry out complex, detailed or simple job instructions, to behave in an emotionally stable manner and to relate predictably in social situations. (R. at 416-17.) Buston based these findings on Porter's diagnoses of anxiety disorder, not otherwise specified, and depressive disorder, not otherwise specified. (R. at 416-17.)

On May 16, 2012, Teresa E. Jarrell, M.A., a licensed psychologist, evaluated Porter at the request of Porter's attorney. (Plaintiff's Brief, Att. No. 2.) Porter reported that she had been seeing a counselor for nearly one year, but she had never been hospitalized for inpatient psychiatric treatment. (Plaintiff's Brief, Att. No. 2 at 2.) Jarrell reported that Porter had a mildly anxious mood and restricted affect. (Plaintiff's Brief, Att. No. 2 at 3.) Jarrell noted that Porter did not endorse symptoms consistent with delusions, illusions or obsessive compulsive behavior patterns. (Plaintiff's Brief, Att. No. 2 at 3.) She reported that Porter endorsed mildly paranoid thoughts. (Plaintiff's Brief, Att. No. 2 at 3.) Jarrell reported that the Wechsler Adult Intelligence Scale - Fourth Edition, ("WAIS-IV"), was administered, and Porter obtained a verbal IQ score of 70, and a full-scale IQ score of 70. (Plaintiff's Brief, Att. No. 2 at 4-5.) Jarrell diagnosed severe, recurrent major depressive disorder without psychotic features, panic disorder without agoraphobia, generalized anxiety disorder, amnesic disorder, not otherwise specified, pain disorder associated with both psychological factors and general medical condition and borderline intellectual functioning. (Plaintiff's Brief, Att. No. 2 at 5-6.) Jarrell assessed Porter's then-current Global Assessment of

Functioning score, (“GAF”),⁶ at 50.⁷ (Plaintiff’s Brief, Att. No. 2 at 6.)

Jarrell noted that Porter’s prognosis was poor and that she did not anticipate that she could successfully re-enter the competitive workforce. (Plaintiff’s Brief, Att. No. 2 at 6.) She reported that Porter did not have the cognitive capability to carry out detailed or complex instructions. (Plaintiff’s Brief, Att. No. 2 at 6.) Jarrell reported that Porter’s capacity, even on a short task in a quiet setting, was mildly deficient. (Plaintiff’s Brief, Att. No. 2 at 6.) She reported that Porter’s memory impairments hindered her ability to meet performance expectations in a work setting. (Plaintiff’s Brief, Att. No. 2 at 6.) The Cognistat 2011⁸ and mental status examination substantiated moderate memory problems. (Plaintiff’s Brief, Att. No. 2 at 6.) Jarrell reported that Porter’s ability to repetitively carry out simple job instructions was hindered by the combination of her physical health problems, psychiatric symptoms and problems with memory and concentration. (Plaintiff’s Brief, Att. No. 2 at 6.) She also noted that problems with punctuality, pace and attendance were highly likely due to the combination of Porter’s physical health problems and psychiatric symptoms. (Plaintiff’s Brief, Att. No. 2 at 6.) Jarrell found that Porter would have great difficulty meeting expectations of personal-

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 that the individual has “[s]erious symptoms ... OR any serious impairment in social, occupational, or school functioning....” DSM-IV at 32.

⁸ The Cognistat Assessment rapidly assesses neurocognitive functioning in the three general areas of level of consciousness, orientation and attention span. *See* www.cognistat.com/what-cognistat-tests (last visited April 10, 2014).

social adjustment in a full-time work setting. (Plaintiff's Brief, Att. No. 2 at 7.)

III. Analysis

The Commissioner uses a five-step process in evaluating DIB claims. *See* 20 C.F.R. § 404.1520 (2013); *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. 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) (2013).

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 her 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).

Porter argues that the ALJ's decision is not based on substantial evidence.

(Plaintiff's Brief at 8-15.) Porter argues that the ALJ failed to properly evaluate her condition from the alleged onset date of disability through her date last insured. (Plaintiff's Brief at 8-15.) She contends that the ALJ should have amended her date last insured to include her 2008 and 2010 earnings, which would change her date last insured from December 31, 2008, to June 30, 2010. (Plaintiff's Brief at 8-12.) Porter also contends that the Appeals Council failed to address the complete evaluation report of psychologist Jarrell. (Plaintiff's Brief at 15-17, Att. 2.)

The ALJ found that the medical evidence established that, through the date last insured, Porter suffered from severe impairments, namely migraines, controlled with medications, COPD, hypertension, insomnia, anxiety and depression, but he found that Porter 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 19-20.) The ALJ also found that, through the date last insured, Porter had the residual functional capacity to perform a limited range of simple, routine, repetitive light work that did not require more than occasional climbing, balancing, stooping, kneeling, crouching and crawling, that did not require her to work around pulmonary irritants, that did not require more than minimal public interaction and that did not require the performance of work tasks directly interdependent with that of co-workers. (R. at 21.)

Porter argues that the ALJ's decision is not based on substantial evidence. (Plaintiff's Brief at 8-15.) I find this argument unpersuasive insofar as the medical evidence supports the ALJ's finding that Porter was not disabled as of December 31, 2008. In assessing Porter's residual functional capacity as of this date, the ALJ noted that Porter's physical impairments of headaches, COPD and hypertension

were controlled with medication. (R. at 25.) The record shows that Porter's blood pressure, which was elevated at 150/90 on her first evaluation in 2007, (R. at 273), was brought within the normal range with effective medication therapy. (R. at 310-11, 334, 355, 358, 367.) "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).

In addition, the record shows that in March 2009, Dr. Phillips found that Porter's mental status was normal two months previously. (R. at 82.) In November 2009, it was noted that Porter's symptoms of depression were improving. (R. at 368.) In December 2009, it was noted that Porter's mood and affect had improved. (R. at 413.) From February 2010 through June 2010, Porter continued to report that she was doing well, stating that her anxiety symptoms had decreased. (R. at 392-93, 395, 402, 406-07, 411, 413.) Porter reported that she enjoyed trips almost every other weekend to South Carolina to visit her grandchild. (R. at 398, 402, 406-07.) In the four counseling sessions of record with Buston, Porter was observed to be neat and clean, with good eye contact, normal speech and good insight and judgment and no thought disorder or psychosis. (R. at 388-91.) However, in January 2012, Buston completed a mental assessment indicating that Porter had a seriously limited, but not precluded, ability to no useful ability to perform all work-related mental activities. (R. at 416-17.) The ALJ noted that he was not giving Buston's opinion significant weight because it was dated almost three years after Porter's date last insured, and it was not supported by the other evidence of record. (R. at 25.)

Porter argues that the ALJ should have amended her date last insured to June

30, 2010, based on the additional evidence submitted with regard to her 2008 income. Based on my review of the record, I find that substantial evidence does not exist in the record to support the ALJ's finding with regard to Porter's date last insured.

The ALJ's opinion noted that Porter had submitted additional evidence of income in 2008 to the SSA prior to his opinion. (R. at 17.) Nonetheless, the ALJ simply noted that Porter's SSA earnings record had not yet been amended to reflect the additional earnings. (R. at 17.) The SSA's regulations state that, before the time limit ends for a year, SSA records are evidence, but not conclusive evidence, of a claimant's amounts and periods of that year's earnings. *See* 20 C.F.R. § 404.803(b) (2013). The regulations state that the time period for correcting a claimant's earnings record, without a showing of special circumstances, is three years, three months and 15 days after the particular year. *See* 20 C.F.R. §§ 404.802, 404.821, 404.822 (2013). A request filed within this time period should result in a correction if "satisfactory evidence shows SSA records are incorrect." 20 C.F.R. § 404.821.

Here, three years, three months and 15 days after the 2008 year would have been April 15, 2012. Porter's attorney filed her written request to correct her 2008 SSA earnings record on or about January 12, 2012. Therefore, it was filed within the applicable time period. Since the SSA records are not conclusive evidence of the wages earned before the time period ends for a year, the ALJ should have, at least, considered the new evidence, which he did not do. That being the case, I cannot find that his decision with regard to Porter's date last insured is supported by substantial evidence.

Porter's contention that the Appeals Council did not consider the evidence from psychologist Jarrell is simply incorrect. The Appeals Council did consider this evidence in declining to review the ALJ's decision. (R. at 1-5.) The Appeals Council noted that this assessment was for a later time and that it would not affect the ALJ's decision. (R. at 2.) That being the case, this court also must consider this evidence in determining whether substantial evidence supports the ALJ's decision. *See Wilkins*, 953 F.2d at 96. Porter contends that, although the Appeals Council mentioned Jarrell's report, it failed to address the report itself. (Plaintiff's Brief at 15.) The Fourth Circuit has held that "nothing in the Social Security Act or regulations promulgated pursuant to it requires that the Appeals Council explain its rationale for denying review." *Meyer v. Astrue*, 662 F.3d 700, 705 (4th Cir. 2011). The Fourth Circuit found that the Appeals Council's denial of a request for review differs sharply from an ALJ's decision. *See Meyer*, 662 F.3d at 705. While the Social Security regulations explicitly require the ALJ to issue decisions supported by findings of fact and the reasons for the decision, the regulations do not require the Appeals Council to articulate its rationale for denying a request for review. *See Meyer*, 662 F.3d at 705 (citing 20 C.F.R. § 404.953(a)). The Fourth Circuit clarified that "[o]nly if the Appeals Council *grants* a request for review and issues its own decision on the merits is the Appeals Council required to make findings of fact and explain its reasoning." *Meyer*, 662 F.3d at 706 (citing 20 C.F.R. §§ 404.979, 404.1527(f)(3)).

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 Porter's date last insured was December 31, 2008; and
2. Substantial evidence does not exist in the record to support the Commissioner's finding that Porter was not disabled under the Act and was not entitled to DIB benefits.

RECOMMENDED DISPOSITION

The undersigned recommends that the court deny Porter's and the Commissioner's motions for summary judgment and remand this case 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. 2013):

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

