

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

TERESA LEIGH CARTER,)	
Plaintiff)	
v.)	Civil Action No. 1:13cv00044
)	<u>REPORT AND</u>
)	<u>RECOMMENDATION</u>
CAROLYN W. COLVIN,)	
Acting Commissioner of)	
Social Security,)	By: PAMELA MEADE SARGENT
Defendant)	United States Magistrate Judge

I. Background and Standard of Review

Plaintiff, Teresa Leigh Carter, (“Carter”), filed this action pro se challenging the final decision of the Commissioner of Social Security, (“Commissioner”), denying plaintiff’s claims for disability insurance benefits, (“DIB”), and supplemental security income, (“SSI”), under the Social Security Act, as amended, (“Act”), 42 U.S.C.A. §§ 423 and 1381 *et seq.* (West 2011 & West 2012). 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 Carter filed her applications for SSI and DIB on September 8, 2009, alleging disability as of August 5, 2009, due to traumatic brain injury, diabetes, asthma and lung cancer. (Record, (“R.”), at 31, 65, 177-85, 234, 237.) The claims were denied initially and upon reconsideration. (R. at 31, 65-96, 99-113, 114, 115-30.) Carter then requested a hearing before an administrative law judge, (“ALJ”). (R. at 131-32.) A hearing was held on January 10, 2012, at which Carter was represented by counsel. (R. at 29-55.)

By decision dated February 6, 2012, the ALJ denied Carter’s claims. (R. at 13-22.) The ALJ found that Carter met the disability insured status requirements of the Act for DIB purposes through September 30, 2011. (R. at 15.) The ALJ found that Carter had not engaged in substantial gainful activity since August 5, 2009, the alleged onset date. (R. at 15.) The ALJ found that the medical evidence established that Carter had a severe combination of impairments, namely hypertension, chronic obstructive pulmonary disease, (“COPD”), right adrenal nodule, renal cyst, benign right lung mass, status post fracture of the left upper extremity, compression deformity of the thoracic and lumbar spine and degenerative changes of the cervical spine, but the ALJ found that Carter did not have an impairment or combination of impairments that met or medically equaled one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. at 15-18.) The ALJ

found that Carter had the residual functional capacity to perform light work,¹ with only occasional pushing, pulling and reaching with the left upper extremity and that did not require her to climb ladders, ropes or scaffolds or work around concentrated exposure to irritants such as fumes, odors, dust, gases and poorly ventilated areas or even moderate exposure to operational control of hazardous machinery or unprotected heights. (R. at 18.) The ALJ found that Carter was unable to perform any of her past relevant work. (R. at 21.) Based on Carter's age, education, work experience and residual functional capacity and the testimony of a vocational expert, the ALJ found that a significant number of jobs existed in the national economy that Carter could perform, including jobs as a packer, a counter rental clerk and an usher-lobby attendant. (R. at 21-22.) Thus, the ALJ concluded that Carter was not under a disability as defined by the Act and was not eligible for DIB or SSI benefits. (R. at 22.) *See* 20 C.F.R. §§ 404.1520(g), 416.920(g) (2013).

After the ALJ issued his decision, Carter pursued her administrative appeals, (R. at 8), but the Appeals Council denied her request for review. (R. at 1-6.) Carter 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 (2013). This case is before this court on the Commissioner's motion for summary judgment filed January 17, 2014.

II. Facts

Carter was born in 1958, (R. at 65), which, at the time of the ALJ's decision, classified her as a "person closely approaching advanced age" under 20 C.F.R. §§

¹ 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 someone can perform light work, she also can perform sedentary work. *See* 20 C.F.R. §§ 404.1567(b), 416.967(b) (2013).

404.1563(d), 416.963(d). Carter has a college education and past work experience as a dental assistant and a waitress. (R. at 77-79, 254.) Carter testified that she last worked in 2007 and could no longer work as a dental assistant because her left arm was too uncoordinated to handle the instruments. (R. at 36.) Carter testified that, as a waitress, she would have to carry pans of food weighing from 15 to 50 pounds. (R. at 38.)

Carter testified that she has had problems with her left arm and back since being hit by a car in 2008. (R. at 39.) She said that she could lift items weighing up to 10 pounds with her right arm and items weighing up to three with her left arm. (R. at 44.) Carter stated that she could sit for only 15 to 20 minutes before her leg goes numb. (R. at 44.) Carter stated that she could stand for 20 minutes and walk supported for maybe 50 feet. (R. at 44-45.) Carter testified that she would take 12 to 16 extra strength Tylenol and three Tramadol tablets a day for pain. (R. at 39-40.) Carter testified that she also suffered a traumatic brain injury when she was hit by the car. (R. at 41-42.) Carter testified that her memory was real bad and she could not concentrate. (R. at 43.) Carter has a history of multiple cancers in the past, but she admitted that no one has told her that she currently suffers from cancer. (R. at 42-43.)

Carter testified that on a typical day she would be up a couple of hours and then have to lie down for a couple of hours. (R. at 45.) Carter said she could not vacuum, change light bulbs, cook, mop or sweep. (R. at 46.) Carter said she did her own grocery shopping, could dust the furniture, wash the dishes and do her laundry. (R. at 46.) Carter testified that she suffered from chest pain whenever she took a deep breath. (R. at 47.) She also stated that, since being hit by the car, she suffered from dizziness and blurred vision. (R. at 47.) Carter stated that she also suffered from bad headaches, which would require her to lie down for 30 to 45

minutes at a time. (R. at 48.) She testified that the Tramadol made her feel drowsy. (R. at 48.) Carter said that she often had nightmares about a car hitting her. (R. at 48.) Carter testified that she normally slept for only four hours a night and would often have to take a couple of naps during the day. (R. at 49.)

Vocational expert, Robert Jackson, testified at Carter's hearing. (R. at 49-53.) Jackson stated that Carter's past work as a dental assistant was light, skilled work and that her job as a waitress was light, semi-skilled work, with the exception of the job as buffet attendant, which was light and unskilled. (R. at 51.) The ALJ asked Jackson to consider a hypothetical individual of Carter's age, education and work history, who could occasionally lift and carry items weighing 20 pounds and frequently lift and carry items weighing 10 pounds, stand, walk or sit for six hours in an eight-hour workday with normal breaks, who was limited to only occasionally pushing, pulling or reaching overhead or at waist level with the left upper extremity, who had no postural limitations and who should avoid concentrated exposure to irritants, such as fumes, odors, dusts, gases and poorly ventilated areas and even moderate exposure to operational control of moving machinery and unprotected heights. (R. at 51.) Jackson testified that such an individual could not perform Carter's past work. (R. at 52.) Jackson also identified jobs that existed in significant numbers at the light, unskilled level that such an individual could perform, including jobs as a packer, a counter rental clerk and a usher, lobby attendant. (R. at 52.)

Jackson also was asked to assume the same individual, but who would be off task 20 to 25 percent of the workday due to chronic fatigue and pain. (R. at 52.) Jackson stated that there would be no jobs that such an individual could perform. (R. at 52.) Jackson testified that, if an employee would routinely miss two days a month, it would preclude gainful employment. (R. at 53.)

In rendering his decision, the ALJ reviewed records from Beverly Patterson, a family nurse practitioner with Dr. Scott Saffold, M.D.; Dr. William J. O'Connor, M.D.; Dr. James O. Merritt, IV, M.D.; Grand Strand Regional Medical Center; Palmetto Health Baptist Hospital; Smyth County Community Hospital; University of Virginia Health Services; Dr. Juan Morales, M.D.; Dr. William D. Powers, M.D.; Angela Berry, Psy.D., a licensed clinical psychologist; Dr. Jacinto Alvarado, M.D.; Dr. Bert Spetzler, M.D., a state agency physician; and Joseph Leizer, Ph.D., a state agency psychologist.

On October 5, 2006, Carter saw Beverly Patterson, a family nurse practitioner, complaining of bloody drainage from her ears. (R. at 309-10.) Patterson's examination of Carter's ears revealed no abnormalities. (R. at 309.) Patterson ordered audiometric testing. (R. at 310.) Carter saw Patterson again on October 16, 2006, for the same complaints. (R. at 311.) Other than the left ear canal skin being mildly inflamed, Patterson found no other abnormalities. (R. at 311.)

Carter was treated inpatient at Grand Strand Regional Medical Center from June 15-17, 2007, after being hit in the head and losing consciousness. (R. at 351-56.) It was noted that Carter had a contusion and abrasion in the left parietal scalp. (R. at 354.) At CT scan revealed no fracture and no intracranial pathology. (R. at 354.) Carter was diagnosed with a mild closed head injury. (R. at 354.)

Carter saw Dr. William J. O'Connor, M.D., on June 28, 2007. (R. at 330-32.) Carter complained of some dysuria, urgency and frequency for the past three days. (R. at 330.) She also complained of having memory loss, confusion and dizziness. (R. at 330.) Carter said that she would be walking when her legs would stop working and were "out of her control" and she would just have to stand and

wait several seconds for her legs to start working again. (R. at 330.) Carter claimed that she had suffered a head injury in a “mugging” on June 14, 2007, when she was hit on the head and had to be treated in the hospital for four days. (R. at 330-31.) Carter also complained of dizzy spells during which she would break out in a sweat, feel nauseous and experience her heart racing. (R. at 330.) Dr. O’Connor diagnosed a urinary tract infection and recommended an MRI of her brain. (R. at 331.)

On September 7, 2007, Carter saw Dr. O’Connor for a follow-up appointment for diabetes management. (R. at 328.) On this occasion, Carter denied experiencing any weakness, sweats, headaches, numbness, gait disturbances or vision changes. (R. at 329.) Dr. O’Connor noted that he thought Carter “may have been overdiagnosed regarding diabetes,” and he ordered bloodwork, including a fasting glucose tolerance test, to confirm the diagnosis. (R. at 329.)

On October 12, 2007, Carter again was seen at the Grand Strand Regional Medical Center emergency room complaining of being assaulted a week previously. (R. at 357.) Carter claimed she had been punched in the left eye and kicked behind the right lower leg. (R. at 357.) She complained of difficulty walking with a headache and drowsiness. (R. at 357.) Carter was in handcuffs on this occasion and accompanied by a police officer. (R. at 357.) Exam showed periorbital ecchymosis on the left side and tenderness over the lateral right knee area with some ecchymosis noted. (R. at 357.) X-rays showed a nondisplaced fracture of the right proximal fibula, and she was placed in a long-leg posterior splint, given crutches and told to follow up with orthopedics. (R. at 357.) A CT scan of her head showed no acute process. (R. at 357.)

On March 13, 2008, Carter saw Dr. O'Connor for complaints of a urinary tract infection and upper respiratory infection. (R. at 316-20.) Dr. O'Connor noted that Carter's examination was normal. (R. at 316.) Carter returned to see Dr. O'Connor on July 1, 2008, complaining of coughing up bright red blood for the past 24 hours. (R. at 320.) Dr. O'Connor prescribed prednisone and advised Carter to seek evaluation at an emergency room urgently. (R. at 322.)

On October 17, 2007, Carter saw Dr. James O. Merritt, IV, M.D., for evaluation of her right knee. (R. at 336.) Carter said that she had been kicked in the knee during an altercation. (R. at 336.) Carter was brought to the appointment by a police officer because she was being detained in prison at the time. (R. at 336.) X-rays revealed a proximal fibular fracture that was aligned anatomically. (R. at 336.) Dr. Merritt ordered weightbearing with crutches without a splint. (R. at 336.) When Carter returned to Dr. Merritt on November 14, 2007, x-rays revealed the fracture to be healing in an anatomic position with no evidence of displacement. (R. at 337.) Dr. Merritt stated that Carter should return only on an as-needed basis. (R. at 337.)

Carter was treated at Grand Strand Regional Medical Center on June 21, 2008, for injuries sustained in an assault. (R. at 338-41, 359-60, 385-86.) Carter stated that she was homeless and lived in the woods. (R. at 359, 385.) She stated that she had been assaulted the night before and was unconscious for a period of time after being struck in the head. (R. at 359, 385.) X-rays of Carter's cervical spine showed no evidence of acute fracture or dislocation, but did show some degenerative changes. (R. at 338.) X-rays of her right ankle showed a probable nondisplaced transverse fracture over the lateral malleolus with superficial soft tissue swelling. (R. at 339.) A CT scan of Carter's head showed no evidence of intracranial injury. (R. at 340.)

Carter saw Dr. Merritt again on June 27, 2008, regarding the recent injury to her ankle. (R. at 342.) Carter gave a history of injury to her ankle in an assault a few days earlier. (R. at 342.) Dr. Merritt noted tenderness over Carter's distal fibula with some moderate swelling. (R. at 342.) X-rays revealed the fibular fracture aligned anatomically with no evidence of significant displacement. (R. at 342.) Dr. Merritt ordered that Carter wear a Cam boot for four to six weeks and gradually increase her activities. (R. at 342.) On July 25, 2008, Dr. Merritt stated that Carter was doing well with no major problems. (R. at 343.) He noted normal alignment of her ankle, with a little stiffness and no significant swelling or problems. (R. at 343.) Dr. Merritt stated that Carter's leg was in a cast, and he stated that the cast could come off and Carter be allowed to continue to increase her activities. (R. at 343.)

Carter was treated inpatient at Grand Strand Regional Medical Center from September 14-18, 2008, for injuries she sustained when, as a pedestrian, she was struck by a car. (R. at 344-48, 361-80, 387-407.) It was noted that Carter was confused at first and unable to relay how she had been injured. (R. at 361.) Upon admission through the emergency room, Carter was diagnosed as suffering from a left frontal subdural hematoma, left humerus fracture, right type 1 tibial plateau fracture and a urinary tract infection. (R. at 346.) Her urine screen was positive for the use of marijuana. (R. at 344.) Carter was discharged as stable on September 18, 2008, with her broken arm in a sling and her broken leg immobilized with no weightbearing. (R. at 346.) It was recommended that she follow up with her orthopedic physician, Dr. Merritt. (R. at 346.)

Dr. Merritt saw Carter on September 24, 2008. (R. at 349.) Dr. Merritt noted that Carter was in prison at the time. (R. at 349.) Dr. Merritt noted that on physical exam, Carter's left arm was neurologically intact with humerus in good alignment.

(R. at 349.) Carter's knee was in good alignment, and her leg was neurologically intact with a little tenderness around the ankle. (R. at 349.) Dr. Merritt recommended to continue with no surgical treatment. (R. at 349.) Dr. Merritt saw Carter again on October 14, 2008, while she was still in custody. (R. at 410.) Dr. Merritt noted that Carter was neurologically intact, with her swelling going down in both extremities. (R. at 410.) X-rays showed both fractures lined up well. (R. at 410.) Dr. Merritt ordered continued conservative treatment with no weightbearing on her leg for another three weeks. (R. at 410.)

Carter was treated at Richland Community Healthcare Association on July 24, 2009, for burning upon urination. (R. at 456-57.) Carter was diagnosed with asthma, urinary tract infection and hypertension. (R. at 457.)

Carter was seen in the Palmetto Health Baptist Hospital Emergency Department on August 11, 2009, for complaints of left side/chest pain radiating into her back when breathing. (R. at 417-22, 426-31.) Carter was diagnosed with pleurisy, costochondritis, bronchitis and a nodule on the lower lobe of her right lung. (R. at 428.) Examination showed tenderness over the left lateral chest wall area. (R. at 427.) A CT scan of Carter's chest showed a suspicious right lower lobe nodule and a right adrenal adenoma. (R. at 427, 430.) Carter was told that the lung nodule could be cancer or could be an infectious/inflammatory process or scar tissue. (R. at 428.)

Carter was seen by Richland Community Healthcare Association for follow-up and a bronchoscopy was scheduled on Carter for September 29, 2009, for a biopsy of the lung mass. (R. at 252.) The bronchoscopy was performed at Palmetto Health Richland by Dr. Juan Morales, M.D., on September 29, 2009. (R. at 462.) Dr. Morales reported that the procedure revealed mild edema in the right

bronchial tree, and he performed washings and brush cytology. (R. at 462.) The pathology report was negative for malignancy. (R. at 464-65.) Dr. Morales saw Carter for follow up on September 30, 2009. (R. at 470-71.) Carter complained of right-sided chest pain beginning after the procedure. (R. at 470.) Dr. Morales noted that the bronchoscopy did not show any evidence of infection. (R. at 471.) Dr. Morales recommended a CT guided biopsy of the right lung nodule. (R. at 471.)

Carter was seen by Dr. Cynthia Brown, M.D., with the University of Virginia Health Services on November 17, 2009, for evaluation of a lung nodule. (R. at 511-14.) Carter complained of right-sided pleuritic chest pain of several months' origin that had grown progressively worse and was associated with a significant shortness of breath. (R. at 511.) Carter also complained of occasional blurred vision and double vision, which she related to a previous head trauma. (R. at 512.) Carter gave a history of a previous heart attack, "reverse heartbeat," uterine and ovarian cancer and tumors in her stomach and esophagus of unknown etiology. (R. at 512.) Carter said that she had difficulty with her memory. (R. at 512.)

Dr. Brown noted that, on examination, she observed a gross bony deformity in Carter's left arm that appeared to be a nonunion of her humerus. (R. at 513.) Dr. Brown also noted that it was unlikely that the lung nodule was the cause of Carter's complaints of chest pain, because it appeared to be of musculoskeletal origin because it was reproducible on examination. (R. at 514.) Dr. Brown recommended a CT scan. (R. at 514.) Dr. Brown also recommended pulmonary function testing because she suspected that Carter suffered from COPD. (R. at 514.)

A CT scan performed on November 17, 2009, showed the right lower lobe lung nodule. (R. at 516-17.) The scan also revealed an ill-defined nodule in the left lower lobe and a right-sided lipid rich adrenal adenoma (benign lesion). (R. at 517.)

On referral from Dr. Brown, Carter saw Dr. Benjamin D. Kozower, M.D., with UVA Health System on December 3, 2009. (R. at 527.) Dr. Kozower ordered a PET scan and biopsy of Carter's right lower lobe nodule. (R. at 527.) A CT-scan-guided biopsy was performed on the nodule on December 23, 2009. (R. at 543-46.) The pathology report, however, suggested that the samples taken might not have been of the nodule. (R. at 549-50.) A PET scan was performed on January 7, 2010, and did not show any malignancy. (R. at 551-52.) Dr. Kozower saw Carter again on January 7, 2010. (R. at 529.) Dr. Kozower noted that Carter's PET scan was negative, and a CT-scan-guided biopsy was nondiagnostic. (R. at 529.) Carter complained that her right-sided back pain had gotten worse, but Dr. Kozower stated that he did not think the pain was caused by the lung nodule. (R. at 529.) He also noted that the lesion had not changed significantly. (R. at 529.)

Carter saw Dr. William Powers, M.D., on December 28, 2009, for refills of her pain medications and an upper respiratory infection. (R. at 554-55.) Dr. Powers gave Carter a prescription for pain medication on this date. (R. at 554.) Carter returned to Dr. Powers on January 25, 2010, complaining that she had been out of pain medication for one month. (R. at 556.) On this occasion, Carter complained of constant abdominal pain, which Dr. Powers stated seemed to merge with her chest pain. (R. at 556.) Dr. Powers noted that Carter's right lung mass was regarded as benign and not the cause of her complaints of pain. (R. at 556.) Dr. Powers prescribed a 30-day supply of pain medication. (R. at 556.) A CT scan of Carter's abdomen performed on January 28, 2010, showed no new findings. (R. at 612-13.)

Carter returned to see Dr. Powers on February 22, 2010, complaining of a sinus infection and stating that she needed a refill of her pain medication. (R. at 558.) Carter complained of pain in the right mid back and right lateral abdomen. (R. at 558.) Carter said that the pain was on both sides of her back and went across her upper/mid abdomen. (R. at 558.) Dr. Powers noted that a CT scan of Carter's abdomen and pelvis showed sigmoid diverticuli, right adrenal adenoma of stable size and a small left renal cyst with no kidney stones. (R. at 558.) Dr. Powers decreased Carter's pain medication, stating that he could find no indication for continued use of narcotic pain medication. (R. at 559.)

Carter returned to see Dr. Powers on March 22, 2010, seeking a refill of her narcotic pain medication. (R. at 560-61.) Carter stated that she had been well since her last visit and denied any chest pain. (R. at 560.) Carter did complain of left shoulder pain which had worsened in recent weeks with pain radiating down her arm. (R. at 560.) Dr. Powers diagnosed benign hypertension, acute sinusitis, and joint pain in Carter's upper arm. (R. at 561.) He ordered a refill of her pain medication and also prescribed an anti-inflammatory. (R at 561.)

Carter was seen at the Smyth County Community Hospital emergency department on April 9, 2010, for complaints of headache, cough, chills, nausea and dizziness. (R. at 620-24.) Carter specifically denied any musculoskeletal pain. (R. at 620.) Carter was diagnosed with sinusitis and a sinus headache. (R. at 621.) A chest X-ray taken on April 9 revealed mild compression fracture deformities at the T6 and T8 level of unknown age. (R. at 631.) A CT scan of her head performed on April 10, 2010, was normal except for an "old insult lower left frontal lobe." (R. at 630.) Carter returned to see Dr. Powers on April 19, 2010. (R. at 590-91.) Carter told Dr. Powers that she had been seen in the emergency room of Smyth County Community Hospital on April 9 and told that she might have meningitis. (R. at

590.) Carter complained of pain of a 10 on a 10-point scale on her right side. (R. at 590.) Dr. Powers diagnosed acute sinusitis and spinal enthesopathy. (R. at 590.) Dr. Powers wrote refills of Carter's medications, including her narcotic pain medication. (R. at 590.)

Carter again saw Dr. Powers on May 20, 2010, seeking medication refills. (R. at 592-93.) Carter said that she had used more of her narcotic pain medication recently because of right side, left shoulder and neck pain. (R. at 592.) Carter said that she had been out of her pain medication for the past two weeks. (R. at 592.) Dr. Powers stated that Carter was difficult to examine because she "seem[ed] to hurt everywhere." (R. at 592.) Dr. Powers did state that Carter appeared well and comfortable. (R. at 592.) Nonetheless, Dr. Powers increased the frequency of Carter's pain medication. (R. at 592-93.) Dr. Powers ordered a CT scan of Carter's abdomen and pelvis, which was performed on May 21, 2010. (R. at 640, 641-42.) This CT scan revealed stable right adrenal nodule, slightly enlarged left renal cyst, no kidney stones and diverticula present but no pericolonic inflammation seen to suggest colitis or diverticulitis. (R. at 642.)

Dr. Powers saw Carter again on May 25, 2010. (R. at 596-97.) Dr. Powers noted that Carter complained of low back, neck and shoulder pain, which she rated as a 10 on a 10-point scale. (R. at 596.) Dr. Powers stated that Carter's complaints of pain seemed out of proportion to her behavior. (R. at 596.) Dr. Powers, again, noted that Carter appeared well and comfortable, disproportionate to her pain scale rating. (R. at 596.) Dr. Powers noted that the range of motion in Carter's neck was normal with no vertebral spine tenderness or trapezius tenderness. (R. at 596.) Dr. Powers did note a myofascial trigger point in the scapulae bilaterally. (R. at 596.) Dr. Powers administered a trigger point injection in this area, and Carter voiced

partial relief. (R. at 597.) Dr. Powers wrote refills for Carter's medication, including her narcotic pain medication. (R. at 597.)

State agency physician Dr. Bert Spetzler, M.D., completed a Residual Functional Capacity, ("RFC"), evaluation on Carter on June 14, 2010.² (R. at 75-77, 91-93.) According to Dr. Spetzler, Carter could occasionally lift and carry items weighing up to 20 pounds and frequently lift and carry items weighing up to 10 pounds. (R. at 75, 91.) Dr. Spetzler stated that Carter could stand and/or walk for a total of six hours and sit with normal breaks for a total of six hours in an eight-hour workday. (R. at 75, 91.) He stated that Carter could only occasionally push and/or pull with her left arm. (R. at 75-76, 91.) He stated that Carter could never climb ladders, ropes or scaffold and that reaching with her left arm in front, laterally or overhead was limited to only occasional. (R. at 76, 92.) Dr. Spetzler also stated that Carter should avoid concentrated exposure to fumes, odors, dusts, gases and poor ventilation and should avoid even moderate exposure to hazards such as machinery or heights. (R. at 77, 93.)

State agency psychologist Joseph Leizer, Ph.D., completed a Psychiatric Review Technique assessment for Carter on June 16, 2010. (R. at 73-74, 89-90.) Leizer stated that Carter suffered from an anxiety-related disorder that did not meet or equal the requirements of a listed impairment. (R. at 73, 89.) Leizer opined that any restrictions on Carter's activities of daily living were mild, and she suffered from mild difficulties in maintaining social functioning and maintaining concentration, persistence or pace. (R. at 74, 89-90.) He found that Carter suffered from no repeated episodes of decompensation of extended duration. (R. at 74, 90.)

² The only evidence of this contained in the Administrative Record is the summary of this RFC assessment found in the Disability Determination Explanation forms completed on reconsideration. (R. at 65-80, 81-96.)

Leizer stated that Carter did not appear to suffer from a severe mental impairment. (R. at 74, 90.)

Carter returned to see Dr. Powers on June 22, 2010. (R. at 598-99.) Carter stated that she needed a refill of her pain medication. (R. at 598.) Carter stated that she suffered from right lumbar pain coming to the front that went “right thru [her].” (R. at 598.) Carter stated that she was out of her pain medication and had been taking 16 Tylenol a day. (R. at 598.) Dr. Powers stated that Carter appeared “very comfortable.” (R. at 598.) Dr. Powers noted that “since there continues to be no medical indication for narcotic pain meds in the quantity used over the past month, will decrease quantity once again.” (R. at 598.) Carter returned to Dr. Powers on July 20, 2010, again complaining that she had run out of pain medication the previous day. (R. at 600-01.) Carter complained of upper back pain, lower thoracic, costal margin pain which came around as before. (R. at 600.) Dr. Powers ordered bloodwork, which was negative for the use of oxycodone despite an ongoing prescription containing oxycodone. (R. at 601, 604.) This same bloodwork tested positive for the use of opiates and hydromorphone. (R. at 604.)

Dr. Powers saw Carter again on October 22, 2010. (R. at 602-03.) Carter complained of burning and frequency in urination for the past two weeks; she also stated that she had run out of pain medication four days earlier. (R. at 602.) Dr. Powers noted that Carter had been getting oxycodone and hydrocodone for the past three months from Dr. McGarry, who fixed her shoulder in August, and had been using up to 160 doses in 30 days. (R. at 602.) Dr. Powers told Carter that he would not prescribe those for her. (R. at 602.) Dr. Powers noted that he was discontinuing Carter’s prescription for narcotic pain medication. (R. at 603.)

At the request of the state agency, Carter had a psychological evaluation performed by Angelia Berry, Psy.D., a licensed clinical psychologist, on May 18, 2010. (R. at 566-70.) Berry noted that Carter reported that she drove herself to Berry's Wytheville office from Marion. (R. at 566.) She noted that Carter's gait appeared normal. (R. at 566.) Berry stated that Carter alleged disability due to brain damage, post-traumatic stress disorder and a broken left arm. (R. at 566.) Carter gave a history of a cyst in her right lung and left kidney and a mass on her right kidney. (R. at 566.) Carter told Berry that she was mugged in 2007, suffering numerous injuries including traumatic brain injury and loss of consciousness for four days. (R. at 567.) Carter also said that she was struck by a car in September 2008 with loss of consciousness. (R. at 567.) She complained of memory loss as a result of these head injuries. (R. at 567.)

Carter stated that she suffered from high blood pressure, low blood sugar, hiatal hernia, severe headaches with her level of pain a 10 on a 10-point scale, asthma, allergies, chronic respiratory infections and a recent meningitis infection. (R. at 567.) Berry noted that medical records showed that Carter suffered no intracranial injury or evidence of trauma in June 2008, but did suffer intracranial injury in September of 2008. (R. at 567.)

Carter complained of sleep disturbance, fatigue, feeling hopeless, helpless and worthless, constant nervousness and tension, nightmares and flashbacks of being mugged and hit by the car. (R. at 567.) She denied experiencing frequent sadness or crying, but she said that, if she was in parking lots or saw African-American males, she would shake, sweat and experience intense fear. (R. at 567.) Carter denied manic or hypomanic episodes, hallucinations, panic or suicidal/homicidal ideation, intent or plan. (R. at 567.) She denied any history of substance abuse. (R. at 567.) Carter reported that she had been arrested several

times for “loitering, trespassing and ‘refusing to be a narcotics informant.’” (R. at 567.)

Carter stated that she had obtained her GED and associate’s degree and was a certified dental assistant. (R. at 567.) Carter said that she had worked in retail sales and as a waitress and a dental assistant. (R. at 567.) She said that she last worked as a day laborer in 2008 and quit working because she could not remember work tasks. (R. at 567.) Carter stated that she needed assistance with tasks that required her to raise her arms and reported significant pain if she raised her arms. (R. at 568.) Carter stated that she could sit for an hour at a time before she had to change positions. (R. at 568.)

Berry found that Carter was oriented to person, place, time and situation. (R. at 568.) Her speech was of normal volume and speed, and her eye contact was good. (R. at 568.) Carter’s thought content was logical and coherent. (R. at 568.) Motor activity appeared normal. (R. at 568.) Carter’s short-term and long-term memory was grossly intact. (R. at 568.) Working memory screening revealed no impairment. (R. at 568.) Carter was administered the Wechsler Adult Intelligence Scale – Fourth Edition, (“WAIS-IV”), on which she obtained a full-scale IQ score of 88, a verbal IQ score of 81 and a performance IQ score of 88, which placed Carter in the low average range of intellectual functioning. (R. at 568-69.) Carter was administered the Wechsler Memory Scale – Third Edition, (“WMS-III”), on which she scored in the average to high average range in all memory areas assessed, which indicated no significant deficits in memory functioning. (R. at 569.)

Berry diagnosed Carter with post-traumatic stress disorder. (R. at 570.) According to Berry, Carter denied symptoms consistent with clinically significant

levels of depression, panic, mania or psychosis. (R. at 570.) Berry stated that cognitive testing showed no significant problems with memory functioning and an intelligence level in the upper limits of the low average range. (R. at 570.) Berry placed Carter's then-current Global Assessment of Functioning, ("GAF"),³ score at 67.⁴ (R. at 570.) She also stated that Carter was capable of managing her own finances. (R. at 570.) Berry opined that Carter's comprehension was adequate and that she was capable of understanding simple, detailed and complex directions. (R. at 570.) She stated that Carter's memory and decision-making skills were not impaired and that her ability to interact with others was adequate. (R. at 570.) Berry stated that Carter could cope effectively with daily stressors, although she might experience lapses in coping ability if she should suffer flashbacks of past traumas, but any such impairment would be minimal. (R. at 570.)

Carter had a CT scan of her abdomen, and pelvis with and without contrast, performed at Smyth County Community Hospital on May 21, 2010. (R. at 572-73.) The report of this imaging stated that it showed the right adrenal lesion as stable and a left renal cyst slightly enlarged in size. (R. at 573.) Diverticula were present, but no evidence of acute diverticulitis was seen. (R. at 573.) A CT scan of Carter's lungs performed on July 15, 2010, showed that the right lung nodule was unchanged. (R. at 583-84.) The CT scan report also noted evidence of emphysema, coronary artery calcifications and an unchanged right adrenal adenoma. (R. at 584.) Carter also saw Dr. Kozower again on July 15, 2010, who noted that the right lung nodule had become less discreet and had not increased in size. (R. at 586.)

³ 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).

⁴ A GAF score of 61-70 indicates "[s]ome mild symptoms ... OR some difficulty in social, occupational, or school functioning ... but generally functioning pretty well" DSM-IV at 32.

On August 17, 2010, Dr. Timothy McGarry, M.D., performed an open reduction and internal fixation with revision of nonunion with iliac crest bone grafting of Carter's left humerus. (R. at 731-32.) Carter apparently received some physical therapy at Smyth County Community Hospital after her surgery. (R. at 648-66.) Carter complained of shoulder pain and stiffness, but the therapy notes are difficult to decipher and it appears she only attended a few sessions.

Carter returned to Dr. Powers for follow up on January 31, 2011. (R. at 667-68.) Carter reported being well since her last visit. (R. at 667.) Carter did complain of right upper quadrant abdominal pain. (R. at 667.) Carter returned on March 17, 2011, complaining of cough, fever, head and chest congestion, left ear pain and diffuse muscle aches. (R. at 669.) Dr. Powers diagnosed an acute upper respiratory infection. (R. at 669.)

A CT scan of Carter's head performed on April 20, 2011, showed an "old insult inferior left frontal lobe." (R. at 671-72.) On April 30, 2011, Carter sought treatment at the Smyth County Community Hospital emergency department for shortness of breath and cough. (R. at 676-77.) Carter was diagnosed with bronchitis and COPD. (R. at 677.) A chest X-ray taken that day showed no acute cardiopulmonary disease. (R. at 682.)

Carter saw Dr. Powers on May 4, 2011, for follow up. (R. at 703.) Dr. Powers diagnosed acute bronchitis and advised Carter to stop smoking. (R. at 703.)

Carter began treating with Dr. Jacinto Alvarado, M.D., on May 18, 2011. (R. at 701-02.) Carter complained of shortness of breath, headache, vomiting and diarrhea for the past five to six days and a rash. (R. at 701.) Dr. Alvarado advised Carter to quit smoking and stated that he gave her something for her nerves. (R. at

701.) The note reflects that Dr. Alvarado prescribed diazepam with a tapered dose to finish its use in four weeks. (R. at 702.) Carter followed up with Dr. Alvarado on May 25, 2011. (R. at 697-98.) Dr. Alvarado diagnosed acute bronchitis and ordered a chest x-ray. (R. at 697-98.) A chest x-ray taken that date showed no radiographic evidence of pneumonia or acute cardiopulmonary abnormality. (R. at 699.) Carter saw Dr. Alvarado on June 8, 2011, for a yeast infection. (R. at 695-96.)

Carter saw Dr. Mitchell Rosner, M.D., of the UVA Health System Kidney Center Clinic, on July 12, 2011, for evaluation of renal cysts seen on a CT scan. (R. at 691-94.) Carter reported a history of right-sided pleuritic chest pain that had gotten progressively worse with significant shortness of breath. (R. at 691.) Dr. Rosner reported that a CT scan taken that day showed a left renal cyst, a benign adrenal adenoma and an L3 compression fracture. (R. at 691-92, 711-14.) Dr. Rosner said there was no evidence of polycystic kidney disease. (R. at 694.)

Carter also saw Dr. Kozower on July 12, 2011, regarding her lung nodule. (R. at 716-17.) Dr. Kozower noted that Carter had no surgical lesion, and he recommended that she stop smoking. (R. at 717.)

Carter saw Dr. Alvarado on September 8, 2011, for complaints of an earache, cough and congestion. (R. at 689-90.) Dr. Alvarado diagnosed acute bronchitis. (R. at 690.)

Carter saw Steven Chapman, F.N.P., on September 22, 2011, complaining of head, chest, kidney and lower abdominal pain. (R. at 687-88.) Carter reported diffuse tenderness to palpation of her abdomen. (R. at 687.) Chapman diagnosed a

urinary tract infection. (R. at 687.) Carter was seen by Chapman again on November 21, 2011, complaining of dizziness and vomiting. (R. at 684-85.)

A PET scan was performed on Carter on December 2, 2011, at Johnston Memorial Hospital. (R. at 721-22.) Other than the right lung lower lobe nodule, the PET scan was normal. (R. at 721-22.)

Carter has submitted several medical records to the court that were not before the ALJ or the Appeals Council. One such report is from Dr. Emory Robinette, M.D., and documents pulmonary function testing administered on July 11, 2013. (Docket Item No. 8 at 2.) Dr. Robinette stated that the findings showed moderate obstructive lung disease with evidence of reduction in diffusion capacity. Carter also has submitted a portion of the radiology report from a July 12, 2011, abdominal CT scan. (Docket Item No. 14-1 at 3.) This report confirms Dr. Rosner's summary of its results -- right lower lobe lung nodule, a left renal cyst, a benign adrenal adenoma and an L3 compression fracture. This report, again, recommended follow up of the lung nodule to ensure that it was not cancerous.

III. Analysis

The Commissioner uses a five-step process in evaluating DIB and SSI claims. *See* 20 C.F.R. §§ 404.1520, 416.920 (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, 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) (2013).

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 2011 & West 2012); *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).

In her brief, Carter argues that the ALJ's finding that she was not disabled is not supported by substantial evidence. (Docket Item No. 14), ("Plaintiff's Brief"), at 1.) Carter insists that she is disabled because she suffers from lung cancer. Carter asserts that she, now, has been awarded benefits effective back to March 2012. She argues that her condition beginning in 2009 was the same as in March 2012. The Commissioner asserts that substantial evidence supports the decision denying benefits.

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 her decision is supported by substantial evidence. *See Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990). 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 his findings and his rationale in crediting evidence. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997).

Based on my review of the record, I find that substantial evidence supports the finding that Carter was not disabled during the period of time relevant to these claims. On the applications at issue in this case, Carter alleged disability as of August 5, 2009. (R. at 66, 179, 234.) The ALJ issued the decision denying Carter's claims on February 6, 2012. (R. at 13-22.) Therefore, the relevant period of time is from August 5, 2009, through February 6, 2012.⁵

The ALJ found that, during this relevant period, Carter suffered from a severe combination of impairments, namely hypertension, COPD, right adrenal nodule, renal cyst, benign right lung mass, status-post fracture of the left upper extremity, compression deformity of the thoracic and lumbar spine and degenerative changes of the cervical spine. (R. at 15-18.) I find that substantial evidence exists in the record to support this finding. Despite Carter's insistence to the contrary, there is no evidence contained in this record to support a finding that she suffers from lung cancer. In fact, the evidence of record shows that she has a benign right lower lobe nodule, which has remained constant in size since its discovery in 2009. None of Carter's physicians have opined that this nodule has caused any of Carter's pain or other symptoms. Furthermore, psychologists Berry's and Leizer's reports support the ALJ's finding that Carter does not suffer from a severe mental impairment.

⁵ According to Carter, she filed a subsequent application for SSI, which was approved effective March 12, 2010.

I also find that substantial evidence supports the ALJ's residual functional capacity finding. The ALJ found that Carter had the residual functional capacity to perform light work, with only occasional pushing, pulling and reaching with the left upper extremity and that did not require her to climb ladders, ropes or scaffolds or work around concentrated exposure to irritants such as fumes, odors, dust, gases and poorly ventilated areas or even moderate exposure to operational control of hazardous machinery or unprotected heights. (R. at 18.) The only medical opinion contained in the record regarding Carter's residual functional capacity is Dr. Spetzler's, which is identical to the ALJ's findings. (R. at 75-77, 91-93.) It is also important to note that, other than during brief periods when Carter was restricted from weightbearing on her broken leg, none of Carter's treating physicians restricted her physical or mental activities in any way.

I further find that the testimony of the vocational expert, Robert Jackson, supports the ALJ's finding that a significant number of jobs existed in the national economy that Carter could perform. (R. at 21-22.) Based on the above, I find that substantial evidence exists in the record to support the ALJ's finding that Carter was not disabled.

Insofar as Carter's brief could be interpreted as requesting a remand of this case for consideration of the additional evidence from Dr. Robinette, I note that this pulmonary function testing was done on July 11, 2013, more than a year after the ALJ's decision denying benefits. Dr. Robinette's report, therefore, is not pertinent to Carter's condition during the relevant time period.

PROPOSED FINDINGS OF FACT

As supplemented by the above summary and analysis, the undersigned now

submits the following formal findings, conclusions and recommendations:

1. Substantial evidence exists to support the Commissioner's finding regarding Carter's severe impairments;
2. Substantial evidence exists to support the Commissioner's finding regarding Carter's residual functional capacity;
3. Substantial evidence exists to support the Commissioner's finding that other jobs were available that Carter could perform; and
4. Substantial evidence exists to support the Commissioner's finding that Carter was not disabled under the Act and was not entitled to DIB or SSI benefits.

RECOMMENDED DISPOSITION

The undersigned recommends that the court grant the Commissioner's motion for summary judgment and affirm the Commissioner's decision denying benefits.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C.A. § 636(b)(1)(C) (West 2006 & Supp. 2014):

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: July 25, 2014.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE