

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

<b>HOWARD EDWARD HORN,</b>	)	
Plaintiff	)	
v.	)	Civil Action No. 1:14cv00075
	)	<b><u>REPORT AND</u></b>
	)	<b><u>RECOMMENDATION</u></b>
<b>CAROLYN W. COLVIN,</b>	)	
Acting Commissioner of	)	
Social Security,	)	By: PAMELA MEADE SARGENT
Defendant	)	United States Magistrate Judge

*I. Background and Standard of Review*

Plaintiff, Howard Edward Horn, (“Horn”), filed this action challenging the final decision of the Commissioner of Social Security, (“Commissioner”), denying his 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 upon transfer by consent of the parties pursuant to 28 U.S.C. § 636(c)(1).

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 Horn protectively filed his applications for SSI and DIB on November 11, 2010, alleging disability as of August 27, 2010, due to back and leg pain, arm pain and numbness, low intelligence quotient, (“IQ”), depression, anxiety and spinal stenosis with neuropathy. (Record, (“R.”), at 301-04, 307-13, 328, 332.) The claims were denied initially and upon reconsideration. (R. at 185-87, 192-94, 198-201, 203-08, 210-12.) Horn then requested a hearing before an administrative law judge, (“ALJ”). (R. at 213.) A video hearing was held on January 10, 2013, at which Horn was represented by Jennifer Morgan, a paralegal, (“Morgan”). (R. at 55-99.) A supplemental hearing was held on July 16, 2013, at which Horn was represented by Morgan. (R. at 43-54.)

By decision dated August 6, 2013, the ALJ denied Horn’s claims.<sup>1</sup> (R. at 19-35.) The ALJ found that Horn met the disability insured status requirements of the Act for DIB purposes through September 30, 2012.<sup>2</sup> (R. at 21.) The ALJ found that Horn had not engaged in substantial gainful activity since August 27, 2010, the alleged onset date. (R. at 22.) The ALJ found that the medical evidence established that Horn had severe impairments, namely obesity, degenerative disc disease of the lumbar and cervical spine, history of peripheral neuropathy, major depressive

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<sup>1</sup> Horn previously filed applications for SSI and DIB that ultimately resulted in an unfavorable decision on August 26, 2010. (R. at 103-15.) The ALJ’s decision was affirmed by the Appeals Council on May 1, 2012. (R. at 19.) Horn did not appeal the Appeals Council’s decision; thus, this court will review the record for the dates August 27, 2010, Horn’s alleged onset date of disability through August 6, 2013, the date of the ALJ’s decision.

<sup>2</sup> To be eligible for DIB benefits, Horn must show he became disabled before September 30, 2012.

disorder, generalized anxiety disorder and borderline intellectual functioning, but the ALJ found that Horn 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 22.) The ALJ found that Horn had the residual functional capacity to perform simple, easy-to-learn, unskilled, light work<sup>3</sup> that did not require good reading or math skills, that did not require high production quotas or strict time demands for production and that required no more than occasional interaction with the public and co-workers. (R. at 24.) The ALJ found that Horn was unable to perform any of his past relevant work. (R. at 34.) Based on Horn's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ found that a significant number of jobs existed that Horn could perform, including jobs as a cafeteria attendant, a mail clerk and a sewing machine operator. (R. at 34-35.) Thus, the ALJ concluded that Horn was not under a disability as defined by the Act and was not eligible for DIB or SSI benefits. (R. at 35.) *See* 20 C.F.R. §§ 404.1520(g), 416.920(g) (2015).

After the ALJ issued his decision, Horn pursued his administrative appeals, (R. at 14), but the Appeals Council denied his request for review. (R. at 1-5.) Horn 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 (2015). This case is before this court on Horn's motion for summary judgment filed June 18, 2015, and the Commissioner's motion for summary judgment filed September 18, 2015.

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<sup>3</sup> 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, he also can perform sedentary work. *See* 20 C.F.R. §§ 404.1567(b), 416.967(b) (2015).

## *II. Facts*<sup>4</sup>

Horn was born in 1965, (R. at 60, 301, 307), which, at the time of the ALJ's decision, classified him as a "younger person" under 20 C.F.R. §§ 404.1563(c), 416.963(c). Horn has an eighth grade<sup>5</sup> education and was enrolled in special education services. (R. at 62, 407, 410.) He has past work experience as a cabinet assembler, a farm hand and a stone mason helper. (R. at 63, 334.) Horn testified that he had difficulty reading and writing. (R. at 63.) He stated that he was fired from his job as a cabinet assembler because he did not get along with the human resource manager. (R. at 65.) Horn stated that he was on medication for depression and anxiety and that it helped; however, he stated that he continued to feel bad and nervous. (R. at 77, 80-81.) He stated that he saw a psychiatrist monthly. (R. at 78.)

Vocational expert, Barbara Byers, testified at Horn's January 10, 2013, hearing. (R. at 90-96.) Byers stated that Horn's past work as a farm worker was heavy,<sup>6</sup> semi-skilled work, that his job as a cabinet builder was medium,<sup>7</sup> skilled work, his job as a stone mason was heavy and skilled, and his job as a stone mason helper was heavy, semi-skilled work. (R. at 925.) The ALJ asked Byers to consider

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<sup>4</sup> Horn does not challenge the ALJ's findings with respect to his alleged physical impairments. Therefore, the discussion of the medical evidence will be limited to those records pertaining to Horn's mental health.

<sup>5</sup> Horn testified that he tried to obtain a general equivalency development, ("GED"), diploma, but failed the test. (R. at 74.)

<sup>6</sup> 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, he also can do sedentary, light and medium work. *See* 20 C.F.R. §§ 404.1567(d), 416.967(d) (2015).

<sup>7</sup> 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 sedentary and light work. *See* 20 C.F.R. §§ 404.1567(c), 416.967(c) (2015).

a hypothetical individual of Horn's age, education and work experience, who could perform simple, easy-to-learn, unskilled, nonstressful, light work and who could only occasionally interact with the public and co-workers. (R. at 92-93.) Byers testified that such an individual could not perform any of Horn's past work. (R. at 93.) Byers identified jobs that existed in significant numbers at the light, unskilled level that such an individual could perform, including jobs as a cafeteria attendant, a mail clerk and an agricultural produce sorter. (R. at 93-94.) Byers stated that, should the individual have limited reading skills and math skills, the job of mail clerk would be eliminated. (R. at 94.) She stated that, should the individual have limited reading skills and be limited to light, unskilled work, he could perform the job as a sewing machine operator. (R. at 94.) Byers stated that, there would be no jobs available should the individual have marked limitations resulting in an unsatisfactory ability to maintain activities within a schedule, to maintain regular attendance and to be punctual within customary tolerances. (R. at 95.) She also stated that there would be no jobs available that the individual could perform should he be absent from work more than two days a month. (R. at 96.)

Mark Komen, another vocational expert, testified at Horn's supplemental hearing. (R. at 49-51.) Komen stated that all full-time competitive employment would be eliminated should an individual have an unsatisfactory ability to perform activities within a schedule, to be regular in attendance, to be punctual within customary tolerances, to get along with co-workers and peers without distracting them or exhibiting behavioral extremes, to maintain socially appropriate behavior, to adhere to basic standards of neatness and cleanliness and to respond appropriately to changes in a routine work setting. (R. at 50-51.)

In rendering his decision, the ALJ reviewed records from Buchanan County Public Schools; Howard S. Leizer, Ph.D., a state agency psychologist; Joseph Leizer, Ph.D., a state agency psychologist; C-Health of Lebanon; Clearview Russell County Medical Center; Mountain States Medical Group Behavioral Health; Healing Waters Counseling Center, LLC; Elizabeth Jennings, M.A., a licensed psychologist; Thompson Family Health Center; and B. Wayne Lanthorn, Ph.D., a licensed clinical psychologist.

School records from Buchanan County Public Schools show that Horn was retained once in the first grade and twice in the eighth grade. (R. at 407, 409.) He also was placed in special education for most of his schooling. (R. at 409-10.) When he was eight years old, Horn scored an 81 on the Kuhlmann-Anderson IQ test. (R. at 408.) While in the third, fourth and fifth grades, Horn was ranked “average” to “above average” in all subjects. (R. at 412.) While in the sixth grade, Horn ranked “average” in reading and “above average” in math, while ranking “average” in all other subjects. (R. at 412.) In April 1982, at the age of 17, Horn failed all of the Virginia graduation competency tests administered to him. (R. 416-17.) It appears Horn quit school at age 17 without completing the eighth grade. (R. at 415, 418.)

On October 13, 2008, Elizabeth Jennings, M.A., a licensed psychologist, evaluated Horn. (R. at 691-95.) The Wechsler Adult Intelligence Scale - Third Edition, (“WAIS-III”), was administered, and Horn obtained a performance IQ score of 67, a verbal IQ score of 76 and a full-scale IQ score of 69. (R. at 693-94.) She noted a significant difference between the verbal and performance divisions of the WAIS-III, opining that Horn’s verbal IQ score of 76 was most commensurate with his reports of adaptive functioning. (R. at 694.) Although Horn reported a

history of special education placement as a young child, Jennings noted that he had obtained a driver's license and had an extensive work history. (R. at 694.) Jennings noted that the overall performance on the WAIS-III revealed intellectual functioning to be within the mild to borderline range of mental retardation. (R. at 694.) Jennings diagnosed generalized anxiety disorder; depressive disorder, not otherwise specified; and borderline intellectual functioning. (R. at 694.) She assessed Horn's then-current Global Assessment of Functioning, ("GAF"),<sup>8</sup> score at 55.<sup>9</sup> (R. at 694.) Jennings opined that Horn did not appear capable of performing detailed or complex tasks. (R. at 695.) She opined that, with more simplified training and ongoing supervision, performance of simpler, repetitive tasks seemed likely. (R. at 695.) Jennings found that Horn's chronic pain and depressive symptoms would make it difficult for him to interact with co-workers, supervisors and the public or to navigate stressors typically encountered in gainful employment. (R. at 695.)

On September 27, 2010, Angela N. Harrison, F.N.P., a family nurse practitioner with C-Health of Lebanon, ("C-Health"), completed a medical evaluation for the Department of Social Services in support of Horn's application for temporary assistance for needy families, ("TANF"). (R. at 440-41.) She reported that Horn was unable to participate in employment and training activities in any capacity due to mental health limitations, which included depression and anxiety resulting from a physical condition that was expected to last 12 months. (R. at 440-41.) She also noted that Horn had a limited education, but that his condition

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<sup>8</sup> 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).

<sup>9</sup> A GAF score of 51-60 indicates that the individual has "[m]oderate symptoms ... OR moderate difficulty in social, occupational, or school functioning...." DSM-IV at 32.

did not hinder his ability to care for his children. (R. at 441.) On October 22, 2010, Dr. Lori Nelson-Madison, M.D., a physician with C-Health, saw Horn for his complaints of back pain. (R. at 447.) Horn did not complain of anxiety, depression or suicidal thoughts. (R. at 447.) Dr. Nelson-Madison noted that Horn's mood and affect were depressed, and he had poor insight and judgment. (R. at 448.) She diagnosed moderate depression. (R. at 448.) Dr. Nelson-Madison referred Horn to a psychiatrist for evaluation and counseling for his depression. (R. at 449.) In December 2010, Richard Carroll, Ph.D., a psychologist with C-Health, saw Horn, who reported being "severely down and depressed," which he attributed, in part, to his physical health. (R. at 445.) Carroll diagnosed major depression, single episode, severe. (R. at 445.) Carroll assessed Horn's then-current GAF score at 51. (R. at 445.) On December 31, 2010, Dr. Nelson-Madison saw Horn for complaints of back pain and worsening depression. (R. at 570.) He denied suicidal ideation. (R. at 570.) Dr. Nelson-Madison reported that Horn was alert and oriented; his mood and affect were depressed; and he had poor insight and judgment. (R. at 571.)

On January 11, 2011, Horn reported that he felt "somewhat better." (R. at 569.) Horn's wife and son reported that they had seen progress since the previous month. (R. at 569.) Horn reported that his physical limitations "sometimes" made him depressed. (R. at 569.) Carroll noted that Horn was casually dressed; he had adequate hygiene; his affect was blunted; his mood relaxed; he had psychomotor retardation; he reported no suicidal ideations; he had slightly improved insight; and he had poverty of thought. (R. at 569.) On February 8, 2011, Carroll noted that Horn had a constricted affect; he had a relaxed mood; and he had improved insight. (R. at 566.) On February 18, 2011, Horn saw Dr. Nelson-Madison for complaints of back pain and worsening depression. (R. at 563.) Dr. Nelson-Madison noted that

Horn was alert and oriented; his mood and affect were depressed; and he had poor insight and judgment. (R. at 564.)

On April 14, 2011, Carroll noted that Horn was casually dressed; he had diminished hygiene; he had a blunted affect; he had psychomotor retardation with the exception of some shifting in his seat to be comfortable from the pain; he had no suicidal ideations; he had limited social interactions; he had limited insight regarding the nature of his current difficulties; and he had impaired coping skills. (R. at 562.)

That same day, Carroll completed a mental assessment, indicating that Horn had mild limitations in his ability to understand and remember very short and simple instructions. (R. at 640-42.) He opined that Horn had moderate limitations in his ability to remember locations and work-like procedures; to carry out very short and simple instructions; to carry out detailed instructions; to work in coordination with or in proximity to others without being distracted by them; to make simple work-related decisions; to ask simple questions or request assistance; to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness; to travel in unfamiliar places or use public transportation; and to set realistic goals or make plans independently of others. (R. at 640-42.) Carroll opined that Horn had a severely limited, but not precluded, ability to maintain attention and concentration for extended periods; to sustain an ordinary routine without special supervision; 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 be aware of normal hazards and take appropriate precautions. (R. at 641-42.)

On April 26, 2011, Carroll noted that Horn had poor hygiene; a slightly anxious mood; slightly improved insight; and limited social interactions by choice. (R. at 561.) On May 26, 2011, Horn reported that he continued to experience severe pain, which caused him to be irritable and moody. (R. at 560.) Carroll noted that Horn was casually dressed; he had improved interaction and eye contact; his hygiene was adequate; he had limited insight and social interaction; his affect was constricted; he had limited intellectual capacity; and his decision-making ability was impaired. (R. at 560.) Carroll diagnosed moderate depression. (R. at 560.) On June 10, 2011, Harrison saw Horn for complaints of back pain. (R. at 558.) Horn voiced no complaints of anxiety, depression or suicidal thoughts. (R. at 558.) On September 13, 2011, Carroll noted that Horn had a constricted affect and relaxed mood; he had psychomotor retardation; his social skills and socialization were limited; he made good eye contact; he had low self-esteem; and his judgment had slightly improved. (R. at 622.) On September 26, 2011, Horn did not report anxiety, depression or suicidal thoughts. (R. at 619.) Harrison noted that Horn was alert and oriented, and he had a depressed mood and affect and poor insight and judgment. (R. at 620.)

On January 16, 2012, Dr. Nelson-Madison noted that Horn was alert and oriented, and he had an appropriate affect and demeanor and good insight and judgment. (R. at 616-17.) On June 26, 2012, Harrison noted that Horn was alert and oriented, and he had an appropriate affect and demeanor and fair insight and judgment. (R. at 613-14.)

On February 5, 2011, Howard S. Leizer, Ph.D., a state agency psychologist, completed a Psychiatric Review Technique form, ("PRTF"), indicating that Horn suffered from an affective disorder. (R. at 123-24.) Leizer opined that Horn had

mild restriction on his activities of daily living, moderate limitations in maintaining social functioning and in maintaining concentration, persistence or pace and had experienced no repeated episodes of decompensation of extended duration. (R. at 124.) Leizer stated that Horn's impairment did not meet the listed impairment for an affective disorder. (R. at 124.) Despite Horn's allegation that he was disabled, in part, for low intelligence, Leizer did not consider whether Horn's condition met or equaled the listed impairment for intellectual disability, found at 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.05.

Leizer completed a mental assessment, indicating that Horn was not significantly limited in his ability to remember locations and work-like procedures; to understand, remember and carry out very short and simple instructions; to sustain an ordinary routine without special supervision; to work in coordination with or in proximity to others without being distracted by them; to make simple work-related decisions; to ask simple questions or request assistance; to accept instructions and respond appropriately to criticism from supervisors; to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness; and to be aware of normal hazards and take appropriate precautions. (R. at 126-28.) He opined that Horn had moderate limitations in his ability to understand, remember and carry out detailed instructions; to maintain attention and concentration for extended periods; to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances; to 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 get along with co-workers or peers without distracting them or exhibiting behavioral extremes; and to respond appropriately to changes in the

work setting. (R. at 127-28.) Leizer opined that Horn could engage in repetitive, competitive, unskilled, nonstressful tasks at substantial gainful activity levels. (R. at 128.)

On March 8, 2011, Dr. Henrike Brinker, M.D., a physician with Mountain States Medical Group Behavioral Health, saw Horn for complaints of depression and suicidal ideation with a possible plan to shoot himself. (R. at 580-82.) Horn was unable to contract for safety, and, therefore, was admitted to Clearview Russell County Medical Center, (“Clearview”). (R. at 522-23, 531-45, 580, 582.) At the time of admission, Dr. Brinker assessed Horn’s GAF score at 35.<sup>10</sup> (R. at 582.) While at Clearview, Horn’s medications were adjusted, his mood improved, and he denied suicidal or homicidal ideation. (R. at 522.) Upon the time of discharge, Horn was alert and oriented; he was cooperative; his speech had a normal rate, volume and tone; his mood was good; he had a full affect; his thought process was goal-directed and linear and showed no delusions, suicidal or homicidal ideations; his perception was free of visual or auditory hallucinations; and his insight and judgment were fair. (R. at 523.) Horn denied depression and anxiety and stated that his medications were “working.” (R. at 532-33.) He was discharged on March 10, 2011, with a diagnosis of major depressive disorder, single episode, severe, without psychotic features. (R. at 523.) Dr. Brinker assessed Horn’s GAF score at 60 at time of discharge. (R. at 523.)

On June 1, 2011, Horn reported that he was “doing good.” (R. at 721.) Dr. Brinker reported that Horn’s behavior was cooperative; his mood was “ok;” his affect was full; his thought processes were goal-directed; his thought content

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<sup>10</sup> A GAF score of 31-40 indicates that the individual has “[s]ome impairment in reality testing or communication ... OR major impairment in several areas, such as work or school, family relations, judgment, thinking or mood ....” DSM-IV at 32.

showed no signs of delusions, suicidal or homicidal ideations; and he had fair insight and judgment. (R. at 721.) On July 19, 2011, Dr. Brinker reported that Horn's behavior was cooperative; his mood was depressed; his affect was restricted; his thought processes were goal-directed; his thought content showed no signs of delusions, suicidal or homicidal ideations; and he had fair insight and judgment. (R. at 584.) On September 14, 2011, Dr. Brinker described Horn's mood as "worn out;" he had a full affect; his thought processes were goal-directed; his thought content showed no signs of delusions, suicidal or homicidal ideations; and his insight and judgment were fair. (R. at 583.) On October 10, 2011, Horn reported that he continued to feel anxious around people, but, overall, his symptoms were stable. (R. at 604.) Dr. Brinker reported that Horn's behavior was cooperative; his mood was anxious; his affect was restricted; this thought processes were goal-directed; his thought content showed no signs of delusions, suicidal or homicidal ideations; and he had fair insight and judgment. (R. at 604.) Dr. Brinker diagnosed major depressive disorder, recurrent, mild; and generalized anxiety disorder. (R. at 604.) On December 19, 2011, Horn reported that he felt sad at times. (R. at 763.) Dr. Brinker reported that Horn's behavior was cooperative; his mood was anxious; his affect was restricted; his thought processes were goal-directed; his thought content showed no signs of delusions, suicidal or homicidal ideations; and he had fair insight and judgment. (R. at 763.)

On February 21, 2012, Horn reported that he was "doing good." (R. at 760.) Dr. Brinker reported that Horn's behavior was cooperative; his mood was "ok;" his affect was full; his thought processes were goal-directed; his thought content showed no signs of delusions, suicidal or homicidal ideations; and he had fair insight and judgment. (R. at 760.) On March 20, 2012, Horn reported that he was "doing good." (R. at 758.) Dr. Brinker reported that Horn's behavior was

cooperative; his mood was good; his affect was full; his thought processes were goal-directed; his thought content showed no signs of delusions, suicidal or homicidal ideations; and he had fair insight and judgment. (R. at 758.) On May 30, 2012, Horn continued to complain of experiencing anxiety when in crowds. (R. at 755.) Dr. Brinker reported that Horn's behavior was cooperative; his mood was anxious; his affect was full; his thought processes were goal-directed; his thought content showed no signs of delusions, suicidal or homicidal ideations; and he had fair insight and judgment. (R. at 755.) On July 18, 2012, Dr. Brinker reported that Horn's behavior was cooperative; his mood was "ok;" his affect was full; his thought processes were goal-directed; his thought content showed no signs of delusions, suicidal or homicidal ideations; and he had fair insight and judgment. (R. at 750.)

On November 27, 2012, Horn reported that he was more depressed and tired. (R. at 737.) Dr. Brinker reported that Horn's behavior was cooperative; his mood was depressed; his affect was restricted; his thought processes were goal-directed; his thought content showed no signs of delusions, suicidal or homicidal ideations; and he had fair insight and judgment. (R. at 737.) That same day, Dr. Brinker completed a mental assessment, indicating that Horn had moderate limitations in his ability to interact appropriately with the general public; to ask simple questions or request assistance; to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness; and to be aware of normal hazards and take appropriate precautions. (R. at 701-03.) He opined that Horn was severely limited, but not precluded, in his ability to remember locations and work-like procedures; to understand, remember and carry out very short and simple instructions; to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances; to sustain an ordinary routine without

special supervision; to work in coordination with or in proximity to others without being distracted by them; to make simple work-related decisions; to accept instructions and respond appropriately to criticism from supervisors; to get along with co-workers or peers without distracting them or exhibiting behavioral extremes; to respond appropriately to changes in the work setting; to travel in unfamiliar places or use public transportation; and to set realistic goals or make plans independently of others. (R. at 701-03.) Dr. Brinker opined that Horn had no useful ability to understand, remember and carry out detailed instructions; and to maintain attention and concentration for extended periods. (R. at 701-02.)

On February 12, 2013, Dr. Brinker reported that Horn's behavior was cooperative; his mood was depressed; his affect was restricted; his thought processes were goal-directed; his thought content showed no signs of delusions, suicidal or homicidal ideations; and he had fair insight and judgment. (R. at 729.) On April 29, 2013, Horn reported that his depression had improved. (R. at 830.) Dr. Brinker reported that Horn's behavior was cooperative; his mood was "ok;" his affect was full; his thought processes were goal-directed; his thought content showed no signs of delusions, suicidal or homicidal ideations; and he had fair insight and judgment. (R. at 830.)

On October 6, 2011, Joseph Leizer, Ph.D., a state agency psychologist, completed a PRTF, indicating that Horn suffered from an affective disorder. (R. at 152.) Leizer opined that Horn had mild restriction on his activities of daily living, moderate limitations in maintaining social functioning and in maintaining concentration, persistence or pace and had experienced one or two repeated episodes of decompensation of extended duration. (R. at 152.) Leizer stated that Horn's impairment did not meet the listed impairment for an affective disorder. (R.

at 152.) Despite Horn's allegation that he was disabled, in part, for low intelligence, Leizer did not consider whether Horn's condition met or equaled the listed impairment for intellectual disability found at 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.05.

Leizer completed a mental assessment, indicating that Horn was not significantly limited in his ability to remember locations and work-like procedures; to understand, remember and carry out very short and simple instructions; to sustain an ordinary routine without special supervision; to work in coordination with or in proximity to others without being distracted by them; to make simple work-related decisions; to ask simple questions or request assistance; to accept instructions and respond appropriately to criticism from supervisors; and to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness. (R. at 155-56.) He opined that Horn had moderate limitations in his ability to understand, remember and carry out detailed instructions; to maintain attention and concentration for extended periods; to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances; to 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; and to get along with co-workers or peers without distracting them or exhibiting behavioral extremes. (R. at 155-56.) Leizer opined that Horn could engage in repetitive, competitive, unskilled, nonstressful tasks at substantial gainful activity levels. (R. at 156.)

Horn received counseling at Healing Waters Counseling Center, LLC, from December 2011 through October 2012. (R. at 645-71.) During this time, Horn was

diagnosed with major depressive disorder, recurrent, moderate; and borderline intellectual functioning. (R. at 645, 647, 653, 656, 658, 660, 662, 665, 669.) Horn's GAF score was assessed at 51 to 60. (R. at 645, 647, 653, 656, 658, 660, 662, 665, 669.) On December 6, 2011, the Beck Depression Inventory, ("BDI"), was administered, which indicated that Horn was severely depressed. (R. at 664-65.) The Beck Anxiety Inventory, ("BAI"), was administered, which indicated that Horn suffered from moderate anxiety. (R. at 664-65.) The Wechsler Abbreviated Adult Scale of Intelligence, ("WASI"), was administered, and Horn obtained a full-scale IQ score of 62. (R. at 665.) Horn related his depression to chronic pain and lack of finances. (R. at 661, 663.) Bradley T. Kinder, M.S., a licensed professional counselor, diagnosed major depressive disorder, recurrent, moderate; and borderline intellectual functioning. (R. at 665.)

In February 2012, Horn reported that receiving disability benefits would help alleviate much of his depression. (R. at 661.) He reported that he had been working on his sons' dirt bikes. (R. at 661.) On March 19, 2012, Horn reported that he felt less sad and was experiencing periods of joy. (R. at 658.) He stated that he was "doing better" and that he had been going to his sons' races and working on their dirt bikes. (R. at 659.) Horn also stated that he was going to a nearby farm to help a friend do some "easy work." (R. at 659.) On April 30, 2012, Horn reported that he was getting out of the house and helping out at the dirt track and at his relative's farm. (R. at 657.) He reported depression resulting from his financial situation and inability to work. (R. at 657.) He stated that, if he received his disability, he would not feel as depressed. (R. at 657.) On June 25, 2012, Horn reported that he would not receive back pay for his disability, and he did not know if his applications for disability would be granted. (R. at 654.) He stated that he could handle his back and leg pain, but had difficulty dealing with depression. (R.

at 654.) Horn stated that he felt better when he was “doing some type of activity.” (R. at 654.) He also stated that talking about his feelings made him feel better. (R. at 654.) On August 14, 2012, Horn reported that therapy helped to assist him with stress, pain and depression. (R. at 651.) On October 11, 2012, Horn reported that he was managing his pain and depression better and that he was very positive about his future. (R. at 645.)

On July 3, 2013, B. Wayne Lanthorn, Ph.D., a licensed clinical psychologist, evaluated Horn at the request of Horn’s representative. (R. at 837-45, 846-50.) The Wechsler Adult Intelligence Scale - Fourth Edition, (“WAIS-IV”), was administered, and Horn obtained a verbal comprehension index score of 66, a perceptual organization index score of 71 and a full-scale IQ score of 57. (R. at 838.) The Wide Range Achievement Test – Revised 4, (“WRAT4”), was administered, which indicated that Horn’s ability to read was on the K.3 level. (R. at 838.) Lanthorn noted that Horn was functionally illiterate. (R. at 845.) Lanthorn described Horn’s mood as an agitated depression. (R. at 843.) After 10 minutes, Horn could recall only one out of five words. (R. at 843.) He could not perform either serial seven’s or three’s. (R. at 843.) Horn could correctly spell the word “world” forward, but could not do so backward. (R. at 843.) Lanthorn diagnosed major depressive disorder, recurrent, severe; generalized anxiety disorder; chronic pain disorder associated with both psychological factors and general medical conditions; and mild mental retardation. (R. at 845.) He assessed Horn’s then-current GAF score at 45 to 50.<sup>11</sup> (R. at 846.) Lanthorn opined that Horn had functioned in the mildly retarded range throughout his lifetime and continued to do so. (R. at 846.)

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<sup>11</sup> 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.

Lanthorn completed a mental assessment, indicating that Horn had some mild limitations in his ability to understand, remember and carry out very short and simple instructions and to ask simple questions or request assistance. (R. at 848-50.) He opined that Horn had moderate limitations in his ability to remember locations and work-like procedures; to make simple work-related decisions; to be aware of normal hazards and take appropriate precautions; to travel in unfamiliar places or use public transportation; and to set realistic goals or make plans independently of others. (R. at 848-50.) Lanthorn opined that Horn had a severely limited, but not precluded, ability to understand, remember and carry out detailed instructions; to maintain attention and concentration for extended periods; to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances; to sustain an ordinary routine without special supervision; to work in coordination with or in proximity to others without being distracted by them; to interact appropriately with the general public; to accept instructions and respond appropriately to criticism from supervisors; to get along with co-workers or peers without distracting them or exhibiting behavioral extremes; to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness; and to respond appropriately to changes in the work setting. (R. at 848-50.) Lanthorn found that the earliest date that these restrictions and/or limitations could have been present was approximately 2009. (R. at 850.)

### *III. Analysis*

The Commissioner uses a five-step process in evaluating DIB and SSI claims. *See* 20 C.F.R. §§ 404.1520, 416.920 (2015). *See also Heckler v. Campbell*, 461 U.S. 458, 460-62 (1983); *Hall v. Harris*, 658 F.2d 260, 264-65 (4<sup>th</sup> 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. §§ 404.1520(a), 416.920(a) (2015).

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 2011 & West 2012); *McLain v. Schweiker*, 715 F.2d 866, 868-69 (4<sup>th</sup> Cir. 1983); *Hall*, 658 F.2d at 264-65; *Wilson v. Califano*, 617 F.2d 1050, 1053 (4<sup>th</sup> Cir. 1980).

In his brief, Horn argues that the ALJ erred by failing to find that his impairments meet the criteria for the listing for intellectual disability, found at 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.05(C). (Plaintiff's Brief In Support Of Summary Judgment, ("Plaintiff's Brief"), at 2-9.) Horn further argues that the ALJ's hypothetical questions to the vocational expert failed to account for his moderate difficulties in concentration, persistence or pace and for his limited reading ability. (Plaintiff's Brief at 9-15.) Horn also argues that the ALJ erred by finding that a significant number of jobs existed that he could perform. (Plaintiff's

Brief at 15-19.) Horn does not challenge the ALJ's findings with regard to his physical residual functional capacity.

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*, 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 his findings and his rationale in crediting evidence. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4<sup>th</sup> Cir. 1997).

Horn argues that the ALJ erred by failing to find that his impairments meet the medical listing for intellectual disability, found at § 12.05(C). The Regulations explain that a claimant may not meet the intellectual disability listing unless his "impairment satisfies the diagnostic description in the introductory paragraph and any one of the four sets of criteria..." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(A) (2015). The introductory paragraph states that "[i]ntellectual disability refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; *i.e.*, the evidence demonstrates or supports onset of the impairment before age 22." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05 (2015).

To qualify as disabled under 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.05(C), a claimant's condition must meet two requirements: (1) a valid verbal, performance or full-scale IQ score of 60 through 70; and (2) a physical or other

mental impairment imposing additional and significant work-related limitation of function. The Secretary's Regulations do not define the term "significant." However, this court previously has held that it must give the word its commonly accepted meanings, among which are, "having a meaning" and "deserving to be considered." *Townsend v. Heckler*, 581 F. Supp. 157, 159 (W.D. Va. 1983). In *Townsend*, the court also noted that the antonym of "significant" is "meaningless." See 581 F. Supp. at 159. The Regulations do provide that "where more than one IQ is customarily derived from the test administered, e.g., where verbal, performance, and full scale IQs are provided in the Wechsler series, we use the lowest of these in conjunction with 12.05." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(D)(6)(c) (2015); see *Flowers v. U.S. Dep't of Health & Human Servs.*, 904 F.2d 211 (4<sup>th</sup> Cir. 1990).

The ALJ who heard Horn's pending claims did not specifically consider whether Horn's condition met or equaled § 12.05(C). Instead, the ALJ noted that the previous ALJ concluded that Horn did not meet the criteria of Listing § 12.05(C) based on a full-scale IQ score of 69, and the fact that Horn had obtained a driver's license and had an extensive work history, beginning employment when he was a teenager. (R. at 25, 666.) The ALJ also noted that this finding was upheld on appeal. (R. at 25.) The ALJ also noted that additional evidence presented on Horn's pending claims showed that Horn obtained a full-scale IQ score of 62 in December 2011 and a full-scale IQ score of 57 in July 2013. (R. at 25, 665, 838.) The ALJ noted that Horn's IQ scores deviated significantly. (R. at 25.) The ALJ further found that this evidence was insufficient to disturb the previous ALJ's opinion. (R. at 25.) The problem with this finding, however, is that the ALJ on Horn's previous claims did not make a finding that his condition did not meet § 12.05(C). (R. at 106-07.) Instead, the previous ALJ only considered whether

Horn's condition met the listed impairment for organic mental disorders, found at § 12.02, *see* 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 12.02 (2015), despite the fact that the ALJ noted that the record contained evidence that Horn's performance IQ score was only 67, and his full-scale IQ score was only 69 on testing performed in 2008. (R. at 693-94.) That being the case, I cannot find that the ALJ's decisions with regard to Horn's mental impairment are supported by substantial evidence, especially in light of the additional IQ testing by Lanthorn, which placed Horn's IQ score in the 57 to 71 range. (R. at 838.)

### **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 Horn did not meet or equal the listing for §12.05(C); and
2. Substantial evidence does not exist in the record to support the Commissioner's finding that Horn was not disabled under the Act and was not entitled to SSI and DIB benefits.

### **RECOMMENDED DISPOSITION**

The undersigned recommends that the court deny Horn'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 is hereby given to the parties of the provisions of 28 U.S.C.A. § 636(b)(1)(C) (West 2006 & Supp. 2015):

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: March 9, 2016.

*s/ Pamela Meade Sargent*  
UNITED STATES MAGISTRATE JUDGE